UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TIKTOK INC.
Petitioner,

v.

CELLSPIN SOFT, INC.,
Patent Owner

IPR2024-00757
Patent 8,756,336

PETITIONER'S OPPOSITION TO
PATENT OWNER'S MOTION TO TERMINATE

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I. INTRODUCTION

Patent Owner ("CellSpin") sued various TikTok and Bytedance entities for patent infringement, asserting, among other allegations, that the TikTok app infringes seven CellSpin patents. TikTok Inc. is the provider of the TikTok app in the United States, so TikTok Inc. responded to CellSpin's infringement charges by filing petitions for *inter partes* review ("IPR"). The Board correctly determined that TikTok Inc. is likely to succeed on the merits and instituted review of all asserted claims of all seven patents.

After the Board instituted review of CellSpin's patents, and after CellSpin's deadline to raise new arguments passed, CellSpin is now resorting to a new but flawed theory that is incorrect on the facts and the law, and underscores the lack of merit permeating not only their papers in these proceedings, but also their papers in the underlying parallel district court case. CellSpin is now asserting that these proceedings should be terminated because the Chinese Communist Party ("CCP") is allegedly a "real party in interest" ("RPI") to the proceedings and was not identified as an RPI in the Petitions. There is no basis for such an allegation.

Moreover, the Board need not even entertain CellSpin's frivolous motion. As discussed in detail below, CellSpin's motion should be denied as untimely and as waived. CellSpin was admonished to raise all arguments in response to the Petition in its Patent Owner Response (POR), and any arguments not raised may be deemed

waived. Paper 9, 10. CellSpin filed its POR on January 3, 2025, but made no mention of this alleged RPI issue—even though it was well aware at that time of the alleged "facts" on which its motion is based. Accordingly, CellSpin should be found to have waived the issue.

Moreover, even if there were an unnamed real party-in-interest (RPI) (there is not), then the remedy for failing to identify an RPI is not termination. Rather, the remedy is to identify the missing RPI and assess whether a time bar applies to that RPI. But here, CellSpin admits that there would be no time bar issue even if the CCP were an RPI. Motion, 10; Transcript of March 18, 2025 Call with Board, EX2023, 25:3-25. Further, *Return Mail Inc. v. United States Postal Service*, 587 U.S. 618 (2019) does not provide the remedy that CellSpin seeks because the "sovereign" in *Return Mail* was the U.S. Government, and the discussion in that case does not apply to any entity other than the U.S. Government or its proxies. Thus, CellSpin's motion must be denied. CellSpin is incorrect on the facts (the CCP is not an RPI) and is incorrect on the law (even if Petitioner failed to identify an RPI, termination is not the available remedy).

II. CELLSPIN FAILS TO MEET ITS BURDEN OF SHOWING THAT AN RPI HAS NOT BEEN NAMED

A. Summary of the Law

As a preliminary matter, CellSpin has the burden of production in establishing that an RPI has not been named. *Hughes Network Sys. v. Calif. Inst. of Tech.*, IPR2015-00059, Paper 42 at 10-11 (PTAB April 21, 2016); *CaptionCall, L.L.C. v. Ultratec, Inc.*, IPR2015-00636, Paper 98 at 4 (PTAB Sept. 8, 2016). As discussed herein, CellSpin has not met its burden.

Next, the Consolidated Trial Practice Guide explains that, "at a general level, the 'real party-in-interest' is the party that desires review of the patent. Thus, the 'real party-in-interest' may be the petitioner itself, and/or it may be the party or parties at whose behest the petition has been filed." Consolidated Trial Practice Guide, 14 (Nov. 2019) ("CTPG"). The Federal Circuit in *Applications in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336 (Fed. Cir. 2018) ("*AIT*") held that "the focus of the real-party-in-interest inquiry is on the patentability of the claims challenged in the IPR petition, bearing in mind who will benefit from having those claims canceled or invalidated" (*id.* at 1348), and that, ultimately, the determination of who is an RPI should consider "who, from a 'practical and equitable' standpoint, will benefit from the redress" that the IPR might provide (*id.* at 1349). The Federal Circuit directed the Board to the CTPG for guidance on "the 'fact-dependent' nature

of this inquiry, explaining that the two questions lying at its heart are whether a non-party 'desires review of the patent' and whether a petition has been filed at a nonparty's 'behest.'" *Id*. at 1351 (citing Trial Practice Guide, 77 Fed. Reg. at 48,759). Accordingly, the "key to a real party-in-interest inquiry is the relationship between the potential unnamed real party-in-interest and the proceeding, not the relationship between parties." *Hughes Network* at 11; *CaptionCall* at 6.

The Board in *Ventex Co., Ltd. v. Columbia Sportswear N. Am., Inc*., IPR2017-00651, Paper 152 (PTAB Jan. 2019) (precedential) also recognized that "we must be cautious not to 'overextend[]' the reasoning set forth in AIT to any situation where 'a party benefits generally from the filing of the Petition and also has a relationship with the Petitioner.'" *Id*. at 10 (*citing Unified Patents, Inc. v. Realtime Adaptive Streaming, LLC*, IPR2018-00883, Paper 36 at 14-15 (PTAB Oct. 2018)). On remand from *AIT*, the Board in *RPX Corp. v. Applications in Internet Time, LLC*, IPR2015-01750, Paper 128 (PTAB Oct. 2020) (precedential) explained that "the RPI and privity requirements were designed to avoid harassment and preclude parties from getting 'two bites at the apple' by allowing such parties to avoid either the estoppel provision or the time-bar." *Id*. at 9.

B. The CCP Would Not Benefit from The Invalidation of CellSpin's Patent in IPR

TikTok Inc. has a singular concern in invalidating the CellSpin patent at issue: CellSpin has accused the TikTok app of infringing its patent, and TikTok Inc. seeks a decision by the Board that the CellSpin patent is unpatentable and should not have issued. Thus, TikTok Inc. filed the IPR petition in response to CellSpin's accusations against its TikTok app.

The RPI inquiry asks who "desires review of the patent." CTPG, 14. TikTok Inc. desires review of the patent. The CCP does not desire review of CellSpin's patents. There is no assertion that the CCP will be or has been threatened with an infringement suit by CellSpin. *Cf. RPX* at 22, 27; *see Unified* at 16. Indeed, CellSpin admitted that the CCP is not a party in the related litigation. EX2023, 20:11-20, 25:21-25. There is no assertion that the CCP has attempted to challenge the patent in a prior AIA proceeding, has any interest in invalidating CellSpin patents, or would benefit from invalidating CellSpin patents. *Cf. RPX* at 23-24, 27; *see Unified* at 17. Nor would the record support any such assertions.

Additionally, CellSpin does not allege (and the record does not support such an allegation) that the CCP would benefit from having CellSpin's patent invalidated in the IPR proceeding. *See RPX* at 28. Further, CellSpin's assertion that "the CCP may use IPRs, such as the present IPR, to invalidate U.S. patents as part of a broader

state-sponsored industrial policy" is pure baseless speculation. Motion, 7 (citing EX2026, 54-55). RPI decisions are not made based on attorney argument concerning what third party entities might conceivably choose to do.

In sum, there is no relationship between the CCP and this IPR such that the CCP would "benefit from the redress" that the IPR might provide. Nor is there a danger of "two bites at the apple" that the statutes were meant to prevent via the § 315(e) estoppel provisions and the § 315(b) time bar. *RPX* at 9, 20. Indeed, the Board has found that the CCP is not an RPI under similar allegations. *SZ DJI Technology, Co., Ltd. v. Dareltech*, LLC, IPR2019-00717, Paper 8 at 3-4 (PTAB Aug. 2019).

At its core, CellSpin's motion resorts to baseless attacks. CellSpin alleges that the failure to name the CCP was "in bad faith" and "gamesmanship" without first explaining why the CCP would be an RPI in the first place. Motion at 9. There is no intentional concealment or bad faith here, and there has been no attempt to circumvent estoppel rules. TikTok Inc. has named all RPI to this proceeding, and none are missing. *Id.* (citing EX2027, 15). Thus, there is no basis for CellSpin's motion.

C. CellSpin's Various Documents Do Not Reveal a Missing RPI

CellSpin cites to various unverified documents (*e.g.*, EX2024, EX2025), but none even suggest that an RPI is missing, let alone that the CCP exercises "pervasive

control" over TikTok Inc.'s operations or will benefit from the invalidation of CellSpin's patent in the instant IPR proceeding, such that the CCP would need to be named an RPI here. In fact, the CCP does not control TikTok Inc., and there is no "golden share" in TikTok Inc. or its direct or indirect parents—and CellSpin does not assert otherwise (*see* Motion at 3). Nonetheless, even hypothesizing for the sake of argument that, in CellSpin's words, the Chinese government can allegedly "appoint board members and veto certain business decisions" (Motion at 3) of certain Bytedance entities, such allegations (which are not true) do not amount to "pervasive control" over TikTok Inc. by the Chinese government or the CCP, or meet the threshold for being an RPI.[1]

III. FAILURE TO NAME AN RPI DOES NOT RESULT IN TERMINATION

CellSpin admits that the addition of the CCP as an RPI would not create a time bar or estoppel. Motion at 10. Instead, as a basis for termination, CellSpin asserts—without citation or support—that should an RPI be added, the "filing date of the present Petition [must] be changed." Motion at 10. This is incorrect.

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[1] CellSpin cites to *TikTok Inc. v. Garland* cases. Neither case found that the CCP had control over TikTok Inc.'s operations or directs the filing of IPR petitions.

CellSpin's motion is flawed from the outset because any failure to name all RPI is curable. The Federal Circuit and numerous Board decisions have held that the RPI requirement is not jurisdictional and may be corrected. *Applications in Internet Time*, 897 F.3d at 1364 (Reyna, J., concurring) ("Section 312(a)(2) is akin to a pleading requirement that can be corrected."). There is no need to change the Petition's filing date and terminate the proceeding. *See ZTE (USA) Inc. v. Fundamental Innovation Systems International LLC*, IPR2018-00425, Paper 34 at 5-6 (PTAB Feb. 2019).

35 U.S.C. § 312 states that a "petition may be considered only if ... the petition identifies all real parties in interest." The purpose behind the RPI rules is two-fold. First, they allow the assessment of whether a time bar applies to the petition. Second, they identify those who will be subject to estoppel following a final written decision. For example, a petition may not be instituted if "the petitioner **or real party in interest** filed a civil action challenging the validity of a claim of the patent,"[2] 35 U.S.C. § 315(a)(1), or if "the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, **real party in interest**, or privy of the

[2] Emphasis added throughout unless otherwise stated.

petitioner is served with a complaint alleging infringement of the patent," 35 U.S.C. § 315(b).

Should the Board determine that a new RPI has been identified, then the Board must evaluate whether the RPI filed an invalidity declaratory judgment suit or was sued for patent infringement such that the petition is time barred under 35 U.S.C. § 315. *Worlds Inc. v. Bungie, Inc.*, 903 F.3d 1237, 1246 (Fed. Cir. 2018). If an RPI is found missing from the Petition, the solution is simple—the RPI is identified and any potential bars are examined based on the identification. Thus, even if, *arguendo*, TikTok Inc. failed to identify an RPI (TikTok Inc. in fact identified all RPI), that failure would be readily curable and not grounds for termination.

"[T]he Board generally accepts an IPR petitioner's identification of the real parties in interest at the time the petition is filed." *Worlds*, 903 F.3d at 1241. Should the patent owner bring forth "some evidence" suggesting an additional entity should be identified as an RPI, then the Board would determine whether the additional entity should be named as an RPI but only terminate if a time bar or estoppel applied (and no time bar or estoppel applies here). If no time bar or estoppel applies, Petitioner would have one month to correct the deficiency. 37 C.F.R. § 42.106(b); *First Data Corp. v. Cardsoft, LLC*, IPR2014-00715, Paper 9 at 10 (PTAB Oct. 2014). CellSpin cites to 37 C.F.R. § 42.106 but fails to quote the rule, acknowledge that it provides a one-month cure provision, or offer any explanation as to why an "incomplete

petition" would result in termination given the express cure provision in the rule. Motion at 8.

Here, the allegedly missing RPI was not served with a complaint for patent infringement and did not file a lawsuit seeking invalidation of any CellSpin patent. Accordingly, even assuming, *arguendo*, that the CCP is an RPI (it is not), that fact would have no impact on this proceeding, given that CellSpin concedes there is no time bar.

CellSpin further acknowledges that its request for termination is contrary to the holdings in relevant Board decisions. Motion, 8 (*citing Elekta, Inc. v. Varian Med. Sys., Inc.*, IPR2015-01401, Paper 19 at 9 (PTAB Dec. 2015); *Aerospace Commc'ns Holdings Co., Ltd. v. The Armor All/Step Prods. Co*., IPR2016-00441, Paper 12 at 9 (PTAB June 2016); *SharkNinja Operating LLC v. iRobot Corp*., IPR2020-00734, Paper 11 at 18 (PTAB Oct. 2020) (precedential)). CellSpin also cites to the *Proppant Express Investments* Board decision, but that precedential opinion confirms that the RPI identification requirements are "not jurisdictional" and a failure to name an RPI may "be rectified." *Proppant Express Investments, LLC v. Oren Techs., LLC*, IPR2017-01917, Paper 86 at 6-9 (PTAB Feb. 2019). Thus, the governing rules and prior decisions of the Board universally confirm that failure to name an RPI is curable, and, in fact, is only an issue if events concerning the RPI created a time bar or estoppel—a situation admittedly not present here.

Even if TikTok Inc. had failed to name an RPI, then the proper course would be to formally identify such RPI in this proceeding, and nothing more. "Section 312(a)(2) is akin to a pleading requirement that can be corrected, and this court has noted that the Director [of the PTO] can, and does, allow the petitioner to add a real party in interest." *Applications in Internet Time,* 897 F.3d at 1364 (internal quotations omitted).

IV. *RETURN MAIL* DOES NOT BAR TIKTOK INC. FROM FILING AN IPR

CellSpin asserts that the Supreme Court's decision in *Return Mail* impacts these proceedings. CellSpin is mistaken.

A. TikTok Inc. is a "Person" Statutorily Permitted to File a Petition for *Inter Partes* Review

35 U.S.C. § 311 states that:

> Subject to the provisions of this chapter, **a person** who is not the owner of a patent may file with the Office a petition to institute an *inter partes* review of the patent.

The Dictionary Act defines a "person" as used in the United States Code to include corporations: "In determining the meaning of any Act of Congress, unless the context indicates otherwise —... **the word 'person'** ... **include[s] corporations**, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1.

Petitioner TikTok Inc. is a privately-held California corporation. TikTok Inc. provides the TikTok app to Google and Apple, who then make the TikTok app available to users throughout the United States. The TikTok app is a mobile software application that millions of Americans use to create and share short videos composed of expressive content.

TikTok Inc. filed the Petitions in these proceedings precisely because CellSpin accused the TikTok app of infringing seven CellSpin patents. TikTok Inc. is thus precisely the type of private actor that the *inter partes* review procedure was designed for—TikTok Inc. is a private U.S. corporation with a popular product that is being accused of patent infringement. *See, e.g.*, TTI-1036.

CellSpin argues that "TikTok should be treated as the CCP itself." Motion, 12. CellSpin cites *First Nat. City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983) for the proposition that "the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy" (*id.* at 630) but provides no analysis as to how TikTok Inc. is being used "to defeat an overriding public policy" or that disregarding TikTok Inc.'s corporate form would be "in the interests of justice." This is not a situation where another entity is using TikTok Inc. to invoke the IPR process but is "resisting a claim against it which fairly would curtail its recovery," as in *First Nat. Id.* at 632 (*quoting National City*

Bank v. Republic of China, 348 U. S. 356, 361-362 (1955).)). Here, TikTok Inc. is a "person" for purposes of 35 U.S.C. § 311 and may file IPR petitions.

B. The § 315 RPI Provisions Are Different from the § 311 "Person" Requirement and Does Not Require an RPI to be a Person

CellSpin argues that the CCP does not qualify as a "person" who can file petitions for *inter partes* review. This argument is meritless.

Section 311 requires only that the entity filing the petition must be a "person." 35 U.S.C. § 311. As explained above, TikTok Inc. is a "person" permitted to file an IPR petition.

There is no mention of RPI in § 311. Rather, the RPI requirement is introduced in § 315. That section states that RPIs may create time bars and be subject to estoppel. There is no mention in § 315 that an RPI must be a person. CellSpin's suggestion that each RPI must be a "person" is meritless and entirely unsupported. In any case, the RPI here, TikTok Inc., is a person as required in § 311.

C. Return Mail Is Not Applicable to a Foreign Government or to Foreign Political Parties

CellSpin's *Return Mail* argument rests on the incorrect assumption that the CCP is a sovereign. But even assuming it were a sovereign (it is actually not a sovereign but instead is a political party), *Return Mail* is not applicable to foreign sovereigns or foreign entities. The question in *Return Mail* is whether the U.S. Government, specifically, is a "person" capable of instituting an AIA review

proceeding. *Return Mail*, 587 U.S. at 626 (referring to the U.S. Government and its federal agencies as "the sovereign"). *Return Mail*'s analysis rests entirely on special considerations that are pertinent to the U.S. Government that do not apply to non-U.S. Governmental entities, including foreign governments and foreign political parties.

1. Presumption Excluding U.S. Government as a Person Does Not Extend to non-U.S. Government Entities

Return Mail cites several cases in which the U.S. Government was involved for the "'longstanding interpretive presumption that 'person' does not include the sovereign,' and thus excludes a federal agency." *Id*. at 626-627. There is no indication in *Return Mail*, or the cases cited therein, that this presumption applies to entities that are not the U.S. Government (or proxies of the U.S. Government). *See*, *id*., 626-627 (remarking that the Federal Government, specifically, is notably absent from the list of "persons" in the Dictionary Act); *cf*., *Bozeman Financial LLC v. Federal Reserve Bank of Atlanta et al*., 955 F.3d 971, 974-76 (refusing to extend *Return Mail* to Federal Reserve Banks).

2. Return Mail Factors Are Unique to the U.S. Government

Return Mail observes several factors that are unique to the U.S. Government that do not apply to foreign governments or foreign political parties. For example, *Return Mail* observes that Congress may not have authorized the U.S. Government

to become a party in an AIA review proceeding because "the Government is already in a unique position among alleged infringers given that 28 U.S.C. § 1498 limits patent owners to bench trials before the Court of Federal Claims and monetary damages, whereas 35 U.S.C. § 271 permits patent owners to demand jury trials in the federal district courts and seek other types of relief." *Return Mail*, 587 U.S. at 634-636; *see also id*., 628 (discussing that the Federal Government was not a person who could sue for treble damages under the Sherman Anti-Trust Act, as well as other limitations). The benefits conferred on the U.S. Government under § 1498 do not apply to a foreign entities.

Another concern raised by *Return Mail* is that an "anomaly might arise under the statute's estoppel provisions," which "preclude a party from relitigating issues in any subsequent proceedings in federal district court, before the International Trade Commission, and (for *inter partes* review and post-grant review) before the Patent Office"; such estoppel provisions do not name the Court of Federal Claims in which infringement suits against the U.S. Government must be brought under 28 U.S.C. § 1498. *Return Mail*, 587 U.S. at 636, n. 10. While the U.S. Government "might not be precluded by statute from relitigating claims raised before the Patent Office," foreign entities would be subject to such preclusion.

Return Mail further explains that "excluding federal agencies from the AIA review proceedings avoids the awkward situation that might result from forcing a

civilian patent owner (such as Return Mail) to defend the patentability of her invention in an adversarial, adjudicatory proceeding initiated by one federal agency (such as the Postal Service) and overseen by a different federal agency (the Patent Office)." *Return Mail*, 587 U.S. at 636. Such a situation would not arise when neither party to the AIA proceeding is the U.S. Government or a Federal Agency.

The overarching notion underlying *Return Mail*'s analysis is that the U.S. Government is treated differently than private parties in adversarial, adjudicatory patent proceedings. *Return Mail*, 587 U.S. at 634-636. In contrast, a foreign government or foreign political party would be treated no differently than any other private party. Accordingly, *Return Mail* does not stand for the proposition that the term "person" in 35 U.S.C. § 311 excludes a foreign government or foreign political party. Therefore, *Return Mail* cannot bar TikTok Inc. from filing the IPR petition.

In lieu of providing a proper analysis *of Return Mail's* applicability to the CCP, CellSpin resorts to unsupported accusations (Motion, 13-14) that should not be considered.

3. CellSpin Misapplies the Clear Statement Rule

Further, CellSpin's reliance on the "clear statement rule" is misplaced. Motion, 14. As *Return Mail* explains, the "clear-statement rule" provides "that Congress must unequivocally express any waiver of sovereign immunity for that waiver to be effective" and "applies only when a party seeks to hold the Government

liable for its actions; otherwise immunity is generally irrelevant." *Return Mail*, 587 U.S. at 627.

In the event that CellSpin intended to argue that there must be "an express statutory definition" or "some affirmative showing of statutory intent" that "person" includes a foreign government or foreign political party, it is required only if there is a presumption that "person" does not include a foreign government or foreign political party. *See id*. at 626-629. As explained above, there is no indication in *Return Mail* that the presumption there applies beyond the U.S. government. CellSpin's assertion that "Congress designed the IPR process to primarily enable private parties ... to efficiently challenge potentially invalid patents" does not establish otherwise. Motion, 15.

V. CELLSPIN WAIVED THE RPI ISSUE BY FAILING TO RAISE IT IN THE PATENT OWNER RESPONSE

The Board's rules provide that "[a] party should seek relief promptly after the need for relief is identified. Delay in seeking relief may justify a denial of relief sought." 37 C.F.R. § 42.25(b). The record shows that, as early as its Preliminary Response (POPR), CellSpin was aware of TikTok Inc.'s alleged relationship with the CCP but failed to raise the RPI issue. *See, e.g.,* POPR, 22 (alleging that CCP "will not allow TikTok to be sold"). CellSpin attempted to justify its lateness on the RPI issue by relying on "a Fox News report in January, that discussed these what

they call secret golden shares." EX2023, 21:2-20. However, CellSpin's own evidence shows that information about alleged "golden shares" was available as early as March 29, 2023. EX2025. But CellSpin failed to raise the issue in its POR filed two years later on January 3, 2025.

CellSpin's only other justification is "the seriousness of this in terms of the potential control that's going on here by the CCP on U.S. Patent administrative proceedings." EX2023, 21:24-24:16. CellSpin's speculations alone are not enough to show "good cause" or "interests of justice" that the Board requires for excusing late action. 37 C.F.R. § 42.5(c)(3) (2023). CellSpin's delay in raising the RPI issue has wasted resources of both the Board and the parties and has waived its ability to raise an RPI issue now. *See, e.g., Apple Inc. v. MemoryWeb, LLC*, IPR2022-00031, Paper 85, 20-32 (PTAB Dec. 2023) (finding waiver applied to motion to terminate when Patent Owner could have, but did not, raise RPI issue in timely manner); *see also Unified Patents v. JustService.net LLC*, IPR2020-01258, Paper 41, 3 (PTAB Feb. 2022) (declining to decide RPI at FWD due to PO forfeiting untimely RPI arguments); *Unified Patents Inc. v. Mobility Workx, LLC*, IPR2018-01150, Paper 26, 3 (PTAB Dec. 2019) (determining that RPI issue waived based on Patent Owner failing to bring argument in POR); *Funai Elec. Co. v. Gold Charm Ltd.*, IPR2015-01468, Paper 40, 49-50 (PTAB Dec. 2016) (determining that RPI issue waived based on Patent Owner failing to bring argument in POR); *Unified Patents Inc. v. Nonend*

Inventions N.V., IPR2016-00174, Paper 26, 6-7 (PTAB May 8, 2017) (deeming waived RPI argument not raised in POR).

VI. CONCLUSION

For at least the above reasons, CellSpin's motion should be denied.

Respectfully submitted,

Date: May 8, 2025

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CERTIFICATE OF SERVICE

Pursuant to 37 CFR § 42.6(e)(4), the undersigned certifies that on May 8, 2025, a complete and entire copy of this Petitioner's Opposition to Patent Owner's Motion to Terminate was provided by email to Patent Owner by serving the email correspondence addresses of record as follows:

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