

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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DEXCOM, INC.,

Petitioner,

v.

ABBOTT DIABETES CARE INC.,

Patent Owner.

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IPR2023-01396

Patent 11,266,335 B2

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Before JOHN G. NEW, RYAN H. FLAX, and  
CYNTHIA M. HARDMAN, *Administrative Patent Judges*.

NEW, *Administrative Patent Judge*.

DECISION

Denying Patent Owner's Request on Rehearing of  
Decision Denying Institution  
*37 C.F.R. § 42.71(d)*

## I. INTRODUCTION

Petitioner Dexcom, Inc. (“Petitioner”) filed a Petition (Paper 3, the “Petition” or “Pet.”) seeking *inter partes* review of claims 1–4, 8, 9, and 11–27 of U.S. Patent 11,266,335 B2 (Ex. 1001, the “’335 patent”). Patent Owner Abbott Diabetes Care Inc. (“Patent Owner”) timely filed a Preliminary Response. Paper 7 (the “Preliminary Response” or “Prelim. Resp.”).

On April 16, 2024, we entered a Decision Denying Institution of *Inter Partes* Review (Paper 13, the “Decision” or “Dec.”) for all of the challenged claims of the ’335 patent. On May 16, 2024, Patent Owner timely filed a Request for Rehearing (the “Request”) pursuant to 37 C.F.R. § 42.71(d)(2).

Under our Rule 42.71(d), a party dissatisfied with a decision may file a single request for rehearing without prior authorization from the Board. 37 C.F.R. § 42.71(d). The burden of showing a decision should be modified lies with the party challenging the decision. *Id.* 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, a reply, or a sur-reply. *Id.*

For the reasons set forth below, we deny Petitioner’s Request.

## II. ANALYSIS

In its Request, Petitioner presents two general sets of arguments: (1) that the Board misapprehended the Petition’s use of Turner’s teachings in the combinations; and (2) the Board erred in our apparent claim constructions, resulting in further overlooking the significance of Turner.

Request 1, 8. Both of these arguments are thus directed only to our analysis with respect to Ground 2 of the Petition, the sole Ground in which Turner is a cited prior art reference. *See* Pet. 3. We address each of Petitioner’s arguments in turn below.

*A. The Board did not misapprehend the Petition’s use of Turner’s teachings*

Petitioner contends that the Board misapprehended the proposed combination as requiring either (1) “substituting multiple recesses [for a single annular ring] in [Raymond’s] base 122 to engage retaining arms 1226” or (2) “alter[ing] the location of Turner’s rotation-resisting recesses 77 from the upper surface of body 20 to the periphery of body 20.” Request 1–2 (quoting Dec. 31, 49–50). According to Petitioner, the Board’s analysis “over-complicated” the combination to require modifying Raymond’s base or moving Turner’s recesses. *Id.* at 2. Petitioner asserts that the obvious choice to both secure a housing to the Raymond inserter and provide the anti-rotation benefit taught by Turner would have been two spaced-apart recesses on the sidewall of the housing, one to engage each of the two arms taught by Raymond. *Id.* (citing Pet. 30–32, 48).

Petitioner contends that it did not rely on bodily incorporation of Turner’s recesses on the curved upper surface of Stafford’s on-body unit (“OBU”) housing, but, rather, Turner’s multiple recesses would have been positioned on a periphery of Stafford’s housing so as to engage or mate with each of the base-retaining feet on each of Raymond’s two base-retaining arms. *Id.* (citing Pet. 25, 30–31, 33, 43, 48; Ex. 1003 ¶ 60).

Petitioner argues that Turner would have supplied motivation to use two recesses to resist rotation. Request 3. According to Petitioner, a person of ordinary skill in the art “would have been motivated to implement similar plural rotation-restricting recesses on the periphery of the housing ... to prevent rotation between the housing as taught by Stafford and the inserter as taught by Raymond.” *Id.* (citing Pet. 32; Ex. 1003 ¶ 86). Petitioner notes that neither Patent Owner, in its Preliminary Response, nor the Board disputes that Turner provided a motivation to use the design choice of multiple recesses to restrict rotation. *Id.* at 4 (citing Prelim. Resp. 13; Dec. 39).

Petitioner next argues that using two recesses on the sidewall to secure a Stafford-like housing to a Raymond-like inserter was an obvious design choice, which added an anti-rotation benefit. Request 4. Petitioner argues that an OBU housing like that disclosed by Stafford would have required adding an engagement feature to secure it to an inserter like the one disclosed in Raymond. *Id.* To do that, argues Petitioner, only two design choices are supported by the evidence of record: either a single annular recess/ring (as taught by Stafford) or multiple recesses. *Id.* Petitioner maintains that only the latter choice provides Turner’s anti-rotation benefit. *Id.*

Petitioner suggests that the Board appeared to adopt the position that adding multiple recesses rather than a single annular recess/ring would have allegedly “added needless complexity to the design, without producing a substantial benefit or improvement.” Request 5 (citing Dec. 30–31, 46 (applying Ground 1 reasoning to Ground 2)). Petitioner contends that, in

rejecting the two-recesses design choice on this basis, the Board misapprehended the combination and overlooked the benefits of such recesses, as taught by Turner. *Id.* Petitioner further notes that our reviewing court has repeatedly held that an obvious design choice does not need to be an “improvement.” Request 5. Rather, argues Petitioner, the design choice only needs to be a “suitable option” to be obvious. *Id.*

Petitioner argues further that the Board apparently rejected Turner’s recesses as a suitable design choice because “Turner’s rotation-restricting recesses 77 are not located on the peripheral edge of its body 20, such that they can be engaged to hold the on-body housing properly positioned within the device. Instead, they are disclosed as being located upon the upper surface of body 20.” Request 6 (quoting Dec. 48). Petitioner contends that the combination proposed in Ground 2 used instead the idea of multiple recesses, as taught by Turner, but positioned those recesses to engage Raymond’s base-retaining arms with base-retaining feet on a periphery, where Raymond’s base-retaining arms and feet were already designed to engage a peripheral edge or sidewall of the OBU. *Id.* (citing Ex. 1010, Fig. 29; Ex. 1003 ¶¶ 60, 74–75, 77–78, 86, 109, 129; Pet. 25, 30–31, 33, 43, 48). Petitioner contends that this combination in no way required adding Turner’s recesses to an upper surface where no securing or engaging feature is present in Raymond or Stafford. *Id.*

Petitioner asserts that it sufficiently showed that the proposed combination is a “suitable” option. Request 7. This is especially so, argues Petitioner, where only two design choices were supported by the evidence of record, either a single annular recess/ring or multiple recesses. *Id.* In

addition, argues Petitioner, the use of two recesses would have provided an anti-rotation benefit. *Id.* (citing Pet., 25, 31–32, 35; Dec., 37–40).

Petitioner’s arguments now do not persuade us that we overlooked or misapprehended Petitioner’s arguments in the Petition.

In analyzing Ground 1 of the Petition<sup>1</sup>, we found that the relevant cited prior art reference, Raymond, teaches only a single annular ring on the OBU, which:

[C]omprises, at most, a single recess encircling base 122 beneath the annular ring at the periphery of the base. As such, it neither teaches nor suggests “a plurality of recesses disposed on a periphery of the on-body electronics unit housing, wherein the plurality of recesses comprises a first recess in a spaced relation to a second recess,” as required by challenged claim 1 of the ’335 patent.

Dec. 30. We further found that, of the additional prior art cited by the Petitioner<sup>2</sup>, none teaches or suggests a “‘plurality of recesses disposed on a periphery of the on body electronics housing unit,’ as recited in challenged claim 1, but rather disclosed a singular, circular recess between hub 18 and housing20.” *Id.* at 34.

The references cited in Ground 1 thus do not teach or suggest a plurality of recesses as an alternative to the annular ring of Raymond. Therefore, Petitioner failed to present any evidence of record of “a finite number of identified, predictable solutions” to a specific problem that would

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<sup>1</sup> Having identified that Petitioner’s current arguments apply to Ground 2 only, we discuss Ground 1 because some of the relevant findings also apply to Ground 2.

<sup>2</sup> See Dec. 31–35 (reviewing Exhibits 1018, 1040, 1042, and 1057).

present “a simple design choice” for a skilled artisan. *CRFD Res., Inc. v. Matal*, 876 F.3d 1330, 1347 (Fed. Cir. 2017).

Petitioner now argues, with respect to Ground 2 of the Petition, that Turner’s teaching of rotation-resistant recesses 77, located on the middle of the upper surface of the OBU, would have presented the skilled artisan with an obvious design choice between the rotation-resistant recesses and Raymond’s annular ring, with the added advantage of imparting rotation resistance. Request 8 (citing *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007)). Petitioner contends now, without evidentiary support, that it would have been obvious to those of skill in the art to relocate Turner’s rotation-resistant recesses to the sidewalls of the OBU, as a matter of design choice. *Id.* at 6.

The record supports that Turner teaches that its recesses 77 receive rotation-restricting protrusions 71, which “extend[] into each recess 77 such that the recess side walls interfere with the protrusions to prevent rotation of the insertion device relative to body 20.” Ex. 1011 ¶ 69. Further, Turner teaches this assembly as an advantage in that it prevents rotation of body 20. *Id.*

However, Petitioner first raises its “obvious design choice” argument with respect to Turner and Ground 2 in its Request, now; *this* theory of obviousness is not found in its Petition.<sup>3</sup> Petitioner cannot raise an argument

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<sup>3</sup> The Petition did make a design choice argument with respect to the teachings of Raymond under Ground 1, contending that “it would have been an obvious design choice to implement two spaced-apart plural recesses on the housing—one to engage the protrusions on each of the two arms taught by Raymond.” Pet. 38. However, as we explained above,

in a Request for Rehearing if that argument was not first presented in the Petition. The Board cannot overlook or misapprehend arguments that were not previously made by Petitioner. 37 C.F.R. § 42.71(d).

Furthermore, Petitioner’s arguments fail on the merits. As we stated in the Decision:

We further conclude that Petitioner provides no persuasive reason why a person of ordinary skill in the art would have been motivated to alter the location of Turner’s rotation-resisting recesses 77 from the upper surface of body 20 to the periphery of body 20, because Turner and the ’335 patent teach that their respective recesses serve different functions.

Dec. 49–50. In other words, we found that, whereas Turner expressly teaches that its rotation-resisting recesses 77 and the corresponding rotation-resistant protrusions 71 “prevent rotation of the insertion device relative to body 20,” the ’335 patent discloses that its recesses 3766 are configured to engage with engagement bosses 3764 of gripping arms 3762 to “maintain[] the proper height location of the on body housing 322” within the interior of its insertion device. Dec. 50–51 (quoting Ex. 1011 ¶ 69; Ex. 1001, col. 44, ll. 13–14). Consequently, we concluded that, because Turner’s and the ’335 patent’s respective recesses serve different functions, Petitioner needed to provide a reason, supported by evidence of record, why a person of ordinary skill in the art would have been motivated to alter the location of Turner’s

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Petitioner adduced no prior art teaching or evidence of record of “spaced-apart plural recesses on the housing” that would have been known to those of ordinary skill in the art and would have formed the basis of a design choice for a skilled artisan. *KSR*, 550 U.S. at 421. That is not the argument Petitioner makes now with respect to Turner in its Request, and which we address here.

recesses to serve a different function. We concluded that Petitioner had failed to meet this burden. *See WMS Gaming, Inc. v. Int'l Game Tech.*, 184 F.3d 1339, 1355 (Fed. Cir. 1999) (holding that “[w]hen an obviousness determination relies on the combination of two or more references, there must be some suggestion or motivation to combine the references”).

Petitioner’s reliance on *KSR* in its design choice argument is misplaced. The decision in *KSR* holds that:

*When there is a design need or market pressure to solve a problem and there are a finite number of identified, predictable solutions, a person of ordinary skill has good reason to pursue the known options within his or her technical grasp. If this leads to the anticipated success, it is likely the product not of innovation but of ordinary skill and common sense. In that instance the fact that a combination was obvious to try might show that it was obvious under § 103.*

*KSR*, 550 U.S. at 421 (emphasis added).

Our reviewing court has repeatedly held that when alternative methods of solving *the same problem* are known to those of skill in the art, substitution of one method for the other can constitute an obvious design choice. *See Uber Techs., Inc. v. XOne*, 957 F.3d 1334, 1340 (Fed. Cir. 2020); *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1238 (Fed. Cir. 2010) (holding that a motivation to combine and a reasonable expectation of success exist when “it is simply a matter of common sense” to combine known elements of the prior art to solve a known problem).

As we explained in the Decision, countering the rotation tendencies of the OBU and “maintain[ing] the proper height location of the on body housing 322” within the interior of the insertion device are different

problems that are addressed differently by the disclosures of Turner and the '335 patent. Dec. 49–51. Similarly, Raymond teaches that its:

[A]rms **1226** can include base-retaining feet **1227**, to clamp, grasp, or otherwise engage the base **122** and secure it to the shuttle **1116** ... [and] can include sleeve-engagement surfaces **1233** positioned for engagement by the cam surface **1180** of the sleeve **1106** to urge the base-retaining feet **1227** toward the base **122** to impede unintentional disengagement of the infusion device **102** from the shuttle **1116**.

Ex. 1010 ¶ 123. In other words, Raymond teaches that its base-retaining feet **1227** engage with the OBU to maintain its position in the sleeve of the device and prevent unintentional disengagement.

Petitioner does not provide any evidence of record that a person of skill in the art would have recognized that the structures taught by Turner for preventing OBU rotation and those of Raymond and the '335 patent for holding the OBU in its proper location within the insertion device, and preventing disengagement from the device, are equivalent methods for solving a common problem. *See Uber Techs.*, 957 F.3d at 1340 (holding that a person of ordinary skill in the art, faced with two predictable choices for when to perform the *same specific task*, would have an obvious design choice to make). Consequently, Petitioner's arguments in this respect are both untimely and fail on the merits.

*B. The Board did not err in its apparent claim constructions*

Petitioner next argues that the Board construed the term “periphery” based in part on a preliminary opinion from the European Patent Office (“EPO”) that rejected Petitioner's arguments directed to different claim

language: “[a] plurality of recesses circumferentially disposed thereon.” Request 9 (citing Dec. 35–36). According to Petitioner, the EPO’s decision was not final, and the Board should take judicial notice that the EPO ultimately revoked the patent at issue in the EPO’s preliminary opinion. *Id.*

Petitioner asserts that the Board’s apparent or implied construction required that the claimed “recesses disposed on a periphery” be recesses “on the peripheral edge” of a housing. Request 10 (quoting Dec. 48–49). Petitioner argues that the Board provided no express construction of the term “periphery” and engaged in no claim construction analysis to support its conclusion, instead citing to Figure 17 of the ’335 Specification and a preferred embodiment in which the recesses are on the “peripheral edge,” while also asserting that the cited embodiment “does not necessarily limit” the claims. *Id.* (quoting Dec. 46–47).

Petitioner further contends that the Board overlooked evidence of record that establishes that its implied claim construction excluding the location of Turner’s recesses as not being “on a periphery” was incorrect, an argument that Petitioner allegedly would have more fully developed at trial. Request 10.

Petitioner asserts that the ’335 patent does not define “periphery,” or use that term outside of the language of claim 1. Request 11 (citing generally Ex. 1001). Petitioner contends that the Board overlooked and accorded no weight to claim 12 of the ’335 patent, which recites “wherein each recess of the plurality of recesses is disposed on a side wall.” *Id.* (quoting Ex. 1001, col. 49, ll. 61–63). Petitioner argues that, although the ’335 patent discloses only embodiments with recesses in the peripheral edge,

nothing expressly limits “on a periphery” in claim 1 to being “on a side wall” or “on the peripheral edge.” *Id.*

Petitioner also argues that there is nothing in the ’335 patent foreclosing the location of Turner’s disclosed recesses from being “on a periphery,” as claimed. Request 11. Patent Owner contends that nothing in the record and no ordinary meaning of “periphery” limits it to the outermost circumferential edge, pointing to a dictionary definition of “periphery” as meaning “the external boundary or surface of a body,” or “the outward bounds of something as distinguished from its internal regions or center.” *Id.* (quoting “Periphery,” Merriam-Webster Dictionary, *available at*: [www.merriam-webster.com/dictionary/periphery](http://www.merriam-webster.com/dictionary/periphery) (last visited July 30, 2024)).

Furthermore, argues Petitioner, nothing in the art in question so limits the meaning of “periphery.” Request 12. Petitioner notes that its declarant, Dr. Fletcher, opined that, from the point of view of a person of ordinary skill in the art, the recesses in Turner are in fact “disposed on the periphery.” *Id.* (citing Ex. 1003 ¶49). Petitioner notes that Turner contrasts an “outer perimeter” with other perimeters, such as the “outer perimeter 37 of body 20” at the bottom compared to the smaller “perimeter 39 at top 12.” *Id.* (citing Ex. 1011 ¶¶ 71, 104, Figs. 3, 11). Petitioner contends that any number of additional planes between them could be drawn, where each would contain a different perimeter of the Turner embodiment, including planes containing the perimeters in which Turner’s recesses are formed. *Id.*

Petitioner contends now that the Board’s “overly narrow” construction of “periphery” appears to have caused the Board to overlook the teachings of

Turner and influenced the Board’s motivation-to-combine analysis. Request 13 (citing Dec. 49–50). Petitioner asserts now that the Board should have made explicit its implicit construction of the claim term “on a periphery,” excludes a recess on an upper surface (as in Turner) if it is not a recess on the outermost edge of the housing, as depicted, for example, in Figure 17 of the ’335 patent. *Id.*

Finally, Petitioner argues that the Board erred in reading into the claims a “securing” function, further causing the Board to overlook Turner. Request 13. According to Petitioner, the Board agreed with Patent Owner that Turner teaches a plurality of recesses that detachably engage corresponding protrusions, and that Turner’s recesses detachably engage an insertion device. *Id.* at 14 (citing Dec. 37–40; Prelim. Resp. 11–14). However, argues Petitioner, Patent Owner’s argument emphasized not just that recesses configured to secure or hold an OBU to an inserter would have been sufficient to satisfy the claims, but that configuring the recesses to perform this securing function was strictly necessary to satisfy the claims. *Id.* (citing Prelim. Resp. 11–14). Petitioner notes that, in our analysis, we found that Turner does not teach or suggest the claimed plurality of recesses in part because Turner’s recesses on top cannot “be engaged to hold the on-body housing properly positioned within the device.” *Id.* at 14 (citing Dec. 48–49). Petitioner argues, therefore, that the Board erred in reading a “securing” purpose of the recesses into the claims where no such purpose or function is recited. *Id.* at 15.

We do not find Petitioner’s arguments persuasive. As an initial matter, we note that Dr. Fletcher stated that “[e]ach protrusion [71 of

Turner's Figures 2A and 4] is configured to engage a corresponding one of a plurality of rotation-restricting recesses disposed on the periphery of the fluid delivery device's body" (Ex. 1003 ¶ 47). Petitioner cites to this unsupported conclusion by its witness in its Petition (Pet. 19), but Dr. Fletcher did not support his bare assertion that the recesses were located "on the periphery" with any evidence of record that a person of ordinary skill in the art would recognize it as such. *See* 37 C.F.R. § 42.65(a) ("Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight."). Furthermore, we reject Petitioner's contention that we "accepted the requirement" that the recesses "'secure' the OBU to the inserter." Nowhere in the Decision, and particularly not in the portion of the Decision cited by Petitioner (Dec. 48–49), do we make any such construction, nor does our Decision expressly or implicitly require any such "securing" function from any of the challenged claims of the '335 patent. Rather, the cited portion of the analysis concluded that:

Petitioner provides no persuasive reason why a person of ordinary skill in the art would have been motivated to alter the location of Turner's rotation-resisting recesses 77 from the upper surface of body 20 to the periphery of body 20, because Turner and the '335 patent teach that their respective recesses serve different functions.

Dec. 49. This portion of the analysis thus looked to whether a skilled artisan would have been motivated to combine the teachings of Stafford, Raymond, and Turner, based upon the different functions of the recesses, and does not read additional limitations into the claim, as Petitioner contends.

Nor do we accept Petitioner’s argument that we *relied* upon the EPO’s decision in our analysis of Ground 2. Although we quoted from the EPO Decision in summarizing Patent Owner’s argument (Dec. 45), we did not rely upon, or defer to, the EPO’s Decision in any part of the reasoning supporting our analysis. *See* Dec. 46–51.

Petitioner offered no claim construction for the claim term “periphery” in its Petition, other than “the ordinary meaning that the terms would have to a POSITA at the time of the invention, in view of the specification and file history.” *See* Pet. 18 (citing 83 Fed. Reg. 51340; *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc)). Patent Owner agreed, and we applied that standard in the Decision. *See* Prelim. Resp. 32; Dec. 11–12.

In its Reply, Petitioner now proposes a new, specific construction of the claim term “periphery,” equating it with Turner’s “perimeter” to include rotation-resisting recesses 77 located on the upper surface of the body between the center and the edge. To this end, Petitioner adopts a selectively edited (non-technical) dictionary definition of the term “periphery.” The complete Merriam-Webster dictionary definition of periphery reads:

- 1** : the perimeter of a circle or other closed curve also : the perimeter of a polygon
- 2** : the external boundary or surface of a body
- 3** **a** : the outward bounds of something as distinguished from its internal regions or center : CONFINES  
**b** : an area lying beyond the strict limits of a thing.

“Periphery,” Merriam-Webster Dictionary, *available at*: [www.merriam-webster.com/dictionary/periphery](http://www.merriam-webster.com/dictionary/periphery) (last visited July 29, 2024).

In each of the '335 Specification, Stafford, Raymond, and Turner, the OBU is universally depicted as having a circular perimeter oriented around a longitudinal axis, and possessing either a cylindrical shape ('335 patent, Stafford, Raymond) or a roughly domed shape, with a circular, circumferential collar. *See, e.g.*, Ex. 1001, Figs. 8, 17, 52, 54; Ex. 1009, Figs 3A–C, 4A; Ex. 1010, Figs. 14–16; Ex. 1011, Figs. 2A–B, 5G, 7A–B, 9, 11, 13A–B, 14, 15, 19, 20, 21, 25, 29, 30, 37, 38. Moreover, in each description of the location of recesses 3766 in the '335 Specification, the recesses are described as being located “on the side walls” of the OBU. *See* Ex. 1001, col. 44, ll. 8–12; col. 45, ll. 61–64.

Given (1) the circular perimeter of all of these embodiments in the disclosures of the '335 Specification; (2) the teachings and embodiments of Petitioner's cited references; (3) the dictionary definition of “periphery” as being “the perimeter of a circle or other closed curve”; and (4) “the ordinary meaning that the terms would have had to a skilled artisan at the time of the invention, in view of the '335 Specification and file history” (*Phillips*, 415 F.3d at 1312–13), we concluded that a person of ordinary skill in the art would have understood that the “plurality of recesses disposed on a periphery of the on body electronics unit housing” would be located “on the circumference of the on-body housing.” *See* Dec. 48; *see also* Ex. 1001, col. 44, ll. 9–14 (stating that “gripping arms 3762 [of medical device carrier 3730] are provided with engagement boss 3764 which are configured to engage with corresponding recesses 3766 *provided on the side walls of the on body housing 322*” (emphasis added)). Consequently, we are not

persuaded that the Board overlooked or misapprehended any of Petitioner's arguments in this respect.

### III. CONCLUSION

For the reasons we have explained, we conclude that Petitioner has not persuasively demonstrated that the Board overlooked or misapprehended any of Petitioner's arguments presented in its Petition. We therefore deny Petitioner its requested relief.

### IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED, that relief sought by Petitioner in its Request for Rehearing is denied.

IPR2023-01396  
Patent 11,266,335 B2

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