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Paper 36
Date: July 22, 2026

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AROMA360, LLC,
Petitioner,

v.

AIR ESSCENTIALS, INC.,
Patent Owner.

IPR2025-00706
Patent 10,583,448 B1

Before CARL M. DEFRANCO, ERIC C. JESCHKE, and RICHARD H. MARSCHALL, *Administrative Patent Judges*.

JESCHKE, *Administrative Patent Judge*.

ORDER
Granting in Part Petitioner's Motion to Strike
37 C.F.R. § 42.5

I. BACKGROUND

On October 8, 2025, we instituted trial in this *inter partes* review proceeding involving Petitioner Aroma360, LLC and Patent Owner Air Esscentials, Inc. Paper 9. Patent Owner timely filed its Sur-reply (Paper 26, "PO Sur-reply") and its Corrected Revised Contingent Motion to Amend the Claims (Paper 25, "RMTA"), along with Exhibits 2015 and 2016.

With prior authorization (Ex. 3004), Petitioner filed a Motion to Strike Exhibits 2015 and 2016 and Arguments Relying on those Exhibits. Paper 28 ("Mot."). Patent Owner timely filed its Opposition. Paper 29 ("Opp.").

For the reasons below, we *grant* Petitioner's Motion to Strike as to Exhibit 2015 and related arguments and we *deny* Petitioner's Motion to Strike as to Exhibit 2016 and related arguments. We address each of Petitioner's arguments and Patent Owner's responses below.

II. DISCUSSION

A. Exhibit 2015

In the Motion, Petitioner argues that Exhibit 2015 should be stricken from the record and the related arguments disregarded because (1) Board rules do not allow the filing of a declaration such as Exhibit 2015 with a patent owner's sur-reply and (2) Patent Owner cannot file Exhibit 2015 as "supplemental evidence." *See* Mot. 1. Because we are persuaded by both of Petitioner's arguments, we strike Exhibit 2015 and disregard the related arguments in Patent Owner's Sur-reply.

1. Whether Exhibit 2015 is Proper Sur-reply Evidence

We first address whether Patent Owner properly filed Exhibit 2015 as evidence with its Sur-reply. Filed the same day Patent Owner filed its Sur-

reply and its Revised Motion to Amend, Exhibit 2015 was not discussed in the Revised Motion to Amend and was discussed once in the Sur-reply:

> Petitioner filed an Objection to Evidence [Paper 18], wherein Petitioner objected to Exhibit 2002 under FRE 702. In response, on April 15, 2026 Patent Owner ("PO") served supplemental evidence in response to Petitioner's Objection to Evidence, namely, a Declaration of Micklow, each document of which is attached hereto as Exhibit 2015.

PO Sur-reply 3 (§ II). Petitioner argues that we should strike Exhibit 2015 from the record and disregard the portion of the Sur-reply discussing it (quoted above), in part, because 37 C.F.R. § 42.23(b) precludes filing such evidence with a patent owner's sur-reply. *See* Mot. 3–4. Patent Owner responds that Rule 42.23(b) *does* allow a filing such as Exhibit 2015 because it responds to Petitioner's Reply. Opp. 1–5. We agree with Petitioner.

Rule 42.23(b) provides, in relevant part: "A sur-reply may only respond to arguments raised in the corresponding reply and may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness." The *first* clause in this sentence limits a sur-reply to *only* those arguments responsive to a reply, but, contrary to Patent Owner's position, does not allow *any* argument and evidence merely because they are responsive. *Cf.* Opp. 4–5.[1]

The *second* clause in the quoted sentence from Rule 42.23(b) (following "and") *directly contradicts* Patent Owner's position, expressly

[1] Patent Owner quotes the prior sentence in Rule 42.23(b), which provides: "A reply may only respond to arguments raised in the corresponding opposition, patent owner preliminary response, patent owner response, or decision on institution." *See* Opp. 4–5. At issue here, however, are arguments and evidence relating to Patent Owner's Sur-reply; and a "sur-reply" is expressly addressed in the portion of Rule 42.23(b) quoted above.

precluding filing with a sur-reply any "new evidence *other than* deposition transcripts of the cross-examination of any reply witness." 37 C.F.R. § 42.23(b) (emphasis added). As argued by Petitioner, Exhibit 2015 is a new declaration from Patent Owner's declarant, Dr. Micklow, which does not fall into the second clause's exception. Mot. 3 ("Exhibit 2015 is not a deposition transcript. It is a new declaration from Patent Owner's expert."); *see also* 37 C.F.R. § 42.61(a) ("Evidence that is not . . . filed in accordance with this subpart is not admissible.").

Further undermining Patent Owner's arguments is that the Federal Circuit decisions relied on for the proposition that Exhibit 2015 should be allowed involved markedly different facts. *See* Opp. 2–3 (citing six Federal Circuit decisions). Specifically, the cited decisions all addressed whether either argument or evidence (or both) in a *petitioner's reply* properly responded to a *patent owner's response*; in contrast, here, Patent Owner is arguing that argument and evidence in Patent Owner's Sur-reply should be allowed merely because they respond to the Petitioner's Reply. *Compare Anacor Pharms., Inc. v. Iancu*, 889 F.3d 1372, 1380–81 & n.8 (Fed. Cir. 2018); *Intelligent Bio–Systems, Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1369–70 (Fed. Cir. 2016); *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1081–82 (Fed. Cir. 2015); *Ericsson Inc. v. Intell. Ventures I LLC*, 901 F.3d 1374, 1380–81 (Fed. Cir. 2018); *Henny Penny Corp. v. Frymaster LLC*, 938 F.3d 1324, 1329–31 (Fed. Cir. 2019); *Wasica Fin. GmbH v. Cont'l Auto. Sys., Inc.*, 853 F.3d 1272, 1286 (Fed. Cir. 2017), *with* Opp. 4 ("To the contrary, Exhibit 2015 is responsive to arguments made in the proceeding, and within Petitioner's Reply, making it the type of filing the Board routinely finds allowable."). This line of argument, however, ignores the

express preclusion in Rule 42.23(b) *squarely addressing patent owner sur-replies*—that a sur-reply "may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness"—which the Federal Circuit had no reason to address in the decisions cited by Patent Owner in its Opposition here.

For these reasons, we determine that Exhibit 2015 is not properly filed sur-reply evidence under 37 C.F.R. § 42.23(b).

2. Whether Exhibit 2015 is Properly Filed Supplemental Evidence

Petitioner also argues that, on the facts here, Board rules and the Trial Practice Guide do not support the *filing* of Exhibit 2015 as supplemental evidence. Mot. 1–3, 4–5. Patent Owner counters by asserting that filing Exhibit 2015 "makes information available and of record to the Board" that Patent Owner "timely served as supplemental evidence under 37 C.F.R. § 42.64(b)(2)." Opp. 1; *see also* PO Sur-reply 3 (presenting Exhibit 2015 as "supplemental evidence"). Specifically, Patent Owner appears to contend that Exhibit 2015 should be allowed into the record *because* it was served as supplemental evidence. Opp. 1. Supporting this understanding, the title of Exhibit 2015, as filed, is "Patent Owner's Supplemental Evidence in Response to Petitioner's Objection to Evidence." Ex. 2015 (capitalization removed). On this issue, we are persuaded by Petitioner's argument.

Both Petitioner and Patent Owner agree on the relevant facts. Petitioner timely objected to Patent Owner's Exhibit 2002 (the Declaration of Dr. Micklow filed with the Patent Owner's Response). Opp. 1; Mot. 1–2; Paper 19 (Petitioner's Objection). In response, Patent Owner properly *served* on Petitioner as supplemental evidence the document now in the record as Exhibit 2015. Opp. 1; Mot. 2. Thus far, the process followed by

the parties tracks with Rules 42.64(b)(1) (addressing objections to evidence) and 42.64(b)(2) (addressing serving supplemental evidence in response to an objection). *See also* PTAB Trial Practice Guide (online version)[2] ("TPG") § II.K ("Challenging Admissibility; Motions to Exclude; Motion to Strike").

Patent Owner's subsequent *filing* of Exhibit 2015 as alleged supplemental evidence, however, does not find support in our Rules or the Trial Practice Guide. As noted by Petitioner, the Trial Practice Guide makes clear that supplemental evidence is *filed* only in support of an opposition to a motion to exclude: "Supplemental evidence is not filed at the time of the objection, but simply served, and is filed only in support of an opposition to a motion to exclude. *See* 37 C.F.R. §§ 42.64(a), 42.64(b)(2)." TPG § II.K, *cited at* Mot. 1, *quoted at* Mot. 4–5. But here, because Petitioner has not filed a motion to exclude (which would have been due July 9, 2026 (Paper 27 at 7)), Patent Owner had no basis to *file* Exhibit 2015 as supplemental evidence. Mot. 2 ("Petitioner has not filed a motion to exclude in this proceeding that could trigger the filing of any 'supplemental evidence.'"), 1 (arguing that "Exhibit 2015 is 'supplemental evidence' that can only be filed in response to a Motion to Exclude – and no such motion has been filed").

Patent Owner contends that Exhibit 2015 "is ***not*** the type of filing that warrants an exceptional remedy"—i.e., being stricken. Opp. 4; *see also* TPG § II.K (Motion to Strike) ("In most cases, the Board is capable of identifying new issues or belatedly presented evidence when weighing the evidence at the close of trial, and disregarding any new issues or belatedly presented evidence that exceeds the proper scope of reply or sur-reply. As

[2] Available at www.uspto.gov/patents/ptab/trial-practice-guide.

such, striking the entirety or a portion of a party's brief is an *exceptional remedy* that the Board expects will be granted rarely." (emphasis added)). We disagree. As discussed above, Patent Owner has not identified *any* basis to allow the filing of Exhibit 2015 with Patent Owner's Sur-reply in this proceeding. Moreover, the only portion of Patent Owner's Sur-reply discussing Exhibit 2015 makes no substantive arguments for which that exhibit is relied on in support. *See* PO Sur-reply 3. Indeed, Patent Owner admits as much. *See* Opp. 1 ("Further, despite Petitioner's desire to strike any arguments within the Sur-Reply . . . that relies on Exhibits 2015 or 2016, no argument within the Sur-Reply relies on the exhibits."). Although not necessary to the analysis, striking Exhibit 2015 will not remove from consideration any substantive arguments by Patent Owner.

For these reasons, we grant Petitioner's Motion to Strike Exhibit 2015 and the related argument in Section II of Patent Owner's Sur-reply.

B. Exhibit 2016

In the Motion, Petitioner argues that Exhibit 2016 should be stricken from the record and the related arguments in the Revised Motion to Amend disregarded because (1) Patent Owner violated Rule 42.22(a)(2)[3] by not adequately explaining the significance of the cited information in Exhibit 2016 in the Revised Motion to Amend and (2) Patent Owner

[3] Rule 42.22(a)(2) provides, in relevant part: "Each . . . motion must be filed as a separate paper and must include: . . . (2) A full statement of the reasons for the relief requested, including a detailed explanation of the significance of the evidence including material facts, and the governing law, rules, and precedent."

violated Rule 42.6(a)(3)[4] by asking the Board to consider arguments made in Exhibit 2016 and improperly incorporated by reference into the Revised Motion to Amend. *See* Mot. 1. Because we are not persuaded by either of Petitioner's arguments, we do not strike Exhibit 2016, and we will consider the related arguments in the Revised Motion to Amend.

1. Whether the Discussion of Exhibit 2016 in the Revised Motion to Amend Violates Rule 42.22(a)(2)

As background (and as noted by Petitioner (Mot. 1, 2–3)), pages 12–15 of the Revised Motion to Amend include four citations to Exhibit 2016, none of which identify any specific paragraph of the 33 numbered paragraphs in that Exhibit. RMTA 13–15; Ex. 2016. According to Petitioner, this manner of relying on Exhibit 2016 in the Revised Motion to Amend "violates the fundamental rule that motions must provide 'a detailed explanation of the significance of the evidence,'" and we should strike Exhibit 2016 and disregard the related discussion. Mot. 6 (quoting 37 C.F.R. § 42.22(a)(2)). We are not persuaded by Petitioner's argument.

Although we agree that Petitioner has experienced *some* level of prejudice based on having to speculate how Patent Owner's broad manner of citing Exhibit 2016 (i.e., without specific paragraph numbers) supports the arguments (Mot. 7), we do not view that as warranting the "exceptional remedy" of striking the requested evidence and argument. *See* TPG § II.K (Motion to Strike). First, as noted by Patent Owner (Opp. 6), the relevant portions of both the Revised Motion to Amend and Exhibit 2016 organize

[4] Rule 42.6(a)(3) provides: "***Incorporation by reference; combined documents.*** Arguments must not be incorporated by reference from one document into another document. Combined motions, oppositions, replies, or other combined documents are not permitted."

their discussions based on the different prior art at issue—e.g., Sevy and Goubet—thus at least somewhat tempering the need for Petitioner to speculate. *See* RMTA 12–13, 14 (discussing Sevy), 14 (discussing Goubet); Ex. 2016 ¶¶ 5–20 (discussing Sevy in a section with that heading), ¶¶ 21–33 (discussing Goubet in a section with that heading). Second, in the relevant portions of the Motion, Petitioner does not cite any decisions from the Federal Circuit or the Board at all, let alone ones that support striking evidence and related argument based on an alleged violation of Rule 42.22(a)(2). *See* Mot. 5–7.[5]

Here, Patent Owner filed Exhibit 2016 as evidence in support of its Revised Motion to Amend, providing sufficient explanation to satisfy Rule 42.22(a)(2) on the facts here. For the reasons above, we do not grant Petitioner's Motion to Strike Exhibit 2016 and the related arguments in the Revised Motion to Amend based on Rule 42.22(a)(2).

2. Whether the Discussion of Exhibit 2016 in the Revised Motion to Amend Violates Rule 42.6(a)(3)

Petitioner also argues that the Board should not consider any arguments that are in Exhibit 2016 but are not made in the Revised Motion to Amend because those arguments are improperly incorporated by reference into the Revised Motion to Amend, in violation of Rule 42.6(a)(3). Mot. 6.[6] On the facts here, we again do not view Patent Owner's manner of citing Exhibit 2016 as warranting the "exceptional remedy" of striking the requested evidence and argument. *See* TPG § II.K (Motion to Strike).

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[5] The discussion of the two Board decisions in the first full paragraph on page 6 of the Motion relate to the application of Rule 42.6(a)(3), which we discuss in the next section.

[6] Petitioner mistakenly refers to "§ 42.26(a)(3)." Mot. 6.

Although the Board's decision in *Cisco Systems, Inc. v. C-Cation Technologies, LLC*, IPR2024-00454, Paper 12 at 7–10 (PTAB Aug. 29, 2014), relied on by Petitioner (Mot. 7), outlines informative guidance on incorporation by reference, we find the facts here distinguishable. First, unlike the 250-page declaration at issue there, Exhibit 2016 has only nine pages. Second (and more to the point), as mentioned above, the relevant portions of both the Revised Motion to Amend and Exhibit 2016 organize their discussions so as to at least somewhat temper the need for Petitioner to speculate. *Cf. Cisco Sys.*, Paper 12 at 10 (discussing how incorporation by reference "incorporation by reference of numerous arguments from Dr. Roy's 250-page Declaration into the Petition . . . impos[es] on [the Board's] time by asking us to sift through over 250 pages of Dr. Roy's Declaration . . . to locate the specific arguments corresponding to the numerous paragraphs cited to support Petitioner's assertions").

For these reasons, we do not grant Petitioner's Motion to Strike Exhibit 2016 and the related arguments in the Revised Motion to Amend based on Patent Owner's alleged violation of Rule 42.6(a)(3).

It is hereby:

ORDERED that Petitioner's Motion to Strike is *granted* as to Exhibit 2015;

FURTHER ORDERED that Exhibit 2015 will be stricken from the record;

FURTHER ORDERED that the panel will not consider the discussion in Section II of Patent Owner's Sur-reply, and

FURTHER ORDERED that Petitioner's Motion to Strike is *denied* as to Exhibit 2016.

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