

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ASML NETHERLANDS B.V., EXCELITAS TECHNOLOGIES CORP.,
and QIOPTIQ PHOTONICS GMBH & CO. KG,
Petitioner,

v.

ENERGETIQ TECHNOLOGY, INC.,
Patent Owner.

Cases IPR2016-00126 (Patent 9,048,000 B2)
IPR2016-00127 (Patent 8,969,841 B2)¹

Before SALLY C. MEDLEY, JONI Y. CHANG, and
BARBARA A. PARVIS, *Administrative Patent Judges*.

CHANG, *Administrative Patent Judge*.

SCHEDULING ORDER

¹ This Order applies to each of the listed cases. We exercise our discretion to issue one Order to be docketed in each case. The parties, however, are not authorized to use this caption for any subsequent papers.

IPR2016-00126 (Patent 9,048,000 B2)

IPR2016-00127 (Patent 8,969,841 B2)

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).

If requested, a consolidated oral hearing for both aboved-identified proceedings will be held on DUE DATE 7. Any representation made by counsel at the consolidated hearing will be applicable to and useable in both proceedings which have underlying basis for the representation.

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.

1. INITIAL CONFERENCE CALL

The parties are directed to contact the Board within a month of this decision if either party disagrees with holding a consolidated hearing for the

IPR2016-00126 (Patent 9,048,000 B2)

IPR2016-00127 (Patent 8,969,841 B2)

related IPRs or there is a need to discuss proposed changes to this Scheduling Order or proposed motions. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,765–66 (guidance in preparing for the initial conference call).

a. Confidential Information

The parties must file confidential information using the appropriate availability indicator in PRPS (e.g., “Board and Parties Only”), regardless of whose confidential information it is. It is the responsibility of the party whose confidential information is at issue, not necessarily the proffering party, to file the motion to seal, unless the party whose confidential information is at issue is not a party to this proceeding.

A protective order does not exist in a case until one is filed in the case and is approved by the Board. If a motion to seal is filed by either party, the proposed protective order should be presented as an exhibit to the motion.

The parties are urged to operate under the Board’s default protective order, should that become necessary. *See* Default Protective Order, Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,769–71, App. B.

If the parties choose to propose a protective order deviating from the default protective order, they should submit the proposed protective order jointly. A marked-up comparison of the proposed and default protective orders should be presented as an additional exhibit to the motion to seal, so that difference can be understood readily. The parties should contact the Board if they cannot agree on the terms of the proposed protective order.

IPR2016-00126 (Patent 9,048,000 B2)

IPR2016-00127 (Patent 8,969,841 B2)

b. Redactions

Redactions should be limited strictly to isolated passages consisting entirely of confidential information. The thrust of the underlying argument or evidence must be clearly discernable from the redacted version.

c. Confidential Information in Final Written Decisions

Information subject to a protective order will become public if identified in a final written decision in this proceeding. 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.

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.

IPR2016-00126 (Patent 9,048,000 B2)

IPR2016-00127 (Patent 8,969,841 B2)

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. 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).

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