

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN WIRELESS HEADSETS

Inv. No. 337-TA-943

ORDER NO. 11: DENYING RESPONDENTS' MOTION TO STRIKE CERTAIN PORTIONS OF THE SUPPLEMENTAL DECLARATION OF JOSEPH C. MCALEXANDER III, P.E.

(May 22, 2015)

On May 19, 2015, Respondents filed a motion to strike certain portions of the supplemental declaration of Complainant One-E-Way's expert, Joseph C. McAlexander III, P.E. (Motion Docket No. 943-008) In particular, Respondents seek to strike paragraphs 4-18 of the Mr. McAlexander's Supplemental Declaration on the grounds that those paragraphs include opinions that: (1) were not disclosed in One-E-Way's Ground Rule 8.2 disclosures; (2) directly support arguments made in One-E-Way's opening claim construction brief; and (3) cannot be fairly characterized as rebuttal testimony. On May 21, 2015, One-E-Way filed an opposition to the present motion. On May 21, 2015, the Commission Investigative Staff filed a response also in opposition to the motion to strike.

Respondents' expert, Dr. Akl testified that the term "virtually free from interference" is indefinite. In reaching that conclusion Dr. Akl discussed and opined on the patent's intrinsic evidence. Respondents seek to strike paragraphs 4-18 of Mr. McAlexander's declaration, but do not object to paragraphs 19-21. However, the testimony in paragraphs 4-21 is all closely related and Mr. McAlexander's opinions contained therein all relate to the term "virtually free from interference." Paragraphs 4-18 lay the foundation for McAlexander's ultimate conclusion that the term "virtually free from interference" is not indefinite and would be understood by one of ordinary

skill in the art at the time of the invention. Having reviewed paragraphs 4-18 of Mr. McAlexander's supplemental declaration, I find the testimony in those paragraphs constitutes proper rebuttal and thus should not be stricken. Specifically, I find the testimony in paragraphs 4-18 properly responds to Dr. Akl's opinions regarding the intrinsic evidence and his opinion that "an ordinary artisan could not determine how much interference is permitted by the claims."

Ground Rule 8.2 guides the parties' exchange of preliminary claim constructions and requires, among other things, that the parties simultaneously exchange proposed constructions. Thus, at the time One-E-Way filed its 8.2 preliminary claim constructions One-E-Way could not have known the constructions Respondents would be proposing. Accordingly, having found herein Mr. McAlexander's testimony in paragraphs 4-18 of his supplemental declaration to be properly characterized as rebuttal to Respondents' proposed construction (*i.e.*, that the term is indefinite), I find One-E-Way was under no obligation to include such as part of its Ground Rule 8.2 preliminary claim constructions. Therefore, I find Respondents' argument not persuasive.

For the reasons above, Motion Docket No. 943-008 is hereby DENIED.

SO ORDERED.



Thomas B. Pender
Administrative Law Judge

CERTIFICATE OF SERVICE

I, Lisa R. Barton, hereby certify that the attached **PUBLIC ORDER NO. 11** has been served upon the **Commission Investigative Attorney, Vu Bui, Esq.**, and the following parties as indicated on May 22, 2015.



Lisa R. Barton, Secretary
U.S. International Trade Commission
500 E Street, SW, Room 112A
Washington, DC 20436

FOR COMPLAINANTS ONE-E-WAY, INC.:

Douglas G. Meulhauser, Esq.
KNOBBE, MARTENS, OLSON & BEAR, LLP
2040 Main Street, 14th Floor
Irvin, CA 92614

- () Via Hand Delivery
- () Via Express Delivery
- Via First Class Mail
- () Other: _____

FOR RESPONDENTS SONY CORPORATION, SONY CORPORATION OF AMERICA, AND SONY ELECTRONICS, INC.

Paul T. Qualey, Esq.
KENYON & KENYON LLP
1500 K Street, N.W.
Washington, DC 20005

- () Via Hand Delivery
- () Via Express Delivery
- Via First Class Mail
- () Other: _____

FOR RESPONDENT GN NETCOM A/S d/b/a JABRA

William B. Nash, (pro hac vice)
HAYNES & BOONE LLP
112 East Pecan, Suite 1200
San Antonio, TX 78205

- () Via Hand Delivery
- () Via Express Delivery
- Via First Class Mail
- () Other: _____

FOR RESPONDENTS CREATIVE LABS, INC. & CREATIVE TECHNOLOGY LTD.

Jonathan Baker, Esq.
FARNEY DANIELS PC
411 Borel Avenue Suite 350
San Mateo, CA 94402

- () Via Hand Delivery
- () Via Express Delivery
- Via First Class Mail
- () Other: _____