

U.S. PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ORTHOPEDIATRICS CORP.,
Petitioner,

v.

K2M, INC.,
Patent Owner.

Case IPR2018-00429 (Patent 9,532,816 B2)
Case IPR2018-00521 (Patent 9,532,816 B2)

Record of Oral Hearing
Held: February 21, 2019

Before LYNNE H. BROWNE, MICHAEL L. WOODS, and ROBERT L.
KINDER, *Administrative Patent Judges*.

APPEARANCES:

ON BEHALF OF THE PETITIONER:

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The above-entitled matter came on for hearing on Thursday, February 21, 2019, commencing at 10:00 a.m. at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

1 P-R-O-C-E-E-D-I-N-G-S

2 10:00 a.m.

3 JUDGE KINDER: Good morning. Please be seated.

4 Good morning, everyone. I'm Judge Kinder and with me today
5 remotely are Judges Browne and Judge Woods. They're both coming
6 from remote locations.

7 So that being said, if you have demonstratives that you're presenting
8 today, you need to clearly refer to the slide number so they have a chance to
9 flip up your page on your demonstratives. So that's something that's a little
10 abnormal when you're speaking -- for say slide number, but please do that so
11 we can keep track of it.

12 Today we're calling OrthoPediatrics Corp, Petitioner, versus K2M
13 Inc., Patent Owner, Cases No. IPR 2018-00429 and 00521, both involving
14 U.S. Patent No. 9,532,816. And if we could first get an appearance made
15 for Petitioner and then Patent Owner?

16 MR. BENNETT: Thank you, Your Honor. Good morning. John
17 Bennett on behalf of the Petitioner OrthoPediatrics, and with me are lead
18 counsel Paul Ulrich and backup counsel Christopher Singh.

19 JUDGE KINDER: Okay. Thank you.

20 MR. DOUGLAS: Good morning, Your Honor. My name is
21 Christopher Douglas. I'm lead counsel for K2M with Alston & Bird. With
22 me today are my colleagues Mike Connor and Christopher Ziegler.

1 JUDGE KINDER: All right. Thank you. Just to reorient a few
2 things that we put out in the original hearing order, each party -- and we do
3 appreciate, by the way, everyone's willingness to meet one day later.
4 Obviously with the snow day yesterday in the Federal Government, we're
5 meeting today on February 21st. So we appreciate that and everyone
6 sticking around. Hopefully it didn't interrupt your plans too much for
7 travel.

8 Today each party will have one hour of total argument time to
9 present arguments for both proceedings. Petitioner will open the hearing by
10 presenting arguments including any arguments on its motions that are
11 pending. Thereafter the Patent Owner will argue its opposition to
12 Petitioner's arguments and any of its motions as well. Petitioner may
13 reserve time for rebuttal arguments and may present arguments in opposition
14 to the Patent Owner's motions.

15 Petitioner obviously bears the ultimate burden to prove that the
16 claims in the inter partes review are unpatentable, so one thing we've been
17 doing lately is allowing the Patent Owner to have a very brief surrebuttal.
18 So we'll go ahead and do that in this proceeding as well. It's just something
19 we've been doing and it's very brief. I mean, it should be no more than a
20 couple minutes.

21 That being said, Petitioner, how long would you like to reserve for
22 your rebuttal time?

23 MR. BENNETT: Thank you. Twenty minutes, please.

1 JUDGE KINDER: All right. Mr. Bennett, 20 minutes. Mr.
2 Douglas, how long would you like to reserve for the brief, brief surrebuttal?

3 MR. DOUGLAS: We'll reserve five minutes, Your Honor.

4 JUDGE KINDER: All right. And again, the rebuttals should
5 present no new argument. It should be just in direct response to whatever
6 the other party brought up during that time.

7 So I see we do not have a clock in the hearing -- in this hearing
8 room. We're in kind of the quaint cozy hearing room, which I actually like.
9 It's more in-person, but you don't have a clock, so your colleague may want
10 to keep track for you if you want warnings during the time. And I do have a
11 master clock, but it just goes from red, yellow to green, so -- or from green,
12 yellow to red. So if you want to keep your own time, that might be good.

13 And I believe with that we are ready to go, unless my colleagues
14 have any preliminary matters they want to discuss?

15 (No audible response.)

16 JUDGE KINDER: All right.

17 JUDGE BROWNE: I don't have any.

18 JUDGE KINDER: All right. Very good. Mr. Bennett?

19 MR. BENNETT: Thank you, Your Honor. May it please the
20 Board. After the Board instituted inter partes review in these two
21 proceedings the parties have filed almost 300 pages of briefing and yet really
22 all of the disputed issues concerning patentability can be distilled into a
23 single question: Are the Board's claim constructions correct? The answer

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