

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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FITBIT, INC.,  
Petitioner,

v.

BLACKBIRD TECH, LLC d/b/a BLACKBIRD TECHNOLOGIES, LLC  
Patent Owner.

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Case IPR2017-02012  
Patent 6,434,212

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Before DEBRA K. STEPHENS, THOMAS L. GIANNETTI, and  
CHRISTA P. ZADO, *Administrative Patent Judges*.

STEPHENS, *Administrative Patent Judge*.

SCHEDULING ORDER

*37 C.F.R. § 42.5(a)*

The Appendix to this Order sets due dates for the parties to take action after institution of these proceedings. 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 addition, even if the parties stipulate to an extension of DUE DATE 4, any request for oral hearing must still be filed on or before the date set forth in this Order, to provide sufficient time for the Board to accommodate the hearing.

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 D, 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 Order if there is a need to discuss proposed changes to this Order or proposed motions. *See* Office Patent Trial Practice Guide, 77 Fed. Reg.

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48,756, 48,765–66 (Aug. 14, 2012) (guidance in preparing for the initial conference call).

## B. PROTECTIVE ORDER

### *1. Confidential Information*

The parties must file confidential information using the appropriate availability indicator in PTAB E2E, 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.

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 motion to seal must include a certification that the moving party has in good faith conferred or attempted to confer with other affected parties in an effort to resolve any dispute. *See* 37 C.F.R. 42.54(a).

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 differences can be understood readily. The parties should contact the Board if they cannot agree on the terms of the proposed protective order.

2. *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.

3. *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 prevail necessarily over the public interest in maintaining a complete and understandable file history. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,761.

C. DUE DATES

1. 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.

2. 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.

3. 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.

4. DUE DATE 4

a. Each party must file any observations on the cross-examination testimony of a reply witness (*see* section E, below) by DUE DATE 4.

b. Each party must file any motion to exclude evidence (37 C.F.R. § 42.64(c)) by DUE DATE 4.

c. Each party must file any request for oral argument (37 C.F.R. § 42.70(a)) by DUE DATE 4. As noted above, DUE DATE 4 is not extendible with respect to any request for oral argument.

5. 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.

6. DUE DATE 6

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

7. DUE DATE 7

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

D. CROSS-EXAMINATION

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

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