

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NOKIA OF AMERICA CORPORATION,
Petitioner,

v.

ALEXANDER SOTO AND WALTER SOTO,
Patent Owners.

Case IPR2023-00960
U.S. Patent No. 8,238,754

**MOTION TO DISMISS, OR ALTERNATIVELY TO VACATE FILING
DATE AND DEADLINES FOR LACK OF SERVICE**

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EXHIBITS

Exhibit No.	Description
2001	Email from PTAB, dated July 20, 2023
2002	Chain of Emails from Between Counsel for Nokia and Special Appearance Counsel for Patent Owners, Redacting the Username and Password
2003	Excerpt of JOSEPH W. GLANNON, <i>Civil Procedure</i> , in EXAMPLES & EXPLANATIONS (Aspen Publishers, 6th ed. 2008).

In lieu of filing mandatory notices, Alexander Soto and Walter Soto (“Patent Owners”) specially appear via the undersigned counsel to challenge service of the Petition (Paper 2) and the accompanying evidence. Paper 4. Patent Owners move the Board to dismiss the Petition for lack of service, or alternatively to reset the filing date and all deadlines dependent on the date of actual service.

Patent Owners respectfully request consideration of this motion as an exception to 37 C.F.R. § 42.40(b) because Patent Owners cannot not practically obtain authorization in this case. PTAB Consolidated Trial Practice Guide November 2019 at II(A)(2), *available at* <https://www.uspto.gov/sites/default/files/documents/tpgnov.pdf?MURL=TrialPracticeGuideConsolidated>. The deadline for mandatory notices is today, but a panel of judges has yet to be assigned to approve of filing this motion. Paper 3; Ex. 2001 (PTAB writing on July 20, 2023 that, “This case does not have a judge panel”).

Due to limitations with the E2E filing system preventing filing of motions or exhibits before acceptance of a mandatory notice, this motion is being filed in place of the mandatory notice, and all exhibits are appended to this motion.

I. Factual History: Petitioner’s Attempt At Service Failed

On June 30, 2023, Petitioner filed a petition for *inter parties* review. Paper 2 (“Petition”). The Petition certifies that the Petition and exhibits were served on June 30, 2023 via UPS Next Day Air to “5348 Vegas Dr. #396, Las Vegas NV.” Petition

at 100. The certificate of service lacks a zip code. *Id.* However, service was not effected because the Patent Owners did **not** receive this UPS delivery of the Petition or the exhibits.

On June 30, Petitioner also emailed a password protected link to access a courtesy copy of the Petition and exhibits to Russ August & Kabat (“RAK”). Ex. 2002 at 3–4. RAK represents the Patent Owners in IPR proceedings related to other patents, such as IPR2023-00862, where Infinera challenges U.S. Patent 10,771,181. RAK did **not** forward the courtesy copy to Patent Owners, nor did RAK forward Nokia’s password or link. Patent Owners do not exclusively use RAK as their law firm and have used other firms such as Carmichael IP, PLLC, in the past. *II-VI, Inc. v. NextGen Innovations, LLC*, IPR2021-01361, Paper 6 (Sept. 7, 2021) (Power of Attorney to Carmichael IP, PLLC).

On July 10, 2023, the Board issued its Notice of Filing Date Accorded directly to Patent Owners, apparently relying on Petitioner’s certification of service. Paper 3. The Board assigned July 30, 2023 as the filing date and set corresponding deadlines, including July 21, 2023 as the deadline for mandatory notices. *Id.* The Board emailed a copy of this notice to Alex and Walter Soto.

On July 18, 2023, in light of the Notice of Filing Date Accorded, at the request of Patent Owners, RAK asked Nokia’s counsel to provide proof of service. Nokia’s counsel wrote to back that same day, “We just learned that UPS returned the package

indicating that the that [sic] the street number of the address of record was incorrect.” Ex. 2002.¹ Nokia’s counsel did not provide the tracking number, UPS paperwork, or any other requested proof of service. *Id.* Patent Owners are not aware of what address Nokia actually used to attempt service and whether the address actually used was also missing a zip code.

On July 19, RAK confirmed to Nokia that Patent Owners had not yet received service of the Petition and Evidence, and RAK asked Nokia to promptly inform the Board about the lack of service so that the Board could vacate the filing date. Ex. 2002 at 2. This way, the Board would not continue to rely on Patent Owner’s erroneous certification of service in setting the filing date and subsequent deadlines. Nokia refused to do so.

Instead, on July 19, 2023, Nokia then reattempted service, this time using the correct address. Ex. 2002 at 1. On July 20, 2023, Patent Owners finally received a package from Nokia in their mailbox, presumably including a copy of the Petition and evidence.

As of the filing date of the Petition, the USPTO records indicated the correct address of the Patent Owners as 5348 Vegas Dr. #396, Las Vegas, NV 89108. It is

¹ Nokia has not explained how it “just learned” of service issues after RAK’s email 18 days after the original mailing. Based on general UPS practices of timely notifying its customers of failed deliveries, it is believed that Nokia knew or should have known this many days earlier.

this address that Nokia used in its July 19, 2023 attempt. Given Nokia's second mailing successfully reaching the address of record, the original failure stems from Nokia or perhaps its vendor, not the Patent Owners.

As of the filing of this motion, Nokia has neither informed the Board that its original certificate of service is inaccurate nor provided a copy of the original UPS paperwork for inspection to Patent Owners.

II. Due Process Of Law Requires Simultaneous Service Of The Petition

And Exhibits

Constitutional due process guarantees parties the basic right to notice of adversarial proceedings. Ex. 2003 at 345. For *inter partes* review, this requirement is codified in 37 C.F.R. § 42.105, Service of Petition, which states,

In addition to the requirements of § 42.6, the petitioner must serve the petition and exhibits relied upon in the petition as follows:

(a) The petition and supporting evidence must be served on the patent owner at the correspondence address of record for the subject patent. The petitioner may additionally serve the petition and supporting evidence on the patent owner at any other address known to the petitioner as likely to effect service.

(b) Upon agreement of the parties, service may be made electronically. Service may be by Priority Mail Express® or by means at least as fast and reliable as Priority Mail Express®. Personal service is not required.

37 C.F.R. § 42.105 describes requirements for service of the Petition and evidence that are *in addition* to the requirements of 37 C.F.R. § 42.6. Section 42.6(e) is titled "Service" and requires, under subsection (e)(2):

(2) *Simultaneous with filing.* Each document filed with the Board, if not previously served, must be served simultaneously on each opposing party.

Patent attorneys have a duty of candor and good faith before the USPTO. 37 C.F.R. § 1.56; MPEP § 2100. For example, a false affidavit constitutes material misconduct in patent proceedings, as does an intentional omission of material fact and withholding material information. *Therasense, Inc. v. Becton, Dickinson & Co.*, 649 F.3d 1276, 1292 (Fed. Cir. 2011) (“finding the intentional omission of declarant’s employment with inventor’s company rendered the affidavit false”); *Spectrum Solutions LLC v. Longhorn Vaccines & Diagnostics, LLC*, IPR2021-00860, Paper 109 (PTAB May 3, 2023) (granting adverse judgment for withholding material information).

A party may make a special appearance in inter parties review proceedings before the USPTO to challenge jurisdiction and due process. *Allergan, Inc. v. Teva Pharms. USA, Inc.*, No. 2:15-CV-1455-WCB, 2017 WL 4619790, at *1 (E.D. Tex. Oct. 16, 2017) (making special appearance to challenge the USPTO’s jurisdiction).

III. The Board Should Dismiss the Petition For Lack Of Simultaneous Service

Both Nokia’s first and second attempts at service violate due process as required in 37 C.F.R § 42.105.

When Nokia first filed its Petition, it failed to serve under 37 C.F.R. § 42.105(a) because its mail was returned as unsuccessfully delivered for unknown reasons, likely due to Nokia's error of failing to include a zip code or other error by Nokia in filling out the address. There was no alternative agreement for service under 37 C.F.R. § 42.105(b). *See* Patent Owner's Special Power of Attorney, filed herewith ("practitioners are **not** authorized to waive personal service and **not** authorized to accept personal service on behalf of Alexander Soto and Walter Soto as required by 37 C.F.R. 42.105"). Petitioner's courtesy email does not satisfy subsection of 37 C.F.R. § 42.105(b), nor was it even reasonable for Nokia to assume that RAK was automatically the Patent Owners' representative in this proceeding.

Nokia's second attempt at service on July 19, 2023 violates the "simultaneous with filing" requirement of 37 C.F.R. § 42.6, which is incorporated by reference in 37 C.F.R. § 42.105. Nokia's July 19, 2023 service attempt 19 days after filing is not "simultaneous" with its filing on June 30, 2023.

Nokia's petition for *inter partes* review should therefore be denied for lack of due process because Nokia failed its attempt at original service, and the subsequent attempts to cure fail to meet the "simultaneous" requirement of service. Service is a requirement of **constitutional** due process that cannot be overlooked by an agency.

IV. The Board Should Dismiss the Petition With Prejudice For Nokia's Lack of Candor

Additionally, the Board should dismiss Nokia's Petition for its failure to comply with its duty of candor to the USPTO. 37 C.F.R. § 1.56.

When RAK asked Nokia to promptly inform the Board about the lack of service so that the Board could vacate the filing date, Nokia refused to do so. Ex. 2002 at 1–2. Nokia was aware that the Board relied on its erroneous certification when the Board issued its Notice of Filing Date Accorded. As of the filing of this motion, the Board's Notice of Filing Date Accorded (Paper 3) is still relying on Patent Owner's erroneous certification of service (Petition at 100) in setting the filing date and subsequent deadlines. Nokia knows that its failure to serve is material to its Petition for *inter partes* review because RAK explicitly raised this issue. Rather than inform the PTAB about its lack of service, Nokia is trying unsuccessfully to fix its problem behind the scenes. This is a transparent attempt by Nokia to preserve its original filing date and unfairly expedited deadlines by giving delayed notice to the Patent Owners as part of Nokia's race to reach a final written decision against the District Court trial date. Regardless of whether Nokia's initial service failure stemmed from an honest mistake, Nokia's actions thereafter constitute intentional and deliberate withholding of material information from the PTAB.

Both the Federal Circuit and the PTAB have deemed similar withholding of material information to violate the duty of candor. *Therasense*, 649 F.3d at 1292

(“finding the intentional omission of declarant’s employment with inventor’s company rendered the affidavit false”); *Spectrum Solutions*, IPR2021-00860, Paper 109, *passim* (granting adverse judgment for withholding material information). Here, Nokia learned that its certification of service became false but still withholds this information.

The Board should not grant a Petition for *inter partes* review from a petitioner who withholds such basic information—service of the Petition—from the Board. Instead, the Board should dismiss the Petition for *inter partes* review from Nokia because it withheld, and continues to withhold, material information from the Board. In light of Nokia’s refusal to remedy the obvious inaccuracy of the certification, the Board should further forbid Nokia from resubmitting its Petition or any other Petition challenging the ’754 patent.

V. Alternatively, Board Should Reset the Filing Dates and All Deadlines

Patent Owners have given the Board two good reasons to dismiss the Petition. At a minimum, however, the Board should reset the filing date and all subsequent deadlines. Patent Owners did not receive Nokia’s mailing of the Petition and exhibits until July 20, 2023. The Notice of Filing Date Accorded sets the very next day—July 21—as the date for mandatory notices. Paper 3. It would be fundamentally unfair to require Patent Owners to make its final election for a law firm to generally appear just one day after receiving the Petition and exhibits. It is also fundamentally

unfair to have the Patent Owners prepare their preliminary response on a schedule shortened by 20 days unilaterally caused by Nokia's failure of service.

Nokia opposes even this request to vacate the filing date and extend the deadlines. Ex. 2002 at 1 ("Nokia disagrees with the assertion that the filing date and upcoming mandatory notice date are vacated").

VI. Conclusion

The Board should dismiss the Petition for lack of service with prejudice. Nokia's failure of service combined with its lack of candor merit more than simple dismissal.

Date: July 21, 2023

/ Qi Tong /

Qi Tong (Reg. No. 74,292)
RUSS AUGUST & KABAT
4925 Greenville Avenue, Suite 200
Dallas, TX 75206
(310) 826-7474

Attorney for Patent Owners

CERTIFICATION REGARDING WORD COUNT

Pursuant to 37 C.F.R. § 42.24(a)(1)(v) for motions, Patent Owner certifies that there are less than 15 pages in the paper excluding the portions exempted under 37 C.F.R. § 42.24.

Date: July 21, 2023

/ Qi Tong /

Qi Tong (Reg. No. 74,292)
RUSS AUGUST & KABAT
4925 Greenville Avenue, Suite 200
Dallas, TX 75206
(310) 826-7474

Attorney for Patent Owners

CERTIFICATE OF SERVICE (37 C.F.R. § 42.6 (e)(1))

The undersigned hereby certifies that the above document was served on July 21, 2023, by filing this document through the Patent Review E2E system as well as delivering a copy via electronic mail upon the following attorneys of record for the Petitioner:

M. Scott Stevens (Reg. No. 54,762)

scott.stevens@alston.com

Karlee N. Wroblewski (Reg. 76,805)

karlee.wroblewski@alston.com

Matthew M. Welch (Reg. No. 75,429)

matt.welch@alston.com

Mary I. Riolo (Pro hac vice)

mary.riolo@alston.com

Date: July 21, 2023

/ Qi Tong /

Qi Tong (Reg. No. 74,292)

RUSS AUGUST & KABAT

4925 Greenville Avenue, Suite 200

Dallas, TX 75206

(310) 826-7474

Attorney for Patent Owners

Exhibit 2001

Exhibit 2002

Subject: RE: IPR2023-00960 - Pat. 8,238,754 - Leave to File Motion Challenging Service

Date: Thursday, July 20, 2023 at 8:38:42 AM Central Daylight Time

From: Trials

To: ptong@raklaw.com

CC: Alex Soto, 'walt@nextgeninov8.com', scott.stevens@alston.com, Karlee.Wroblewski@alston.com, matt.welch@alston.com, dan.oconnor@alston.com, Trials

Priority: High

Counsel,

This case does not have a judge panel associated with it. Once a judge panel is assigned, your e-mail will be shared with the panel.

Regards,

Esther Goldschlager
Supervisory Paralegal Specialist
Patent Trial & Appeal Board
U.S. Patent & Trademark Office

From: ptong@raklaw.com <ptong@raklaw.com>

Sent: Thursday, July 20, 2023 9:25 AM

To: Trials <Trials@USPTO.GOV>

Cc: Alex Soto <alex@nextgeninov8.com>; 'walt@nextgeninov8.com' <walt@nextgeninov8.com>; scott.stevens@alston.com; Karlee.Wroblewski@alston.com; matt.welch@alston.com; dan.oconnor@alston.com

Subject: IPR2023-00960 - Pat. 8,238,754 - Leave to File Motion Challenging Service

Importance: High

CAUTION: This email has originated from a source outside of USPTO. **PLEASE CONSIDER THE SOURCE** before responding, clicking on links, or opening attachments.

To the Honorable Board,

On behalf of Patent Owners Alex and Walt Soto, Russ August & Kabat seek the Board's permission to make a special appearance to file a motion to vacate the filing date and all deadlines due to lack of service of the Petition and evidence in IPR2023-000960.

Qi (Peter) Tong

Reg. No. 74,292

Russ, August & Kabat

4925 Greenville Avenue, Suite 200 | Dallas, Texas 75206

Main +1 310 826 7474 | ptong@raklaw.com | www.raklaw.com

Subject: RE: No. IPR2023-00960; Nokia of America Corporation v. Soto, et al.
— Petition, POA, & Exhibits

Date: Wednesday, July 19, 2023 at 8:05:02 PM Central Daylight Time

From: Riolo, Mary

To: ptong@raklaw.com, Gunder, Stacy, ilee@raklaw.com,
bwang@raklaw.com, aweiss@raklaw.com, Kroeger, Paul,
rak_nextgen@raklaw.com

CC: Nokia22-309

Peter,

Nokia disagrees with the assertion that the filing date and upcoming mandatory notice date are vacated. The Petition and its related exhibits were sent to the correspondence address of record. 37 C.F.R. § 42.105(a). In addition, by way of additional service, RAK, as the Soto's counsel in the related litigation matter and in other IPR matters, has had notice of the filing of the IPR since at least 6/30/2023. Regardless, as a courtesy and to rectify UPS's indication that the correspondence address of record was incorrect, we have re-sent a full set of documents to the following addresses:

Alexander Soto
5348 Vegas Dr. #396
Las Vegas, NV 89108

Alexander Soto
5348 Vegas Dr.
Las Vegas, NV 89108

Alexander Soto
7673 Hazard Center Dr.
San Diego, CA 92108

Regards,

Mary I. Riolo
Associate
ALSTON & BIRD
1120 South Tryon Street
Suite 300
Charlotte, NC 28203-6818
704-996-8985 (C)
704-444-1284 (O)
mary.riolo@alston.com

From: ptong@raklaw.com <ptong@raklaw.com>

Sent: Wednesday, July 19, 2023 10:20

To: Riolo, Mary <Mary.Riolo@alston.com>; Gunder, Stacy <Stacy.Gunder@alston.com>;
ilee@raklaw.com; bwang@raklaw.com; aweiss@raklaw.com; Kroeger, Paul

<pkroeger@raklaw.com>; rak_nextgen@raklaw.com

Cc: Nokia22-309 <Nokia22-309@alston.com>

Subject: Re: No. IPR2023-00960; Nokia of America Corporation v. Soto, et al. — Petition, POA, & Exhibits

Importance: High

EXTERNAL SENDER – Proceed with caution

Hi Mary,

The Sotos have not yet received service of your Petition and Evidence, and RAK is not authorized to receive service of the Petition and Evidence on behalf of the Sotos under 37 CFR 42.105.

Please promptly notify the Board about the lack of service so that the filing date and upcoming mandatory notice date are vacated.

Peter Tong

Russ, August & Kabat

4925 Greenville Avenue, Suite 200 | Dallas, Texas 75206

Main +1 310 826 7474 | ptong@raklaw.com | www.raklaw.com

From: Riolo, Mary <Mary.Riolo@alston.com>

Date: Tuesday, July 18, 2023 at 7:07 PM

To: ptong@raklaw.com <ptong@raklaw.com>, Gunder, Stacy <Stacy.Gunder@alston.com>, ilee@raklaw.com <ilee@raklaw.com>, bwang@raklaw.com <bwang@raklaw.com>, aweiss@raklaw.com <aweiss@raklaw.com>, Kroeger, Paul <pkroeger@raklaw.com>, rak_nextgen@raklaw.com <rak_nextgen@raklaw.com>

Cc: Nokia22-309 <Nokia22-309@alston.com>

Subject: RE: No. IPR2023-00960; Nokia of America Corporation v. Soto, et al. — Petition, POA, & Exhibits

Peter,

We served the Soto Brothers via UPS Next Day Air at the address of record for the '754 Patent, as required under 37 C.F.R. § 42.105(a). We just learned that UPS returned the package indicating that the street number of the address of record was incorrect.

Simultaneous with our service via UPS, on June 30, 2023, we served notice on RAK as counsel of record in the litigation and counsel of record in the 3 co-pending IPRs for the 3 Related Patents. We also understand that the USPTO also notified the Soto Brothers of accordance of a filing date via email on July 10, 2023.

Please confirm that you received service on June 30, 2023 and that you agree that this electronic service affected service under 35 U.S.C. § 312(a)(c) and 37 C.F.R. § 42.105(a). If not, please provide a correct address at which the Soto Brothers can be served or alternatively if you will accept physical service of the documents via mail on their behalf.

Thank you,

Mary I. Riolo
Associate
ALSTON & BIRD
1120 South Tryon Street
Suite 300
Charlotte, NC 28203-6818
704-996-8985 (C)
704-444-1284 (O)
mary.riolo@alston.com

From: ptong@raklaw.com <ptong@raklaw.com>
Sent: Tuesday, July 18, 2023 11:32
To: Gunder, Stacy <Stacy.Gunder@alston.com>; ilee@raklaw.com; bwang@raklaw.com; aweiss@raklaw.com; Kroeger, Paul <pkroeger@raklaw.com>; rak_nextgen@raklaw.com
Cc: Nokia22-309 <Nokia22-309@alston.com>
Subject: Re: No. IPR2023-00960; Nokia of America Corporation v. Soto, et al. — Petition, POA, & Exhibits

EXTERNAL SENDER – Proceed with caution

Counsel for Nokia,

Could you please provide your proof of service of the petition and evidence on the Soto brothers?

Peter Tong
Russ, August & Kabat
4925 Greenville Avenue, Suite 200 | Dallas, Texas 75206
Main +1 310 826 7474 | ptong@raklaw.com | www.raklaw.com

From: Gunder, Stacy <Stacy.Gunder@alston.com>
Date: Friday, June 30, 2023 at 8:41 PM
To: ptong@raklaw.com <ptong@raklaw.com>, ilee@raklaw.com <ilee@raklaw.com>, bwang@raklaw.com <bwang@raklaw.com>, aweiss@raklaw.com <aweiss@raklaw.com>, Kroeger, Paul <pkroeger@raklaw.com>, rak_nextgen@raklaw.com <rak_nextgen@raklaw.com>
Cc: Nokia22-309 <Nokia22-309@alston.com>
Subject: No. IPR2023-00960; Nokia of America Corporation v. Soto, et al. — Petition, POA, & Exhibits

Counsel,

Nokia of America Corporation's Petition for *Inter Partes* Review, Power of Attorney, and Exhibits 1001 through 1034 were filed with the PTAB today in Case No. IPR2023-00960; all are available at the FTP below.

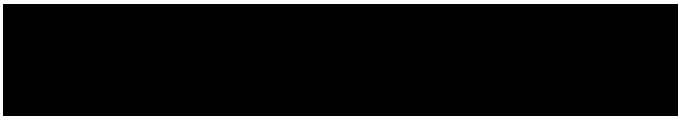
FTP SITE ACCESS INSTRUCTIONS

To access the site using a web browser, navigate to <https://transfer.alston.com> and then provide the credentials below when prompted, being careful to not copy any trailing spaces at the end of the password. If prompted, please do not save the FTP Username and Password in your browser as this will prevent you from seeing the files (they will appear to not be present even though they are).

To access the site using a file transfer program that supports SFTP or FTPS, configure your software client to connect to transfer.alston.com and authenticate using the credentials below. FileZilla is an example of a software client that can be used (and is already installed on all A&B computers). Detailed instructions for the use of FileZilla can be found here: <https://files.alston.com/files/docs/ITSEC-Filezilla-Quickconnect-Guide.pdf>

Transfers performed either way will be protected by encryption.

Username
Password:



Stacy Gunder
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Exhibit 2003

EXAMPLES & EXPLANATIONS

ASPEN PUBLISHERS

Civil Procedure

Sixth Edition

Joseph W. Glannon



Wolters Kluwer
Law & Business

The Bearer of Bad Tidings

Service of Process in the Federal Courts

INTRODUCTION

Some of the most profound protections of our constitutional system are astoundingly simple. “Due process of law” under the Fourteenth Amendment, for example, guarantees parties the basic right to notice of a court’s intention to adjudicate their rights and an opportunity for those parties to be heard before the court proceeds to do so. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank*, 339 U.S. 306, 311 (1950). In civil suits, this requirement is fulfilled through service of process.

The term *service of process* is often used to refer to the delivery to a party or witness of various court orders required by the relevant rules of law to be served upon him, including subpoenas, writs, and other orders that are entered in the course of litigation. However, in a stricter sense the term is used—as we will use it here—to refer to service of the initial notice to the defendant of the filing of a lawsuit against him. Service of this initial summons both notifies the defendant that he has been sued and informs him that the court intends to proceed to adjudicate his rights. The summons in the *Schulansky* case, for example (*infra* p. 640), specifically warns the defendants that they must respond to the plaintiff’s complaint, or judgment by default will be entered against them.