Paper No. 16
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ALLSTEEL INC.
Petitioner

v.

DIRTT ENVIRONMENTAL SOLUTIONS LTD.
Patent Owner

Case IPR2015-01691
Patent No. 8,024,901

Before SALLY C. MEDLEY, SCOTT A. DANIELS, and JACQUELINE T. HARLOW, *Administrative Patent Judges*.

PETITIONER'S MOTION FOR REHEARING
PURSUANT TO 37 C.F.R. § 42.71(d)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

RULES

REGULATIONS

OTHER AUTHORITIES

I. INTRODUCTION AND STATEMENT OF RELIEF REQUESTED

The Panel's decision not to institute *inter partes* review ("IPR") of claim 8 of the '901 patent represents an abuse of discretion because it depends upon constructions of two claim terms that ignore the sole embodiment of claim 8 disclosed in the '901 patent—indeed, the Panel's constructions exclude this sole embodiment. This oversight is fatal to the Panel's analysis under Federal Circuit law, which has repeatedly emphasized that under the *Phillips* standard "a claim construction that excludes a preferred embodiment is 'rarely, if ever, correct'" and "a construction that excludes *all* disclosed embodiments . . . is especially disfavored." *See, e.g.*, *Kaneka Corp. v. Xiamen Kingdomway Group Co.*, 790 F.3d 1298, 1304 (Fed. Cir. 2015) (internal citation omitted). Ignoring this intrinsic evidence results in the Panel's analysis being inconsistent with the broadest reasonable interpretation standard that it is required to apply here, *In re Cuozzo Speed Tech., LLC*, 793 F.3d 1268, 1275-79 (Fed. Cir. 2015)—a standard that can never result in a construction that is **narrower** than what a court would provide under the *Phillips* standard. *Facebook, Inc. v. Pragmatus AV, LLC*, 582 F. App'x 864, 869 (Fed. Cir. 2014). Here, if the Panel's improperly narrow constructions are corrected, the Petitioner's evidence and arguments show that claim 8 is invalid, or, at the very least, that there is a "reasonable likelihood" that Petitioner will prevail for claim 8—especially because the "reasonable likelihood of success"

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