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On behalf of Patent Owner Ocado Innovation Limited

By: Stephen J. Elliott (Reg. No. 52,858)  
Raffaele A. DeMarco (Reg. No. 54,061)  
Laurie N. Stempler (pro hac vice)  
Email: [Ocado\\_PTAB@sullcrom.com](mailto:Ocado_PTAB@sullcrom.com)  
SULLIVAN & CROMWELL LLP  
125 Broad Street  
New York, NY 10004  
Tel. 212-558-7446 Fax: 212-291-9868

Sheila N. Swaroop (Reg. No. 53,658)  
John L. Paik (Reg. No. 54,355)  
KNOBBE, MARTENS, OLSON & BEAR, LLP  
2040 Main Street, 14<sup>th</sup> Floor  
Irvine, CA 92614  
Tel.: 949-760-0404 Fax: 949-760-9502  
Email: [BoxOcado@knobbe.com](mailto:BoxOcado@knobbe.com)

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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AutoStore System Inc.  
Petitioner

v.

Ocado Innovation Limited  
Patent Owner

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**IPR2021-00798**  
Patent 9,796,080

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**PATENT OWNER SUR-REPLY TO PETITIONER REPLY  
TO PRELIMINARY RESPONSE**

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Patent Owner (“PO”) hereby responds to Petitioner’s Reply.

**I. 35 U.S.C. § 102(d) CODIFIED THE *DYNAMIC DRINKWARE* RULE**

Section 102(d) requires Lert to be “entitled to claim” priority to the provisional to be accorded the provisional filing date. The plain language of 35 U.S.C. § 119(e)(1), along with Federal Circuit precedent and PTAB decisions, establish that a patent is not “entitled to claim” priority to a provisional unless the provisional discloses “an invention . . . in the manner provided by section 112(a).” Petitioner agreed with this interpretation, acknowledging it needed to prove that “[a]t least one claim in Lert is supported by the Lert Provisional” under *Dynamic Drinkware*. Pet. at 13-16 (citing *Unified Patents, Inc. v. Longhorn HD LLC*, IPR2020-00879, Paper 10 at 14-15 (PTAB Nov. 12, 2020), which applies *Dynamic Drinkware*).

Now, after PO demonstrated that Lert’s provisional does not enable the “autonomous vehicles” limitation, Petitioner argues that § 102(d) legislatively overruled the *Dynamic Drinkware* rule, such that a provisional no longer needs to enable any claim of the patent for the patent to be accorded the provisional filing date. Rep. at 2-4. This statutory interpretation argument, in addition to being inconsistent with the Petition, is incorrect for several reasons.

First, Petitioner quotes a portion of § 102(d) but emphasizes only the requirement that Lert’s provisional should “describe[] the subject matter” relied on

as alleged prior art and deemphasizes that Lert must be “entitled to claim a right of priority.” Rep. at 2-3. As explained below, the latter requires the provisional to enable the claimed invention, but the provisional does not do so.

Second, Petitioner cites only USPTO guidance to examiners. Rep. at 3. But such guidance “does not have the force of law.” MPEP, Foreword. When such guidance is inconsistent with precedent, precedent controls. *cxLoyalty, Inc. v. Maritz Holdings Inc.*, 986 F.3d 1367, 1376, n.1 (Fed. Cir. 2021).

The section of the MPEP cited by Petitioner, § 2154.01(b), suggests that the “AIA draws a distinction between actually being entitled to priority” under § 100(i)(1)(B) “and merely being entitled to claim priority” under § 102(d). But § 102(d) does not state that the different phrasing of those sections means that a showing of enablement is not required for a prior art reference to be “entitled to claim” priority to a provisional.

Moreover, the guidance relies on questionable legislative history in which Senator Kyl argued that the statutory sections governing priority—119 and 120—distinguish the “core requirement” of “an enabling disclosure” from merely “ministerial requirements” such as “copendency and specific reference.” 157 Cong. Rec. S1370 (Mar. 8, 2011) (cited by April 5, 2018 Guidance at 2). But the language of § 119(e)(1) does not make such a distinction and instead treats the requirements for claiming priority together, without identifying any “core requirement” or

“ministerial requirements.” 35 U.S.C. § 119(e)(1). This snippet of legislative history, made by a single senator and unsupported by the statutory text, cannot be grounds for interpreting § 102(d)’s “entitled to claim” language to eliminate decades of precedent that requires a priority application to provide Section 112 support, including an enabling disclosure.<sup>1</sup>

Rather than relying on Petitioner’s interpretation of § 102(d), the Board should rely on longstanding Federal Circuit precedent. Consistent judicial usage in pre-AIA precedential decisions and recent PTAB decisions strongly favor interpreting § 102(d)’s “entitled to claim” language to mean that an earlier application must meet the § 112 requirements for a later patent to be “entitled to claim” priority to or the benefit of the earlier application. Numerous precedential cases decided before the AIA established that satisfaction of § 112 ¶ 1 by an earlier

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<sup>1</sup> Courts have at least twice rejected Senator Kyl’s interpretation of post- and pre-AIA law. The Supreme Court rejected Senator Kyl’s position that the AIA eliminated secret on-sale prior art. *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 634 (2019); 157 Cong. Rec. S1370. And the Federal Circuit rejected Senator Kyl’s position that *In re Wertheim* “was already almost completely overruled by the American Inventors Protection Act of 1999” by reaffirming *Wertheim* in *Dynamic Drinkware*, 800 F.3d at 1381; 157 Cong. Rec. S1369.

application is a necessary condition for a later patent being “entitled to claim priority” to or the benefit of the earlier application. For example, the C.C.P.A. held:

Under 35 U.S.C. § 120, an applicant is entitled to claim the benefit of the filing date of an earlier application for a later-claimed invention only when that earlier application discloses that invention in the manner required by 35 U.S.C. § 112 first paragraph.

*In re Berkman*, 642 F.2d 427, 429 (C.C.P.A. 1981). And the Federal Circuit has held that a patent is “not entitled to claim priority” to an earlier application if the disclosure in the earlier application is not enabling. *Adang v. Fischhoff*, 286 F.3d 1346, 1358 (Fed. Cir. 2002); *see also Applied Materials, Inc. v. Advanced Semiconductor Materials Am., Inc.*, 98 F.3d 1563, 1575 (Fed. Cir. 1996); *Research Corp. Techs. v. Microsoft Corp.*, 627 F.3d 859, 872 (Fed. Cir. 2010); *Trading Techs. Int'l, Inc. v. eSpeed, Inc.*, 595 F.3d 1340, 1361 (Fed. Cir. 2010); *Chiron Corp. v. Genentech, Inc.*, 363 F.3d 1247, 1252 (Fed. Cir. 2004); *In re Daniels*, 144 F.3d 1452, 1457 (Fed. Cir. 1998); *In re NTP, Inc.*, 654 F.3d 1268, 1273 (Fed. Cir. 2011).

Consistency in precedent supports PO’s interpretation of “entitled to claim a right of priority.” As the Supreme Court has explained, “When ‘all (or nearly all) of the’ relevant judicial decisions have given a term or concept a consistent judicial gloss, we presume Congress intended the term or concept to have that meaning when it incorporated it into a later-enacted statute.” *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011). Section 102(d)’s “entitled to claim” language did not overturn pre-

AIA precedent supporting the *Dynamic Drinkware* rule; it codified it.

Petitioner’s assertion that the Federal Circuit found the *Dynamic Drinkware* rule “not applicable to AIA patents” (Rep. at 4) is wrong. The court merely declined to decide whether *Dynamic Drinkware* applies to AIA patents because that case addressed “the pre-AIA version of § 102.” *Dynamic Drinkware LLC v. Nat’l Graphics, Inc.*, 800 F.3d 1375, 1382, n.2 (Fed. Cir. 2015). The Board itself has subsequently held that *Dynamic Drinkware* applies to AIA patents. *See, e.g., Ex Parte Soumyadip Ghosh, Dung Phan, and Xu Sun*, Appeal 2020-004145, 2021 WL 3053333, at \*2 (PTAB July 15, 2021).

Moreover, *Dynamic Drinkware* held that a “reference patent is only **entitled to claim the benefit** of the filing date of its provisional application if the disclosure of the provisional application provides support for the claims in the reference patent in compliance with § 112, ¶ 1.” *Id.* at 1381 (emphasis added). The MPEP’s reliance on the same “entitled to claim” language to eliminate the need for a provisional to provide § 112 support directly contradicts this Federal Circuit precedent. *Dynamic Drinkware*’s use of the statutory “entitled to claim” language demonstrates that an earlier application must provide Section 112 support even under post-AIA § 102(d).

In sum, rather than adopting Petitioner’s new interpretation of § 102(d), the Board should rely on the statute’s language and precedent, all of which support the conclusion that a provisional must satisfy 35 U.S.C. § 112 ¶ 1 for a later patent to

be entitled to claim priority to the provisional, and should reject Petitioner’s argument that Lert is prior art even if its provisional is non-enabling.

## II. CLAIM CONSTRUCTION

### A. “autonomous vehicle” (Lert claims 1 and 5)

PO’s proposed construction of “autonomous vehicles”—“self-guided vehicles that navigate essentially without outside control of a human or external human processor”—is the plain and ordinary meaning and should be adopted by the Board. POPR at 14. Petitioner’s proposed construction of “autonomous vehicles” is *not* the plain and ordinary meaning. Rep. at 5. Petitioner relies on attorney argument to contend that “autonomous” excludes only one form of external control, namely, human control.<sup>2</sup> *Id.* But a POSITA would understand that “autonomous” excludes *all* external control, both by humans and computers. Ex. 2009 ¶ 39.

Lert expressly distinguishes (1) “rail-guidance” embodiments—in which rail “switches are controlled by the CCS, which also manages movement of the R-Bots themselves, so the R-Bots on the guideway simply drive on the rails wherever the

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<sup>2</sup> Even under Petitioner’s proposed construction of “autonomous vehicles,” the embodiments in which Lert’s vehicles are controlled by the CCS are not autonomous (contrary to Petitioner’s contention) because they also use “human operators.” AS-1005 at 3:44-50 (CCS communicates with “human operators”).

switches take them and whenever the CCS tells them”—from (2) an embodiment in which “*self-guidance by R-Bots* running unconstrained on the floor may be used.” AS-1005 at 8:22-35 (emphasis added). The key phrase, “self-guidance by R-Bots,” discloses vehicles that control themselves, which aligns with a POSITA’s understanding of “autonomous vehicles.” Ex. 2009 ¶ 42. Further, the embodiments in which the R-Bots “simply drive on the rails wherever the switches take them and whenever the CCS tells them” aligns with a POSITA’s understanding of *non*-autonomous vehicles. *Id.* Thus, Lert plainly discloses non-autonomous vehicles that move with outside control and autonomous vehicles that do not.

Petitioner attempts to write “self-guidance by R-Bots” out of Lert’s specification. First, Petitioner argues that “R-Bots running unconstrained on the floor” does not say that those vehicles are “autonomous” or that they operate outside of CCS control. Rep. at 7. But Petitioner omits the key phrase, “self-guidance by R-Bots,” which discloses that the vehicles operate without CCS control.

Second, Petitioner argues that *all* embodiments in Lert use “autonomous vehicles,” citing a sentence that says that “the disclosed embodiment” uses “autonomous robotic vehicles.” *Id.* (citing AS-1005 at 2:56-63). However, that sentence immediately follows the introduction of Figs. 2a and 2b, which illustrate multiple “disclosed embodiments.” AS-1005 at 2:52-55. Both Figs. 2a and 2b show CCS 130 in dashed lines, indicating that it is optional—some embodiments may

include CCS control, and some may not. Thus, the disclosure of one embodiment that uses “autonomous robotic vehicles” in connection with Figs. 2a and 2b does not show that all embodiments use “autonomous vehicles.”

Petitioner also relies on Lert’s statements that the CCS manages “all of the various robots” and communicates “with all of the other active subsystems” to argue that even autonomous robots may be controlled by the CCS. Rep. at 5. But those statements relate only to a particular “disclosed *embodiment*” that “can be characterized as a system *generally* comprised of eleven elements or sub-systems.” AS-1005 at 3:10-12 (emphases added). Not every embodiment has every disclosed element, and a POSITA would understand that the embodiments with “self-guidance by R-Bots” either do not have a CCS or the CCS does not control the self-guided vehicles’ movement. In short, the passage on which Petitioner relies does not show that autonomous robots are controlled by the CCS.

Third, Petitioner asserts that the “self-guidance by R-Bots” sentence does not eliminate, and is not inconsistent with, CCS guidance. Rep. at 8. Petitioner ignores that the sentence contrasts self-guided R-Bots with R-Bots described in the preceding paragraph, which describes embodiments in which the vehicles “simply drive on the rails wherever the switches take them and whenever the CCS tells them.” AS-1005 at 8:32-35. In other words, the sentence contrasts R-Bots whose movement is “self-guid[ed]”—autonomous robots—with R-Bots whose movement

is CCS-controlled. Contrary to Petitioner’s argument, the distinction could hardly be clearer.

Fourth, Petitioner incorrectly equates rail-guidance with the guideway network. Rep. at 8. Neither the specification nor the claims require the “guideway network” to be a rail network in every embodiment, and the specification distinguishes between the guideway (which consists of a floor on which the rails may be mounted) and the rails (which actively guide robots using railroad components). *See, e.g.*, AS-1005 at 7:67-8:4, 8:19-21, 11:42, 23:14-32, 23:52-24:15. A POSITA would therefore understand the “self-guidance of R-Bots running unconstrained on the floor” sentence as disclosing an embodiment in which autonomous vehicles move along a guideway network, but not necessarily on rails.

In addition to attempting to write “self-guidance by R-Bots” out of Lert’s specification, Petitioner also argues that other published Lert applications use “autonomous” consistently with Petitioner’s construction. But, unlike the robots described in Lert, the “autonomous vehicular transport robots” in those applications have an on-board “control system 1220” that is “configured to provide communications, supervisory control, bot localization, *bot navigation and motion control*, case sensing, case transfer and bot power management.” AS-1014 ¶¶ 45, 63; Figs. 7, 12 (emphasis added). In other words, the bots can control their own movement without external control. Thus, the disclosure cited by Petitioner—that

the bots “*may* be controlled by” a “control server”—is optional, and the bots in fact control their own movement. Rep. at 7 (citing AS-1014 ¶ 73). The other published application, AS-1015, incorporates AS-1014 by reference “in its entirety,” and, thus, has the same disclosure. AS-1015 ¶ 25.

Petitioner denies that Lert’s use of the different phrases “autonomous robotic vehicles” and “robotic vehicles” implies that mere “robotic vehicles” are not “autonomous.” Contrary to Petitioner’s argument, it is not a “hyper-technical word game” (Rep. at 8) to analyze the specification’s use of “autonomous vehicles” to ascertain what that claim phrase means. Such analysis is an essential part of a proper claim construction. *Phillips v. AWH*, 415 F.3d 1303, 1315 (Fed. Cir. 2005).

Petitioner does not argue that PO’s dictionary definition of “autonomous” is inaccurate. Rep. at 9. Instead, Petitioner argues, without citing any support, that the definition does not exclude control by an external computer. *Id.* But the phrase “without outside control” excludes *all* external control, by human or computer. Ex. 2009 ¶ 39. Petitioner also does not dispute Dr. Pfeifer’s testimony that the definition is consistent with the ordinary meaning of “autonomous vehicles” as describing “self-guided vehicles that navigate essentially without outside control of a human or external computer processor.” *Id.* Petitioner simply argues no extrinsic evidence is needed because “the meaning of ‘autonomous vehicles’ is clear from the intrinsic evidence.” Rep. at 9. But the intrinsic evidence supports PO’s construction and not

Petitioner’s, and Dr. Pfeifer established that the dictionary is a useful tool to ascertain the ordinary meaning of “autonomous.” Ex. 2009 ¶ 39.

Thus, the Board should adopt PO’s construction of “autonomous vehicles.”

**B. The *storage container transport* limitations (claims 1 and 13)**

Petitioner’s Reply changes the Petition’s implicit construction of the *storage container transport* limitations by adding the bolded qualifiers: the “storage containers are transported *essentially* only by robots within a storage and retrieval system *during normal operation.*” Rep. at 9 (emphases added); *compare with* Pet. at 33 (“P-Totes and O-Totes are exclusively handled by robotic handlers within the TSS or OLS (i.e., a ‘storage and retrieval system’)”).

Petitioner should not be allowed to change its claim construction. But even applying Petitioner’s new claim construction does not overcome the fatal deficiency: the Petition fails to make a *prima facie* showing that Lert discloses the *storage container transport* limitations. POPR at 30-32. Petitioner’s statement that “P-Totes and O-Totes are exclusively handled by robotic handlers within the TSS or OLS (i.e., a ‘storage and retrieval system’), and there is no disclosure to the contrary” (Pet. at 33) remains unsupported, even under its new construction. PO maintains its positions set forth in POPR footnote 4.

**C. “a structural framework defining a grid of storage locations” (cl. 1, 23)**

The plain and unambiguous claim language requires “a *structural framework*

defining a grid of storage locations.” Petitioner’s construction is fundamentally incorrect because it writes the “structural framework” out of the claims. Petitioner argues that the “structural framework defining a grid of storage locations” simply requires a result, “that the storage locations must be arranged in a grid.” *See Rep.* at 11. But Petitioner omits the very structure that defines the grid to achieve the result.

The specification supports PO’s construction and undermines Petitioner’s.

Fig. 3 is a top-down view of a “framework defining a grid of storage locations.”

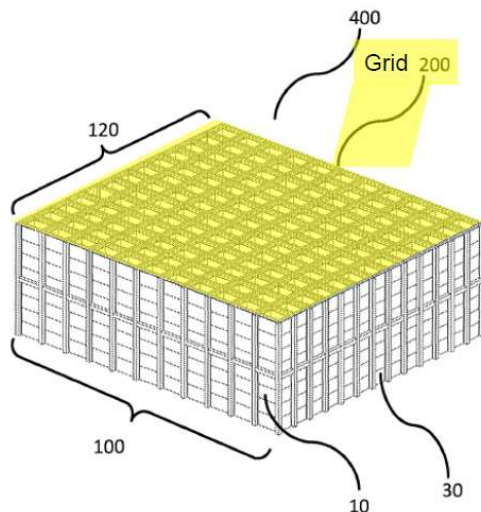


Fig. 3 (annotations added). Fig. 3 and the specification’s description of it are the best evidence of what the claims mean by a “structural framework defining a grid of storage locations.” Fig. 3 shows that the grid 200, viewable by looking at the top of the storage and retrieval system 400, is a framework of structural elements that intersect with each other, forming boundaries of (*i.e.*, “defining”) the places where containers can be stored (*i.e.*, “storage locations”). The structural framework also provides the rails on which the load handlers move, AS-1001 at 6:38-42, but

Petitioner asks the Board to ignore this key claim language.

Petitioner argues that the “core dispute is what the term ‘grid’ refers to.” Rep. at 11. But it is undisputed that “grid” is a “grid of storage locations,” as recited in the claim language. The actual dispute is what performs the act of “*defining* a grid of storage locations.” The unambiguous claim language resolves the dispute: “a structural framework defining a grid of storage locations” means that the “structural framework” defines the “grid of storage locations.”

Further, the only sentence in the specification that refers to defining a grid in connection with a specific figure refers to grid 200 in Fig. 3. That sentence describes the “*frames* used to support the containers 10 and thereby *define the grid 200.*” AS-1001 at 6:41-42 (emphasis added). Petitioner argues that this sentence means that the containers define the grid because “‘containers 10’ immediately precedes ‘define the grid 200’ and the focus of the sentence is on describing ‘specific containers,’ not ‘frames.’” Rep. at 14-15. But that interpretation renders the sentence ungrammatical and ignores the sentence’s structure:

Specific container(s) 10 required for fulfillment of orders may be accessed by automated devices such as robotic *overhead* load handlers 40, operating on rails 160 formed by *frames used to* support the containers 10 and thereby define the grid 200.

AS-1001 at 6:38-42 (emphasis added). Because “frames” is followed by “support the containers” and “define the grid,” a POSITA would understand that the “frames”

perform both actions. If the containers defined the grid, the sentence would read “frames used to support the containers 10, which, in turn, define the grid 200.” Moreover, if the sentence meant that the containers define the grid, it would have no bearing on the meaning of a limitation that expressly requires a “structural framework,” not containers, to “defin[e] a grid of storage locations.”

Unable to point to any embodiment that supports its construction, Petitioner misapplies *Liebel-Flarsheim*, which is about improper *importation of unclaimed features* of a preferred embodiment into the claims. Rep. at 14. Here, “a structural framework defining a grid of storage locations” is expressly claimed, and PO properly relies on Fig. 3 and the related specification text as the “single best guide” to its meaning. *See Phillips v. AWH*, 415 F.3d 1303, 1315 (Fed. Cir. 2005). Further, Petitioner does not identify any embodiment of a “structural framework” that PO has overlooked and is inconsistent with PO’s construction. At best, Petitioner argues that general statements that the invention is not limited to “exact components” and can be applied to storage systems of “any type” or use “other means of storage and retrieval” mean that “the inventors contemplated structures beyond the one shown in Figure 3.” Rep. at 14. But rather than indicating what the inventors meant by “a structural framework defining a grid of storage locations,” such statements simply suggest that the inventors thought of other storage systems, such as *non-grid* storage systems, that are not claimed. *See, e.g.*, AS-1001 at 4:42-44.

Petitioner argues that references to “grids” of “containers” or “bins” support Petitioner’s construction. Rep. at 11-12. But these references are irrelevant because they do not refer to the claimed “grid of *storage locations*.” Further, Petitioner omits that the specification also discloses “frames used to support the containers 10 and thereby define the grid 200” and the file history describes a “frame of the grid . . . comprised of rails.” AS-1001 at 6:41-42; AS-1002 at 322.

Finally, Dr. Pfeifer properly used a dictionary definition of “grid,” contrary to Petitioner’s contention. Rep. at 13-14. Dr. Pfeifer’s unrebutted testimony established that the dictionary is a useful, although not dispositive, tool to determine the ordinary meaning of “grid,” a common, non-technical, English word. Ex. 2009 ¶ 32. He further established that the definition is consistent with the ordinary meaning and specification’s use of “grid.” *Id.* Petitioner bizarrely argues that definitions 2 and 7, related to maps (*see* Ex. 2004 at 577), would have been better. Rep. at 14, n.4. But those definitions also support PO’s construction by confirming that a “grid” is a two-dimensional array formed by intersecting elements, which, for a “structural framework,” would be structural elements.

Thus, the Board should adopt PO’s construction of this limitation.

### **III. CONCLUSION**

As explained herein and in the POPR, the Board should deny the Petition.

Respectfully submitted,

Dated: August 24, 2021

By: /Sheila N. Swaroop/  
Stephen J. Elliott (Reg. No. 52,858)  
Raffaele A. DeMarco (Reg. No. 54,061)  
Laurie N. Stempler (pro hac vice)  
[Ocado\\_PTAB@sullcrom.com](mailto:Ocado_PTAB@sullcrom.com)  
SULLIVAN & CROMWELL LLP

Sheila N. Swaroop (Reg. No. 53,658)  
[2SNS@knobbe.com](mailto:2SNS@knobbe.com)  
John L. Paik (Reg. No. 54,355)  
[2JLP@knobbe.com](mailto:2JLP@knobbe.com)  
KNOBBE, MARTENS, OLSON & BEAR, LLP

Attorneys for Patent Owner  
Ocado Innovation Limited

**CERTIFICATE OF SERVICE**

I hereby certify that, pursuant to 37 C.F.R. § 42.6(e) and with the agreement of counsel for Patent Owner, a true and correct copy of **PATENT OWNER SUR-REPLY TO PETITIONER REPLY TO PRELIMINARY RESPONSE** is being served electronically on August 24, 2021, to the email addresses below:

W. Todd Baker  
[todd.baker@kirkland.com](mailto:todd.baker@kirkland.com)  
Joseph A. Loy  
[jloy@kirkland.com](mailto:jloy@kirkland.com)  
Aaron Resetarits  
[aaron.resetarits@kirkland.com](mailto:aaron.resetarits@kirkland.com)  
[AutoStore\\_PTAB@kirkland.com](mailto:AutoStore_PTAB@kirkland.com)  
Kirkland & Ellis LLP  
1301 Pennsylvania Ave., N.W.  
Washington, D.C. 20004  
Ph: 202-389-5000

By:     /Sheila N. Swaroop/      
Stephen J. Elliott (Reg. No. 52,858)  
Raffaele A. DeMarco (Reg. No. 54,061)  
Laurie N. Stempler (pro hac vice)  
SULLIVAN & CROMWELL LLP

Sheila N. Swaroop (Reg. No. 53,658)  
John L. Paik (Reg. No. 54,355)  
KNOBBE, MARTENS, OLSON & BEAR, LLP