

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LUXOTTICA OF AMERICA INC.,

Petitioner

v.

E-VISION OPTICS, LLC

Patent Owner

Case No. IPR2024-01071

Patent No. 8,905,541

PATENT OWNER'S PRELIMINARY RESPONSE TO PETITION

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE BOARD SHOULD EXERCISE ITS DISCRETION TO DENY INSTITUTION UNDER 35 U.S.C. § 314(a)	3
A.	Factor 1: The District Court Has Denied A Stay	5
B.	Factor 2: A District Court Trial Is Expected More Than Five Months Before The Final Written Decision Deadline	7
C.	Factor 3: The Parties Have Invested Significant Resources In The District Court Proceeding.....	10
D.	Factor 4: The Issues And Parties Overlap Significantly	12
E.	Factor 5: Both Parties Are Parties In The Parallel Litigation	14
F.	Factor 6: The Petition Does Not Present “Compelling Evidence Of Unpatentability”	16
III.	THE BOARD SHOULD EXERCISE ITS DISCRETION TO DENY INSTITUTION UNDER 35 U.S.C. § 325(d) AND/OR § 314(a).....	17
A.	The Same Or Substantially The Same Prior Art And Arguments Were Previously Presented To The Office.....	19
1.	Grounds 1-4.....	21
2.	Grounds 5 & 6.....	25
B.	Petitioner Makes No Claim that the Examiner Erred During Prosecution	28
IV.	CONCLUSION.....	31
	CERTIFICATION OF WORD COUNT	1
	CERTIFICATE OF SERVICE	2

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Advanced Bionics LLC v. MED-EL Elektromedizinische Gerate GmbH,</i> IPR2019-01469, Paper 6 (PTAB Feb. 13, 2020).....	<i>passim</i>
<i>Apple Inc. v. Fintiv, Inc.,</i> IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020)	<i>passim</i>
<i>Apple Inc. v. Fintiv, Inc.,</i> IPR2020-00019, Paper 15 (PTAB May 13, 2020) (<i>informative</i>)	7
<i>Becton, Dickinson and Co. v. B. Braun Melsungen AG,</i> IPR2017-01586, Paper 8 (PTAB Dec. 15, 2017)	19, 28
<i>Biofrontera Inc. v. DUSA Pharms.,</i> IPR2018-01585, Paper 10 (PTAB Feb. 26, 2019).....	18
<i>Cisco Sys., Inc. v. Monarch Networking Solutions LLC,</i> IPR2020-01227, Paper 11 (PTAB Mar. 4, 2021)	14
<i>Commscope Techs. v. Dali Wireless, Inc.,</i> IPR 2022-01242 (PTAB Feb. 27, 2023).....	16
<i>Eclinical Works, LLC v. Decapolis</i> LLC, IPR2022-00229, Paper 10 (PTAB Apr. 13, 2022).....	9
<i>Ericsson Inc. v. Collision Comms., Inc.,</i> IPR2022-01233, Paper 12 (PTAB Jan. 19, 2023)	12
<i>JUUL Labs, Inc. v. NJOY, LLC,</i> IPR2024-00160, Paper 10 (PTAB May 24, 2024)	23
<i>Magellan Midstream Partners L.P v. Sunoco Partners Mktg. & Terms. L.P.,</i> IPR2019-01445, Paper 12 (PTAB Jan. 22, 2020)	8

Patent Owner’s Preliminary Response to
Petition for Inter Partes Review
Patent No. 8,905,541

<i>Medtronic Corevalve LLC v. Speyside Medical, LLC</i> , IPR2021-00310, Paper 9 (PTAB July 23, 2021)	23, 28
<i>Monolithic Power Sys., Inc. v. Volterra Semiconductor LLC</i> , IPR2020-01348, Paper 19 (PTAB Mar. 4, 2021)	18, 31
<i>NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.</i> , IPR2018-00752, Paper 8 (PTAB Sept. 12, 2018) (<i>precedential</i>)	9
<i>Nokia of Am. Corp. v. Godo Kaisha IP Bridge</i> , IPR2022-00755, Paper 9 (PTAB Nov. 2, 2022)	15
<i>NXP USA, Inc. v. Impinj, Inc.</i> , PGR2022-00005, Paper 20 (PTAB Aug. 24, 2022)	11
<i>Quasar Sci. LLC v. Colt Int’l Clothing, Inc.</i> , IPR2023-00611, Paper 10 (PTAB Oct. 10, 2023)	29
<i>Regeneron Pharmas. Inc. v. Novartis Pharma AG</i> , IPR2020-01317, Paper 15 (PTAB Jan. 15, 2021)	12
<i>Samsung Elecs. Co. v. California Institute of Tech.</i> , IPR2023-00131, Paper 10 (PTAB May 4, 2023)	9
<i>Sotera Wireless, Inc. v. Masimo Corp.</i> , IPR2020-01019, Paper 12 (PTAB Dec 1, 2020)	14
<i>Universal Elecs., Inc. v. Universal Remote Control, Inc.</i> , 943 F. Supp. 2d 1028 (C.D. Cal. 2013)	5, 6, 7
<i>Vizio, Inc. v. Maxell, Ltd.</i> , IPR2022-01459, Paper 7 (PTAB Apr. 11, 2023)	15
Statutes	
35 U.S.C. § 314(a)	3, 17
35 U.S.C. § 325(d)	2, 17, 18

Other Authorities

AMERICA INVENTS ACT, Congress. H. Rept. 112-98 Part 1 (June 1, 2011).....	3
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Other References

Director’s Memo, <i>Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation</i> (June 21, 2022).....	4, 7, 16
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EXHIBIT LIST

Exhibit	Description
2001	<i>eVision Optics, LLC and Vision Smart Optics, Inc. v. Luxottica Group S.P.A. and Luxottica of America Inc.</i> , Case No. 8:23-cv-02013 AB (SHK) Order Denying Defendants' Motion to Stay, Dkt. 75 (Aug. 21, 2024 C.D. Cal.)
2002	<i>eVision Optics, LLC and Vision Smart Optics, Inc. v. Luxottica Group S.P.A. and Luxottica of America Inc.</i> , Case No. 8:23-cv-02013 AB (SHK) Order Re Civil Jury/Court Trial, Dkt. 54 (April 4, 2024 C.D. Cal.)
2003	<i>eVision Optics, LLC and Vision Smart Optics, Inc. v. Luxottica Group S.P.A. and Luxottica of America Inc.</i> , Case No. 8:23-cv-02013 AB (SHK) Order Scheduling Additional Dates and Correcting Scheduling Order, Dkt. 58 (April 18, 2024 C.D. Cal.)
2004	<i>eVision Optics, LLC and Vision Smart Optics, Inc. v. Lenovo Group, Ltd., et al.</i> , Case No. 8:23-cv-01860 AB (SHK) Defendants' Preliminary Invalidity Contentions (July 19, 2024 C.D. Cal.)
2005	<i>eVision Optics, LLC and Vision Smart Optics, Inc. v. Luxottica Group S.P.A. and Luxottica of America Inc.</i> , Case No. 8:23-cv-02013 AB (SHK) Defendants' Invalidity Contentions (July 12, 2024 C.D. Cal.)
2006	<i>eVision Optics, LLC and e-Vision Smart Optics, Inc. v. Lenovo Group, Ltd. et al.</i> , Case No. 8:23-cv-01860-AB-SHK, Order re Civil Jury/Court Trial, Dkt. 54 (April 3, 2024 C.D. Cal.)
2007	Lex Machina – Federal Court – Federal District Court Cases in C.D. Cal, Pending Between 2019-09-01 and 2024-09-19
2008	Vacancies in the Federal Judiciary 118th Congress, last updated on 9/23/2024, https://www.uscourts.gov/judges-judgeships/judicial-vacancies/current-judicial-vacancies

Patent Owner's Preliminary Response to
Petition for Inter Partes Review
Patent No. 8,905,541

Exhibit	Description
2009	<i>eVision Optics, LLC and Vision Smart Optics, Inc. v. Luxottica Group S.P.A. and Luxottica of America Inc.</i> , Case No. 8:23-cv-02013 AB (SHK) Order Scheduling Additional Dates and Correcting Scheduling Order, Dkt. 58 (April 18, 2024 C.D. Cal.)
2010	<i>eVision Optics, LLC and e-Vision Smart Optics, Inc. v. Lenovo Group, Ltd. et al.</i> , Case No. 8:23-cv-01860-AB-SHK, Order Granting Joint Stipulation to Schedule Additional Dates, Dkt. 56 (April 18, 2024 C.D. Cal.)
2011	<i>eVision Optics, LLC and Vision Smart Optics, Inc. v. Luxottica Group S.P.A. and Luxottica of America Inc.</i> , Case No. 8:23-cv-02013 AB (SHK) (IN CHAMBERS) Order Continuing Claim Construction Hearing, Dkt. 97 (Oct. 7, 2024 C.D. Cal.)
2012	<i>eVision Optics, LLC and e-Vision Smart Optics, Inc. v. Lenovo Group, Ltd. et al.</i> , Case No. 8:23-cv-01860-AB-SHK, (IN CHAMBERS) Order Continuing Claim Construction Hearing, Dkt. 74 (Oct. 7, 2024 C.D. Cal.)

E-Vision Optics, LLC (“Patent Owner”) submits this Preliminary Response to the Petition of Luxottica of America Inc. (“Petitioner”) seeking *inter partes* review (“IPR”) of U.S. Patent No. 8,905,541 (“the ‘541 patent”).

I. INTRODUCTION

Patent Owner respectfully requests that the Board exercise its discretion and deny institution for two reasons. First, denial under Section 314(a) and *Fintiv* is appropriate, because the ‘541 patent is asserted against two defendants in parallel litigations that are scheduled for—and expected to reach—trial three-to-five months before the Board’s final written decision. In October 2023, Patent Owner filed suit against both Petitioner and third-party Lenovo in the Central District of California for infringement of the ‘541 patent, as well as infringement by Petitioner of four additional patents and infringement by Lenovo of six additional patents:

ASSERTED PATENT	LENOVO	LUXOTTICA
8,905,541	X	X
8,708,483	X	X
8,801,174	X	X
10,613,355		X
10,598,960	X	X
8,931,896	X	
10,795,411	X	
11,586,057	X	

While the cases have not been formally consolidated, the extent of overlap has resulted in the parties coordinating a near-identical schedule and a shared claim construction hearing.

Despite its acknowledgment of the parallel litigation on the '541 patent against Lenovo (Petition at 86), Petitioner is silent regarding the overlap between this proceeding and the proceeding against Lenovo when assessing whether a *Fintiv* denial is appropriate. (Petition at 78-81.) In particular, Petitioner fails to address the fact that even if Petitioner has filed a stipulation to purportedly limit the overlap of the issues, Lenovo has not joined in such a stipulation and will continue—even past institution—to litigate the validity of the '541 patent based on the very same prior art references and arguments contained in the petition. Given the advanced stage of the parallel litigations and that expert reports on validity will be exchanged before the Board's institution decision, institution of yet another proceeding on the validity of the '541 patent would needlessly waste party, Board, and district court resources.

Second, denial under Section 325(d) and *Advanced Bionics* is appropriate, because three out of five prior art references cited in the petition are the same prior art previously considered by the Patent Office, the fourth reference is substantially the same, and the fifth reference is relevant as to only two dependent claims. Institution

under such circumstances would be a colossal waste of Board, party, and district court resources.

II. THE BOARD SHOULD EXERCISE ITS DISCRETION TO DENY INSTITUTION UNDER 35 U.S.C. § 314(a)

The Board should decline to institute IPR of the '541 patent under *Fintiv* because instituting this IPR would undermine Congress's stated goals in creating IPR proceedings: to provide "quick and cost effective alternatives to litigations" and "limit unnecessary and counterproductive litigation costs." H.R. Rep. No. 112-98, pt. 1, at 40 (2011), 2011 U.S.C.C.A.N. 67, 69. An IPR here would be neither quicker than, nor an alternative to, ongoing district court litigation.

The '541 patent is one of eight patents asserted in claims against three different parties in a series of cases pending in the Central District of California. A hearing to construe the claims in both cases involving the '541 patent will be held December 6, 2024—ensuring that the district court's claim construction order will be issued before the Board's institution decision is due. Furthermore, the district court is on track to adjudicate the same prior art raised in the petition more than five months before the Board issues a final written decision. Instituting a parallel IPR proceeding lagging well behind the district court would needlessly increase the cost of resolving the underlying dispute. Under these circumstances, the Board should exercise its discretionary authority to deny institution under 35 U.S.C. § 314(a).

Because Congress's goal in enacting post-grant proceedings was "to ... limit unnecessary and counterproductive litigation costs," Director Vidal has instructed the Board not to institute IPRs that would "increase, rather than limit, litigation costs." Director's Memo, *Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation* ("Guidance") at 1 (June 21, 2022).

Instituting this IPR would cause just such an increase. The district court has already denied a motion to stay. And although that denial was without prejudice, the court will continue to consider the same prior art regardless because two other defendants assert the same invalidity grounds in parallel litigation. Accordingly, for more than a year, the Board and the district court will labor to decide the very same issues, thereby "increase[ing], rather than limit[ing], litigation costs," creating "potential conflict between the ... (PTAB) and district court proceedings," and generally increasing "the potential for inefficiency and gamesmanship." Guidance at 1. This is precisely the situation that the precedential *Fintiv* decision seeks to avoid by instructing the Board to take "a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review." *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 6 (PTAB Mar. 20, 2020).

A. Factor 1: The District Court Has Denied A Stay

The first *Fintiv* factor asks “whether [1.] the court granted a stay or [2.] evidence exists that one may be granted if a proceeding is instituted.” *Fintiv*, IPR2020-00019, Paper 11 at 6. Here, the undisputed answer to both questions is **no**: a stay has not been granted, and Petitioner has identified no evidence that one will be. To the contrary, specific evidence indicates that a stay is unlikely.

On August 21, 2024, the district court denied Petitioner’s motion to stay the parallel litigation pending the outcome of this proceeding. (EX-2001.) While the district court denied the motion without prejudice, allowing Petitioner to move again upon a potential institution, the very same three factors that persuaded the district court to deny the stay will only become more persuasive as time passes, making a stay unlikely. (See EX-2001 at 2 (citing *Universal Elecs., Inc. v. Universal Remote Control, Inc.*, 943 F. Supp. 2d 1028, 1030-31 (C.D. Cal. 2013)).

First, a trial date has already been set, and fact discovery in both parallel litigations will close on November 8, 2024¹—two months before the Board’s institution decision is due. (EX-2002 at 3; EX-2006 at 3.) Indeed, rebuttal expert

¹ The district court later corrected a typographical error and confirmed the close of fact discovery is November 8, 2024, and not November 8, 2025. (EX-2003 at 2.)

reports will be exchanged December 20, 2024—several weeks before the Board's institution decision. (EX-2002 at 3; EX-2006 at 3.) The district court is unlikely to stay the case *after* the completion of discovery and after the parties have already expended the time and expense of submitting initial and rebuttal expert reports. *Universal Elecs.*, 943 F. Supp. 2d at 1030-31 (considering stay factor (1) whether discovery is complete and whether a trial date has been set).

Second, a stay will not simplify issues before the district court, because the '541 patent will be asserted at trial against not only against Petitioner but also against Lenovo, who asserts the very same prior art. *Universal Elecs.*, 943 F. Supp. 2d at 1030-31 (considering stay factor (2) whether a stay will simplify the issues in question and trial of the case). Lenovo asserts the very same prior art references relied upon in the petition: Howell-596; Howell-158; Hattori-913; Kokonaski-999; and Kokonaski-166. (EX-2004 at 25-26 (listing references), 33 (incorporating the petition and its arguments by reference).) The district court is unlikely to stay the case against Petitioner when it will move forward to a trial on the validity of the '541 patent based on the same invalidity contentions.

Finally, undue prejudice and disadvantage against Patent Owner would only increase if the district court were to stay the litigation against Petitioner, while the related case against Lenovo moved forward to trial. *Universal Elecs.*, 943 F. Supp.

2d at 1030-31 (considering stay factor (3) whether a stay would unduly prejudice or present a clear tactical disadvantage to the nonmoving party). A stay would effectively give Petitioner two bites at the apple, letting its co-defendants fight the battle for it in district court while not being bound by any adverse results in those cases. The district court is unlikely to force Patent Owner, after having completed both fact and expert discovery, to then wait an additional year to resolve its claims against one party while continuing through trial on the same issues against two other parties.

As a stay has been denied and any renewed request for a stay is unlikely to be granted, *Fintiv* factor 1 weighs heavily in favor of the Board's exercising its discretion to deny institution.

B. Factor 2: A District Court Trial Is Expected More Than Five Months Before The Final Written Decision Deadline

Factor 2—the implications of the district court and IPR schedules—also weighs for denial. “[A] parallel proceeding in an advanced state implicates considerations of efficiency and fairness, which can serve as an independent reason to apply discretion to deny institution.” *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 15 at 11-12, 17 (PTAB May 13, 2020) (*informative*); Guidance at 1.

Trial on the '541 patent is scheduled against both defendants for July 2025—nearly six months before the Board's final written decision is expected. (EX-2002

at 3; EX-2006 at 3.) The median time-to-trial in the Central District of California for civil cases is 700 days (i.e., roughly 23 months). (EX-2007 at 2.) That is, one would expect trial in the parallel litigations to commence by September 25, 2025—still more than three months before the Board's final written decision is expected on January 11, 2026.

Petitioner cites 29.7 months as the median time-to-trial, but focuses on 2023 in isolation—which, as demonstrated by Petitioner's own evidence, is an outlier for the Central District of California. (Petition at 80.) The median time-to-trial for civil cases in the Central District of California over the last five years—700 days or roughly 23 months—is much more representative of civil time-to-trial in this district. (See Ex. 1016 (listing median time-to-trial for prior years as ranging from 20 months to 24 months).)

In other words, if the Board institutes IPR here, the IPR proceeding would not produce a result until four-to-six months after the district court litigation has concluded, and the parties will have expended precisely the “duplicative,” “unnecessary[,] and counterproductive litigation costs” that the AIA was designed to avoid. *Fintiv*, IPR2020-00019, Paper 11 at 5 (citing *Magellan Midstream Partners L.P. v. Sunoco Partners Mktg. & Terms. L.P.*, IPR2019-01445, Paper 12 at 10 (PTAB Jan. 22, 2020)); see *id.* *Fintiv*, IPR2020-00019, Paper 15 at 17 (discretionarily

denying institution where district court trial was scheduled two months before the final decision deadline); *NHK Spring Co., Ltd. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 20 (PTAB Sept. 12, 2018) (*precedential*) (finding that institution of IPR when the district court trial would resolve validity before the PTAB “would not be consistent with an objective of the AIA...to provide an effective and efficient alternative to district court litigation”); *Samsung Elecs. Co. v. California Institute of Tech.*, IPR2023-00131, Paper 10 at 15, 24 (PTAB May 4, 2023) (discretionarily denying institution where “[r]egardless of whether we consider the scheduled trial date or the trial date expected based on time-to-trial statistics, the trial in the underlying litigation would commence several months before the expected date of our final written decision”); *Eclinical Works, LLC v. Decapolis LLC*, IPR2022-00229, Paper 10 at 9 (PTAB Apr. 13, 2022) (discretionarily denying institution where CDCA trial was scheduled “roughly one to two months before any final decision would have been due”).

While Petitioner cites the filing of 17,000 new cases (both civil and criminal) and judicial vacancies as reasons for concern (Petition at 79), Petitioner’s own evidence demonstrates that this number of cases is typical for the Central District of California—indeed, it is still lower than the average number of filings before the global Covid-19 pandemic. (Ex. 1016.) Furthermore, Petitioner cites nothing to

suggest an unusual number of judicial vacancies that would cause concern, and the current report as of September 23, 2024, shows only two vacancies in the Central District of California. (EX-2008.)

Because the district court will resolve validity well before the Board reaches its final written decision, the second *Fintiv* factor also heavily favors discretionary denial.

C. Factor 3: The Parties Have Invested Significant Resources In The District Court Proceeding

Factor 3—the resources invested in the parallel district court proceeding—favors denial “if, at the time of the institution decision, the district court has issued substantive orders related to the patent.” *Fintiv*, IPR2020-00019, Paper 11 at 9-10; *see also id.* at n.16 (collecting cases). *Fintiv* holds specifically that “claim construction orders may indicate that the court and parties have invested sufficient time in the parallel proceeding to favor denial.” *Id.* at 10.

Both the parties and the district court have invested significant resources in the two parallel proceedings over the last year. A hearing to construe the claims in both cases involving the '541 patent will be held December 6, 2024—ensuring that the district court's claim construction order will be issued before the Board's institution decision. (EX-2009 at 2; EX-2010 at 2; EX-2011; EX-2012) Additionally, in both parallel litigations, the parties will have completed fact

discovery by November 8, 2024,² and submitted expert reports on the issue of validity several weeks before the Board's institution decision is due. (EX-2002 at 3; EX-2006 at 3.) Accordingly, while Petitioner proffers a stipulation in this proceeding to purportedly mitigate duplicative efforts and resource expenditure, the stipulation is meaningless, because by the time of the Board's institution decision, the parties will have already expended the resources to litigate validity of the challenged patent through expert reports.

Petitioner's analysis of this factor fails to account for any of these resource expenditures, as it wrongly considers only those resources expended at the time the petition was filed (Petition at 80) and not at the time of institution, as directed by *Fintiv*. *Fintiv*, IPR2020-00019, Paper 11 at 6; *NXP USA, Inc. v. Impinj, Inc.*, PGR2022-00005, Paper 20 at 7 (PTAB Aug. 24, 2022) (Board should consider "the duplicative efforts that will occur during the [] duration of a review"); *Cisco Sys., Inc. v. Monarch Networking Solutions LLC*, IPR2020-01227, Paper 11 at 11-12 (PTAB Mar. 4, 2021) (finding that more work completed by the parties and the court suggests that institution would lead to duplicative costs).

² The district court later corrected a typographical error and confirmed the close of fact discovery is November 8, 2024, and not November 8, 2025. (EX-2003 at 2.)

Petitioner's delay in filing this petition further weighs for denial. Petitioner waited more than seven months after receiving Patent Owner's October 26, 2023 complaint before filing its petition. Petitioner offers no explanation for its delay, which weighs for denial. *Fintiv*, IPR2020-00019, Paper 11 at 11-12; *Ericsson Inc. v. Collision Comms., Inc.*, IPR2022-01233, Paper 12 at 15 (PTAB Jan. 19, 2023) (finding that where the parties invested significant resources and petitioner waited to file its petition, "this factor weighs decidedly in favor of discretionary denial"); *Regeneron Pharmas. Inc. v. Novartis Pharma AG*, IPR2020-01317, Paper 15 at 17 (PTAB Jan. 15, 2021) (finding that even where the petition was filed "less than a month after learning of the complaints," the investment by the parties in the parallel proceeding "outweighs the effort expended so far in this proceeding").

In light of the significant resources already invested at the district court, factor 3 weighs decidedly in favor of denial.

D. Factor 4: The Issues And Parties Overlap Significantly

Factor 4—the degree of overlap between the issues in the petition and those before the district court—also supports denial.

Regarding this fourth factor, *Fintiv* explains that "concerns of inefficiency and the possibility of conflicting decisions [are] particularly strong" where "the Board [is] presented with substantially identical prior art arguments...at issue in district

court.” *Fintiv*, IPR2020-00019, Paper 11 at 12. “Accordingly, if the petition includes the same or substantially the same claims, grounds, arguments, and evidence as presented in the parallel proceeding, this fact has favored denial.” *Id.*

There is complete overlap between the petitioned grounds and both parallel litigations:

Petitioned Prior Art Reference	Petitioner's Invalidity Contentions	Lenovo's Invalidity Contentions
Howell-596	Yes. (EX-2005 at 16.)	Yes. (EX-2004 at 25, 33.)
Howell-158	Yes. (EX-2005 at 16.)	Yes. (EX-2004 at 26, 33.)
Hattori-913	Yes. (EX-2005 at 16-17.)	Yes. (EX-2004 at 26, 33.)
Kokonaski-166	Yes. (EX-2005 at 18.)	Yes. (EX-2004 at 26, 33.)
Kokonaski-999	Yes. (EX-2005 at 18.)	Yes. (EX-2004 at 26, 33.)

While Petitioner has submitted a stipulation purporting to reduce the issues in front of the district court, Lenovo has filed no such stipulation. That is, even if the Board were to institute this proceeding, the parallel district court case against Lenovo will move forward to determine the validity of the challenged patent on the very same prior art at issue in the petition.

Petitioner's stipulation should carry no weight here because: (a) Petitioner and Patent Owner will have already expended the resources to litigate the same prior art through the completion of validity expert reports before the Board's institution decision; and (b) the stipulation does not bar Lenovo from litigating the very same invalidity challenges before the district court. Institution will multiply the burden

on Patent Owner while permitting Petitioner to benefit from Lenovo's continued assertion of the same prior art in the district court. In light of these parallel tracks, and Lenovo's failure to join in Petitioner's stipulation, instituting IPR will multiply the burden on Patent Owner and create the possibility of inconsistent decisions between the district court and the Board.

Because Petitioner's stipulation does not "mitigate[] any concerns of duplicative efforts between the district court and the Board," or "of potentially conflicting decisions," Factor 4 weighs heavily in favor of discretionary denial. *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12 at 19 (PTAB Dec. 1, 2020).

E. Factor 5: Both Parties Are Parties In The Parallel Litigation

Factor 5—the overlap of the parties between the petition and the parallel litigation—suggests denial because (1) Petitioner is a defendant in the parallel litigation and, as such, will have a full, fair opportunity to litigate the petitioned grounds, and (2) the prior art references Petitioner raises are the same ones another defendant has *also* raised in the parallel litigation.

Under *Fintiv*, "[i]f a petitioner is unrelated to a defendant in an earlier court proceeding, the Board has weighed this fact against exercising discretion to deny institution." *Fintiv*, IPR2020-00019, Paper 11 at 13-14. That is not the case here

because Petitioner is a defendant in the litigation. Accordingly, the circumstances raise no fairness concerns that denial would deprive Petitioner of its “day in court.” *See Vizio, Inc. v. Maxell, Ltd.*, IPR2022-01459, Paper 7 at 21-22 (PTAB Apr. 11, 2023) (“Because Petitioner is the litigation defendant, factor 5 weighs in favor of discretionary denial”); *Nokia of Am. Corp. v. Godo Kaisha IP Bridge*, IPR2022-00755, Paper 9 at 13 (PTAB Nov. 2, 2022) (holding that Factor 5 weighed for discretionary denial where Petitioner was defendant in parallel proceeding).

That another defendant is *also* litigating the petitioned prior art at the district court further suggests denial. *Fintiv* holds that, “[e]ven when a petitioner is unrelated to a defendant, ... if the issues are the same as, or substantially similar to, those ... about to be litigated, or other circumstances weigh against redoing the work of another tribunal, the Board may, nonetheless, exercise the authority to deny institution.” *Fintiv*, IPR2020-00019, Paper 11 at 14. Because of this consideration, *Fintiv* requires that “[a]n unrelated petitioner ... discuss why addressing the same or substantially the same issues would not be duplicative of the [other] case even if the petition is brought by a different party.” *Id.*

Petitioner offers no such explanation here. (Petition at 81.) That another defendant is currently litigating the same prior art raised in the petition raises serious concerns of duplicative work by adjudicators, and any public-policy concerns

regarding patent validity will be thoroughly addressed by the parallel litigation. Thus, that *another* defendant in the district court proceedings is *also* litigating the petitioned prior art weighs yet further for discretionary denial.

F. Factor 6: The Petition Does Not Present “Compelling Evidence Of Unpatentability”

Factor 6—the merits of the petition—also weighs against institution, because the petition fails to pass the higher threshold of a “compelling” unpatentability challenge that could preclude discretionary denial. Guidance at 4. “[T]he compelling merits standard is a higher standard than the standard for institution set by statute.” *Commscope Techs. v. Dali Wireless, Inc.*, IPR 2022-01242, Paper 23, 3 (PTAB Feb. 27, 2023). That higher standard requires determining that Petitioner is “*highly likely*” to succeed on the merits. *Id.* at 4. The opposite is true here.

As discussed below in more detail, three of the five prior art references cited in the petition were previously presented to the patent office during prosecution of the '541 patent; the fourth reference—which is incorporated by reference in one of the previously considered references—is cumulative, and the fifth reference is only offered in support of two grounds challenging only two dependent claims. *See* Section III, *infra*. Petitioner fails to explain how the examiner erred when considering identical prior art subject matter during prosecution, alleging only that the examiner must have “failed to appreciate the teachings” of the prior art and “did

not have the benefit” of expert testimony. (Petition at 85.) Petitioner cites the fact that the prior art has never “been considered by a court or jury” (Petition at 81); however, this fact is irrelevant, particularly where the patent office examiner is demonstrably more qualified than a lay jury to assess the validity of the patent.

Because the petition merely retreads old grounds previously presented to the Patent Office, it is not reasonably likely – and is certainly not *highly* likely – to succeed on the merits. Accordingly, this factor weighs in favor of discretionary denial.

* * *

In sum, all six factors weigh for discretionary denial. Accordingly, Patent Owner respectfully requests that the Board exercise its discretion to deny institution.

III. THE BOARD SHOULD EXERCISE ITS DISCRETION TO DENY INSTITUTION UNDER 35 U.S.C. § 325(d) AND/OR § 314(a)

The Board has discretion to deny institution of a petition when “the same or substantively the same prior art or arguments previously were presented to the Office,” 35 U.S.C. § 325(d), as well as when institution “would not be an efficient use of the Board’s time and resources.” 35 U.S.C. § 314(a).

Here, discretionary denial is proper because (a) three of the five prior art references cited in the petition are the same prior art previously considered by the Patent Office, with the fourth reference being duplicative and the fifth reference

asserted against only two dependent claims; and (b) even if the fifth reference presented new material relevant to two dependent claims, it would not be an efficient use of the Board's time and resources—nor the parties'—to institute all six grounds against all 19 claims, all of which rely on previously considered prior art arguments. *See Monolithic Power Sys., Inc. v. Volterra Semiconductor LLC*, IPR2020-01348, Paper 19 at 12-13 (PTAB Mar. 4, 2021) (discretionarily denial where Section 325(d) “is sufficiently implicated such that its statutory purpose would be undermined by instituting on the remaining claims”); *Biofrontera Inc. v. DUSA Pharms.*, IPR2018-01585, Paper 10 at 14, 43 (PTAB Feb. 26, 2019).

When deciding whether to exercise its Section 325(d) discretion, the Board considers a two-part framework: “(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.” *Advanced Bionics LLC v. MED-EL Elektromedizinische Gerate GmbH*, IPR2019-01469, Paper 6 at 8 (PTAB Feb. 13, 2020) (precedential).

**A. The Same Or Substantially The Same Prior Art And Arguments
Were Previously Presented To The Office**

Four references are the same or substantially the same prior art previously presented to the Patent Office. Howell-158, Kokonaski-166, and Kokonask-999 are the same references previously reviewed by the Patent Office, and Howell-596 is duplicative of Howell-158.

In the first part of the *Advanced Bionics* framework, the Board may consider the relevant *Becton Dickinson* factors: (a) the similarities of the asserted art and the art previously considered; (b) the cumulative nature of the asserted art and the art previously considered; and (d) the extent of the overlap between the arguments made during examination and the petitioner's arguments. *Advanced Bionics*, IPR2019-01469, Paper 6 at 9-10 (citing *Becton, Dickinson and Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8, 17–18 (PTAB Dec. 15, 2017) (informative)).

Petitioner asserts six grounds that include varied combinations of just five references:

Reference(s)	Grounds	Previous Consideration
Howell-158	1, 2, 5, 6	Cited in signed IDS. (Ex. 1003 at 44.)

Patent Owner's Preliminary Response to
Petition for Inter Partes Review
Patent No. 8,905,541

Reference(s)	Grounds	Previous Consideration
Howell-596	1-4	Howell-158 claims priority to Howell-596 and incorporates Howell-596 by reference. (Ex. 1006 [0003].)
Hattori-913	2, 4	New reference.
Kokonaski-166	5	Analyzed by examiner in rejection (Ex. 1003 at 76-81) and traversed by applicant. (<i>Id.</i> at 55-62, 65-67.) Twice cited in signed IDS. (Ex. 1003 at 10, 53.) Analyzed by international search authority regarding the following international applications with report provided to the examiner: - PCT/US2010/020498 (Ex. 1003 at 246-47.) - PCT/US2011/061505 (<i>Id.</i> at 258.) - PCT/US2011/042882 (<i>Id.</i> at 415-418.) - PCT/US2011/061495 (<i>Id.</i> at 233-35.)
Kokonaski-999	6	Twice cited in signed IDS. (Ex. 1003 at 9, 45.)

Reference(s)	Grounds	Previous Consideration
		Analyzed by international search authority regarding the following international applications with report provided to the examiner: - PCT/US2011/061505 (<i>Id.</i> at 233-35.) - PCT/US2011/061495 (<i>Id.</i> at 258-63.) Cites Kokonaski-166 as relevant prior art. (Ex. 1009 at 58, 62.)

With the exception of two dependent claims, the petition presents no new prior art disclosure and instead asks the Board to reconsider the examiner's previous findings.

1. Grounds 1-4

Howell-158 is the same prior art previously presented to the Patent Office. In the prosecution history of the '541 patent, the examiner signed an IDS disclosing Howell-158, explicitly noting that "[a]ll references [were] considered except where lined through." (Ex. 1003 at 44.)

Howell-158 cites priority to Howell-596's application (U.S. Application No. 11/078,857) and incorporates the application by reference. (Ex. 1006, [0003].)

While the specifications are not identical, the same subject matter in Howell-596 on which Petitioner relies was disclosed in Howell-158 and previously considered by the examiner. Specifically, Howell-158 discloses eyeglass frames (with two lenses) that contain a cavity for coupling an electronic device—e.g., a circuit board, audio speaker, etc. (Ex. 1006, Abstract, [0069]-[0070], cls. 22-27.) In its challenge of the independent claims under Grounds 1-4, Petitioner relies on Howell-596's alleged disclosure of eyeglass frames (with two lenses) that contain a cavity for coupling a UV detection system—i.e., a circuit board. (Petition at 15-21; Ex. 1004, [0068], [0073], [0197].)

Under Grounds 1-4, Petitioner relies on Howell-596, either alone or in combination with Howell-158, in challenging the independent claims of the '541 patent. (Petition at 15, 45, 47, 52.) Regarding independent claim 1, Petitioner asserts that Howell-158 (which was previously considered by the examiner) further discloses the final “insulating layer” limitation—the very limitation the examiner found to be lacking in combination with the other limitations in the prior art. (Ex. 1003 at 76-81 (office action), 65-66 (response), 37 (notice of allowance).) Regarding claim 19, Petitioner relies on Howell-596, alone. (Petition 43-44.) That is, Grounds 1-4 all rely on the same subject matter previously considered by the examiner during prosecution and—at least with respect to independent claim 1—the

exact same reference previously considered by the examiner, over which the patent was issued.

It appears that Petitioner substitutes Howell-596 as the primary reference in an effort to evade discretionary denial, while seeking reconsideration of the same subject matter. Reconsideration of the same reference and the same subject matter would duplicate the examiner's efforts and needlessly expend Board and party resources.

Petitioner also argues that because Howell-158 was not discussed in a rejection, it categorically cannot satisfy the first prong of *Advanced Bionics*. (Petition at 82.) However, the notice of proposed rule-making and Board decision Petitioner cites only clarify that mere listing of a reference in an IDS “will not *automatically* satisfy the first prong of the analytical framework.” *JUUL Labs, Inc. v. NJOY, LLC*, IPR2024-00160, Paper 10 at 11–12 (PTAB May 24, 2024) (citing 89 FR 28693, 28702 (Apr. 19, 2024)). This does not nullify or contradict the Board's previous guidance that references also need not have been included in a rejection to satisfy the first prong. *See Medtronic Corevalve LLC v. Speyside Medical, LLC*, IPR2021-00310, Paper 9 at 26 (PTAB July 23, 2021) (“Petitioner...seems to limit this factor to references that are expressly included in a rejection by the examiner. This factor is not so limited.”). Indeed, the Board has confirmed that “[p]reviously

presented art includes... art provided to the Office by an applicant, such as on an [IDS].” *Advanced Bionics*, IPR2019-01469, Paper 6 at 7-8.

Here, where Howell-158 is not merely listed on an IDS but also signed by the examiner as having been reviewed, the first prong of *Advanced Bionics* has clearly been met. That is, Howell-158 is the same prior art previously presented to the Office. And as discussed above, the subject matter of Howell-596 on which Petitioner relies is duplicative of Howell-158's disclosure. Even when combined, Petitioner relies on Howell-158—the previously considered reference—to satisfy the very limitation the examiner found missing when issuing a notice of allowance.

Hattori-913 is asserted only in Grounds 2 and 4 against two dependent claims. (Petition at 39-40.) Petitioner does not rely on Hattori-913 as allegedly disclosing any of the independent claim limitations—indeed, Petitioner primarily relies on an argument against claims 16 and 17 based on Howell-596's disclosure, again asking the Board to reconsider subject matter previously before the Patent Office. (Petition at 39.) Petitioner cites Hattori-913 only as an alternative argument for those limitations added by claims 16 and 17. (*Id.* at 39-40.) Even if Hattori-913 presented new prior art subject matter and even if Petitioner's obviousness assertions were correct (which they are not), Grounds 2 and 4 would still rise or fall based on

Petitioner's request that the Board reconsider the subject matter of the Howell references as allegedly rendering obvious independent claim 1.

Accordingly, Grounds 1-4 present no new prior art disclosure in challenging the independent claims and all but two of the dependent claims, as the same or substantially the same prior art was previously reviewed by the examiner.

2. Grounds 5 & 6

Kokonaski-166 and Kokonaski-999 are the same prior art references considered by the examiner during prosecution of the '541 patent.

Two of the five inventors of the challenged '541 patent are named inventors of Kokonaski-166, and four of the five inventors are named inventors of Kokonaski-999. (*See* Ex. 1001 at 1.) Kokonaski-166 and Kokonaski-999 share two common inventors with each other. (*Compare* Ex. 1008 at 1 *with* Ex. 1009 at 1.) Given the overlapping inventorship, both Kokonaski-166 and Kokonaski-999 were cited to the Patent Office and extensively considered—both by international searching authorities and a U.S. Patent Office examiner—throughout the prosecution of the '541 patent.

The '541 patent applicant expressly traversed and overcame Kokonaski-166, which the examiner discussed in an initial rejection. (Ex. 1003 at 76-81, 55-62, 65-67.) The examiner also had the benefit of four detailed search reports, which

analyzed Kokonaski-166 in conjunction with corresponding international applications:

Search Report	'541 Prosecution History	Relevant Reference
May 21, 2013 search report for PCT/US2011/061495	Ex. 1003 at 233-35.	Kokonaski-166
July 12, 2011 search report for PCT/US2010/020498	Ex. 1003 at 246-47.	Kokonaski-166
May 21, 2013 search report for PCT/US2011/061505	Ex. 1003 at 258-63.	Kokonaski-166
Jan. 8, 2013 search report for PCT/US2011/042882	Ex. 1003 at 415-18.	Kokonaski-166

The examiner expressly reviewed these search reports, which are listed in signed IDSs with the note that “[a]ll references [were] considered except where lined through”:

Search Report	IDS Showing Signed Review of Report
May 21, 2013 search report for PCT/US2011/061495	Ex. 1003 at 98.
July 12, 2011 search report for PCT/US2010/020498	Ex. 1003 at 98.
May 21, 2013 search report for PCT/US2011/061505	Ex. 1003 at 98.
Jan. 8, 2013 search report for PCT/US2011/042882	Ex. 1003 at 96.

The examiner was provided and reviewed two similarly detailed reports for Kokonaski-999,³ which were also listed in signed IDSs alongside the Kokonaski-999 reference itself. (Ex. 1003 at 9, 45.)

Petitioner does not dispute that Kokonaski-166 was previously considered by the Patent Office. *See* Petition at 82-83. Rather, Petitioner asserts that the Board should reconsider Kokonaski-166 and Kokonaski-999, based on Petitioner's combination of each reference with Howell-158. (Petition 82, 83.) But as explained above, Howell-158 was also previously considered by the examiner. *See* Section III(A)(1), *supra*.) In particular, Petitioner asserts that Howell-158 discloses the claimed "insulating layer"—the very limitation which the examiner, after considering Howell-158, found to be missing in the prior art. (Ex. 1003 at 65-66 (response), 37 (notice of allowance).)

Finally, Petitioner again argues that the examiner did not discuss Kokonaski-999 and Howell-158 in a rejection and that the two references are therefore new.

³ Ex. 1003 at 233-35 (May 21, 2013 search report for PCT/US2011/061495), 258-263 (May 21, 2013 search report for PCT/US2011/061505); *id.* at 96 (signed IDSs listing the May 21, 2013 search report for PCT/US2011/061505; the May 21, 2013 report for PCT/US2011/061495).

(Petition 82-83.) But as explained above, the Board has expressly confirmed that references need not have been discussed in a rejection to be considered redundant. *See Medtronic*, IPR2021-00310, Paper 9 at 26; *Advanced Bionics*, IPR2019-01469, Paper 6 at 7-8.

Neither Ground 5 nor Ground 6 presents any new prior art disclosure, as *the same* references were previously reviewed by the examiner.

* * *

Petitioner asks the Board to reconsider the same or substantially the same prior art previously considered by the examiner. Petitioner's reliance on two allegedly new, duplicative references does not insulate the petition from discretionary denial where the new references do not distinguish Petitioner's grounds from arguments previously considered by the Office. *Advanced Bionics*, IPR2019-01469, Paper 6 at 14-17 (denying institution despite petitioner's combining a previously examined reference with three new references, finding new references duplicative of disclosure and arguments already considered by the Office).

B. Petitioner Makes No Claim that the Examiner Erred During Prosecution

Becton Dickinson factors (c), (e), and (f) relate to whether the petitioner has demonstrated a material error by the Office. *Advanced Bionics*, IPR2019-01469, Paper 6 at 10; *see Becton Dickinson*, IPR2017-01586, Paper 8, 17–18 (designated as

informative). Here, Petitioner asserts that the examiner “failed to appreciate the teachings of Howell-596, Howell-158, Hattori-913, or Kokonaski-999” (Petition at 85) and cites *Quasar* to support its assertion that citation of a reference in an IDS alone, and not in a rejection, is itself evidence of a material error. (Petition at 84.) *See also, Quasar Sci. LLC v. Colt Int’l Clothing, Inc.*, IPR2023-00611, Paper 10 at 14 (PTAB Oct. 10, 2023). *Quasar* supports no such conclusion.

The Board in *Quasar* reviewed a petition which cited two references previously presented to the Office as part of an IDS and four new references alleged to be substantially similar to references listed in an IDS or the examiner’s search results, ***none of which*** were ever substantively discussed. *Quasar*, IPR2023-00611, Paper 10 at 13-14. Within this context, the Board explained that “[i]f the record of the Office’s previous consideration of the art is not well developed or silent, then a petitioner may show the Office erred by overlooking something persuasive.” *Id.* at 14. The Board declined to exercise its discretion in *Quasar* where the petitioner “demonstrate[d] that the Office overlooked the prior art’s teachings of the limitations that were the basis for allowing the challenged claims.” *Id.* at 15.

Petitioner here does not allege any specific examiner error as to Kokonaski-166 or Kokonaski-999. *See* Petition at 84-85. The only specific error Petitioner alleges is that the Board overlooked Howell-158’s disclosure of an alleged

“insulating layer”—that could then purportedly be added to other references already considered. Petition at 84. In support of this allegation, Petitioner relies on a single paragraph of Howell-158, which merely discloses double-sided dielectric tape. Petition at 22-23 (citing Ex. 1006 (Howell-158) at [0053]).

The examiner did not err. The disclosure of Howell-158 to which Petitioner cites discloses only double-sided dielectric tape, of which one side is stuck to the circuit board and the other is stuck to the temple face. Petition at 22-23 (citing Ex. 1006 (Howell-158) at [0053]). Howell-158 then teaches that an “adhesive can be used to glue the two faces of the temple piece together.” (Ex. 1006 at [0053].) The examiner would have correctly found such a disclosure irrelevant, because applying that tape to the other prior art before the Patent Office (and on which Petitioner relies) would have nullified stated benefits of those references. *Advanced Bionics*, IPR2019-01469, Paper 6 at 9 (“If reasonable minds disagree regarding the purported treatment of the art or arguments, it cannot be said that the Office erred in a manner material to patentability.”).

For example, Howell-596 (just like Howell-158) discloses the inclusion of a UV detection system—i.e., a circuit board—within eyewear frames. (Ex. 1004 at [0189], [0194]; Ex. 1006 at .) As Howell-596 explains, it is critical that the UV sensor on the circuit board be left exposed to light outside of the frames in order to

function—therefore, making it impractical to wrap the circuit board in double-sided tape. (Ex. 1004 at [0189], [0194].)

Kokonaski-166 and Kokonaski-999 are both directed to eyewear which advantageously has a removable circuit board. (Ex. 1008 at [0098]; Ex. 1009 at Abstract.) By adhering the circuit board within the frames using double-sided tape stuck to the circuit board, it would be prohibitively difficult or impossible to remove the circuit board. (*See id.*)

The examiner made no error in issuing the '541 patent over Howell-158, Kokonaski-166, and Kokonaski-999, and Howell-596 offers no new disclosure. Even if Hattori-913 provides new disclosure, such disclosure is only relevant to two dependent claims under two grounds, and it would be a waste of Board and party resources to duplicate so much of the Patent Office's previous review. *See Monolithic Power*, IPR2020-01348, Paper 19 at 12-13. Accordingly, the *Advanced Bionics* framework supports discretionary denial of institution under Section 325(d) and/or Section 314.

IV. CONCLUSION

For the foregoing reasons, Patent Owner respectfully requests that the Board exercise its discretion to deny institution.

Patent Owner's Preliminary Response to
Petition for Inter Partes Review
Patent No. 8,905,541

Date: October 11, 2024

Respectfully submitted,

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CERTIFICATION OF WORD COUNT

The undersigned hereby certifies that the portions of the above-captioned **PATENT OWNER'S RESPONSE** specified in 37 C.F.R. § 42.24 have 6,409 words, in compliance with the 14,000 word limit set forth in 37 C.F.R. § 42.24. This word count was prepared using Microsoft Word 365 v.2022.

Date: October 11, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing **PATENT OWNER'S PRELIMINARY RESPONSE** and all supporting **EXHIBITS 2001 – 2012** were served by filing the documents through the Patent Trial and Appeal Case Tracking System (P-TACTS) on October 11, 2024 and courtesy copies were also served via electronic mail, in their entireties on the following:

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