

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FITBIT, INC.
Petitioner,

v.

SMART WEARABLE TECHNOLOGIES INC.,
Patent Owner.

Case IPR2018-00252
Patent 6,997,882 B1

Before PATRICK R. SCANLON, ZHENYU YANG, and
TIMOTHY J. GOODSON, Administrative Patent Judges.

YANG, *Administrative Patent Judge.*

SCHEDULING ORDER
37 C.F.R. § 42.5(a)

A. DUE DATES

This order sets due dates for the parties to take action after institution of the proceeding. The parties may stipulate to different dates for DUE DATES 1 through 5 (earlier or later, but no later than DUE DATE 6). A notice of the stipulation, specifically identifying the changed due dates, must be promptly filed. The parties may not stipulate to an extension of DUE DATES 6 and 7.

In stipulating to different times, the parties should consider the effect of the stipulation on times to object to evidence (37 C.F.R. § 42.64(b)(1)), to supplement evidence (37 C.F.R. § 42.64(b)(2)), to conduct cross-examination (37 C.F.R. § 42.53(d)(2)), and to draft papers depending on the evidence and cross-examination testimony (*see* section B, below).

1. INITIAL CONFERENCE CALL

The parties are directed to contact the Board within a month of this decision if there is a need to discuss proposed changes to this Scheduling Order or proposed motions. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,765–66 (Aug. 14, 2012) (guidance in preparing for the initial conference call).

2. DUE DATE 1

The patent owner may file—

- a. A response to the petition (37 C.F.R. § 42.120), and
- b. A motion to amend the patent (37 C.F.R. § 42.121).

The patent owner must file any such response or motion to amend by DUE DATE 1. If the patent owner elects not to file anything, the patent owner must arrange a conference call with the parties and the Board. The patent

owner is cautioned that any arguments for patentability not raised in the response will be deemed waived.

3. DUE DATE 2

The petitioner must file any reply to the patent owner's response and opposition to the motion to amend by DUE DATE 2.

4. DUE DATE 3

The patent owner must file any reply to the petitioner's opposition to patent owner's motion to amend by DUE DATE 3.

5. DUE DATE 4

a. Each party must file any motion for an observation on the cross-examination testimony of a reply witness (*see* section C, below) by DUE DATE 4.

b. Each party must file any motion to exclude evidence (37 C.F.R. § 42.64(c)) and any request for oral argument (37 C.F.R. § 42.70(a)) by DUE DATE 4.

6. DUE DATE 5

a. Each party must file any response to an observation on cross-examination testimony by DUE DATE 5.

b. Each party must file any opposition to a motion to exclude evidence by DUE DATE 5.

7. DUE DATE 6

Each party must file any reply for a motion to exclude evidence by DUE DATE 6.

8. DUE DATE 7

The oral argument (if requested by either party) is set for DUE DATE 7.

B. MOTIONS TO SEAL, PROTECTIVE ORDERS, AND CONFIDENTIAL INFORMATION

A protective order does not exist in this proceeding unless the parties file one and the Board approves it. Papers and exhibits filed with the Board are public unless designated as confidential when filed. 37 C.F.R. § 42.14. Papers and exhibits may be filed as confidential if filed with a motion to seal. *Id.* Those papers and exhibits will remain under seal provisionally until the Board renders its decision on the motion. *Id.*

A motion to seal must include a proposed protective order, or must refer to a protective order already approved in the proceeding. 37 C.F.R. § 42.54(a). We encourage the parties to adopt the Board's default protective order if they conclude that a protective order is necessary. See Default Protective Order, Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, App. B (Aug. 14, 2012). If the parties choose to propose a protective order deviating from the default protective order, they must submit the proposed protective order jointly along with a marked-up comparison of the proposed and default protective orders showing the differences.

The Board has a strong interest in the public availability of the proceedings. We advise the parties that redactions to documents filed in this proceeding should be limited to isolated passages consisting entirely of confidential information, and that the thrust of the underlying argument or evidence must be clearly discernible from the redacted versions. We also advise the parties that information subject to a protective order will become

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public if identified in a final written decision in this proceeding, and that a motion to expunge the information will not necessarily prevail over the public interest in maintaining a complete and understandable file history. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,761.

C. MOTIONS TO AMEND

Patent Owner may file a motion to amend without prior authorization from the Board. Patent Owner, however, must confer with the Board before filing such a motion. *See* 37 C.F.R. § 42.121(a). Patent Owner should arrange for a conference call with the panel and opposing counsel at least one week before DUE DATE 1 in order to satisfy the conferral requirement. We direct the parties to the Board's website for representative decisions relating to Motions to Amend among other topics. The parties may access these representative decisions at:

<https://www.uspto.gov/patents-application-process/appealing-patent-decisions/decisions-and-opinions/representative-orders>

We also direct the parties to the Guidance on Motions to Amend in view of *Aqua Products*. The parties may access the Memorandum at:

https://www.uspto.gov/sites/default/files/documents/guidance_on_motions_to_amend_11_2017.pdf

D. DEPOSITIONS

The parties are reminded that the Testimony Guidelines appended to the Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,772 (Aug. 14, 2012) (Appendix D), apply to this proceeding. The Board may impose an appropriate sanction for failure to adhere to the Testimony Guidelines. 37 C.F.R. § 42.12. For example, reasonable expenses and attorneys' fees

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