UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SKECHERS U.S.A., INC.,

Petitioner,

v.

NIKE, INC.,

Patent Owner.

Case IPR2025-00150
Patent No. 9,060,562

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.2018. As such, Skechers' discussion of *Fintiv* factors 2-6 should be given no weight.[1] 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 PR2025-00150 against Nike's U.S. Patent No. 9,060,562 ("the '562 Patent"). Skechers 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"), 16-35.

I. 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.2019, 3. Here, a balance of all the relevant circumstances warrant discretionary denial.

[1] Even more egregious, Skechers insisted that a Reply was necessary to, in part, address the recission of the 2022 *Fintiv* Guidance. Ex.2018, 1-2. Skechers does not discuss the recission of this Guidance *at all* in its Reply.

Factor One: Skechers' Reply heavily emphasizes the existence of the stay in the parallel litigation. Reply, 1-5. 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.2019, 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, 2-3. 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, 31-33. Skechers instead relies on cherry-picked statements from the Court's stay order. Reply, 3-4. 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 '562 Patent is central to both this proceeding and the parallel litigation. POPR, 33-34. 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, 4. 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, 4-5. 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, 35-48. 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, 5; Ex.2012, 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 35 U.S.C. §325(d), a holistic review of all relevant considerations makes clear that discretionary denial is warranted.

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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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