

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RØDE MICROPHONES, LLC, and
FREEDMAN ELECTRONICS PTY LTD.,

Petitioner,

v.

ZAXCOM, INC.,

Patent Owner.

IPR2025-00231

U.S. Patent No. 7,929,902

**PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW
UNDER 37 C.F.R. § 42.75
OF PAPER 23, GRANTING INSTITUTION OF *INTER PARTES* REVIEW**

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GLOSSARY OF TERMS

“’307 Patent”	U.S. Patent No. 9,336,307 issued May 10, 2016
“’814 Patent”	U.S. Patent No. 8,385,814 issued February 26, 2013
“’902 Patent”	U.S. Patent No. 7,929,902 issued April 19, 2011
“BRI”	The broadest reasonable interpretation claim construction standard
“Challenged Claims”	Claims 1-6, 9, 10, 13, and 16-20
“DI”	Paper 23, Granting Institution of <i>inter partes</i> review of IPR2025-00231
“Director”	Coke Morgan Stewart, Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office
“Federal Circuit”	United States Court of Appeals for the Federal Circuit
“Freedman”	Petitioner Freedman Electronics Pty., Ltd.
“FWD”	PTAB Final Written Decision
“Guidance”	Interim Process for PTAB Workload Management (Mar. 26, 2025)
“IDS”	Information Disclosure Statement
“IPR”	<i>Inter Partes</i> Review
“Lectrosonics’ IPRs”	The Prior ‘902 IPR, Prior ‘814 IPR, and the Prior ‘307 IPR, collectively
“Motion to Terminate”	The Motion to Terminate filed in IPR2025-00231, Papers 15 (confidential), 16 (public redacted)
“Patent Owner”	Zaxcom, Inc.
“Petition”	The Petition filed in IPR2025-00231
“Phillips standard”	The claim construction standard set in <i>Phillips v. AWH Corp.</i> , 415 F.3d 1303 (Fed. Cir. 2005)
“POPR”	Patent Owner’s Preliminary Response in IPR2025-00231
“PTAB”	The Patent Trial and Appeal Board
“U.S. Supreme Court	The Supreme Court of the United States

Under 37 C.F.R. § 42.75, Patent Owner submits this Request for Director Review of the DI instituting IPR of the Challenged Claims of the '902 Patent. In the DI, the Board has contravened the Director's recent Guidance by failing to consider its other "Relevant Considerations," and ignoring subsequent Director decisions and relevant persuasive cases that followed. The Board also erred in analyzing *Fintiv* factors 1-3 and 6, failed to rely on any meaningful analysis of the merits under *Fintiv* factor 6, and has placed too much weight on this factor.

I. LEGAL STANDARD FOR DIRECTOR REVIEW

"[T]he Director may review any decision on institution under 35 U.S.C. 135, 314, or 324...[and] any interlocutory decision rendered by the Board in reaching that decision." *See* 37 C.F.R. § 42.75(a). "A party ...may file one request for Director Review of a decision ...instead of filing a request for rehearing of that decision." *See* 37 C.F.R. § 42.75(c). "A decision on institution...shall become the final agency decision unless: (1) [a] party requests rehearing or Director Review within the time provided." *See* 37 C.F.R. § 42.75(d)(1). "[T]he schedule for requesting rehearing or Director Review as to a decision on institution remain unchanged." *See* Guidance, pg. 2.

"Decisions related to compliance with the Board's procedures are reviewed for an abuse of discretion...'An abuse of discretion is found if the 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. THE DIRECTOR’S GUIDANCE AND PERSUASIVE AUTHORITY

The Director issued the Guidance on March 26, 2025 to bifurcate discretionary considerations from merits and other non-discretionary statutory considerations. Regarding discretionary considerations, the Guidance sets forth “considerations enumerated in existing Board precedent and the Consolidated Trial Practice Guide (Nov. 2019) ...[including]...settled expectations of the parties, such as the length of time the claims have been in force” (“Settled Expectations Consideration”). *See* Guidance, pg. 2.

Patent Owner did not specifically address the Guidance in its POPR because it had not yet been issued¹, but Patent Owner nonetheless addressed the facts regarding the Settled Expectations Consideration. Yet, in an abuse of its discretion, the Board’s DI focused solely on the *Fintiv* factors without any mention of the Guidance, the Settled Expectations Consideration, or the other considerations enumerated in the Guidance. Although the interim process described in the Guidance does not directly apply to this IPR, granting Director

¹ Patent Owner submitted its Preliminary Response on March 18, 2025. The Guidance was released on March 26, 2025.

Review and vacating the DI is consistent with the Guidance which gives the Director the power to decide these issues in order to “improve PTAB efficiency, maintain PTAB capacity to conduct AIA proceedings, reduce pendency in *ex parte* appeals, and promote consistent application of discretionary considerations in the institution of AIA proceedings.” Guidance, pg. 3.

The ‘902 Patent was issued in 2011, following its parent, the ‘443 Patent, which was issued in 2010. IPR2025-00231, Paper 8, Glossary of Terms at x. That is, the earliest priority date in the family dates back 15 years, and the ‘902 Patent has been in force for 14 years. Petitioners had long been on notice of the asserted patent. “The Petition was filed 14 months after the Complaint, Ex-2001, ECF1, was filed, and 44 months after Zaxcom notified Petitioners of its patent portfolio in a cease-and-desist letter. Ex-2009.” Paper 8 at 13.

Additionally, Zaxcom’s patents are listed as prior art in numerous subsequent patent application filings in the technical field including those of Freedman. Prior to receiving Zaxcom’s cease and desist letter (Ex-2009), Freedman filed an application for U.S. Patent No. 11,671,734 on February 23, 2021 along with an IDS (on the same date) listing three Zaxcom patents as relevant prior art: the ‘902 Patent, the ‘814 Patent, and the ‘307 Patent. Despite long standing knowledge of the ‘902 Patent and its family, Petitioners delayed over 44 months after receiving Patent Owner’s cease and desist letter and over

45 months after including the ‘902 Patent in its IDS, before filing the Petition. Through this delay, Petitioners have created a settled expectation of the claims’ patentability, an implicit expectation between the parties, and an acquiescence as to the patentability of the ‘902 Patent. In addition, Petitioners challenge solely claims left *unchallenged* in prior PTAB proceedings.

In the DI, the Board found *Fintiv* factor 1 to be neutral, factor 3 weighs slightly against denial of institution, factors 2 and 6 weigh against denial of institution, and factors 4 and 5 weigh in favor of denying institution. These findings, the factual underpinning of these findings, and the facts above regarding the Settled Expectations Consideration, are more favorable to Patent Owner than the comparable facts in the Director’s recent June 6, 2025, decision in *iRhythm, Inc. v. Welch Allyn, Inc.*, IPR2025-00363, Paper 10 (PTAB June 6, 2025) in which the Director denied institution. In *iRhythm*, the Director found that even though *Fintiv* factors 1 (high likelihood of a stay), 2 (a trial date later than projected FWD date), and 3 (little investment by the parties in the district court proceeding) weighed against discretionary denial, “settled expectations favor denial of institution” because “Petitioner’s awareness of Patent Owner’s applications and failure to seek early review of the patents favors denial and outweighs the above discussed [Fintiv] considerations.” *Id.* at 2.

The present Settled Expectations Considerations are also more

compelling than those in *Dabico Airport Sol'ns Inc. v. AXA Power APS*, IPR2025-00408, Paper 21 (PTAB June 18, 2025), in which the Director invoked them to deny institution. There, the patent had been in force “eight years, creating settled expectations.” *Id.* at 2. Here, the patents have been in force far longer: 15 years (the '443 Patent) and 14 years (the '902 Patent). While the '207 Patent has been in force for 6 years (compared to 8 as in *Dabico*), it ultimately claims priority to the '443 Patent, and in any event the Board overlooked analyzing the question entirely. *See Dabico* at 3 (noting there is “no bright-line rule on when expectations become settled,” citing the six-year statutory damages limitation under 35 U.S.C. § 286 as a comparator and explaining “the longer the patent has been in force, the more settled expectations should be.”). Likewise, while actual notice of patent infringement was not necessary to invoke the Settled Expectations Considerations in *Dabico*, actual notice of infringement here occurred 44 months before the Petition, making discretionary denial here far more compelling than in *Dabico*. The Board has erred in its conclusion of law in deciding its DI by failing to adhere to the Director’s Guidance and subsequent authority, resulting in an inconsistent application of discretionary considerations in the institution of AIA proceedings, and should therefore be overturned.

III. THE BOARD ERRED IN ITS FAILURE TO DECIDE PATENT OWNER’S MOTION TO TERMINATE PURSUANT TO 35 U.S.C. § 315(b)

PRIOR TO INSTITUTION

Patent Owner filed a June 2, 2025, Motion to Terminate this IPR under 35 U.S.C. § 315(b). Papers 15 (confidential), 16 (public redacted). Without ruling on the Motion, the Board instituted this IPR on June 16, 2025, stating: “[t]he parties’ briefing did not permit sufficient time to decide the motion prior to the three-month statutory deadline for determining whether to institute an inter partes review...We express no opinion at this time on Patent Owner’s motion to terminate, which will be decided in due course.” Paper 23 at 2.

The Board abused its discretion in granting institution prior to deciding the Motion as 35 U.S.C. § 314(b) mandates that “[a]n inter partes review **may not be instituted** if the petition requesting the proceeding is filed more than 1 year after the date on which the petitioner, real party in interest, or privy of the petitioner is served with a complaint alleging infringement of the patent” (emphasis added). The statute mandates a definitive pre-institution ruling on timeliness of the Petition as it places a threshold requirement on the Board’s ability to institute the Petition. Delaying decision of the Motion while instituting a Petition that may be time-barred under 35 U.S.C. § 315(b) results in inefficiencies and wasted time and cost for Patent Owner, Petitioners, and the USPTO and frustrates the Congressional intent behind 35 U.S.C. § 315(b). The U.S. Supreme Court has held that “Section 315(b)’s time limitation is integral to, indeed a condition on, institution. After all,

§315(b) sets forth a circumstance in which ‘[a]n inter partes review may not be instituted.’ Even...the Court of Appeals recognize that §315(b) governs institution.” *See Thryv, Inc. v. Click-To-Call Techs., LP*, 590 U.S. 45, 53-54 (2020). Lastly the Board’s decision not to review the Motion to Terminate frustrates the Director’s aim “to improve PTAB efficiency, [and] maintain PTAB capacity to conduct AIA proceedings.” *See Guidance*, pg. 3.

IV. THE BOARD ERRED IN ITS EVALUATION OF FINTIV FACTORS 1-3 AND 6

The Board properly concluded that *Fintiv* factors 4 and 5 favor exercising the Board’s discretion to deny institution under 35 U.S.C. § 314(a) but abused its discretion in failing to properly analyze the remaining *Fintiv* factors. When properly analyzed, all factors favor denial of institution.

As to factor 1, the Board concluded this factor is neutral stating: “Patent Owner contends that a stay...would be ‘unlikely’ to be granted ... Petitioner contends that Petitioner ‘intends to seek a stay’...but without specific evidence how the court will rule.” Paper 23 at 8. In the DI, the Board wholly ignores Patent Owner’s five-page explanation as to why a stay is unlikely to be granted, including the presence of seven patents in the litigation, only four of which are under PTAB challenge.

Subsequent events underscore this factor is not “neutral,” but favors denial. On June 26, 2025, nearly 20 months after filing the Complaint, the

Petitioners submitted a motion to stay, in response to which Judge Murphy maintained the July 9, 2025 Markman hearing date (*i.e.* partially denying the stay), while setting argument for remaining aspects of the requested stay to occur during the Markman hearing. That is, the district court has substantively ruled that at least the Markman hearing will not be stayed. The Board's assessment of this factor as neutral is an erroneous factual finding that warrants Director review and reversal as it ignores the failure of the Petitioners to request a pre-institution stay, Petitioners' lack of evidence that a stay would be granted if requested, and Patent Owner's showing that granting of a stay is unlikely. When properly assessed, Factor 1 weighs in favor of denial of institution.

The Board also erroneously assessed factor 2 stating: "the statutory deadline for the final written decision in this proceeding would be in June 2026. There is no trial date set in the district court case. *See* Ex. 1031, 3. Therefore, we find that factor 2 weighs against exercising discretion to deny institution." Paper 23 at 9. In its analysis, the Board ignores the Litigation Order submitted in the POPR, which sets forth the dates leading up to trial and indicates that a trial is extremely likely to occur in 2026. *See* Ex-2007 (trial briefing is scheduled to end on April 10, 2026, two months prior to the expected FWD in this case). The proximity of the expected trial date to the projected statutory deadline for a final written decision is narrow, and absence of a trial date is not

a dispositive factor. *See Ericsson, Inc. and CellCo Partnership v. ProComm International Pte. Ltd.*, IPR2024-01455, Paper 15 (PTAB May 16, 2025). (denying institution where the trial date had not been set in the parallel litigation). The Board’s factor 2 assessment is an erroneous factual finding warranting Director review and reversal.

The Board fails to sufficiently weight factor 3 stating “much work remains in the district court case as it relates to validity because discovery is in its early stages...,” finding that this factor weighs *slightly* against exercising discretion to deny institution. Paper 23 at 10. However, the parties are a mere month away from the end of discovery and produced over 350,000 documents. Paper 8 at 12. The Markman hearing is on track to be held nine days from the filing of this request (i.e., July 9, 2025), as confirmed by Judge Murphy on June 27, 2025. The parties submitted the final Joint Claim Construction Brief in preparation for same on June 27, 2025. The parties have, in fact, input much investment into the parallel proceeding. Paper 8 at 17. The Board completely ignores that much of the delay that has occurred in the district court litigation is due to Petitioners’ gamesmanship. *Id.* at 13-14. However, the Board admits that “the filing of the Petition does not seem diligent.” Paper 23 at 10.

The weighting of this factor by the Board is inconsistent with recently decided PTAB precedent. *See Samsung Elecs. Co., Ltd., v. Sionyx, LLC*,

IPR2025-00064, Paper 16 at 12 (June 6, 2025) (weighing factor 3 as neutral where “the litigation is only in its early- to mid-stages--discovery is still ongoing, and the claim construction phase has not even begun yet.”) *See also Apple Inc., v. Haptic, Inc.*, IPR2024-01476, Paper 11 at 12 (April 4, 2025) (weighing factor 3 as weighing in favor of exercising discretion to deny institution “[b]ased on the level of investment and effort already expended on claim construction and fact discovery in the District Court.”). When properly assessed, factor 3 weighs in favor of the Board exercising its discretion to deny institution and the Board’s assessment of this factor is an erroneous factual finding warranting Director review and reversal.

As to *Fintiv* factor 6, the Board has failed to perform a proper analysis of this factor and has instead based its decision on an erroneous conclusion of law. The Board found that Factor 6 weighs against exercising discretionary denial based solely upon the following:

The issues raised by Petitioner are similar to those raised in the Lectrosonics IPRs. In IPR2018-01129, similar claims in the ’902 patent were found unpatentable over Strub, Nagai, Gleissner, and Woo. In IPR2018-00972, similar claims in a related patent were found unpatentable over Strub, Nagai, and Gleissner. In IPR2018-01130, similar claims in a related patent were found unpatentable over Strub, Nagai, Gleissner, and Woo. In each of these cases, many of the same issues were decided, albeit under a different claim construction

standard. In view of the totality of the circumstances, this factor weighs against exercising discretionary denial.

Paper 23 at 12-13.

In other words, because “similar claims” in the ‘902 Patent or “similar claims in a related patent” were held unpatentable under a BRI claim construction standard, the instant claims are likely to be found unpatentable under the different *Phillips* standard solely because they are “similar claims” and/or similar claims to “related patents.” The Board performed no comparison of the currently challenged claims to the prior adjudicated claims, nor an analysis of how the different claim construction standards would have affected the patentability of the previously adjudicated claims (*i.e.*, whether such claims would have been unpatentable without amendment under the *Phillips* standard).

The Board’s reasoning is an illogical error of law because it is well established that claims found unpatentable under the BRI standard may be held patentable under the *Phillips* standard. *See PPC Broadband, Inc. v. Corning Optical Communs. RF, LLC*, 815 F.3d 747, 756 (Fed. Cir. 2016) (“The Board applies the broadest reasonable construction standard even in IPRs ... even when the identical patent may be simultaneously in litigation ... and where the district court would be deciding the correct construction consistent with *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc)...If we were tasked with

reviewing the Board's construction according to *Phillips*, and in fact if the Board had applied the *Phillips* standard rather than the broadest reasonable construction, this case would be straight-forward. PPC Broadband's construction is the only construction of the term consistent with the use of the same term throughout the specification. But this case is much closer under the broadest reasonable interpretation standard given the ordinary meanings attributable to the term at issue. We conclude that while close, the Board's construction is not reasonable in light of the specification). *See also Facebook, Inc. v. Pragmatus AV, LLC*, 582 F. App'x 864, 869 (Fed. Cir. 2014) (“The broadest reasonable interpretation of a claim term may be the same as or broader than the construction of a term under the *Phillips* standard.”)

Further, the Board fails to address that the previously adjudicated “similar claims” were held patentable after amendment and fails to compare the claims in this IPR to the amended claims that were held patentable in the prior IPRs. These valid amended claims are also “similar claims” or “similar claims to related patents.” As such, using the Board’s logic, one could argue that since the amended claims are “similar claims” of “related patents” that were held patentable, the merits of this Petition are low because it is likely that the currently challenged claims will also be held to be patentable.

The Board’s reasoning for its finding under *Fintiv* factor 6 also conflicts

with its collateral estoppel reasoning in which it opines:

We agree with Patent Owner based on the current record. Although the Lectrosonics IPRs involved the '902 patent and other patents from the same family as the '902 patent, which recite many similar claim limitations, the Lectrosonics IPRs were all decided using the BRI standard, not the *Phillips* standard. Thus, no claim interpretation has been made using the standard that will be applied in this case, and the asserted prior art has not been applied to claims interpreted according to the standard in this case. Accordingly, on this record, we are not persuaded that collateral estoppel applies to any of the disputed issues in this proceeding. *See DDR Holdings, LLC v. Priceline.com LLC*, 122 F.4th 911, 918–919 (Fed. Cir. 2024) (“‘Because the Board applies the broadest reasonable construction of the claims while the district courts apply a different standard of claim construction as explored in *Phillips*,’ a party is not collaterally estopped in district court proceedings by the Board’s constructions during IPR.”); *SkyHawke*, 828 F.3d at 1376.”

Paper 23 at 29.

It is a further error of law to evaluate the merits of the instant Petition based upon the merits or outcome of wholly different petitions filed by an entirely different Petitioner and law firm. Patent Owner has raised multiple concerns over the Petition’s failure to meet the particularity requirements of 35 U.S.C. § 314(a), which were ignored by the Board. Instead, the Board ignores the Petition’s glaring deficiencies and ranks the merits high based upon the

reasoning that different petitions filed by a different Petitioner had partial success in requiring amendment of the claims to maintain patentability thereof.

In its DI, the Board is required to take a “holistic view of whether efficiency and integrity of the system are best served by denying or instituting review”. *See Apple, Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 6 (PTAB March 20, 2020) (precedential). Additionally, discretionary denial of a petition under 35 U.S.C. § 314(a) is appropriate even when *Fintiv* factor 6 or the merits of a Petition are strong when the other *Fintiv* factors weigh against discretionary denial of a Petition. *See* IPR2025-00064 at 18 (“Considering all factors as a whole, the proximity of the trial date as well as the investment and overlapping issues and parties in the district court case--*Fintiv* factors 2 through 5--collectively weigh in favor of denial and outweigh the strong merits the Petition presents (factor six)”).

It serves the goals of the Guidance to deny institution of an IPR in which:

- Petitioner waited until the last day (indeed, the last 30 minutes!) of the 1-year bar period to file the petition (as it did with the '902 Patent);
- During this year, and subsequently, the parties have nearly completed robust and costly parallel district court validity discovery, and the district court will go ahead with a *Markman* hearing despite Petitioner’s motion to stay and the Board’s current institution decision;

- The case will be trial-ready at the district court prior to any PTAB FWD;
- Only previously unchallenged claims of the Patents are now under challenge, for Patents now in force for (respectively) 15, 14 and 6 years (the Settled Expectations Considerations); and
- Petitioner’s intervening acquisition of the very company (Lectrosonics) who tried but failed to eliminate any of the claims challenged in the Lectrosonics’ IPRs —*i.e.*, decisions allowing amended claims that were fully affirmed at the Federal Circuit.

The Board’s decision strays from recent Guidance and precedent, and Director intervention is necessary to achieve the Director’s goals “to improve PTAB efficiency, maintain PTAB capacity to conduct AIA proceedings ... and promote consistent application of discretionary considerations in the institution of AIA proceedings.” Under proper analysis under the Guidance, the Guidance considerations, the *Fintiv* factors, and recent persuasive authority, institution should be discretionarily denied. Thus, Director review is warranted, and on review, the Director should reverse the DI and determine that discretionary denial under 35 U.S.C. § 314(a) is proper.

Dated: June 30, 2025

/Rita C. Chipperson/

Rita C. Chipperson (Reg. No. 54,031)

CHIPPERSON LAW GROUP, P.C

Counsel for Patent Owner

CERTIFICATE OF SERVICE

The undersigned certifies that on June 30, 2025, a complete and entire copy of the foregoing “**PATENT OWNER’S REQUEST FOR DIRECTOR REVIEW UNDER 37 C.F.R. § 42.75 OF PAPER 23, GRANTING INSTITUTION OF *INTER PARTES* REVIEW**” is being served on the Petitioners at the electronic addresses shown below per consent.

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