

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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NECKSGEN, INC.

Petitioner

v.

SIMPSON PERFORMANCE PRODUCTS, INC.

Patent Owner

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Case IPR2018-00133

Patent No. 9,351,529 B1

Issued: May 31, 2016

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**PETITIONER NECKSGEN, INC.'S REQUEST FOR RECONSIDERATION  
UNDER 37 C.F.R. §42.71 OF THE DECISION DENYING INSTITUTION  
OF *INTER PARTES* REVIEW**

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Petitioner NecksGen, Inc. requests rehearing and reconsideration of The Patent Trial and Appeal Board's ("Board") decision Denying Institution of *Inter Partes* Review dated May 4, 2018, Paper No. 9, pursuant to 37 C.F.R. §42.71. This filing is proper without prior authorization from the Board pursuant to 37 C.F.R. §42.71(d).

### 1. Statement of Relief Requested

U.S. Patent No. 9,351,529 ("the '529 Patent") is directed to a head and neck support apparatus that uses tethers to connect a driver's helmet to an anchor. The Board's institution decision focused on representative claim 1 with elements [a] through [d], of which only element 1[d] is at issue. Paper 9, p. 10. Element 1[d] provides for the joint attachment of two tethers on either side of a helmet. More specifically element 1[d] states: "wherein the at least one rear tether and one of the pair of side tethers are *jointly attached to the helmet at a single attachment point on each respective side of the helmet.*" (emphasis added). The Board concluded that prior art patent *Ashline* '360, even though it disclosed the joint attachment of two tethers to a helmet, Paper, p. 10-11, it did not disclose the joint attachment of *exactly* the same tethers to a helmet as claimed in the '529 Patent, Paper, p. 11, and thus did not render the representative claim obvious.

The Board reached this conclusion without construing the disputed claim term "tether", which is essential to a proper perspective of the claim element 1[d],

the scope of the prior patent *Ashline* ‘360, and assessing the motivation to combine. The broadest reasonable interpretation, (“BRI”) of the term “tether” means “any tether” – which includes *front*, *rear*, and *side* tethers. This construction is fully supported by the specification and the claim language which makes no functional distinctions between the various tethers. The designation of *front*, *rear*, and *side* tethers in the claims is merely a naming convention and does not represent a substantive difference between the various tethers. When the BRI of “tether” meaning “any tether” construction is applied consistently to element 1[d] and prior art patent *Ashline* ‘360, the joint attachment of two tethers on either side of a helmet structure of element 1[d] is fully disclosed by *Ashline* ‘360 and the motivation to combine is established. Thereby creating a reasonable likelihood that Claim 1 is unpatentable.

Petitioner requests that the Board rehear its Petition for *inter partes* review of the ‘529 Patent and institute an IPR trial for all Challenged Claims.

## **2. Standard of Review – Abuse of Discretion**

The Board reviews institution decisions under an abuse of discretion standard. 37 C.F.R. §42.71(c). An abuse of discretion occurs if the decision (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact findings; or (4) involves a record that contains no evidence on which the Board could rationally base its decision.

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