UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LKQ CORPORATION and
KEYSTONE AUTOMOTIVE INDUSTRIES, INC.,
Petitioner,

v.

GM GLOBAL TECHNOLOGY OPERATIONS LLC,
Patent Owner.

Case IPR2020-00065
Patent No. D813,120

PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION TO WITHDRAW AND DISMISS

I. INTRODUCTION

Fueled by frustration over stalled licensing negotiations, LKQ has singled out GM's design patent portfolio by filing 16 IPRs or PGRs to date, with the threat of many more to come. If that harassment were not enough, LKQ now seeks to drop two of those challenges, without prejudice to refile, shortly after GM spent significant resources pointing out the flaws in LKQ's petitions in its preliminary responses. The Board should not allow this.

This motion is not about saving resources or creating efficiencies. Instead, after having the benefit of GM's preliminary response on the '120 Patent, LKQ learned the weaknesses of its petition and now seeks to avoid the consequences of an institution denial or adverse judgment. In a classic case of road-mapping, LKQ seeks to replace its flawed petition with a new request—this time an *ex parte* reexam—using what it learned from GM's preliminary response. Thus, not only has LKQ already wasted GM's resources in forcing a preliminary response (and the Board's in addressing this motion), but it still seeks to take up the Patent Office's resources in addressing an *ex parte* reexam, and potentially yet another IPR on this same patent. This motion is about gamesmanship, not efficiency.

LKQ's claim that its request is spurred by newly-discovered art is equally meritless. The art LKQ now relies on as "new" is no closer to the claimed design than the art LKQ already relied on in its petition in this case. Further, LKQ fails to

explain why it only "recently" discovered this art—which have been publicly available since February 18, 2014 (Kubota); December 27, 2016 (Kazama); and May 23, 2017 (Wolff), when these references published—or when this discovery actually took place. Given the number and breadth of petitions LKQ has already filed, it is difficult to believe LKQ has not been aware of this art for months.

At bottom, granting LKQ's motion would reward gamesmanship, unduly prejudice GM, and result in no measurable efficiencies. No case supports this result, and all of LKQ's authority is readily distinguishable. To the extent that termination is not coupled with an adverse judgment against LKQ, the Board should deny the motion.

II. ARGUMENT

LKQ seeks to abandon this IPR without bearing the consequences of such abandonment—intending to file an *ex parte* reexamination and not being precluded from filing additional *inter partes* review petitions on the '120 Patent. Paper 12 at 3. Permitting LKQ to do this with GM's preliminary response as a roadmap would serve only to enable LKQ's harassing behavior and reward LKQ's gamesmanship. As such, if LKQ's motion is granted, it should be coupled with entry of adverse judgment against LKQ.

A. Granting LKQ's Motion Would Cause GM Undue Prejudice.

GM would be unduly prejudiced by dismissal of the petition without entry of adverse judgment. GM has already expended considerable resources analyzing LKQ's petition and preparing its preliminary response. This fact alone distinguishes it from cases where the Board dismissed without entering adverse judgment. In the *NEC* case LKQ cites, the Patent Owner had declined to file a preliminary response. *See NEC Corp., et al. v. Neptune Subsea IP Ltd.*, IPR2018-01190, Paper 11 at 3 (PTAB Jan. 30, 2019). In *HTC*, not only had the Patent Owner not filed a preliminary response, but the motion to terminate was unopposed. *See HTC Corp. v. Patentmarks Comm., LLC*, IPR2014-00905, Paper 7 at 3 (PTAB Aug. 26, 2014).

Dismissing the petition without adverse judgment would also unfairly prejudice GM by providing LKQ with a roadmap to improve its arguments in future challenges, without having to face the consequences of its initial weak efforts. Further, an adverse judgment against LKQ or denial of institution would have value to GM, either estopping LKQ from challenging validity or providing significant evidence of the patent's validity in any subsequent litigation. *See Metaswitch Networks Ltd. v. Genband US LLC*, No. 2:14-CV-744-JRG-RSP, 2016 WL 3618831, at *7–*8 (E.D. Tex. Mar. 1, 2016) (allowing evidence of a denial of institution). The undue prejudice to GM compels denial of LKQ's motion.

B. LKQ's Efficiency Arguments Are Overstated And Disingenuous.

LKQ's efficiency arguments are also meritless because, unlike the cases it relies on, it is not time barred from re-filing an IPR and has not otherwise committed to dismiss its petition with prejudice. In the *Samsung* case LKQ cites, for example, the Board granted Petitioner's request to terminate, highlighting not only the preliminary stage of the proceeding, but also the fact that Petitioner was time-barred from filing addition petitions for the patents-at-issue. IPR2015-01270, Paper 11 at 3–4 (PTAB Dec. 9, 2015) ("Petitioner is, therefore, barred from filing another petition for *inter partes* review with respect to these petitions. Under these circumstances and based on the record before us, we exercise our discretion and dismiss[.]" (internal citations omitted)). This is not the case here. LKQ is not time-barred from filing additional petitions; it offers only the hollow statement that it "does not intend to do so." Paper 12 at 3.

The harassing nature of LKQ's approach to these IPRs and PGRs is further common-sense evidence that this motion has nothing to do with efficiency. To date, LKQ has filed 16 separate petitions for *inter partes* or post-grant review (*see* Paper 12 at 5), and LKQ does not intend to stop there. Indeed, LKQ states in its motion that it "anticipates filing numerous additional challenges" and that it seeks to challenge the '120 Patent through *ex parte* reexamination. *Id.* at 3, 5. If LKQ's motion were granted without adverse judgment, at a minimum, GM would be forced to expend resources both here (as it has already done so in its preliminary

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