

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FITBIT, INC.,
Petitioner,

v.

BLACKBIRD TECH, LLC d/b/a BLACKBIRD TECHNOLOGIES, LLC,
Patent Owner.

Case IPR2017-02012
Patent 6,434,212 B2

Before DEBRA K. STEPHENS, THOMAS L. GIANNETTI, and
CHRISTA P. ZADO, *Administrative Patent Judges*.

STEPHENS, *Administrative Patent Judge*.

ORDER
Trial Hearing
37 C.F.R. § 42.70

The Scheduling Order sets December 12, 2018, as the date for oral argument, if requested by the parties and granted by the Board (Paper 9, 8). Petitioner and Patent Owner have requested oral argument pursuant to 37 C.F.R. § 42.70(a) (Paper 22; Paper 23). The parties' requests for oral argument are *granted*.

Each party will have sixty (60) minutes to present arguments. At the oral hearing, Petitioner will proceed first to present the issues for which it bears the ultimate burden. Thereafter, Patent Owner will argue its opposition to Petitioner's case, and present the issues for which it bears the ultimate burden. To the extent Petitioner reserves rebuttal time, Petitioner then may make use of its rebuttal time responding to Patent Owner. To the extent Patent Owner reserves rebuttal time, Patent Owner then may make use of its rebuttal time responding to Petitioner.

Oral argument will commence at **2:00 PM Eastern Time on December 12, 2018**, on the **ninth floor of Madison Building East, 600 Dulany Street, Alexandria, Virginia**. All attendees will need a valid form of government-issued identification in order to enter the building and may be subject to security screening. The hearing will be open to the public for in-person attendance, and in-person attendance will be accommodated on a first-come, first-served basis. If the parties have any concern about disclosing confidential information, they are to contact the Board at least five (5) business days before the hearing to discuss the matter. The Board will provide a court reporter for the hearing and the reporter's transcript will constitute the official record of the oral argument.

At least seven (7) business days prior to oral argument, each party shall serve on the other party any demonstrative exhibit(s) it intends to use during oral argument (*see* 37 C.F.R. § 42.70(b)). The parties also shall provide the demonstrative exhibits to the Board at least five (5) business days prior to oral

argument by e-mailing them to Trials@uspto.gov. **The parties shall not submit any demonstrative exhibits in this case without our prior authorization.**

Demonstrative exhibits are not evidence, but merely a visual aid at the oral arguments, and should be clearly marked as such. For example, each slide of a demonstrative exhibit may be marked with the words “DEMONSTRATIVE EXHIBIT – NOT EVIDENCE” in the footer. Demonstrative exhibits may not introduce new evidence or raise new arguments, but instead, should cite to evidence in the record (*see Dell Inc. v. Acceleron, LLC*, 884 F.3d 1364, 1369 (Fed. Cir. 2018) (noting that the “Board was obligated to dismiss [the petitioner’s] untimely argument . . . raised for the first time during oral argument”). The parties are directed to *St. Jude Medical, Cardiology Division, Inc. v. The Board of Regents of the University of Michigan*, Case IPR2013-00041 (PTAB Jan. 27, 2014) (Paper 65) and *CBS Interactive Inc. v. Helferich Patent Licensing, LLC*, Case IPR2013-00033 (PTAB Oct. 23, 2013) (Paper 118), for guidance regarding the appropriate content of demonstrative exhibits.

The parties should attempt to resolve any objections to demonstratives prior to involving the Board. The parties must request a conference call with the Board at least two (2) business days before the hearing to present any unresolved objection regarding the propriety of any demonstrative exhibit. Any unresolved objection to demonstrative exhibits that is not timely presented will be considered waived. The Board asks the parties to confine demonstrative exhibit objections to those identifying egregious violations that are prejudicial to the administration of justice. To aid in the preparation of an accurate transcript, each party shall provide paper copies of its demonstratives to the court reporter on the day of the oral arguments. Such paper copies shall not become part of the record of this proceeding.

The parties are reminded that each presenter must identify clearly and specifically each demonstrative exhibit (e.g., by slide or screen number), paper, or exhibit referenced during the oral arguments to ensure the clarity and accuracy of the reporter's transcript. The parties also should note that at least one member of the panel will be attending the oral arguments electronically from a remote location and that if any demonstrative is not made fully available or visible to the judge presiding over the oral arguments, that demonstrative will not be considered. Because of limitations of the audio transmission systems in our hearing rooms, the presenter may speak only when standing at the hearing room lectern. If the parties have questions as to whether demonstrative exhibits would be sufficiently visible and available to all of the judges, the parties are invited to contact the Board at (571) 272-9797.

The Board expects lead counsel for each party to be present in person at oral argument. If a party anticipates that its lead counsel will not be attending the oral arguments, the parties should request a joint telephone conference with the Board no later than seven (7) business days prior to the oral arguments to discuss the matter. Any counsel of record, however, may present the party's arguments.

Per the recent update to the Office Patent Trial Practice Guide, either party may request a pre-hearing conference (Office Patent Trial Practice Guide, August 2018 Update, 83 Fed. Reg. 39,989 (Aug. 13, 2018) (found at the following link to the USPTO website: <https://go.usa.gov/xU7GP>)). Requests for a pre-hearing conference must be made by December 5, 2018. To request such a conference, an email should be sent to Trials@uspto.gov including several dates and times of availability for one or both parties, as appropriate, that are generally no later than three business days prior to the oral hearing. Please refer to the Guide for more information on the prehearing conference.

Requests for audio-visual equipment are to be made at least five (5) business days in advance of the date of the hearing by sending the request to Trials@uspto.gov. If the request is not received timely, the equipment may not be available on the day of the hearing.

ORDER

It is hereby:

ORDERED that oral argument for this proceeding shall take place beginning at 2:00 PM Eastern Time on December 12, 2017, on the ninth floor of Madison Building East, 600 Dulany Street, Alexandria, Virginia.

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