

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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KINGSTON TECHNOLOGY COMPANY, INC.,  
Petitioner,

v.

POLARIS INNOVATIONS LTD.,  
Patent Owner.

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Case IPR2016-01621 (Patent 6,438,057 B1)  
Case IPR2016-01622 (Patent 6,850,414 B2)  
Case IPR2016-01623 (Patent 7,315,454 B2)<sup>1</sup>

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Before SALLY C. MEDLEY, JEAN R. HOMERE, and  
MATTHEW R. CLEMENTS, *Administrative Patent Judges*.

HOMERE, *Administrative Patent Judge*.

SCHEDULING ORDER

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<sup>1</sup> This Scheduling Order sets due dates that are identical in all three cases. We, therefore, exercise our discretion to issue one Scheduling Order to be filed in each case. The parties are not authorized to use this style heading for any subsequent papers.

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## 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).<sup>2</sup> A notice of the stipulation, specifically identifying the changed due dates, must be filed promptly. 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.

### 1. INITIAL CONFERENCE CALL

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

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<sup>2</sup> The parties may not change DUE DATE 4 with respect to the requirement for requesting oral argument, without express authorization from the panel.

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call, and should be prepared to discuss (1) any proposed changes to this Scheduling Order; (2) any motions the parties anticipate filing during the trial; and **(3) the parties' availability to appear for a hearing or hearings in Alexandria, VA; or San Jose, CA.**<sup>3</sup>

## 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 and fully briefed in the response will be deemed waived. *See In re Nuvasive, Inc.*, 842 F.3d 1376, 1381 (Fed. Cir. 2016) (“NuVasive abandoned its challenge to the public accessibility determination even though the PTAB had warned NuVasive [in the Scheduling Order] that this would result in waiver.”).

## 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.

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<sup>3</sup> While we seek the parties' input on the location of any hearing or hearings, we remind the parties that any hearing or hearings in these cases first must be requested by the parties by DUE DATE 4 and that the ultimate location of any hearing or hearings will depend heavily on the availability of hearing rooms at the various possible locations at the time of the request.

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#### 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.

#### 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 any motion for observations 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 to any opposition to 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—

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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.*

#### C. 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. 48,756, 48,768 (Aug. 14, 2012). 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.

#### D. MOTION TO AMEND

Although the filing of a Motion to Amend is authorized under our rules, Patent Owner must confer with us before filing any Motion to Amend. 37 C.F.R. § 42.121(a). Patent Owner should contact the Board to request such a conference, if necessary, at least ten business days before DUE DATE 1.

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