

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DATAVANT, INC.,
Petitioner,

v.

VIGILYTICS LLC,
Patent Owner.

IPR2024-00307
Patent 9,965,651 B1
IPR2024-00311
Patent 10,109,375 B1
IPR2024-00381
Patent 10,886,012 B1
IPR2024-00382
Patent 9,665,685 B1¹

Before THOMAS L. GIANNETTI, BRIAN J. McNAMARA, and
STEVEN M. AMUNDSON, *Administrative Patent Judges*.

PER CURIAM.

SCHEDULING ORDER

¹ This order is to be filed in each case. The parties are not authorized to use this style heading in any subsequent papers

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A. GENERAL INSTRUCTIONS

1. INITIAL AND ADDITIONAL CONFERENCE CALLS

The parties must contact the Board within one month of this Order if there is a need to discuss proposed changes to this Order or proposed motions that have not been authorized in this Order or other prior Order or Notice. *See* PTAB Consolidated Trial Practice Guide (“Consolidated Practice Guide”)² at 9–10, 65 (guidance in preparing for a conference call); *see also* 84 Fed. Reg. 64,280 (Nov. 21, 2019). A request for an initial conference call must include a list of proposed motions, if any, to be discussed during the call.

The parties may request additional conference calls as needed. Any email requesting a conference call with the Board must: (a) copy all parties, (b) indicate generally the relief being requested or the subject matter of the conference call, (c) include multiple times when all parties are available, (d) state whether the opposing party opposes any relief requested, and (e) if opposed, either (i) certify that the parties have conferred telephonically or in person to attempt to reach agreement or (ii) explain why such a conference did not occur. The email must not contain substantive argument and, unless otherwise authorized, must not include attachments. *See* Consolidated Practice Guide at 9–10.

2. PROTECTIVE ORDER

No protective order will apply to this proceeding until the Board enters one. If either party files a motion to seal before entry of a protective

² Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

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order, a jointly proposed protective order must be filed as an exhibit with the motion. It is the responsibility of the party whose confidential information is at issue, not necessarily the proffering party, to file the motion to seal.³ The Board encourages the parties to adopt the Board's default protective order if they conclude that a protective order is necessary. *See Consolidated Practice Guide at 107–22 (App. B, Protective Order Guidelines and Default Protective Order)*. 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 between the two and explain why good cause exists to deviate from the default protective order.

The Board and the public have a strong interest in the public availability of trial proceedings. Redactions to documents filed in this proceeding must be limited to the minimum amount necessary to protect confidential information, and 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 may become 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 Consolidated Practice Guide at 21–22*.

³ If the entity whose confidential information is at issue is not a party to the proceeding, the parties should contact the Board to arrange a conference call.

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3. DISCOVERY DISPUTES

The Board encourages parties to resolve disputes relating to discovery on their own. To the extent that a dispute arises between the parties relating to discovery, the parties must meet and confer to resolve the dispute before contacting the Board. If attempts to resolve the dispute fail, a party may request a conference call with the Board and the other party to seek authorization to move for relief.

4. TESTIMONY

The Testimony Guidelines appended to the Consolidated Practice Guide at 127–30 (App. D, Testimony Guidelines) 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 (2024). For example, reasonable expenses and attorneys’ fees incurred by any party may be levied on a person who impedes, delays, or frustrates the fair examination of a witness.

Whenever a party submits a deposition transcript as an exhibit in this proceeding, the submitting party must file the full transcript of the deposition rather than excerpts of only the cited portions. After a deposition transcript has been submitted as an exhibit, all parties who subsequently cite to portions of the transcript must cite to the already submitted exhibit instead of submitting another copy of the same transcript. *See* 37 C.F.R. § 42.6(d) (“A document already in the record of the proceeding must not be filed again, not even as an exhibit or an appendix, without express Board authorization.”).

5. CROSS-EXAMINATION

Except as the parties might otherwise agree, for each due date:

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Cross-examination ordinarily takes place after any supplemental evidence is due. 37 C.F.R. § 42.53(d)(2).

Cross-examination ordinarily ends no later than a week before the filing date for any paper in which the cross-examination testimony may be used. *Id.*

6. MOTION TO AMEND

Patent Owner may file a motion to amend without prior authorization from the Board. Nevertheless, Patent Owner must confer with the Board before filing such a motion. 37 C.F.R. § 42.121(a). To satisfy this requirement, Patent Owner should request a conference call with the Board no later than two weeks before DUE DATE 1. *See* Section B below regarding DUE DATES.

Patent Owner has the option to receive preliminary guidance from the Board on its motion to amend. *See* Notice Regarding a New Pilot Program Concerning Motion to Amend Practice and Procedures in Trial Proceedings Under the America Invents Act Before the Patent Trial and Appeal Board, 84 Fed. Reg. 9,497 (Mar. 15, 2019) (“MTA Pilot Program Notice”); *see also* Consolidated Practice Guide at 67. If Patent Owner elects to request the Board’s preliminary guidance on its motion, it must do so in its motion to amend filed on DUE DATE 1.

Any motion to amend and briefing related to such a motion must generally follow the practices and procedures described in the MTA Pilot Program Notice unless otherwise ordered by the Board in this proceeding. The parties are further directed to *Lectrosonics, Inc. v. Zaxcom, Inc.*, IPR2018-01129, Paper 15 (PTAB Feb. 25, 2019) (precedential), and Rules

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of Practice to Allocate the Burden of Persuasion on Motions to Amend in Trial Proceedings Before the Patent Trial and Appeal Board, 85 Fed. Reg. 82,923 (Dec. 21, 2020).

At DUE DATE 3, Patent Owner has the option to file a reply to the opposition to the motion to amend and preliminary guidance, or a revised motion to amend. *See* MTA Pilot Program Notice at 9,500–01. Patent Owner may elect to file a revised motion to amend even if Patent Owner did not request to receive preliminary guidance on its motion to amend. A revised motion to amend must provide amendments, arguments, or evidence in a manner that responds to issues raised in the preliminary guidance or Petitioner’s opposition.

If Patent Owner files a revised motion to amend, the Board will enter a revised scheduling order setting the briefing schedule for that revised motion and adjusting other due dates as needed. *See* MTA Pilot Program Notice at 9,501, App. 1B.

As discussed in the MTA Pilot Program Notice, if the Board provides preliminary guidance on the motion to amend and Patent Owner files neither a reply to the opposition to the motion to amend nor a revised motion to amend at DUE DATE 3, Petitioner may file a reply to the preliminary guidance no later than three (3) weeks after DUE DATE 3. Petitioner’s reply may only respond to the preliminary guidance. Patent Owner may file a sur-reply in response to Petitioner’s reply to the preliminary guidance. Patent Owner’s sur-reply may only respond to arguments made in Petitioner’s reply and must be filed no later than three (3) weeks after

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Petitioner's reply. *See* MTA Pilot Program Notice at 9,502. In this situation, no new evidence may accompany the reply or the sur-reply.

7. ORAL ARGUMENT

Requests for oral argument must comply with 37 C.F.R. § 42.70(a). To permit the Board sufficient time to schedule the oral argument, the parties may not stipulate to an extension of the request for oral argument beyond the date set forth in the Due Date Appendix.

Unless the Board notifies the parties otherwise, oral argument, if requested, will be held at the USPTO headquarters in Alexandria, Virginia. The parties may also request that the oral argument instead be held virtually by videoconference. For the parties' information in making this decision, even if the parties elect an in-person hearing, it is anticipated that two judges will appear remotely by video and one judge will appear in person at the USPTO headquarters in Alexandria, Virginia. The parties should state in the request for oral argument (DUE DATE 4) whether the parties would prefer either a video hearing or an in-person hearing. The Board will conduct an in-person hearing only when requested by all parties.

Note that the Board may not be able to honor the parties' preferences due to, among other things, the availability of hearing room resources, the needs of the panel, and USPTO policy at the time of the hearing. The Board will consider the parties' request and notify the parties of how and where the hearing will be conducted.

For in-person hearings, seating in the Board's hearing rooms may be limited, and will be available on a first-come, first-served basis. If either party anticipates that more than five (5) individuals will attend the argument

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on its behalf, the party should notify the Board as soon as possible, and no later than the request for oral argument. Parties should note that the earlier a request for accommodation is made, the more likely the Board will be able to accommodate additional individuals.

The Board has established the “Legal Experience and Advancement Program,” or “LEAP,” to encourage advocates before the Board to develop their skills and to aid in succession planning for the next generation. The Board defines a LEAP practitioner as a patent agent or attorney having three (3) or fewer substantive oral arguments in any federal tribunal, including PTAB. Parties are encouraged to participate in the Board’s LEAP program.⁴ The Board will grant up to fifteen (15) minutes of additional argument time to that party, depending on the length of the proceeding and the Board’s hearing schedule. A party should submit a request, no later than five (5) business days before the oral argument, by email to the Board at PTABHearings@uspto.gov.⁵

All practitioners appearing before the Board must demonstrate the highest professional standards. The Board expects all practitioners to have a command of the factual record, the applicable law, and Board procedures, as well as the authority to commit the party they represent.

⁴ Information about the LEAP program can be found at www.uspto.gov/leap.

⁵ Additionally, a LEAP Verification Form must be submitted by the LEAP practitioner, confirming eligibility for the program. A combined LEAP Practitioner Request for Oral Hearing Participation and Verification Form is available at www.uspto.gov/leap.

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B. DUE DATES

This Order sets due dates for the parties to act after institution of the proceeding. The parties may stipulate different dates for DUE DATES 1, 5, and 6, as well as the portion of DUE DATE 2 related to Petitioner's reply (earlier or later, but no later than DUE DATE 3 for Patent Owner's sur-reply) and the portion of DUE DATE 3 related to Patent Owner's sur-reply (earlier or later, but no later than DUE DATE 7). The parties may not stipulate to a different date for the portion of DUE DATE 2 related to Petitioner's opposition to a motion to amend or for the portion of DUE DATE 3 related to Patent Owner's reply to an opposition to a motion to amend (or Patent Owner's revised motion to amend) without prior authorization from the Board. In stipulating to move any due dates in this Order, the parties should be aware that the Board requires four weeks after the filing of an opposition to the motion to amend (or the due date for the opposition, if none is filed) for the Board to issue its preliminary guidance, if requested by Patent Owner. The parties must promptly file a notice of the stipulation, specifically identifying the changed due dates. The parties may not stipulate an extension of DUE DATES 4, 7, and 8.

In stipulating different dates, 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.

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1. DUE DATE 1

Patent Owner may file—

a. a response to the petition (37 C.F.R. § 42.120). If Patent Owner elects not to file a response, Patent Owner must arrange a conference call with the parties and the Board. Patent Owner is cautioned that any patentability arguments not raised in the response may be deemed waived; and

b. a motion to amend the patent (37 C.F.R. § 42.121).

2. DUE DATE 2

Petitioner may file a reply to Patent Owner's response.

Petitioner may file an opposition to the motion to amend.

3. DUE DATE 3

Patent Owner may file a sur-reply to Petitioner's reply.

Patent Owner may also file either:

- a. a reply to the opposition to the motion to amend and the preliminary guidance (if provided by the Board); or
- b. a revised motion to amend.

NOTE: If Patent Owner files neither of the above papers (a reply to the opposition or a revised motion to amend), and the Board has provided preliminary guidance, Petitioner may file a reply to the preliminary guidance no later than three (3) weeks after DUE DATE 3. Patent Owner may file a sur-reply to Petitioner's reply to the preliminary guidance no later than three (3) weeks after Petitioner's reply.

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4. DUE DATE 4

Either party may file a request for oral argument (may not be extended by stipulation).

5. DUE DATE 5

Petitioner may file a sur-reply to Patent Owner's reply to the opposition to the motion to amend.

Either party may file a motion to exclude evidence (37 C.F.R. § 42.64(c)).

6. DUE DATE 6

Either party may file an opposition to a motion to exclude evidence.

Either party may request that the Board hold a prehearing conference.

7. DUE DATE 7

Either party may file a reply to an opposition to a motion to exclude evidence.

8. DUE DATE 8

Oral argument (if requested by either party) will be held on this date. Approximately one month before the hearing, the Board will issue an order setting the start time of the hearing and the procedures that will govern the parties' arguments.

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DUE DATE APPENDIX

DUE DATE 1September 26, 2024

Patent Owner's response to the petition

Patent Owner's motion to amend the patent

DUE DATE 2 December 19, 2024

Petitioner's reply to Patent Owner's response to the petition

Petitioner's opposition to Patent Owner's motion to amend

DUE DATE 3January 30, 2025

Patent Owner's sur-reply to Petitioner's reply to the response
to the petition

Patent Owner's reply to Petitioner's opposition to the motion
to amend OR Patent Owner's revised motion to amend

DUE DATE 4 February 20, 2025

Request for oral argument (may not be extended by stipulation)

DUE DATE 5March 13, 2025

Petitioner's sur-reply to Patent Owner's reply to the opposition
to the motion to amend

Motion to exclude evidence

DUE DATE 6March 20, 2025

Opposition to motion to exclude

Request for prehearing conference

DUE DATE 7March 27, 2025

Reply to opposition to motion to exclude

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Oral argument (if requested)

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