

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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SKECHERS U.S.A., INC.,

*Petitioner,*

v.

NIKE, INC.,

*Patent Owner.*

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Case IPR2025-00141

Patent No. 8,266,749

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**PATENT OWNER'S SUR-REPLY  
TO PETITIONER'S REPLY TO POPR**

Skechers' Reply ventures considerably outside the bounds of what it requested and the Board authorized. Ex.2007. As such, Skechers' discussion of *General Plastics* factors 2-7 and *Fintiv* factors 2-6 should be given no weight.<sup>1</sup> Nonetheless, for completeness, Nike addresses each of Skechers' arguments, including those that are impermissible.

In its Reply, Skechers fails to justify, let alone cure, any of the deficiencies of its Petition in IPR2025-00141 against Nike's U.S. Patent No. 8,266,749 ("the '749 Patent"). Skechers does not deny that it exploited the fulsome record from lululemon's IPR2024-00460 (the "lululemon IPR") as roadmap for its Petition. It attempts to point the finger at Nike rather than take responsibility for its own strategic posturing. For the reasons expressed in the POPR and herein, the Board should exercise its discretion and deny institution. Paper 6 ("POPR"), 31-52.

#### **I. Skechers' Gamesmanship Warrants Denial Under *General Plastic***

Skechers does not deny its road-mapping based upon the record of the lululemon IPR. Instead, Skechers points to Nike's purported delay in bringing suit. Skechers' arguments are irrelevant and unconvincing.

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<sup>1</sup> Even more egregious, Skechers insisted that a Reply was necessary to, in part, address the rescission of the 2022 *Fintiv* Guidance. Ex.2007, 1-2. Skechers does not discuss the rescission of this Guidance *at all* in its Reply.

**Factor One:** Skechers incorrectly argues that factor one “necessarily outweighs” the other factors due to the alleged lack of a “significant relationship” between Skechers and lululemon. Reply, 1-2. But, here, Skechers created a relationship with lululemon by openly admitting that it used lululemon’s petition as a roadmap. POPR, 42-44. This admitted roadmapping creates an implicit relationship between Skechers and lululemon. *Ericsson Inc. v. Uniloc 2017, LLC*, IPR2019-01550, 2020 WL 1285387, \*5 (P.T.A.B. Mar. 17, 2020) (“The instant Petitioner’s decision to use the prior petitions as a roadmap for its own petition ties the interests of all of the petitioners together.”). And in any case, the relationship between the petitioners has no impact on factors two through seven. *Google LLC v. Uniloc 2017, LLC*, PR2019-01584, 2020 WL 6115402, \*2 (P.T.A.B. Oct. 16, 2020) (“[T]he consideration of the second through seventh factors does not require a showing of a specific relationship between the petitioners to consider those factors.”).

**Factor Two:** Factor two relates to knowledge of the prior art, not time spent evaluating it. Skechers does not deny it was aware, or should have been aware, of the asserted art after lululemon filed its petition. Reply, 2; *see also* POPR, 43.

**Factors Three – Five:** Skechers lumps these factors together, yet they are directed to markedly different topics. Reply, 2. Factor three relates to roadmapping. Skechers is entirely silent to this factor. Reply, 2. The reason is apparent: Skechers

expressly admitted that it delayed filing its petition until it had received the benefit of the entire lululemon IPR record. POPR, 43-44; Ex.2003, 1 (“please note some of the similarities between the two petitions filed yesterday and the already instituted lululemon IPRs against those same patents”); Ex.2004, 1 (“But the relationship between some of the art and arguments in those two petitions and the instituted lululemon petitions is one example of the merits of Skechers’ petitions.”).

Turning to factors four and five, Skechers, without support, blames Nike’s purported “staged litigations” as the reason for its delay. But Skechers does not deny that it could have filed this petition, which is admittedly “similar” to lululemon’s petition, in April 2024 after serving its Preliminary Invalidity Contentions. POPR, 19-20. Skechers’ intentional delay should not be rewarded.

**Factors Six and Seven:** Skechers does not deny that its delay needlessly taxes the finite resources of the Board. Reply, 2. Skechers’ wait-and-see approach must face consequences.

## **II. The Updated *Fintiv* Guidance Warrants Denial of Institution**

The Board’s updated *Fintiv* guidance (the “2025 Guidance”) makes clear that “the [*Fintiv*] factors considered in the exercise of discretion are part of a balanced assessment of all the relevant circumstances in the case.” Ex.2008, 3. Here, a balance of all the relevant circumstances warrant discretionary denial.

**Factor One:** Skechers' Reply heavily emphasizes the existence of the stay in the parallel litigation. Reply, 3-7. But "no single [*Fintiv*] factor is dispositive. Rather ... [the Board] take[s] a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review." *Samsung Elec. Co., Ltd. v. Clear Imaging Rsch., LLC*, IPR2020-01551, 2021 WL 628829, \*3 (P.T.A.B. Feb. 17, 2021). What's more, the parallel litigation is only stayed "pending institution decisions from the PTAB." Ex.1067, 8. Thus, the District Court is fully prepared to resume the case should the Board deny institution. The stay should be lifted, and the parallel litigation can proceed with minimal delay.

Furthermore, Skechers simply dismisses that it has not filed a *Sotera* stipulation. But under the 2025 Guidance, a *Sotera* stipulation remains "highly relevant." Ex.2008, 2-3. Skechers' argument effectively voids *Sotera* by arguing that failing to make a stipulation and presuming that the Board will institute proceedings is equivalent to making a *Sotera* stipulation. This makes no sense. Skechers is preserving its right to pursue the same arguments it advances in the petition in the District Court if the Board denies institution. It would fly in the face of *Fintiv* and *Sotera* were the Board to accept Skechers' argument as the basis to decline to exercise its discretion. Skechers has signaled that it will raise the same arguments in the District Court. The Board should conserve its finite resources and let Skechers do so.

**Factor Two:** Skechers does not deny that, should the stay be lifted, the parallel litigation can resume with minimal delay and a trial can take place on or about June 2026, the same month of the expected Final Written Decision date. Skechers also does not deny that its invalidity defense in the parallel litigation will involve IPR-ineligible challenges under 35 U.S.C. § 112. Skechers only speculates that the stay is unlikely to be lifted due to the number of proceedings at issue. Reply, 5. But this has no bearing on whether or not to deny institution *in this proceeding*. See *Hillman Grp., Inc. v. Hy-Ko Prod. Co. LLC*, IPR2022-00168, 2022 WL 1462743, \*4 (P.T.A.B. May 9, 2022) (simultaneously denying institution of four related proceedings). Additionally, due to the similarity of discretionary issues raised across the related proceedings, Skechers' petitions likely rise and fall together.

**Factor Three:** Skechers wholly ignores the extensive record evidence of the current investment in the parallel proceeding. Skechers does not and cannot deny that substantial activity in support of the parallel litigation has taken place. POPR, 50-51. Skechers instead relies on cherry-picked statements from the Court's stay order. Reply, 5-6. But Skechers omits that the District Court expressly found that "the parties and the Court have invested a significant amount of resources" and "work" in the parallel litigation. Ex.1067, 4. Thus, "the current investment in invalidity and construction contentions" weighs in favor of discretionary denial. *Cisco Sys., Inc. v. Ramot at Tel Aviv Univ.*, IPR2020-00122, Paper 15 at 8-9

(P.T.A.B. May 15, 2020); *see also* *TCL Elec. Holdings Ltd. v. Univ. of Rochester*, IPR2024-01245, Paper 10, 12-13 (P.T.A.B. Feb. 13, 2025).

**Factor Four**: Skechers cannot deny that the validity of the '749 Patent is central to both this proceeding and the parallel litigation. POPR, 51. Skechers instead quibbles with Nike's assertion that the duplication of efforts from the Board would be wasteful and inefficient, citing the potential for issue simplification should institution be granted. Reply, 6. But the District Court already found that Skechers' "potential simplification" argument is "speculative," as the Board has not decided whether to institute any of its petitions. Ex.1067, 5. And again, Skechers' failure to file a *Sotera* stipulation, or even a more narrow one, weighs in favor of discretionary denial. *E.g., Samsung Elec. Co., Ltd. v. Secure Wi-Fi LLC*, IPR2024-01369, Paper 10, 14-15 (P.T.A.B. Mar. 25, 2025)

**Factor Five**: The parties are undeniably the same in both this proceeding and in the parallel litigation. *See Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12, 19 (PTAB Dec. 1, 2020) (precedential as to Section II.A).

**Factor Six**: Skechers argues that institution is warranted due to purported "strong merits" of its Petition. Reply, 6-7. But as discussed in the POPR, Skechers' arguments on the merits suffer severe deficiencies such that it is unable to demonstrate that there is a reasonable likelihood of success for any challenged claim. POPR, 15-30. Thus, Skechers' "strong merits" argument is toothless.

Skechers' assertion that there is no evidence of delay for strategic reasons is belied by its own admissions. Reply, 7; Ex.2004, 1-2 (Skechers filed its petitions at a time when it knew that Nike would "be doing 'triple duty' by simultaneously pursuing litigations against Skechers, New Balance, and lululemon"). Indeed, the District Court found that the potential undue prejudice to Nike weighed in favor of denying Skechers' stay motion, in part due to Skechers' delay in filing its petitions until the end of the statutory period. Ex.1067, 7. Coupled with the appropriateness of discretionary denial under *General Plastic* and 35 U.S.C. §325(d), a holistic review of all relevant considerations makes clear that discretionary denial is warranted.

Dated: April 11, 2025

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies service on the Petitioner, pursuant to 37 C.F.R. §42.6(e) and by agreement of counsel, by electronic (e-mail) delivery of a true copy of the foregoing **PATENT OWNER'S SUR-REPLY TO PETITIONER'S REPLY TO POPR**, which was served on April 11, 2025 to the following Counsel for Petitioner via e-mail:

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