

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE, INC.,
Petitioner,

v.

ALIVECOR, INC.,
Patent Owner.

IPR2021-00970 (Patent 9,572,499 B2)
IPR2021-00971 (Patent 10,595,731 B2)
IPR2021-00972 (Patent 10,638,941 B2)

Before ROBERT A. POLLOCK, ERIC C. JESCHKE, and DAVID COTTA,
Administrative Patent Judges.

COTTA, *Administrative Patent Judge.*

ORDER
Setting Oral Argument
37 C.F.R. § 42.70

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ORAL ARGUMENT

*Time and Format*¹

Oral arguments will commence at **9:00 AM Eastern Time** on **September 14, 2022**, at the USPTO headquarters in Alexandria, Virginia.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 ninety (90)** minutes to present argument and Patent Owner will have **a total of ninety (90)** minutes to respond. 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 argument. 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-rebuttal. *See* CTPG 83. Neither party may reserve more than **twenty (20)** minutes from the time allotted for their respective rebuttal or sur-rebuttal.

The parties may request a pre-hearing conference in advance of the hearing. *Id.* at 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

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

² If there are any concerns about disclosing confidential information, and such concerns are not otherwise addressed in this Order, the parties must contact the Board at Trials@uspto.gov at least ten (10) business days before the hearing date.

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

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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 at least seven (7) business days before the hearing date to request a conference call for that purpose.

If the parties anticipate disclosing information that is alleged to be confidential during oral argument, the parties should segregate, if possible, such disclosure of confidential information to a certain portion of their respective presentations. The parties should inform the Board during the argument, and before such disclosure is made, that they intend to argue a point or cite an exhibit that requires disclosure of confidential or potentially confidential information so that the Board may take appropriate action to safeguard such information. The parties should also consider whether it is possible to make their oral arguments without specific disclosure of confidential information (e.g., referring to the evidence generally, and directing the Board’s attention to papers and/or exhibits to which the Board and parties have access, but which are presently filed subject to a motion to seal). Objections during the other party’s portions of oral argument are generally not expected, except to the extent necessary to preserve information as confidential. These efforts will assist the Board in maintaining, to the full extent possible, this proceeding as open to the public, consistent with our rules. 37 C.F.R. § 42.14.

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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 day of the hearing.⁴

Demonstratives are not a mechanism for making new arguments. Demonstratives also are not evidence, and will not be relied upon 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 shall be clearly marked with the words "DEMONSTRATIVE EXHIBIT – NOT EVIDENCE" in the footer. *See Dell Inc. v. Acceleron, 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, it is strongly recommended 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"

⁴ The parties may stipulate to an alternative schedule for serving and filing demonstratives, and request that the Board modify the schedule for filing and serving demonstratives at least seven (7) business days before the hearing date.

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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 shall 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 time of the hearing. The objections shall 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.⁵ Any objection to demonstratives that is not timely presented will be considered waived.

Finally, the parties are reminded that 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.

⁵ If time permits, the Board may schedule a conference call with the parties to discuss any filed objections.

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