

Trials@uspto.gov

Tel: 571-272-7822

Paper 13

Entered: June 3, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NEPTUNE GENERICS, LLC,
Petitioner,

v.

ELI LILLY & COMPANY
Patent Owner.

Case IPR2016-00240
Patent 7,772,209 B2

Before MICHAEL P. TIERNEY, JACQUELINE WRIGHT BONILLA, and
TINA E. HULSE, *Administrative Patent Judges*.

TIERNEY, *Administrative Patent Judge*.

SCHEDULING ORDER

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. *See* 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 via e-mail at Trials@uspto.gov at least three business days before the date set for the initial conference call if there is no need to discuss proposed changes to this Scheduling Order or proposed motions with the Board. If no such discussion is needed, the initial conference call will be cancelled. The

parties are directed to the Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,765–66 (Aug. 14, 2012), for guidance in preparing for the initial conference call, and should be prepared to discuss any proposed changes to this Scheduling Order (i.e., changes to DUE DATES 6 and/or 7), and any motions the parties anticipate filing during the trial that are not authorized already by our Rules or by this Scheduling Order.

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. The patent owner is reminded that it must confer with the Board before filing a motion to amend. 37 C.F.R. § 42.121(a). The patent owner should contact the Board to request any such conference in sufficient time to ensure that the conference is conducted at least one week before DUE DATE 1. If the patent owner elects not to file either a response to the petition or a motion to amend, 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, or any evidence not referred to, are 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.

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. *See* 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. *See 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.

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