

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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BOE TECHNOLOGY GROUP CO., LTD.,

Petitioner,

v.

PANELTOUCH TECHNOLOGIES LLC,

Patent Owner.

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Case IPR2025-01245  
U.S. Patent No. 9,250,758

**PATENT OWNER'S REQUEST FOR DISCRETIONARY DENIAL OF  
INSTITUTION**

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**PATENT OWNER'S EXHIBIT LIST**

<b>No.</b>	<b>Description</b>
2001	Docket Navigator IPR Stay Statistics
2002	Docket Navigator Judge Gilstrap Median Time-to-Trial Statistics
2003	<i>Dabico Airport Solutions Inc. v. Axa Power Aps</i> , IPR2025-00408 (Paper 21)

## I. INTRODUCTION

Pursuant to the Director’s March 26, 2025 memorandum regarding Interim Processes for PTAB Workload Management (“March 26, 2025 Memo”), Patent Owner Optronic Sciences LLC requests that the Director exercise discretion under 35 U.S.C. § 314(a) and issue a decision denying institution of the Petition.

As discussed further below, the *Fintiv* factors weigh in favor of discretionary denial. For Factor 1, the District Court has not entered a stay and a stay is unlikely. For Factor 2, trial in the District Court litigation is likely to occur a month prior to a Final Written Decision in these proceedings. For Factor 3, Petitioner’s unjust delay tactics cause this factor to weigh against institution or at least be neutral. For Factor 4, the challenged claims in the Petition cover all the claims of the Patent and the *Sotera*-type stipulation does not prevent overlap between this IPR and the District Court proceeding. For Factor 5, Petitioner is the defendant in the District Court litigation. And for Factor 6, additional considerations favor discretionary denial, including the length of time the claims have been in force and Patent Owner’s settled expectations.

Patent Owner thus respectfully requests discretionary denial of the Petition.<sup>1</sup>

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<sup>1</sup> Patent Owner will file a Preliminary Response addressing the merits of the Petition pursuant to 37 C.F.R. § 42.107(a) on the schedule set forth by regulation and consistent with the March 26, 2025, Memorandum. *See* 37 C.F.R. § 42.107(b).

## II. DENIAL OF INSTITUTION UNDER §314 IS WARRANTED.

35 U.S.C. § 314(a) gives the Director discretion to deny institution of IPR due to the advanced state of parallel district court litigation regarding the same issues. *See NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 19-21 (PTAB Sept. 12, 2018) (precedential) (“*NHK*”). The Board has set forth six factors for determining whether discretionary denial in light of such parallel litigation is appropriate:

1. whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted;
2. proximity of the court's trial date to the Board's projected statutory deadline for a final written decision;
3. investment in the parallel proceeding by the court and the parties;
4. overlap between issues raised in the petition and in the parallel proceeding;
5. whether the petitioner and the defendant in the parallel proceeding are the same party;
6. other circumstances that impact the Board's exercise of discretion, including the merits.

*Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 5-6 (PTAB Mar. 20, 2020) (precedential) (“*Fintiv I*”). In evaluating these factors, the Board “takes a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review.” *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 15 at 7-17 (PTAB May 13, 2020) (informative) (“*Fintiv II*”).

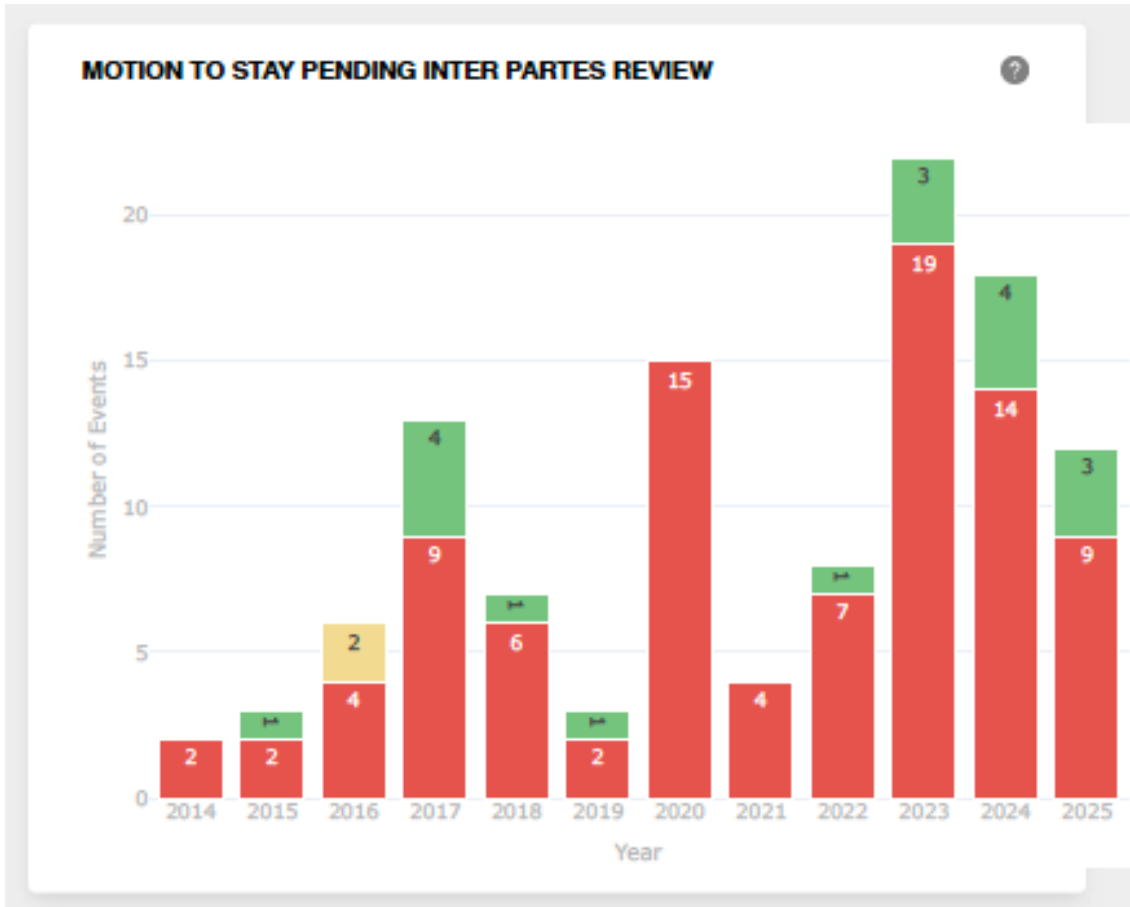
### A. *Fintiv* Factor 1: The District Court Is Unlikely To Grant A Stay

*Fintiv* Factor 1 looks to “whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted.” *Fintiv I* at 5-6.

Here, the District Court has not granted a stay, and a stay is statistically unlikely. For example, the Petitioner has not yet filed a motion to stay pending IPR in the District Court proceedings. The presiding judge, Judge Rodney Gilstrap, as well as other judges in the Eastern District, have consistently explained that it is the practice of the Eastern District to deny motions to stay where, as here, IPRs have not been instituted. *See, e.g., Luminati Networks Ltd. v. Teso LT, UAB*, No. 2:19-CV-00395-JRG, 2020 WL 6803255, at \*1 (E.D. Tex. Oct. 30, 2020) (“this Court has a consistent practice of denying motions to stay when the PTAB has yet to institute post-grant proceedings.”); *see also Trover Grp., Inc. v. Dedicated Micros USA*, No. 2:13-CV-1047-WCB, 2015 WL 1069179, at \*6 (E.D. Tex. Mar. 11, 2015) (Bryson, J.) (“it is the universal practice” in this District to deny pre-institution motions to stay); *Viavi Sols. Inc. v. Zhejiang Crystal-Optech Co.*, No. 2:21-CV-00378-JRG, 2022 WL 16856099, at \*5 (E.D. Tex. Nov. 10, 2022) (“It is the Court’s established practice to consider that motions to stay pending IPR proceedings which have not been instituted are inherently premature and should be denied as such.”).

Moreover, even if the Board institutes IPR proceedings, it is statistically unlikely that the District Court would grant a stay. For example, an analysis of the outcomes for motions to stay pending IPR before Judge Gilstrap demonstrates that

the *vast majority* of these motions have been denied; indeed, in the last five years, only *eleven (11)* such motions have been granted, while *sixty-eight (68)* have been denied:



See Ex. 2001 (Docket Navigator Stay Statistics).

Thus, while Patent Owner recognizes that the Board ordinarily “will not attempt to predict” how a district court will proceed if a stay has not been granted (see *Sand Revolution II, LLC v. Continental Intermodal Group-Trucking LLC*, IPR2019-01393, Paper 24 at 7 (Jun.16, 2020) (informative)), the present facts indicate that it is unlikely that Judge Gilstrap will grant a stay.

*Fintiv* Factor 1 thus weighs in favor of discretionary denial.

**B. *Fintiv* Factor 2: The District Court Trial Is Likely to Occur a Month Before the Deadline for a Final Written Decision**

*Fintiv* Factor 2 looks to “proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision.” *Fintiv I* at 5-6. “If the court’s trial date is earlier than the projected statutory deadline, the Board generally has weighed this fact in favor of exercising authority to deny institution under *NHK*.” *Id.* at 9.

Here, the deadline for a final written decision is January 21, 2027, which may be extended to July 21, 2027 for good cause or in the case of joinder. 37 C.F.R. § 42.100(c). Although a trial date has not yet been set,<sup>2</sup> the median time-to-jury-trial for Judge Gilstrap is twenty-two (22) months. *See* Ex. 2002 (Docket Navigator Median Time-to-Trial Statistics). Because the parallel District Court action was filed on February 28, 2025, this indicates that the District Court trial is likely to occur in December of 2026, a month prior to the statutory deadline for a Final Written Decision.

Thus, *Fintiv* Factor 2 weighs in favor of discretionary denial. *See, e.g., Samsung Elecs. Co. v. Mojo Mobility Inc.*, IPR2023-01094, Paper 11 at 8-9 (PTAB Feb. 9, 2024) (“*Mojo*”) (denying institution when trial was set before the final

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<sup>2</sup> Delays in the District Court scheduling are a result of Petitioner’s gamesmanship of U.S. Procedure, which is a factor that favors discretionary denial, as discussed below.

written decision would issue); *BOE Tech. Grp. Co. v. Element Capital Commercial Co.*, IPR2023-00808, Paper 9 at 21-22 (PTAB Nov. 15, 2023) (“*BOE*”) (same); *Vector Flow, Inc. v. HID Global Corp.*, IPR2023-00353, Paper 8 at 19-20 (PTAB July 17, 2023) (“*Vector Flow*”) (same); *Roku, Inc. v. IOEngine, LLC*, IPR2022-01551, Paper 11 at 10-11 (PTAB May 5, 2023) (“*Roku*”) (same).

Indeed, the Board has denied institution on account of even smaller gaps between the final written decision and trial. *See, e.g., EClinicalWorks, LLC v. Decapolis LLC*, IPR2022-00229, Paper 10 at 9 (PTAB Apr. 13, 2022) (“*EClinicalWorks*”) (finding this factor weighed in favor of discretionary denial and denying institution where “the beginning of the jury trial in the WDTX Cases is roughly *one or two months* before any final decision would have been due had *inter partes* review been instituted”) (emphasis added).

Accordingly, this factor weighs against institution because trial is likely to happen a month before the statutory deadline for final written decision in this IPR. *Fintiv II* at 13.

**C. *Fintiv* Factor 3: The Parties Will Have Invested Substantially in the District Court Case Before Any Institution Decision**

*Fintiv* Factor 3 looks to “amount and type of work already completed in the parallel litigation by the court and the parties *at the time of the institution decision.*” *Fintiv I* at 9 (emphasis added). For example, “if, at the time of the institution decision, the district court has issued substantive orders related to the patent at issue

in the petition,” this factor favors denial. *Id.* at 9-10. “Likewise, district court claim construction orders may indicate that the court and parties have invested sufficient time in the parallel proceeding to favor denial.” *Id.* at 10.

An institution decision would be due by January 21, 2026. *See* AIA § 6 (codifying 35 U.S.C. § 314(b)). The Court has not entered a scheduling order due to delays caused by Petitioner’s gamesmanship of U.S. procedure, which weighs against institution as explained below.

Thus, *Fintiv* Factor 3 weighs against institution or is neutral.

**D. *Fintiv* Factor 4: There is Substantial Overlap Between this IPR and the District Court Proceeding**

*Fintiv* Factor 4 looks to “whether all or some of the claims challenged in the petition are also at issue in district court” and whether the “petition includes the same or substantially the same claims, grounds, arguments, and evidence” as the parallel district court case. *Fintiv I* at 12-13. In short, this factor evaluates “concerns of inefficiency and the possibility of conflicting decisions” when substantially identical prior art is submitted in both the District Court and IPR proceeding. *Id.* at 12.

The Petition challenges all the claims of the ’758 Patent, so there will be substantial overlap between this IPR and the District Court proceeding.

Additionally, while Petitioner served and filed a *Sotera*-type stipulation stating that Petitioner will not pursue that “claims subject to this IPR are invalid on grounds that were raised in this IPR or grounds that could have reasonably been

raised in this IPR,” such a stipulation is not sufficient to ensure that IPR proceedings would be a “true alternative” to the District Court litigation. *See Sotera*, Paper 12 at 19; *see also Motorola v. Stellar*, IPR2024-01205, -01206, -01297, -01208, Paper 19 at 3–4 (March 28, 2025) (Director vacating decision granting institution where the petitioner’s “stipulation does not ensure that these [inter partes review] proceedings would be a ‘true alternative’ to the district court proceeding”).

The Board has no ability to enforce such a stipulation before the district court. Previously, this inability to enforce led to inconsistent decisions, but now the Federal Circuit has weighed in to explain “IPR estoppel does not preclude a petitioner from relying on the same patents and printed publications as evidence in asserting a ground that could not be raised during the IPR, such that the claimed invention was known or used by others, on sale, or in public use.” *Ingenico Inc. v. IOENGINE, LLC*, No. 2023-1367, 2025 WL 1318188, at \*7 (Fed. Cir. May 7, 2025). The Director has already found, in *Motorola v. Stellar*, that a standard *Sotera* stipulation is ***no longer sufficient*** to determine that *Fintiv* Factor 4 weighs in favor of institution where the district court invalidity contentions “are more expansive and include combinations of the prior art asserted in these proceedings with unpublished system prior art, which Petitioner’s stipulation is not likely to moot.” *Motorola v. Stellar*, Paper 19 at 4 (March 28, 2025) (“although Petitioner’s *Sotera* stipulation may mitigate some concern of duplication between the parallel proceeding and this

proceeding, the stipulation does not outweigh the substantial investment in the district court proceeding or Fintiv factors 1, 2, and 5....”). With the Federal Circuit’s narrow interpretation of IPR estoppel, a *Sotera* stipulation, on its own, has nearly no value in preventing overlap between an IPR and district court actions.

Here, Petitioner’s stipulation does not provide any assurance that there will be no substantial overlap between the District Court proceedings and the proposed IPR proceedings. Petitioner has not yet served invalidity contentions in the district court. But Patent Owner expects that Petitioner’s invalidity contentions include combinations of any art (including the art asserted in this IPR) with unpublished system art, rendering Petitioner’s stipulation insufficient to ensure that the IPR proceedings are a “true alternative” to the District Court proceedings.

Additionally, Petitioner’s stipulation still permits subsequent *ex parte reexamination* petitions on grounds that could have been raised in the Petition, should Petitioner not receive its preferred outcome here. Thus, Petitioner’s stipulation still allows for repeated challenges to the same patent by the same defendant in multiple venues, obviating the very purpose of the IPR process to streamline the patent system and reduce litigation costs. *See, e.g.*, H.R. Rep. No. 112-98, at 39–40 (2011) (“The legislation is designed to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.”). While the Director’s concerns in *Motorola*

*v. Stellar* focused on concerns over the duplication between the PTAB and District Court proceedings, expecting the Patent Office (through the PTAB and the Central Reexamination Unit) to hear two serial challenges to the same patent is similarly problematic.

In short, if the Board was to grant institution in this proceeding, it would be issuing an opinion on the same claims of the '758 patent whose validity would have been previously tried before the District Court months prior, and the same claims of the '758 patent whose validity may subsequently be challenged again during any potential *ex parte reexamination* process. This is the opposite of efficiency and contravenes the very purpose of the IPR process.

Accordingly, *Fintiv* Factor 5 weighs against institution.

**E. *Fintiv* Factor 5: Petitioner Is The Defendant in the District Court Litigation.**

*Fintiv* Factor 5 looks to “whether the petitioner and the defendant in the parallel proceeding are the same party.” *Fintiv I* at 5-6. Specifically, when “the petitioner and the defendant in the parallel proceeding are the same party, this factor weighs in favor of discretionary denial.” *Fintiv II* at 15. Here, the Petitioner is the defendant in the parallel litigation.

Thus, *Fintiv* Factor 5 weighs in favor of discretionary denial.

**F. *Fintiv* Factor 6: Other Considerations Weigh Against Institution**

*Fintiv* Factor 6 looks to “other circumstances that impact the Board's exercise of discretion, including the merits.” *Fintiv I* at 5-6. This factor also weighs heavily against institution because, as discussed further below, “additional considerations” (as outlined in the Director’s March 26, 2025 Memo) weigh in favor of discretionary denial, including the length of time the challenged claims have been in effect.

**III. Additional Considerations Weigh In Favor Of Discretionary Denial**

In addition to the above factors, as explained in the March 26, 2025 Memo, additional relevant considerations may weigh in favor of discretionary denial, including:

- Whether the PTAB or another forum has already adjudicated the validity or patentability of the challenged patent claims;
- Whether there have been changes in the law or new judicial precedent issued since issuance of the claims that may affect patentability;
- The strength of the unpatentability challenge;
- The extent of the petition's reliance on expert testimony;
- Settled expectations of the parties, such as the length of time the claims have been in force;
- Compelling economic, public health, or national security interests; and
- Any other considerations bearing on the Director’s discretion.

Here, as discussed further below: 1) no changes in the law support reconsideration of validity of the '758 patent claims and 2) the challenged claims have been in force for over nine (9) years.

**A. No Changes in the Law Support Reconsideration of Validity**

First, no changes in the law support reconsideration of the validity of the '758 patent claims, and Petitioner does not identify any such change.

**B. The Patent Has Been in Force for Over Nine (9) Years**

This consideration looks to the “[s]ettled expectations of the parties, such as the length of time the claims have been in force.” The Director published a decision granting Patent Owner’s Request for Discretionary Denial and Denying Institution of *Inter Partes* Review in *Dabico Airport Solutions Inc. v. Axa Power Aps* (“*Dabico*”). Ex. 2003. Patent Owner submits that *Dabico* further supports its request that the Director deny institution in the instant proceeding.

In *Dabico*, the Director denied institution after reviewing the totality of the evidence, holding that the Office is “disinclined to disturb the settled expectations” of the patent owner in the absence of persuasive reasons why the Office should review the challenged patent. Ex. 2003 at 3. The Director held that settled expectations were created because “the challenged patent has been in force almost eight years[.]” Id. at 2. The Director further stated, “[a]lthough there is no bright-line rule on when expectations become settled, in general, the longer the patent has

been in force, the more settled expectations should be.” *Id.* at 3. The Director emphasized consistency with the “other approaches to settled expectations and incentives, for example, for filing infringement lawsuits.” *Id.* (citing, *cf.* 35 U.S.C. § 286) (“Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action.”). *Dabico* further explains that “actual notice of a patent or of possible infringement is not necessary to create settled expectations.” *Id.* at 3.

The settled expectations of the ’758 Patent are stronger than those in *Dabico*. The ’758 Patent has been in force since 2016 and was filed in 2014. Ex. 1001 at 1. Ex. 1001 at 1. The ’758 Patent has therefore been in force for over ***nine (9) years***—over a year longer than the patent in *Dabico* and significantly longer than the length of statutory damages for infringement actions, as cited by the Director in *Dabico*. See Ex. 2003 at 3 (“in general, the longer the patent has been in force, the more settled expectations should be”). The considerable length of time that the claims have been in force has built a foundation of settled expectations by the Patent Owner, providing a reasonable expectation that the presumptively valid patent claims—*which already passed thorough examination by the Office*—may be relied upon to defend Patent Owner’s intellectual property rights.

When a patent has strong settled expectations like the '758 Patent, a petitioner must provide “persuasive reasoning” to disturb those settled expectations. *See* Ex. 2003 at 3. No such reasoning exists here. Thus, settled expectations of the parties is an additional relevant consideration weighing against institution.

**C. Strength of the Unpatentability Challenge/Overreliance on Expert Testimony: The Petition Fails to Meet Its Burden**

Patent Owner disputes Petitioner’s contentions on the merits and maintains that Petitioner has not met its burden to show that institution is warranted. Accordingly, the Petition should be denied.

**D. Other Considerations: Petitioner’s Manipulation Of Their Status As A Foreign Entity**

Petitioner is a Chinese company. As such, in order to effect formal service, Patent Owner was required to engage in lengthy foreign service protocols that can take a year or longer. Petitioner has used these requirements to slow down the litigation while accelerating its effort to file its Petition.

Petitioner was notified of the district court complaint shortly after filing because Patent Owner quickly provided a copy to Petitioner. Patent Owner provided this courtesy copy to Petitioner because, among other things, it sought to have Petitioner agree to waive formal service. Petitioner declined to do so until July 23, 2025 (over *five months* after filing) before waiving service. While refusing to accept service, Petitioner used the delay afforded by its foreign status to file several IPR

petitions, including the instant IPR (filed July 10, 2025) and IPR2025-01246 (filed July 10, 2025), followed closely by IPR2025-01267 (filed August 5, 2025). ***Two of the three IPRs were written and filed before waiving service.*** Such gamesmanship will result in delays that prejudice Patent Owner (including upsetting Patent Owner's settled expectations) and undermine the efficiency of both district court litigation and AIA proceedings. Patent Owner expects Petitioner will use the gap in between filing and its waiver of formal service to its advantage by disagreeing as to the likely trial date. Allowing Petitioners to manipulate timing in this manner incentivizes strategic delays, contrary to congressional intent that IPRs serve as a streamlined and efficient alternative— not a tactical weapon that frustrates judicial economy.

Accordingly, the Director should exercise discretion to deny institution and discourage abuse of U.S. process.

#### **IV. THE BALANCE OF EVIDENCE FAVORS DENIAL**

In sum, the *Fintiv* Factors weigh in favor of discretionary denial, including the additional relevant considerations that further weigh in favor of discretionary denial. Thus, considered as a whole, the relevant facts all weigh in favor of exercising discretionary denial.

#### **V. CONCLUSION**

Patent Owner respectfully requests that the Director exercise discretion under Section 314(a) to deny institution.

Date: September 22, 2025

Respectfully submitted,

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**CERTIFICATE OF WORD COUNT**

I certify that there are 3,392 words in this paper, excluding the portions exempted under 37 C.F.R. § 42.24(a)(1), according to the word count tool in Microsoft Word.

*/Jefferson Cummings/*  
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**CERTIFICATE OF SERVICE (37 C.F.R. § 42.6(e)(1))**

The undersigned hereby certifies that the above document was served on September 22, 2025, by filing this document through the P-TACTS system as well as delivering a copy via electronic mail upon the following attorneys of record for the Petitioner:

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