

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.

VOIP-PAL.COM, INC.,  
Patent Owner

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Case IPR2016-01198 and IPR2016-01201<sup>1</sup>  
Patents 9,179,005 B2 and 8,542,815 B2

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Before SCOTT R. BOALICK, *Acting Chief Administrative Patent Judge*,  
JACQUELINE WRIGHT BONILLA, *Acting Deputy Chief Administrative  
Patent Judge*, and MICHAEL P. TIERNEY, *Vice Chief Administrative  
Patent Judge*.

BOALICK, *Acting Chief Administrative Patent Judge*.

ORDER

*Granting-in-Part Petitioner's Motion for Sanctions*  
*37 C.F.R. §§ 42.5, 42.12*

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<sup>1</sup> This Order pertains to both noted proceedings. The Board exercises its discretion to issue a single Order for entry in each proceeding. The parties are not authorized to use this style heading for any subsequent papers.

The two above-captioned proceedings are on remand from the United States Court of Appeals for the Federal Circuit. *Apple Inc. v. Voip-Pal.com, Inc.*, Nos. 18-1456, -1457 (Fed. Cir. Feb. 21, 2018) (“Remand Order”). The Federal Circuit’s order remands these cases for the limited purpose of allowing us to consider the motion for sanctions (“Motion” or “Mot.”) that Apple Inc. (“Petitioner”) filed, and states that the court otherwise retains jurisdiction over the appeals. *Id.*

For the reasons that follow, the Motion is granted-in-part. The Motion is granted to the extent that Petitioner seeks sanctions against Voip-Pal.com, Inc. (“Patent Owner”) for improper *ex parte* communications and a new panel (Mot. 14–15). As a sanction, the new panel will reconsider the Final Written Decisions on rehearing in view of the entirety of record in these proceedings. The Motion is denied to the extent that Petitioner seeks judgment against Patent Owner on all claims at issue in these proceedings, or vacatur of the Final Written Decisions (Mot. 1, 15; Reply 10).

## I. PROCEDURAL HISTORY

On November 20, 2017, the Board entered Final Written Decisions in each of the proceedings at issue. IPR2016-01198, Paper 53; IPR2016-01201, Paper 54. During a conference call on December 19, 2017, Petitioner obtained authorization to file a motion for sanctions. The Board memorialized this authorization in an order entered on December 20, 2017. Paper 54, 3.<sup>2</sup> That order stayed the deadline for filing requests for rehearing of the Final Written Decisions pending a decision on Petitioner’s motion,

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<sup>2</sup> This citation and all subsequent citations to Paper numbers are to the Paper numbers in IPR2016-01198.

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and also entered six *ex parte* communications (Ex. 3003–3008) into the record. *Id.* at 2–3.

As authorized, Petitioner filed its Motion for Entry of Judgment in Favor of Petitioner as a sanction, alleging that the *ex parte* communications were improper *ex parte* communications made by Patent Owner’s former CEO (Dr. Thomas Sawyer), in concert with Patent Owner and its counsel. Paper 55. Patent Owner filed an Opposition to the Motion (“Opp’n”). Paper 61. Petitioner filed a Reply in support of its Motion (“Reply”). Paper 65. Just prior to filing its Reply, Petitioner also filed a Notice of Appeal indicating that it had appealed the Final Written Decisions to the Federal Circuit. Paper 64. As noted above, the Federal Circuit stayed those appeals pending the resolution of the Motion before the Board in both cases. Remand Order 2.

Thereafter, the Board issued an order changing the panel to Deputy Chief Administrative Patent Judge (currently Acting Chief Administrative Patent Judge) Boalick, Vice Chief Administrative Patent Judge (currently Acting Deputy Chief Administrative Patent Judge) Bonilla, and Vice Chief Administrative Patent Judge Tierney. Paper 69.

## II. BACKGROUND

Petitioner’s Motion requests that the Board sanction Patent Owner in light of six letters Patent Owner’s former CEO and Chairman and current advisor, Dr. Thomas Sawyer, wrote and sent to the Chief Administrative Patent Judge, among many others, including the judges initially assigned to conduct the proceedings. Mot. 1; Exs. 3003–3008. Petitioner argues that these letters are *ex parte* communications that violate Petitioner’s due

process rights, Board regulations, and the Administrative Procedure Act (“APA”). Mot. 7. Petitioner further argues that Patent Owner is responsible for these letters, that the Board’s response to these letters prejudiced Petitioner, and that the Board should sanction Patent Owner by entering adverse judgment against Patent Owner or, alternatively, by vacating the Final Written Decisions and assigning a new panel to preside over “constitutionally correct” proceedings going forward. *Id.* at 8–9, 12–15.

Patent Owner opposes Petitioner’s Motion, arguing first that the letters are not *ex parte* communications because they only reference a pending proceeding to illustrate a systemic concern and do not discuss substantive issues relevant to the instant proceedings themselves. Opp’n 2–7 (citing Office Patent Trial Practice Guide (“Trial Practice Guide”), 77 Fed. Reg. 48,756, 48,758 (Aug. 14, 2012)). Patent Owner further contends that even if the letters are deemed impermissible *ex parte* communications, they are not so egregious as to require the sanctions Petitioner requests, that Petitioner was not prejudiced by the letters, and that Petitioner’s due process rights were not violated. *Id.* at 7–11, 14–15. Furthermore, Patent Owner states that Petitioner’s Motion is untimely and barred because Petitioner was aware of two of the letters, but chose to do nothing, instead waiting until after the Board issued its Final Written Decisions to bring the Motion. *Id.* at 12–14.

In the Reply, Petitioner faults Patent Owner for previously misrepresenting in a press release that the letters were written “independent of [Patent Owner’s] management” and issuing a corrected press release stating that the letters were written “in consultation with [Patent Owner’s] management” only after Petitioner filed the Motion. Reply 1–2 (emphases

omitted) (quoting Exs. 1019, 1023). Petitioner again argues that the letters are *ex parte* communications that violate 37 C.F.R. § 42.5(d) and deprive Petitioner of due process. *Id.* at 4–10. The Reply reiterates Petitioner’s request for judgment against Patent Owner and, in the alternative, requests an opportunity to file new petitions. *Id.* at 10.

### III. ANALYSIS

The parties’ arguments initially present two threshold issues: (A) whether Petitioner’s Motion is barred under 37 C.F.R. § 42.73(a) (Opp’n 13–14); and (B) whether the letters are *ex parte* communications (Mot. 9–10; Opp’n 2–7; Reply 4–6). If these threshold issues are resolved such that the Motion is not barred and the letters are, in fact, *ex parte* communications, then the parties ask us to further consider the following three issues: (C) whether Petitioner’s due process rights were violated (Mot. 10–12; Opp’n 14–15; Reply 6–9); (D) whether Patent Owner should be sanctioned and, if so, what sanction is appropriate (Mot. 14–15; Opp’n 7–9; Reply 10); and (E) whether Petitioner’s rights under the APA were violated (Mot. 10). We address each of these issues in turn.

#### A. *Whether the Motion Is Barred Under 37 C.F.R. § 42.73(a)*

Under 37 C.F.R. § 42.73(a), “[a] judgment, except in the case of a termination, disposes of all issues that were, or by motion reasonably could have been, raised and decided.” Patent Owner asserts that Petitioner is barred from bringing its Motion under § 42.73(a) because Petitioner became aware of two of the letters, on May 8, 2017, and November 1, 2017, respectively, before the Board issued the Final Written Decisions on November 20, 2017, yet chose to do nothing. Opp’n 13. Petitioner

acknowledges that it was aware of the first and last letters, but indicates that it did not become aware of the second through fifth letters until it began an investigation after the Final Written Decisions issued. Mot. 9 n.5; Reply 2–3; Ex. 1021, 3–6.

We are not persuaded that 37 C.F.R. § 42.73(a) serves to bar Petitioner’s Motion in this case, namely because Petitioner was not aware of four of the six letters until after the Final Written Decisions issued. Patent Owner argues that those four letters are cumulative (Opp’n 14), but we disagree. Unlike the two letters of which Petitioner was aware, the four additional letters request, for example, “a judgment in the patent owner’s favor or a dismissal of the action” (Ex. 3004, 3); an “explanation for the replacement of all of the members of the panel” (Ex. 3005, 1); and that the Board “dismiss the two Apple petitions that have been instituted” (Ex. 3006, 5).

Thus, evidence supports the finding that Petitioner did not know about a number of relevant letters and, likewise, did not know that those letters requested certain substantive action in the instant cases, until after the Final Written Decisions issued. Thus, we determine that Petitioner is not barred from bringing its Motion under § 42.73(a).

*B. Whether Patent Owner’s Letters Are Ex Parte Communications*

Under 37 C.F.R. § 42.5(d), an *ex parte* “[c]ommunication regarding a specific proceeding with a Board member defined in 35 U.S.C. 6(a) is not permitted unless both parties have an opportunity to be involved in the communication.” This prohibition on *ex parte* communications includes “seeking supervisory review in a proceeding by contacting the judge’s supervisor, without including the opposing party in the communication.”

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Rules of Practice for Trials Before the Patent Trial and Appeal Board and Judicial Review of Patent Trial and Appeal Board Decisions (“Trial Practice Rules”), 77 Fed. Reg. 48,612, 48,617 (Aug. 14, 2012). The prohibition, however, does not extend to, among other things, “referring to a pending case to illustrate a systemic concern.” *Id.*; *accord* Trial Practice Guide, 77 Fed. Reg. at 48,758.

We do not agree with Patent Owner that the letters at issue refer to the instant proceedings entirely for the purpose of illustrating a systemic concern (Opp’n 2). Although the letters do allege what could be termed systemic concerns, the letters go beyond that discussion such that they seek specific relief from the Chief Administrative Patent Judge in these proceedings. In particular, among other things, the letters suggest the need to disqualify a panel of judges hearing the identified cases, ask for judgment in Patent Owner’s favor or dismissal of the petitions, and argue that such relief is necessary to satisfy due process. Ex. 3003, 1–3; Ex. 3004, 3; Ex. 3006, 5.

In its own briefing, Patent Owner acknowledges that it discussed relevant issues with Dr. Sawyer and participated in preparing the letters Dr. Sawyer sent to the Board. Opp’n 2 n.1; *see also* Motion 8–9 (discussing Patent Owner’s website postings in September 2017). Thus, evidence sufficiently establishes that Patent Owner, through Dr. Sawyer, engaged in written communication with the Board in a manner that did not involve or inform Petitioner. Because Patent Owner participated in preparing the letters, and because Petitioner did not have the opportunity to be involved in the communications, we determine that the letters constitute improper *ex parte* communications under 37 C.F.R. § 42.5(d).

*C. Whether Petitioner’s Due Process Rights Were Violated*

Petitioner relies on *Stone v. Federal Deposit Insurance Corp.*, 179 F.3d 1368 (Fed. Cir. 1999), in arguing that Patent Owner’s improper *ex parte* communications violated its due process rights. Mot. 11–12; Reply 6–9. We agree with Patent Owner, however, that *Stone* is not applicable in this instance (Opp’n 14–15) and that Petitioner’s due process rights have not been violated.

*Stone* involves a federal constitutional claim under the Due Process Clause of the Fifth Amendment. 179 F.3d at 1374. In *Stone*, the Federal Circuit made clear that the appellant’s due process arguments depended upon having a property right. *Id.* (“[The appellant]’s federal constitutional due process claim depends on his having a property right in continued employment. . . . If [the appellant] does possess such a property interest, then the government cannot deprive him of this property without due process.”); *id.* at 1377 (further discussing the appellant’s property interest in continued employment); *cf. Oil States Energy Servs., LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365, 1375 (2018) (stating that patents convey “a specific form of property right—a public franchise” and that the Court’s “decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause”).

Here, by contrast, Petitioner does not allege that it has any property interest of which it has been deprived. Because there is no evidence that Petitioner possesses the prerequisite property interest for a *Stone* analysis to apply, we do not find that Petitioner has shown that it had its rights unconstitutionally violated under the Due Process Clause of the Fifth



Amendment and the *Stone* framework. However, a due process violation is not required in order to impose sanctions.

*D. Whether Patent Owner Should Be Sanctioned and, if so, What Sanction is Appropriate*

Under 37 C.F.R. § 42.12(a)(1), “[t]he Board may impose a sanction against a party for misconduct, including . . . [f]ailure to comply with an applicable rule . . . in the proceeding.” Accordingly, “the initiation of . . . an *ex parte* communication may result in sanctions against the initiating party.” Trial Practice Rules, 77 Fed. Reg. at 48,616. As we have found in § III.B above, Patent Owner has violated 37 C.F.R. § 42.5(d) prohibiting *ex parte* communications, and this is sanctionable misconduct.

As a remedy for Patent Owner’s noncompliance with this rule, Petitioner seeks entry of judgment against Patent Owner as to all of the claims at issue or, alternatively, vacatur of the Final Written Decisions followed by assignment of a new panel, and the opportunity to file new petitions. Mot. 15; Reply 10. “[L]oss of patent rights, like dismissal with prejudice of a civil action, is a sanction which may sound the death knell for important rights and interests. . . . [S]uch dismissals should be used as ‘a weapon of last, rather than first, resort.’” *Abrutyn v. Giovannello*, 15 F.3d 1048, 1053 (Fed. Cir. 1994) (citation omitted) (quoting *Gerritsen v. Shirai*, 979 F.2d 1524, 1532 (Fed. Cir. 1992)).

The Board’s rules provide for sanctions up to and including adverse judgment. 37 C.F.R. § 42.12(b). In fashioning a sanction for violating the rules, the selected sanction should bear a reasonable relationship to the severity of the violation. Further, a sanction should be selected to ensure

compliance with the Board's rules, deter others from such conduct and, if appropriate, render whole the aggrieved party. *See* 37 C.F.R. § 42.11(d)(4).

On the current record, there is evidence sufficient to conclude that Patent Owner intentionally violated 37 C.F.R. § 42.5(d). As noted above, Patent Owner admits to participating in preparing the letters. Opp'n 2 n.1. This admission is even more troublesome in view of the fact that Patent Owner's initial press release posting the letters on its website stated that the letters were written "independent of [Patent Owner's] management" (Ex. 1019), and that Patent Owner did not issue a correction until after Petitioner filed its Motion (*see* Ex. 1023 (corrected press release stating that the letters were written "in consultation with [Patent Owner's] management")). We do not find credible Patent Owner's assertion that it believed that the content of the letters was permissible under 37 C.F.R. § 42.5(d). *See* Opp'n 2-3, 2 n.1, 6-7 (asserting that the letters referenced a pending case to illustrate a systemic concern, such that the letters were within the requirements of 37 C.F.R. § 42.5 pursuant to the Trial Practice Guide, and that Patent Owner did not hide the letters, instead posting them on its website).

Viewing the entire record as a whole, we do not find that Petitioner has been unfairly prejudiced as a result of Patent Owner's actions. Petitioner contends that it has been prejudiced because "the Board took actions adverse to [Petitioner] after receiving [Patent Owner]'s unauthorized *ex parte* communications asking for that precise result." Mot. 13. According to Petitioner, because the original panel was accused of bias and replaced with a substitute panel, the substitute panel was, in turn, instilled with a

“reciprocal bias” against Petitioner, and the new panel was “implicitly pushed” to side in favor of Patent Owner. *Id.* at 13–14.

Petitioner’s allegation that the substitute panel members were biased is a serious accusation, yet it is based only on mere speculation. Furthermore, notwithstanding the seriousness of Petitioner’s bias allegations and even though Petitioner had two letters in its possession, Petitioner did not raise the issue promptly. Instead, Petitioner raised the issue of panel bias only after receiving the Final Written Decisions that were not in Petitioner’s favor.

On this record, Petitioner, at best, has shown the potential for an appearance of prejudice, but has failed to provide sufficient evidence of actual prejudice. The lack of evidence of actual prejudice to Petitioner weighs against imposing the sanction of judgment against Patent Owner on all of the challenged claims.

We now consider any prejudice to the United States Patent and Trademark Office (“Office”) or the public interest in determining an appropriate sanction. Those interests include “creating sufficient deterrence for like cases in the future,” *Abrutyn*, 15 F.3d at 1053, and as it relates to this case, deterring improper *ex parte* communications and public misrepresentations as to the parties’ involvement in those communications. At the same time, however, it is in the Office’s interest to have parties promptly raise any allegations of panel bias or improper *ex parte* communications.

As discussed above, Petitioner could have raised its concerns as to possible panel bias as of the June 7, 2017, conference call, at which time Petitioner was aware of both the first letter and the fact that the panel had

been replaced. Instead, Petitioner waited over six months to do so—until after the Final Written Decisions issued. Similarly, Petitioner was aware of the last letter on November 1, 2017 (Reply 3), yet did not request authorization to file the Motion until December 15, 2017 (Ex. 3002)—again, after the Final Written Decisions issued on November 20, 2017. Petitioner’s Reply states that, although the last letter “suggested that [Patent Owner] might be involved [in the communications], it was *far from clear*.” Reply 3 (emphasis added). This statement is inconsistent with Petitioner’s statements in the Motion, where Petitioner asserts that the last letter “*makes clear* that Dr. Sawyer [was] no rogue actor; rather [Patent Owner] knew about—and assisted in—Dr. Sawyer’s *ex parte* communications with the Board” (Mot. 8 (emphasis added); *see also id.* at 9 n.4 (“[Patent Owner]’s description of these letters as ‘independent’ is belied by the content of the letters themselves . . . .” (citation omitted))). Moreover, Dr. Sawyer’s last letter, which Petitioner acknowledges it received on November 1, 2017 (Reply 3), expressly states that, “[o]ver the last several months,” Dr. Sawyer “participated in a series of meetings and consultations with attorneys for Voip-Pal.” Ex. 3008, 1.

Accordingly, we are persuaded that the record sufficiently establishes Petitioner had reason to understand, as of November 1, 2017, that Dr. Sawyer prepared and sent at least his last letter (Ex. 3008) with Patent Owner’s involvement or knowledge. When considering the interests of the Office and public, judgment against Patent Owner would be an inappropriate sanction under the facts of these cases. It is not in the Office’s interest to have a party delay its investigation into issues of alleged impropriety, or to wait and see the results of a final written decision before raising any issues

of alleged impropriety, and then reward that party for its delay by reversing a final written decision that is not in its favor.

In the alternative, Petitioner requests vacatur of the Final Written Decisions and “constitutionally correct” proceedings going forward that provide Petitioner with the right to file new petitions. Mot. 15; Reply 10. We do not agree that this is an appropriate sanction for the same reasons that we do not find judgment against Patent Owner to be an appropriate sanction. For example, we do not wish to reward Petitioner with a “do-over” after it failed to raise the issues promptly. Furthermore, it is in neither the Office’s nor the public’s interest to vacate the results of 17 months of proceedings and commence entirely new proceedings. Although *Stone* explains that, where a constitutional due process violation has occurred as a result of *ex parte* communications, a new constitutionally correct procedure is required, 179 F.3d at 1377, we do not find that *Stone* applies here, as discussed in § III.C above.

Petitioner has requested a new panel (Mot. 15), and in our view, assigning a new panel and having the new panel issue a rehearing decision achieves the most appropriate balance when considering both parties’ conduct as a whole. As noted above, the Board issued an order changing the panel on August 22, 2018. Paper 69. In addition, the new panel now authorizes Petitioner to file a request for rehearing of the Final Written Decision in each proceeding, limited to 20 pages, by Tuesday, January 8, 2019. Patent Owner may file a response to Petitioner’s request, also limited to 20 pages, by Tuesday, January 22, 2019. Petitioner may then file a reply, limited to 10 pages, by Tuesday, January 29, 2019. This panel will decide each request for rehearing under the standard set forth in 37 C.F.R.

§ 42.71(d), meaning that Petitioner bears the burden of showing that the Final Written Decisions should be modified, and Petitioner must specifically identify all matters it believes the Board misapprehended or overlooked in the Final Written Decisions, and where in the record each matter was previously addressed.

*E. Whether Petitioner's Rights under the APA were Violated*

Petitioner contends that Patent Owner's *ex parte* communications violate the APA, specifically, § 557(d)(1)(A) of the APA. Mot. 10. APA § 557(d)(1)(A) applies to formal rulemaking and formal adjudications before administrative agencies and prohibits *ex parte* communications "relevant to the merits of the proceeding." 5 U.S.C. § 557(d)(1)(A). In its briefing on this argument, however, Petitioner does not explain why or how the letters at issue are "relevant to the merits of the proceeding" within the meaning of that phrase under the APA. *See* Mot. 10.

In any event, courts have held that there are two remedies for improper *ex parte* communications under the APA: "[t]he first is disclosure of the communication and its content"; and "[t]he second requires the violating party to 'show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of [the] violation.'" *Prof'l Air Traffic Controllers Org. v. Fed. Labor Relations Auth.*, 685 F.2d 547, 564 (D.C. Cir. 1982) (third alteration in original) (quoting 5 U.S.C. § 557(d)(1)(D)). The Board already has provided the first remedy. *See* Paper 54 (making Ex. 3003–3008 of record and available to the parties on December 20, 2017).

As to the second remedy, "Congress did not intend . . . that an agency would dismiss a party's interest more than rarely . . . [and] the statutory

language clearly states that a party's interest in the proceeding may be adversely affected only "to the extent consistent with the interests of justice and the policy of the underlying statutes." *Id.* (citation omitted) (quoting 5 U.S.C. § 557(d)(1)(D)). We do not find it in the interests of justice to enter judgment against Patent Owner for the reasons discussed in § III.D above. Rather, we determine that the proper course of action, as a matter of fairness in view of both parties' actions, is to have the new panel reconsider the Final Written Decisions on rehearing in view of the entirety of record before us. In its requests for rehearing, Petitioner may point out matters it "believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply." 37 C.F.R. § 42.71(d).

#### IV. CONCLUSION

Petitioner's Motion is granted-in-part. The Motion is granted to the extent that Petitioner has shown that Patent Owner engaged in sanctionable conduct under 37 C.F.R. § 42.5(d), and further to the extent that Petitioner has requested a new panel in these proceedings going forward. The Motion is denied to the extent that Petitioner requests judgment to be entered against Patent Owner as to all of the claims challenged in these proceedings or, alternatively, vacatur of the Final Written Decisions and new proceedings in which Petitioner may file new petitions.

In view of the unique circumstances and record before us, we determine that the proper course of action, as a matter of fairness in view of actions by both parties, is for the new panel to reconsider the Final Written Decisions on rehearing in view of the entirety of record in these proceedings.

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Thus, upon completion of the briefing as authorized in this Order, the Final Written Decisions will be reviewed in accordance with the standard set forth in 37 C.F.R. § 42.71(d). Specifically, on rehearing, there will be an assessment of whether Petitioner sufficiently identifies “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.” 37 C.F.R. § 42.71(d).

### ORDER

It is hereby

ORDERED that Petitioner’s Motion is granted-in-part;

FURTHER ORDERED that the panel members for consideration of all matters in these proceedings are designated in accordance with the order filed on August 22, 2018 (Paper 69);

FURTHER ORDERED that the stay of the deadline for Petitioner to file requests for rehearing of the Final Written Decisions is lifted;

FURTHER ORDERED that Petitioner is authorized to file requests for rehearing of the Final Written Decisions in the two above-captioned proceedings by January 8, 2019, and such requests for rehearing shall total no more than 20 pages each and otherwise be subject to the standards set forth in 37 C.F.R. § 42.71(d);

FURTHER ORDERED that Patent Owner is authorized to file, by January 22, 2019, responses to any requests for rehearing of the Final Written Decisions that Petitioner files, and such responses shall total no more than 20 pages each; and



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FURTHER ORDERED that Petitioner is authorized to file replies in support of any requests for rehearing by January 29, 2019, and such replies shall total no more than 10 pages each.

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