

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ZHUHAI COSMX BATTERY CO., LTD.,
Petitioner

v.

NINGDE AMPEREX TECHNOLOGY LIMITED,
Patent Owner

Case IPR2025-00385
U.S. Patent No. 10,964,927

**PETITIONER’S REQUEST FOR DIRECTOR REVIEW OF THE
INSTITUTION DECISION**

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PETITIONER'S EXHIBIT LIST

Exhibit No.	Description
1001	U.S. Patent No. 10,964,927
1002	File History of U.S. Patent No. 10,964,927
1003	Declaration of Dr. Michael Pecht
1004	U.S. Patent Application Publication No. 2015/0180002 to Nishikawa et al. ("Nishikawa")
1005	Chen et al., "Deformation and fracture behaviors of microporous polymer separators for lithium ion batteries" <i>RSC Advances</i> (March 2014) ("Chen")
1006	U.S. Patent No. 10,559,802 to Zhang et al. ("Zhang")
1007	Zhang, "Mechanical Behavior of Shell Casing and Separator of Lithium-ion Battery" <i>Massachusetts Institute of Technology</i> (June 2017) ("Zhang Thesis")
1008	Certified English-language Translation of Prosecution History of Chinese Patent Application No. CN201810640157.9A
1009	<i>Curriculum Vitae</i> of Michael Pecht
1010	Jordan, J.L., et al., "Mechanical Properties of Low Density Polyethylene," <i>Journal of Dynamic Behavior of Materials</i> , 2:411-420 (2016)
1011	Salakhov, I.I., "Low-Temperature Mechanical Properties of High-Density and Low-Density Polyethylene and Their Blends," <i>Polymers</i> , 13(1821):1-21 (2021)
1012	Carr, S.H., et al., "Structural Basis for the Mechanical Properties of Polyethylenes," Department of Defense (1983)
1013	Complaint, <i>Ningde Amperex Tech. Ltd. v. Zhuhai CosMX Battery Co.</i> , No. 2:24-cv-00728-JRG (E.D. Tex. Sept. 6, 2024), ECF 1
1014	Unopposed Application for Extension of Time to Answer Complaint, <i>Ningde Amperex Tech. Ltd. v. Zhuhai CosMX Battery Co.</i> , No. 2:24-cv-00728-JRG (E.D. Tex. Dec. 4, 2024), ECF 16
1015	Arora et al., "Battery Separators" <i>Chem Rev.</i> (Oct. 2004)
1016	EP Patent Application No. 0924780 A1 to Yu

Exhibit No.	Description
1017	Xiong, B., “Contribution to the study of elastic and plastic deformation mechanisms of polyethylene and polypropylene as a function of microstructure and temperature,” <i>Materials</i> (2014)
1018	Beer, F., et al. “Mechanics of Materials” (2009)
1019	Baldwin, R.S., “Properties and Performance Attributes of Novel Co-extruded Polyolefin Battery Separator Materials” (2011)
1020	Dupen, B., “Applied strength of Materials for Engineering Technology,” Vol.11 (Revised January 2017)
1021	Hibbeler, R.C., “Mechanics of Materials,” 8th Ed. (2011)
1022	“Nearly two lithium battery fires per week on airplanes in the US alone,” International Association of Fire and Rescue Services (Dec. 19, 2024), <i>available at</i> : https://www.ctif.org/news/nearly-two-lithium-battery-fires-week-airplanes-us-alone .
1023	Docket Control Order, <i>Ningde Amperex Tech. Ltd. v. Zhuhai CosMX Battery Co.</i> , No. 2:24-cv-00728-JRG (E.D. Tex. Feb. 6, 2025), ECF 27
1024	Federal Court Management Statistics (Sept. 30, 2024)
1025	Federal Court Management Statistics (Dec. 31, 2024)
1026	Results charted from LexMachina.com, run on June 2, 2025, for patent cases before District Judge James Rodney Gilstrap
1027	Declaration of John C. Evans

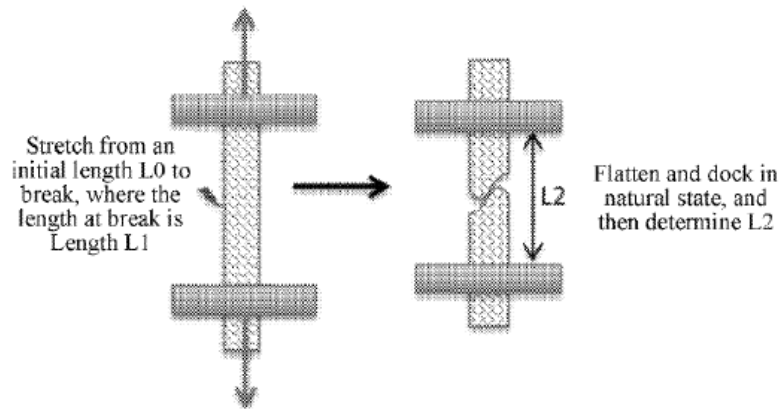
Pursuant to 37 C.F.R. § 42.75(c), Petitioner, Zhuhai CosMx Battery Co., Ltd. (“Petitioner”), hereby respectfully requests Director Review of the Board’s denial of institution of *inter partes* review under 35 U.S.C. § 314 (Paper 10, “ID”). This request is timely filed within 30 days of the August 20, 2025 Decision and is accompanied by the required fee. 37 C.F.R. §§ 42.15(f), 42.71(d), 42.75(c).

The panel here made multiple errors of law and misapprehensions of fact by: (1) misapplying the law of inherency by requiring express disclosure in the prior art, (2) improperly evaluating inherency based on understanding of a POSITA, rather than what is necessarily present in the physical properties of the prior art, and (3) improperly treating the measured properties of an apparatus claim as a method step. The panel also held Petitioner to an improperly high evidentiary standard and ignored entire sections of the Petition.

I. BACKGROUND

The challenged patent claims a separator *apparatus* for use in a battery. A battery separator is a membrane that separates positive and negative electrodes of the battery. All separators have certain physical properties, like tensile strength, elasticity, and plasticity. These properties influence how the separator will respond in the event that the battery is pierced by a foreign object or by a shard of the battery’s external housing (like when the battery is dropped or crushed). A separator that deforms around a shard will prevent the battery from shorting.

There are generally two kinds of deformation that any material undergoes: elastic and plastic. Elastic is the amount of deformation that will recover, or “bounce back,” after the force is removed. Plastic is permanent deformation that will not bounce back. The independent claims recite a numeric range for the absolute plastic deformation rate (APDR) determined by stretching the porous substrate of the battery separator to the breaking point, docking and flattening the fragments, and measuring their collective length:



EX1001, FIG. 1.

That measurement was then input to a standard equation for expressing a difference as a rate of change: $(L2 - L0)/L0 \times 100\%$. Regardless of how it is measured or expressed, the underlying physical property—plasticity—is an innate attribute of all materials that can be measured or calculated in different ways.

The Petition presents three Grounds based on inherent anticipation and obviousness using three references not considered during prosecution. While none of the applied references reported numeric values for APDR as measured by stretching the porous substrates to breaking, docking and flattening, and measuring

the post-stretching length, all three disclosed numeric values for the deformation that occurred while stretching the porous substrates to the breaking point. The Petition explained how that data provided concrete APDRs of the separators disclosed in the art. The Petition walked through the calculations, and showed how the properties of the prior-art separators fell within the claimed numeric range.

The Acting Director declined discretionary denial and referred the Petition to the merits panel. *See* Paper 9. The merits panel denied institution pursuant to 35 U.S.C. § 314(a). *See* Paper 10. In its ID, the panel found that the applied prior art disclosed all of the limitations of the independent claims except for the numeric range for the “absolute plastic deformation rate” of the porous substrate. The panel found that the prior art did not determine the length of the separator after stretching to break, docking, and flattening the pieces, and was not persuaded that the claimed property could be calculated from other data. *Id.* In doing so, the panel made multiple errors discussed below. Accordingly, Director Review is required.

II. ARGUMENT

Director review of a Board decision on institution is warranted when the request presents “. . . (c) erroneous findings of material fact, or (d) erroneous conclusions of law.” Director Review Process, Section 2.B (available at <https://www.uspto.gov/patents/ptab/decisions/director-review-process>, last accessed March 26, 2025). Both types of errors are present here.

A. Ground 1: Legal and Factual Errors

The panel made multiple legal errors that misapply the law of inherency by (1) requiring express disclosure in the prior art of the apparatus claim property, and (2) evaluating inherency through the lens of what the POSITA would understand, rather than what is physically true about the prior art. *See ID*, 13-14 (“Petitioner points to nothing in Nishikawa that allows a POSITA to determine L2 (defined as ‘a length of the porous substrate after the porous substrate is stretched to breakage and docked along the fracture caused by the breakage and flattened’) or $L2 - L0$.”).

There is no requirement that a POSA would have recognized an inherent disclosure—only that the subject matter is in fact inherent in the prior-art reference. *See Schering Corp. v. Geneva Pharms., Inc.*, 339 F.3d 1373, 1377 (Fed. Cir. 2003) (rejecting that inherent anticipation requires recognition by a POSITA and allowing expert testimony to show inherency); *Abbott Lab ’ys v. Geneva Pharms., Inc.*, 182 F.3d 1315, 1319 (Fed. Cir. 1999) (same); *Atlas Powder Co. v. IRECO Inc.*, 190 F.3d 1342, 1348-49 (Fed. Cir. 1999) (“[I]t is irrelevant that the prior art did not recognize the key aspect of [the] invention An inherent structure, composition, or function is not necessarily known.”).

In other words, if the prior art teaches the composition, then the properties of that composition are necessarily present. *Pet.*, 44; *In re Spada*, 911 F.2d 705, 709 (Fed. Cir. 1990). This is applicable for both inherent anticipation and obviousness.

In re Kubin, 561 F.3d 1351 (Fed. Cir. 2009) (finding that where the claimed activity was an inherent property of the known composition, the prior art's failure to mention this was irrelevant to a finding that the claim was obvious).

Nishikawa does not measure the APDR of its separator, so there is no L2 value in the reference. Pet., 25-34. But, the Petition clearly establishes the claimed plastic deformation rate is *necessarily present* because Nishikawa does measure the total elongation at break (L1) and reports other properties of the separator (tensile strength and Young's modulus) that reveal its elasticity, which reveals the portion of the elongation that is elastic. *Id.* The total elongation minus the elastic deformation is the plastic deformation. By requiring that Petitioner identify express teachings in Nishikawa corresponding to the recited measured L2 distance, the panel misapplied the law of inherency. ID, 14.

Compounding that error, the panel effectively turned an “electrochemical device” claim with a recited parameter range into a method step, requiring express disclosure of claim language that is not itself a limitation at all. As explained in the Petition, Pet., 25-32, the specific equation recited in claim 1 for the APDR “merely clarifies what absolute plastic deformation represents” and “does not impart patentable weight” because the claim is an apparatus claim, not a method claim. *Cf. Teva Pharmaceuticals USA, Inc. v. Sandoz, Inc.*, 789 F.3d 1335 (Fed. Cir. 2015) (illustrating how a method of measurement provides context for a numeric

range without being a method step). The law does not require prior art for an apparatus claim to provide the same inputs measured by the same methods to solve the same equation that a method claim might require. *See In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303 (Fed. Cir. 2011) (explaining that an apparatus claim cannot properly include method steps).

The panel inappropriately dismissed Petitioner's expert's explanation for how the prior art necessarily discloses the same material property by a different derivation as "insufficient." ID, 14. The panel's rationale was that Petitioner's calculations involved certain approximations and estimates, which the panel claimed were not adequately justified. *Id.* That misapprehension of fact is flatly contradicted by the Petition itself. The Petition opens with a tutorial on elastic and plastic strain, tensile strength, Young's modulus, and the relationships among these properties. *See* Pet., 6-11. It then walks through each step of each equation and explains what approximations are being made and why they are appropriate. *See, e.g.,* Pet., 25-34. Each step is fully articulated and corroborated with evidence.

As shown in the Petition, the entire range of possible APDRs for the prior art separators falls within the claimed range—meaning the actual APDR of the Nishikawa separator is *necessarily* within the claimed range. In Nishikawa's Example 1, the MD APDR necessarily falls between 72.55% and 82%, and is thus within the claimed range of 40%–1800%. The upper bound (82%) is expressly

disclosed in Table 1 as the elongation at break. APDR can never exceed the total elongation at break (assuming 100% plastic and 0% elastic deformation). The lower bound, 72.55%, is derived from Table 1 data, which provides tensile strength and Young's modulus. The Board faulted Petitioner for not explaining why tensile strength $\div$ Young's modulus is "a proxy for L1 – L2." ID, 14. The answer is straightforward: substituting tensile strength for yield strength necessarily obtains an *overestimate* of elastic strain. Because 9.25% overestimates the actual value, the calculated plastic strain of 72.75% (82% – 9.25%) represents a *lower bound*. Thus, Nishikawa's Example 1 necessarily and inevitably discloses an APDR between 72.55% and 82%—well within the claimed range of 40%–1800%. The panel decision ignores this evidence and improperly denies its existence. *Id.*

The panel's observation that the textbook stress-strain curve of an idealized material is not consistent with the actual stress-strain curves of porous separators is irrelevant. ID, 14. The purpose of referring to the theoretical stress-strain curve is to explain the innate mathematical relationships between properties like tensile strength and Young's modulus, and show the origins of Petitioner's calculations. Petitioner expressly compensates for the reality that polymer separators do not behave like ideal materials by calculating the upper and lower bounds of possible plastic deformation rates for the disclosed separator to show the entire disclosed range necessarily falls within the claimed range. *See Pet.*, 47-48.

The panel rejects this logic by stating that “Petitioner provides no evidence to demonstrate that the [APDR] claimed is inherent in a porous substrate.” ID, 16; *see id.*, n.6 (noting that two of the comparative examples in the specification did not have APDR within the claimed range). This constitutes yet another legal error. The panel requires that Petitioner demonstrate that the *entire* claimed numeric range (i.e., the claimed genus) be inherent in any porous separator—citing two counterexample species as disproof of inherency. ID, 16 n.6. The law does not require that every species within a genus inherently possess the claimed property. Rather, Petitioner only needs to show *one* species (i.e., one separator) in the prior art that necessarily falls within the claimed range in order to inherently anticipate the entire claim. *Eli Lilly & Co. v. Barr Lab’ys, Inc.*, 251 F.3d 955, 971 (Fed. Cir. 2001) (confirming blackletter law that a genus claim limitation is anticipated by a single prior-art species, including where that species inherently has properties later claimed as defining the genus). The separator disclosed in Nishikawa is one such species, even though Nishikawa itself may not expressly state as much. Overlooking the inherency of this disclosure because the properties of the prior-art separators were not measured or expressed in the same way was error.

B. Ground 2: Legal and Factual Errors

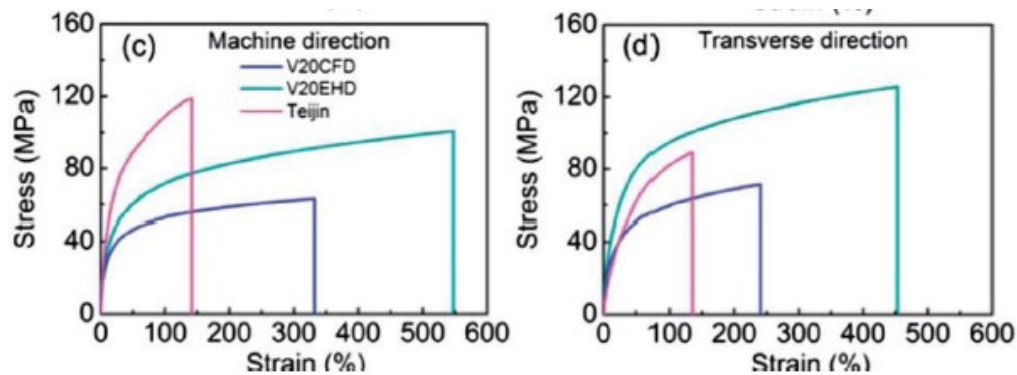
The panel erred in finding that in order to disclose the claimed absolute plastic deformation rate, Chen must expressly disclose the L2 distance or the (L2 –

$L0)/L0*100\%$ equation, and must measure the porous substrate after it has been stretched to breakage and docked along the fracture caused by the breakage and flattened. ID, 18-19. This finding suffers from two legal errors.

First, the panel's decision treats the calculation of the recited APDR in the apparatus claims as a method step, effectively requiring the prior art to perform the same measurement (stretching the porous substrate until breaking, docking and flattening, and measuring the resulting length) in order to disclose an *apparatus* that has the same underlying physical property. *Cf. Teva*, 789 F.3d 1335. But this apparatus claim cannot be properly construed to require a method of measuring step. *See In re Katz*, 639 F.3d 1303. The panel legally erred in categorically rejecting calculations measuring plastic strain in other ways. ID, 18-19.

The panel repeats Patent Owner's arguments that the prior-art references use different chuck-to-chuck distances and stretching speeds, but does not indicate whether this argument was credited. ID, 19. To the extent it was, that is another legal error in Grounds 2 and 3. The claim does not require any particular chuck-to-chuck distance or stretching speed in measuring L0 or L2. *See Hospira, Inc. v. Fresenius Kabi USA, LLC*, 946 F.3d 1322, 1330 (Fed. Cir. 2020) (finding that importing limitations into the claim for the inherency analysis is improper). The claim recites a broad percentage without specifying how the porous substrate needs to be stretched in order to measure the L2 distance. Pet., 3-4, 16-17, 26-30.

Second, it imposes a requirement that the prior art use the same words and equations in order to disclose an underlying physical property that can be measured by many different methods. But there is no *ipsissimis verbis* test for determining whether a reference discloses a claim element, i.e., identity of terminology is not required. *In re Bond*, 910 F.2d 831, 832 (Fed. Cir. 1990). Chen measures plastic strain by stretching the porous substrate to break on a machine that measures the changing length and changing tension in the porous substrate as it stretches to the breaking point. Chen reports the results of this test in the graph below.



EX1005, FIGs. 3(c)-(d).

The graph shows the deformation of the substrate at all points while it is being stretched, with the “absolute” deformation being the strain at the breaking point, where the curve drops to zero. The portion of the strain that is elastic versus plastic is calculated using the information in the graph and Chen’s other reported data.

Meanwhile, the patent *apparatus* claim recites an APDR parameter calculated by stretching the porous substrate to breaking, docking and flattening the broken pieces, and measuring their reassembled length. Both the Chen and

claimed calculations measure the same property: the total plastic deformation the material undergoes. The data produced by the two calculations is different, so one must perform different calculations to derive the APDR for Chen or the claim. But a separator that has a total plastic strain, as measured in Chen, necessarily has an APDR parameter as recited in the apparatus claim. It is just plasticity expressed in different terms. The panel legally erred in finding that Chen did not necessarily or obviously disclose APDR parameter of an apparatus as claimed merely because Chen did not expressly disclose an L2 value or the $(L2 - L0)/L0 * 100\%$ equation.

Additionally, the panel erroneously dismisses the Petition's motivation to combine Nishikawa and Chen by mischaracterizing the Petition. ID, 19-20. The Petition explains the proposed combinations included (1) inserting the Teijin separator of Chen into the battery of Nishikawa, or (2) modifying the Teijin separator in Nishikawa to adopt the properties measured in Chen. Pet., 48-51. The panel quotes the Petition out of context as saying that "Nishikawa and Chen 'disclose different attributes of the *same products*.'" ID, 19 (panel's emphasis). The panel then points to the fact that the Teijin separators in Nishikawa and Chen have different plastic strain values and different Young's moduli as proof that they are not the "same product." *Id.* It concludes that Petitioner's failure to explain these discrepancies "call[s] into question" the motivation to combine the references. *Id.*, 19-20. But several times the Petition explains that the separators in Nishikawa and

Chen are the same *types* of separators, made by the same manufacturer and the same process—not literally the same separator. *See* Pet., 48-51.

Nothing about the proposed combinations requires that the porous substrates have the same plastic strain and Young’s modulus. The Petition explained that one of skill in the art would expect success in using the Chen separator (or a separator with similar properties) in Nishikawa’s battery because both references use Teijin separators manufactured by the same wet process. It was error for the panel to completely overlook the actual motivation to combine in favor of a “same products” theory not advanced in the Petition.

C. Ground 3: Legal and Factual Errors

The panel legally erred in multiple respects in Ground 3. *First*, the panel repeats the legal errors and misapprehensions of fact present in Ground 2 by carrying forward its finding that Chen does not disclose the APDR of the separators it tests by virtue of providing the stress-strain curves. ID, 20-21. As discussed above, the panel’s legal rationale imposes an improper *ipsissimis verbis* requirement, and an improper method step requirement into an apparatus claim. *See In re Bond*, 910 F.2d at 832; *In re Katz*, 639 F.3d 1303.

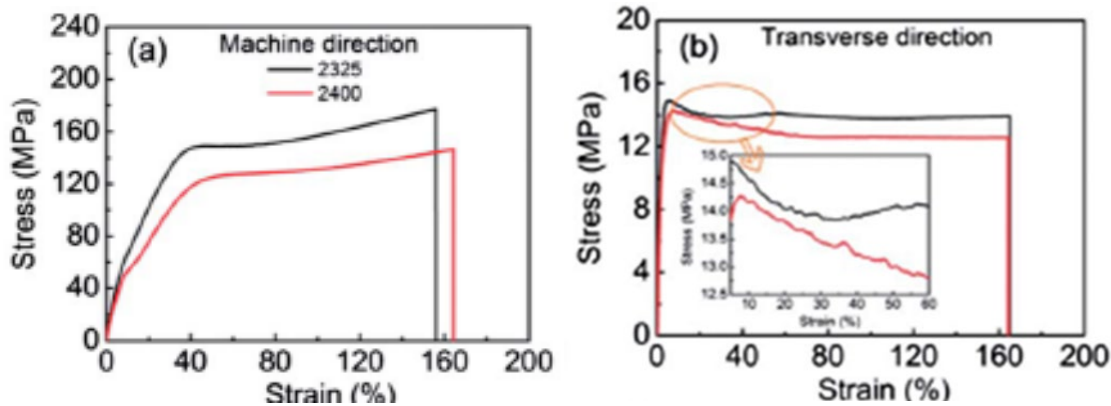
Second, the panel dismissed the entirety of Petitioner’s Ground 3 analysis on the basis that it used 35% strain as the yield point for the Celgard separators measured in Chen, instead of the reported “point . . . where the stress-strain curve

becomes non-linear” that Petitioner used for the Teijin separators discussed in Ground 2. The panel incorrectly states “[t]here is no explanation given for the dramatic difference, or why ‘strain that non-linearly occurred’ represents elastic strain for the Teijin separator, but not for the Celgard separators.” ID, 20-21.

The Petition clearly explains why the data used for the calculations is what it is. *See* Pet., 9-10, 30-32, 47-48, 65-66. The panel clearly erred in ignoring this entire section of the Petition. At a high level, the reason Petitioner’s expert used different metrics for the different separators is because the Teijin and Celgard separators are made by different processes (wet process vs. dry process), which results in their stress-strain curves having different shapes. As the Petition (and the patentee) explained, APDR of a porous substrate depends on the process by which it was made. Pet., 33; EX1008, 24.

Wet process separators (Teijin) have a smooth, convex stress-strain curve. The Petition explains that for wet process separators, the deformation before the yield point is *predominantly* elastic, and the deformation after the yield point is *predominantly* plastic, such that the minority deformation type is negligible (at least in view of the staggeringly broad numeric range in the claims). Pet., 9-10, 30-32, 47-48, 65-66. Petitioner explained why disregarding the minority deformation type introduced a margin of error into the calculation, but the separator still necessarily had the claimed deformation rate. Pet., 9-10, 47-48.

Dry process separators (Celgard) have an initial spike in strain, followed by a slight concave region of the curve.



EX1003, FIGs. 3(a)-(b).

The Petition explains that *all* deformation after the 35% strain is necessarily plastic. Pet., 65-66 (citing EX1005, 14910). That value thus provides an indisputable lower bound for L2. To the extent there is plastic deformation prior to the 35% strain point, that only takes the L2 value further towards the center of the claimed range. In other words, Petitioner's expert ensured that all of his calculations were as conservative as possible, i.e., making all approximations in favor of the patent's validity. Pet., 9-10, 47-48. Because the Celgard separators produce a stress-strain curve with a dramatically different shape, there is an additional data point that allows for an even more conservative calculation. EX1005, 14910. That is why the Petition used 35% strain for the Celgard separators. The panel erred in ignoring this extensive explanation, as though there was "no explanation given." ID, 20.

D. All Grounds: The panel erred in its evidentiary standard.

Finally, the panel legally erred throughout all three Grounds by holding Petitioner to an improperly high evidentiary standard. Whether the calculations and results presented in the Petition establish that the claimed APDR is inherent in the prior-art separators is ultimately assessed under a preponderance of the evidence standard. 35 U.S.C. § 316(e). At the institution stage, the Board is tasked with determining whether the Petition shows a reasonable likelihood that it will ultimately prove inherency. 35 U.S.C. § 314(a). That likelihood is established by presenting evidence that the devices disclosed in the prior art must have the claimed property (to a reasonable degree of mathematical certainty) by virtue of their compositions and attributes. *The Mangrove Partners Mater Fund, Ltd. v. VitnetX Inc.*, IPR2015-01046, Paper 14 (PTAB Jan. 25, 2016). Here, the panel effectively required that the Petition show the claimed APDR *conclusively* in order to justify institution. That was legal error.

III. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Director grant this request for Director Review and reverse the panel's denial of institution. Even if not reversed, Petitioner respectfully requests the Director remand this case to the panel to correctly analyze the Petition and corroborating evidence under the correct inherency anticipation and reasonable likelihood to succeed standards.

Respectfully submitted,

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

I certify that the above-captioned **PETITIONER’S REQUEST FOR
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