

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RESMED LIMITED, RESMED INC., and RESMED CORP.,
Petitioners,

v.

FISHER & PAYKEL HEALTHCARE LIMITED,
Patent Owner.

Case IPR2016-01719
Patent 6,398,197 B1

Before HYUN J. JUNG, CARL M. DeFRANCO, and
MICHAEL L. WOODS, *Administrative Patent Judges*.

DeFRANCO, *Administrative Patent Judge*.

SCHEDULING ORDER

This Order sets a schedule for trial, including due dates for the parties to take action upon institution of the trial. *See* Appendix. The trial will be administered in a just, speedy and inexpensive manner such that pendency before the Board is no more than one year after institution. 37 C.F.R. §§ 42.1(b) and 42.100(c).

A. INITIAL CONFERENCE

An initial conference call has been scheduled in this case. The parties are directed to the *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,765–66 (Aug. 14, 2012), for guidance in preparing for the call and should be prepared to discuss any proposed changes to this Scheduling Order and any motions the parties anticipate filing during the trial.

B. MEET AND CONFER REQUIREMENT

The parties are encouraged to engage in meaningful discussions before seeking authorization under 37 C.F.R. § 42.20(b) to file a request for relief with the Board. At a minimum, before requesting authorization, the parties shall confer with each other in a good-faith effort to resolve the issue for which relief is to be sought. Only if the parties cannot resolve the issue on their own may a party request a conference call with the Board in order to seek authorization to move for relief. In any request for a conference call with the Board, the requesting party shall: (1) certify that it has in good-faith conferred (or attempted to confer) with the other parties in an effort to resolve the issue; (2) identify with specificity the issue for which agreement has not been reached; (3) state the precise relief to be sought; and (4) propose specific dates and times at which both parties are available for the conference call.

C. DUE DATES

The Appendix specifies due dates for the parties to take action in this trial proceeding. 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 any stipulation, specifically identifying the changed due dates, must be filed promptly with the Board. The parties may not stipulate to an extension of DUE DATES 6 and 7.

In stipulating to different dates, 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).

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 and fully briefed 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 motion for an observation 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)) and any request for oral argument (37 C.F.R. § 42.70(a)) by DUE DATE 4.

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*

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—

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

2. Cross-examination ends no later than a week before the filing date for any paper in which the cross-examination testimony is expected to be used. *Id.*

The parties are reminded that the Testimony Guidelines appended to the *Trial Practice Guide*, 77 Fed.Reg. at 48,772 (App. D), apply to this proceeding. Pursuant to 37 C.F.R. § 42.12, the Board may impose an appropriate sanction on any party who fails to adhere to the Testimony Guidelines, including reasonable expenses and attorney fees incurred by a party affected by another party's misconduct.

E. MOTION FOR OBSERVATION ON CROSS-EXAMINATION

A motion for observation on cross-examination provides the parties with a mechanism to draw the Board's attention to relevant cross-examination testimony of a reply witness, because no further substantive paper is permitted after the reply. *See Trial Practice Guide*, 77 Fed. Reg. at 48,768. The observation must be a concise statement of the relevance of precisely identified testimony to a precisely identified argument or portion of an exhibit. Each observation should not exceed a single, short paragraph. The opposing party may respond to the observation. Any response must be equally concise and specific.

APPENDIX

INITIAL CONFERENCE CALL.....	April 14, 2017
Discuss schedule, related proceedings, proposed motions, and other initial matters ¹	
DUE DATE 1.....	June 16, 2017
Patent owner's response to the petition	
Patent owner's motion to amend the patent	
DUE DATE 2.....	September 15, 2017
Petitioner's reply to patent owner's response to the petition	
Petitioner's opposition to motion to amend	
DUE DATE 3.....	October 6, 2017
Patent owner's reply to petitioner's opposition to motion to amend	
DUE DATE 4.....	October 27, 2017
Motion for observation regarding cross-examination of reply witness	
Motion to exclude evidence	
Request for oral argument	
DUE DATE 5.....	November 10, 2017
Response to observation	
Opposition to motion to exclude	
DUE DATE 6.....	November 17, 2017
Reply to opposition to motion to exclude	
DUE DATE 7.....	December 6, 2017
Oral argument	

¹ The facts and circumstances of this case may warrant oral testimony from the parties' declarants at the hearing. The parties should be prepared to discuss the need for such testimony in the initial conference call.

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FOR PETITIONER:

Michael T. Hawkins
Christopher C. Hoff
Stephen R. Schaefer
Michael J. Kane
Andrew Dommer
FISH & RICHARDSON P.C.
hawkins@fr.com
hoff@fr.com
schaefer@fr.com
kane@fr.com
dommer@fr.com

FOR PATENT OWNER:

Brenton R. Babcock
Joseph F. Jennings
KNOBBE, MARTENS, OLSON & BEAR, LLP
2brb@knobbe.com
2jfy@knobbe.com
BoxFPH764-2@knobbe.com