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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

SHENZHEN ROOT TECHNOLOGY CO., LTD.,

Petitioner,

v.

CHIARO TECHNOLOGY LTD.,

Patent Owner.

IPR2024-00953

Patent 11,413,380B2

PROCEEDINGS held on Tuesday, August 6, 2024,
before PTAB judges, Ameer Shah and Meredith
Petravick, for the U.S. Patent Trial and
Appeal Board, held telephonically at or about
12:00 p.m.

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1 **P R O C E E D I N G S**

2 JUDGE SHAH: This is Judge Shah. And
3 with me today I have judge Meredith
4 Petravick.

5 Can you please tell me who is on the
6 call.

7 MR. HAWKINS: Hello. This is Michael
8 Hawkins from the Petitioner. And I
9 believe the court reporter is also on.
10 Her name is Randi Garcia.

11 THE REPORTER: Hi, this is the court
12 reporter. Who else is on the call?

13 JUDGE SHAH: Judge Amee, A-M-E-E
14 Shah. S-H-A-H. With me is, I have Judge
15 Meredith Petravick. P-E-T-R-A-V-I-C-K.

16 MR. PHERO: Graham Phero here on
17 behalf of the Patent Owner.

18 JUDGE SHAH: And that is everyone on
19 the call, is that correct?

20 MR. HAWKINS: This is Michael Hawkins
21 for Petitioner. I want to say that also
22 Craig Deutsch, who is also with

1 Petitioner, backup counsel, he is on the
2 line.

3 MR. PHERO: This is Graham Phero
4 again with Patent Owner. I have Rich
5 Coller and Tyler Drye here with me.

6 JUDGE SHAH: Thank you. Just to be
7 clear, we are here for IPR 2024-00953?

8 MR. HAWKINS: That is correct.

9 JUDGE SHAH: So I understand we are
10 having this call because -- Petitioner, I
11 would like you to maybe explain -- well,
12 let me go back. We are having this call
13 because Petitioner wanted to withdraw
14 their petition, and have need to file a
15 new one, based on something that happened
16 at the district court.

17 So Petitioner, can you please give me
18 a little bit more of an explanation as to
19 exactly what it is you're asking for, what
20 changed -- and what changed that you would
21 need -- that you would want a new petition
22 filed.

1 MR. HAWKINS: Yes. Sure. Thank you,
2 your Honor. And good afternoon.

3 Basically after the petition was
4 filed and during the month of June, two
5 events happened. The first was that
6 Petitioner received Patent Owner's
7 infringement contentions. And then also,
8 shortly after that, shortly after the
9 notice according on filing date, the
10 district court provided an order that
11 essentially wiped out all of the dates of
12 the trial schedule.

13 There is -- the current task there is
14 no actual date scheduled for the jury
15 trial. They're waiting until after
16 Markman in 2025.

17 So then about almost four weeks ago
18 we reached out to Patent Owner to explain
19 that we plan on filing an updated
20 petition, that we think those -- that
21 information should be in front of the
22 Board and rather than, for example, you

1 know, waiting until after a POPR to
2 request a preliminary reply, since it was
3 in such an early stage of the IPR, there
4 was no preliminary response. There was no
5 earlier board decision.

6 This is not an attempt to, for
7 example, any type of roadmapping of any
8 type. It was truly to put the right
9 information and get, you know, out things
10 that changed outside of Petitioner's
11 control after the filing petition to just
12 basically put it in a better form.

13 We did explain to opposing counsel
14 that we, you know, recognize that doing so
15 may cause some of the -- for example, a
16 couple (indiscernible) on the claims or
17 some other grounds to not being
18 necessarily included or to be somewhat
19 shortened via word count reasons --
20 primarily for word count reasons.

21 (clarification by the reporter.)

22 MR. HAWKINS: The word limit reasons.

1 Sorry.

2 And so we decided to -- we figured it
3 is just best to just hit the reset button
4 and to provide this updated petition that
5 had this information that we think an
6 inquisitive mind would want to know and
7 have in front of them when they're making
8 decisions.

9 So we are faced with, of course, then
10 the Trial Practice Guide explains that,
11 you know, at this early stage we could
12 file something that is, I guess,
13 characterized as a parallel petition in
14 terms of two petitions before -- you know,
15 there is any type of institution decision.

16 And then that would include then, of
17 course, like, we would provide a document
18 that -- that ranks the two petitions. And
19 so that's what made us reach out to
20 opposing counsel, the Patent Owner, to
21 explain, well, this seems to make most
22 sense to just simply, rather than rank the

1 updated petition as being number one and
2 the first one being number two, to simply
3 just dismiss the first one, maybe, if you
4 want to think about it, maybe a more
5 extreme version of the ranking. It seems
6 as if that would provide a solution here
7 --

8 JUDGE SHAH: Well, let me --

9 MR. HAWKINS: I'm sorry, please go
10 ahead.

11 JUDGE SHAH: I just want to make sure
12 I understand. So there is nothing
13 substantive that happened at the district
14 court in the sense that you would need to
15 have some different arguments for
16 different rankings that we are only
17 talking about the trial date --

18 MR. HAWKINS: Yeah, so --

19 JUDGE SHAH: -- the trial date -- to
20 change the trial date and the schedule.

21 MR. HAWKINS: Yeah. Well, two things
22 have happened. So the first was, yes, the

1 original petition just simply said in,
2 essentially a single paragraph, petition
3 had requested a -- a revised schedule
4 because even though we are almost a year
5 out from when the 30 -- '380 patent was
6 asserted, Patent Owner has more recently
7 asserted even more patents. So it's kind
8 of shifting everything backwards.

9 And so the original petition simply
10 says, we don't know any dates, we are
11 trying to request one. And so now,
12 again -- four weeks ago, or almost four
13 weeks ago we were in a position of, well,
14 seems as if we have this information now,
15 why not just simply insert that, but doing
16 that, of course, might cause other word
17 limit issues, and so we would need to
18 amend- -- change that back.

19 The second one was the infringement
20 contentions. At the time there was only
21 one set of infringement contentions. They
22 were provided in June, and we found that

1 from a petitioner's perspective, that they
2 were interesting in the way the Patent
3 Owner was viewing the patent scope, and we
4 found that information to be very helpful
5 for the Board.

6 And then actually, I think it was, I
7 want to say two or three business days ago
8 we essentially received updated
9 infringement contentions just now. So
10 this is after I requested the call. Then
11 again, our -- I believe it will be very
12 interesting. And so we believe all
13 exhibits should be in front of the Board
14 in the petition, and the Patent Owner can
15 file a preliminary response in the normal
16 course. And so our plan was simply to
17 either file, you know, the updated
18 petition and then with -- as the Trial
19 Practice Guides says, with the document
20 that explains how they should be ranked,
21 or to give basically everyone the option,
22 that, well, maybe we should just dismiss

1 the first one, that way there is only a
2 single POPR to be filed, and there's only
3 a single institution decision to be
4 written.

5 And so when we raised that with the
6 Patent Owner, they said they opposed
7 because of -- I think you saw in the
8 e-mail -- of some sort of an older
9 decision based upon a fear of follow-on
10 petition, and it was the Fresenius case is
11 actually what was cited in the Patent
12 Owner's e-mail.

13 And, you know, in our view, the
14 solution we are proposing is, in fact,
15 avoids a -- it's the other solutions
16 impact is just a single POPR to do, it's a
17 single institution decision to do. We
18 could proceed in the way the Trial
19 Practice Guide suggests, where you file
20 the updated petition and then rank them,
21 and -- and we understand that. We are
22 just trying to offer a more efficient

1 solution for everybody.

2 The Fresenius case that the Patent
3 Owner cited, in that case there was
4 actually an earlier board institution
5 decision prior to when the Petitioner
6 said, I would like to file a second
7 petition, or -- and that is not the case
8 here. In other words, in the Fresenius
9 case there was an authentic concern of
10 roadmapping, you know, the classic General
11 Plastic concern. But that is not a
12 concern here. There is --

13 JUDGE SHAH: So --

14 MR. HAWKINS: -- no preliminary
15 response, no institution decision. It's
16 just simply trying to make things more
17 efficient for everybody, was our proposal.

18 JUDGE SHAH: So if I understand
19 correctly, will you be changing the
20 substance of the petition in terms of
21 your arguments based on the --

22 MR. HAWKINS: Yes.

1 JUDGE SHAH: -- the new infringement
2 contention?

3 MR. HAWKINS: Yes. So at a minimum,
4 a couple of dependent claims will probably
5 be cut from the updated petition. And
6 then one or two of the secondary
7 references, likely, would be, again,
8 allotted as for insufficiency of word
9 usage as a part of -- I should say it's
10 part of the reason behind that. But in
11 terms of, you know, of the independent
12 claims or the primary reference that is
13 not currently in any type of plan now. It
14 was more of just putting the right
15 exhibits in front of the Board, and to
16 offer Patent Owner an opportunity to have
17 just a single preliminary response in a
18 normal time frame.

19 JUDGE SHAH: So Petitioner, if this
20 is an extraordinary remedy they're asking
21 for to file a new petition, I'd like to
22 get -- you've discussed briefly General

1 Plastics, as --

2 MR. HAWKINS: Yes.

3 JUDGE SHAH: -- but I'd also like to
4 get your thoughts -- your thoughts on how
5 this would go into factors of General
6 Plastic and Valve. If you need the case
7 cites, I can provide those.

8 MR. HAWKINS: No. I actually have
9 the Trial Practice Guide --

10 THE REPORTER: Who is speaking now?

11 MR. HAWKINS: This is Michael Hawkins
12 for Petitioner. Mr. Phero has not yet
13 spoken.

14 JUDGE SHAH: So I'm not talking about
15 the Trial Practice Guides. I'm talking
16 about our precedential cases in terms of
17 General Plastics v. Canon Kabushiki, the
18 IPR2016-01357. And I am also talking
19 about Valve Corp v. Electric Scripting
20 Products, IPR2019-00062, 00063 and 00084.

21 Can you briefly explain how those
22 factors, in both of those, are affected by

1 your request -- or would apply to your
2 request.

3 MR. HAWKINS: Yes. So in essence,
4 when we filed the updated petition, if the
5 first one is dismissed, in our view, there
6 is not even a second petition to worry
7 about.

8 Again, this is all occurring prior to
9 any preliminary response, prior to any
10 institution decision. It is simply trying
11 to reset -- basically resetting our clock
12 and providing everyone the same amount of
13 time they would have ordinarily.

14 So that being said, there were two
15 pending at the same time. Then, in our
16 view, there is the first factor, of course
17 it is the same petitioner -- we are
18 talking about two petitions here.

19 The second one, in terms of, for
20 example, the prior art, the secondary
21 reference that I mentioned that we would
22 be switching out, in fact, we did only

1 recently learn about that. And then the
2 -- to me, perhaps, the third General
3 Plastics factor, the key one, which is
4 that, is there a roadmapping concern,
5 right? Which is at the time of filing the
6 second petition, did they already receive
7 a preliminary response or receive a board
8 decision on it to institute. And the
9 answer is no. Again, in good faith we --
10 we reached out almost four weeks ago. We
11 are trying to do this very rapidly after
12 the notice according to filing date to
13 simply say, let's just proceed with the
14 second petition, being -- instead of it
15 being greater ranks, just have it be the
16 only petition, and in the length of time
17 between when petitioner learned of the
18 prior art and second petition, it would be
19 literally, you know, a couple of months.
20 The month of May is when we filed that
21 first petition; the month of May is when
22 we would have had access to a secondary

1 reference -- again, the primary reference
2 is the same. We are not trying to
3 reinvent the wheel.

4 And then, there are -- the fifth
5 factor, I believe, relates to an adequate
6 explanation for the elapsed time. To be
7 quite honest, a lot of it was triggered
8 during the events that happened in late
9 June, shortly -- either right before or
10 right after the notice according to filing
11 date, and so then by mid July -- I believe
12 it was July 18th we were reaching out to
13 Patent Owner saying we'd like to proceed
14 down this path to have it dismissed,
15 rather than filing a second one that has,
16 you know, a higher ranking.

17 And here we are four weeks later
18 still later waiting to hear the answer.
19 And so we were trying to act quite rapidly
20 in that case. And then all the finite re-
21 -- resources of the Board, factor six,
22 General Plastic precedent, but we believe

1 we're actually the only party offering a
2 solution. We are trying to limit the
3 amount of work that may be done by anybody
4 in terms of there would only be a single
5 POPR. There would only be a single
6 institution decision. And so our goal is
7 trying to avoid any scenario where there
8 needs to be two, in a way where there is
9 also no roadmapping, right. So to offset
10 fits squarely within kind of the Hesai
11 example that we set forth, which is, yeah,
12 this is very early, and they are going to
13 proceed in a way where the Patent Owner
14 gets a new filing date for the POPR and
15 everyone seems to have sufficient notice.

16 And then, finally, the requirements
17 under 3516 (a) 11, vacate a final decision
18 not later than one year after the date on
19 which there's institution review. That,
20 of course, happened because we are very
21 early in the stage. Even today, there's
22 no institution indicating at all in these

1 cases. And again, our solution would
2 actually create a scenario where there is
3 no institution review in the first IPR.
4 There is only one pending by the time it
5 reaches the Board.

6 So that is how we feel. It creates
7 this kind of scenario that it doesn't seem
8 to offer a lot of prejudice to others and
9 still puts the right information in front
10 of the Board.

11 JUDGE SHAH: So I just want to make
12 sure I understand. Do you -- is this
13 something -- I believe you mentioned
14 earlier that this can be addressed by a
15 reply to the Patent Owner's preliminary
16 reply. Is that right?

17 MR. HAWKINS: No. The -- I don't
18 think so, from the perspective of the
19 substance in terms of how to explain how
20 the prior art aligns with what the Patent
21 Owner is saying, seems to align with the
22 claim's scope. So I think that might be a

1 different thing.

2 But when it comes to the trial court
3 date, arguably, yes, if that was the only
4 issue, in theory, it could be there would
5 be a POPR where they would address, you
6 know, that -- possibly that trial court
7 date. And then we would ask for a
8 preliminary reply to address that. But
9 that would be maybe, in our view, a bit
10 out of order in terms of -- normally it
11 seems like that should be in a petition
12 and let them -- in Patent Owner's
13 preliminary response, accordingly. And,
14 again, four weeks ago, that seemed to make
15 a lot more sense definitely in terms of
16 timing.

17 And so we weren't trying to -- there
18 is no -- there was no gamesmanship or
19 roadmapping happening -- happening at all.
20 It's simply a matter of allowing that to
21 happen the way it seemed to have happened,
22 in the Hesai case. There is another

1 example case that we did indeed look at
2 that -- that, you know, we were modeling
3 after. And it was slightly different
4 facts. And it wasn't precedential, but it
5 did explain that in fact, you know, there
6 is no kind of right to an institution
7 decision, and that if there's no
8 roadmapping, there shouldn't be much of a
9 concern here. And so that was our --
10 that -- that and Ambers (indiscernible)
11 is what we thought was a fair option.

12 If you're interested, that case
13 number was -- it's LQ Corporation, is the
14 name of it -- I'm sorry, LKQ Corporation,
15 and it's a -- let's see -- Case Number
16 IPR2020-00063, and it's paper number 13.
17 So there they dismissed the petition.

18 Now, in that case it was slightly
19 different in terms of they were dismissing
20 the petition and opting to file a
21 reexamination request. But in terms of
22 the kind of a policy, and explaining it,

1 especially page 4 of paper number 13. To
2 us it seemed to kind of fit squarely in
3 the fact that there is no roadmapping and
4 there is not going to be any -- there's no
5 action that rises to the level of an abuse
6 of the process, and we thought it would be
7 fair to do, for everybody to have a single
8 POPR and a single institution decision.

9 JUDGE SHAH: Okay. Thank you. I
10 understand your position better now.

11 MR. HAWKINS: Great.

12 JUDGE SHAH: Patent Owner, can you
13 explain to me -- oh, I'm sorry,
14 Petitioner, did you have anything you
15 wanted to add?

16 MR. HAWKINS: No. Thank you, your
17 Honor. I appreciate the time.

18 JUDGE SHAH: Patent Owner, can you
19 explain to me your opposition to this
20 withdrawal of a petition with a new
21 petition that addresses substantive issues
22 from the infringement.

1 MR. PHERO: Yes. Thank you, your
2 Honor. Graham Phero for the Patent Owner.
3 Can you hear me okay?

4 JUDGE SHAH: Yes, I can. Thank you.

5 MR. PHERO: So first I just wanted to
6 bring to your attention that Mr. Hawkins
7 is new counsel for the Petitioner. And
8 the prior counsel for Petitioner and the
9 client decided that they wanted to file
10 their petition in May.

11 They knew when the contentions were
12 going to be coming up, and they could have
13 certainly waited. There was not a time
14 bar. And for whatever reason now, the new
15 counsel for Petitioner seems to want a
16 redo, where the Patent Owner has already
17 invested significant time and resources to
18 address this petition that is already
19 present before us on its merits at the
20 preliminary response stage.

21 Now, when we previously met and
22 conferred with -- with Mr. Hawkins, he

1 represented that they needed to address
2 Fintiv properly in view of the schedule.
3 Now we are hearing for the first time that
4 they want to make substantive changes to
5 the petition and are going to be
6 potentially filing a second petition,
7 which, again, you know, we would have
8 arguments against under General Plastics
9 for that follow-on petition.

10 But we also have arguments against
11 why the current petition should be denied,
12 and we would like to present those in our
13 preliminary response at the end of the
14 month.

15 Again, we have been working
16 diligently since this was filed. Their
17 request to delay and to terminate this
18 proceeding came nearly two months after
19 they filed it and, again, this seems to be
20 related to their new counsel. In the case
21 that Mr. Hawkins cited, the Hesai case,
22 their petitioner requested dismissal after

1 only one week, you know. It's unclear
2 whether or not the Patent Owner even
3 realized the petition had been filed. The
4 Patent Owner hasn't -- didn't do anything
5 in that case.

6 Here, Patent Owner objects to
7 withdrawing this petition, and we would be
8 prejudiced by allowing it to be terminated
9 only to have him simply refile it again.

10 Now, the Fresenius case, and that is
11 IPR2017-01910 at paper 7, there the panel
12 held that none of the board rules
13 contemplate the withdrawal of a petition
14 by a petitioner over the objections of the
15 patent owner. And that is exactly the
16 case we have here.

17 Patent Owner objects to just giving
18 Petitioner a redo, for whatever reason.
19 And to the extent they need to address the
20 Fintiv arguments, we would not object to a
21 very brief targeted reply to our
22 preliminary response, so long as the

1 Patent Owner gives a sur-reply.

2 So again, I think the Board
3 understands the issues here. This is,
4 again, an extraordinary remedy, what the
5 patent -- the Petitioner is requesting.
6 And Patent Owner strongly objects due to
7 the prejudice and due to the substantial
8 investment we've already made.

9 We would like to go forward on the
10 current timeline and we are prepared to
11 move forward with our preliminary
12 response.

13 JUDGE SHAH: Sorry about that. That
14 was me.

15 I think Judge Petravick has a
16 question for Petitioner as well, and then
17 we can see if there is anything else that
18 Petitioner wants to add.

19 JUDGE PETRAVICK: This is Judge
20 Petravick. So if we -- this panel can
21 only decide whether to dismiss or not
22 dismiss this petition. Any follow-on

1 petition you file will not be guaranteed
2 to get the same panel. Could possibly get
3 the same -- get assigned to the same
4 panel, but not guaranteed that it would be
5 assigned to the same panel.

6 So we do not have any authority to
7 tell whatever new panel whether your
8 petition would be okay under 314 or
9 General Plastics or not. That would be a
10 risk you take by filing the second
11 petition, whatever that petition, panel
12 would decide as to General Plastics.

13 So given that there is that risk
14 there, and there, you know, basically
15 whatever this panel says does not affect
16 whatever the future panel would decide, do
17 you still want your petition dismissed?

18 MR. HAWKINS: Thank you, your Honor.
19 So if I'm understanding you right, the
20 timing would be that, say, the petition
21 would be dismissed this week, and the
22 updated petition would be filed shortly

1 thereafter. And then, you know, again,
2 roughly six or seven months from now there
3 would be possibly a different panel
4 answering with an institution decision.
5 Again, our view is at the stage --

6 JUDGE PETRAVICK: Wait. For example,
7 they -- they could decide -- that panel
8 could -- there is a risk that the panel
9 could decide that that it's still a
10 follow-on petition, and -- and that there
11 was no good reasons for you to file a
12 second petition.

13 MR. HAWKINS: Right. Well --

14 JUDGE PETRAVICK: They could find
15 that there were a good reason --

16 MR. HAWKINS: My -- my
17 understanding -- no, I think I do
18 understand. Thank you. That helps
19 clarify a lot.

20 First of all, I didn't realize it
21 wouldn't be the same panel. So that --
22 that is interesting. I guess I would --

1 we also didn't know the panel --

2 (simultaneous crosstalk)

3 JUDGE PETRAVICK: It could or it
4 could not. I cannot guarantee that that
5 is the case. That is up to the paneling
6 will. So we could not --

7 MR. HAWKINS: Our understanding is
8 that --

9 JUDGE PETRAVICK: -- judge that issue
10 for you at all.

11 MR. HAWKINS: Right. So our
12 understanding was that, say, we just never
13 even reached out to Patent Owner to offer
14 this, what we thought was an efficiency
15 for everyone, and we just simply filed the
16 updated petition, it would be
17 characterized as a parallel petition,
18 page 59 in the Trial Practice Guides --
19 that's what happened, you file that, and
20 then you file a paper that ranks them, and
21 then the Board will basically, possibly,
22 under General Plastic it will dismiss one

1 of the two. Because it will say, yep,
2 under General Plastic we're only going to
3 consider one on the merits and then --

4 JUDGE PETRAVICK: Or you could argue
5 to both. Yeah.

6 MR. HAWKINS: You could argue to
7 both, but as far as I know, General
8 Plastics doesn't say if somebody files two
9 petitions, then, in its discretion, we
10 should deny both. I believe General
11 Plastics stood for the --

12 JUDGE PETRAVICK: No, I -- that's not
13 what I --

14 MR. HAWKINS: -- for the
15 proposition --
16 (simultaneous crosstalk)

17 JUDGE PETRAVICK: No, that's not what
18 I am suggesting.

19 MR. HAWKINS: -- only one petition is
20 needed.

21 JUDGE PETRAVICK: That is not what
22 I'm suggesting. What I'm suggesting is

1 you could file -- if you had good enough
2 reasons, you could file a second one, and
3 there could be both going. We could --
4 you know, but, again --

5 MR. HAWKINS: Yeah, the alternative
6 --

7 JUDGE PETRAVICK: -- there is no
8 guarantee that a -- that the panel, the
9 current panel would be the same panel for
10 the second petition, in either case.

11 MR. HAWKINS: Right. And so I guess
12 our understanding was, let's say we just
13 went down a road where we just simply
14 filed the updated petition and ranked them
15 in accordance with what the Trial Practice
16 Guide says. And in that case, there would
17 be two petitions pending before the Board,
18 and they would, under General Plastic,
19 possibly dismiss one of them, probably the
20 one that is lower ranked, possibly.

21 But my point is, in the scenario
22 you're raising, if there is only one

1 petition pending, then -- then there would
2 be -- in other words, the dismissal is, in
3 effect, the same equivalent to the -- the
4 General Plastics dismissal of the lower
5 ranked one. That is all we were trying to
6 do is --

7 JUDGE PETRAVICK: Well, --

8 MR. HAWKINS: -- in the efficiency,
9 if we don't do the five-page ranking and
10 then they don't have to do two POPRs.

11 (simultaneous crosstalk)

12 JUDGE PETRAVICK: It is
13 unfortunate that --

14 MR. HAWKINS: And so I was under the
15 impression --

16 JUDGE PETRAVICK: -- that that is
17 your -- that is your litigation risk at
18 that point.

19 MR. HAWKINS: Right.

20 JUDGE PETRAVICK: You could also
21 argue under, not only under General
22 Plastics, but under General 314(a) abuse

1 of process, or any other 314(a) issues.

2 But that is your litigation risk. And
3 that is your choice as to how to proceed
4 with your litigation.

5 So the question for this panel is
6 only, Do we dismiss this petition or not?
7 You know, the panel would not give you an
8 answer that we will dismiss the petition
9 and your second-filed petition will be
10 okay. Whatever happens after --

11 MR. HAWKINS: Right, yeah --

12 JUDGE PETRAVICK: -- the petition is
13 your risk. So --

14 MR. HAWKINS: Right, okay. I
15 understand. As far as I know I'm not
16 aware --

17 THE REPORTER: I'm sorry, I can only
18 get one person speaking at a time, please.

19 JUDGE PETRAVICK: The question comes
20 down to --

21 MR. HAWKINS: -- example --

22 Sorry, please go ahead.

1 JUDGE PETRAVICK: So that I mean,
2 what we are looking for is reasons for why
3 this petition should be dismissed. We
4 can't guarantee that there is any
5 efficiency as to what happens next.

6 MR. HAWKINS: Yes. Thank you. I
7 understand that there is no guarantee. We
8 are unaware of any example in which
9 General Plastics or its, you know, progeny
10 was ever used to dismiss -- oh, okay, was
11 having not considered on the merits. And
12 so I think that is where we feel it would
13 be the appropriate solution. And if
14 someone wanted to say that General
15 Plastics stands for the proposition then,
16 in fact, if there are two petitions, that
17 both should be dismissed discretionarily,
18 then we would address that at that time.
19 But as far as we know, I have never heard
20 of that happening in the past. Again,
21 this is simply a solution that is taking
22 the more extreme firm of the ranking,

1 right, that one is ranked one and one is
2 ranked two, rather than having the board
3 direct institutions -- institution, it seems
4 -- it seems like why not just write one on
5 the merits and have the other one
6 dismissed thoroughly.

7 That is the only solution. And if
8 there was somebody who was planning to
9 write that General Plastics stands for the
10 proposition that zero petition should be
11 considered on the merits, then I guess we
12 would have to address that accordingly at
13 the time.

14 JUDGE PETRAVICK: So Petitioner, I
15 have another question. So I believe
16 Patent Owner cited to IPR2017-01910
17 Fresenius-Kabi v. AstraZeneca, which has
18 somewhat similar facts. And in that case,
19 the Board noted that -- I'm sorry -- the
20 Board noted that the Trial Practice Guides
21 didn't really contemplate a withdrawal of
22 the petitioner over the opposition of the

1 patent owner.

2 Do you know of any cases where the
3 Board has allowed for a dismissal of a
4 petition over the objection to the patent
5 owner?

6 MR. HAWKINS: Yes. So first, the
7 Fresenius case was from 2017. It was
8 prior to the trial practice guide -- guide
9 explaining what should be happening in a
10 case with parallel petitions. After Trial
11 Practice Guide is the case I gave the
12 example, it was LKQ Corp, and it is IPR
13 Case Number 2020-00063, and its paper 13.
14 And there they dismissed the petition over
15 the objection of the patent owner. And
16 the patent owner explained that -- that
17 there would be some level of prejudice
18 because there was a -- in that case it was
19 an already filed preliminary response.
20 And there the Board explained that --
21 that, in fact, it's a minimal amount of
22 prejudice at this stage, and that there

1 was -- I believe the word was, quote,
2 Indeed, there is no right for either party
3 of the matter procedural or legal due
4 process to a decision on the merits. And
5 that was patent owner saying we want to
6 have a decision on the merits on the first
7 one. And then, also, on page 4 of that
8 decision where they talk about, by the
9 way, there's not a roadmapping concern
10 here, that is not what's happening. And
11 again, we came into this period from the
12 perspective of rather than linking two
13 petitions and having one -- the lower one
14 possibly dismissed on a General Plastic
15 precedent, to just simply say, why don't
16 we just fast forward that and just have
17 one for everybody.

18 So that was our goal. It was never
19 an intent to have any type of roadmapping,
20 no type of abuse or gamesmanship. We
21 reached out, I think it was at that point
22 in time just, I think right around four

1 weeks after the -- the notice according
2 filing date, and so if there was a concern
3 about an abuse of process, then -- then we
4 understand, and it's not what our goal
5 was, and so we would -- there would be no
6 need for dismissal, and we would simply
7 follow what the Trial Practice Guide says,
8 and you know, apply the parallel petition
9 process with the ranking as needed and
10 address it that way.

11 But in our view, it was simply in
12 good faith trying to make it be where
13 there would be no ranking document for
14 petitioner and be no second -- or you
15 know, there is no need for two POPRs and
16 two institution decisions. That was the
17 underlying goal for everyone here.

18 JUDGE SHAH: This is Judge Shah
19 again. So I wanted to point out that in
20 the LKQ case you cited, that petitioner
21 actually filed a motion to dismiss the
22 petition. Why are we not doing that here?

1 MR. HAWKINS: Well, two reasons: The
2 first being a timing reason now.

3 Originally, when we reached out four weeks
4 ago, there was probably more time for
5 written briefing. We are approaching --

6 JUDGE SHAH: But at that time -- at
7 that time you could have either filed a
8 motion or requested to file a motion. So
9 you made the decision at that time --

10 MR. HAWKINS: Right.

11 JUDGE SHAH: -- four weeks ago to not
12 request filing of a motion, but instead to
13 go this route. So I don't think the
14 timing is an issue that is really in your
15 favor at this point.

16 MR. HAWKINS: Right. I understand.
17 I guess I -- when we reached out to the
18 Board to suggest this option and cited the
19 Hesai example, we didn't realize at the
20 time that a written motion would be
21 preferred by the Board. And so looking
22 back, I guess, that we should have done

1 so, and I apologize for that.

2 (brief pause.)

3 JUDGE SHAH: Sorry, I'm just thinking
4 for a minute.

5 MR. HAWKINS: No problem, we
6 understand.

7 JUDGE SHAH: Okay. I think at this
8 point I understand the issues, and we'll
9 take it under advisement.

10 Judge Petravick, do you have any
11 other questions?

12 (brief pause)

13 JUDGE SHAH: Judge Petravick does not
14 have any other questions.

15 So do you know when you will be able
16 to get a transcript of this for the Board
17 to -- for the review for your
18 consideration, before making a decision?

19 MR. HAWKINS: Yes. Yes. I believe
20 that we should be able to provide the
21 formal transcript, I believe it is within
22 one business day from the court reporter,

1 is what we requested. So the goal would
2 be to get it to you tomorrow or the next
3 day.

4 JUDGE SHAH: Okay. Patent Owner, do
5 you have anything else that you would like
6 to add?

7 MR. PHERO: Your Honor, I think you
8 understand the issues. And, again, I
9 think we will just reiterate that we would
10 like to move forward on the current
11 proceeding as is.

12 So thank you for your time today.

13 JUDGE SHAH: Okay. I appreciate
14 that. If no one else has anything else to
15 add, then we will consider this -- we'll
16 consider the case under advisement, and
17 we'll look at it once we get the
18 transcript.

19 Thank you both for your time.

20 MR. HAWKINS: Thank you.

21 MR. PHERO: Thank you.

22 (Time Noted: 12:40 p.m.)

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I, the undersigned authority, hereby
certify that the foregoing transcript, page 1
through 41 is a true and correct transcription
of my stenographic notes, taken before me at
the time and place set forth on the title page
hereof.



RANDI GARCIA, COURT REPORTER, RPR

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