UNITED STATES PATENT AND TRADEMARK OFFI	CE
BEFORE THE PATENT TRIAL AND APPEAL BOAR	D
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THE BOEING COMPANY	

v.

Petitioner,

SEYMOUR LEVINE Patent Owner

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Case IPR2016-00023

Patent RE039,618

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# PATENT OWNER PRELIMINARY RESPONSE TO PETITION PURSUANT TO 37 C.F.R. § 42.107



### Case IPR 2016-00023 Patent Owner Preliminary Response

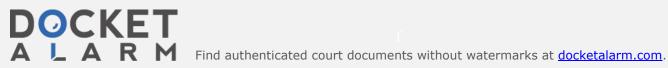
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Patent Owner Seymour Levine ("Levine") hereby submits this preliminary response to the Petition filed by Petitioner The Boeing Company ("Boeing"), which was accorded a filing date of October 7, 2015 (Paper 5), seeking *inter partes* review of claims 4, 5, 8, 9, 10, 14 and 16 of U.S. Reissued Patent No. RE39,618 ("the '618 patent").

### I. INTRODUCTION

By its own admission, this petition "is identical to the petition in pending IPR2015-01341, except" that Boeing has supplemented its expert's declaration specifically "to address purported deficiencies raised in the PO Preliminary Response in IPR2015-01341." Pet. at 1.

On December 21, 2015, the Board instituted review on all challenged claims in IPR2015-01341 (the "1341 case"), IPR2015-01341, Paper 10, rendering this petition completely redundant. For the reasons discussed below, the Board should exercise its discretion under 35 U.S.C. § 325(d) and deny this petition.

The Patent Owner does not repeat here its arguments on the merits as those have already been considered by the Board in the '1341 case. Patent Owner, nevertheless, expressly reserves its right to address this IPR on the merits should it be instituted in any respect.



### II. THE BOARD SHOULD DENY THIS PETITION UNDER § 325(d)

The Director, and, by extension, the Board, has broad discretion to deny a petition for *inter partes* review that raises substantially the same prior art or arguments previously presented to the Office:

In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.

# A. Boeing's Second Petition Presents the Same Art and the Same Argument as Its Original Petition

The Board has invoked this authority numerous times to deny petitions that merely recycle previously presented prior art references and couple them with modified arguments that attempt to address the failings of the petitioner's first effort. It has done so both when its prior decision denied review and, as here, where the prior decision instituted review. *See, for example, Butamax Advanced Biofuels LLC v. Gevo, Inc.*, Case IPR2013-00581, slip op. at 9-10, (PTAB Oct 14, 2014) (Paper 8) (denying review under § 325(d) where petition sought to add evidence to correct mistake in prior petition where review had been instituted against the same claim); *Intelligent Bio-Systems, Inc. v. Illumina Cambridge Ltd.*, Case IPR2013-00324, slip op. at 6-7 (PTAB Nov. 21, 2013) (Paper 19)



35 U.S.C. § 325(d).

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