

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Aroma360, LLC,
Petitioner,

v.

AIR ESSCENTIALS, INC.
PATENT OWNER.

Case IPR2025-00707
Patent 10,929,918

**PETITIONER’S MOTION TO STRIKE EXHIBITS 2015 AND 2016
AND ARGUMENTS RELYING ON THOSE EXHIBITS**

I. RELIEF REQUESTED

Petitioner respectfully moves to strike Exhibits 2015 and 2016 and to strike or disregard Patent Owner's arguments relying on those exhibits, specifically the arguments made at pages 3, 15-16 of Patent Owner's sur-reply ("Patent Owner's Sur-Reply") and any portions of Patent Owner's Revised Motion to Amend ("Patent Owner's Revised MTA") that purport to rely on either exhibit.

Exhibits 2015 and 2016 are improper supplemental expert declarations from Dr. Gerald Micklow that Patent Owner filed with its sur-reply despite the prohibition against submitting new declarations in a sur-reply. 37 C.F.R. § 42.23(b). Additionally, Exhibit 2015 is "supplemental evidence" that can only be filed in response to a Motion to Exclude – and no such motion has been filed. *See* Trial Practice Guide at II(K), (updated December 12, 2025) ("TPG") (available at <https://www.uspto.gov/patents/ptab/trial-practice-guide>).

Patent Owner's sur-reply provides only blanket citations to Exhibits 2015 and 2016, thereby failing to comply with the Board's rules against improper incorporation by reference and the requirement to explain evidence. *See Cisco Sys., Inc. v. C-Cation Techs., LLC*, IPR2024-00454, Paper 12 at 10 (P.T.A.B. Aug. 29, 2014) (informative); 37 C.F.R. § 42.22(a)(2) (motions require "a detailed explanation of the significance of the evidence").

As such, neither exhibit is permitted by the rules for an IPR. Given the exhibits should be stricken, the argument in the papers that purportedly cites to these exhibits

should also be stricken.

II. BACKGROUND

Patent Owner's sur-reply identifies Exhibit 2015 as "Patent Owner's Supplemental Evidence in Response to Petitioner's Objection to Evidence," and identifies Exhibit 2016 as a "Supplemental Declaration of Dr. Gerald Micklow, PhD." Petitioner timely objected to Dr. Micklow's original declaration, Exhibit 2002, under Federal Rule of Evidence 702. As Petitioner explained, Dr. Micklow testified during his deposition that he did not recall seeing or applying the parties' agreed claim constructions and instead applied his own understanding and thus his testimony does not help the Board understand the evidence or determine a fact in issue, is not based on sufficient facts or data, and does not reliably apply proper principles or methods. Paper 18, 1. In response to this objection, Patent Owner served "supplemental evidence" on Petitioner. Petitioner has not filed a motion to exclude in this proceeding that could trigger the filing of any "supplemental evidence."

Instead of waiting for a motion to exclude, Patent Owner filed its "supplemental evidence" with its sur-reply as Exhibit 2015. Exhibit 2015 is a supplemental declaration from Dr. Micklow that states that it was submitted to "clarify" his prior deposition testimony that Petitioner objected to. Ex. 2015 ¶¶ 2-5. Patent Owner also relies on Exhibit 2016 in its sur-reply to support its arguments regarding patentability. All citations to Exhibit 2016 in Patent Owner's sur-reply

are identical blanket citations of “Ex. 2016” without any pinpoint citations to specific paragraphs or any explanation of the declaration. *See* PO Sur-Reply at 15-16.

III. ARGUMENT

A. Exhibits 2015 and 2016 are Improper New Sur-Reply Evidence

A sur-reply “may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness.” 37 C.F.R. § 42.23(b). Exhibits 2015 and 2016 are not deposition transcripts. They are new declarations from Patent Owner’s expert. Patent Owner filed Exhibits 2015 and 2016 with its sur-reply, listed them in the sur-reply exhibit list, devoted Section II of the sur-reply to explaining that Patent Owner served and attached the new Exhibit 2015 Micklow declaration as “supplemental evidence” in response to Petitioner’s objection, and generally cited to the full Exhibit 2016 Micklow declaration in Patent Owner’s sur-reply. PO Sur-Reply, 2-3, 15-16. Rule 42.23(b) bars including, in a sur-reply, new evidence other than cross-examination deposition transcripts and does not have an exception to submit “supplemental evidence” with a sur-reply.

Moreover, Exhibits 2015 and 2016 are prejudicial to Petitioner. Exhibit 2015 is purportedly intended to “clarify” Dr. Micklow’s prior deposition testimony, and Exhibit 2016 is intended to “provide additional clarification” regarding his prior opinions. Ex. 2015, ¶¶ 3, 5-6, Ex. 2016, ¶ 2. Any such clarification should have taken place during Dr. White’s deposition, not post hoc declarations, to allow

Petitioner an opportunity to address the testimony in its Reply. Petitioner has no further briefing in which to address this supplemental testimony.

Petitioner deposed Dr. Micklow on his original declaration. Petitioner then used that deposition testimony to show that Dr. Micklow did not consider key patent disclosure, did not apply the parties' claim constructions, and used a non-stipulated understanding of "fluid dispersion." Reply, 1-5. Patent Owner now uses Exhibits 2015 and 2016 to try and rehabilitate the admissions made by Dr. Micklow after Petitioner already filed its last brief.

Rule 42.23(b) does not permit Patent Owner to submit new declarations with its sur-reply at all, let alone to explain away admissions made by its expert during his deposition. *See Mallinckrodt Pharmaceuticals Ireland Ltd. v. BioVie Inc.*, IPR2018-00974, Paper 34 at 9-10 (PTAB Nov. 13, 2019) (striking supplemental declaration filed with Patent Owner's sur-reply); *Lenovo Holding Co. v. DoDots Licensing Solutions LLC*, IPR2019-01278, Paper 37 at 31-32 (PTAB Jan. 19, 2021) (same).

Thus, the Board should strike Exhibits 2015 and 2016 and disregard any portion of Patent Owner's Sur-Reply that relies on it, namely Section II of Patent Owner's Sur-Reply and page 15-16. *See, e.g.*, PO Sur-Reply, 3, 15-16.

B. Exhibit 2015 is Not Properly Filed Supplemental Evidence

Patent Owner styled Exhibit 2015 as "supplemental evidence" under 37 C.F.R. § 42.64(b)(2). Ex. 2015, 2. But Rule 42.64(b)(2) merely permits the party

relying on objected-to evidence to serve supplemental evidence within ten business days of the objection. The Trial Practice Guide confirms that 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.” TPG(II)(K) (emphasis added). Yet, no motion to exclude has been filed in this proceeding.

Patent Owner did not simply serve Exhibit 2015 and preserve it for the motion-to-exclude process. Patent Owner filed Exhibit 2015 with the Sur-Reply, included it in the Sur-Reply exhibit list, and addressed it in the Sur-Reply. PO Sur-Reply, 2-3. Patent Owner cannot use Rule 42.64(b)(2) to avoid the prohibition against submitting new expert testimony in a sur-reply.

Finally, Patent Owner’s counsel informed Petitioner’s counsel that it could file Exhibit 2015 in response to this motion to strike. To the extent Patent Owner attempts to do so, the Board should likewise strike any new submission of Exhibit 2015. Indeed, it would be bizarre if a party could moot a motion to strike by filing the very exhibit sought to be struck in opposition to that motion. Patent Owner’s counsel provided no rule supporting this theory.

Rather, the Trial Practice Guide identifies a single specific authorized use of supplemental evidence: it is filed in support of an opposition to a motion to exclude. TPG(II)(K). An opposition to a motion to strike does not authorize the filing of supplemental evidence.

C. Exhibit 2016 is Improper Incorporation by Reference and Not Explained by Patent Owner

Exhibit 2016 is cited in Patent Owner’s sur-reply, but each citation is a blanket cite to all twelve paragraphs of Exhibits 2016. *See* PO Sur-Reply at 15-16 (citing “Ex. 2016” without any pinpoint citations to specific paragraphs or explanation of the declaration). There are no pinpoint citations to specific paragraphs in Exhibit 2016 and no explanation in Patent Owner’s sur-reply how the declaration supports the arguments therein. Such an approach violates the fundamental rule that motions must provide “a detailed explanation of the significance of the evidence.” 37 C.F.R. § 42.22(a)(2).

In addition, the Board should “not consider arguments that are not made” in the sur-reply “but are instead incorporated by reference to the cited paragraphs” of the expert declaration. *See Cisco*, IPR2014-00454, Paper 12 at 1; 37 C.F.R. § 42.26(a)(3) (improper to incorporate arguments by reference). That is precisely the case here. Indeed, other panels have found less egregious examples to constitute improper incorporation by reference. *See, e.g., Google LLC v. MindbaseHQ*, IPR2021-01252, Paper 41 at 37 (PTAB Jan. 6, 2023) (“reliance on seven paragraphs of [expert declaration] is an improper incorporation by reference, as [party] did not discuss that testimony” in its brief).

Moreover, *Cisco* is not limited to circumstances in which a party deliberately evades page limits. *Cisco* explains that a party may not incorporate arguments by

reference into an expert declaration and must provide a detailed explanation of the significance of the evidence in the paper itself. *Cisco Sys.*, IPR2014-00454, Paper 12 at 10; *see also* 37 C.F.R. § 42.22(a)(2), 42.23(a). Patent Owner's sur-reply repeatedly cites Exhibit 2016 generally, without paragraph pin cites, to support patentability arguments over Sevy, Goubet, Gao, and the asserted art generally. PO'S Sur-Reply, 14-16. Petitioner is prejudiced by having to speculate and guess as to how Patent Owner believes Exhibit 2016 supports its arguments. In so doing, Petitioner is deprived of the protection under the rules that a party must provide "a detailed explanation of the significance of the evidence," which is particularly important when it comes to expert declarations. 37 C.F.R. § 42.22(a)(2).

The Board should not permit Patent Owner blanket citations to a new expert declaration without any explanation how the declaration supports Patent Owner's positions. In addition, the Board should strike the portions of Patent Owner's sur-reply that rely on these citations. *See* PO Sur-Reply at 15-16.

IV. CONCLUSION

Petitioner respectfully requests that the Board strike Exhibits 2015 and 2016, strike Section II and pages 15-16 of Patent Owner's Sur-Reply that relies on Exhibits 2015 and/or 2016, and strike any portions of Patent Owner's Revised MTA that purport to rely on Exhibit 2016.

Date: June 15, 2026

Respectfully submitted,

/James P. Murphy/

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CERTIFICATE OF SERVICE UNDER 37 CFR § 42.6(e)(4)

The undersigned hereby certifies that a copy of the accompanying Petitioner's Opposition to the Motion to Amend and all accompanying exhibits have been served on June 15, 2026, via electronic mail directed to the following counsel of record for the Patent Owner:

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