

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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APPLE INC.,  
Petitioner,

v.

FINTIV, INC.,  
Patent Owner.

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IPR2022-00976  
Patent 9,892,386 B2

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Before KRISTEN L. DROESCH, MICHAEL R. ZECHER, and  
GEORGE R. HOSKINS, *Administrative Patent Judges*.

ZECHER, *Administrative Patent Judge*.

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

## I. ORAL ARGUMENT

Petitioner, Apple Inc. (“Apple”), and Patent Owner, Fintiv, Inc. (“Fintiv”), each requested an oral argument pursuant to 37 C.F.R. § 42.70(a). Papers 20, 21. In accordance with the terms set forth in this Order, the parties’ requests for an oral argument are *granted*.

### A. Time and Format

Each party requests a virtual hearing. Paper 20, 1; Paper 21, 1. As a result, the hearing will be conducted virtually. Oral argument will commence at **1:00PM ET on Wednesday, August 23<sup>rd</sup>, 2023, by video**.<sup>1</sup> The Board will provide a court reporter for the hearing, and the reporter’s transcript will constitute the official record of the hearing.

Each party requests forty-five (45) minutes of total argument time. Paper 20, 1; Paper 21, 2. Therefore, Apple will have a total of 45 minutes to present arguments and Fintiv will have a total of 45 minutes to respond. Apple will open the hearing by presenting its case-in-chief regarding the challenged claims. Thereafter, Fintiv will respond to Apple’s arguments. Apple may reserve rebuttal time to respond to arguments presented by Fintiv. In accordance with the Consolidated Trial Practice Guide<sup>2</sup> (“CTPG”), issued in November 2019, Fintiv may request to reserve time for a brief sur-rebuttal. *See* CTPG 83.

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<sup>1</sup> If there are any concerns about disclosing confidential information, the parties must contact the Board at [Trials@uspto.gov](mailto:Trials@uspto.gov) at least ten (10) business days before the hearing date.

<sup>2</sup> *Available at* <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

The parties are reminded that arguments made in rebuttal and sur-rebuttal must be responsive to arguments the opposing party made in its immediately preceding presentation. In addition, the parties may only rely upon evidence that has been previously submitted in this proceeding and may only present arguments that have been previously made in the submitted papers. No new arguments or evidence may be presented at the hearing. The parties have not requested to present live testimony during the hearing. As a result, live testimony will not be permitted.

*B. Pre-Hearing Conference*

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](mailto:Trials@uspto.gov) at least seven (7) business days before the hearing date to request a conference call for that purpose.

*C. 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 as a paper at least two (2) business day before the hearing.<sup>3</sup>

Demonstratives are not a mechanism for making new arguments.

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<sup>3</sup> 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.

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 submitted 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 86; *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 arguments or evidence 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" 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 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.<sup>4</sup> Any objection to demonstratives that is not presented timely 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.

#### *D. 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 arguments, in whole or in part, as long as that counsel is present by video.

#### *E. Video or Telephonic Hearing Details*

To facilitate planning, each party must contact the Board at [PTABHearings@uspto.gov](mailto: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

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<sup>4</sup> If time permits, the Board may schedule a conference call with the parties to discuss any filed objections.

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