

2019-1208

---

---

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

---

THUNDER POWER NEW ENERGY VEHICLE  
DEVELOPMENT COMPANY LIMITED,

*Plaintiff-Appellant,*

– v. –

BYTON NORTH AMERICA CORPORATION, NANJING BYTON NEW  
ENERGY VEHICLE TECHNOLOGY DEVELOPMENT CO., LTD.,

*Defendants-Appellees,*

---

---

*On Appeal from the United States District Court for the  
Northern District of California in No. 3:18-cv-03115-JST  
Honorable Jon S. Tigar, United States District Judge*

---

---

**PLAINTIFF-APPELLANT'S COMBINED PETITION FOR  
PANEL REHEARING AND REHEARING EN BANC**

KRISTOPHER L. REED  
DAVID E. SIPIORA  
KILPATRICK TOWNSEND  
& STOCKTON LLP  
1400 Wewatta Street, Suite 600  
Denver, Colorado 80202  
(303) 571-4000  
kreed@kilpatricktownsend.com  
dsipiora@kilpatricktownsend.com

DARIO A. MACHLEIDT  
KILPATRICK TOWNSEND  
& STOCKTON LLP  
1420 Fifth Avenue, Suite 3700  
Seattle, Washington 98101  
(206) 467-9600  
dmachleidt@kilpatricktownsend.com

*Attorneys for Appellant*

*Thunder Power New Energy Vehicle Development Company Limited*

October 29, 2019

## CERTIFICATE OF INTEREST

Counsel for Appellant Thunder Power New Energy Vehicle Development Company Limited certifies the following:

1. The full names of every party represented by me are:

Thunder Power New Energy Vehicle Development Company Limited.

2. The names of the real parties in interest (if the parties named in the caption are not the real party in interest) represented by me are:

None.

3. The parent corporations and publicly held companies that own 10% or more of stock in Appellant Thunder Power New Energy Vehicle Development Company Limited:

Expert Time Limited (BVI)

Electric Power Technology Limited (Taiwan, 4529-TW)

Thunder Power Holdings Limited (BVI)

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

Darius C. Samerotte

Matthew C. Holohan

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 are:

None.

## TABLE OF CONTENTS

CERTIFICATE OF INTEREST .....	i
STATEMENT OF COUNSEL .....	1
REASONS FOR GRANTING THE PETITION.....	3
I. Rehearing Is Warranted Because Application of Rule 36 to District Court Determinations on Complex Legal Issues Is Not Appropriate .....	3
II. Rehearing Is Warranted Because Application of Rule 36 Violates Due Process .....	5
III. Rehearing Is Warranted To Correct the Panel’s Erroneous Affirmance of a Dismissal Under Fed. R. Civ. P. 12(b)(6) Despite Plausible and Specific Factual Allegations that Aspects of the Claims are Inventive .....	7
IV. Rehearing Is Warranted Because the Panel’s Summary Affirmance Necessarily Contradicts the Plain Language of Section 101.....	12
CONCLUSION.....	16

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Aatrix Software, Inc. v. Green Shades Software, Inc.</i> , 882 F.3d 1121 (Fed. Cir. 2018) .....	1, 7, 9, 12
<i>Amdocs (Israel) Ltd. v. Openet Telecom, Inc.</i> , 841 F.3d 1288 (Fed. Cir. 2016) .....	10, 11
<i>Bascom Glob. Internet Servs., Inc. v. AT&amp;T Mobility LLC</i> , 827 F.3d 1341 (Fed. Cir. 2016) .....	9
<i>C.f. Content Extraction and Transmission LLC v. Wells Fargo Bank, N.A.</i> , 776 F.3d 1343 (Fed. Cir. 2014) .....	15
<i>Cellspin Soft, Inc. v. Fitbit, Inc.</i> , 927 F.3d 1306 (Fed. Cir. 2019) .....	1, 7, 9, 12
<i>Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.</i> , 880 F.3d 1356 (Fed. Cir. 2018) .....	16
<i>Elec. Power Grp., LLC v. Alstom S.A.</i> , 830 F.3d 1350 (Fed. Cir. 2016) .....	4
<i>Finjan, Inc. v. Blue Coat Systems, Inc.</i> , 879 F.3d 1299 (Fed. Cir. 2018) .....	15
<i>Inventor Holdings, LLC v. Bed Bath &amp; Beyond, Inc.</i> , 876 F. 3d 1372 (Fed. Cir. 2017) .....	15
<i>Memorylink Corp. v. Motorola, Inc.</i> , 676 F.3d 1051 (Fed. Cir. 2012) .....	5
<i>Taylor v. McKeithen</i> , 407 U.S. 191, 92 S.Ct. 1980, 32 L.Ed.2d 648 (1972).....	5, 6
<i>Thales Visionix Inc. v. United States</i> , 850 F.3d 1343 (Fed. Cir. 2017) .....	1, 4, 15

*U.S. Surgical Corp. v. Ethicon, Inc.*,  
103 F.3d 1554 (Fed.Cir.1997) .....5

**Statutes**

28 U.S.C. § 1254.....6

35 U.S.C. § 101 .....*passim*

**Rules**

Fed. Cir. R. 25(c) .....18

Fed. Cir. R. 35(c)(2).....19

Fed. Cir. R. 36.....*passim*

Fed. R. App. P. 25.....18

Fed. R. App. P 32(g)(1) .....19

Fed. R. Civ. P. 12(b)(6).....*passim*

**TABLE OF ABBREVIATIONS**

373 Patent	U.S. Patent No. 9,547,373
329 Patent	U.S. Patent No. 9,563,329
724 Patent	U.S. Patent No. 9,561,724
Patents-in-Suit	Collectively, the 329 Patent, 373 Patent, and 724 Patent
Thunder Power	Thunder Power New Energy Vehicle Development Company Limited
Byton	Collectively Byton North America Corporation and Nanjing Byton New Energy Vehicle Technology Development Co., Ltd.

## STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to at least the following decisions: *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121 (Fed. Cir. 2018); *Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306, 1319 (Fed. Cir. 2019); *Thales Visionix Inc. v. United States*, 850 F.3d 1343 (Fed. Cir. 2017).

Based on my professional judgment, I believe this appeal requires an answer to the following precedent-setting questions of exceptional importance:

1. Whether the Court's application of Federal Circuit Rule 36 exceeds the scope of permissible use of a summary affirmance such that it violates constitutional guarantees of due process.
2. Whether plausible and specific factual allegations that aspects of the claims are inventive are sufficient to defeat a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).
3. Whether the combination of physical components to accomplish a technological improvement to a machine is dispositive as to patent eligibility under 35 U.S.C. § 101.

/s/ Kristopher L. Reed  
Kristopher L. Reed

Appellant Thunder Power respectfully seeks rehearing and suggests rehearing *en banc* of the panel decision in this matter. The panel's summary affirmance of the district court opinion under Fed. Cir. R. 36 misapprehends that rule because it both denies a valuable precedent to patent holders regarding the boundaries of patent eligible subject matter under 35 U.S.C. § 101 when Fed. Cir. R. 36 is, by its own terms, restricted to opinion that "would have no precedential value," and also violates due process under the Fifth Amendment because the panel's lack of explanation for its ruling effectively prevents meaningful review of the panel's ruling on the merits by either this Court *en banc* or the Supreme Court. Further, rehearing is warranted to resolve confusion in this Court's case law regarding patent eligibility under 35 U.S.C. § 101 by correcting the panel's erroneous affirmance of a dismissal under Fed. R. Civ. P. 12(b)(6) despite Thunder Power's plausible, specific, and corroborated factual allegations in the Complaint that aspects of the claims are inventive. Rehearing is also warranted because the Court's summary affirmance necessarily contradicts the plain language of Section 101 by finding an improvement to a machine patent ineligible.



## REASONS FOR GRANTING THE PETITION

### **I. Rehearing Is Warranted Because Application of Rule 36 to District Court Determinations on Complex Legal Issues Is Not Appropriate**

This case involved the highly complex and evolving issue of patent-eligibility under 35 U.S.C. §101. At the district court, Thunder Power's Complaint made factual allegations regarding the inventive nature of the patents-in-suit—even including a corroborating expert declaration to establish that, at least at the pleading stage, these patents are patent eligible. Byton nevertheless moved to invalidate the patents-in-suit at the Rule 12 stage, asking the district court to ignore the standards of Fed. R. Civ. P. 12(b)(6) and Thunder Power's well-pleaded allegations. The district court granted Byton's motion.

The district court found the Patents-in-Suit invalid, for claiming patent-ineligible subject matter, based on illogical comparisons to a hypothetical football team and analogies to prior cases that were not on point. Further, the district court paid little attention to distinctions between the patents and the claims and was not clear in setting forth the precise factual and legal basis justifying its ruling under this Court's complicated 35 U.S.C. § 101 jurisprudence.

Thunder Power's appeal presented questions of whether the district court erred in granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6) in light of the well-pleaded and corroborated allegations in the complaint that the claims of the Patents-in-Suit contain inventive concepts, whether the district court erred in

determining that each of the claims of the Patents-in-Suit is directed to an abstract idea, and whether the district court erred in determining that the claims of the Patents-in-Suit do not represent patent-eligible inventive concepts.

Each issue was legitimately contested by the parties. For example, Thunder Power's appeal pointed out the strong similarities between the vehicle system claims at issue here and those found patent-eligible in *Thales* and other cases, whereas Byton sought to compare the claims to, for instance, the methods found ineligible in *Elec. Power Grp., LLC v. Alstom S.A.*, 830 F.3d 1350, 1353-54 (Fed. Cir. 2016).

Federal Circuit Rule 36 provides that an affirmance without opinion is only permitted when any of five delineated conditions exist and "an opinion would have no precedential value." That is certainly not the case here where district courts are in dire need of additional guidance on the metes and bounds of 35 U.S.C. § 101. Resolving the issues presented here regarding whether well-pleaded and corroborated allegations that the claims of a duly issued patent are inventive are sufficient to defeat a motion to dismiss under Fed. R. Civ. P. 12(b)(6), or whether an improvement to a motor vehicle technology can confer patent-eligibility without an improvement to computer technology, would have precedential value for the many patent holders facing uncertainty as to whether their patents, issued by experts at the Patent Office, will be summarily invalidated

by district courts despite the standards of Rule 12, the presumption of validity, and expert testimony in the record. Further, a decision from this Court would have particular precedential value to the parties because, for example, Thunder Power has pending patent applications utilizing the same specifications for which claims were invalidated by the district court, but the Court has provided no guidance as to the parameters under which new sets of claims would be eligible or ineligible.

## **II. Rehearing Is Warranted Because Application of Rule 36 Violates Due Process**

Members of this Court have acknowledged that summary affirmance under Rule 36 impedes meaningful review of the decision. *See Memorylink Corp. v. Motorola, Inc.*, 676 F.3d 1051, 1051-53 (Fed. Cir. 2012) (O'Malley, J. dissenting from denial of a petition for rehearing *en banc*) (explaining that “parties should not be discouraged from asking the entire court to assess the propriety of those judgments.”)

This Court has stated that Rule 36 “permits the court to dispense with issuing an opinion that would have no precedential value, when the circumstances of the Rule exist.” *U.S. Surgical Corp. v. Ethicon, Inc.*, 103 F.3d 1554, 1556 (Fed.Cir.1997) (citing *Taylor v. McKeithen*, 407 U.S. 191, 194 n. 4, 92 S.Ct. 1980, 32 L.Ed.2d 648 (1972) (“We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or how to write opinions.

That is especially true with respect to summary affirmances.”)) But this Court’s reliance on the dicta from a footnote in *Taylor* does not comport with the holding in *Taylor* which vacated the Court of Appeals decision and remanded because the Supreme Court lacked “the benefit of the insight of the Court of Appeals.” *Taylor*, 407 U.S. at 194.

Litigants before this Court have a right to seek review of this Court’s determinations via petition for rehearing or rehearing *en banc*, or via petition the United States Supreme Court for a writ of certiorari to review a determination of this Court under 28 U.S.C. § 1254. Further, such litigants have a Constitutional right to due process pursuant to the Fifth Amendment to the Constitution in connection with such petitions for review.

Here, where a decision from the Court would have precedential value, use of a Rule 36 affirmance incorrectly insulates the Court’s judgment from meaningful review by withholding the basis for the Court’s determination. Because of the summary affirmance, Thunder Power has no way to know the basis for this Court’s determination or assess in what manner the Court applied its precedents. This interference with Thunder Power’s ability to exercise its rights to review granted by the Federal Rules of Appellate Procedure and 28 U.S.C. § 1254 impinges Thunder Power’s right to due process. This interference with Thunder Power’s due process rights requires either a different result in the present case or

a re-evaluation of the Court’s use of Rule 36 in cases like the present one.

**III. Rehearing Is Warranted To Correct the Panel’s Erroneous Affirmance of a Dismissal Under Fed. R. Civ. P. 12(b)(6) Despite Plausible and Specific Factual Allegations that Aspects of the Claims are Inventive**

*Aatrix* held and *Cellspin* affirmed “that patentees who adequately allege their claims contain inventive concepts survive a § 101 eligibility analysis under Rule 12(b)(6).” *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1125-27 (Fed. Cir. 2018); *Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306, 1319 (Fed. Cir. 2019) (“To the extent the district court departed from this principle by concluding that issued patents are presumed *valid* but not presumed *patent eligible*, it was wrong to do so.”)

Starting with the 373 patent, claim 1 discloses the inventive concept of using specially-positioned cameras and a custom processor to “control[] execution devices through gestures” (Appx176(¶ 26)). The amended complaint alleges that this inventive concept improves on the prior art in at least three ways by (1) “help[ing] reduce driver distraction” (Appx175(¶ 21)); (2) permitting access to operating signals “normally disabled during operation of a vehicle” (Appx175(¶ 22)); and (3) providing capabilities beyond prior art “passive consumption displays” (Appx176(¶ 26)).

This concept clearly is captured in claim 1. Claim 1 describes the camera devices used for gesture capture, the storage and processing devices that control

the cameras and associated gesture capture, and the conversion of the gestures to operation signals for controlling the vehicle itself. *See* Appx43(9:60-10:13).

The alleged inventive concept and the associated technological improvements are confirmed in the specification. For example, the 373 patent's specification describes the claimed system where the execution devices are repositioned and controlled by gestures and the constituent hardware.

Appx39(1:37-61). And the specification discloses that the technological improvements associated with this inventive concept include improvements in safety and reliability due to “reduced driver distraction” (Appx39, 1:34-37; 2:15-20); and, as another example, describing how the invention permits access to operating signals such as Bluetooth that are normally disabled during vehicle operation (Appx43, 9:5-11).

Also with respect to claim 1 of the 373 patent, the amended complaint alleges that the detection and “treatment of conflicting driver and passenger commands” also is a “key feature of the invention” (Appx176 (¶ 25)), in contrast to prior art systems that rely on, for example, a “physical constraint” to give the driver “override” power (Appx175 (¶ 23)). This inventive concept also is captured in claim 1, as seen at Appx43, column 10, lines 8-21, and further disclosed in the specification at column 9, lines 29-32.

With respect to the other two patents, the related 724 and 329 patents, the

amended complaint identifies the inventive concept of an in-dashboard display screen with multiple separate and independent information panels configured to exchange and duplicate information between driver and passenger. The amended complaint alleges this “represents an important technological and safety advancement over the prior art” by, for example, “allow[ing] the driver to change the arrangement of information panels” rather than “requir[ing] a driver to take their eyes off the road and enter destination information.” Appx177-178, (¶¶33-34).

Yet instead of accepting these allegations as true and denying the motion on that basis alone under *Aatrix*, the district court went on to make a series of factual findings in its order regarding what it subjectively believed is or is not sufficiently inventive. This was error under *Bascom* and *Aatrix* and now *Cellspin*, and on this basis alone the panel should have reversed the district court. *See Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1349 (Fed. Cir. 2016); *see Aatrix* 882 F.3d at 1125-27; *see Cellspin* 927 F.3d 1306, 1319.

First, the district court made the factual finding with respect the 373 patent that claim 1 “could be performed by a human, ex[er]cising generic computer-implemented steps.” Appx7. No evidence exists in the record to support this finding, and the amended complaint alleges the exact opposite. For instance, the

complaint alleges that “the concrete nature of the patented invention is also seen in the fact that it repositions and controls execution devices through gestures,” describes how it differs from passive consumption displays, and then confirms that “[t]his is activity that cannot occur in a user’s head and implemented using [a] generic computer.” Appx176(¶ 26-27). These are all factual allegations that should have been accepted as true but were not.

As another example of impermissible fact finding, also with respect to the 373 patent, the district court reviewed the ordered combination of elements in claim 1 and summarily determined it is “unconvinced that this amounts to an inventive concept.” Appx11. Implicit in that determination is the factual finding that the ordered combination of elements do not “operate in an unconventional manner to achieve an improvement.” *See Amdocs (Israel) Ltd. v. Openet Telecom, Inc.*, 841 F.3d 1288, 1300-01 (Fed. Cir. 2016). But again, the complaint alleges the opposite where it alleges in factual detail how the specification teaches this is an unconventional improvement over prior art systems. *See Appx174-176 (¶¶ 20-22).*

Third, with respect claim 1 of the 373 patent, the district court made the express factual finding that “the fact that the system outlined in the 373 patent can prioritize between conflicting inputs in selecting an output is not enough to render it inventive.” Appx11. Again, the complaint alleges the opposite. *See*



Appx175-176 (¶¶ 23-25). It alleges facts demonstrating how this claim feature was unconventional in comparison to prior art vehicles where physical constraints were used to avoid conflicting user operation. *Id.*

With respect to the other two patents, in the district court's order (at Appx13-16), there are three additional similar factual findings by the district court that contradict specific factual allegations in the amended complaint found at Appx177-178 (¶¶ 30-37).

In the last paragraph at Appx13, the district court acknowledged certain of Thunder Power's arguments regarding "operational and safety improvements" but concludes that it "find these assertions unconvincing." Yet those assertions trace directly back to factual allegations in the complaint. *See* Appx177-178 ¶¶ 31-34.

With respect to the 724 patent specifically, the district court made implicit factual findings regarding the supposed conventionality of the claimed interchangeable dashboard display panels with the switch-back feature in holding the combination is "insufficient to render the abstract idea set forth in Claim 1 into an inventive concept." *See* Appx14. The district court also made implicit factual findings regarding whether how well-known, routine, and conventional the claimed combination of claim 1 of the 329 patent must be, summarily concluding it is "less inventive" than the 724 patent and thus also ineligible. Appx16. Both of these determinations ignore and contradict factual allegations in

the amended complaint that establish that the claimed combinations provide “novel safety benefits,” and thus “were not well-known, routine, and conventional.” *See* Appx178(¶ 34-36).

Furthermore, the amended complaint incorporates by reference an expert declaration verifying each of the factual allegations in the amended complaint. Appx242-251.

Given the above, the panel’s decision cannot be squared with *Aatrix* and *Cellspin*, and should be revisited.

#### **IV. Rehearing Is Warranted Because the Panel’s Summary Affirmance Necessarily Contradicts the Plain Language of Section 101**

35 U.S.C. § 101 specifically provides that “[w]hoever invents or discovers any new and useful...machine...or any new and useful improvement thereof, may obtain a patent therefor.” Here, even though the panel’s decision is under Rule 36, it necessarily contradicts the plain language of Section 101.

Each of the claims in this case is directed to a specific technological improvement that enables a vehicle to do things it could not do before. Critically, none of the claims represents a situation where a vehicle is merely being used as a generic tool for implementing a conventional practice.

Claim 1 of the 373 Patent is directed to a system that improves vehicle safety and convenience by using specially positioned cameras to capture touchless gestures from both driver and passenger, arbitrate as needed, and

translate those into vehicle operations. In other words, this is a physical system comprised of tangible parts working together to capture physical actions by vehicle passengers and control a physical vehicle. There is nothing “abstract” about what this claim is directed to. Yet the district court reduced this claim to a point of non-recognition. The district court held that “[u]ltimately, the patent amounts to little more than a system for ‘collecting information, analyzing it, and displaying certain results of the collection and analysis.’” Appx7. This characterization has lost all connection to the gesture capture, the prioritization, and the translation to vehicle operational control at the heart of claim 1 of the 373 patent, not to mention the physical system comprised of in-vehicle cameras, customized processor, and execution devices that makes it all happen.

Later the Court provides a somewhat different formulation, characterizing the claim as “the ability to receive signals from multiple users, assess whether they are consistent, and, where they are inconsistent, implement the signal of the preferred user.” Appx9. This is more specific than the first characterization, but it still misses the heart of what these claims are directed to. This claim is not concerned with simply receiving any type of signal from any two users in any context and choosing between them. This is a physical system for operating a vehicle that uses specially arranged cameras and a custom processor to facilitate the identification of and differentiation between, not just any signals, but gestures

from multiple vehicle passengers, and then translates those to operational control of the vehicle functions. That is what provides the safety improvement; that is what this claim is directed to, and that is not abstract.

With respect to the 724 and 329 Patents, claim 1 of each is directed to Thunder Power’s signature dashboard display screen that has multiple, separate and independent embedded information panels and the capability to exchange or duplicate the content between given panels based on user instructions. The specification states that this represents an improvement in vehicle technology “compared with the traditional fixed display of information panels,” as the claimed panels “may advantageously let the user(s) of the transportation apparatus share information with another user or other users.” Appx56(1:58-2:2).

In finding the 724 and 329 Patent claims ineligible, as with the 373 Patent, the district court missed the crux of what these claims are directed to. The district court instead held that the claims are directed to “two abstract functions,” namely “(i) enabling the acquisition of content to be displayed; and (ii) enabling the control over when to display the acquired content, for how long, and then displaying it.” Appx14; *see also* Appx16. What this characterization misunderstands is the difference between “the acquisition and display of information”—display as a verb—as opposed to the claimed physical display screen, which represents the improvement in vehicle technology. The cases like

*Interval Licensing* cited by the district court merely used a generic computer as a tool to display certain content. The 724 and 329 Patents in contrast represent a step forward in vehicle display screen technology itself.

The fact that these are physical system claims is not per se dispositive, but the fact that these physical components are combined to accomplish a technological improvement to a machine is dispositive. Unlike the scanner in *Content Extraction* or the point of sale device in *Inventor Holdings*, this is not a situation of using generic hardware in well-understood, routine, and conventional ways to implement an abstract idea. *C.f. Content Extraction and Transmission LLC v. Wells Fargo Bank, N.A.*, 776 F.3d 1343 (Fed. Cir. 2014); *Inventor Holdings, LLC v. Bed Bath & Beyond, Inc.*, 876 F. 3d 1372 (Fed. Cir. 2017).

For the 373 patent, the claim describes an improved vehicle system that employs specially configured cameras and a custom processor in order to allow both a driver and passenger to control a vehicle using gestures made in the air. The 329 and 724 patents claim an improved dashboard display that has multiple embedded information panels at independent positions and the capability to exchange or duplicate the content between given panels based on user instructions. These combinations of claim elements endow a vehicle with capabilities it never had before, making this akin to *Thales* or *Finjan, Inc. v. Blue Coat Systems, Inc.*, 879 F.3d 1299 (Fed. Cir. 2018), and unlike *Content*

*Extraction* and similar cases.

While much of the case law under *Alice* addresses the narrow question of “whether the claims are directed to a specific improvement in the capabilities of computing devices,” *e.g.*, *Core Wireless Licensing S.A.R.L. v. LG Elecs., Inc.*, 880 F.3d 1356, 1361 (Fed. Cir. 2018), that is because most *Alice*-challenged patents involve claims to software running on a generic computer and not concrete innovations like the in-dashboard vehicle display interface claimed in the patents here. The panel’s affirmance, which necessarily finds the claimed improvements to a machine patent ineligible, contradicts the plain language of Section 101 and stretches *Alice* too far.

## CONCLUSION

The petition should be granted.

October 28, 2019

/s/ Kristopher L. Reed  
Kristopher L. Reed  
David E. Sipiora  
Kilpatrick Townsend & Stockton LLP  
1400 Wewatta Street, Suite 600  
Denver, Colorado 80202  
(303) 571-4000  
dsipiora@kilpatricktownsend.com  
kreed@kilpatricktownsend.com

Dario A. Machleidt  
Kilpatrick Townsend & Stockton LLP  
1420 Fifth Avenue, Suite 3700  
Seattle, WA 98101

(206) 467-9600  
dmachleidt@kilpatricktownsend.com

*Attorneys for Appellant Thunder Power  
New Energy Vehicle Development  
Company Limited*

# ADDENDUM



NOTE: This disposition is nonprecedential.

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

---

**THUNDER POWER NEW ENERGY VEHICLE  
DEVELOPMENT COMPANY LIMITED,**  
*Plaintiff-Appellant*

v.

**BYTON NORTH AMERICA CORPORATION,  
NANJING BYTON NEW ENERGY VEHICLE  
TECHNOLOGY DEVELOPMENT CO., LTD.,**  
*Defendants-Appellees*

---

2019-1208

---

Appeal from the United States District Court for the  
Northern District of California in No. 3:18-cv-03115-JST,  
Judge Jon S. Tigar.

---

**JUDGMENT**

---

KRISTOPHER L. REED, Kilpatrick Townsend & Stockton  
LLP, Denver, CO, argued for plaintiff-appellant. Also rep-  
resented by DAVID E. SIPIORA; DARIO ALEXANDER  
MACHLEIDT, Seattle, WA.

JOHN FRANKLIN MORROW, JR., Womble Bond Dickinson

(US) LLP, Winston-Salem, NC, argued for defendants-appellees. Also represented by DAVID BOAZ, Raleigh, NC.

---

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (NEWMAN, TARANTO, and CHEN, *Circuit Judges*).

**AFFIRMED. See Fed. Cir. R. 36.**

ENTERED BY ORDER OF THE COURT

September 13, 2019  
Date

/s/ Peter R. Marksteiner  
Peter R. Marksteiner  
Clerk of Court

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

*Thunder Power v. Byton North America Corporation, et al.*, No. 2019-1208

**PROOF OF SERVICE**

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by **KILPATRICK TOWNSEND & STOCKTON LLP**, counsel for Appellant Thunder Power New Energy Vehicle Development Company Limited to print this document. I am an employee of Counsel Press.

On **October 29, 2019**, counsel has authorized me to electronically file the foregoing **Combined Petition for Panel Rehearing and rehearing En Banc** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to all counsel registered as CM/ECF users, including any of the following:

John Franklin Morrow Jr.  
Womble Bond Dickinson (US) LLP  
One West Fourth Street z  
Winston-Salem, NC 27101  
336-721-3584  
john.morrow@wbd-us.com

David Boaz  
Womble Bond Dickinson (US) LLP  
555 Fayetteville Street, Ste. 1100  
Raleigh, NC 27601  
919-755-8124  
david.boaz@wbd-us.com

Additionally, eighteen (18) copies will be filed with the Court within the time provided in the Court's rules.

October 29, 2019

/s/ Robyn Cocho  
Counsel Press

**CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P 32(g)(1)**

I, Kristopher L. Reed, counsel for Appellant, certify that the foregoing Motion complies with the length limits set forth in Federal Rule of Appellate Procedure 32(g)(1). Specifically, exclusive of the exempted portion of the petition, as provided in Fed. Cir. Rule 35(c)(2), this petition contains 3,583 words as determined by the word count feature of the word processing program used to create this brief. The petition has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font.

Date: October 28, 2019

/s/ Kristopher L. Reed

Kristopher L. Reed