

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AMERICAN HONDA MOTOR CO. INC.,
Petitioner,

v.

NEO WIRELESS LLC,
Patent Owner.

Case IPR2023-00797
Patent 10,771,302

**PATENT OWNER'S AUTHORIZED RESPONSE TO
PETITIONER'S REQUEST FOR DIRECTOR REVIEW (PAPER 16)**

TABLE OF CONTENTS

	Page
I. STATEMENT OF FACTS	1
II. THE PANEL CORRECTLY EXERCISED DISCRETION TO DENY INSTITUTION OF IPR UNDER <i>GENERAL PLASTIC</i> AND <i>VALVE</i>	3
A. <i>General Plastic</i> Factor 1 Weighs Against Institution.....	4
1. Congressional Guidance And Precedent Confirm That Honda’s Joint Relationship With VW Supports Denial Of Institution.....	4
2. Honda’s Attempt To Limit The Concerns Of Serial Petitioning To Roadmapping In The Petition Is Contrary To Law And Fact.	11
3. Honda’s Assertion Of No Active Coordination With VW Is Incorrect And Irrelevant.	13
B. Honda’s Request To Delete <i>General Plastic</i> Factor 2 Is Improper....	14
III. CONCLUSION.....	15

TABLE OF AUTHORITIES

Page(s)

COURT DECISIONS

Nuance Communs., Inc. v. ABBYY USA Software House, Inc.,
813 F.3d 1368 (Fed. Cir. 2016).....9

AGENCY DECISIONS

Code200, UAB v. Bright Data Ltd.,
IPR2022-00861, Paper 18 (Aug. 23, 2022)
(precedential).....13

Fresenius Kabi USA v. Amgen, Inc.,
IPR2019-00971, Paper 13 (Oct. 16, 2019).....10

General Plastic Co. v. Canon Kabushiki Kaisha,
IPR2016-01357, Paper 19 (Sep. 6, 2017)
(precedential).....4, 11

Intel Corp. v. VLSI Tech. LLC,
IPR2022-00366, Paper 14 (June 8, 2022)13

Qualcomm Inc. v. Monterey Rsch., LLC,
IPR2020-01492, Paper 8 (Mar. 8, 2021).....10

Shenzhen Silver Star Intelligent Tech. Co., Ltd. v. iRobot Corp., No.
IPR2018-00761, Paper 15 (Sep. 5, 2018).....10

Shenzhen Silver Star Intelligent Technology Co. v. iRobot Corp.,
IPR2018-00882, Paper 9 (Oct. 1, 2018).....10, 11

Valve Corp. v. Elec. Scripting Prods.,
IPR2019-00062, Paper 11 (Apr. 2, 2019)5

Valve Corp. v. Elec. Scripting Prods.,
IPR2019-00064, Paper 10 (May 1, 2019)5

Videndum Prod. Sols., Inc. v. Rotolight Ltd.,
IPR2023-01218, Paper 9 (Jan. 25, 2024)12

STATUTES

35 U.S.C. § 2998

RULES

Consolidated Trial Practice Guide (Nov. 2019).....5, 9, 12

*USPTO Executive Summary of Public Views on Discretionary Institution of AIA
Proceedings* (Jan. 2021).....6

OTHER AUTHORITIES

H.R. Rep. No. 112-98 (2011).....4

The Director should affirm the Board Panel’s discretionary denial of institution of American Honda Motor Co. Inc.’s (“Honda”) Petition. Paper 14.

I. STATEMENT OF FACTS

If institution of this Petition had been granted, it would not have been the first IPR trial to evaluate this Patent’s merits. On Sep. 15, 2022, VW filed a first petition against the Patent. *Volkswagen Gp. of Am. v. Neo Wireless*, IPR2022-01538, Paper 2. Neo filed a POPR in that case, and the Board denied the petition on the merits. *Id.*, Paper 7. This, the second petition against the Patent, was filed by Honda. It was filed on March 30, 2023, well after Neo’s POPR in 01538, on the very last day before Honda’s §315(b) bar. This Petition presents two grounds that, for the disclosure of every limitation except “mobile device,” both rely on *IEEE 802.16a*, a reference on the face of the Patent that already was considered by the examiner. Pet., 2, 25, 61; Paper 6 [“POPR”] 16-18.¹ For the (“mobile device”) limitation, Petitioner relies on *Koo* (ground 1) or *Kitroser* (ground 2). *Id.*

Neo served both Honda and VW with infringement complaints in March 2022. Ex. 2009 [Honda]; Ex. 2011 [VW]. Those actions were consolidated for pre-

¹ While the Petition references both *IEEE 802.16a-2001* and *IEEE 802.16a-2003*, the Board, Petitioner and Patent Owner all treat both documents together as a single IEEE802.16a reference. Paper 2, 2; POPR, 4 n.1; Paper 14, 15 n.5.

trial proceedings in a “multi-district litigation” (MDL), proceeding in light of the close relationship between the VW and Honda actions. As the Court found, and the POPR explains, “all accused infringers ... are automaker groups” alleged to infringe the Patent by implementing certain wireless standards, and their actions “can be expected to *share factual questions concerning such matters as the technology underlying the patents, prior art, claim construction, and/or issues of infringement involving the patents.*” Ex. 2015 [Transfer Order] 1-2; POPR 6-10.²

In the consolidated MDL, the court directed Honda, VW and other accused infringers to jointly present their invalidity contentions. Ex. 2016, 3. Accordingly, Honda and VW jointly assessed the Patent’s validity, jointly identified prior art, and jointly formulated and selected grounds in joint invalidity contentions, served on Nov. 16, 2022. Ex. 2013, 2, 1027. There, jointly, Honda and VW identified the primary reference (*IEEE802.16a*), and the secondary reference of the first ground (*Koo*) in Honda’s Petition in this case. Ex. 2013, 29; 12 (identifying Pat. App. No. 2004/0174845 (*Koo*)); POPR 9, 12. They also jointly identified all three references forming the grounds challenging the independent claims in VW’s 01538 Petition. Ex. 2013, 20 (identifying U.S. Pat. 7,508,798 (*Tong*)); 19 (identifying U.S. Pat. 6,928,062 (*Krishnan*)); 20 (identifying U.S. Pat. 7,986,742 (*Ketchum*)).

Though Honda and VW jointly identified and raised their art simultaneously

² All emphasis is added unless stated otherwise.

in Court, they chose not to raise them jointly, or even contemporaneously, in the PTAB. Instead, they presented staggered, serial challenges, with Honda's trailing by months. That choice prejudiced Neo, maximized the burden on both the patent owner and the Board, and maximized Honda's road-mapping opportunities—both before institution and, if instituted, for the remainder of the case. POPR 19-23.

The assigned Panel exercised discretion to deny this Petition under *General Plastic* and *Valve*. Paper 14. Honda filed a Request for Director Review raising new arguments and authority. Paper 16. The Director granted Honda's Request. On January 23, the Director authorized this response to Honda's Request. Paper 23.

II. THE PANEL CORRECTLY EXERCISED DISCRETION TO DENY INSTITUTION OF IPR UNDER *GENERAL PLASTIC* AND *VALVE*.

Even a single petition to challenge a patent, statistically, has a relatively high likelihood of resulting in invalidation of claims. In FY 2023, 71% of challenged patents had a petition instituted, and 79% of claims that had a Final Written Decisions issued were invalidated.³ Not surprisingly, Congress, industry comments and Board precedent agree that multiple challenges against the same patent can shift the balance from improving patent quality to harassment and waste of resources, and limit serial challenges. But Honda does not like this law. It wants to be able to combine its resources with VW to identify validity challenges *jointly*,

³ www.uspto.gov/sites/default/files/documents/ptab_aia_fy2023__roundup.pdf.

but then be free to mount those challenges *serially*. Honda’s arguments in its Request for Director Review urge the Director to reinvent discretionary denial to achieve that result. Honda ignores congressional guidance and Board precedent. It ignores the *Valve* precedent, which it cites only twice, in passing. It even argues for total elimination of a *General Plastic* factor. Honda’s self-serving request to change the law to do exactly what Congress has said not to do should be rejected.

A. *General Plastic* Factor 1 Weighs Against Institution.

1. *Congressional Guidance And Precedent Confirm That Honda’s Joint Relationship With VW Supports Denial Of Institution.*

The Board correctly found that the first *General Plastic* factor favors denial of institution. Paper 14, 11-13. That conclusion is amply supported by the structure of IPR, Congressional guidance, Board precedent, and industry commentary.

It is well settled that IPRs “are not to be used as tools for harassment or a means to prevent market entry through repeated litigation and administrative attacks on the validity of a patent.” H.R. Rep. No. 112-98, pt. 1, 48 (2011) (quoted by *General Plastic Co. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19, 15–17 (Sep. 6, 2017) (precedential)). *General Plastic* recites certain “non-exhaustive” factors for limiting serial petitions, but further considerations were quickly seen to be needed. On Apr. 9, 2019, Senators Tillis and Coons wrote to Director Iancu:

[W]e urge you to prioritize solutions to the problem of abusive serial petitions—multiple follow-on petitions attacking the same patent

claims and asserting new or modified arguments—*either by the same petitioner or different petitioners*. These petitions *impose an undue burden on patent owners and harm innovation. ... [They] rob the process of its efficiency and consume resources that inventive companies could otherwise devote to research and development*.

Exhibit 2014 [Senators’ Letter] 1.

The Senators noted that while *General Plastic* was “a step in the right direction,” it was “not sufficient.” *Id.* The Senators (at 2) urged the Office to:

adopt a presumption that, when the PTAB has already issued a decision on institution with respect to a particular patent, further petitions, *whether by the original petitioner or different petitioners, will not be entertained in the absence of compelling circumstances*.

At about this time, the *Valve* decisions issued, with the then-Director on their *ex officio* panel. *Valve Corp. v. Elec. Scripting Prods.*, IPR2019-00062, Paper 11 (Apr. 2, 2019); *Valve Corp. v. Elec. Scripting Prods.*, IPR2019-00064, Paper 10 (May 1, 2019). These decisions were soon designated as precedential, on May 7, 2019 and Aug. 2, 2019, respectively. *Valve* applies *General Plastic* expansively to consider “*any relationship between those petitioners when weighing the General Plastic factors*.” IPR2019-00062, Paper 11, 9; *accord* CTPG 57 n. 1.

Valve’s case-specific consideration of “any relationship” was welcomed. On Oct. 20, 2020, the Office issued a Request for Comments relating to (*inter alia*) “[PTAB’s] current case-specific approaches to exercising discretion on whether to

institute an [AIA] proceeding,” including *Valve. Exec. Summary of Public Views on Discretionary Institution of AIA Prcdgs.* (2021), 1.⁴ “Most comments expressed the view that ***the Director should exercise discretion on a case-specific basis when considering serial and parallel petitions to prevent AIA trial proceedings from becoming an unfettered opportunity for petitioners to file repeated challenges.***” *Id.*, 3. And “***comments from three U.S. Senators (the only legislators who submitted comments) expressed their view that Congress intended the Director to use discretion to avoid repeated challenges***” of patents. *Id.*

Applying these principles, the Board correctly found here that *General Plastic* factor 1 weighs against institution. Paper 14, 11-13. Honda’s and VW’s court actions have been consolidated for pre-trial procedures to “promote just and efficient conduct of the litigation.” Ex. 2015 [Transfer Order] 1. They are both “automaker groups” infringing by implementing the same standards, and therefore “can be expected to share factual questions concerning such matters as the technology underlying the patents, prior art, claim construction, and/or issues of infringement involving the patents.” *Id.*, 1-2; *see also* POPR, 6-8. Honda and VW jointly assessed the Patent’s validity, identified prior art, and formulated and selected validity challenges in their invalidity contentions served on Nov. 16, 2022.

⁴ <https://www.uspto.gov/sites/default/files/documents/USPTOExecutiveSummaryofPublicViewsonDiscretionaryInstitutiononAIAProceedingsJanuary2021.pdf>.

Ex. 2013, 2, 1027. In fact, Honda and VW jointly identified Honda's Petition's primary reference (*IEEE802.16-a*), as well as the secondary reference of its first ground (*Koo*). Ex. 2013, 29; 12; POPR 9, 12. They also jointly identified all three references forming VW Petition's challenges to independent claims. § I, *supra*.

Nothing prevented VW and Honda, having jointly located and asserted their invalidity grounds in court, from jointly asserting them in PTAB. Yet, Honda did not file a joint petition with VW. It did not file a separate petition in parallel with VW's. Instead, it waited six more months, until the last day of a statutory time bar, to file its petition. POPR 14. That timing prejudicially allowed Honda to roadmap its petition, based on the POPR in VW's denied 01538 case, and lets it refine its positions based on that guidance, both before and after institution, if it is granted.

Under these circumstances, weighing the interest of improving patent quality against unjust and inefficient burden on the Patent Owner and the Board counsels against institution. If instituted, this Petition would be the second time the Board considers the Patent on the merits, after having denied VW's petition on the merits, and notably, mostly on the *same art* already considered during prosecution. POPR, 16-18, 20; § I, *supra*. On the other side of the scale, this tactically delayed serial attack, disjointly presenting grounds that were jointly presented in court, maximizes unfairness, burden and inefficiency for no legitimate reason.

Petitioner's counter-arguments lack support in law or fact.

Honda argues it should be allowed to pursue a strategically serial petition because its district court case will be decided by a different jury than VW's case, and because MDL pre-trial consolidation was due to "Neo's strategic decision." Paper 16, 2. These distinctions prioritize form over substance. Honda and VW *had* to be served with separate complaints: current law now requires that each infringer ordinarily be sued by a separate complaint. 35 U.S.C. § 299 (2011). As is widely known, the use of MDL pre-trial consolidation greatly increased in *reaction* to this change of law. Furthermore, consolidation was based on a court order finding that MDL *would* "*promote just and efficient conduct of the litigation.*" Ex. 2015, 1.

What is important here is the facts of what actually happened, the substance of petitioners' actual relationship as co-defendants, and what would be just and efficient to all in the circumstances. The substance caused the MDL panel to order consolidation. As explained in § I, *supra*, the court joined Honda and VW into a single MDL because having the jointly select and raise their invalidity contentions would be "just and efficient" because of strong overlap of issues, ranging from claim construction to validity. *Id.* Honda and VW, thus, *did* jointly identify, select and raise in court the art used in both their petitions. To pretend that these facts do not exist, and ignore the inefficiency and unfairness of strategically staggering these attacks against the Patent even though the attackers developed their invalidity contentions jointly, would fly in the face of *Valve's* precedent.

Nor does application of *Valve* here raise any unfairness or policy concerns. It is simple fairness and common sense that if petitioners jointly develop invalidity theories in the district court, they should jointly present them in the Office unless good reasons justify such burdensome inefficiency. Attackers who jointly develop invalidity contentions can easily present their theories in a joint petition. Even if different petitioners may desire to focus on different claim constructions or arguments, they can readily do that in the same petition—or, if they prefer, file parallel petitions and argue that the facts justify such parallel petitions, following well-worn parallel petition procedures. *See, e.g.*, CTPG, 59 (noting that, *e.g.*, an unusually large number of claims—unlike here—can justify parallel petitions).⁵

Cooperating to jointly select, narrow and present their invalidity theories together is exactly what these petitioners are required to do in the district court, and

⁵ Honda’s argument that its petition raises a priority dispute does not help Honda here. Paper 16, 13. Honda and VW jointly raised the same priority dispute months earlier in the district court. *Compare* Ex. 2013, 9-10 *with* Paper 2, 2-4. Justification, therefore, is required for timing their serial petitions six months apart instead of in parallel. And even if a single petitioner files two *parallel* petitions based on different priority dates, it must rank them so patent owners can reduce “fairness, timing and efficiency” concerns by, *e.g.*, a stipulation. CTPG, 59-61.

for good reasons. Ex. 2015, 1 (consolidating petitioners’ court cases to “promote just and efficient conduct of the litigation.”). There is no policy reason why at least the same considerations of efficiency, fairness, and justice should not apply here. *See, e.g., Nuance Communs., Inc. v. ABBYY USA Software House, Inc.*, 813 F.3d 1368, 1376 (Fed. Cir. 2016) (finding it was not a due process violation for a court to order a patent owner to limit the number of claims it asserted were infringed); *Fresenius Kabi USA v. Amgen, Inc.*, IPR2019-00971, Paper 13, 7 (Oct. 16, 2019) (denying a second petition where two petitioners who were not co-defendants and had no business relationship indicated desires to coordinate their separately filed petitions). The bottom line is that Honda and VW developed and filed their contentions together in court, and should have reasonably done the same in the PTAB. Instead, their petitions were filed half a year apart, to gain an advantage.

Petitioner argues that the panel’s decision here deviated from other Board decisions. But even if panels have not been fully consistent in applying *Valve*, the Director should clarify that denying institution on these facts is *correct* under *Valve*. And in any event, the cases Honda cites do not help Honda’s arguments. In *Qualcomm Inc. v. Monterey Rsch., LLC*, No. IPR2020-01492, Paper 8, 16 (Mar. 8, 2021) (*see* Request, 9), the two petitioners were merely alleged to be in a “joint defense group,” the cases were not consolidated, and the petitioners were never ordered to jointly identify and raise district court validity challenges. *Shenzhen*

Silver Star Intelligent Tech. Co., Ltd. v. iRobot Corp., No. IPR2018-00761, Paper 15, 14-16 (Sep. 5, 2018) (*see* Request, 10) actually supports the Board’s denial of institution here, by denying institution on facts that weighed *less* in the patent owner’s favor than those here. There, two petitions were filed 7 months apart by ITC co-defendants who were “likely” on a “joint defense team.” *Shenzhen Silver Star Intelligent Tech. Co. v. iRobot Corp.*, IPR2018-00882, Paper 9, 6-7, 9-10 (Oct. 1, 2018) (elaborating on facts in -00761 *supra*). The Board found that *General Plastic* factor 1 favored institution at the time, since *Valve*’s mandate to consider “any relationship” between petitioners had not been issued—but, still denied institution anyway, recognizing that *General Plastic*’s factors were “non-exhaustive” and that “additional factors may arise in other cases for consideration, where appropriate.” *Id.*, 8-9 (quoting *Gen. Plastic*, 16, 18). *Shenzhen* elucidated an eighth relevant factor, “to discourage tactical filing of petitions over time by parties that faced the same threat at the same time,” and held that “[a]bsent mitigating explanation, of which we have none, this suggests an attempt to secure tactical advantage by waiting for the petitioner in the [first serial] IPR to file a ‘test case.’ Factor 8 weighs against tactical filing of petitions.” *Id.*, 16-17. Just so here.

In sum, the serial attack here amply supports the panel’s denial of institution.

2. *Honda’s Attempt To Limit The Concerns Of Serial Petitioning To Roadmapping In The Petition Is Contrary To Law And Fact.*

Petitioner’s Request attempts to recast *General Plastic* and *Valve*, arguing

that “preventing improper playbooking lies at the heart of *General Plastic*.” Paper 16, 2. Relying on this recharacterization, Petitioner then quickly dismisses *General Plastic* factors 1 (including consideration of its relationship with VW) and 3 (whether it had received the POPR in the earlier IPR) by insisting that the Director must take its word that it did not roadmap. Paper 16, 8-10. Honda is incorrect on the law, and, in any event, the Board correctly found that it *did* roadmap. *See infra*.

First, nothing in the legislative history or Board precedent suggests that roadmapping is the sole, overriding concern of serial petitioning. For example, as Senators Tillis and Coons observed, serial validity attacks “impose an undue burden on patent owners and harm innovation,” and “rob the process of its efficiency and consume resources that inventive companies could otherwise devote to research and development.” Exhibit 2014, 1. Similarly, as the CTPG explains, even parallel petitions that have *no* roadmapping “could raise fairness, timing, and efficiency concerns.” *Id.*, 59; *see also* POPR, 21-22.

Second, roadmapping concerns are not limited to the Petition. If instituted, the timing of this serial attack would allow Honda to roadmap its positions *at every step* based on the Board’s earlier evaluation of the Patent on the merits.

Third, as the Board correctly found, Honda *did* roadmap its Petition. Paper 14, 18-19; POPR, 19-23. And roadmapping almost certainly occurs even *absent* the glaring evidence present here. *The very decision to file this Petition* based

mostly on recycled art may well have been due to Neo’s strong (and successful) POPR in VW’s “test case.” *See* n.6, *infra*. Similarly, other considerations such as selection of art almost certainly involve strategic considerations of VW’s petition.

Fourth, Honda repeats its incorrect argument—rejected by the Board (Paper 14, 18)—that under *Code200, UAB v. Bright Data Ltd.*, IPR2022-00861, Paper 18 (Aug. 23, 2022) (precedential), the absence of roadmapping virtually dispositively shifts the balance in favor of institution. Paper 16, 2, 4, 10. However, as the POPR (at 19-20) noted, the first petition in *Code200*, unlike the first petition here, was discretionarily denied. *Code200*, IPR2022-00861, Paper 18, 4. As *Code200* holds, “when the first-filed petition was *not* evaluated on the merits,” instituting the second petition “best balances the desires to improve patent quality and patent-system efficiency against the potential for abuse of the review process by repeated attacks on patents.” *Id.* (quoting *Intel Corp. v. VLSI Tech. LLC*, IPR2022-00366, Paper 14, 9-10 (June 8, 2022)). Here, VW’s “test case” petition was denied *on the merits*, which tilts the balance from quality to harassment and waste of resources.

Honda’s no-roadmapping claim is legally irrelevant and factually incorrect.

3. *Honda’s Assertion Of No Active Coordination With VW Is Incorrect And Irrelevant.*

Honda argues that it did not coordinate its IPR with VW. Paper 16, 6. That assertion ignores the relevant facts, and is itself irrelevant. As explained (§ I, *supra*), Honda and VW jointly identified the closest prior art in court, and then

based their petitions mostly on this jointly prepared selection. At a minimum, each of Honda and VW has at some level contributed to the petition filed by the other.

Furthermore, explicit coordination of serial challenges is not required for discretionary denial. It was not shown in *Valve* itself. Nor is there any reason for Honda and VW, represented by sophisticated counsel with much IPR experience, to explicitly coordinate. Both would be aware of typical IPR strategies and the benefits of serial petitioning. Finally, even if there *was* active coordination, Neo is not in a position to obtain direct evidence of it. Communications between co-defendants are held under privilege, and such discovery is rarely available in IPR.

Honda's assertion that it did not explicitly coordinate with VW does not rebalance the *General Plastic/Valve* factors.

B. Honda's Request To Delete *General Plastic* Factor 2 Is Improper.

The Board correctly found that *General Plastic* factor 2 weighs against institution because Honda knew or should have known of the references in its Petition at the time of VW's petition. Paper 14, 14-16; POPR, 10-12. Both of Petitioner's grounds rely on *IEEE 802.16a* for all limitations except "mobile device." Pet., 25, 61. *IEEE 802.16a* is listed on the face of the Patent, and was also listed in Honda and VW's joint district court invalidity contentions around the time of VW's petition. POPR, 11. Petitioner's secondary reference in its first ground (*Koo*) was also listed in the same joint invalidity contentions at the same time. POPR, 12.

Honda's Request to the Director argues, for the first time, that Honda did not find *Kitroser* (upon which it relies only for disclosure of a "mobile device" and only in the second ground) until March 14, 2023. Paper 16, 15. But, as the Board correctly found (Paper 14, 16), Petitioner cannot show it could not reasonably have found *Kitroser* earlier. *Kitroser* is hardly an obscure foreign document. It is an English language submission to the U.S. standard committee in connection with the same IEEE 802.16 standard underlying the primary reference *IEEE 802-16a*. Paper 16, 15. *Kitroser*'s title states it relates to "mobility" in that standard. *Id.* It is, and has likely long been, readily available on the website of the IEEE 802.16 standard (www.ieee802.org/16/tge/contrib/C80216e-03_06.pdf).⁶

Failing to present any reason why reasonable diligence could not have found *Kitroser* earlier, Honda says *General Plastic* factor 2 should be done away with! Paper 16, 14. But ample authority confirms that even *General Plastic*'s explicit factors do not go far enough. § I.A.1, *supra*. Honda's request should be rejected.

III. CONCLUSION.

The Director should affirm the denial of institution of Honda's Petition.

⁶ Notably, Petitioner's timing for finding this readily available reference itself suggests roadmapping: Petitioner asserts it found *Kitroser* on a date *after* Neo's Feb. 8, 2023 POPR in the VW IPR revealed VW Petition's weaknesses.

Respectfully submitted,

/ Parham Hendifar /

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Date: February 6, 2024

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following documents were served by electronic service, by consent between the parties, on the date signed below:

PATENT OWNER'S AUTHORIZED RESPONSE TO PETITIONER'S REQUEST FOR DIRECTOR REVIEW (PAPER 16)

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