

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO. LTD.,
SAMSUNG ELECTRONICS AMERICA, INC. and APPLE, INC.,
Petitioner,

v.

NEONODE SMARTPHONE LLC,
Patent Owner.

IPR2021-00144
Patent 8,095,879 B2

Before KARA L. SZPONDOWSKI, CHRISTOPHER L. OGDEN, and
SCOTT B. HOWARD, *Administrative Patent Judges*.

OGDEN, *Administrative Patent Judge*.

ORDER
Setting Oral Argument
37 C.F.R. § 42.70(a)

I. ORAL ARGUMENT

A. TIME AND FORMAT¹

Oral arguments will commence at **1:00 p.m. Eastern Time on September 6, 2022, by video.**² The Board will provide a court reporter for the hearing, and the reporter's transcript will constitute the official record of the hearing.

Petitioner will have a total of sixty (60) minutes to present argument in this case and Patent Owner will have a total of sixty (60) minutes to respond. Having the burden of persuasion (*see* 35 U.S.C. § 316(e)), Petitioner will open the hearing by presenting its case regarding the challenged claims for which the Board instituted trial. Thereafter, Patent Owner will respond to Petitioner's arguments. Petitioner may reserve rebuttal time to respond to arguments presented by Patent Owner. In accordance with the Consolidated Trial Practice Guide³ ("CTPG"), issued in November 2019, Patent Owner may request to reserve time for a brief sur-

¹ If a party is no longer able to appear in-person for the hearing, the party must contact PTABHearings@uspto.gov as soon as possible.

² According to guidance issued on June 23, 2022, at least in this initial phase of re-establishing in-person hearings, the Board will only conduct in-person hearings when requested by all parties. *See* <https://www.uspto.gov/patents/ptab/hearings>. Petitioner has requested that the oral argument take place virtually via remote video conference. *See* Paper 47, 2.

³ Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

rebuttal, which will be limited to issues raised during Petitioner's rebuttal. *See* CTPG 83.⁴

The parties may request a pre-hearing conference in advance of the hearing. *See* CTPG 82. "The purpose of the pre-hearing conference is to afford the parties the opportunity to preview (but not argue) the issues to be discussed at the hearing, and to seek the Board's guidance as to particular issues that the panel would like addressed by the parties." *Id.* If either party desires a pre-hearing conference, the parties should jointly contact the Board at Trials@uspto.gov by August 19, 2022 (DUE DATE 6 of the Scheduling Order, Paper 27) to request a conference call for that purpose.

B. DEMONSTRATIVES

As set forth in 37 C.F.R. § 42.70(b), demonstratives shall be served on opposing counsel at least seven (7) business days before the hearing date and filed no later than three (3) business days before the hearing.⁵

Demonstratives are not a mechanism for making new arguments. Demonstratives also are not evidence, and the Board will not consider them as evidence. Rather, demonstratives are visual aids to a party's oral presentation regarding arguments and evidence previously presented and discussed in the papers. Accordingly, demonstratives must be clearly marked

⁴ Patent Owner requests the opportunity to provide a closing statement. Paper 46, 2 (citing *Mangrove Partners Master Fund, Ltd. v. VirnetX, Inc.*, IPR2015-01046, Paper 60, 2 (PTAB June 2, 2016)). Each party may provide a closing statement as part of its rebuttal or sur-rebuttal time.

⁵ The parties may jointly request, at least seven (7) business days before the hearing date, that the Board modify the schedule for filing and serving demonstratives.

with the words “DEMONSTRATIVE EXHIBIT—NOT EVIDENCE” in the footer. *See Dell Inc. v. Accelaron, LLC*, 884 F.3d 1364, 1369 (Fed. Cir. 2018) (holding that the Board is obligated under its own regulations to dismiss untimely argument “raised for the first time during oral argument”). “[N]o new evidence may be presented at the oral argument.” CTPG 85; *see also St. Jude Med., Cardiology Div., Inc. v. The Bd. of Regents of the Univ. of Mich.*, IPR2013-00041, Paper 65, 2–3 (PTAB Jan. 27, 2014) (explaining that “new” evidence includes evidence already of record but not previously discussed in any paper of record).

Furthermore, because of the strict prohibition against the presentation of new evidence or arguments at a hearing, the Board strongly recommends that each demonstrative include a citation to a paper in the record, which allows the Board to easily ascertain whether a given demonstrative contains “new” argument or evidence or, instead, contains only that which is developed in the existing record.

Due to the nature of the Board’s consideration of demonstratives and the opportunity afforded for the parties to reach an agreement without involving the Board, the Board does not anticipate that objections to demonstratives are likely to be sustained. Nevertheless, to the extent that a party objects to the propriety of any demonstrative, the parties must meet and confer in good faith to resolve any objections to demonstratives prior to filing the objections with the Board. If such objections cannot be resolved, the parties may file any objections to demonstratives with the Board no later than two (2) business days before the hearing. The objections must identify with particularity which portions of the demonstratives are subject to objection (and should include a copy of the objected-to portions) and include

a one (1) sentence statement of the reason for each objection. No argument or further explanation is permitted. The Board will consider any objections, and may reserve ruling on the objections.⁶ Any objection to demonstratives that is not timely presented will be considered waived.

Finally, each presenter should identify clearly and specifically each paper (e.g., by slide or screen number for a demonstrative) referenced during the hearing to ensure the clarity and accuracy of the court reporter's transcript and for the benefit of all participants appearing electronically.

C. PRESENTING COUNSEL

The Board generally expects lead counsel for each party to be present at the hearing. *See* CTPG 11. Any counsel of record may present the party's argument, in whole or in part, as long as that counsel is present by video.

D. VIDEO OR TELEPHONIC HEARING DETAILS

To facilitate planning, each party must contact the Board at PTABHearings@uspto.gov at least five (5) business days prior to the hearing date to receive video set-up information. As a reminder, all arrangements and the expenses involved with appearing by video, such as the selection of the facility from which a party will attend by video, must be borne by that party. If a video connection cannot be established, the parties will be provided with dial-in connection information, and the hearing will be conducted telephonically.

⁶ If time permits, the Board may schedule a conference call with the parties to discuss any filed objections.

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