

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SUPERCELL OY,
Petitioner,

v.

GREE, INC.,
Patent Owner.

Cases

PGR2018-00050 (Patent 9,675,886 B2)
PGR2018-00060 (Patent 9,694,287 B2)¹

Before LYNNE H. BROWNE, HYUN J. JUNG, and
CARL M. DEFRANCO, *Administrative Patent Judges*.

JUNG, *Administrative Patent Judge*.

ORDER
Oral Hearing
37 C.F.R. § 42.70

¹ We exercise our discretion to enter one order into both proceedings. The parties are not authorized to use a multiple-case caption.

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Post Grant Review in PGR2018-00050 and PGR2018-00060 was instituted on September 28, 2018. Paper 8 in PGR2018-00050; Paper 9 in PGR2018-00060. A contemporaneously issued Scheduling Order set the date for oral hearing to June 26, 2019, if hearing is requested by the parties and granted by the Board. Paper 9 in PGR2018-00050; Paper 10 in PGR2018-00060. The parties have requested oral argument pursuant to 37 C.F.R. § 42.70 in the above-captioned proceedings. Papers 25, 26 in both proceedings. The parties' requests are *granted*.

Because of the significant overlap of issues in both proceedings, the oral hearing for both will be combined. Oral argument will commence at 1 PM Eastern Time on Wednesday, June 26, 2019, in Hearing Room A on the ninth floor of Madison Building East, 600 Dulany Street, Alexandria, Virginia 22314.

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. The Board will provide a court reporter for the hearing, and the reporter's transcript will constitute the official record of the hearing.

Petitioner requests up to one (1) hour of oral argument per side to present argument in each proceeding. Paper 26, 1. Patent Owner requests one (1) hour of oral argument in each proceeding. Paper 25, 1. We allocate each party seventy-five (75) minutes of total argument time. The parties may use their 75 minutes to present their arguments for both cases as they see fit. If the panel requires a lengthy examination of a party's argument, the panel may extend argument time. If the panel extends argument time for one party, the panel will extend argument time for the other party by an equal amount.

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Petitioner bears the ultimate burden of proof that the claims at issue in these reviews are unpatentable. Therefore, at oral hearing, Petitioner will proceed first to present its arguments with regard to the challenged claims and grounds on which basis we instituted trial in this proceeding. Petitioner may reserve some (but not more than half) of its allotted argument time for rebuttal to respond to Patent Owner's arguments.

After Petitioner's initial presentation, Patent Owner will argue its opposition to Petitioner's case and present the issues for which it bears the ultimate burden, including argument on any of Patent Owner's pending motions, such as the Motion to Amend Claims. Thereafter, Petitioner may use any reserved time to respond to Patent Owner's presentation. Patent Owner may reserve some (but no more than half) of its allotted argument time for use in sur-rebuttal if it so chooses, and may use its reserved time for sur-rebuttal to respond to Petitioner's arguments.² The parties are reminded that arguments made during rebuttal and sur-rebuttal periods must be responsive to arguments the opposing party made in its immediately 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.

Demonstrative exhibits must be served on opposing counsel at least *four (4) business days* before the hearing. *See also* 37 C.F.R. § 42.70(b). The parties also shall file a courtesy copy of the demonstratives as an exhibit

² *See* Trial Practice Guide August 2018 Update, p. 20, *available at* www.uspto.gov/sites/default/files/documents/2018_Revised_Trial_Practice_Guide.pdf (providing that the "Board may also permit patent owners the opportunity to present a brief sur-rebuttal if requested").

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to the Board at least *three (3) business days* prior to the hearing by emailing them to Trials@uspto.gov. In addition, the parties shall file any demonstrative exhibits in these proceedings within two (2) days of the hearing. Each party shall provide a hard copy of its demonstratives to the court reporter at the hearing. The parties are reminded that demonstrative exhibits are visual aids to oral argument and not evidence and are intended only to assist the parties in presenting their oral argument to the panel. Each slide may be marked with the words “DEMONSTRATIVE EXHIBIT – NOT EVIDENCE” in the footer. The parties are directed to *St. Jude Medical, Cardiology Division, Inc. v. The Board of Regents of the University of Michigan*, IPR2013-00041 (PTAB Jan. 27, 2014) (Paper 65) for guidance regarding the appropriate content of demonstrative exhibits. Demonstrative exhibits may not be used to advance arguments or introduce evidence not previously presented in the record. *See Dell Inc. v. Accelaron, 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”). Instead, demonstrative exhibits should cite to the briefs and evidence in the record.

The parties shall meet and confer to discuss any objections to demonstrative exhibits. If any issues regarding demonstratives remain unresolved after the parties meet and confer, the parties shall file jointly (by email to Trials@uspto.gov) a one-page list of objections to the demonstrative exhibits at least one (1) business day before the hearing. For each objection, the list must identify with particularity the demonstratives subject to the objection and include a short, one-sentence statement explaining the objection. The panel will consider the objections and may

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schedule a conference call if deemed necessary. Otherwise, rulings on the objections will be reserved until the hearing or after the hearing. Any objection to demonstrative exhibits not presented timely will be considered waived.

During the oral hearing, the presenter must identify clearly and specifically each demonstrative exhibit (e.g., by slide or screen number) referenced during the hearing to ensure the clarity and accuracy of the reporter's transcript, and to assist Judges Browne and DeFranco, who will join the hearing remotely from Maryland and Massachusetts, respectively. Judges Browne and DeFranco will be unable to view images projected in the hearing room. Similarly, to ensure presenters may be heard by Judges Browne and DeFranco, the parties are reminded to speak only when standing at the hearing room podium and toward the attached microphone. The parties should note that if a demonstrative is not filed or otherwise made fully available or visible to the judges presiding over the hearing remotely, that demonstrative will not be considered. 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 the oral hearing. Lead or backup counsel, however, may present the party's argument. If either party anticipates that its lead counsel will not be attending the hearing, that party should initiate a joint telephone conference with the other party and the panel no later than *two (2) business days* prior to the hearing to discuss the matter.

No live testimony from any witness will be taken at the oral argument.

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