

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
SAMSUNG ELECTRONICS CO., LTD.; and
SAMSUNG ELECTRONICS AMERICA, INC.
Petitioners,

v.

MULLEN INDUSTRIES LLC,
Patent Owner.

Case No. IPR2025-00021
U.S. Patent No. 11,096,039

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

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Pursuant to 35 U.S.C. § 42.75, Mullen Industries LLC (“Patent Owner” or “Mullen”) submits this Request for Director Review of the Board’s decision (“DI”) instituting *Inter Partes Review* of U.S. Patent No. 11,096,039 (“the ’039 Patent”).

As detailed herein, the Board abused its discretion by erring in its fact-finding as to *Fintiv* factors 1, 3, 4, 5, and 6. Here, the inventor, Mr. Jeffrey D. Mullen, is the sole member of the Plaintiff Mullen Industries LLC in parallel district court litigation against the Samsung Petitioners that will ***imminently commence trial*** in five months in November 2025. The Samsung Petitioners’ request to drastically multiply the proceedings by adding more than 10 IPRs to what is presently a single district court case is the epitome of waste and inefficiency and should be flatly rejected.

I. LEGAL STANDARD FOR DIRECTOR REVIEW

Director Review of a Board’s decision on institution aims to “correct errors at the institution stage, for example, to avoid unnecessary trials for patent owners.” USPTO, Revised Interim Director Review Process, §2.B (updated Mar. 18, 2025). The Director reviews decisions to institute presenting “(a) an abuse of discretion, (b) important issues of law or policy, (c) erroneous findings of material fact, or (d) erroneous conclusions of law.” *Id.* An abuse of discretion is found if a decision: (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact finding; or (4) involves a record that contains no evidence on which the Board could rationally base its decision.

Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd., 821 F.3d 1359, 1367 (Fed. Cir. 2016).

II. FACTUAL BACKGROUND CONCERNING THE *FINTIV* FACTORS IN THIS PROCEEDING

The district court trial date is set for November 3, 2025, which is more than six months *before* the earliest expected date of a FWD (mid-May 2026) in this Petition, and the District Court *denied* Petitioner’s motion to transfer venue. In light of these undisputed facts, the Board properly concluded that *Fintiv* factor 2 favors exercising the Board’s discretion to *deny institution* under 35 U.S.C. § 314(a). This should have carried through the Board’s analysis and resulted in denial of institution, but erroneously, it did not and unless corrected the Board’s decision stands to unnecessarily waste resources of the Parties and the Board.

The Board’s analysis of the remaining *Fintiv* factors contains many errors. As to **factor 1**, the Board concluded, in error, that the factor is neutral because “the district court denied Samsung’s motion to stay ‘**WITHOUT PREJUDICE** to refile of the same within fourteen (14) days following the PTAB’s institution decision on the last of the pending IPRs’” and “decline[d] to speculate whether the district court will grant a stay.” DI at 8-9 (quoting Ex. 2008, 3) (emphasis in original). The Board failed to consider specific evidence in the form of Judge Gilstrap’s prior orders on requested stays pending IPRs in analogous

circumstances—*denying* a stay in each instance—which demonstrate that Judge Gilstrap will invariably deny any potential future request for a stay here too.

As to **factor 3**, the Board concluded in error that “much work remains in the district court case as it relates to invalidity because discovery is in its early stages and a *Markman* hearing has not yet occurred.” DI at 10. The Board acknowledged that “the filing of the Petition does not seem diligent,” which should have weighed in favor of denying institution, but erroneously determined that this factor is neutral because purportedly “the timing overall does not outweigh the limited investment in the district court litigation.” *Id.* The Board was wrong. The parties have already completed virtually *all* fact discovery (i.e., fact discovery closes on May 30, 2025) and the parties will serve *all* opening expert reports on May 30, 2025 as well. *Markman* briefing is also complete. Accordingly, the Board’s findings as to factor 3 are not supported by the facts and are erroneous.

As to **factor 4**, the Board referenced and placed undue emphasis on Petitioner’s post-petition stipulation to “not pursue in the [parallel district court] litigation any grounds that were raised or reasonably could have been raised in the IPR.” DI at 10 (citing Ex. 1079 and *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12 (PTAB Dec. 1, 2020)). The Board concluded that “Petitioner’s stipulation mitigates some, but not all of the concerns of overlap, and weighs against exercising discretionary denial.” *Id.* However, the Board *ignored* or

failed to properly weigh the undisputed facts that Petitioner’s invalidity contentions include a plethora of invalidity theories, the majority of which relates to several “*device art*” or “*systems prior art*” references, much of which is offered for obviousness based on combinations with the same prior art at issue in this IPR. Therefore, Petitioner’s post-petition stipulation is essentially meaningless, duplicative of the grounds raised in the IPR, and will *not* reduce the burden on the district court or the parties in that proceeding. Moreover, adding to the Board’s error, Patent Owner requested leave to file—before the Board issued its Institution decision—a letter that it sent to Petitioners containing a stipulation relating to the district court case. As noted in the correspondence to the Board, “[e]ach stipulation states that, if the Board permits the Patent Owner to file the letter as an exhibit in the corresponding IPR proceeding and denies institution of the IPR proceeding, Patent Owner will not assert in any future district court action against Samsung any claims of the challenged patent that have not been elected in the Litigation.” This was highly significant as it further confirms that instituting this IPR is wasteful, and the Board’s failure to consider Patent Owner’s stipulation as part of its discretionary analysis was erroneous and likewise warrants Director review and reversal.

As to **factor 5**, the Board acknowledged that Mullen and the Samsung entities are parties in both this proceeding and the district court litigation. Nevertheless, the Board determined that this factor is neutral because Google LLC is not a party in the

district court litigation. DI at 11. The fact that Google LLC is an additional co-Petitioner in these IPR proceedings is of no moment—as prior precedent shows—and the Board’s contrary conclusion was erroneous and, too, warrants Director review and reversal.

As to **factor 6**, the Board incorrectly concluded that “[t]he issues raised by Petitioner are similar, if not identical, to those raised in IPR2023-00096, in which we instituted” and that “at this stage of the proceeding, we find that Petitioner has shown that at least some claims of the ’039 patent recite well-known and obvious features of remotely locating a first wireless device.” DI at 11-12. This was clearly erroneous, as Patent Owner pointed out that Petitioner failed to address known disputes and claim construction issues, and because Patent Owner cited plain expert admissions from such prior proceedings. The Board overlooked these facts, and compounded its error by improperly attributing alleged showings to the Petition that, in fact, were not contained in the Petition. The Board also improperly placed undue weight on this factor, which cannot outweigh the inefficiency and waste that will be perpetrated by instituting this IPR instead of having all validity challenges adjudicated in the single district court case that will be tried in November 2025.

III. THE BOARD ERRED IN ITS ANALYSIS OF *FINTIV* FACTORS 1, 3, 4, 5, AND 6

The Board’s factual findings as to factors 1, 3, 4, 5, and 6 are fundamentally flawed and warrant Director review. Under a proper analysis of the *Fintiv* factors, each of the factors 1-6 favor exercising discretion to deny institution in favor of the district court trial that will begin on November 3, 2025. Thus, Director review is warranted, and the Director should reverse the DI and deny institution under 35 U.S.C. § 314(a).

A. Factor 1

As to **factor 1**, the Board concluded that the factor is neutral because “the district court denied Samsung’s motion to stay ‘**WITHOUT PREJUDICE** to refiling of the same within fourteen (14) days following the PTAB’s institution decision on the last of the pending IPRs’” and “decline[d] to speculate whether the district court will grant a stay.” DI at 8-9 (quoting Ex. 2008, 3) (emphasis in original). The Board failed to consider “specific evidence” of whether or not the district court will grant a stay in the individual case at issue. *Sand Revolution II, LLC v. Continental Intermodal Group – Trucking LLC*, IPR2019-01393, Paper 24 at 7 (PTAB June 16, 2020) (informative). In particular, the Board failed to consider specific evidence in the form of Judge Gilstrap’s prior orders on requested stays pending IPRs in analogous circumstances—*denying a stay in each instance*—which

demonstrate that Judge Gilstrap will invariably also deny any potential future request for a stay here too. Notably, the Board will not even issue its institution decisions in the last of the pending IPRs until at least July 2025, which will be less than four months before the district court trial will begin on November 3, 2025. Moreover, a Final Written Decision (if any) in this IPR would be received approximately *six months after the district court trial* and approximately at least *eight months after the district court trial* in Petitioner’s third set of IPRs. Judge Gilstrap invariably denies motions to stay district court litigation pending IPRs in such circumstances. *See, e.g., MyPort, Inc. v. Samsung Elecs. Co., Ltd.*, Case No. 2:22-CV-00114-JRG, Order, Dkt. 73 at 4-5 (E.D. Tex. June 13, 2023) (denying a motion to stay when trial was scheduled and “the PTAB [final written] decision is not due until over two months after jury trial is set to begin”) (Ex. 2009 at 4-5); *Solas OLED Ltd. v. Samsung Display Co., Ltd.*, Case No. 2:19-CV-00152-JRG, 2020 U.S. Dist. LEXIS 125973, at *6 (E.D. Tex. July 17, 2020) (denying a motion to stay because “trial is only a few months away” and PTAB final written decisions would have been issued months after the scheduled trial) (Ex. 2010 at *6); *Oyster Optics, LLC, v. Infinera Corp.*, Case No. 2:19-CV-00257-JRG, Order, Dkt. 87 at 4-5 (E.D. Tex. July 17, 2020) (denying a motion to stay because claim construction briefing was finished and “[f]act discovery is closing in about a month and trial is only six months away.”)

(Ex. 2011 at 4-5). The Board’s failure to consider this specific evidence was an abuse of discretion and warrants Director review and reversal.

B. Factor 3

As to **factor 3**, the Board concluded that “much work remains in the district court case as it relates to invalidity because discovery is in its early stages and a *Markman* hearing has not yet occurred.” DI at 10. The Board noted that “Petitioner filed the Petition eight months after Patent Owner filed its complaint in district court” and that “[t]he instant Petition largely copies from previously filed petitions.” *Id.* Although the Board acknowledged that “the filing of the Petition does not seem diligent,” the Board determined that this factor is neutral because “the timing overall does not outweigh the limited investment in the district court litigation.” *Id.*

The Board failed to properly consider that fact discovery ends May 30, 2025 and the Parties serve opening expert reports on the same day. In addition, the Parties have prepared and exchanged infringement and invalidity contentions, presented initial disclosures, served many discovery requests, taken depositions, conducted numerous expert reviews of produced source code (including both source code produced by Petitioner as well as source code produced by a non-party by way of subpoena), and are in the midst of additional substantial fact discovery that has already resulted in document production in the district court litigation of over 400,000 pages from both parties and non-parties. Moreover, claim construction is

fully briefed in the district court case (including the *same* claim term identified for construction in this proceeding). And again, the district court trial is scheduled for November 3, 2025, which is approximately *six months before* any Final Written Decision would issue in this IPR.

C. Factor 4

As to **factor 4**, the Board referenced Petitioner’s post-petition stipulation to “not pursue in the [parallel district court] litigation any grounds that were raised or reasonably could have been raised in the IPR.” DI at 10 (citing Ex. 1079 and *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12 (PTAB Dec. 1, 2020)). The Board further noted that “the defendant’s invalidity contentions include system prior art and other invalidity defenses rooted on lack of written description, indefiniteness, enablement, and obviousness-type double patenting that cannot be asserted in an IPR.” DI at 10 (citing Ex. 2014, 116–119, 125–129). Although the Board acknowledges that Petitioner’s stipulation only “mitigates some, but not all of the concerns of overlap,” the Board nevertheless erroneously determined that factor 4 weighs against exercising discretionary denial. However, the Board *overlooked* facts showing that Petitioner subverts the very purpose of the stipulation proposed by the Board in *Sotera Wireless, i.e.*, to “ensure[] that an *inter partes* review is a ‘true alternative’ to the district court proceeding.” *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12 at 19 (PTAB Dec. 1, 2020).

First, in the parallel district court proceeding, Petitioner is relying on purported “device art” that is not materially different than patents or printed publications that could have been raised in this IPR. Prejudicially, this will lead to the situation where Patent Owner must litigate the same validity issues in both forums because in district court “IPR estoppel does **not** apply to device art, **even when** that device art is cumulative of patents and printed publications that were or could have been asserted in a prior IPR.” *Prolitec Inc. v. ScentAir Techs., LLC*, No. 20-984-WCB, 2023 WL 8697973 (D. Del. Dec. 13, 2023), at *23 (emphases added).

Second, even worse, Petitioner’s invalidity contentions in the district court include many invalidity grounds **combining** the “device art” or “system prior art” with the **same** references in this IPR. Thus, the majority of Petitioner’s invalidity contentions will not be mooted by Petitioner’s *Sotera* stipulation despite clear overlap in subject matter. *See Motorola Solutions Inc. v. Stellar, LLC*, IPR2024-01205, Paper 19 at 3 (PTAB March 28, 2025) (reversing Board and denying institution because “Petitioner’s invalidity arguments in the district court are more expansive and include combinations of the prior art asserted in these proceedings with unpublished system prior art, which Petitioner’s stipulation is not likely to moot”). Accordingly, the idea that Petitioner’s stipulation here would significantly reduce the issues before the district court (or that this proceeding is a “true

alternative” to the district court proceeding) is not credible and it was erroneous for the Board to reach such a conclusion.

Notably, on May 2, 2025, Patent Owner provided a further reduced election of asserted claims in the underlying litigation. On May 8, 2025, Patent Owner requested authorization to file a copy of a letter that Patent Owner sent to Petitioners containing a stipulation related to the co-pending parallel district court. As noted in the correspondence to the Board, “[e]ach stipulation states that, if the Board permits the Patent Owner to file the letter as an exhibit in the corresponding IPR proceeding and denies institution of the IPR proceeding, Patent Owner will not assert in any future district court action against Samsung any claims of the challenged patent that have not been elected in the Litigation.” This further confirmed that there is no reason for the Parties and the Board to proceed in this IPR because doing so will unnecessarily multiply the proceedings. The Board’s apparent failure to consider Patent Owner’s stipulation as part of its discretionary analysis was an abuse of discretion, clearly erroneous, and arbitrary.

Under the facts here, the Board’s finding that factor 4 does not favor exercising discretion to deny institution was a clearly erroneous factual finding that warrants Director review and reversal.

D. Factor 5

As to **factor 5**, the Court determined that this factor is neutral because Google LLC is a party in this proceeding but is not a party in the district court litigation. DI at 11. Although the Board acknowledged that Mullen and the Samsung entities are parties in this proceeding and the district court litigation, the Board reasoned that “the involvement of a non-defendant, even if a named real party in interest in this proceeding” renders factor 5 neutral. *Id.*

The Samsung Petitioners are defendants in the parallel litigation. “Because the petitioner and the defendant in the parallel proceeding are the same party, this factor weighs in favor of discretionary denial.” *Fintiv*, IPR2020-00019, Paper 11 at 15. According to prior precedent, the addition of Google as a co-Petitioner does not alter the analysis. *Fintiv*, IPR2020-00019, Paper 11 at 14 (“Even when a petitioner is unrelated to a defendant, however, if the issues are the same as, or substantially similar to, those already or 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”); *Mylan Laboratories Ltd. v. Janssen Pharmaceuticals N.V.*, IPR2020-00440, Paper 17 at 12 (PTAB Jan. 14, 2021) (denying institution under *Fintiv* in light of an upcoming district court trial notwithstanding that the petitioner was *not* the defendant in that trial), *aff’d*, 989 F.3d 1375, 1378 (Fed. Cir. 2021); *Teso LT, UAB v. Luminati Networks Ltd.*, IPR2021-00249, Paper 12 at 11

(PTAB June 2, 2021) (“Given the commonality of most of the petitioners in this proceeding and the defendants in the [parallel] district court case, and the close relationship of all the petitioners, we find that this factor favors exercising our discretion to deny institution”).

Moreover, Google LLC chose to join with the Samsung Petitioners as a party to the IPR, rather than file its own petition, now or at a later date. Google LLC is indeed related to, and collaborating with, the Samsung entities in both the district court case and these proceedings. The Samsung Petitioners are the defendants in the upcoming November 3, 2025 district court trial, and Petitioner Google LLC, while not a named party in the district court proceeding, is voluntarily participating on Samsung’s behalf in the district court. Specifically, in the district court case Google LLC has (i) voluntarily submitted declarations on Samsung’s behalf, (ii) produced documents and source code in response to subpoenas, and (iii) is represented by the same outside counsel that represents the Samsung entities. *See* Ex. 1036 at 2-3 (identifying counsel representing the Samsung entities, including, *e.g.*, Messrs. Trac, Snyder, and Liang, and Ms. Simmons, who also represent Google LLC in connection with the district court case); Ex. 2016 (same counsel representing Google LLC in the district court case). The Samsung Petitioners and co-Petitioner Google LLC are thus related, collectively involved in the district court case, and cooperating in the district court case on Samsung’s behalf. Google LLC’s undeniable interest in the

outcome of the litigation against Samsung will be resolved on the same schedule as the Samsung Petitioners' interests in that outcome.

Accordingly, the Board's finding that factor 5 does not weigh in favor of denying institution was clearly erroneous and warrants Director review and reversal.

E. Factor 6

As to **factor 6**, the Board concluded that "[t]he issues raised by Petitioner are similar, if not identical, to those raised in IPR2023-00096, in which we instituted" and that "at this stage of the proceeding, we find that Petitioner has shown that at least some claims of the '039 patent recite well-known and obvious features of remotely locating a first wireless device." DI at 11-12.

Petitioners' arguments on the merits (including Petitioners' failure to address known claim construction disputes) do not meet the high standard required for an invalidity challenge. *See, e.g.*, Ex. 2007 at 4 (even now-rescinded policy requiring "compelling, meritorious challenges ... at the PTAB" to consider allowing an IPR to proceed "where district court litigation is proceeding in parallel"); *see id.* ("Compelling, meritorious challenges are those in which the evidence, if unrebutted in trial, would plainly lead to a conclusion that one or more claims are unpatentable by a preponderance of the evidence."); *see also Vector Flow, Inc. v. HID Glob. Corp.*, IPR2023-00353, Paper 8 at 23-24 (PTAB July 27, 2023) (same). Here, the Petition (i) strategically chose not to address known disputes over the claim terms'

meaning and (ii) misreads both the claims and the cited references, which demonstrates the weakness of the Petition and favors denial of institution. The Petition also ignored expert admissions from the prior proceedings that demonstrate the nonobviousness of the claimed inventions. Paper 7 (Mullen’s Preliminary Response) at 48-49 (citing Ex. 2015, 17:6-12, 114:12-25). In addition, as noted above, by overlooking that the Petition did not address, much less resolve, these issues, the Board erroneously attributed alleged showings to the Petition that were nowhere contained in the Petition.

There is no substantial challenge, much less a “compelling challenge,” of invalidity on the merits of the Petition. Thus, the Board’s factual findings as to factor 6 are fundamentally flawed and, too, warrant Director review and reversal.

IV. CONCLUSION

For the above-described reasons, Patent Owner respectfully requests that the Director vacate the Institution Decision and terminate this proceeding.

Dated: May 23, 2025

Respectfully submitted,

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