IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re: Ex Parte Reexamination of	Confirmation No.: 8866
U.S. Patent No.: 10,268,608	Art Unit: 3992
Control No.: 90/015,449	Examiner: WILLIAM H WOOD
Filed: August 22, 2025	Atty. Docket: 5526.008RPO0

Title: **MEMORY MODULE WITH TIMING-CONTROLLED DATA PATHS IN DISTRIBUTED DATA BUFFERS**

Netlist's Petition for the Director to Suspend the Rules and Deny the Request for Reexamination Under 35 U.S.C. §§ 303(a) and 325(d)

Mail Stop *Ex Parte* Reexam
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Pursuant to 35 U.S.C. §§ 303(a) and 325(d), as well as 37 C.F.R. §§ 1.181(a)(3) and 1.182, Netlist petitions the Director to intervene and deny the August 22, 2025 request for reexamination challenging the validity of U.S. Patent No. 10,268,608 as an improper serial attack on the patent. Additionally, pursuant to 37 C.F.R. § 1.183, Netlist requests that the Director suspend any rule that would prevent consideration of this petition (including but not limited to §§ 1.515 and 1.530(a)).

TABLE OF CONTENTS

TABLE OF EXHIBITS

Reference No.	Description
US1	U.S. Patent No. 9,128,632 B2 to Lee et al., issued September 8, 2015
NPL1	*Samsung Elecs. Co. v. Netlist, Inc.*, IPR2022-00615, Paper 96 (P.T.A.B. April. 17, 2024)
NPL2	*Micron Tech., Inc. v. Netlist, Inc.*, IPR2022-00237, Paper 2 (P.T.A.B. Dec. 23, 2021)
NPL3	*Micron Tech., Inc. v. Netlist, Inc.*, IPR2022-00237, Paper 15 (P.T.A.B. July 19, 2022)
NPL4	*Micron Tech., Inc. v. Netlist, Inc.*, IPR2022-00237, Paper 17 (P.T.A.B. Sept. 16, 2022)
NPL5	*Samsung Elecs. Co. v. Netlist, Inc.*, IPR2023-00847, Paper 1 (P.T.A.B. Apr. 27, 2023)
NPL6	*Samsung Elecs. Co. v. Netlist, Inc.*, IPR2023-00847, Paper 6 (P.T.A.B. Sept. 14, 2023)
NPL7	Non-Final Office Action mailed June 2, 2017, in U.S. Patent Application No. 15/426,064 (now U.S. Patent No. 9,824,035)
NPL8	*Micron Tech., Inc. v. Netlist, Inc.*, IPR2024-00370, Paper 1 (P.T.A.B. Jan. 10, 2024)
NPL9	*Micron Tech., Inc. v. Netlist, Inc.*, IPR2024-00370, Paper 8 (P.T.A.B. July 23, 2024)
NPL10	*Micron Tech., Inc. v. Netlist, Inc.*, IPR2024-00370, Paper 10 (P.T.A.B. Oct. 8, 2024)
NPL11	*Netlist, Inc. v. Micron Tech., Inc.*, No. 1-22-cv-00136, Dkt. 19 (W.D. Tex. Aug. 20, 2021)
NPL12	*Netlist, Inc. v. Micron Tech., Inc.*, No. 1-22-cv-00136, Dkt. 69 (W.D. Tex. May 11, 2022)
NPL13	*Netlist, Inc. v. Samsung Elecs. Co.*, No. 2:22-cv-00293, Dkt. 855 (E.D. Tex. Dec. 2, 2024)
NPL14	*Netlist, Inc. v. Micron Tech., Inc.*, No. 2:22-cv-00294, Dkt. 151 (E.D. Tex. July 11, 2024)
NPL15	*Netlist, Inc. v. Micron Tech., Inc.*, No. 6:21-cv-00431, Dkt. 1 (W.D. Tex. Apr. 28, 2021)
NPL16	Davis, R., "Stewart Says New Policies Seek Fairness For Patent Owners," Law360 (Sept. 15, 2025) https://www.law360.com/lifesciences/articles/2386048/stewart-says-new-policies-seek-fairness-for-patent-owners
NPL17	Davis, R., "Stewart Says New Policies Aim to Bring Stability," Law360 (Sept. 8, 2025) https://www.law360.com/ip/articles/2364638

I. Introduction

Once again, Netlist finds itself on the receiving end of serial post-grant attacks on its intellectual property. An anonymous party has requested *ex parte* reexamination of Netlist's '608 patent—a patent that has survived six years of repeated challenges, including three failed IPRs and myriad validity attacks in district court, and which underlies a multi-million-dollar jury verdict in Netlist's favor. To say that Netlist has acquired settled expectations in the validity of this patent is a dramatic understatement. Even worse, the present request rehashes unpatentability arguments virtually identical to those the Office has already rejected, apparently in the hope that, this time, they will stick. That is a profoundly inappropriate use of the reexamination process. The Office is not a casino. Patent challengers should not be permitted to pull the slot machine until they eventually find an examiner or APJ who turns up their desired result.[1] The Director—in keeping with the Office's commitment to achieve "more balance and fairness" for patent owners[2]—should exercise his discretion under 37 C.F.R. §§ 1.182 and 1.183 and deny this reexamination request under 35 U.S.C. § 325(d).

Netlist is a small company based in Irvine, California, that competes in the computer-memory space against much larger players such as Samsung, Micron, and others. Over the past twenty-five years, Netlist has made a name for itself as a market disrupter, developing innovative memory designs that buck conventional trends and offer superior performance. A key to Netlist's

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[1] *Cf.* Memorandum re: PTAB Consideration of Prior Findings of Fact and Conclusions of Law (Sept. 16, 2025) ("A more detailed explanation is required from the Board when the same or substantially the same evidence and/or arguments that were previously presented to the Office, the district court, or the ITC are being relied upon in the subsequent AIA trial proceeding.").

[2] Davis, R., *Stewart Says New Policies Seek Fairness For Patent Owners*, https://www.law360.com/lifesciences/articles/2386048/stewart-says-new-policies-seek-fairness-for-patent-owners (NPL16); *see also id.* (quoting then-Acting Director (now Deputy Director) Stewart as saying: "I think what we're trying to do is bring it back to a level playing field … [a]nd frankly, it shouldn't even be a level playing field, because the patent owner, of course, has the issued grant.").

success against the Goliaths of the industry has been its significant investment in R&D and patent protection. Netlist currently holds 120 U.S. patents covering its novel memory designs.

Unable to out-innovate Netlist, many of its competitors have decided simply to use Netlist's technology without permission. And, when taken to court for their infringement, those competitors have responded by repeatedly challenging Netlist's patents in post-grant proceedings. After all, "it's only a matter of simple math that if you challenge the same claim over and over again, you will increase the odds that it will be determined to be unpatentable, even if a majority of examiners and judges think it is patentable."[3] As a result, "[e]ven extremely strong patents become unreliable when subject to serial or parallel validity challenges."[4] It is no wonder, then, that in just the past five years, 17 of Netlist's patents have been attacked at the Patent Office, with 12 of those patents subject to multiple attacks. Netlist's '608 patent at issue here is a prime example.

The '608 patent solves synchronization and timing problems for data and strobe signals in dynamic memory modules. Throughout its life, the patent has been subject to numerous validity challenges in multiple fora and survived them all. One IPR petition was denied institution on the merits. Another was denied on discretionary grounds based in part on its attempt to improperly use prior IPRs as a roadmap to shore up deficiencies. And yet another failed after a full trial on the merits. On top of that, a jury found that Samsung willfully infringes

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[3] Davis, R., *Stewart Says New Patent Policies Aim To Bring Stability*, https://www.law360.com/ip/articles/2364638 (NPL17).

[4] Notice of Proposed Rulemaking, Revision to Rules of Practice Before the Patent Trial and Appeal Board, Dep't of Commerce, 90 Fed. Reg. 48335 (Oct. 17, 2025). To address these concerns in the IPR context, the Office has issued a notice of proposed rulemaking that would curb serial petitions. *See id.* ("[P]atents cannot serve their economic function if they are perpetually subject to *de novo* review."). The exact same concerns are present here, where a reexam request follows on the heels of serial IPR petitions.

the '608 patent and that the claims are not invalid, awarding Netlist $12 million in damages. If ever there were a patent whose validity has been thoroughly vetted, it is this one.

Now, after all prior invalidity challenges have failed—and with Netlist's multi-million-dollar damages award on the line—a nameless third party has entered the fray. This time, the challenge takes the form of a reexam request. But the substance of the challenge is nearly identical to those that preceded it: the request relies on the same primary reference (Hiraishi) and secondary reference (Ellsberry) as asserted in the IPRs. The request tacks on additional references (Rajan and Guo), to be sure, but Rajan was considered during original examination, and both Rajan's and Guo's teachings are cumulative of art the PTAB already considered.

This is exactly the type of patent-owner harassment that § 325(d) was designed to prevent. The Federal Circuit's decision in *In re Vivint, Inc.*, 14 F.4th 1342 (Fed. Cir. 2021), proves the point. *Vivint* held that the Office acted arbitrarily and capriciously by allowing a reexamination request that was substantially similar to challenges that the PTAB had previously rejected in three IPRs. The third IPR had been denied because it was an abusive serial filing that had improperly used prior institution decisions as a roadmap. *Id.* at 1353. The fourth challenge—a reexamination request—likewise used the failed IPRs as a roadmap, but swapped out a secondary reference. The court held that the reexam request also should have been denied for the same reason the third IPR was: "when applying § 325(d)," the Office "cannot deny institution of IPR based on abusive filing practices then grant a nearly identical reexamination request that is even more abusive." *Id.* at 1354. That same reasoning applies here. The present reexam request is simply the "fourth iteration" in a "string of undesirable, incremental petitioning" and uses the prior failed IPRs as a roadmap. *Id.* at 1353. One of those IPRs was denied for improper roadmapping, and this request should be too.

Vivint's concerns about patent owner harassment are all the more salient here given the history with Netlist's portfolio. Netlist competitors have serially attacked at least a dozen Netlist patents—including one, U.S. Patent No. 7,619,912, that emerged from ten years of exhaustive *inter partes* reexaminations initiated by Google and its partners. The reexams involved numerous unpatentability grounds, five office actions, more than twenty briefs, two appeals to the PTAB, and an appeal to the Federal Circuit. After all that, Netlist successfully asserted the patent against two of its competitors and was awarded more than $500 million in damages. *Netlist, Inc. v. Samsung Elecs. Co.*, No. 2:22-cv-00293, Dkt. 855 (E.D. Tex. Dec. 2, 2024) (NPL13); *Netlist, Inc. v. Micron Tech., Inc.*, No. 2:22-cv-00294, Dkt. 151 (E.D. Tex. July 11, 2024) (NPL14). But that still was not enough. Samsung (one of Google's suppliers) had filed an IPR petition against the patent, and the PTAB—disregarding more than a decade of decisions upholding the '912 patent—found the claims obvious, thus negating Netlist's subsequent half-a-billion dollar damages awards (unless and until the ruling is reversed by the Federal Circuit). *Samsung Elecs. Co. v. Netlist, Inc.*, IPR2022-00615, Paper 96 (P.T.A.B. Apr. 17, 2024) (NPL1); *Netlist, Inc. v. Samsung Elecs. Co.*, No. 24-2304 (Fed. Cir.). That is not how the system is supposed to work. Patent owners such as Netlist are entitled to some measure of repose.

Reexaminations serve an important purpose in a stable patent system. But they were not designed as vehicles for relitigating issues the PTAB already rejected. On the contrary, repeated "reconsideration of patent grants … is the antithesis of stability."[5] The Director should thus exercise his authority to step in and deny the request. 35 U.S.C. § 303(a). If ever there were a case for the Director to do so, it is this one.

[5] Davis, R., *Stewart Says New Patent Policies Aim To Bring Stability*, https://www.law360.com/ip/articles/2364638 (NPL17).

II. Statement of Facts

The '608 patent claims priority to a series of continuation applications extending back to July 2012. The patent is directed to an innovative design for a "memory module"—a form of dynamic memory used in computers systems—and, in particular, one that solves data timing and synchronization problems that plagued prior-art modules. It does so by adding "isolation devices" (also called "data buffers" or "buffer circuits") to the module. *See* EX1001, Fig. 2A, 3:27-29, 4:30. Each isolation device includes a "data path corresponding to each data signal line," and each data path in turn includes a tristate buffer and a delay circuit. *Id.*, 12:3-26, 19:43-55. The isolation devices provide the correct timing for data signals and control signals. *Id.*, 8:56-9:3.

Since it issued in 2019, the '608 patent has been challenged in five proceedings across three tribunals. As explained below, it has so far survived every single one.

A. The '608 patent has survived six years of repeated attacks on its validity.

Even before it issued, the '608 patent was subject to a rigorous examination. During two years in prosecution, the Examiner considered more than 200 prior-art references, including the Ellsberry and Rajan references at issue here, which were cited in an IDS.[6] EX1002, 94, 214, 223, 252; EX1006; EX1014. The Examiner concluded that none of the references was close to Netlist's claimed invention, noting that "the prior art does not fairly teach or suggest, individually or in combination, a memory module system" having the claimed isolation devices

[6] The Examiner initialed the IDS, thus indicating that he considered the references. 37 C.F.R. § 1.97(b); M.P.E.P. § 609.01. By contrast, when the Examiner did *not* consider certain references, he said so expressly. *See, e.g.*, EX1002, 205 (Examiner stating that he did not consider certain Non-"Patent Literature Documents and Foreign Patent Documents" that were listed in IDSs dated October 3, 2018).

controlling the timing of data signals on data paths. EX1002, 205-06. The patent issued in April 2019.

In April 2021, Netlist asserted the '608 patent against Micron in the Western District of Texas. *Netlist, Inc. v. Micron Tech., Inc.*, Nos. 6:21-cv-00431, 1:22-cv-00136 (W.D. Tex.) (NPL15). Micron counterclaimed, arguing, among other things, that the '608 patent is obvious over two prior-art references not at issue here (though one of the references (Saito) discloses similar subject matter as the Hiraishi reference and includes overlapping inventors). *Id.*, Dkt. 19, ¶¶ 41-46 (NPL11). The case was stayed in May 2022 pending resolution of various challenges to the '608 patent and other asserted patents. *Id.*, Dkt. 69 (NPL12). It remains stayed to this day.

In December 2021, Micron filed an IPR petition with the PTAB challenging claims 1-5 of the '608 patent[7] as anticipated by and obvious over (among other references) Osanai, which all agree is materially identical to the Hiraishi reference at issue here. *Micron Tech., Inc. v. Netlist, Inc.*, IPR2022-00237, Paper 2, 4 (P.T.A.B. Dec. 23, 2021) (NPL2); *see Samsung Elecs. Co. v. Netlist, Inc.*, IPR2023-00847, Paper 6, 5 (P.T.A.B. Sept. 14, 2023) (NPL6) (noting that Osanai and Hiraishi are materially identical). Micron's obviousness ground relied on Osanai/Hiraishi for most claim limitations, including claim 1's isolation devices. IPR2022-00237, Paper 2, 20-65 (NPL2). For limitation 1[f]'s requirement that signals be "delay[ed] … through the data path by an amount determined … in response to" control signals, Micron relied on a secondary reference not at issue here. *Id.*, 45-51, 62-63. The PTAB denied institution on the merits, finding that Micron had not demonstrated that the prior art discloses the claimed "data

[7] At the time, the '608 patent recited twelve claims, but claims 6-12 have since been disclaimed.

path" including "a delay circuit." *Id.*, Paper 15, 19-20 (NPL3). The PTAB then denied Micron's request for rehearing. *Id.*, Paper 17 (NPL4).

In August 2022, Netlist asserted the '608 patent against Samsung in the Eastern District of Texas. *Netlist, Inc. v. Samsung Elecs. Co.*, No. 2:22-cv-00293 (E.D. Tex.). After more than two years of litigation—during which the Hiraishi and Ellsberry references at issue here were asserted against the '608 patent (but later dropped)—the case was finally tried to a jury in November 2024. The jury found that Samsung willfully infringed the '608 patent and that the asserted claims were not invalid. *Id.*, Dkt. 855 (NPL13). The jury awarded Netlist $12 million in damages. *Id.*

Meanwhile, Samsung tried its own hand at an IPR. In April 2023, Samsung filed a petition challenging all of the '608 patent claims as obvious over various combinations of references, including Hiraishi and Ellsberry. *Samsung Elecs. Co. v. Netlist, Inc.*, IPR2023-00847, Paper 1 (P.T.A.B. Apr. 27, 2023) (NPL5). Samsung relied on Hiraishi (which, again, is materially identical to the Osanai reference on which Micron relied) for nearly every aspect of claim 1 but bolstered its argument with secondary references not at issue here. *Id.*, 15-53, 72-102. Samsung relied on Ellsberry for dependent claims 4-5. *Id.*, 108-110. The PTAB instituted review but upheld all claims after a full trial on the merits, finding that Hiraishi does not disclose "the recited 'delay circuit'" and does not "delay[] a signal through the data path by an amount determined by the command processing circuit in response to at least one of the module control signals," as required by claim 1. *Id.*, Paper 42, 37, 48 (EX1008). Samsung appealed that decision and is now recycling its same arguments to the Federal Circuit. *Samsung Elecs. Co. v. Netlist, Inc.*, No. 25-1378 (Fed. Cir.).

Micron likewise took another shot. In January 2024—well after it was time-barred under 35 U.S.C. § 315(b)—Micron filed a second IPR petition asserting the same Hiraishi and Ellsberry grounds as asserted in Samsung's IPR petition and seeking joinder to Samsung's IPR. *Micron Tech., Inc. v. Netlist, Inc.*, IPR2024-00370, Paper 1 (P.T.A.B. Jan. 10, 2024) (NPL8). The PTAB once again denied institution, finding that Micron (and indeed, Samsung before it) improperly sought to use the PTAB's prior decisions "as a roadmap" to invalidate Netlist's claims. *Id.*, Paper 8, 15-16 (NPL9). In particular, the PTAB explained that "[t]he challenge in the Samsung IPR was modified in a manner that was directed to the deficiencies of the [first] Micron IPR, and therefore appear[ed] to be an attempt to use the information gained in the Micron IPR to improve the possible success of the later petition." *Id.*, 15. "By moving for joinder to the Samsung IPR," the PTAB found, Micron was "also therefore seeking to capitalize on the benefits of this road mapping." *Id.*, 15-16. The Director thereafter denied review.[8] *Id.*, Paper 10 (NPL10).

In total, obviousness combinations involving Hiraishi (or the materially identical Osanai reference) have been considered and rejected three times by the PTAB. In all three of those proceedings, the patent challengers relied on Hiraishi for nearly every element in claim 1 and secondary references for limitation 1[f] requiring a "delay circuit" in a "data path." In two of those proceedings, moreover, the challengers relied on Ellsberry for the elements in claims 4-5.

[8] Further, in September 2025, Netlist filed a complaint against Samsung, Google, and Super Micro in the ITC alleging that the respondents infringe the '608 patent (among other patents). *See In the Matter of Dynamic Random Access Memory (DRAM) Devices, Products Containing the Same, and Components Thereof*, Inv. No. 337-TA-3854 (I.T.C. Sept. 30, 2025). The respondents will undoubtedly raise similar prior-art challenges there as well.

B. The present request for reexamination recycles substantially the same unpatentability arguments that were previously rejected.

In August 2025, an anonymous requestor filed the present request, once again challenging all claims of the '608 patent as obvious over Hiraishi and Ellsberry. Request, 69-127. The request adds two other references to the mix (Guo and Rajan), but Rajan was already considered during prosecution and, in any event, the request's obviousness arguments are substantially the same as Samsung's and Micron's failed challenges.[9] Specifically, the request relies on Hiraishi as a primary reference to disclose nearly every element of claim 1 and on Guo and Rajan for limitation 1[f]. *Id.*, 103-110, 120-123, 125-127. In addition, as discussed in more detail below, the disclosures from Guo and Rajan are cumulative to prior-art teachings that were previously considered by the Office in relation to limitation 1[f]. The request relies on Ellsberry for claims 4-5. *Id.*, 120-123, 127.

Notably, while the request summarizes prior proceedings in which the PTAB rejected various obviousness challenges to the '608 patent, *id.*, 16-18, it does not argue that the PTAB erred in those proceedings. Instead, the request simply asserts that, because the particular "combination of prior art references were not previously presented" in the other proceedings, "there is no basis to exercise discretion under 35 U.S.C. § 325(d)." *Id.*, 127-128. That is the extent of the request's § 325(d) analysis (which is inconsistent with the Federal Circuit's decision in *Vivint*).

[9] Additionally, the request cites several background references that were cited in Micron's and Samsung's IPR petitions. *Compare* EX1007 (JESD79-3), *with* IPR2023-00847, EX1020, *and* IPR2022-00237, EX1013; *compare* EX1010 (Jacob Article), *with* IPR2023-00847, EX1021; *compare* EX1013 (Takefman), *with* IPR2022-00237, EX1007.

III. Legal Principles

A. The Director has authority to deny reexamination requests.

Congress granted the Director with authority to decide whether to order reexamination. 35 U.S.C. § 303(a). By rule, the Director has delegated that authority to the examining corps, *see* 37 C.F.R. § 1.515(a), but he may suspend "any requirement of the regulations … which is not a requirement of the statutes" in "an extraordinary situation, when justice requires," 37 C.F.R. § 1.183. Rule 1.515's delegation to the examining corps is not a requirement of any statute, and, as explained below, justice requires that the Director suspend the Rule here and intervene to deny the reexam request under 35 U.S.C. § 325(d).

B. Section 325(d) guards against serial invalidity challenges to a patent.

"Section 325(d) applies to both IPR petitions and requests for *ex parte* reexamination." *Vivint*, 14 F.4th at 1354. The statute authorizes the Director to deny a request for reexamination if "the same or substantially the same prior art or arguments previously were presented to the Office." It reflects Congress's concern that the Patent Office was being "forced to accept many requests for *ex parte* … reexamination that raise challenges that are cumulative to or substantially overlap with issues previously considered by the Office," without any prospect of finality. 157 Cong. Rec. S1376 (Mar. 8, 2011) (statement of Sen. Kyl). So strong was that concern that Congress enacted § 325(d) to fill gaps left by other statutory estoppel provisions in the IPR context (e.g., 35 U.S.C. § 315(e)(1)). Unlike those other provisions, § 325(d) can apply even if a prior IPR was denied and the ultimate issue of patentability was not reached, and even if the reexamination request raises a substantial new question of patentability. *Id.*; *see Vivint*, 14 F.4th at 1354.

The reason for § 325(d)'s broad reach is simple: "allowing similar, serial challenges to the same patent … risks harassment of patent owners and frustration of Congress's intent in enacting the AIA." *Vivint*, 14 F.4th at 1353 (cleaned up). "That is the heart of a § 325(d) analysis." *Id.* Indeed, the Office has denied reexamination requests under § 325(d) which, like this one, recycle arguments that were previously rejected by the Office. *See, e.g.*, *In re Haller*, No. 90/014,770, Decision on Petitions, 12 (Feb. 10, 2022) (Office "exercis[ing] its discretion to reject" a request under § 325(d) where the claims had previously been upheld during reexam).

C. The PTAB's IPR discretionary denial framework is informative as to how the Office should apply § 325(d) in the reexam context.

The policy concerns undergirding § 325(d) apply with equal force to both reexams and IPRs. The Office has recognized that, to achieve stability in the patent system, we should encourage prompt patentability challenges and discourage serial challenges—and that logic holds regardless of whether the challenge is brought in an *ex parte* reexam or an AIA trial proceeding.[10] No matter the particular proceeding at issue, repeated "reconsideration of patent grants … is the antithesis of stability."[11] In light of these shared goals, factors that are typically considered when determining whether to discretionarily deny IPR are informative here.

1. In the IPR context, the PTAB has adopted the two-part *Advanced Bionics* test to determine whether § 325(d) is satisfied. That analysis considers:

> (1) whether the same or substantially the same art previously was presented to the Office or whether the same or substantially the same arguments previously were presented to the Office; and (2) if either condition of first part of the framework is satisfied, whether the petitioner has demonstrated that the Office erred in a manner material to the patentability of challenged claims.

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[10] Davis, R., *Stewart Says New Patent Policies Aim To Bring Stability*, https://www.law360.com/ip/articles/2364638 (NPL17).

[11] *Id.*

Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH, IPR2019-01469, Paper 6, 8 (P.T.A.B. Feb. 13, 2020) (precedential). The framework "reflects a commitment to defer to previous Office evaluations of the evidence of record unless material error is shown." *Id.*, 9; *cf.* Memorandum re: PTAB Consideration of Prior Findings of Fact and Conclusions of Law (Sept. 16, 2025).

Part one of the *Advanced Bionics* framework considers "whether the same or substantially the same art previously was presented to the Office or whether the same or substantially the same arguments previously were presented to the Office." IPR2019-01469, Paper 6, 8. If art was made of record by either the examiner or applicant during prosecution, that is enough to satisfy part one of the analysis, regardless of whether the art was applied in a rejection. *See, e.g.*, *Ivantis, Inc. v. Sight Scis., Inc.*, IPR2022-01529, Paper 16, 17 n.8 (P.T.A.B. Mar. 21, 2023) ("there is no requirement that [the] Examiner needs to rely on a reference in a rejection during prosecution in order for the reference to be 'considered' during prosecution"); *Boragen, Inc. v. Syngenta Participations AG*, IPR2020-00124, Paper 16, 21-22 (P.T.A.B. May 5, 2020) (denying petition under § 325(d) and explaining that "a rejection applying a reference that is later relied upon by a petitioner is not a prerequisite to a finding that such reference was already presented to the Office under § 325(d)").

Under part two of the *Advanced Bionics* framework, "if either condition of [the] first part of the framework is satisfied," the adjudicator determines "whether the petitioner has demonstrated that the Office erred in a manner material to the patentability of challenged claims." IPR2019-01469, Paper 6, 8; *see id.*, 10-11. Examples of material error include "misapprehending or overlooking specific" prior-art disclosures or "error[s] of law," but only if those missteps "impact[] patentability of the challenged claims." *Id.*, 8-9 n.9. Importantly, "[i]f

reasonable minds can disagree regarding the purported treatment of the art or arguments," then, by definition, the Office has not "erred in a manner material to patentability." *Id.*, 9.

2. Also informative are various factors that the PTAB and Director consider when determining whether to exercise their discretion under § 314(a) to deny IPR petitions. *See Vivint*, 14 F.4th at 1353 (recognizing overlap between § 314(a) and § 325(d) analysis); *Ascentcare Dental Prods., Inc. v. Solmetex, LLC*, IPR2025-01020, Paper 11, 3 (P.T.A.B. Oct. 10, 2025) (denying IPR petition under both §§ 314(a) and 325(d)). Those factors include:

- Whether the PTAB or another forum has already adjudicated the validity or patentability of the challenged patent claims;
- Settled expectations of the parties, such as the length of time the claims have been in force;
- Whether the challenger had the opportunity to use prior validity decisions as a roadmap to remedy prior, deficient challenges until a ground is found that results in an invalidity finding;
- The finite resources of the tribunal; and
- Any other considerations bearing on the Director's discretion.

Memo, Interim Processes for PTAB Workload Management at 2-3 (Mar. 26, 2025); *General Plastic Indus. Co. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19, 16-17 (P.T.A.B. Sept. 6, 2017).

Collectively, these factors account for "undue inequities and prejudices" to patent owners, as well as "the potential for abuse of the review process by repeated attacks on patents." *General Plastic*, IPR2016-01357, Paper 19, 17.

IV. Argument

The reexamination request here should be denied under the plain language of § 325(d): "the same or substantially the same prior art or arguments" presented in the request were previously before the PTAB in three failed IPRs. Indeed, as explained below: (A) the request is just as abusive as the one in *Vivint* and should be denied for the same reasons articulated by the Federal Circuit in that case; (B) *Advanced Bionics* likewise counsels in favor of denying the request under § 325(d); and (C) justice demands a reprieve from serial attacks on Netlist's '608 patent, especially in light of the strong settled expectations around the patent, as well as other factors that the PTAB and Director typically consider in the IPR context. In short, there are multiple reasons why the request should be denied, and any one of them is sufficient to grant Netlist's requested relief.

A. The request should be denied under § 325(d) and *Vivint*.

Vivint establishes that the reexam request here is the type of abusive request that § 325(d) aims to curtail. In *Vivint*, Alarm.com filed three IPRs challenging the claims of Vivint's patent. All were denied at institution; the third was denied specifically because Alarm.com had impermissibly "used prior Board decisions as a roadmap to correct past deficiencies" in its petitions. 14 F.4th at 1346. More than one year later, Alarm.com filed a request for reexamination that largely repackaged its failed IPR arguments but that, for two of the four SNQs, swapped out a reference used in the IPR with another reference not previously considered. *Id.* at 1347. The Office found that § 325(d) did not bar the reexamination and ultimately rejected all claims of the patent. *Id.* at 1348.

The Federal Circuit vacated that ruling, finding that the Office acted arbitrarily and capriciously by ordering reexamination after having previously denied three IPR petitions raising

substantially similar challenges. *Id.* at 1351. The PTAB itself had concluded that Alarm.com engaged in "undesirable, incremental petitioning" by using "prior Board decisions as a roadmap to correct past deficiencies." *Id.* at 1353. Yet, having made that finding, the Office turned around and allowed a nearly identical reexamination request. *Id.* The court held that this about-face was impermissible: the Office "cannot deny institution of IPR based on abusive filing practices then grant a nearly identical reexamination request that is even more abusive." *Id.* at 1354. And the court reached that result even though the reexam request included two SNQs with a new reference. *See id.* at 1350, 1353-54.

That reasoning squarely applies here. Just as in *Vivint*, three IPRs challenging the '608 patent have failed. Two were denied on the merits (one at institution (IPR2022-00237) and the second after a full trial (IPR2023-00847)), and another (Micron's second petition (IPR2024-00370)) was denied because the PTAB noted that both Samsung and Micron had used "prior decisions as a roadmap" to "capitalize" on each other's challenges. IPR2024-00370, Paper 8, 15-16 (NPL9). The PTAB thus concluded that Micron's IPR amounted to an improper "serial attack" of the '608 patent. *Id.* at 16. Also like in *Vivint*, the request here largely repackages those failed IPR attempts but tries to avoid their shortcomings by simply swapping out certain secondary references. Importantly, moreover, the request was filed *more than three years* after the first Micron non-institution decision and *eight months* after the Samsung final written decision, giving the requestor plenty of time to try to shore up the deficiencies in Micron's and Samsung's IPR petitions.[12]

[12] In the Micron IPR (IPR2022-00237), the Board denied the petition in July 2022. In the Samsung IPR (IPR2023-00847), the Board issued its final written decision upholding the validity of the '608 patent in December 2024.

If Samsung and Micron engaged in impermissible roadmapping based on the failed challenges that preceded them, that conclusion holds *a fortiori* for the anonymous requestor here, which relies on *both* Samsung's *and* Micron's failed challenges. Stated differently, the "same considerations" that justified denial of Micron's copycat IPR petition apply with greater force to the request here. *Vivint*, 14 F.4th at 1353. It is indeed a "more egregious abuse" than even the Micron IPR petition that was denied for improper roadmapping. *Id.*

The only distinction between *Vivint* and this case is that the requestor here has not revealed its identity, making it impossible to determine whether the requestor was involved with the prior failed IPRs (or is in privity with an entity that was). But a patent challenger cannot sidestep *Vivint*'s holding by staying anonymous. If anything, the requestor's anonymity weighs more heavily in favor of denial because it forecloses statutory or collateral estoppel from applying to this proceeding unless and until the requestor reveals its identity. Section 325(d) was enacted to apply to cases, like this one, that statutory and collateral estoppel cannot reach. *See infra* pp. 25-26.

At bottom, this case is materially indistinguishable from *Vivint*. Denial under § 325(d) is therefore warranted, just as it was in *Vivint*. The Director can end his analysis here.

B. The *Advanced Bionics* framework also counsels in favor of denying the reexam request.

Even if *Vivint* were not enough to end the matter (it is), the *Advanced Bionics* framework also counsels in favor of denying the reexam request. As explained below, the request simply rehashes arguments that the PTAB already rejected. And the request fails to explain how the PTAB allegedly committed material error—indeed, it does not even try. The validity challenge here is exactly the type of challenge that the PTAB commonly rejects in the IPR context. And it makes little sense to apply a different § 325(d) standard in the reexam context. *Vivint*, 14 F.4th at

1354 ("Section 325(d) applies to both IPR petitions and requests for *ex parte* reexamination.").

1. The request advances substantially the same art and arguments that were previously presented to (and rejected by) the PTAB.

The request fails the first part of the *Advanced Bionics* analysis because it repackages substantially the same obviousness arguments that the PTAB has repeatedly considered and rejected.

The request purports to raise four SNQs based on various combinations of four references:

1. Hiraishi and Guo (claims 1-5);
2. Hiraishi, Guo, and Ellsberry (claims 4-5);
3. Hiraishi, Guo, and Rajan (claims 1-5); and
4. Hiraishi, Guo, Rajan, and Ellsberry (claims 4-5).

Request, 69-127. Out of the four references, two (Hiraishi and Ellsberry) were already considered by the PTAB in prior IPR proceedings. *See* IPR2022-00237,[13] Paper 15 (NPL3); IPR2023-00847, Paper 42 (EX1008); IPR2024-00370, Paper 8 (NPL9).

In fact, the request makes substantially the same arguments as the ones that the PTAB already rejected. Just like in the IPRs, the request relies on Hiraishi as a primary reference to disclose nearly every element of claim 1. For example, the IPR petitions and reexam request all rely on Hiraishi's "memory module 100" for the claim's "module board" and on Hiraishi's "data registry buffers 300" for the claim's "buffer circuits." *Compare* IPR2022-00237, Paper 2 (Micron's first petition) (NPL2), 24-25, 32, *and* IPR2023-00847, Paper 1 (Samsung's petition) (NPL5), 17-19, 29-30, *with* Request, 73-74, 89-90. Also just like the Samsung IPR, the request

[13] IPR2022-00237 involved the Osanai reference, which is materially identical to, and shares the same group of inventors as, Hiraishi. *Supra* p. 6.

relies on Ellsberry to satisfy the limitations of claims 4-5. *Compare* IPR2023-00847, Paper 1 (Samsung's petition) (NPL5), 108-110, *with* Request, 120-123, 127.

The only limitation of any claim for which the request does not rely on Hiraishi or Ellsberry is limitation 1[f], which requires "a delay circuit configured to delay a signal through the data path by an amount determined by the command processing circuit in response to at least one of the module control signals." For that limitation, the request adds two additional references (Guo and Rajan). Request, 103-110, 125-126. But those references do not meaningfully distinguish the request from the failed IPR petitions. To start, Rajan was considered during prosecution and appears on the face of the '608 patent. So it does not qualify as a "new" reference. *See Keysight Techs., Inc. v. Centripetal Networks, Inc.*, IPR2022-01421, Paper 14, 5 (P.T.A.B. Aug. 24, 2023) (on Director review, confirming that "the first part of the *Advanced Bionics* framework does not require that an Examiner provide a discussion, analysis, or other findings on the applicability of the relevant material contained in an IDS" (cleaned up)); *Ivantis*, IPR2022-01529, Paper 16, 17 n.8; *Boragen*, IPR2020-00124, Paper 16, 21-22.

Further, the disclosure from Guo and Rajan on which the request relies to satisfy limitation 1[f] is materially identical to the disclosure on which the failed IPR petitions relied. Specifically, the IPR petitions and reexam request all rely on the secondary references' delay circuits having adjustable delay capabilities. *Compare* IPR2022-00237, Paper 2 (Micron's first petition) (NPL2), 45-46 ("Tokuhiro explains that such leveling techniques are necessary to compensate for different propagation delays. … To compensate for these different delays, 'the difference in the delay time caused in the write operations between the memory controller 90 and the plurality of SDRAMs 92 is adjusted by employing the write leveling function.'"), *and* IPR2023-00847, Paper 1 (Samsung's petition) (NPL5), 99 (arguing that Tokuhiro teaches

"adjustable delay elements" to "delay DQ and DQS signals on data path L0"), *with* Request, 104 (arguing that Guo's "adjustable delay circuit (59) can be used to … reduce the timing variations across different data signal lines"), 125 ("Thus, a POSITA looking to improve Hiraishi's data register buffer using Guo's data alignment circuitry would have been motivated to apply Rajan's teachings and thereby add Guo's data alignment circuitry on a per-bit or per-lane basis, *i.e.*, add Guo's adjustable delays to each bit line of the 8-bit data paths in Hiraishi's data register buffer."). In substance, the relied-upon disclosures are the same (or at least substantially similar).

Indeed, the requestor's own expert makes that very point. He equates Guo and Rajan with references previously before the PTAB and says that they are all "*consistent with*" one another. EX1003, ¶¶158 ("Like Oh, Takefman, and Rajan [], Guo also recognized the benefits of reducing skew within the plurality of data signals lines that pass through buffer devices on a memory module."), 212 ("Thus, a POSITA would have been motivated to apply Guo's teaching and suggestion (which is consistent with the teachings and suggestions from Oh, Takefman, and Rajan) to Hiraishi … ."), 113. By pointing to consistencies between the references—without explaining how Guo or Rajan add anything beyond what is already disclosed in the references previously considered—the requestor's expert effectively concedes that the references are cumulative.

In the end, "[d]espite the addition of these secondary references, the totality of the grounds in the present … request that rely on the new secondary references, present substantially the same art or arguments as the corresponding grounds" in the prior IPRs. *Haller*, No. 90/014,770, Decision on Petitions, 10 (rejecting serial reexam request filed by Samsung under similar circumstances). The request fails *Advanced Bionics* Part one.

2. The request fails to address—much less demonstrate—how the PTAB materially erred in the earlier proceedings.

The request likewise fails *Advanced Bionics* part two. Indeed, the request does not contain a single argument as to why the PTAB erred in finding that Hiraishi and Ellsberry do not teach or suggest features of the challenged claims. Instead, the request states in cursory fashion that "none of the proposed rejections presented herein are based on prior art or arguments that include the same or substantially the same prior art or arguments previously presented to the Office." Request, 127 (cleaned up). And, while the request summarizes the Samsung IPR proceeding, *id.*, 15-18, it does not explain why the PTAB materially erred by upholding the claims in that proceeding. Nor does the request identify anything material about the obviousness combinations it asserts here that would have changed the PTAB's prior patentability determinations there. On the contrary, as explained above, the request merely asserts that certain secondary references (Rajan and Guo) are "consistent with" previously considered prior art. In other words, the requestor effectively concedes that the PTAB considered all relevant teachings in the references at issue here (including relevant subject matter in Rajan and Guo, as taught in other references previously before the PTAB), but provides no explanation or evidence that the PTAB erred in its prior decisions. That is fatal to the request.

Although unclear, the request seems to suggest that the PTAB adopted a "new construction" of the term "data path" in the Samsung IPR that nobody could have anticipated. *Id.*, 23. But that argument fails on several levels. As an initial matter, the PTAB's construction of "data path" as limited to "data signal lines carrying data signals and not to strobe signal lines carrying strobe signals" is correct and derives from a plain reading of the '608 patent claims. IPR2023-00847, Paper 42 (EX1008), 24. The PTAB's construction can hardly be said to be "new" in any reasonable sense of the word.

In any event, the request makes no attempt to argue that the PTAB's construction is wrong (under either the *Phillips* standard or the BRI standard). While in some cases § 325(d) might not apply where the PTAB's decision upholding patent claims is based on an incorrect construction, *see Advanced Bionics*, IPR2019-01469, Paper 6, 8-9 n.9, the request here does not even allege that this is one of those cases. Quite the opposite: the request assumes that the PTAB's construction is correct and applies that construction in its analysis. *See* Request, 94-100. The PTAB's construction is thus no basis for the reexam. The Director should deny the request under § 325(d). *See Vital Connect Inc. v. Bardy Diagnostics, Inc.*, IPR2023-00381, Paper 7, 19-20 (P.T.A.B. July 11, 2023) (denying institution where petition was "silent on material error"); *Siemens Mobility, Inc. v. Metrom Rail, LLC*, IPR2024-00947, Paper 12, 17-19 (P.T.A.B. Nov. 19, 2024).

C. Justice requires the Director to intervene and deny the reexam request.

If all that were not enough, the Director can reach the same conclusion through the lens of 37 C.F.R. § 1.183 and the factors that the PTAB and Director typically consider when discretionarily denying IPR petitions. While this case involves a reexam request—not an IPR—those factors are highly relevant to the determination of whether justice is served by forcing Netlist to defend against yet another attack on the '608 patent.

Under Rule 1.183, the Director may intervene to decide a reexam request "[i]n an extraordinary situation, when justices requires." This is such a case, as illustrated by several facts: the request here (1) tramples upon prior validity rulings, (2) upsets settled expectations, (3) engages in improper roadmapping, (4) wastes the Office's finite resources, and (5) effectively exploits a gap where statutory and collateral estoppel cannot reach. If that is not an extraordinary case deserving of Director intervention, it is difficult to conceive of a case that would be.

Prior validity adjudications. As explained at length, the PTAB has already upheld the validity of the '608 patent claims in three proceedings. IPR2022-00237, Paper 15 (NPL3); IPR2023-00847, Paper 42 (EX1008); IPR2024-00370, Paper 8 (NPL9). A jury likewise upheld the claims after years of litigation. 2:22-cv-00293, Dkt. 855 (NPL13). The Patent Office and the courts have spoken: the '608 patent claims are not invalid. The requestor here should not be permitted to try again where others have failed. *See Webgroup Czech Rep., A.S. and NKL Assocs., S.R.O., v. Dish Tech. LLC*, IPR2025-00467, Paper 14, 2 (P.T.A.B. Jul. 16, 2025) (denying institution of IPR where, even though the patent was "issued relatively recently," certain claims had been challenged and upheld in three IPRs and an ITC investigation); *Intel Co. v. Advanced Cluster Sys., Inc.*, IPR2025-00794, Paper 13, 3 (P.T.A.B. Aug. 14, 2025) ("[R]epeated prior challenges weigh against institution.").

Settled expectations. The '608 patent issued in 2019 and thus "has been in force for approximately six years, creating settled expectations" for Netlist, its customers, and the public. *Intel*, IPR2025-00794, Paper 13, 2. Those settled expectations are particularly important here because Netlist materially relied on the PTAB's prior decisions upholding the '608 patent to make the strategic choice to take its infringement claims against Samsung to trial. In so doing, Netlist incurred significant costs throughout the litigation, including by defending against Samsung's invalidity challenges. (Indeed, Netlist is *still* incurring those costs as Samsung pursues an appeal that merely rehashes arguments the PTAB already rejected.) Those investments paid off, as Netlist was awarded $12 million for Samsung's willful infringement.

It would it be grossly unfair to Netlist to pull the rug out from under it now, after having invested so heavily in its infringement case. It would also be tremendously inefficient, as the Office would be required to redo (or, more precisely, *un*do) what the PTAB and the courts have

already done, effectively negating the parties' and the tribunals' substantial investments to date. *See Celltrion, Inc. v. Regeneron Pharms., Inc.*, IPR2025-00456, Paper 14, 2 (P.T.A.B. June 25, 2025) (denying IPR petition where district court had "already adjudicated the validity of the challenged patent claims," and there was "substantial investment by the parties and the court" in a parallel proceeding).

Further, the '608 patent claims priority to a long line of continuation patents. *See* EX1002, 83-91; *see also* '035 Patent File History, June 2, 2017 Non-Final Office Action (NPL7), at 3-9. The patent family has been in force for ten years, with the first non-provisional application having issued in September 2015. *See* U.S. Patent No. 9,128,632 (US1). Since that time, Netlist has developed strong settled expectations in its ownership of the underlying subject matter. The industry has adopted Netlist's patented distributed buffer architecture for DDR4 generation LRDIMMs, the predominant high-end server memory module for the past several years. And over the past decade, Netlist has manufactured and sold millions of dollars' worth of memory modules embodying the patents to customers from a wide swath of industries. Subjecting the '608 patent to another invalidity challenge would threaten to disrupt Netlist's and its customers' reliance interests.

Improper roadmapping. As also explained at length, the request engages in improper roadmapping. *See supra* pp. 15-16. The anonymous requestor clearly knew about the prior failed IPR proceedings as evidenced by the fact that it referenced them in the request. Request, 16-18. And yet the request does not explain why the PTAB allegedly erred in those cases. Instead, it attempts to use those cases "as a roadmap" until "a ground is found that results" in the challenged claims being held unpatentable. *General Plastic*, IPR2016-01357, Paper 19, 17-18. That strategy is "unfair to patent owners." *Id.* And it serves as an additional basis to deny the

reexam request. *See Alliance Laundry Sys., LLC v. Payrange LLC*, IPR2025-00950, Paper 11, 2 (P.T.A.B. Sept. 19, 2025) (denying institution where petitioner "addresse[d] and cure[d] any purported deficiencies with" a primary reference that had been asserted in two failed IPR petitions "by relying on additional references").

The Office's finite resources. The reexamination unit has limited resources. And those resources are better spent assessing challenges to patents of questionable strength, not repeating work that the Office has already done (three times over) by entertaining requests like this one. Indeed, "it would not be an efficient use of Office resources to revisit substantially similar arguments that have already been adjudicated." *Azurity Pharms., Inc. v. Exelixis, Inc.*, IPR2025-00427, Paper 13, 2 (P.T.A.B. July 2, 2025).

The inefficiency here is especially stark given that substantially similar challenges are now being simultaneously adjudicated in multiple fora. The Samsung IPR is currently on appeal to the Federal Circuit, and briefing is now closed. No. 25-1378 (Fed. Cir.). Thus, the court is poised to decide whether the PTAB's ruling in that case should be affirmed (and will likely make that decision long before this reexamination would be completed). If the court affirms, the Federal Circuit will become the fifth tribunal to uphold the '608 patent claims. If, by contrast, the court concludes that the PTAB erred, the court would remand for the PTAB to redo its analysis.[14] Either way, the patentability of the '608 patent will be addressed in the appeal. And similar invalidity challenges are very likely to be adjudicated in the pending district-court case against Micron as well as in the pending ITC proceeding. *See* No. 1:22-cv-00136; Inv. No. 337-

[14] Samsung's appeal briefing does not ask for reversal. *See* No. 25-1378, Dkt. 11, 76 (Fed. Cir.).

TA-3854; *supra* p. 8 n. 8. It makes little sense for the reexamination unit to be added to the mix. *See UlPath, Inc. v. Rule 14, LLC*, IPR2025-00623, Paper 8, 2 (P.T.A.B. July 29, 2025).

Other considerations. As also explained, under the circumstances of this case, the anonymity of the requestor weighs in favor of rejecting the request. A comparison between reexamination proceedings and IPRs demonstrates why this is so.

In the IPR context, patent challengers and real-parties-in interest must be identified. 35 U.S.C. § 312(a)(2); 37 C.F.R. § 42.8(b)(1). This is important because it ensures that petitioners who receive adverse final written decisions are statutorily and collaterally estopped from bringing the same or similar challenges down the road. *See, e.g.*, 35 U.S.C. § 325(e) (IPR estoppel applies only to petitioner and real parties in interest or privies); *Google LLC v. Hammond Dev. Int'l, Inc.*, 54 F.4th 1377, 1381 (Fed. Cir. 2022) (collateral estoppel requires estopped party to have a full and fair opportunity to litigate the issue).

In the reexamination context, by contrast, a requestor can remain anonymous. Normally, that does not present a problem. But here, the requestor's anonymity makes it impossible to determine whether the requestor participated in prior failed IPRs (or is in privity to an entity that did) and thus whether some form of estoppel applies. To be sure, the request certifies in conclusory fashion that statutory estoppel does "not prohibit Requestor from filing this request." Request, 3. But because Netlist has no ability to unmask the requestor, it cannot verify the requestor's certification. *Contra In re Frankland*, No. 90/019,069, Decision on Petitions, 6-10 (May 26, 2023) (finding that an identified reexam requestor was statutorily estopped based on prior failed IPR decision and thus that the requestor's no-estoppel certification was "improper"). The inability of Netlist to probe this issue effectively creates a gap where neither statutory nor

collateral estoppel can reach. Section 325(d) was enacted in part to fill such gaps. *See* 57 Cong. Rec. S1376.

Of course, that is not to say that a requestor's anonymity is always (or even usually) reason to deny a reexamination request. But on the unique facts here, where the request is preceded by repeated failed validity challenges based on substantially the same art, the anonymous nature of the request should be taken into account as one factor that supports denial.

* * *

The factors above demonstrate just how extraordinary this case is. Indeed, if the request had been filed as an IPR petition, it very likely would have been denied. There is no reason to reach a different result here, particularly because *Vivint* and the *Advanced Bionics* framework also support rejecting the request. Regardless of which framework the Director applies, the result is the same: the reexamination request, which is simply a repackaged version of arguments that multiple fora have already considered and rejected multiple times over, should be denied.

V. Conclusion

For the foregoing reasons, Netlist respectfully requests that the Director intervene and deny the request.

Respectfully submitted,

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