

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VIZIO, INC.,
Petitioner,

v.

NICHIA CORP.,
Patent Owner.

Case IPR2018-00437
Patent No. 9,537,071 B2

Before SALLY C. MEDLEY, WILLIAM V. SAINDON, and
NATHAN A. ENGELS, *Administrative Patent Judges*.

ENGELS, *Administrative Patent Judge*.

SCHEDULING ORDER
and

GENERAL INSTRUCTIONS

37 C.F.R. § 42.5

A. GENERAL INSTRUCTIONS

1. Request for an Initial Conference Call

Unless at least one of the parties requests otherwise, we will not conduct an initial conference call as described in the Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,765–66 (Aug. 14, 2012). The parties ***must request*** an initial conference call if either party is aware of any conflicts or concerns with DUE DATES 6 or 7 set forth in the Appendix of this Scheduling Order. Any request for an initial conference call must be made no later than 25 days after the institution of trial.

2. Standing Procedure for Requests for Conference Calls

If the parties request a conference call, including an initial conference call, the parties must follow these procedures:

- a. Prior to requesting a conference call, the parties must confer in an effort to resolve any issue to be discussed with the Board, or be prepared to explain to the Board why such a conference was not possible.
- b. Parties may request a conference call by contacting the Board at the email address or telephone number listed above the caption of this Order. Requests via email are expected and preferred; requests via telephone should be reserved for time-critical circumstances. Requests by email must copy opposing counsel. Requests by telephone should include opposing counsel as practicable.
- c. The request must include a list of proposed issues and/or motions to be discussed during the call.

- d. The request may include a brief background discussion of the issue(s) and/or motion(s) to be discussed, but must not include arguments. Email correspondence between the parties and the Board is for administrative purposes only and is not a part of the record.
- e. The request must certify that the parties conferred in accordance with 2.a., and must indicate the result of the conference (e.g., whether the non-requesting party opposes or does not oppose the request).
- f. The request must include a list of dates and times when both parties are available for the call.

3. *Motions to Seal, Protective Orders, and Confidential Information*

Papers and exhibits filed with the Board are public unless designated as confidential when filed. 37 C.F.R. § 42.14. Papers and exhibits may be filed as confidential if filed with a motion to seal. *Id.* Those papers and exhibits will remain under seal provisionally until the Board renders its decision on the motion. *Id.* A motion to seal must include a proposed protective order, or must refer to a protective order already approved in the proceeding. 37 C.F.R. § 42.54(a). A protective order does not exist in this proceeding unless the parties file one and the Board approves it. Board approval typically does not occur until its decision on a motion to seal, although the parties may request a conference call to seek approval prior to a decision on a motion to seal if the particular circumstances of the case so require.

Often, a party moves to seal confidential or protective order material of the opposing party. In this case, the opposing party is authorized to file a

response to the motion to seal to address why the motion to seal should be granted. Such a response is due within 7 days of the filing of the motion to seal and is subject to the same filing requirements (e.g., length, document format) as the motion to seal.

We encourage the parties to adopt the Board's default protective order if they conclude that a protective order is necessary. *See* Default Protective Order, Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, App. B (Aug. 14, 2012). If the parties choose to propose a protective order deviating from the default protective order, they must submit the proposed protective order jointly along with a marked-up comparison of the proposed and default protective orders showing the differences; and the parties must explain why the proposed deviations from the default protective order are necessary.

The Board has a strong interest in the public availability of the proceedings. We advise the parties that redactions to documents filed in this proceeding should be limited to isolated passages consisting entirely of confidential information, and that the thrust of the underlying argument or evidence must be clearly discernible from the redacted versions. We also advise the parties that information subject to a protective order will likely become public if identified in a final written decision in this proceeding, and that 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.

4. Motions to Amend

Patent Owner may file a motion to amend without prior authorization from the Board. Nevertheless, Patent Owner must confer with the Board before filing such a motion by requesting a conference call under the

procedures set forth above. *See* 37 C.F.R. § 42.121(a). The conference call must occur at least *two weeks* before DUE DATE 1 in order to satisfy the conferral requirement.

5. Discovery Disputes

The panel encourages parties to resolve disputes relating to discovery on their own and in accordance with the precepts set forth in 37 C.F.R. § 42.1(b). To the extent that a dispute arises between the parties requiring Board intervention, the parties are to follow the procedures for requesting a conference call set forth above.

6. Depositions

The parties are advised 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.

Whenever a party submits a deposition transcript as an exhibit in this proceeding, the submitting party shall file the full transcript of the deposition rather than excerpts of only those portions being cited.

7. Cross-Examination

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

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

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