

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NAUTILUS, INC.,
Petitioner,

v.

ICON HEATH & FITNESS INC.,
Patent Owner.

Case IPR2017-01363 (Patent 9,403,047 B2);
Case IPR2017-01407 (Patent 9,616,276 B2);
Case IPR2017-01408 (Patent 9,616,276 B2)¹

Before GEORGE R. HOSKINS, TIMOTHY J. GOODSON, and
JAMES A. WORTH, *Administrative Patent Judges*.

GOODSON, *Administrative Patent Judge*.

ORDER
Conduct of the Proceedings
37 C.F.R. § 42.5

¹ This Order applies to each of the listed cases. These proceedings have not been consolidated. The parties may use a consolidated caption only if a paper contains a footnote indicating that the identical paper has been filed in each proceeding.

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IPR2017-01408 (Patent 9,616,276 B2)

A hearing in these proceedings is scheduled for August 29, 2018. Our Order scheduling the hearing provided that Petitioner may reserve time to respond to arguments by Patent Owner, but did not provide for Patent Owner's ability to reserve time for a sur-rebuttal. *See* Paper 28.² On Wednesday, August 22, 2018, the parties sent an email to the Board requesting that we resolve a dispute as to whether Patent Owner will be allowed sur-rebuttals during the oral hearing. Patent Owner "requests permission for a sur-rebuttal on all issues," while Petitioner "does not oppose a surrebuttal argument for issues where [Patent Owner] bears the burden of proof . . . , but does oppose granting one . . . on issues where [Patent Owner] does not." The email further indicates that the parties agree that the "request is relatively straightforward and therefore could be decided without a conference call with the Board."

The Board recently published an update to its Trial Practice Guide, which states the following regarding hearing procedures:

At the oral hearing, a petitioner generally will argue first, followed by the patent owner, after which a rebuttal may be given by the petitioner. . . . The Board may also permit patent owners the opportunity to present a brief sur-rebuttal if requested.

Trial Practice Guide August 2018 Update, p. 20, *available at* www.uspto.gov/sites/default/files/documents/2018_Revised_Trial_Practice_Guide.pdf. In light of that guidance, the panel will permit Patent Owner to reserve a portion of its time for a brief sur-rebuttal. The panel does not think it necessary to restrict the topics that can be addressed in that sur-rebuttal

² For expediency, this Order cites only to papers filed in Case IPR2017-01363. The other proceedings include similar or identical papers.

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time to issues on which Patent Owner carries the burden of proof. However, we remind the parties that rebuttal and sur-rebuttal time should only be used to respond to arguments the opposing party made during its directly preceding presentation. The parties are also reminded that during the hearing, the parties “may only present arguments relied upon in the papers previously submitted.” Trial Practice Guide August 2018 Update, p. 23.

ORDER

In consideration of the foregoing, it is hereby:

ORDERED that Patent Owner may reserve a portion of its allocated time during the oral argument in these proceedings for sur-rebuttal.

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