UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PATENT QUALITY ASSURANCE, LLC,
INTEL CORPORATION
Petitioners,

v.

VLSI TECHNOLOGY LLC,
Patent Owner.

Case IPR2021-01229*
Patent 7,523,373

PATENT OWNER'S BRIEF IN RESPONSE TO DIRECTOR REVIEW ORDER

~~CONTAINS HIGHLY CONFIDENTIAL PROTECTIVE ORDER MATERIAL~~
NON-CONFIDENTIAL REDACTED VERSION

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* Intel Corporation, which filed a petition in IPR2022-00479, has been joined as a party to this proceeding.

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I. INTRODUCTION

This case raises the significant question of whether the Office should allow itself to be used to facilitate extortion. After VLSI obtained a damages verdict, two entities, OpenSky and PQA, formed to file IPRs challenging the patents-at-issue. Neither entity faces any threat of infringement and has no business aside from their attempts to profit from the IPRs. OpenSky formed and filed first. Second in line but seeing an opportunity to shove its way to the front, PQA exclusively retained OpenSky's declarant (Ex. 1034) to secure institution of its petition and the denial of OpenSky's. Once OpenSky was out of the way, [redacted] PQA's actual business, as revealed by its conduct, is extortion.

In accord with that corrupt purpose, PQA has steadfastly refused to allow any insight into its members, business plans, reasons for forming, profit distributions, and more and indeed refused to produce or log internal communications in willful violation of the Director's Orders. Instead of complying, PQA accused the Director of conducting a "fishing expedition" that "shocks the conscience." Ex. 1039, 7-8. And although PQA declined to log any withheld documents, PQA sought *in camera* review of 260 of the 266 entries on VLSI's log without even suggesting the documents are not privileged. Ex. 2087.

In sum, PQA was formed to file extortive IPRs. It has shown contempt for the Office, its rules, the Director, and her Orders. PQA portends what is to follow if parties with no skin in the game are allowed to weaponize IPRs for financial gain. Such harassment is a clear abuse of the system and inconsistent with the goals of the Office and the AIA. Respectfully, the Director should make clear that IPRs are not to be used for extortion. Nor should PQA's abuse permit Intel to proceed with an otherwise time-barred challenge. Lest PQA's conduct become commonplace, this IPR should be terminated and the underlying institution and joinder decisions should be vacated. Such petitions should be denied to deter speculators from leveraging IPRs into financial windfalls.

II. INTERROGATORY RESPONSES.

A. When was PQA formed? For what purpose? What is the business of PQA? Who are members of PQA? Which other persons or entities have an interest in PQA or any of its activities including this proceeding? Explain.

PQA formed as a South Dakota LLC on June 14, 2021 (Ex. 2009), exactly one week after OpenSky filed petitions challenging VLSI's '373 and '759 patents. PQA's business and purpose is to file IPRs against VLSI's patents in the hope of extracting a large payout. On June 9, just two days after OpenSky filed and five days before PQA formed (Ex. 2009), PQA's outside counsel contacted Dr. Singh (Ex. 2081) and the next day, Dr. Singh signed an exclusive engagement agreement

with the law firm agreeing to pay a "minimum fee of $25,000" with the exclusivity period being "at least eighteen months," without regard to whether the IPR was still ongoing. Ex. 1034. PQA then argued that its petition, and not OpenSky's, should be instituted because OpenSky had not retained Dr. Singh. Pet., 4-5. PQA's strategy worked and the Board denied institution of OpenSky's petition on this basis. IPR2021-01056, Paper 18, 9.

Four days after OpenSky's petition was denied, [redacted] *See* Section II.B. [redacted] PQA [redacted] filed, a joinder petition challenging the '759 patent, falsely claiming its objective was to defend the "integrity of the patent system." *See* IPR2022-00480, Paper 2, 2-3. [redacted]

PQA's extortive "business model" is not difficult to understand. With the work already done, PQA paid a pre-institution filing fee ($19,000) and Dr. Singh's exclusivity fee ($25,000) to file its IPR. [redacted] Ex. 2060, 19:6-11.

Given PQA's tactics, it is perhaps unsurprising that it has chosen to operate in complete secrecy. PQA's members cannot be identified because PQA has adamantly refused to identify them. PQA formed in a state that does not require an LLC to identify its members. PQA filed a declaration from Mr. Uradnik, a patent prosecutor (Ex. 1032), but in deposition, Mr. Uradnik refused to answer any questions concerning PQA's members—[redacted]—repeating the mantra "[redacted]." Ex. 2060, 9:16-11:1, 18:9-19:5 ([redacted]). [redacted]. Ex. 2072, 1. Even the Director's Orders did not cause PQA to identify its members. As discussed in Section III.B.2, PQA refused to produce or log any internal communications, a willful violation of three orders. *See* Papers 35, 37, 39. On explicit notice that its violations were sanctionable (*id.*), PQA still refused to produce anything—not even a privilege log of withheld documents—which might identify its members. In view of PQA's conduct, including [redacted] followed by gross violations of the Director's Orders (*see* Section III.B.2), the Director should find that PQA filed its IPRs for improper purposes. *See* Paper 39,

4 ("sanctions may include '[a]n order holding facts to have been established in the proceeding.'") (citing 37 C.F.R. § 42.12).

While PQA has not identified its members, PQA's pre-formation activities suggest that PQA is likely the creation of its outside counsel. It seems improbable that anyone else would see OpenSky's IPR filing on June 7, retain its counsel, and exclusively retain Dr. Singh within 72 hours (Ex. 1034). It seems most probable that PQA's outside counsel in this case is the driving force behind PQA's formation and efforts to misuse the IPR process.

B. What is the relationship between PQA and each of the other parties? Other than communications already in the record, what communications have taken place between PQA and each of the other parties?

Relationship And Communications Between VLSI And PQA. PQA and VLSI have no relationship outside of this proceeding. On August 10, 2021, VLSI called PQA to discuss its IPR. PQA's counsel confirmed his clients were "business people" who would presumably be interested in having a conversation. Ex. 2024. PQA later responded with a made-for-litigation letter, claiming that the '373 posed "a unique threat to the integrity of the ... patent system," and PQA "does not believe a conversation ***at this stage*** makes sense." Ex. 1035.

On December 27, after OpenSky's IPR challenging the '373 was not instituted, [redacted]

[redacted] *See* Ex. 2064. [redacted] Ex. 2065. [redacted] (Exs. 2067, 2075-2076). [redacted] (Ex. 2068), [redacted]" Ex. 2069. [redacted]

[1] The Director's Order precludes the submission of new declaratory evidence. VLSI will submit declaratory evidence [redacted] if requested by the Director.

"[redacted]" [redacted]. Ex. 2071. [redacted] Exs. 2070, 2077-2078, 2073. [redacted] (Ex. 2074), the day before the institution decision issued. VLSI and PQA [redacted].

Relationship and Communications Between Intel and PQA. VLSI does not know the nature of Intel's relationship with PQA. VLSI only knows that (1) Intel and PQA have communicated regarding this proceeding, including about "[redacted]"; (2) Intel and PQA have withheld all of their communications—including [redacted] (Ex. 2088); (3) Intel is [redacted] (Ex. 2089); (4) Intel has not [redacted] whether Intel and PQA entered into any agreements; and (5) Intel claims that it and PQA share a "common interest." Ex. 2088

C. Could PQA be subject to claims of infringement of the '373 patent? Does PQA have development plans to create a product that could arguably infringe the '373 patent? Does PQA have a policy reason for filing the Petition that benefits the public at large beside any reasons articulated in the already-filed papers? Explain.

PQA could not be subject to any claims of infringement and has no plans to create any product, much less one that could infringe the '373. PQA formed after the verdict and its only business is filing extortive IPR petitions. Contrary to any pretextual "policy reason" PQA may raise, [redacted] *See* Section II.A-B. In view of PQA's refusal to produce or log internal documents, PQA's self-serving assertions should be ignored.

D. Does the evidence in this proceeding demonstrate an abuse of process or conduct that otherwise thwarts, as opposed to advances, the goals of the Office and/or the AIA and, if so, which evidence and how should that evidence be weighted and addressed?

The evidence overwhelmingly demonstrates that PQA abused the IPR process and that its conduct is diametrically opposed to the goals of the Office and the AIA. PQA filed extortive IPRs in the hopes of [redacted], falsely claiming that it sought to "instill confidence in the integrity of the patent system." Pet., 2-3; IPR2022-00480, Paper 2, 2-3. Thus, as discussed in Section III.B.3, PQA filed its IPRs for an "improper" and "harassing" purpose and violated its duties of candor and good faith to the Board.

PQA's gross violations of the Director's Orders are a further abuse of process and are contrary to the goals of the Office. PQA did not produce or log internal documents, a willful violation of three orders. Though it produced no log, PQA asymmetrically and baselessly demanded that nearly all of VLSI's logged

documents be reviewed *in camera*. *See* Section III.B.2. PQA threatened VLSI that its compliance with the Director's Order [redacted] and it further filed objections disparaging the Director's Order as a "fishing expedition" that "shocks the conscience," (Ex. 1039, 7-8), showing disrespect for the Office.

E. What is the basis for concluding that there are no other real parties in interest, beyond PQA (*see* Pet. 75)? Are there additional people or entities that should be considered as potential real parties in interest? Explain.

Owing to, *inter alia*, PQA's gross violation of the Director's Orders and Mr. Uradnik's stonewalling, VLSI has little direct insight into who is behind PQA and whether additional individuals or entities should be identified as real parties-in-interest. As discussed, PQA's pre-formation activities suggest that PQA's outside counsel may well be the driving force behind PQA. *See* Section II.A. Intel should also be deemed an RPI as the jury's infringement finding and damages award prompted PQA's challenge (Pet., 2) and PQA copied and refiled Intel's grounds and exhibits. *App. in Internet Time, LLC v. RPX Corp.*, 897 F.3d 1336, 1348-9 (Fed. Cir. 2018) (focus of RPI "inquiry is on the patentability of ... claims ... bearing in mind who will benefit... from the redress that the ... tribunal might provide."). Intel, who now claims a common interest privilege with PQA and has effectively taken over this case, is the true beneficiary of this petition. Under these circumstances, Intel, should have been identified as an RPI, a finding that is further

necessitated by PQA's discovery abuse. *See* Section III.B.2-3. This is further reason to terminate. 35 U.S.C. § 315(b).

F. Did PQA ever condition any action relating to this proceeding, including but not limited to delaying, losing, not participating in, withdrawing from, or taking action that will influence any experts' participation in this proceeding, on payment or other consideration by PQA or anyone else? Explain.

[redacted] *See* Section II.B. Additionally, PQA's outside counsel exclusively retained Dr. Singh for an 18-month-period, specifying that Dr. Singh is not to accept new consulting engagements related to the '373 without prior written consent. Ex. 1034, 2.

III. THIS IPR SHOULD BE TERMINATED AND VOIDED *AB INITIO*.

The Director's Order asks the parties to address (1) what actions the Director/Board should take when faced with evidence of an abuse of process or conduct or conduct that otherwise thwarts, as opposed to advances, the goals of the Office and/or the AIA; and (2) how the Director/Board should assess conduct to determine if it constitutes an abuse of process, or if it thwarts, as opposed to advances, the goals of the Office and/or the AIA, and what conduct should be considered as such. Paper 35, 7-8. The two cases before the Director reveal the disastrous consequences of allowing newly-formed entities, facing no threat of infringement, to challenge patents that are the subject of a damages verdict. The Director should find that IPRs filed in such circumstances should presumptively be

denied institution or terminated, unless the petitioner can prove its filing is in good faith and not for an improper purpose, *e.g.*, extortion. *See* Section III.A. Even in the absence of such a general rule, PQA's conduct is demonstrably egregious and its IPR should be terminated and voided *ab initio*. *See* Section III.B-C.

A. Petitions Filed By Newly Formed Entities Against Patents That Are The Subject Of A Damages Verdict Should Presumptively Be Denied, Or Terminated If Instituted, Absent Compelling Proof They Were Filed In Good Faith And Not For Extortion.

Absent Director intervention, opportunities to uncover direct evidence of bad faith will likely be rare. However, a petition filed by a newly formed entity not accused of infringing the patent in the wake of a significant verdict raises significant concerns. During this time, the patent owner is particularly vulnerable, and IPRs can no longer serve as effective alternatives to litigation. Allowing review in these circumstances incentivizes gamesmanship and places the Office in the position of facilitating extortion and collateral attacks on verdicts.

That was not the AIA's intent. IPRs were intended to provide "'quick and cost effective alternatives to litigation'" and to "'establish a more efficient and streamlined patent system that will improve patent quality[.]'" *WesternGeco LLC v. ION Geophysical Corp*., 889 F.3d 1308, 1317 (Fed. Cir. 2018) (quoting H. REP. NO. 112-98, 40, 48 (2011)). "Congress recognized the importance of protecting patent owners from patent challengers who could use the new administrative

review procedures as 'tools for harassment'" via "'repeated litigation and administrative attacks on the validity of a patent.'" *Id.* (quoting H. REP. NO. 112-98, 40). The Board too has recognized the AIA's goals of avoiding repeated and harassing attacks on patents that may constitute an "abuse of the review process." *General Plastic v. Canon*, IPR2016-01357, Paper 19, 16-17 (Sept. 6, 2017) (precedential). In accord, the AIA and the regulations prescribe sanctions for "abuse of process" or "any other improper use of the proceeding, such as to harass." 35 U.S.C. § 316(a)(6); 37 C.F.R. § 42.12(a)(6)-(7). Congress further gave the Director "complete discretion to decide not to institute review." *St. Regis. v. Mylan Pharms.*, 896 F.3d. 1322, 1327 (Fed. Cir. 2018) (citation omitted).

The Director need not find express evidence of bad faith to terminate a proceeding where the circumstances, as here, irrefutably show that the petition was brought for an improper purpose. Indeed, this is precisely why Congress gave the Director complete discretion to deny petitions. The cases before the Director involving newly formed entities with no threat of infringement and no business other than IPRs challenging the patents that are the subject of a damages verdict, present a particularly clear instance where the petitioner's motivations are suspect from the outset. Entities forming just after a verdict to challenge patents-at-issue should, at a minimum, bear the burden of proving they are acting in good faith, and such petitions should presumptively not be instituted. Unless these petitioners can

prove they are acting in good faith, institution only invites gamesmanship and turns the Office into a tool for harassment. In making this determination, the Board should not credit a petitioner's unsubstantiated, self-serving representations concerning, *e.g.*, the "integrity of the patent system."

Moreover, denying institution prevents otherwise time-barred parties from thwarting the purpose of the AIA by taking advantage of abusive petitions through joinder. For the same reason, institution decisions premised on abusive petitions should be vacated, thereby short-circuiting not only opportunistic conduct by time-barred petitioners but also the incentive for third parties to play those with actual skin in the game against each other. Simply terminating an abusive petitioner from an instituted proceeding would neither deter misconduct nor address the damage to the integrity of the Office or the harassment suffered by the patent owner.

B. PQA's Egregious Conduct Constitutes An Abuse Of Process And Thwarts The Goals Of the Office And The AIA.

Even in the absence of the aforementioned presumption, the record here shows that PQA's conduct constitutes a clear abuse of the IPR process and is contrary to the goals of the Office and the AIA. PQA has not only failed to substantiate a non-abusive justification for its petition, it weaponized the IPR process and used it for purposes of extortion. As Senators Tillis and Hirono recognized, PQA's "motives … w[ere] suspect from the outset," as it "formed

shortly before filing [its] petition[]," "did not make, use, sell, or import *any* products, let alone any products that could subject [it] to claims of infringement," and filed "only after VLSI had secured a $2.2 billion infringement judgment." Ex. 2046, 2. PQA's "activities represent clear abuses of the IPR system" and "[t]he facts and circumstances … suggest …PQA… brought [its] proceeding[] to manipulate the [Office] for [its] own financial gain." *Id.*, 1-2. The Senators concerns were well-founded. Once PQA secured a non-institution of OpenSky's petition, [redacted] *See* Section II.A-B. [redacted] PQA publicly claimed it was protecting the "integrity of the patent system." [redacted] PQA's improper and harassing purpose is also confirmed by its insistence upon secrecy and refusal to reveal anything about its members, reasons for forming, business plan, distribution of profits and more—secrecy PQA most recently perpetuated by violating three Director orders when it refused to produce or log any internal documents.

PQA thus has abused the IPR process by bringing extortive IPRs contrary to the Office's and the AIA's goals. It violated the Director's Orders, thereby concealing the full extent of its misconduct, and violated numerous Office rules

requiring duties of candor and good faith to the Office and that papers not be filed for an improper or harassing purpose.

1. PQA Filed An Extortive IPR Petition.

An IPR filed for extortive purposes—like PQA's—is plainly brought for an "improper" and "harassing" purpose (and if PQA's conduct does not rise to the level of an "improper" or "harassing" purpose, it is unclear what would). Ex. 2046 ("weaponiz[ing] the IPR process for [petitioner's] financial gain" is a "clear abuse[] of the IPR system."). As discussed, where a new entity, facing no threat of infringement, forms in the wake of a verdict to file IPR petitions against patents supporting that verdict, the Board should have a strong presumption against institution unless the petitioner can prove a good-faith, non-extortive motivation.

2. PQA Has Willfully Violated The Director's Orders.

Beyond PQA's extortive purpose, PQA has also materially violated the Director's Orders. The Scheduling Order made clear (i) PQA had to produce seven categories of documents "including … documents maintained by officers, directors, employees, agents, experts, consultants, or outside counsel," (ii) the requests "shall be interpreted inclusively and broadly," and (iii) "[a]ny attempt to withhold evidence based on a narrow interpretation of the requests … may … be sanctionable." Paper 35, 9-10. The Order also required parties to maintain and exchange a privilege log of withheld documents. *Id.*, 11.

PQA lodged objections, stating it was "willing to produce responsive ***third-party communications*** … between PQA and OpenSky, VLSI, Intel, governmental entities, and Dr. Singh," if the Office confirmed its production would not constitute a waiver. Ex. 3004. VLSI responded that "PQA suggests that it will only be producing selected 'third-party documents' and only those exchanged with particular, identified third parties at that, apparently intending to exclude multiple categories of responsive documents from its production" and that PQA further "suggests that PQA does not intend to log communications it is withholding under claim of privilege." Ex. 3005. In response, the Director issued an order reaffirming the parties "are required to comply ***with the full scope of the Scheduling Order***, including its Mandated Discovery provisions," and that "failure to comply with my Order may be sanctionable." Paper 39, 3. The Director reiterated the requirement to "maintain a privilege log of documents withheld," confirming that "[n]o responsive document may be withheld without being included in such a privilege log." *Id.*, 4; Paper 37, 4 (similar).

Despite this clarity, PQA willfully violated the Director's Orders. PQA neither produced nor logged ***any*** internal documents. Instead, PQA just repeated the same objection, indicating that "PQA hereby makes a good faith production (or log) of all responsive documents/communications between PQA ***and any third party***. This includes documents/communications between PQA and OpenSky,

VLSI, governmental entities and Dr. Singh." Ex. 1039, 1; *id.* ("PQA has redacted and logged work product materials in the documents/communications ***between PQA and Dr. Singh***."), 1-2 ("VLSI now has access to all responsive documents/communications ***between PQA and any third party*** …"). Thus, PQA refused to produce or log internal documents after the Director made clear this was a sanctionable violation of multiple orders.

PQA further stated that it "is not withholding (i) any responsive documents or communications within the scope of Request Nos. iv-vii; (ii) any responsive documents filed with state, federal, and/or other governmental regulatory entities or third-party communications relating to the same or to the formation of PQA (Request No. i); or any responsive third-party communications 'relating to the filing, settlement, or potential termination of this proceeding, or experts in this proceeding' (Request No. iii)." Ex. 1039, 2.

PQA's statement concerning category (iv)—"all documents and communications relating to the filing, settlement or termination of any other *inter partes* review proceeding concerning the '373 patent, not already of record in the proceeding"—is dubious. Are we to believe PQA has ***no*** documents concerning the filing or termination of OpenSky's IPR2021-01056 petition, specifically referenced in PQA's petition? Or of Intel's IPR2020-00158 petition, from which PQA's brief is substantially copied? Even if PQA's representations are taken at

face value, it implicitly confirms that PQA ***is*** withholding and not logging documents in categories i-iii, including (i) "… communications related to" documents filed with governmental entities concerning the formation of PQA and "communications related to … the formation of PQA," (ii) "all documents relating to PQA's business plan including its funding, its potential revenue, and the future allocation of any of its profits," and (iii) internal "documents and communications relating to the filing, settlement, or potential termination of this record, or experts in this proceeding, not already of record in the proceeding." Paper 35, 9.

In refusing to provide a privilege log, PQA argues that producing a log could result in *in camera* review which, per PQA, "would likely result in PQA's waiver of attorney-client privilege and work-product protections as to any such documents ..." Ex. 1039, 17. This is frivolous. Privilege logs, ubiquitous in modern litigation, are intended to allow the opposing party to test the basis for a claim of privilege through judicial *in camera* review. *Kerr v. U.S. Dist. Ct. for N. Dist. Cal*., 426 U.S. 394, 404 (1976). *In camera* review does not waive privilege.

VLSI, unlike PQA, produced a privilege log as ordered identifying 266 documents (Ex. 2080). Though PQA did not log ***any*** internal communications, PQA indiscriminately sought *in camera* review of the first 260 entries on VLSI's log, *i.e.*, all but 6 of the logged entries. PQA did not offer any reason why any of these 260 logged documents might not be privileged. Instead, PQA wants the

Director to review "***to see if there is evidence*** of VLSI manipulating the proceedings …" and "***to see if there is evidence*** of VLSI suggesting, internally or with its attorneys, an agreement between VLSI and OpenSky ..." Ex. 2087. Thus, after violating three orders requiring it to log withheld documents, PQA has the gall to insist that nearly all of VLSI's logged documents should be reviewed, "to see if there is evidence" of various propositions, when in PQA's stated view, *in camera* review waives privilege.

What is more, PQA's objections dismiss the Mandated Discovery as "overly burdensome" and a "fishing expedition" that "shocks the conscience." Ex. 1039, 8. Such hyperbolic insults would be frowned upon in a discovery letter to an opposing party. The Director should not countenance such insults, particularly from a party who filed extortive IPRs, misrepresented its motives, and willfully violated the Director's Orders.

PQA also refused to produce any communications with VLSI, [redacted] even though those documents are plainly required to be produced by the Scheduling Order. Paper 35, 10. Indeed, on July 14, PQA wrote VLSI's counsel "to provide notice of PQA's intent to produce documents [redacted] between PQA and VLSI," and that "PQA understands disclosure of this information ***has been ordered by the Director's Order dated July 7, 2022*** (Paper 35), and that the documents ***must be produced*** by

July 21, 2022." Ex. 2084. VLSI responded that it would "not oppose PQA producing these documents provided PQA does not object to our production of communications between counsel for the parties," further stating that VLSI "will mark communications between the parties as 'PROTECTIVE ORDER MATERIAL – CONFIDENTIAL.'" Ex. 2085. Thus, both parties agreed that these documents needed to be produced to comply with the Order. Nonetheless, two days before the ordered deadline, this very same PQA attorney wrote to "clarify PQA's position," stating that [redacted] Ex. 2079. Thus, PQA went from confirming that the parties would provide their communications as necessary to comply with the order to [redacted]. PQA was not content with violating the Director's Orders, it pressured VLSI to violate the Orders too.

3. PQA Violated The Office's Rules.

PQA has violated numerous Office's rules. Parties "have a duty of candor and good faith to the Office during the course of a proceeding." 37 C.F.R. § 42.11(a). And, "[b]y presenting to the Office ... any paper, the party presenting such paper ... is certifying that ... [a]ll statements made therein … are true ..." and that "[t]o the best of the party's knowledge, information and belief ... [***t]he paper is not being presented for any improper purpose, such as to harass someone*** ...[and] [t]he allegations and other factual contentions have evidentiary support ..." 37 C.F.R. § 11.18(b)(1)-(2). An extortive IPR, by definition, is filed for an improper and harassing purpose. And by claiming to protect the patent system's "integrity" while extorting VLSI, PQA violated its duty of candor and good faith.

Further, PQA attempted to intimidate VLSI into violating the Order as well. Ex. 2079. PQA's threats violate the Office's rules. 37 C.F.R. § 11.304(a) ("A practitioner shall not … conceal a document or other material having potential evidentiary value. A practitioner shall not counsel or assist another person to do any such act."), (f) ("A practitioner shall not … (f) Request a person other than a client to refrain from voluntarily giving relevant information to another party …").

PQA's violations are sanctionable. 37 C.F.R. § 42.12(a) ("The Board may impose a sanction against a party for misconduct, including: (1) Failure to comply with an applicable rule or order in the proceeding ... (3) Misrepresentation of a fact

... (5) Abuse of Discovery; (6) Abuse of process; or (7) Any other improper use of the proceeding including actions that harass.").

C. This IPR Should Be Terminated And Voided *Ab Initio*.

The Director should terminate this IPR and vacate the decision instituting it, as well as the decision joining Intel. Seeing OpenSky's extortive IPRs, PQA exclusively retained Dr. Singh to cut OpenSky off at the knees while cynically claiming its goal was to protect the "integrity of the patent system." Pet., 2-3. In fact, PQA used the IPR process as a vehicle for extortion, [redacted]. In pursuit of its goals, PQA willfully violated the Director's Orders by failing to produce or log internal documents despite the Director clarifying that PQA had to comply with the "full scope" of the Order. Despite its defiance, PQA hypocritically insisted VLSI produce for *in camera* review nearly all of its logged communications and threatened VLSI [redacted] to comply with the Director's Order. This proceeding never should have been instituted and, as discussed above, permitting it to proceed will invite copycat petitioners to create similarly problematic situations without making their extortion demands explicit.

This is egregious conduct and deserves the strictest sanction. The Director may issue terminating sanctions for misconduct. 37 C.F.R. §§ 11.18(c)(5) (Director may "[t]erminat[e] the proceedings" where a party submits a paper for

"any improper purpose, such as to harass someone" or misrepresents facts); 11.18(b)(2)(i), (iii), (iv); 42.12(b)(8) (sanctions include "dismissal of the petition"). The Office must repudiate the institution of these extortive IPRs by terminating them and vacating the institution and joinder decisions. As discussed above, anything short of termination and vacatur will motivate future opportunistic petitioners to strategically file abusive "lottery-ticket petitions" without saying the quiet part out loud. The incentives to leverage post-verdict petitions as tools to extort patent owners and accused infringers are simply too great, and future opportunistic filers will avoid creating written records of their misconduct and harassment. Thus, termination and vacatur not only fall within the Director's sanction authority, but they are also prudent policy.

This case should end. Indeed, it never should have begun. Look at the morass this case has become, the chaos, [redacted], the defiance of and contempt for orders, the cynical protestations regarding the "integrity" of the patent system, the refusals to produce discovery or disclose PQA's members, business plans, financial structure or motives, the threat to VLSI should it comply with the Director's Orders, the ***seven*** IPRs filed against two VLSI patents after prevailing at trial. Absent vacatur rendering this proceeding void *ab initio*, the extraordinary misconduct committed by PQA will become the default, severely harming the Office's reputation.

Beyond its extortion, PQA's discovery misconduct is independently sufficient to justify termination. As the Director thrice warned, violations of the orders would be sanctionable (Paper 35, 10; Paper 37, 4; Paper 39, 3-4). Such sanctions can include "judgment in the trial or dismissal of the petition." *See* 37 C.F.R. § 42.12(b)(8). Willful violations of discovery orders after repeated warnings, as here, warrant terminating sanctions. *Anheuser-Busch, Inc. v. Nat. Beverage Distribs.*, 69 F.3d 337, 348-349 (9th Cir. 1995) (dismissing claim where party "willfully and in bad faith violated the rules of discovery by withholding the documents" and ignored warnings "that discovery misconduct or violating [the court's] orders could result in serious repercussions, including dismissal."); *Buchanan v. Bowman*, 820 F.2d 359, 361 (11th Cir. 1987) (similar); *Telectron, Inc. v. Overhead Door Corp.*, 116 F.R.D. 107, 134 (S.D. Fla. 1987) ("[i]t is not the court's function to drag a party kicking and screaming through discovery.").

No injustice would be suffered by termination and vacatur here. Had PQA revealed its actual motives and purpose, there is little chance this IPR would have been instituted. PQA's IPR should not be allowed to continue. Nor should Intel be allowed to take advantage of PQA's misconduct at VLSI's expense. Intel was long-time-barred and voluntarily forfeited its right to present its IPR defenses to the jury. Ex. 2004. Now, judgement has been "entered against defendant Intel on its counterclaim of invalidity of the asserted claims of the '373 Patent." Ex. 2090.

And, where the Board has found an IPR was improperly instituted, it has terminated that IPR as to any otherwise time-barred joined party. *I.M.L. SLU v. WAG Acquisition, LLC*, IPR2016-01658, Paper 46, 3, 5 (Feb. 27, 2018) ("having vacated the [institution decision], we necessarily also vacate the grant of ... Joinder …"); *Mylan Pharma Inc. v. Horizon Pharma USA, Inc*., IPR2017-01995, Paper 71, 12-13 (Mar. 17, 2019) (similar); *Intel Corp., v. Alacritech, Inc*., IPR2018-00234, Paper 66, 23 (June 4, 2019) (similar); *Sling TV, LLC v. Realtime Adaptive Streaming, LLC*, IPR2018-01331, Paper 39, 8 (Jan. 17, 2020) (similar). Permitting Intel to step into PQA's shoes will only encourage future opportunists to collude with otherwise time-barred parties to enjoy a second bite at the apple.

The Director should confirm the Office will not tolerate entities abusing the IPR process. A clear signal should be sent that IPRs are not to be brought for purposes of extortion—and if they are, they will not be instituted—and if they are instituted under false pretenses, they will be terminated. To allow this IPR to continue would be to punish the victim. This proceeding was rotten from its inception and deserves to be terminated and rendered void *ab initio*. Anything less will encourage others to follow this same path to the patent system's detriment.

IV. CONCLUSION.

The Director should terminate this IPR and vacate the institution and joinder decisions.

Respectfully submitted,

Dated: August 18, 2022

____/ Babak Redjaian /_____
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CERTIFICATE OF SERVICE

I hereby certify that, pursuant to 37 C.F.R. § 42.6(e) and with the agreement of counsel for Petitioner, a true and correct copy of **PATENT OWNER'S BRIEF IN RESPONSE TO DIRECTOR REVIEW ORDER (REDACTED)** is being served electronically on August 24, 2022, to the persons below:

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Dated: August 24, 2022 By: / Colette Woo /