

Appeal No. 2017-2307

**In the
United States Court of Appeals
for the Federal Circuit**

AMERICAN VEHICULAR SCIENCES LLC,

Appellant,

v.

UNIFIED PATENTS INC.,

Appellee.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in No. IPR2016-00364.

**PETITION FOR REHEARING EN BANC
OF APPELLANT AMERICAN VEHICULAR SCIENCES LLC**

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

American Vehicular Sciences, LLC v. Unified Patents, Inc.

Case No. 17-2307

CERTIFICATE OF INTEREST

Counsel for the:

(petitioner) (appellant) (respondent) (appellee) (amicus) (name of party)

American Vehicular Sciences, LLC

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
American Vehicular Sciences, LLC	None	Acacia Research Group, LLC
		Acacia Research Corporation

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (**and who have not or will not enter an appearance in this case**) are:

McNeely, Hare & War LLP: Christopher Casieri

FORM 9. Certificate of Interest

Form 9
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See Fed. Cir. R. 47.4(a)(5) and 47.5(b).* (The parties should attach continuation pages as necessary).

- American Vehicular Sciences LLC v. Hyundai Motor Co., Case No. 5:16-cv-11529-JEL-APP (E.D. Mich., filed Apr. 28, 2016);
- American Vehicular Sciences LLC v. Nissan Motor Co., Case No. 5:16-cv-11530-JEL-APP (E.D. Mich., filed Apr. 28, 2016);
- American Vehicular Sciences LLC v. Toyota Motor Corp., Case No. 5:16-cv-11531-JEL-APP (E.D. Mich., filed Apr. 28, 2016);
- American Vehicular Sciences LLC v. American Honda Motor Co., Case No. 5:16-cv-11532-JEL-APP (E.D. Mich., filed Apr. 28, 2016);
- Prosecution of Application Serial No. 14/721,136 filed on May 26, 2015 which is currently pending, and which claims priority to the patent currently at issue;
- Toyoda Gosei Co., Ltd. v. American Vehicular Sciences LLC, No. IPR2016-01790;
- Takata Corporation v. American Vehicular Sciences LLC, No. IPR2016-01794.
- American Vehicular Sciences LLC v. Autoliv ASP, Inc., Case No. 18-1977 (Fed. Cir.)
- American Vehicular Sciences LLC v. Autoliv ASP, Inc., Case No. 18-1978 (Fed. Cir.)

7/19/2018

Date

s/Robert P. Greenspoon

Signature of counsel

Robert P. Greenspoon

Printed name of counsel

Please Note: All questions must be answered

cc: Counsel of Record (via ECF)

Reset Fields

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Rule

35 U.S.C. § 1031

I. STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the following precedents of the Supreme Court and the Federal Circuit: *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007); *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966); *K/S HIMPP v. Hear-Wear Techs., LLC*, 751 F.3d 1362 (Fed. Cir. 2014); *In re Kotzab*, 217 F.3d 1365 (Fed. Cir. 2000). Consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court's decisions.

Also, I believe this Petition raises one or more precedent-setting questions of exceptional importance, arising thousands of times per year in patent examination and litigation:

Whether a decisionmaker may hold a claimed invention obvious under 35 U.S.C. § 103 over prior art that does not disclose a limitation in the claim, when no contemporaneous documentary evidence suggests the desirability of modifying the prior art to be the claimed invention.

/s/ Robert P. Greenspoon
ATTORNEY OF RECORD
FOR APPELLANT / PETITIONER

II. ARGUMENT FOR REHEARING *EN BANC*

Federal Circuit jurisprudence concerning single-reference obviousness is in conflict. This is a recurring and important issue badly in need of *en banc* resolution. The intractable conflict in controlling precedent has created confusion over the proper disposition of thousands (if not hundreds of thousands) of patent determinations every year.

Disputes frequently recur both in patent examination and litigation over whether a single prior art reference that fails to disclose a particular claim limitation would have rendered the claimed invention obvious. Panels of this Court have struggled with how to resolve such allegations. The following pre- and post-*KSR* decisions reject that a single reference made an invention obvious:

- *Arendi S.A.R.L. v. Apple Inc.*, 832 F.3d 1355 (Fed. Cir. 2016) (O’Malley, C.J., author, with Linn and Moore, C.J.)
- *K/S HIMPP v. Hear-Wear Techs., LLC*, 751 F.3d 1362 (Fed. Cir. 2014) (Lourie, C.J., author, with Wallach, C.J.) (dissent by Dyk, C.J.), *cert denied*, 135 S. Ct. 1439 (2015)
- *In re Kotzab*, 217 F.3d 1365 (Fed. Cir. 2000) (Linn, C.J., author, with Lourie and Gajarsa, C.J.) (reference teaching one sensor per valve did not render obvious claims for one sensor for multiple valves, despite “simplicity” of proposed modification extending a sensor to multiple valves)

- *In re Laskowsky*, 871 F.2d 115 (Fed. Cir. 1989) (Newman, C.J., author, with Archer and Michel, C.J.) (reciting and applying legal standard that, for obviousness over single reference, prior art must “suggest[] the desirability of the modification”).¹

The following pre- and post-*KSR* decisions, in contrast, agree that a single reference made an invention obvious:

- *In re Bayne*, 527 F. App'x 847 (Fed. Cir. 2013) (Dyk, Bryson and Wallach, C.J., per curiam)
- *Perfect Web Techs., Inc. v. InfoUSA, Inc.*, 587 F.3d 1324 (Fed. Cir. 2009) (Linn, C.J., author, with Dyk and Prost, C.J.)
- *Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299 (Fed. Cir. 2006) (Dyk, C.J., author, with Schall and Gajarsa, C.J.)

It is difficult if not impossible to reconcile these decisions to distill a unitary legal standard. On the one hand, the *K/S HIMPP v. Hear-Wear* decision (hereafter, *Hear-Wear*, cited favorably in the later *Arendi* decision) held 2-1 that a decisionmaker may not hold a claimed invention obvious over a single prior art reference that fails to disclose a core structural claim limitation, unless

¹ The following post-*KSR* decision recites with approval the legal standard that prior art must teach the desirability of modifying the single reference to be the claimed invention, but finds such desirability evidence on the record of that case: *In re Urbanski*, 809 F.3d 1237 (Fed. Cir. 2016) (Lourie, C.J., author, with Bryson and Chen, C.J.).

contemporaneous documentary evidence suggested that a POSITA would have modified the reference with the missing item. *Hear-Wear*, 751 F.3d at 1366. Other cases state the same principle slightly differently: that the prior art must suggest the desirability of the modification. *In re Laskowsky*, 871 F.2d at 117; *see also In re Urbanski*, 809 F.3d at 1243-44 (reaffirming need for contemporaneous “desirability of the modification” evidence).

Put simply, under this line of authority favoring patentees, “common sense” to achieve the claimed invention must have a documentary basis in the record, lest a decisionmaker use impermissible hindsight reasoning. These holdings take inspiration from Supreme Court directives in *KSR* to avoid hindsight. They also distinguish decisions where *all* of the claim limitations existed in a proposed multi-reference combination. *E.g.*, *Hear-Wear*, 751 F.3d at 1366.

On the other hand, the dissent’s view in *Hear-Wear* prevailed in the *Bayne*, *Perfect Web* and *Ormco* decisions. In those decisions, obviousness over a single reference did not turn on the presence or absence of documentary evidence suggesting the modification. There, judicial common sense and reasoning held full sway. These holdings take inspiration from Supreme Court directives in *KSR* that courts should look to the knowledge, creativity and common sense that an ordinarily skilled artisan would have brought to bear when considering combinations or modifications. *See KSR*, 550 U.S. at 415-22.

Petitioner believes that *Hear-Wear* correctly decided the question. *Hear-Wear* considered and rejected the argument (presented in dissent) that requiring documentary evidence conflicted with *KSR*.

The requirement that evidence on the record is necessary to support the “plurality of prongs” limitation is not inconsistent with *KSR*’s caution against the “overemphasis on the importance of published articles and the explicit content of issued patents.” *KSR*, 550 U.S. at 419. In *KSR*, the Supreme Court criticized a rigid approach to determining obviousness based on the disclosures of individual prior art references that were already on the record, with little recourse to the knowledge, creativity, and common sense that an ordinarily skilled artisan would have brought to bear when considering combinations or modifications. *Id.* at 415-22. But the present case does not present a question whether the Board declined to consider the common sense that an ordinarily skilled artisan would have brought to bear when combining or modifying references.

Instead, it is about whether the Board declined to accept a conclusory assertion from a third party about general knowledge in the art *without evidence on the record*, particularly where it is an important structural limitation that is not evidently and indisputably within the common knowledge of those skilled in the art. *Cf. Randall Mfg. v. Rea*, 733 F.3d 1355, 1362-63 (Fed. Cir. 2013) (Board's failure to consider *evidence* of the knowledge of one of skill in the art was plainly prejudicial).

Hear-Wear, 751 F.3d at 1365-66. The Supreme Court denied the later-filed petition for a writ of certiorari.

Whether or not the *Hear-Wear* majority interpreted *KSR* correctly, or its dissent did, this Court’s decisions have resulted in a sharp, well defined split among Federal Circuit panels and judges. Single-reference obviousness presents a recurring issue – perhaps one of the most recurring issues in all of patent law. Uniformity in

the applicable legal standard, and certainty in adjudications, is imperative and of national importance. The full Court should convene to bring about such uniformity, and lift the fog that currently obscures this area of patent law.

A second split decision after *Hear-Wear* shows that confusion over legal standards persists. See *In re Stepan*, 868 F.3d 1342 (Fed. Cir. 2017) (Moore, C.J., author, with O'Malley, C.J.) (dissent by Lourie, C.J.). In *Stepan*, the panel majority vacated and remanded after holding that the Board failed to explain “*why* it would have been routine optimization to arrive at the claimed invention” based on single reference. *Id.* at 1346. The majority compared the Board’s error to those where “the Board found claimed inventions would have been ‘intuitive’ or ‘common sense. . . .’” *Id.* The dissent did “not disagree” with the majority’s critique over the Board “not explaining itself adequately,” but would have affirmed anyway because the prior art “almost anticipates claim 1,” based on “a reference we can plainly see.” *Id.* at 1349-50. The Judges of this Court therefore continue to disagree over the level of record support needed to establish single-reference obviousness, and the permissible latitude of judicial analysis during appellate review.

III. THE PRESENT DECISION RESULTS FROM THIS SPLIT

The present decision squarely presents this issue.

The patent held invalid in this appeal discloses and claims (among other things) an automotive side curtain airbag. The relevant claim limitation discusses a

single side airbag “extending” from the front passenger row to the rear passenger row. (Appx186, claim 1). The asserted prior art does not disclose a side curtain airbag. Appellee / Respondent (Unified Patents) admitted in proceedings below that its primary reference – a prior art patent to Leising – did not disclose a side curtain airbag. (Appx222). It instead discloses a side airbag solely for the front seat. (Appx659, Fig. 2).

Unified Patents completed its proofs using a “motivation” reference – a prior art patent to Lau – that also did not disclose a side curtain airbag extending across two rows. (See Appellee Br. 28). Lau instead disclosed a front seat side airbag and a back seat side airbag, each below the window line. (Appx672, col. 2, ll. 61-63; Appx669, Fig. 1). In this Court, Unified Patents conceded that the Lau reference was simply “an example of a reference that supplied motivation . . . , because Lau specifically indicates that the vehicle’s airbags should also protect passengers in the second row of seating.” (Appellee Br. 28). As such, Unified Patents concedes that it presented a single reference modification theory. That was also plain because the two references, if actually combined, did not include a side curtain airbag – *i.e.*, did not include a single airbag “extending” from one seat row to another, in the words of the patent claims under review.

At oral argument in this Court, members of the panel stated a belief that *KSR* permits free use of “common sense” during appellate review, even without

documentary evidence. The panel made statements suggesting that it did not believe that documentary evidence was necessary to hold that a POSITA would have modified the single reference to achieve the claimed invention.² One member also queried whether Lau constitutes the required documentary evidence.³ But counsel pointed out that Lau undisputedly disclosed a *second* airbag for the rear.⁴ Lau thus did not itself teach toward the *claimed* invention which requires “extending” the front airbag to the rear to result in a single side curtain airbag.⁵ Thus the decision affirming obviousness imposed no documentary evidence requirement on Appellee / Respondent for its proposed modification adding the missing limitation into the obviousness reference, giving no effect to warnings in *KSR* – repeated in *Hear-Wear* – against hindsight.

² (E.g., Oral Argument Recording at 1:47, “I don’t know, I’m not clear on what you’re saying. We don’t need a specific suggestion for motivation to combine right, wasn’t that what *KSR* was all about, that you don’t need an express statement of that?”).

³ (Oral Argument Recording at 5:42, “But why aren’t the prior art references that evidence that you say is lacking? . . . Why is it that a POSITA can’t come and just use common sense to say I’m going to extend this airbag in the front to the back?”).

⁴ (Oral Argument Recording at 8:39, “But what that means is that there’s a magnetic pull to the skilled artisan to go put Lau’s technology, if you’re going to do anything with the combination, put Lau’s technology in the rear seat.”).

⁵ (Oral Argument Recording, at 20:25, “That motivation or suggestion has to lead to the claimed invention; it has to suggest and achieve the claimed invention. And that’s *Kinetic Concepts*, and all the cases after that such as *Nuvasive*.”).

IV. HEAR-WEAR AND ORMCO EXEMPLIFY THE COMPETING AND IRRECONCILABLE APPROACHES TO OBVIOUSNESS WITHIN THIS COURT

Review of the facts and outcomes in two of the Court’s decisions mentioned above – *Hear-Wear* and *Ormco* – reveals how clear and irreconcilable this Court’s competing approaches have become.

In *Hear-Wear*, a requester in *inter partes* reexamination challenged the decision of the Board holding a hearing aid patent nonobvious. The invention included modules joined by a connector. *Hear-Wear*, 751 F.3d at 1363. The claims required the connector to contain a multi-pronged plug. *Id.* No documentary evidence existed in the record of multi-pronged plugs. *Id.* at 1365. This Court rejected the appellant’s attempt to invoke undocumented “basic knowledge” or “common sense” to modify a single prior art reference, and thus secure a reversal. *Id.* at 1366 (“[T]he Board cannot accept general conclusions about what is ‘basic knowledge’ or ‘common sense’ as a replacement for core factual findings in a determination of patentability.”).

Yet in *Ormco*, a general conclusion about “basic knowledge” won the day. There, an infringer challenged a district court decision holding an orthodontic kit patent nonobvious. *Ormco*, 463 F.3d at 1302-03. The central claim limitation discussed on appeal required a particular way of packaging the kit, not shown in the prior art. In finding the invention not “patentably distinct” from a single prior art

reference, this Court relied upon “the well-known practice of packaging items in the manner most convenient to the purchaser.” *Id.* at 1309. The decision did not mention any documentary evidence of such “well-known practice.” As a result, a patent claim reciting that three orthodontic appliances “are provided in a single package to the patient” would have been obvious notwithstanding the absence of documentary evidence of such a three-in-one configuration. *Id.*

Patent examiners, Board judges, litigants and the lower courts are now lost at sea when it comes to single-reference obviousness determinations. In a particular case, one cannot predict whether the obviousness decision will turn on the principles announced in *Hear-Wear* (*i.e.*, forbidding reliance on uncorroborated basic knowledge or common sense to come up with core structural limitations in a claim) or in *Ormco* (*i.e.*, inviting reliance on uncorroborated basic knowledge and well-known practices). An *en banc* determination will resolve the conflict.

V. FOLLOWING AN APPROACH TO OBVIOUSNESS THAT OBVIATES THE NEED FOR CONTEMPORANEOUS DOCUMENTARY EVIDENCE PUTS THIS COURT INTO CONFLICT WITH *GRAHAM*

The *Hear-Wear* panel discussed why the “flexible approach” to determining obviousness required by the Supreme Court’s *KSR* decision does not weaken the requirement of documentary evidence when dealing with a single-reference modification theory. “In contradistinction to *KSR*, this case involves the lack of evidence of a specific claim limitation, whereas *KSR* related to the combinability of

references where the claim limitations were in evidence.” *Hear-Wear*, 751 F.3d at 1366. The same holds true in this case – the single side airbag limitation “extending” across two seating rows undisputedly did not exist in the prior art, and no documentation existed that it was “basic knowledge” or “common sense” to make that modification.

To believe that *KSR* allowed such free and untethered invocation of “basic knowledge” or “common sense” (either through uncorroborated expert testimony, or through the application of bare judicial reasoning) would conflict with other Supreme Court authority. In *Graham v. John Deere Co. of Kansas City*, the Supreme Court held that, in enacting Section 103 of the Patent Act of 1952, Congress incorporated the Court’s prior framework for determining patentability laid out in *Hotchkiss v. Greenwood*, 52 U.S. 248 (1851). *Graham*, 383 U.S. at 1, 10-17 (1966). *Hotchkiss*, in turn, ruled an invention unpatentable because it involved a mere substitution of old materials (potters clay for metal in a doorknob). *Hotchkiss*, 52 U.S. at 265-67. But the Court took special care to note that patentability might be “successfully urged” if the facts were otherwise – *i.e.*, if one of the claim limitations were not in the prior art evidence. *Id.* at 265 (noting a knob of a “new composition,” not potters clay, might have been “the proper subject of a patent”). The *Hotchkiss* framework, reinvigorated in *Graham*, is thus evidentiary, not speculative or inferential.

The *Hotchkiss* framework “required a **comparison** between the subject matter of the patent, or patent application, and the background skill of the calling.” *Id.* at 12 (emphasis added). Consequently, *Graham* names the “background skill” as the baseline for “comparison.” *Graham* leaves no room for such “background skill” to be divined from a set of undocumented assumptions. *Graham* instead goes on to confirm that “[i]t has been from this **comparison** that patentability was in each case determined.” *Id.* (emphasis added). Performing this comparison will, in every case, solve the “inherent problem” of “develop[ing] some means of weeding out those inventions which would not be disclosed or devised but for the inducement of a patent.” *Id.* at 11. *A fortiori*, a “comparison” presupposes **evidence** of the two things being compared. Otherwise, *Graham* would have spoken in terms of inductive reasoning or judicial logic. *Graham*, 383 U.S. at 12 (emphasis added).

How *Graham* resolved specific obviousness disputes confirms the documentary approach. For one of the patents-in-suit (the ’798 patent), the argued distinction over the first item of prior art was merely “interchanging” of two parts (a “shank” and a “hinge plate”) already disclosed in the prior art reference. *Id.* at 23. Such “interchanging” supplied an argued advantage (“flexing” over an entire length of a part) that was not a claim limitation, and not a significant feature at all. *Id.* at 25. The argued distinction over a second item of prior art also failed, because “all of the elements in the ’798 patent are present in the Glencoe structure,” only with

reversal of two structures in a way that did not change the underlying mechanical operation. *Id.* at 26. Thus analysis by the Supreme Court remained tethered to documentary evidence of claim limitations in the prior art.

Analysis in *Graham* of the other patent-in-suit (the Scoggin patent) likewise relied on documentary evidence for all claim limitations. The Supreme Court noted that the claimed features the applicant described, during prosecution, as missing from the file wrapper prior art nonetheless existed within a new prior art reference (Livingston) that the examiner had not considered. *Id.* at 36. This analysis of Scoggin also remained tethered to documentary evidence of claim limitations in the prior art.

Thus, in each analysis of obviousness within *Graham*, the Supreme Court focused on claim limitations in the documentary evidence (albeit with flexibility to consider how those limitations might be “interchanged” or “reversed” by an ordinary mechanic). In no instance did the Court invoke basic knowledge, common sense, or well-known practices to supply a core structure claim limitation otherwise missing from the art. To do so now conflicts with both *Graham* and *KSR*.

VI. THE NO-OPINION AFFIRMANCE DOES NOT DETRACT FROM THE NEED FOR *EN BANC* REVIEW

While it is customary for this Court to deny rehearing of non-precedential decisions, that should not dissuade this Court from granting this Petition.

First, the issue has fully percolated. This Court has already rendered at least two split panel decisions on this legal issue – the *Hear-Wear* and *Stepan* decisions.

This Court has not yet had the opportunity to convene as a full court to resolve the conflict presented in those cases.

Second, the Rule 36 affirmance of this case shows that even when this Court squarely faces the conflict in its own precedents, it may choose not to issue a precedential opinion. There is little chance of further development of the issue in future precedential panel opinions. Meanwhile, this leaves lower tribunals free to expand or contract the scenarios leading to obviousness, without dispositive guidance from this Court. For example, if undocumented “common sense” can bridge the gap of one core claim limitation, why not two claim limitations? Why not all of them? Why require prior art documentary evidence at all, if a hired-gun expert can simply point to a patent claim and recite uncorroborated testimony that a POSITA would have come up with it? The state of the law as it now exists encourages uncertainty in patent examination and litigation.

Third, some of the most important petitioned patent issues of recent memory received post-panel review in the context of no-opinion or nonprecedential decisions. In such cases, the need for review already pre-existed the underlying Federal Circuit judgment. This includes Supreme Court review of the constitutionality of America Invents Act tribunals (*Oil States Energy Svcs. v. Greene’s Energy Group*, 137 S. Ct. 2239 (2018) (cert granted after Fed. Cir. Rule 36 affirmance)), Supreme Court review of “inflexible” obviousness legal standards

(*KSR Intern. Co. v. Teleflex Inc.*, 550 U.S. 398 (2007) (cert granted on nonprecedential opinion)), and this Court's analysis of the standard of review for district court claim construction decisions (*Lighting Ballast Control v. Philips Electronics*, 744 F.3d 1272 (Fed. Cir. 2014) (granting *en banc* review after nonprecedential panel opinion)). Federal Rule of Appellate Procedure 35 also provides that the Court may hear any matter initially *en banc*. Thus, a full precedential panel decision (or any opinion at all, for that matter) has never been a prerequisite for *en banc* review.

Finally, this issue is of immense importance to innovators, to the economy, and to the cause of certainty in the administrative and judicial enforcement the patent laws. Every existing and newly-filed patent application has the potential to draw a single reference obviousness rejection. Every issued patent is vulnerable to attack in America Invents Act tribunals using such theories. How much authority does this Court wish to lodge in such tribunals to render patent claims obvious without corroborative record support? The Court should grant *en banc* review now, in this case, to answer such questions and ensure the stable and uniform administration of the patent laws for future cases.

VII. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court take up the issue of single reference obviousness *en banc*, to resolve conflicting legal standards over its adjudication and appellate treatment.

Dated: July 19, 2018

Respectfully submitted,

/s/ Robert P. Greenspoon

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ADDENDUM

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

AMERICAN VEHICULAR SCIENCES LLC,
Appellant

v.

UNIFIED PATENTS INC.,
Appellee

2017-2307

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2016-00364.

JUDGMENT

ROBERT GREENSPOON, Flachsbart & Greenspoon, LLC, Chicago, IL, argued for appellant. Also represented by GREGORY J. GONSALVES, Gonsalves Law Firm, Falls Church, VA.

DAVID LANGDON CAVANAUGH, Wilmer Cutler Pickering Hale and Dorr LLP, Washington, DC, argued for appellee. Also represented by GREGORY H. LANTIER, ANURADHA SIVARAM, JONATHAN RUDOLPH KOMINEK STROUD, DANIEL V. WILLIAMS.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (PROST, *Chief Judge*, NEWMAN and REYNA, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

June 19, 2018

Date

/s/ Peter R. Marksteiner

Peter R. Marksteiner

Clerk of Court

CERTIFICATE OF SERVICE

I, Rose E. Olejniczak, being duly sworn according to law and being over the age of 18, upon my oath deposes and states that:

Counsel Press was retained by FLACHSBART & GREENSPOON, LLC, Attorneys for American Vehicular Sciences LLC, to print this document. I am an employee of Counsel Press.

On July 19, 2018, FLACHSBART & GREENSPOON, LLC, authorized me to electronically file the foregoing Petition for Rehearing *En Banc* of Appellant American Vehicular Sciences LLC with the Clerk of the Federal Circuit using the CM/ECF System, which will serve e-mail notice of such filing on the following attorneys:

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Eighteen paper copies of the petition will also be filed with the Court, via Federal Express, within the time provided in the Court's rules.

/s/ Rose E. Olejniczak

Rose E. Olejniczak

CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitations of Fed. R. App. P. 35(b)(2)(A). This petition contains 3,573 words, excluding the parts of the petition exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 35(c)(2). This petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This petition has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in fourteen (14) point Times New Roman font.

Dated: July 19, 2018

/s/ Robert P. Greenspoon
Robert P. Greenspoon