

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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NIKE, INC,  
Petitioner,

v.

MAYFONK ATHLETIC, LLC,  
Patent Owner.

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Case IPR2015-00655 & Case IPR2015-00656 &  
(Patent 8,860,584 B1)<sup>1</sup>

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Before SALLY C. MEDLEY, KARL D. EASTHOM, and  
JASON J. CHUNG, *Administrative Patent Judges*.

EASTHOM, *Administrative Patent Judge*.

SCHEDULING ORDER

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<sup>1</sup> This order addresses issues that are the same in the identified cases.  
The parties are not authorized to use this heading style.

## **I. 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).

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 incurred by any party may be levied on a person who impedes, delays, or frustrates the fair examination of a witness.

### **A. 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. To request a conference call, the parties should submit a list of dates and times when they are available for a call. If an initial conference call is requested, the parties should be prepared to discuss

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any proposed changes to this Scheduling Order and any motions the parties anticipate filing during the trial. The parties are directed to the Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,765–66, for guidance in preparing for the initial conference call.

#### **B. 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.

#### **C. 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.

#### **D. 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.

#### **E. DUE DATE 4**

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

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2. 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.

#### **F. DUE DATE 5**

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

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

#### **G. DUE DATE 6**

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

#### **H. DUE DATE 7**

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

### **II. CROSS-EXAMINATION**

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

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

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

### **III. MOTION FOR OBSERVATION ON CROSS-EXAMINATION**

A motion for observation on cross-examination provides the parties with a mechanism to draw the Board's attention to relevant cross-examination testimony of a reply witness because no further substantive paper is permitted after the reply. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,768. The observation must be a concise statement of the relevance of precisely identified testimony to a precisely identified argument or portion of an exhibit. Each observation should not exceed a single, short paragraph. The opposing party may respond to the observation. Any response must be equally concise and specific.

### **IV. MOTION TO AMEND**

Under 37 C.F.R. §§ 42.24 and 42.121, a motion to amend, if filed in this proceeding, as well as Petitioner's opposition to the motion to amend, each are limited to twenty-five (25) pages; patent owner's reply to the opposition to the motion to amend is limited to twelve (12) pages; and the claim listing may be contained in an appendix to the motion to amend, and does not count toward the page limit of the motion. *See* Amendments to the Rules of Practice for Trials Before the Patent Trial and Appeal Board, 80 Fed. Reg. 28,561, 28,565–66 (Final Rule) (May 19, 2015).

### **V. PETITIONER'S REPLY**

Under 37 C.F.R. § 42.24(c), petitioner's reply to patent owner's response is limited to twenty-five (25) pages. *See* Amendments to the Rules of Practice for Trials Before the Patent Trial and Appeal Board, 80 Fed. Reg. at 28,565.

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