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Recent PTAB Precedential and Informative Decisions

Presenters: Lead Judge Kal Deshpande, Judge Kevin Cherry,
and Judge Linda Horner

May 23, 2019

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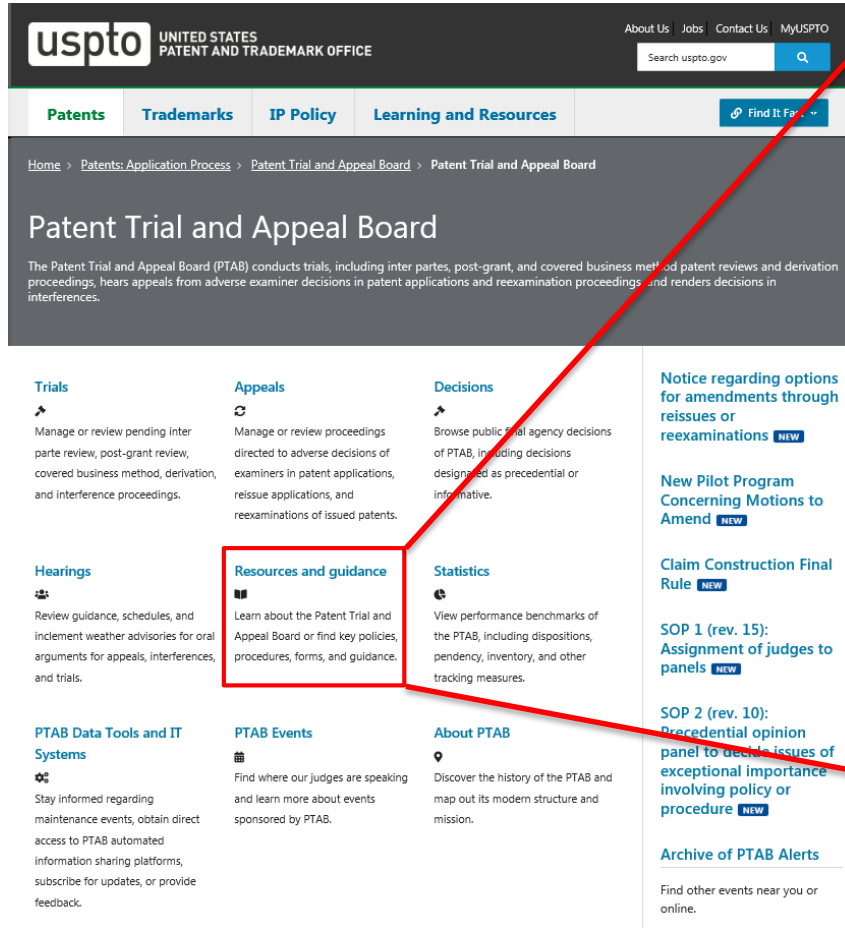
Agenda

- **Standard Operating Procedure 2 (SOP 2): Process for Issuing Precedent**
- **Decisions issued via the Precedential Opinion Panel (POP)**
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 - Topic 1: Real Party in Interest
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Standard Operating Procedure 2 (SOP 2): Process for Issuing Precedent

Standard Operating Procedure 2

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Standard operating procedure 2

September 2018 update

- 2 paths by which the PTAB may issue binding Board precedent:
 - **Path 1:** Precedential Opinion Panel
 - **Path 2:** Designation

SOP 2 Path 1:

Precedential Opinion Panel (POP)

- Establishes new Precedential Opinion Panel (POP) for creating binding Board precedent on rehearing
- Provides notice to the parties when POP review takes place
- Explains the standards, procedures, and timing for requesting POP review in a pending case on rehearing

SOP 2 Path 1: Precedential Opinion Panel (POP)

- **Default composition**
 - Director
 - Commissioner for Patents
 - PTAB Chief Judge

SOP 2 Path 1: Precedential Opinion Panel (POP)

- Criteria used by POP in deciding whether to grant review:
 - Constitutional questions
 - Important questions regarding statutes, rules, regulations
 - Important issues regarding precedential case law
 - Issues of broad applicability to Board
 - Resolve conflicts between Board decisions
 - Promote certainty and consistency

Decisions issued via the Precedential Opinion Panel (POP)

POP decisions and orders

Case/Appeal Name	Case/Appeal Number	Topic	Status	Date Decided
<i>Proppant Express Invs., LLC v. Oren Techs., LLC</i>	IPR2018-00914, Paper 38	AIA - Joinder - 315(c)	Decided (POP)	3/13/2019

Case/Appeal Name	Case/Appeal Number	Topic	Status	Date Order Issued
<i>Hulu, LLC v. Sound View Innovations, LLC</i>	IPR2018-01039, Paper 15	AIA - Printed Publications	Pending (POP)	4/3/2019
<i>GoPro, Inc. v. 360Heros, Inc.</i>	IPR2018-01754, Paper 23	AIA - 315(b) - Time Bar	Pending (POP)	5/10/2019

Proppant Express Invs., LLC v. Oren Techs., LLC

IPR2018-00914 (PTAB Mar. 13, 2019) (Paper 38) (Precedential)

- Precedential Opinion Panel (POP) ordered review to address the following issues:
 - Under 35 U.S.C. § 315(c) may a petitioner be joined to a proceeding in which it is already a party?
 - Does 35 U.S.C. § 315(c) permit joinder of new issues into an existing proceeding?
 - Does the existence of a time bar under 35 U.S.C. § 315(b), or any other relevant facts, have any impact on the first two questions?
- The POP accepted additional briefing from the parties and amici and held an oral hearing on January 31, 2019. The POP issued a precedential decision on March 13, 2019.

35 U.S.C. 315: Relation to other proceedings or actions

- (b) Patent Owner's Action— An inter partes review may not be instituted 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 petitioner is served with a complaint alleging infringement of the patent. The time limitation set forth in the preceding sentence shall not apply to a request for joinder under subsection (c).
- (c) Joinder— If the Director institutes an inter partes review, the Director, in his or her discretion, may join as a party to that inter partes review any person who properly files a petition under section 311 that the Director, after receiving a preliminary response under section 313 or the expiration of the time for filing such a response, determines warrants the institution of an inter partes review under section 314.

Proppant Express Invs., LLC v. Oren Techs., LLC

IPR2018-00914 (PTAB Mar. 13, 2019) (Paper 38) (Precedential)

- The POP concluded:
 - 35 U.S.C. § 315(c) provides discretion to allow a petitioner to be joined to a proceeding in which it is already a party;
 - 35 U.S.C. § 315(c) provides discretion to allow joinder of new issues into an existing proceeding; and
 - The existence of a time bar under 35 U.S.C. § 315(b) is one of several factors that may be considered when exercising discretion under § 315(c).

Proppant Express Invs., LLC v. Oren Techs., LLC

IPR2018-00914 (PTAB Mar. 13, 2019) (Paper 38) (Precedential)

- When an otherwise time-barred petitioner requests same party and/or issue joinder, the Board will exercise its discretion only in limited circumstances—namely, where fairness requires it and to avoid undue prejudice to a party.
- In exercising discretion, exemplary factors the Board may consider include:
 - Actions taken by a patent owner in a co-pending litigation (e.g., late addition of newly asserted claims);
 - Conduct of the parties;
 - The stage and schedule of an existing *inter partes* review; and
 - Non-exclusive factors set out in *General Plastic Industrial Co., Ltd. v. Canon Kabushiki Kaisha*, which may support the exercise of the Board's discretion to deny institution under § 314(a).

Hulu, LLC v. Sound View Innovations, LLC

IPR2018-01039 (PTAB Apr. 3, 2019) (Paper 15)

- Precedential Opinion Panel (POP) ordered review to address the following issue:
 - What is required for a petitioner to establish that an asserted reference qualifies as “printed publication” at the institution stage?
- The POP received additional briefing from parties and amici, due on May 1, 2019.
- The POP received responses to additional briefing from parties, due on May 15, 2019.

GoPro, Inc. v. 360Heros, Inc.

IPR2018-01754 (PTAB May 10, 2019) (Paper 23)

- Precedential Opinion Panel (POP) ordered review to address the following issue:
 - Whether the service of a pleading asserting a claim alleging infringement, where the serving party lacks standing to sue or the pleading is otherwise deficient, triggers the 1 year time period for a petitioner to file a petition under 35 U.S.C. § 315(b).
- The POP is accepting additional briefing from the parties and amici, due on May 24, 2019.
- The POP will accept responses to the additional briefing from the parties, due on June 3, 2019.

Decisions designated as precedential or informative

SOP 2 Path 2: Designation

- Provides for designation of previously-issued cases as precedential or informative by the Director
- Also provides for de-designation of previously-issued precedential or informative cases by the Director

Recent decisions designated precedential

Case/Appeal Name	Case/Appeal Number	Topic	Date Issued	Date Designated
<i>Proppant Express Invs., LLC v. Oren Techs., LLC</i>	IPR2017-01917, Paper 86	AIA - RPI - 312(a)(2), 315(b)	2/13/2019	4/16/2019
<i>Ventex Co., Ltd v. Columbia Sportswear North America, Inc.</i>	IPR2017-00651, Paper 152	AIA - RPI - 312(a)(2), 315(b)	1/24/2019	4/16/2019
<i>Adello Biologics LLC v. Amgen Inc.</i>	PGR2019-00001, Paper 11	AIA - RPI - 322(a)(2)	2/14/2019	4/16/2019
<i>Valve Corp. v. Elec. Scripting Prods., Inc.</i>	IPR2019-00062, -00063, -00084, Paper 11	AIA - 314(a) - Institution	4/2/2019	5/7/2019
<i>NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.</i>	IPR2018-00752, Paper 8	AIA - 314(a), 325(d) – Institution	9/12/2018	5/7/2019
<i>Lectrosonics, Inc. v. Zaxcom, Inc.</i>	IPR2018-01129, -01130, Paper 15	AIA - MTA - 316(d)	2/25/2019	3/7/2019
<i>Amazon.com, Inc. v. Uniloc Luxembourg S.A.</i>	IPR2017-00948, Paper 34	AIA - MTA - 316(d)	1/18/2019	3/18/2019

Recent decisions designated precedential (cont.)

Case/Appeal Name	Case/Appeal Number	Topic	Date Issued	Date Designated
<i>DePuy Synthes Prods., Inc. v. MEDIDEA, L.L.C.</i>	IPR2018-00315, Paper 29	AIA - Oral Argument	1/23/2019	3/18/2019
<i>K-40 Elecs., LLC v. Escort, Inc.</i>	IPR2013-00203, Paper 34	AIA - Oral Argument	5/21/2014	3/18/2019
<i>Huawei Device Co., Ltd. v. Optis Wireless Tech., LLC</i>	IPR2018-00816, Paper 19	AIA - Request for Rehearing	1/8/2019	4/5/2019

Recent decisions designated informative

Case/Appeal Name	Case/Appeal Number	Topic	Date Issued	Date Designated
<i>Deeper, UAB v. Vexilar, Inc.</i>	IPR2018-01310, Paper 7	AIA - Institution - 314(a)	1/24/2019	4/5/2019
<i>Chevron Oronite Company LLC v. Infineum USA L.P.</i>	IPR2018-00923, Paper 9	AIA - Institution - 314(a)	11/7/2018	4/5/2019
<i>Ex Parte Smith</i>	2018-000064	101	2/1/2019	3/19/2019

Topic 1: Real Party in Interest

Proppant Express Invs., LLC v. Oren Techs., LLC

IPR2017-01917 (PTAB Feb. 13, 2019) (Paper 86) (Precedential)

- Designated precedential on April 16, 2019.
- Denied motion to terminate proceeding after Petitioner updated mandatory notices to name additional RPI where Patent Owner argued that update necessitated a change in the petition filing date and termination under 35 U.S.C. § 315(b).
- Considered the following factors when determining whether to allow a Petitioner to amend RPI identification post-institution while maintaining the petition's original filing date:
 - attempts to circumvent the 315(b) bar,
 - bad faith by Petitioner,
 - prejudice to Patent Owner caused by delay, or
 - gamesmanship by Petitioner.

Ventex Co., Ltd v. Columbia Sportswear North America, Inc.

**IPR2017-00651 (PTAB Jan. 24, 2019) (Paper 152 (public version))
(Precedential)**

- Designated precedential on April 16, 2019.
- Dismissed petition, vacated institution, and terminated the review after determining that the petition was time-barred under 35 U.S.C. § 315(b) because Petitioner failed to name an RPI and privy that would have been time-barred if named at the time the petition originally was filed.

Adello Biologics LLC v. Amgen Inc.

PGR2019-00001 (PTAB Feb. 14, 2019) (Paper 11) (Precedential)

- Designated precedential on April 16, 2019.
- Granted Petitioner's pre-institution motion to amend mandatory notices to name additional RPI without changing petition date. Denied PO's motion for discovery of facts surrounding omission of new RPI from initial identification.
- Considered the following factors when determining whether to allow Petitioner to amend RPI identification while maintaining the petition's original filing date:
 - gamesmanship by Petitioner,
 - bad faith by Petitioner, and
 - prejudice to Patent Owner caused by delay.

Topic 2: 35 U.S.C. 314(a)

35 U.S.C. 314(a):

Institution of inter partes review

- (a) Threshold — The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.

Discretion to institute under § 314(a)

General Plastic Indus. Co. v. Canon Kabushiki Kaisha

IPR2016-01357 (PTAB Sept. 6, 2017) (Paper 19) (§ II.B.4.i) (Precedential)

- Non-exhaustive factors (multiple petitions)
 1. Whether same petitioner previously filed a petition directed to same claims of same patent;
 2. Whether, at time of filing of first petition, petitioner knew of prior art asserted in second petition or should have known of it;
 3. Whether, at time of filing of second petition, petitioner already received patent owner's preliminary response to first petition or received Board's decision on whether to institute review in first petition;
 4. Length of time that elapsed between time petitioner learned of prior art asserted in second petition and filing of second petition;
 5. Whether petitioner provides adequate explanation for time elapsed between filings of multiple petitions directed to same claims of same patent;
 6. Finite resources of the Board; and
 7. Requirement under § 316(a)(11) to issue a final determination not later than 1 year after date on which Director notices institution of review.

Valve Corp. v. Elec. Scripting Prods., Inc.

IPR2019-00062, -00063, -00084 (PTAB Apr. 2, 2019) (Paper 11) (Precedential)

- Designated precedential on May 7, 2019
- Denied institution of *inter partes* review after applying the *General Plastic* factors
- Explained that the Board's application of the *General Plastic* factors is not limited to instances when multiple petitions are filed by the same petitioner
- When different petitioners challenge the same patent, the Board considers any relationship between those petitioners when weighing the *General Plastic* factors.

NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.

IPR2018-00752 (PTAB Sept. 12, 2018) (Paper 8) (Precedential)

- Designated precedential on May 7, 2019
- Denied institution under 35 U.S.C. § 325(d) after finding that petition raised substantially the same prior art and arguments as considered previously by the Office
 - 35 U.S.C. 325(d): Notwithstanding sections 135(a), 251, and 252, and chapter 30, during the pendency of any post-grant review under this chapter, if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the post-grant review or other proceeding or matter may proceed, including providing for the stay, transfer, consolidation, or termination of any such matter or proceeding. In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, **the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.** (Emphasis added).

NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.

IPR2018-00752 (PTAB Sept. 12, 2018) (Paper 8) (Precedential)

- Also denied institution under 35 U.S.C. § 314(a) after determining that instituting review would be an inefficient use of Board resources
 - Considered parallel district court proceeding as an additional factor in decision to deny institution
 - District court proceeding was nearing final stages, and
 - Board proceeding would involve:
 - same prior art references as in district court, and
 - same arguments as in district court.

Deeper, UAB v. Vexilar, Inc.

IPR2018-01310 (PTAB Jan. 24, 2019) (Paper 7) (Informative)

- Designated informative on April 5, 2019
- Determines that “instituting a trial with respect to all twenty-three claims and on all four grounds based on evidence and arguments directed to [and where Petitioner demonstrates a reasonable likelihood of prevailing with respect to] only two claims and one ground would not be an efficient use of the Board’s time and resources.”
- Cites to SAS Q&A’s, Part D, *Effect of SAS on Future Challenges that Could Be Denied for Statutory Reasons* (June 5, 2018), available at https://www.uspto.gov/sites/default/files/documents/sas_qas_20180605.pdf
 - “[T]he panel will evaluate the challenges and determine whether, in the interests of efficient administration of the Office and integrity of the patent system (see 35 USC § 316(b)), the entire petition should be denied under 35 USC § 314(a).”

Chevron Oronite Company LLC v. Infineum USA L.P.

IPR2018-00923 (PTAB Nov. 7, 2018) (Paper 9) (Informative)

- Designated informative on April 5, 2019
- Denies institution based on an inefficient use of the Board's time and resources where Petitioner demonstrates a reasonable likelihood of prevailing with respect to only two dependent claims out of 20 claims challenged
- Cites to SAS Q&A's, Part D, *Effect of SAS on Future Challenges that Could Be Denied for Statutory Reasons* (June 5, 2018), available at www.uspto.gov/sites/default/files/documents/sas_qas_20180605.pdf
 - "[T]he panel will evaluate the challenges and determine whether, in the interests of efficient administration of the Office and integrity of the patent system (see 35 USC § 316(b)), the entire petition should be denied under 35 USC § 314(a)."

Topic 3: Motion to Amend

Lectrosonics, Inc. v. Zaxcom, Inc.

IPR2018-01129, -01130 (PTAB Feb. 25, 2019) (Paper 15) (Precedential)

- Designated precedential on March 7, 2019.
- Replaces *Western Digital Corp. v. SPEX Techs., Inc.*, Case IPR2018-00082, -00084 (PTAB April 25, 2018) (Paper 13), previously informative
- Provides guidance and information regarding statutory and regulatory requirements for a motion to amend in light of Federal Circuit case law.

Lectrosonics, Inc. v. Zaxcom, Inc.

IPR2018-01129, -01130 (PTAB Feb. 25, 2019) (Paper 15) (Precedential)

- Sets forth guidance, such as:
 - contingent motions to amend;
 - the burden of persuasion that the Office applies when considering the patentability of substitute claims;
 - the requirement that a patent owner propose a reasonable number of substitute claims;
 - the requirement that the amendment respond to a ground of unpatentability involved in the trial;
 - the scope of the proposed substitute claims;
 - the requirement that a patent owner provide a claim listing with its motion to amend;
 - the default page limits that apply to motion to amend briefing; and
 - the duty of candor.

Amazon.com, Inc. v. Uniloc Luxembourg S.A.

IPR2017-00948 (PTAB Jan. 18, 2019) (Paper 34) (Precedential)

- Designated precedential on March 18, 2019.
- Section 311(b) limits a petitioner to requesting cancellation of existing claims only under § 102 and § 103.
- However, the statutory provision providing a right to a motion to amend, § 316(d), does not prevent the Board from considering unpatentability under sections other than § 102 and § 103 with respect to substitute claims.
- This decision determines that § 311(b) does not preclude Petitioner from raising, or the Board from considering, other grounds of unpatentability, including § 101, as to substitute claims not yet part of a patent, in the context of a motion to amend.

Topic 4: Oral Hearing

DePuy Synthes Prods., Inc. v. MEDIDEA, L.L.C.

IPR2018-00315 (PTAB Jan. 23, 2019) (Paper 29) (Precedential)

- Designated precedential on March 18, 2019.
- Determines that the testimony of an inventor at the oral hearing is considered new evidence, and not permitted, if a declaration from the inventor has not been previously provided.
- As set forth in the Trial Practice Guide:
 - A party may rely upon evidence that has been previously submitted in the proceeding and may only present arguments relied upon in the papers previously submitted. No new evidence or arguments may be presented at the oral argument.

K-40 Elecs., LLC v. Escort, Inc.

IPR2013-00203 (PTAB May 21, 2014) (Paper 34) (Precedential)

- Designated precedential on March 18, 2019.
- The Board does not envision that live testimony will be necessary at many oral arguments and will only order live testimony in limited circumstances, such as where the Board considers the demeanor of a witness critical to assessing credibility.
- Provides factors that may be considered in determining whether to permit live testimony including:
 - The importance of the witness's testimony to the case, i.e., whether it may be case-dispositive.
 - Whether the witness is a fact witness.

Topic 5: Rehearing Request

Huawei Device Co., Ltd. v. Optis Wireless Tech., LLC

IPR2018-00816 (PTAB Jan. 8, 2019) (Paper 19) (Precedential)

- Designated precedential on April 5, 2019.
- Addresses the good cause standard for filing new evidence with a rehearing request.
- As set forth in the Trial Practice Guide:
 - Evidence not already of record at the time of the decision will not be admitted absent a showing of good cause.
- A party should request a conference call prior to filing a rehearing request to argue that good cause exists for admitting the new evidence or, alternatively, the party may argue in the rehearing request itself that good cause exists.

Topic 6: 35 U.S.C. 101

Ex Parte Smith

Appeal 2018-000064 (PTAB Feb. 1, 2019) (Informative)

- Designated informative on March 19, 2019.
- Both majority and dissenting opinions apply the revised guidance published in the USPTO's January 7, 2019 Memorandum, *2019 Revised Patent Subject Matter Eligibility Guidance*.

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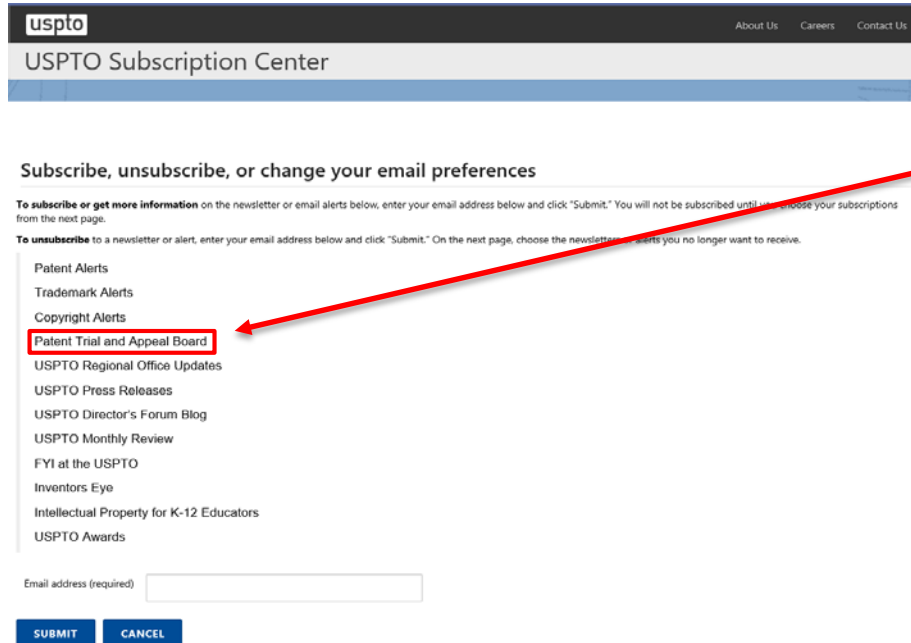
Precedential

- [Valve Corp. v. Elec. Scripting Prods., Inc.](#), Case IPR2019-00062, -00063, -00084, Paper 11 (PTAB Apr. 2, 2019) (designated: May 7, 2019) [AIA § 314(a), deny institution – General Plastic factors apply to different Petitioner]
- [NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.](#), Case IPR2018-00752, Paper 8 (PTAB Sept. 12, 2018) (designated: May 7, 2019) [AIA §§ 314(a), 325(d), deny institution – prior art previously considered, co-pending district court proceeding nearing completion]
- [Adello Biologics LLC v. Amgen Inc.](#), Case PGR2019-00001, Paper 11 (Feb. 14, 2019) (designated: Apr. 16, 2019) [AIA § 322(a)(2), pre-institution update to Mandatory Notices to add RPI]
- [Proppant Express Investments, LLC v. Oren Techs., LLC](#), Case IPR2017-01917, Paper 86 (Feb. 13, 2019) (designated: Apr. 16, 2019) [AIA §§ 312(a)(2), 315(b), post-institution update to Mandatory Notices to add RPI]
- [Ventex Co., Ltd. v. Columbia Sportswear N. Am., Inc.](#), Case IPR2017-00651, Paper 152 (Jan. 24, 2019) (designated: Apr. 16, 2019) [AIA §§ 312(a)(2), 315(b), terminating proceeding where Petition failed to name time-barred RPI and privy]
- [Huawei Device Co., Ltd. v. Optis Cellular Tech., LLC](#), Case IPR2018-00816, Paper 19 (Jan. 8, 2019) (designated: Apr. 5, 2019) [AIA, procedure and standard for submitting new evidence on rehearing]



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