

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC,
Petitioner,

v.

MONARCH NETWORKING SOLUTIONS LLC,
Patent Owner.

IPR2020-01226
Patent 8,130,775 B2

Before THU A. DANG, THOMAS L. GIANNETTI, and ROBERT J.
WEINSCHENK, *Administrative Patent Judges*.

DANG, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

A. Background

Cisco Systems, Inc. (“Petitioner”) filed a Petition requesting an *inter partes* review of claims 1 and 6 (the “challenged claims”) of U.S. Patent No. 8,130,775 B2 (Ex. 1001, “the ’775 patent”). Paper 2 (“Pet.”). Monarch Networking Solutions LLC (“Patent Owner”) filed a Preliminary Response. Paper 8 (“Prelim. Resp.”). Pursuant to our authorization, Petitioner filed a Reply to Patent Owner’s Preliminary Response (Paper 9, “Pet. Prelim. Reply”) and Patent Owner filed a Sur-reply (Paper 10, “PO Prelim. Sur-reply”), each directed to whether we should exercise our discretion to deny institution pursuant to 35 U.S.C. § 314(a).

Under 37 C.F.R. § 42.4(a), the Board has authority to determine whether to institute an *inter partes* review. We may institute an *inter partes* review if the information presented in the petition filed under 35 U.S.C. § 311, and any response filed under § 313, shows that there is a reasonable likelihood that Petitioner would prevail with respect to at least one of the claims challenged in the petition. The Board, however, has discretion to deny a petition even when a petitioner meets that threshold. *Id.*; *see, e.g., Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) (“[T]he agency’s decision to deny a petition is a matter committed to the Patent Office’s discretion.”); *see also* Patent Trial and Appeal Board Consolidated Trial Practice Guide (Nov. 2019) (“Consolidated TPG”), 55–63, available at <https://www.uspto.gov/sites/default/files/documents/tpgnov.pdf> (identifying considerations that may warrant exercise of this discretion). In particular, 35 U.S.C. § 314(a) permits the Board to deny institution under certain circumstances. *See Gen. Plastic Indus. Co. v. Canon Kabushiki Kaisha*,

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IPR2016-01357, Paper 19 (PTAB Sept. 6, 2017) (precedential as to § II.B.4.i).

Having considered the parties' submissions, we determine that it is appropriate in this case to exercise our discretion to deny institution of *inter partes* review pursuant to 35 U.S.C. § 314(a) due to the advanced stage of the parallel district court litigation involving the challenged patent. *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 5 (PTAB Mar. 20, 2020) (precedential) ("*Fintiv*"); *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 (PTAB Sept. 12, 2018) (precedential) ("*NHK*").

B. Related Proceedings

Petitioner identifies the '775 patent as the subject of *Monarch Networking Solutions LLC v. Cisco Systems, Inc. and Charter Communications, Inc.*, No. 2:20-cv-00015 (E.D. Tex.) ("Eastern District of Texas litigation"). Pet. 7–8.

C. The '775 Patent

The '775 patent, titled "Mechanism for Protecting a Pseudo-wire," issued on March 6, 2012, from Application No. 12/528,083, filed on February 26, 2008. Ex. 1001, codes (54), (45), (22).

The '775 patent is directed to routing data packets in packet-switched networks, wherein labels are added to data packet headers with information that enable network routers to determine the next hop for a packet to reach its destination. *See* Ex. 1001, 1:30–39. The '775 patent recognizes that pseudo-wires have been used to emulate a point-to-point link between two devices of a packet-switched network. *Id.* at 1:45–49. The prior art packet-switched network is depicted in Figure 2, reproduced below:

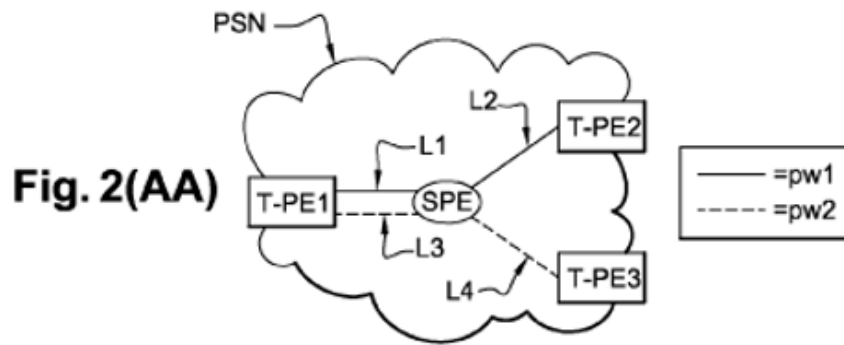


Figure 1 shows prior-art packet-switched network PSN, in which first pseudo-wire pw1 is set up between input router T-PE1 at one edge of network PSN and output router T-PE2 at another edge of network PSN. *Id.* at 2:12–17. First link L1 that is part of pseudo-wire pw1 is set up between input router T-PE1 and intermediate router SPE of network PSN, while second link L2 that is also part of pseudo-wire pw1 is set up between intermediate router SPE and output router T-PE2. *Id.* at 2:15–20. Second pseudo-wire pw2 is then set up between input router T-PE1 constituting a first end of pseudo-wire pw2 and second output router T-PE3 constituting a second end of pseudo-wire pw2. *Id.* at 2:20–23. First link L3 that is part of second pseudo-wire pw2 is set up between input router T-PE1 and intermediate router SPE, while second link L4 that is also part of second pseudo-wire pw2 is set up between intermediate router SPE and output router T-PE3. *Id.* at 2:23–27. According to the '775 patent, prior-art PSN network shown in Figure 1 has the drawback of consuming network resources that increases the restore time in the event of a fault affecting an output router, with a negative impact on quality of service. *Id.* at 2:40–47. Accordingly, the '775 patent proposes setting up two pseudo-wires to broadcast a data stream (*id.* at 2:54–60), wherein, to optimize the use of network resources, for example bandwidth, a single link common to the two

pseudo-wires are set up between the input router and the intermediate router. *Id.* at 3:1–5.

Figure 3 is reproduced below:

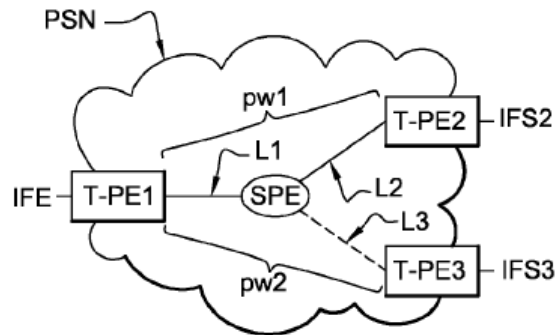


Fig. 3

Figure 3 represents a connection set up between input router T-PE1 and intermediate routers T-PE2 and T-PE3, each of these three routers being at an edge of network PSN. *Id.* at 6:25–28. As shown in Figure 3, first link L1 is set up between input router T-PE1 and intermediate router SPE, and second link L2 is set up between intermediate router SPE and first output router T-PE2, wherein first and second links L1, L2 constitute first pseudo-wire pw1 setting up a connection between input router T-PE1 and first output router T-PE2. *Id.* at 6:29–38. Second pseudo-wire pw2 is set up between input router T-PE1 and second output router T-PE3, wherein second pseudo-wire pw2 consists of first link L1 and second link L3 set up between intermediate router SPE and second output router T-PE3. *Id.* at 6:39–43. Accordingly, first link L1 is shared by pseudo-wires pw1 and pw2. *Id.* at 6:44–45.

D. The Challenged Claims

Both of the challenged claims 1 and 6 are independent claims. Claim 1 is illustrative, and is reproduced below:

1. A method of setting up at least two pseudo-wires able to broadcast a data stream, comprising:

setting up a first pseudo-wire comprising a first link set up between an input router of a packet-switched network and an intermediate router of the packet-switched network and a second link set up between said intermediate router and a first output router of the packet-switched network; and

setting up a second pseudo-wire between said input router and a second output router of the packet-switched network, wherein the second pseudo-wire comprises said first link and a third link set up between said intermediate router and said second output router, said first link being shared by the first and second pseudo-wires.

Ex. 1001, 12:14–27.

E. Asserted Grounds of Unpatentability

Petitioner challenges the patentability of claims 1 and 6 of the '775 patent on the following ground (Pet. 3):

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1, 6	103(a)	Aggarwal, ¹ Hussain, ²

Petitioner relies on the Declaration of Henry Houh, Ph.D. (Ex. 1003) in support of its unpatentability contentions.

¹ U.S. Patent No. 7,602,702 B1, issued October 13, 2009, filed February 10, 2005 (Ex. 1005, “Aggarwal”).

² Hussain, Iftekhar, “Fault-Tolerant IP and MPLS Network,” Cisco Press, printed November 2004 (Ex. 1006, “Hussein”).

II. ANALYSIS

A. *Discretion Under 35 U.S.C. § 314(a)*

Institution of an *inter partes* review is discretionary. Section 314(a) of title 35 of the United States Code provides that “[t]he Director may not authorize an *inter partes* review to be instituted unless the Director determines that the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” The U.S. Supreme Court has explained that because § 314 includes no mandate to institute review, “the agency’s decision to deny a petition is a matter committed to the Patent Office’s discretion.” *Cuozzo*, 136 S. Ct. at 2140; *see also Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016) (explaining that under § 314(a), “the PTO is permitted, but never compelled, to institute an IPR proceeding”). The Director has delegated this authority under § 314(a) to the Board. 37 C.F.R. § 42.4(a) (“The Board institutes the trial on behalf of the Director.”).

In this proceeding, Patent Owner argues that we should exercise our discretion under 35 U.S.C. § 314(a) to deny institution in this case because “it would be an inefficient duplication of ongoing litigation.” Prelim. Resp. 45. In particular, according to Patent Owner, “[g]iven the advanced state of [the district court] litigation, which addresses the same issues raised in the instant Petition, the Board should deny institution.” *Id.*

In determining whether to exercise our discretion, we are guided by the Board’s precedential decision in *NHK*. There, the Board found that the “advanced state of the district court proceeding,” in which the “same prior art and arguments” were presented by Petitioner, expert discovery was

scheduled to end in less than two months, and a jury trial was scheduled to begin in six months, was a “factor that weighs in favor of denying” the petition under § 314(a). *NHK*, IPR2018-00752, Paper 8 at 20. The Board determined that “[i]nstitution of an *inter partes* review under these circumstances would not be consistent with ‘an objective of the AIA . . . to provide an effective and efficient alternative to district court litigation.’” *Id.* (citing *Gen. Plastic Indus.*, IPR2016-01357, Paper 19 at 16–17).

“[T]he Board’s cases addressing earlier trial dates as a basis for denial under *NHK* have sought to balance considerations such as system efficiency, fairness, and patent quality.” *Fintiv*, Paper 11 at 5. When applying *NHK*, the Board has balanced the following non-exclusive factors (herein “*Fintiv* factors”):

1. whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted;
2. proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision;
3. investment in the parallel proceeding by the court and the parties;
4. overlap between issues raised in the petition and in the parallel proceeding;
5. whether the petitioner and the defendant in the parallel proceeding are the same party; and
6. other circumstances that impact the Board’s exercise of discretion, including the merits.

Id. at 5–6.

We discuss the parties’ arguments in the context of considering the above factors.

1. *Whether a stay exists or is likely to be granted if a proceeding is instituted*

Petitioner points out that neither party to the district court case has requested a stay. Pet. 19. Petitioner argues that “given that a motion to stay has not yet been filed, the Board should not infer the outcome of that motion.” *Id.* at 20. Patent Owner counters that Judge Gilstrap is the presiding judge in the district court case, and “it is unlikely that Judge Gilstrap would grant a stay in the parallel proceeding.” Prelim. Resp. 46–47. According to Patent Owner, “it would be March 8, 2021 before the parties know whether institution will occur,” wherein, “[b]y that point, . . . Monarch will have already incurred the majority of expenses associated with the litigation – which Judge Gilstrap has previously found to be sufficiently showing of prejudice.” *Id.* at 47 (citing *Solas OLED Ltd. v. Samsung Display Co.*, No. 2:19-CV-00152-JRG, 2020 U.S. Dist. LEXIS 125973, at *4–6 (E.D. Tex. July 17, 2020)).

On the present record, neither party has produced evidence that a stay has been requested or that the district court has considered a stay in the parallel litigation. Further, a judge determines whether to grant a stay based on the facts of each specific case as presented in the briefs by the parties. Although Patent Owner cites to the presiding Judge’s finding in another proceeding (Prelim. Resp. 47), we decline to infer, based on actions taken in different cases with different facts, how the district court would rule should a stay be requested by the parties in the parallel litigation. *Fintiv* at 12. Thus, we find that this factor does not weigh for or against exercising discretion to deny institution under § 314(a).

2. Proximity of the court's trial date to the Board's projected statutory deadline for a final written decision

The parties agree that the trial in the Eastern District of Texas currently is scheduled to begin on June 7, 2021. *See* Prelim. Resp. 48; Pet. Prelim. Reply 2. However, Petitioner expresses its concern about the uncertainty of the June 7, 2021 trial date due to the COVID-19 pandemic as well as the district court's backlog. Pet. Prelim. Reply 2–3. In particular, Petitioner argues that “the rescheduled June 7, 2021 trial date is still not guaranteed because Judge Gilstrap currently has six other trials scheduled for jury selection on that same date,” and that “in the January-May 2021 period, Judge Gilstrap has more than 60 trials scheduled.” *Id.* at 3 (citing Ex. 1042, 2; Ex. 1043, 1; Ex. 1044, 1; Ex. 1045, 1; Ex. 1046, 1; Ex. 1047, 1; Ex. 1048, 1–34).

Furthermore, Petitioner argues that a motion to transfer the district court case to Northern District of California is currently pending. Pet. Prelim. Reply 3. According to Petitioner, if the motion is granted, the Northern District of California would set a new case schedule, including a new trial date. *Id.* Thus, Petitioner argues that the pending motion to transfer adds uncertainty to the June 7 trial date. *Id.*

Patent Owner counters that a final written decision in this matter “would likely issue in March 2022 – well after the likely conclusion of the litigation in June 2021.” Prelim. Resp. 48. According to Patent Owner, as of the filing date of the Preliminary Sur-reply of January 14, 2021, “the parties are one month away from completing discovery.” PO Prelim. Sur-reply 2 (citing Ex. 2010, 3). Thus, Patent Owner contends that any “hypothetical scenarios” suggested by Petitioner, including Petitioner’s “speculat[ion] that a motion to transfer might influence the timing,” could

not “reasonably be expected to result in a nine-month delay of the trial date.”

Id. at 3.

Generally, if a district court’s trial date is substantially earlier than the projected statutory deadline, the Board has weighed this factor in favor of exercising authority to deny institution under § 314(a). *Fintiv* at 9. We note that there is some uncertainty that the jury trial will occur on June 7, 2021. First, as Petitioner contends, a motion to transfer the district court case to Northern District of California is currently pending. Pet. Prelim. Reply 3. We decline to speculate, though, whether the district court will grant that motion..

Further, as Petitioner points out, there are six other trials scheduled for jury selection on June 7, 2021, in the Eastern District of Texas. Pet. Prelim. Reply 2–3. Although at least some of those trials will not occur on June 7, 2021, we decline to speculate as to which trials will not occur on that date.

Additionally, given the substantial nine-month gap between the scheduled June 7 trial date (and the other potential dates proposed by Patent Owner) and March 2022 (the likely date for any final written decision in this proceeding), even if the trial date were postponed substantially, it appears unlikely, on the present record, that the trial would occur after a final written decision in this proceeding.

Accordingly, on the record before us, this factor weighs in favor of exercising our discretion to deny institution pursuant to § 314(a).

3. *Investment in the parallel proceeding by the district court and the parties*

We consider now the amount and type of work already completed in the parallel litigation by the court and the parties at the time of the institution decision. *See Fintiv* at 9.

The Eastern District of Texas issued a claim construction order on January 7, 2021. Ex. 2013 (Claim Construction Memorandum and Order). Fact discovery currently is scheduled to have closed on January 12, 2021, expert discovery currently is scheduled to have closed on February 19, 2021, and dispositive motions currently are scheduled to have been filed by February 24, 2021. Ex. 2010 (First Amended Docket Control Order).³ As Patent Owner contends, by the time this institution decision issues, “the parties likely will have received the [district court’s] claim construction order, completed discovery, and filed all dispositive motions.” Prelim. Resp. 49. According to Patent Owner, both the district court and the parties have “already made significant investments in the litigation, and most pretrial matters likely will be disposed before any decision on institution issues.” In particular, Patent Owner contends that Petitioner “has already submitted its 694-page invalidity expert report in the district court case,” wherein “all discovery will conclude by February 19, 2021 – likely well before the Board issues its institution decision.” PO Prelim. Sur-reply 3 (emphasis omitted).

As set forth in *Fintiv*, “district court claim construction orders may indicate that the court and parties have invested sufficient time in the parallel proceeding to favor denial.” *Fintiv* at 10. “This investment factor is related to the trial date factor, in that more work completed by the parties and court in the parallel proceeding tends to support the argument[] that the parallel proceeding is more advanced, a stay may be less likely, and instituting would lead to duplicative costs.” *Id.*

However, Petitioner’s timing in filing the Petition is also relevant to this factor. If the evidence shows that a petitioner filed its petition

³ Neither party has advised us of any changes to the schedule.

expeditiously, such as promptly after becoming aware of the claims being asserted, this fact has weighed against denying institution. *Fintiv* at 11 (citing *Intel Corp. v. VLSI Tech. LLC*, IPR2019-01192, Paper 15 at 12–13 (PTAB Jan. 9, 2020); *Illumina Inc. v. Natera, Inc.*, IPR2019-01201, Paper 19 at 8 (PTAB Dec. 18, 2019)). Here, Petitioner contends that it “diligently reviewed prior art and prepared this Petition upon being informed on May 4, 2020 of the claims of the ’775 Patent asserted by Patent Owner against Petitioner” whereas “Petitioner worked diligently to prepare and file this Petition in about two months.” Pet. 19–20.

Although we do not find that Petitioner unreasonably delayed filing the Petition, we do find that the parties already have invested significantly in the Eastern District of Texas litigation. As noted above, the district court claim construction order issued on January 7, 2021, fact discovery currently is scheduled to have closed on January 12, 2021, expert discovery currently is scheduled to have closed on February 19, 2021, and dispositive motions are scheduled to have been filed by February 24, 2021.

We also find that the investment made by the parties in the district court litigation relating to issues of patent validity overlap with the issues in this *inter partes* proceeding. First, the claim construction issues addressed by the court overlap with the issues in this proceeding. For example, the district court made a finding with respect to the term “link” in claims 1–7 of the ’775 patent, and, in this proceeding, Patent Owner contends that neither of the prior art relied upon by Petitioner discloses a “link.” Ex. 2013, 35; Prelim. Resp. 28.

Furthermore, the same prior art at issue here is also at issue in the district court. *See* Pet. 21; Prelim. Resp. 49. Expert discovery is scheduled to have closed on February 19, 2021 (prior to the issuance of this Decision),

and the parties already have invested significant resources in preparing expert reports on overlapping invalidity issues. *See* PO Prelim. Sur-reply 3 (“Cisco has already submitted its 694-page invalidity expert report”).

Weighing the facts in this particular case, including the time invested by the parties and the district court in the parallel litigation, the extent to which the investment in the district court proceeding relates to issues of patent validity, and the timing of the filing of the Petition, we find that this factor weighs in favor of exercising our discretion to deny institution pursuant to § 314(a).

4. Overlap between issues raised in the Petition and in the parallel proceeding

This factor evaluates “concerns of inefficiency and the possibility of conflicting decisions” when substantially identical prior art is submitted in both the district court and the *inter partes* review proceedings. *Fintiv* at 12.

Patent Owner points out Petitioner “concedes” that “Petitioner asserted the exact same invalidity grounds in the parallel proceeding.” Prelim. Resp. 49 (citing Pet. 21). However, Patent Owner also acknowledges that Petitioner represents that it plans to withdraw the overlapping grounds from the district court litigation if the Board issues a decision granting institution. *Id.* at 49–50.

In particular, as set forth in its Preliminary Reply, Petitioner explains that it “stipulated not to pursue in the district court proceeding the same invalidity grounds raised in the Petition, if the Board institutes trial.” Pet. Prelim. Reply 5. According to Petitioner, “[t]his stipulation eliminates any overlap between this proceeding and the district court proceeding, if the Board institutes review.” *Id.* at 5 (citing *Fintiv* at 12–13). Petitioner contends that “[o]ther panels have found that such stipulations avoid

‘overlap’ between the proceedings, which weighs in favor of institution.” *Id.* (citing *Sand Revolution II, LLC v. Cont’l Intermodal Grp.–Trucking LLC*, IPR2019-01393, Paper 24 at 12 (PTAB June 16, 2020) (informative) (“*Sand*”); *NanoCollect Biomedical, Inc. v. Cytonome/ST, LLC*, IPR2020-00551, Paper 19 at 23 (PTAB Aug. 27, 2020); *Apple Inc. v. SEVEN Networks, LLC*, IPR2020-00285, Paper 10 at 22 (PTAB July 28, 2020)).

In its Sur-reply, Patent Owner asserts that Petitioner “only offered to ‘cease asserting in the district court litigation the combination of references on which trial is instituted for the claims on which trial is instituted, while trial is instituted.’” PO Prelim. Sur-reply 4 (citing Pet. 21–22). According to Patent Owner, “[s]uch a narrow stipulation favors exercising discretionary denial.” *Id.* (citing *Sotera Wireless, Inc. v. Masimo Corporation*, IPR2020-01019, Paper 12 (PTAB Dec. 1, 2020) (“*Sotera*”). That is, according to Patent Owner, what is important is whether the “Petitioner broadly stipulates to not pursue ‘any ground raised or that could have been reasonably raised.’” *Id.* (quoting *Sotera* at 19). Patent Owner contends that “Petitioner’s overly narrow stipulation does little to ‘address[] concerns of duplicative efforts and potentially conflicting decisions’ in the litigation.” *Id.* (alteration in original).

As Patent Owner points out, Petitioner is asserting the “exact same invalidity grounds” here as in the district court. Prelim. Resp. 49; *see* Pet. 21. However, Petitioner’s stipulation mitigates, to some degree, the concerns over duplicative efforts between the district court and the Board, as well as concerns over potentially conflicting decisions.

Given the facts here that Petitioner’s stipulation reduces concerns regarding overlapping issues, this factor weighs marginally against discretionary denial under § 314(a).

5. *Identity of Petitioner and the defendant in the underlying litigation*

“If a petitioner is unrelated to a defendant in an earlier court proceeding, the Board has weighed this fact against exercising discretion.” *Fintiv* at 13–14. Both parties acknowledge that Petitioner here is the defendant in the underlying litigation. Pet. 22; Prelim. Resp. 50. Therefore, we find that this factor weighs in favor of exercising our discretion to deny institution pursuant to § 314(a).

6. *Other circumstances that impact the Board’s exercise of discretion, including the merits*

As indicated in *Fintiv*, a balanced assessment of factors may include consideration of the merits. *Fintiv* at 14–15. Here, the parties make arguments related to the merits of Petitioner’s unpatentability challenges. Pet. 22; Prelim. Resp. 50; Pet. Prelim. Reply 6; PO Prelim. Sur-reply 4. In particular, Petitioner contends that claims 1 and 6 of the ’775 patent are obvious over the teachings of Aggarwal and Hussain. Pet. 16. Patent Owner responds that “the merits of this Petition are particularly weak” wherein “Petitioner has not shown that Aggarwal or Hussain, alone or in combination, disclose a ‘link’ or a ‘link being shared’ within the meaning of the ’775 Patent claims.” Prelim. Resp. 50.

The decision whether to exercise discretion to deny institution under § 314(a) is based on “a balanced assessment of all relevant circumstances in the case, including the merits.” Consolidated TPG 58. We have reviewed Petitioner’s unpatentability arguments in the Petition and Reply, and Patent Owner’s arguments in the Preliminary Response and Sur-reply. Based on the limited record before us, we do not find that the merits outweigh the

other *Fintiv* factors. Thus, we find that this factor does not weigh for or against exercising discretion to deny institution under § 314(a).

7. *Conclusion on discretionary denial under § 314(a)*

As noted in *Fintiv*, we consider the above six factors when taking “a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review.” *Fintiv* at 6. We recognize that weighing the *Fintiv* factors in this proceeding is a close call. However, based on the particular circumstances of this case, we determine that instituting an *inter partes* review would be an inefficient use of Board resources. As discussed above, while factor 4 weighs marginally against denying institution, factors 2, 3 and 5 weigh more significantly in favor of denying institution, with factors 1 and 6 being neutral. On balance, after a holistic consideration of the relevant facts, we are persuaded to exercise our discretion pursuant to § 314(a) to deny institution.

III. CONCLUSION

For the foregoing reasons, we exercise our discretion pursuant to 35 U.S.C. § 314(a) to deny institution of *inter partes* review.

IV. ORDER

For the reasons given, it is

ORDERED that the Petition (Paper 2) is denied as to the challenged claims of the '775 patent; and

FURTHER ORDERED that no *inter partes* review is instituted.

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