

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 IPR2016-00494  
Patent 8,897,463 B2

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Before JAMESON LEE, BRIAN J. McNAMARA, and  
JOHN F. HORVATH, *Administrative Patent Judges*.

HORVATH, *Administrative Patent Judge*.

ORDER

Conduct of Proceeding

*37 C.F.R. § 42.5*

On January 9, 2017, Petitioner requested a conference call with the Board seeking authorization to file a motion to strike the Declaration of Jerry Harvey. A conference call was held the same day. The participants were Delfina Homen for Petitioner, Daniel Ravicher for Patent Owner, and Judges Horvath, Lee, and McNamara.

Petitioner seeks authorization to strike Mr. Harvey's declaration because he is not available for deposition. Petitioner indicated that although the parties had scheduled Mr. Harvey's deposition for January 11, 2017, Petitioner was advised by Patent Owner the week of January 4, 2017 that Mr. Harvey was no longer available on that date, and could not be made available before the February 3, 2017 due date for Petitioner's Reply to Patent Owner's Response.

Patent Owner did not dispute Petitioner's representations, and did not oppose Petitioner's request to file a motion to strike. We advised Patent Owner that, given Petitioner's inability to cross-examine Mr. Harvey prior to the due date for Petitioner's Reply, the likely remedy would be to strike Mr. Harvey's declaration. Patent Owner's counsel, Mr. Ravicher, indicated he understood the likelihood of that outcome, and that he had advised his client, Mr. Harvey, of the likelihood of that outcome prior to the conference call. Mr. Ravicher nonetheless indicated that Mr. Harvey was not available for deposition prior to the due date for Petitioner's Reply, and that he was acting in accordance with Mr. Harvey's instructions in that regard. Additionally, Mr. Ravicher did not request an extension of time for Petitioner's Reply to accommodate the rescheduling of Mr. Harvey's deposition, and did not indicate Mr. Harvey would be available for deposition at any time.

Accordingly, we authorize Petitioner to file a motion to strike Mr.

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Harvey's declaration. Petitioner's motion should identify with particularity the exhibits to be stricken and why. Patent Owner is authorized to file a response to Petitioner's motion to strike within 10 days of its filing. Petitioner is authorized to file a reply to Patent Owner's response, if any, within 5 days of its filing.

### ORDER

It is ORDERED that Petitioner is authorized to file a motion to strike the Declaration of Jerry Harvey;

It is FURTHER ORDERED that Patent Owner is authorized to file a response to Petitioner's motion to strike within 10 days of the filing date of Petitioner's motion; and

It is FURTHER ORDERED that Petitioner is authorized to file a reply to Patent Owner's response, if any, within 5 days of the filing date of Patent Owner's response.

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For PETITIONER:

Hillary A. Brooks  
Delfina S. Homen  
[hillary@brooksquinn.com](mailto:hillary@brooksquinn.com)  
[delfina@brooksquinn.com](mailto:delfina@brooksquinn.com)

For PATENT OWNER:

Daniel B. Ravicher  
[ravicher@gmail.com](mailto:ravicher@gmail.com)