

Filed on behalf of: Sand Revolution II, LLC

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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SAND REVOLUTION II, LLC  
Petitioner

v.

CONTINENTAL INTERMODAL GROUP – TRUCKING LLC  
Patent Owner

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IPR2019-01393  
U.S. Patent No. 8,944,740

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**Petitioner's Request for Rehearing  
Under 37 C.F.R. § 42.71(d)**

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**I. STATEMENT OF THE PRECISE RELIEF REQUESTED**

Petitioner Sand Revolution II, LLC (“Petitioner”) respectfully requests rehearing of the Decision denying institution (Paper 12, “Dec.”) of *inter partes* review. Invoking *NHK Spring Co. v. Intri-Plex Technologies, Inc.*, IPR2018-00752, Paper 8 (P.T.A.B. Sept. 12, 2018) (precedential), the Board—over a dissent by Judge DeFranco—denied institution under 35 U.S.C. § 314(a) based solely on the allegedly advanced stage of the parallel district court proceeding with one invalidity dispute similar to that in the instant IPR petition. Judge DeFranco determined that Petitioner’s evidence demonstrated a reasonable likelihood of success with respect to at least one claim, and the panel majority made no finding to the contrary.

The Board should grant reconsideration and set this case for rehearing before the Precedential Opinion Panel (“POP”). The POP should reconsider and overrule *NHK Spring*’s holding that the advanced state of a parallel district court proceeding involving similar invalidity issues as an IPR petition warrants a discretionary denial under § 314(a) because institution under such circumstances would be an inefficient use of Board resources. This holding is inconsistent with the IPR statutory scheme and congressional intent, leads to inconsistent decision-making, encourages forum-shopping for infringement lawsuits, and significantly curtails the availability of IPRs as an alternative forum for challenging patent validity.

Moreover, the panel majority misconstrued *NHK Spring* as providing a broad license to deny institution solely based on a parallel district court action. While *NHK Spring* held that an ongoing parallel district court action can, under certain circumstances, support denial of institution when there is another independent reason supporting denial, it did not hold that the parallel district court action can be the primary or sole reason to decline review. Here, the panel majority did not provide any reason for denial beyond the parallel district court action; thus, the Decision cannot be sustained even under *NHK Spring*.

For these reasons and as discussed below, Petitioner respectfully requests rehearing of the decision not to institute review of the challenged claims.

## II. LEGAL STANDARD

“A party dissatisfied with a decision may file a single request for rehearing.” 37 C.F.R. § 42.71(d). “The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.” *Id.*

Institution decisions are reviewed on rehearing for an abuse of discretion. *See* 37 C.F.R. § 42.71(c). An abuse of discretion occurs when a “decision [i]s based on an erroneous conclusion of law or clearly erroneous factual findings, or ... a clear error of judgment.” *Apple Inc. v. DSS Tech. Mgmt., Inc.*, IPR2015-00369, Paper 14 at 3 (Aug. 12, 2015) (citation omitted).

### III. STATEMENT OF REASONS FOR RELIEF REQUESTED

The Board, applying *NHK Spring*, denied review exercising its discretion under 35 U.S.C. § 314(a) because it found that “the facts here are similar enough to those in the precedential *NHK* Decision [such] that *NHK* governs the outcome of this case.” Dec. at 17. In particular, the Board found that, like in *NHK*, the district court action had progressed to the point where a jury trial was tentatively scheduled to begin in several months and might involve invalidity arguments similar to those in the instant IPR petition. *Id.* at 15-18. Judge DeFranco dissented. In his view, “the facts and circumstances of [this] case [we]re clearly distinguishable” from *NHK Spring*, and “weigh[ed] in favor of utilizing the Board’s unique expertise and resources to decide the validity of this patent.” *Id.* at 19-20 (DeFranco, APJ, dissenting). Finding exercise of § 314(a) discretion inappropriate, Judge DeFranco would have instituted review because he found that Petitioner demonstrated a reasonable likelihood that at least claim 1 of the ’740 patent is unpatentable. *Id.* at 22-24.

Petitioner respectfully submits that the decision not to institute should be set aside. First, *NHK Spring* was wrongly decided insofar as it holds that the advanced stage of a parallel district court action involving similar invalidity disputes can form the basis of a discretionary denial under § 314(a). The POP should reconsider and overrule that aspect of *NHK Spring*. Second, even under *NHK Spring*, the panel

majority abused its § 314(a) discretion because it lacked an independent reason for denying review beyond the existence of a parallel district court action. *NHK Spring* does not give the Board a broad license to deny institution solely because a parallel district court action could potentially resolve the invalidity disputes before a final decision by the Board. Rather, *NHK Spring* held that while denial of institution was proper under another statutory basis (35 U.S.C. § 325(d) there), the advanced state of the district court litigation with similar invalidity disputes was an “additional” factor supporting denial. *NHK Spring* at 18-20. Here, by contrast, there is no such independent reason and the Board erred in denying institution.

**A. The Board Should Reconsider *NHK Spring***

**1. *NHK Spring* Contravenes the IPR Statutory Scheme**

*NHK Spring* held that the advanced state of a parallel district court action involving similar invalidity disputes as an IPR petition can support a denial of an otherwise timely and meritorious IPR petition because “instituting a trial under [such] circumstances . . . would be an inefficient use of Board resources.” *NHK Spring* at 19-20; *see also* Consolidated Trial Practice Guide (Nov. 2019) at 58 n.2. Respectfully, this holding contravenes the IPR statutory scheme.

In promulgating IPRs, Congress chose a precise statutory scheme. *See, e.g.*, 35 U.S.C. § 311(b) (limiting the grounds of patentability to challenges under sections 102 and 103 based on patents and printed publications); 35 U.S.C. § 314(a)

(requiring a determination of a reasonable likelihood that Petitioner will prevail with respect to at least one challenged claim). While Congress was well aware of the possibility of parallel validity proceedings, *see* AIA § 18(b)(1) (codifying a petitioner's ability to seek a stay of the district court in view of a pending CBM review), it did not authorize the Director to deny an IPR simply because of events in a parallel district court proceeding. In fact, Congress only authorized the Board to stay or terminate a pending IPR in view of other proceedings *before the Patent Office*. *See* 35 U.S.C. § 315(d). By not authorizing any similar power, much less denial of institution, in light of a parallel district court (or International Trade Commission) action, Congress indicated the withholding of such powers.

Moreover, Congress provided for estoppel in the district court proceedings based on the grounds raised in the IPR, 35 U.S.C. § 315(e)(2), but did not provide for a similar estoppel based on the district court's validity decision, which is in stark contrast with the pre-AIA *inter partes* reexamination scheme, *see* 35 U.S.C. § 317(b) (2006). That deliberate choice further indicates Congress did not intend for district court actions to preempt IPRs and demonstrates that *NHK Spring* is inconsistent with the AIA statutory scheme.

Denying an IPR petition simply because a parallel district court action could theoretically resolve invalidity before a final decision by the Board also undercuts § 315(b)'s one-year safe-harbor provision for filing an IPR. Under the logic of *NHK*

*Spring*, to avoid a discretionary denial, an accused infringer must time its IPR petition so that a final decision would issue prior to trial in the district court; otherwise the Board could deny institution simply because it would be “an inefficient use of Board resources.” *NHK Spring* at 20. In jurisdictions with a fast time-to-trial practice, this could effectively mean that an accused infringer must file an IPR petition the day after being sued.

But Congress provided a one-year safe harbor for accused infringers to challenge validity at the Patent Office. *See* 35 U.S.C. § 315(b) (an IPR “may not be instituted if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner ... is served with a complaint alleging infringement of the patent”). This one-year period was carefully chosen, over another proposal requiring IPR petitions to be filed within six months of service of a complaint, to provide a petitioner with “a reasonable opportunity to identify and understand the patent claims that are relevant to the [district court] litigation,” given the challenge of determining “in the first few months of the litigation which claims will be relevant and how those claims are alleged to read on the defendant’s products.” Cong. Rec. at S5429 (statement of Sen. Kyl). Section 315(b), thus, reflects Congress’ considered judgment that an IPR petition is timely if filed within one year from service of an infringement complaint. Under *NHK Spring*’s logic, however, § 315(b)’s one-year safe harbor becomes meaningless because the Board can deny

otherwise timely-filed petitions on non-statutory grounds that are entirely outside of a petitioner's control—the time-to-trial practice of the jurisdiction chosen by the plaintiff and the tentative early schedule set by the parties. *See* Jasper L. Tran, *et al.*, *Discretionary Denials of IPR Institution*, 19 Chicago-Kent J. Intell. Prop. 251, 264 (2020) (after *NHK Spring*, IPR petitioners “should not assume that a petition is timely merely because it is filed before the one-year time bar”).

As other panels have observed, it is improper for the Board to use discretion in a way that contradicts the statutory design. *Silicon Labs., Inc. v. Cresta Tech. Corp.*, IPR2015-00615, Paper 9 at 24-25 (Aug. 14, 2015) (“[W]e are not persuaded that it would be a prudent exercise of the discretion granted by § 325(d) to truncate the ability of a petitioner to make full use of the one-year window Congress expressly provided through § 315(b).”). Even if the Board has some discretion to deny institution on non-statutory grounds, the Board cannot exercise discretion to effectively negate an express statutory provision. *See Cuozzo Speed Techs. v. Lee*, 136 S. Ct. 2131, 2141-42 (2016) (institution decisions that are “outside ... statutory limits” or arbitrary and capricious are judicially reviewable).

Congress did not vest the Board with unbounded discretion to deny institution merely for reasons of administrative convenience, especially where such denial would prejudice the party seeking review and effectively negate a statutory provision. Instead, Congress intended that the Director (and therefore, the Board)

exercise its discretion in applying the enumerated statutory factors. *See, e.g.*, 35 U.S.C. § 325(d) (providing discretion to deny a petition “because, the same or substantially the same prior art or arguments previously were presented to the Office”); *see also id.* at § 313 (permitting patent owner to file a preliminary response “that sets forth reasons why no inter partes review should be instituted based upon the failure of the petition *to meet any requirement of this chapter*”) (emphasis added). Relying on the state of a parallel district court proceeding to deny institution has no basis in the statute and should not be considered when determining whether to institute review.

## **2. *NHK Spring*’s Focus on the District Court’s Schedule Ignores Its Inherent Unpredictability**

Both here and in *NHK Spring*, the Board based its denial on a mere *possibility* that the concurrent district court proceeding will result in a verdict before a final written decision. *See* Dec. at 16 (stating that “a jury trial is scheduled to begin on July 20, 2020” and that “[t] his Decision precedes the scheduled trial by several months”). But as the Board itself has recognized, a district court trial schedule is inherently unpredictable and the court will often “extend or accelerate deadlines and modify case schedules for myriad reasons.” *Precision Planting, LLC v. Deere & Co.*, IPR2019-01044, Paper 17 at 15 (P.T.A.B. Dec. 2, 2019). As the dissent here correctly notes, a jury trial date “does not guarantee the entry of final judgment” on

that date. Dec. at 19-20 (DeFranco, APJ, dissenting). Indeed, after the Decision, the jury trial in the parallel proceeding was delayed by another two months, until September 2020, with further delays possible. In *NHK Spring* itself, the district court proceedings were postponed multiple times, belying the Board’s prediction that the trial would occur six months prior to the final decision in the IPR. *See Intri-Plex Techs. v. NHK Int’l Corp.*, 3:17-cv-01097-EMC (N.D. Cal.) (D.I. 173, 175). Thus, denying institution based on the speculative timing of the district court trial is empirically unsound. Moreover, as the dissent observes, a jury trial date “does not guarantee the entry of final judgment by the district court before the time of any Final Decision . . . as the district court litigation may still need to continue with a damages trial and post-trial motions.” Dec. at 20 (DeFranco, APJ, dissenting). *NHK Spring*’s failure to consider the post-trial proceedings—which can be lengthy—further highlights the fundamental unsoundness of its reliance on a speculative jury trial date.

Moreover, district courts frequently stay proceedings before them when the Board institutes IPR review. *See id.* at 20 (DeFranco, APJ, dissenting) (instituting IPR “five months” before the jury trial date would give an opportunity to “the district court . . . to say the litigation”); *Precision Planting* at 14. Indeed, the Board has refused to apply *NHK Spring* where there was an indication the district court would grant a stay. *See, e.g., Ericsson Inc. v. Intellectual Ventures I LLC*, IPR2018-01256,

Paper 6 at 43 (P.T.A.B. Jan. 9, 2019). The district courts, however, in many instances would not grant a stay *unless* the Board institutes review. Thus, by treating a notional future trial date as a fixed certainty, and denying institution on that basis, *NHK Spring* becomes a self-fulfilling prophecy.

### 3. *NHK Spring* Undermines the AIA’s Objectives

In *NHK Spring*, the Board concluded that instituting IPR when the same invalidity dispute would be resolved sooner in district court would contravene the AIA’s objective of providing an “effective and efficient alternative to district court litigation.” *NHK Spring* at 20. This conclusion was based on the erroneous presumption that the PTAB must be the fastest and the sole forum for resolving invalidity. But as the Board has itself recognized:

[T]here is no per se rule against instituting an *inter partes* review when any Final Decision may issue after a district court has addressed the patentability of the same claims. Nor should there be. Instituting under such circumstances gives the district court the opportunity . . . to conserve judicial resources by staying the litigation until the review is complete, thus satisfying the AIA’s objective of providing “an effective and efficient alternative to district court litigation.

*Intuitive Surgical, Inc. v. Ethicon LLC*, IPR2018-01703, Paper 7 at 11-12 (P.T.A.B. Feb. 19, 2019). Indeed, Congress intended for the district courts (not the Board) to determine when to stay invalidity proceedings before them. *See* AIA § 18(b)(1).

Because “district courts have the inherent authority to manage their dockets and courtrooms with a view toward the efficient and expedient resolution of cases,” *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016), they are better suited to determine when best to conserve judicial resources. *NHK Spring* thus inverts congressional logic by shifting the onus of conserving judicial resources from the district court to the Board.

Moreover, some federal district courts, as a matter of policy and practice, adhere to, or at least initially set, a fast time-to-trial in which a jury verdict will generally issue before a final written decision in even an IPR filed months in advance of the § 315(b) one-year bar. An inflexible application of *NHK Spring* would effectively deny petitioners the option of using IPR as an alternative to district court litigation simply because the plaintiff chose to bring suit in a certain jurisdiction. Indeed, the practical effect of *NHK Spring* is that defendants must forego the one-year period Congress deemed necessary to make a proper decision on whether to file an IPR, and instead file IPR petitions immediately upon being sued, before they are able to “identify and understand” fully the relevant patent claims (from an infringement perspective) and prior art. *See* Cong. Rec. at S5429 (statement of Sen. Kyl). This will not only increase the number of invalidity challenges presented to the Board, but also decrease their quality.

An inflexible application of *NHK Spring*, as in the instant Decision, also undermines congressional objective of having IPR serve as “a quick, inexpensive,

and reliable alternative to district court litigation.” *Cuozzo*, 136 S. Ct. at 2143 (quoting S.Rep. No. 110–259, at 20 (2008)). In an IPR, unpatentability must be shown by the preponderance of the evidence standard, a lower burden than the presumption of validity applied in the district courts. *See KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 426 (2007). Thus, in setting up the Board as an “alternative to district court litigation,” *Cuozzo*, 136 S. Ct. at 2143, Congress provided a forum where patent invalidity can be resolved under a lower standard of proof. It is contrary to the AIA’s intent to force Petitioner to litigate the validity issue in district court under a higher burden.

#### **4. *NHK Spring* Incentivizes Forum Shopping**

The Decision liberally interprets *NHK Spring* as supporting a discretionary denial based on something as speculative as a tentative, future district court trial date. Dec. at 15-16. If the supposed trial date precedes the Board’s anticipated final decision date, the Board can deny institution. This reasoning incentivizes forum shopping because plaintiffs wishing to evade IPR would bring patent infringement suits in districts with expedited trial schedules. In certain districts, the so-called “rocket dockets,” the average time to jury verdict can be as little as 12 months. Invariably, in these districts, the scheduled trial date will occur sooner than the Board’s final decision deadline. *NHK Spring*’s reasoning also encourages plaintiffs to engage in gamesmanship, i.e., early on, seek an aggressive district court schedule

that the plaintiff knows will likely require extension down the road; and after IPR is denied or becomes unfeasible under *NHK Spring*'s reasoning, stipulating with the defendant to extend the district court schedule. Providing plaintiffs with an incentive to engage in forum shopping or gamesmanship to evade an IPR cannot be the result envisioned by Congress; nor does incentivizing such behavior comport with the AIA's goal of a healthy patent system that encourages innovation and inexpensive resolution of validity disputes.

**B. *NHK Spring* Should Not Be Applied to Deny Institution Based Solely on the State of Parallel District Court Litigation**

Even if the Board declines to reconsider *NHK Spring*'s holding that the advanced state of a district court proceeding can be a factor in denying institution, the Decision should be reconsidered because it misapplied *NHK Spring*. Under *NHK Spring*, the advanced state of a district court cannot be the primary or sole basis for discretionary denial; instead, there must be an *additional* reason that can independently justify a discretionary denial. *See NHK Spring* at 11-18, 20. But the Decision provided no additional basis for denying institution beyond the advanced state of the district court action, *see* Dec. at 15-18, and thus misapplied *NHK Spring*.

At its core, *NHK Spring* involved discretionary denial under § 325(d). After determining that § 325(d) “*alone* is sufficient to support [discretionary denial of institution],” the panel in *NHK Spring* proceeded to “find that the advanced state of

the district court proceeding is *an additional factor* that weighs in favor of denying the Petition under § 314(a).” *NHK Spring* at 11-18, 20 (emphasis added). Indeed, as the Board acknowledged, *NHK Spring* “was decided chiefly on § 325(d).” *Samsung Elecs. Co. Ltd. v. Immersion Corp.*, IPR2018-01502, Paper 11 at 35 (P.T.A.B. Mar. 29, 2019). And “it is unclear whether considerations under 35 U.S.C. § 314(a) alone would have supported discretionary denial of the petition in [*NHK Spring*].” *Ericsson Inc. v. Intellectual Ventures II LLC*, IPR2018-01689, Paper 15 at 57 (P.T.A.B. April 16, 2019). “*NHK Spring* does not suggest, much less hold, that *inter partes* review should be denied under § 314(a) *solely* because a district court is scheduled to consider the same validity issues before the *inter partes* review would be complete.” *Intuitive Surgical* at 13 (emphasis added). Thus, while *NHK Spring* permits the Board to consider the state of a parallel district court action in its § 314(a) analysis, the state of the parallel action cannot be the primary or sole basis for denying institution. Instead, there must be another independent basis that can justify denial beyond conserving Board resources. Because the Decision found no such independent basis (or even a strong enough basis beyond the advanced state of a parallel district court action), *see* Dec. at 15-18, the Board misapplied *NHK Spring* in denying institution. Indeed, six out of the seven factors set forth in *General Plastic Industrial Co. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 (P.T.A.B. Sept. 6, 2018), for determining a discretionary denial is appropriate

“*weigh in favor of not denying institution under § 314(a).*” Dec. at 18 (emphasis added). The sole factor that weighed the other way was the conservation of the Board’s resources. *Id.*; *see also id.* at 21-22 (DeFranco, APJ, dissenting).

*NHK Spring* is further distinguishable for the reasons set forth in Judge DeFranco’s dissent. Unlike in *NHK Spring*, the ’740 patent would remain valid for “over a decade,” which calls for the use of “the Board’s unique expertise and resources to decide [its] validity.” *Id.* at 19-20. The Board’s decision to construe relevant patent terms, in contrast to the district court’s refusal to offer claim construction, and the comparatively advanced state of unpatentability challenges here further demonstrated that the IPR proceeding would be “a more efficient and effective alternative to district court litigation.” *Id.* at 20-22.

#### IV. CONCLUSION

Petitioner respectfully requests that the Board reconsider its Decision and institute *inter partes* review of the ’740 patent.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 6, 2020, I caused a true and correct copy of the foregoing Petitioner's Request for Rehearing Under 37 C.F.R. § 42.71(d) to be served electronically on the Patent Owner at the following e-mail addresses:

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Dated: March 6, 2020

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