

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ZHUHAI COSMX BATTERY CO., LTD.,
Petitioner

v.

NINGDE AMPEREX TECHNOLOGY LTD.,
Patent Owner

IPR2025-00432
U.S. Patent No. 11,575,148

PATENT OWNER'S DISCRETIONARY DENIAL BRIEF

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2001	Second Amended Complaint, <i>Ningde Amperex Tech. Ltd. v. Zhuhai CosMX Battery Co.</i> , Case No. 2:24-cv-00728-JRG, ECF No. 23 (E.D. Tex. Jan. 28, 2025)
2002	Scheduling Order, <i>Ningde Amperex Tech. Ltd. v. Zhuhai CosMX Battery Co.</i> , Case No. 2:24-cv-00728-JRG, ECF No. 27 (E.D. Tex. Feb. 6, 2025)
2003	CosMX Invalidity Contentions Cover Pleading, <i>Ningde Amperex Tech. Ltd. v. Zhuhai CosMX Battery Co.</i> , Case No. 2:24-cv-00728-JRG (E.D. Tex. Jan. 7, 2025)
2004	Summons to attend oral proceedings in German Case No. 3 Ni 12/23 (EP) (“Germany Order 1”)
2005	Summons to attend oral proceedings in German Case No. 3 Ni 12/24 (EP) (“Germany Order 2”)
2006	DocketNavigator Statistics for Judge Rodney Gilstrap (accessed May 5, 2025)
2007	Docket, <i>Ningde Amperex Tech. Ltd. v. Zhuhai CosMX Battery Co.</i> , Case No. 2:22-cv-00232 (E.D. Tex.)
2008	Joint Motion for Entry of Protective Order, <i>Ningde Amperex Tech. Ltd. v. Zhuhai CosMX Battery Co.</i> , Case No. 2:24-cv-00728-JRG, ECF No. 30 (E.D. Tex. Feb. 11, 2025)
2009	Amended Final Judgment, <i>Ningde Amperex Tech. Ltd. v. Zhuhai CosMX Battery Co.</i> , Case No. 2:22-cv-00232, ECF No. 427 (E.D. Tex.)
2010	Article, <i>Lithium battery manufacturer ATL won injjction against its Chinese rival COSMX in German Court</i> , China IP Today (April 6, 2024)

I. INTRODUCTION

Ningde Amperex Technology Ltd. (“ATL” or “Patent Owner”) respectfully submits this brief requesting that the Board deny institution of the Petition for *inter partes* review (Paper 1 or “Pet.”) filed by Petitioner Zhuhai CosMX Battery Co., Ltd. (“Petitioner” or “CosMX”) pursuant to the Acting Director’s March 26, 2025 Memorandum titled “Interim Processes for PTAB Workload Management” (hereafter “Director Memo”).

The Petition seeks *inter partes* review (“IPR”) of claims 1-19 (the “Challenged Claims”) of U.S. Patent No. 11,575,148 (the “’148 Patent,” Ex. 1001). The ’148 Patent and five other patents are the subject of a patent infringement action that ATL has brought against CosMX that is currently pending in the Eastern District of Texas as Civil Action No. 2:24-cv-728 (the “Second Texas Litigation”). The Petition should be rejected and institution should be denied for numerous reasons.

First, the Second Texas Litigation involves six patents in a single unified district court proceeding. Ex. 2001 (Second Amended Complaint) at 1. However, Petitioner has filed (to date) seven different IPR petitions¹ on six patents over the

¹ See IPR2025-0405; IPR2025-00432; IPR2025-00385; IPR2025-00431; IPR2025-00389; IPR2025-00722; and IPR2025-00524.

span of three months in an attempt to avoid or delay a single streamlined district court trial, which would frustrate the intended efficiencies of the America Invent Act (“AIA”). In essence, Petitioners are attempting to convert (A) a single district court proceeding into (B) the same district court proceeding, *plus* seven separate IPR trials (involving invalidity determinations by potentially *up to twenty-two* factfinders), a classic example of the type of waste and inefficiency (and potential for inconsistent results) that the Director’s new interim guidance suggests avoiding. A single Article III proceeding has the strong potential to be the fastest and most efficient resolution of the Parties’ many disputes, which favors denial of institution.

Second, as will be explained in detail in Patent Owner’s Preliminary Response, the technical merits of Petitioner’s arguments are weak. All the claims of the ’148 Patent require certain pore structure characteristics, including that the pores are “formed by the binder” and “at least comprise[] a part of the inorganic particles,” and include claimed particle size distribution values (Dv10, Dv50, and Dv90). Ex. 1001 at 25:32-26:65. But the claimed pore structure *in conjunction with* the claimed particle size distribution values (Dv10, Dv50, and Dv90) is not disclosed or rendered obvious by the prior art. This is because, even if Petitioner had correctly interpreted the prior art such that there is a Ground with the proper pore structure or the proper distribution sizes (which there is not), the prior art at best, even accepting Petitioner’s

arguments, teaches *either* the pore structure characteristics *or* the distribution sizes, but not both at the same time.

Third, the Petition should be denied under § 314(a) based on the *Fintiv* and other discretionary factors identified by the Acting Director because, in the district court case where the '148 Patent is at issue, (1) the parties are the same as in this IPR,² (2) a stay has not been requested and is unlikely to be granted if requested,³ (3) trial in the district court is scheduled to occur roughly two months *before* the statutory final written decision deadline in this IPR (and at least five months *before* the statutory final written decision deadline in IPRs on other patents at issue in the same case, which makes the district court even less likely to grant a stay),⁴ and (4) the same prior art that is asserted in the Petition is asserted by Petitioner at the district court, including in combination with unpublished system prior art.⁵

² Ex. 2001 (Second Amended Complaint).

³ See, e.g., *Force MOS Tech. Co., Ltd. v. ASUSTeK Computer, Inc.*, Case No. 2:22-cv-000460, ECF No. 74, (E.D. Tex. April 10, 2024) (stating it “has a consistent practice of denying motions to stay when the PTAB has yet to institute post-grant proceedings” as to all patents at issue).

⁴ Ex. 2002 (Second Texas Litigation Scheduling Order).

⁵ Ex. 2003 (Invalidity Contentions Cover Pleading) at 23-25.

While Petitioner claims to have executed a *Sotera* stipulation, the effect of this stipulation is significantly reduced (if not eliminated completely) because Petitioner asserts obviousness combinations of unpublished system prior art in the district court proceeding together with the prior art references relied on in its Petition. *See* Ex. 2003 (Invalidity Contentions Cover Pleading) at 23-25. As a result, Petitioner has retained for themselves the option to try essentially the same invalidity arguments in multiple fora, in contrast to the efficiency sought by the creation of *inter partes* review in the AIA. As the Acting Director recognized in a recent Order Granting Director Review, such stipulations do not ensure that these IPR proceedings would be a “true alternative” to the district court proceeding where unpublished system prior art is asserted in combination with the art used in the IPR’s grounds. *Motorola Sol’ns, Inc. v Stellar LLC*, IPR No. 2024-01205, Paper 19 (Order Granting Director Review, Vacating the Decision Granting Institution, and Denying Institution of *Inter Partes* Review) at 3-4 (P.T.A.B. March 28, 2025) (Stewart, Dir.) (finding that a *Sotera* stipulation was unlikely to moot petitioner’s combination of IPR art with unpublished system prior art in district court proceedings, and therefore could not outweigh other factors favoring denial).

Fourth, the desire for administrative efficiency and not risking inconsistent results favors denial. The underlying district court lawsuit at issue here follows an earlier district court lawsuit (the “First Texas Litigation,” Civil Action No. 2:22-cv-

00232) in which CosMX was already adjudicated to be a willful infringer of three other ATL patents and was ordered to pay ongoing royalties on CosMX products for the one patent that was not found invalid. Ex. 2007 (First Texas Litigation Docket Control Order); Ex. 2009 (Amended Final Judgment in First Texas Litigation). The First Texas Litigation involves a parent application to one of the patents pending in the current district court litigation, and thus similar invalidity and infringement issues were already presented in the first litigation. *Id.* For example, documents about the same types of products were produced and depositions of multiple individuals were already taken in that proceeding. Ex. 2008 at 2-4.

Fifth, the parties have invested significant effort, resources, and discovery not only in the prior and current U.S. proceedings but in other patent proceedings around the world, including patent infringement and validity proceedings in both Germany and China. CosMX has been found to be an infringer of ATL patents in the U.S., Germany, and China and has been ordered to pay a running royalty rate for sales of CosMX products on a different U.S. patent already while its products are already the subject of injunctions in Germany and China. *See, e.g.*, Ex. 2007 (First Texas Litigation Docket Control Order); Ex. 2004 (German Order 1); Ex. 2005 (German Order 2), Ex. 2010 (press release). The resolution of this single IPR proceeding and the six other co-pending IPR petitions related to the same district court case is therefore unlikely to effect a final resolution of the parties' worldwide dispute, but

would require *significant* investment of resources by the PTAB to reach final written decisions in all seven IPR proceedings. Further, even if trial is instituted but ultimately the patent claims are found valid, this significant investment of effort would likely be duplicated in the district court because CosMX asserts invalidity theories including various system prior art references in the district court, meaning the district court will need to conduct an invalidity analysis regardless of the outcome of this IPR or the other six co-pending IPRs. Ex. 2003 (Invalidity Contentions Pleading). Efficient stewardship of the PTAB's limited resources requires allowing the U.S. district court to decide CosMX's myriad validity challenges in a single streamlined district court proceeding, instead of holding seven separate PTAB proceedings *plus* a district court proceeding.

Sixth, Petitioner has filed a lengthy expert declaration purporting to address every single limitation of the asserted claims and every ground, rather than limiting expert testimony to a few key limitations where it is required. *See, e.g.*, Ex. 1003 ¶¶ 75-121 (providing detailed expert testimony for every limitation of claim 1). Moreover, significant portions of the expert declaration include unsupported testimony that is used to fill significant gaps in the references themselves. Patent Owner intends to file an expert declaration with its Preliminary Response that will rebut this evidence. As such, there will be numerous complex issues disputed by the experts, and an Article III court is a more appropriate forum for resolving those

disputes. FAQs at Q.21 (“While the Board may consider expert testimony, as a matter of efficiency, extensive reliance on expert testimony and/or reasonable disputes between experts on dispositive issues may suggest that the questions are better resolved in an Article III court.”)

Seventh, the sheer number of proposed Grounds (eight) weighs in favor of denial.

Eighth, one of the co-pending petitions (the Petition for the ’910 Patent) fails to even attempt to set forth a *prima facie* ground for claim element 20.7 of independent claim 20 of the ’910 Patent. Therefore, even if every argument in this Petition and every other co-pending Petition were successful, trial would still need to proceed in the district court regarding the infringement and validity of claim 20 of the ’910 Patent. Because trial cannot be avoided even with Petitioner’s numerous IPR petitions, institution should be denied in the interest of efficiency.

Lastly, and perhaps most important to the efficient distribution of PTAB resources, the underlying district court trial is likely to proceed regardless of whether the Board institutes review in this IPR proceeding because (to date) seven IPR petitions have been filed against the six different patents at issue in that district court proceeding, which were spaced out over the course of several months, resulting in final written decision deadlines that are likely to be five or more months after the scheduled jury trial in that case. *See, e.g.*, IPR2025-00405, Paper 1 (filed Jan. 3,

2025); IPR2025-00524, Paper 1 (filed Apr. 2, 2025); Ex. 2002 (Second Texas Litigation Scheduling Order). Further, this is after the denial of institution for three IPR petitions previously filed by Petitioner against ATL patents at issue in the First Texas Litigation. IPR Nos. 2023-00586; 2023-00587; 2023-00585. The significant amount of effort and resources required by the Board to address seven IPR petitions, where the district court is highly likely to proceed to trial anyway (at least because Petitioner has failed to even make a prima facie case as to claim 20 of the '910 Patent challenged in the '910 Patent Petition), counsels against further wasting the Board's resources for these numerous IPR petitions that will be resolved in a single trial before the Final Written Decisions by the Board.

The Board should therefore exercise its discretion to deny institution because Petitioner has not met its burden of demonstrating that it is more likely than not that any claim of the '148 Patent is unpatentable and because denial is warranted in the interests of efficiency and fairness. If CosMX has invalidity defenses to raise against the '148 Patent or against the five other patents at issue in the district court proceeding, including defenses it intends to raise combining the asserted prior art references together with the invalidity references, it may raise those all together in a single consolidated district proceeding where they may all be considered in view of all the evidence. This is the most efficient outcome and achieves the AIA's intended efficiency goals better than multiple serial IPR proceedings that trail the underlying

district court proceeding and only add additional uncertainty and risk of inconsistent positions to the process.

II. BACKGROUND

A. Technology Overview

Non-aqueous secondary batteries, such as lithium-ion batteries, have a separator. Ex. 1001 at 1:22-26. During the cycle process of a lithium-ion battery (i.e. charging and discharging the battery), a gap is formed between the electrode and the separator. *Id.* at 1:29-33. This gap results “in a reduction of the cycle capacity of the lithium-ion battery” and has a negative impact on its “service life.” *Id.*

B. The '148 Patent Claims a Porous Film Having a Delicate Balance of Pore Structure with Specific Particle Size Distributions

The '148 Patent teaches solving the gap issue of the prior art by providing a separator having a porous film, the porous film comprising a specific pore structure and particle size distributions. Ex. 1001 at 1:42-2:56. In particular, the claims recite that (1) its porous film has pores “formed by the binder,” (2) those pores “at least comprise[] a part of the inorganic particles,” and (3) the porous film’s inorganic particles have a size distribution such that Dv10 ranges from 0.015 microns to 3 microns, Dv50 ranges from 0.2 microns to 5 microns, and Dv90 ranges from one micron to ten microns. *Id.* at 25:34-46. The '148 Patent explains that this claimed porous film “has excellent adhesion, and meanwhile the pore structure of the porous

film can still be well maintained after being immersed in the electrolyte, thereby reducing the probability of pore blockage of the porous film and enabling the porous film to have high ionic conductivity.” *Id.* at 2:47-52. Thus, “the rate performance of the lithium-ion battery is greatly improved, and the provided lithium-ion battery has excellent rate performance and cycle performance.” *Id.* at 2:52-56.

III. LEGAL STANDARDS

It is Petitioner’s burden to demonstrate unpatentability by a preponderance of the evidence. The Petition must establish, with particularity, the grounds and evidence that support invalidating the patented claims. 35 U.S.C. §312(a)(3). Petitioner “must ‘specify where each element of the claim is found in the [relied upon] prior art patents.’” *In-Depth Geophysical, Inc. v. ConocoPhillips Co.*, IPR2019-00850, Paper 56, *27 (Sept. 3, 2020) (quoting 37 C.F.R. § 42.104(b)(4)). And, as is the case here, Petitioner must demonstrate that the prior art (e.g. Murakami) “discloses[] within the four corners of the document . . . all of the limitations claimed,” and that disclosure must be “arranged or combined in the same way as recited in the claim.” *Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1371 (Fed. Cir. 2008). Petitioner cannot satisfy this burden by reliance on unsupported and unscientific assumptions, an unreliable method, and baseless inferences that attempt to cover the glaring shortcoming of the prior art.

In addition, the Board makes its determination regarding institution based on what the Petition *actually presents* and not what it could have reasonably contained had it been drafted differently. *In re Magnum Oil Tools Int’l, Ltd.*, 829 F.3d 1364, 1381 (Fed. Cir. 2016) (holding that the Board is *not* “free to adopt arguments on behalf of petitioners that could have been, but were not, raised by the petitioner during [a post-grant proceeding]”). The Board cannot “deviate from the grounds in the petition and raise its own” theories of invalidity. *Sirona Dental Sys. GmbH v. Institut Straumann AG*, 892 F.3d 1349, 1356 (Fed. Cir. 2018).

In addition to the underlying failures of the Petition, the Board should deny institution under *Apple v. Fintiv, Inc.*, No. IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential) (“*Fintiv*”) and other discretionary factors committed to the Board’s discretion under § 314(b), including the factors identified by the Acting Director in the March 26 Memorandum and the Board’s latest guidance responding to FAQs for Interim Processes for PTAB Workload Management at <https://www.uspto.gov/patents/ptab/faqs/interim-processes-workload-management>.

The *Fintiv* factors include:

1. Whether the court has granted a **stay** or evidence exists that one may be granted if an IPR is instituted.
2. The **proximity of the court’s trial date** to the PTAB’s projected statutory deadline for a final written decision.

3. The **investment** in the parallel proceeding by the court and the parties.
4. The **overlap** between issues raised in the petition and those in the parallel proceeding.
5. Whether the petitioner and the defendant in the parallel proceeding are the **same party**.
6. **Other circumstances** that impact the PTAB's exercise of discretion, **including the merits** of the petition

Fintiv at 6. The Board takes a “holistic view” of whether efficiency and integrity of the system are best served by denying or instituting review. *Id.*

Furthermore, the Director Memo identified a non-exhaustive number of additional factors that may be considered by the Board when evaluating how to apply the Board's discretion under § 314(b) (hereafter, the “Memo Factors”) including (but not limited to):

1. Whether the PTAB or another forum has **already adjudicated** the validity or patentability of the challenged patent claims;
2. Whether there have been **changes in the law** or new judicial precedent issued since issuance of the claims that may affect patentability;
3. The **strength** of the unpatentability challenge (related to *Fintiv* Factor 6, above);
4. The extent of the petition's **reliance on expert testimony**;

5. **Settled expectations** of the parties, such as the length of time the claims have been in force;
6. **Compelling** economic, public health, or national security **interests**; and
7. Any **other considerations** bearing on the Director's discretion.

Director Memo at 2-3. The Board's FAQs further indicate that "[t]he Process Memorandum includes a *non-exhaustive* list of issues that may be raised in discretionary briefing. Parties are encouraged to address *any* fact or circumstance they believe bears on the Director's discretion to institute, including reasons not discussed in current Board precedent or in the Process Memorandum." FAQs at Q.11 (emphasis added).

IV. **THE BOARD SHOULD NOT INSTITUTE INTER PARTES REVIEW UNDER § 314(A) BASED ON THE *FINTIV* AND OTHER DISCRETIONARY FACTORS**

A. ***Fintiv* Factor 1: The District Court Has Already Stated It Will Not Issue a Stay In Similar Circumstances, Which Favors Denial**

***Fintiv* Factor 1** favors denial of institution. Patent Owner has not requested a stay in the Second Texas Litigation pending institution of this IPR (or the *six other* co-pending IPR petitions), and even if a stay were requested, the evidence shows that it is unlikely to be granted. Petitioner presents no evidence in its Petition that it has requested a stay or that a stay is likely. When Petitioner presents no evidence that a stay is likely in parallel proceedings, the Board has found *Fintiv* Factor 1 to

favor discretionary denial. *See Luxshare Precision Industry v. Amphenol Corp.*, IPR2022-00132, Paper 10 at 9 (PTAB May 3, 2022).

While six patents have been asserted in the underlying district court case, CosMX only filed its latest IPR petition on the final one of the six patents on April 2, 2025, and that Petition was accorded a filing date via notice on May 5, 2025. *See* IPR2025-00524. At the earliest, the institution decision deadline in that latest IPR petition would be November 5, 2025—which is after the parties will have already provided the Court with a joint claim construction statement and will be in the middle of claim construction discovery, and will be just five weeks from the deadline to substantially complete document production. Ex. 2002 (Second Texas Litigation Scheduling Order). The Court in the Eastern District of Texas is on record that it “has a consistent practice of denying motions to stay when the PTAB has yet to institute post-grant proceedings” as to all patents at issue. *Force MOS Tech. Co., Ltd. v. ASUSTeK Computer, Inc.*, Case No. 2:22-cv-000460, ECF No. 74, (E.D. Tex. April 10, 2024) (citations omitted). The district court will, therefore, not stay the underlying action while no institution decision has been entered in that last (or any other pending) IPR proceeding. Furthermore, CosMX would need to prevail on institution of at least six independent IPR petitions for there to be any chance of a stay in the district court proceeding—an unlikely outcome, particularly where CosMX failed to achieve institution on any of the three IPR petitions it filed against

patents at issue in the first round of U.S. litigation. *See* IPR Nos. 2023-00586; 2023-00587; 2023-00585. Furthermore, because CosMX has failed to even attempt to set forth a *prima facie* case of invalidity as to independent claim 20 of the '910 Patent,⁶ at least one claim from these six patents will necessarily have to proceed to a jury trial even if CosMX were successful on every argument it has raised in its seven Petitions. The certainty of an eventual district court trial on at least one patent claim weighs against the likelihood of a stay ever entering in the underlying district Court proceeding and therefore strongly favors denial. *See, e.g., MyPort, Inc. v. Samsung Electronics Co., Ltd.*, Case No. 2:22-cv-00114, ECF No. 73 (June 13, 2023) (denying request for stay when final written decision in pending IPRs were scheduled to issue two months after trial, even though the Court had not yet held a Markman hearing, in view of the parties substantial investment in the case and the plaintiff's interest in timely vindication of its patent rights).

B. *Fintiv* Factor 2: Any Final Written Decision Will Occur After the District Court's Scheduled Jury Trial Date, and Decisions in Other IPRs Would Occur Even Later

***Fintiv* Factor 2** weighs heavily against institution because a trial date is already scheduled to occur in the district court on July 6, 2026, over two months

⁶ *See* IPR2025-00405, Paper 1; and see also the upcoming discretionary denial briefing and Patent Owner's Preliminary Response in that IPR.

before the September 8, 2026 statutory deadline for the Board to issue a final written decision in this IPR (assuming that the Board issues an institution decision on September 8, 2025, three months after Patent Owner's Preliminary Response). Ex. 2002 (District Court Schedule). The median time to jury trial in patent cases filed before Judge Gilstrap after January 1, 2020 (which includes a number of cases that were delayed as a result of the Covid-19 epidemic, and is therefore a conservative estimate) is just 21.1 months after the filing of the original district court complaint. Ex. 2006 (Docket Navigator Statistics). Applying that median time to trial to the complaint in the underlying district court case here would result in an expected trial date in early June of 2026, indicating that the currently scheduled district court trial date of July 6, 2026 is both conservative and achievable.

Thus, when considering either the scheduled jury trial date or the district court's median time-to-trial statistics, the seven petitions filed against the six patents asserted in the district court case will not each have final written decisions until at least November of 2026 (assuming they are all instituted), more than five months after the scheduled jury trial in the district court action and seven months after the median time-to-trial in cases filed after January 1, 2020. Pet. at 72.

The Board has denied institution in view of smaller gaps between the final written decisions and trial. *See, e.g., EClinicalWorks, LLC v. Decapolis LLC*, IPR2022-00229, Paper No. 10 at 9 (PTAB Apr. 13, 2022) (finding this factor

weighed in favor of discretionary denial and denying institution where “the beginning of the jury trial in the WDTX Cases is roughly one or two months before any final decision would have been due had *inter partes* review been instituted”); *see also, e.g., Resmed Corp. v. Cleveland Med. Devices Inc.*, IPR2023-00565, Paper No. 13 at 11 (PTAB September 25, 2023) (denying institution where trial was scheduled to occur “approximately one month” before the deadline to issue a final written decision).

Accordingly, this factor weighs heavily against institution.

C. *Fintiv* Factor 3: The Parties Have Already Invested Significant Effort and Resources in Parallel District Court Proceedings, Including Related Proceedings in the US and Worldwide on Related Patents and Related Accused Products

***Fintiv* Factor 3** weighs heavily against institution. The Second Texas Litigation is only the latest investment of effort and resources by the Parties in a long and continuing series of worldwide litigation involving family members of the patents asserted in district court, as well as many other patents. *See e.g.,* Ex. 2007 (First Texas Litigation Docket Control Order); Ex. 2004 (Germany Order 1); Ex. 2005 (Germany Order 2). This extensive investment of global resources differs significantly from the more common “one-off” US district court litigation posture and weighs heavily against institution of this IPR. The chance that this single IPR

proceeding on a single patent is likely to resolve the parties' global patent dispute is low, and therefore weighs strongly against institution.

As a result of the First Texas Litigation, the collection of documents and depositions regarding the composition of many CosMX's accused products was already substantially completed, and so the Parties begin with a *significant* head start on collecting and producing relevant discovery in the second district court case. *See* Ex. 2008 (Joint Motion for Entry of Protective Order) at 3 (CosMX arguing that "given the related patents and overlap in technical subject matter and accused products, a substantial amount of the discovery that will need to be conducted in this case was likely already conducted in the 232 Action.").⁷ In the first district court litigation (addressing similar accused products and similar technologies), the parties and the Court previously invested substantial efforts and resources, including:

- Completing all fact witness and expert witness depositions (33 fact witness depositions and 13 expert witness depositions);

⁷ While the Court denied CosMX's request to not allow blanket cross-use of all evidence from the First Texas Litigation, CosMX itself admits that much of the relevant information has already been collected for the First Texas Litigation and simply needs to be reproduced in the Second Texas Litigation. Ex. 2008 (Joint Motion for Entry of Protective Order) at 3.

- Completing the collection and production of documents regarding the same types of CosMX battery products accused of infringement in the second case;
- Conducting a Markman hearing on August 15, 2023, with an order construing patent claims entered on October 18, 2023;
- Completing expert reports and expert discovery;
- A hearing on various discovery issues and a motion to correct inventorship on October 13, 2023;
- A pretrial conference on January 17, 2024 addressing multiple issues;
- Completing a jury trial in February 2024; and
- Holding a hearing on August 23, 2024 granting ATL's motion for an ongoing royalty.

Ex. 2007 (First Texas Litigation Docket). The extensive investment of party resources in the First Texas Litigation (which involved similar accused products and technology) should also be considered as investments in this follow-on lawsuit, and therefore strongly favors denial of this Petition.

As to the Second Texas Litigation, by the institution deadline in this IPR, the parties will already have completed exchanging initial infringement and invalidity contentions, and the parties will have made extensive document productions. Ex.

2002 (Second Texas Litigation Scheduling Order). ATL has already produced tens of thousands of documents and will continue to make ongoing supplemental productions regarding its hundreds of patent-practicing products. CosMX has likewise committed to producing technical documents for the hundreds of accused products implicated by ATL's infringement contentions. Further, ATL has served third-party subpoenas on twelve of CosMX's customers seeking documents and testimony related to the sales of downstream products incorporating CosMX's accused batteries. The return dates on all third-party subpoenas pre-date the institution deadline in this IPR. In addition, the *Markman* process will commence prior to the week of September 8, as the parties must exchange claim terms for construction by September 9, 2025. *Id.*

In addition to the U.S. district court litigations, one of the other asserted patents has many related counterparts across the world that have been litigated in Germany and China. *See e.g.*, Ex. 2004 (Germany Order 1); Ex. 2005 (Germany Order 2); Ex. 2010 (News article regarding German injunction and Chinese validity proceeding). The extensive investment of party resources in foreign proceedings is just further evidence that deciding this one IPR petition on the merits will not solve the global patent dispute between ATL and CosMX.

D. *Fintiv* Factor 4: The Overlap Between the Asserted Art and Petitioner’s Invalidity Arguments in the District Court is Significant, and Petitioner’s *Sotera* Stipulation Is Ineffective Because of Its System Art Combinations With The Prior Art in this Petition

Fintiv Factor 4 also weighs against institution because Petitioner asserts every prior art reference relied on in a ground in this Petition (Murakami, Honda, Tanaka, Beard, and Akiike) in the Second Texas Litigation. Ex. 2003 (Invalidity Contentions Cover Pleading). Furthermore, Petitioner’s Invalidity Contentions in the Eastern District of Texas each raise obviousness grounds combining various unpublished system art references (which it cannot raise in this IPR proceeding) with each of Murakami, Honda, Tanaka, Beard, and Akiike (each of which is raised in the instant Petition). *Id.*

Accordingly, even with the limited *Sotera* stipulation proffered by Petitioner, CosMX would still claim to retain the ability to discuss at the jury trial every single one of the prior art references discussed in this Petition *in combination* with system prior art that they have identified.

As the Acting Director recognized in a recent Order Granting Director Review, such stipulations do not ensure that these IPR proceedings would be a “true alternative” to the district court proceeding where unpublished system prior art is asserted in combination with the art used in the IPR’s grounds. *Motorola Sol’ns, Inc. v Stellar LLC*, IPR No. 2024-01205, Paper 19 (Order Granting Director Review,

Vacating the Decision Granting Institution, and Denying Institution of *Inter Partes* Review) at 3-4 (P.T.A.B. March 28, 2025) (Stewart, A.D.) (finding that a *Sotera* stipulation was unlikely to moot petitioner’s combination of IPR art with unpublished system prior art in district court proceedings, and therefore could not outweigh other factors favoring denial); *see also* FAQs at Q.14 (“ . . . The Director will take into account whether the stipulation materially reduces overlap between the proceedings. Where the petitioner is relying on corresponding system art in a co-pending proceeding and/or several other invalidity theories, a stipulation may not be particularly meaningful because the efficiency gained by any AIA proceeding will be limited.”).

Because there is substantial overlap between the art raised in these proceedings and asserted in the underlying district court proceedings, and because that overlap is not materially diminished by Petitioner’s *Sotera* stipulation in view of Petitioner’s combination of the prior art used in this Petition with unpublished system art in the district court proceeding, this factor heavily favors denial.

E. *Fintiv* Factor 5: The Identity of the Parties Weighs Against Institution

***Fintiv* Factor 5** also weighs against institution because the Petitioner is the accused infringer and defendant, while Patent Owner is the plaintiff, in the underlying district court litigation. Ex. 2001 (Second Amended Complaint).

F. *Fintiv* Factor 6 and Memo Factor 3: The Merits of the Petition Are Weak

***Fintiv* Factor 6** and **Memo Factor 3** weigh against institution because the merits of the Petition are weak. While the merits will be more fully addressed in Patent Owner’s Preliminary Response (which is incorporated herein by reference pursuant to FAQ Q.25), a few examples are provided below to illustrate the weakness of Petitioner’s arguments. These examples are not meant to be exhaustive but simply illustrative.

The Petition sets forth three grounds (out of eight) that relate to independent claims, Claims 1 and 10: (1) obviousness over Murakami (Ground 1), (2) obviousness over Murakami in view of Beard (Ground 4), and (3) obviousness over Beard in view of Akiike (Ground 7). Not only does the Petition lack a credible motion to combine these references, but none of the references—alone or in combination—disclose every claim limitation.

For example, as will be detailed at length in Patent Owner’s Preliminary Response, the **Murakami** reference does not disclose either (1) “pores formed by the binder” or (2) the claimed Dv10, Dv50, and Dv90 values of inorganic particles in the finished porous film. These shortcomings permeate both Grounds 1 and 4.

For “pores formed by the binder” in Grounds 1 and 4, Petitioner relies solely on unsupported expert testimony to extrapolate from Murakami that this limitation

is met. *See, e.g.*, Pet. at 23-25. Unlike the '148 Patent, the Murakami reference has no SEM images or any other kind of images to show the pore structure or how they are formed. Given this plain deficiency, Petitioner's expert **assumes** that the pores in Murakami must be formed by the binder because (a) Murakami discloses that "the filler is bound by the binder resin" and (b) they claim that Murakami's process for coating the porous layer onto its porous film is "comparable" to the '148 Patent's process. Ex. 1003 ¶¶ 90-95. Such unsupported and conclusory findings fail.

The evidence will show that Petitioner's expert is wrong—Murakami discloses the opposite, that pores are **not** formed by the binder. This is clear from the Murakami reference itself, which states that the inorganic filler in Murakami is "bound by the binder resin" and **not** dispersed in it because "a porous layer in which a filler is dispersed in a resin (binder resin) is not suitable." Ex. 1005 ¶ [0070]. This means there is very little binder in Murakami's porous layer—just enough to glue (i.e. bind) the inorganic particles together, not nearly enough to form the pores. This is consistent with what Petitioner itself admits in its Petition, that Murakami has a much lower amount of binder compared to the '148 Patent. Pet. at 27 ("[T]he '148 Patent explains that the porous film can have up to three times more inorganic particles than binder—i.e., 75/25 inorganic particles to binder by volume—significantly *less* than Murakami's binder.") (emphasis in original); *id.* ("Murakami states that the **filler content** comprises most of the filler-binder combination by

weight, preferably *up to 99 wt%.*”). Far from CosMX’s expert’s assumption that the very low amount of binder in Murakami would form pores in the same way as ’148 Patent (with its much larger amount of binder), the evidence will show that this low amount of binder in Murakami would indicate to a POSITA that the binder in Murakami is not what forms the pores but rather is only there to serve as little dots of glue sticking the inorganic particles together.⁸ For the claimed Dv10, Dv50, and Dv90 values in Grounds 1 and 4, Petitioner and its expert overlook key disclosures in Murakami that make clear the D10, D50, and D90 values reported in Murakami are unreliable and are not the actual sizes of the inorganic particles in the finished porous film. For example, they ignore the fact that paragraph 141 of Murakami states: “[t]he obtained dispersion was dispersed by high pressure with the use of a high-pressure dispersing device (manufactured by SUGINO MACHINE LIMITED; Star Burst) (high-pressure dispersion condition),” which would damage particles or

⁸ These very low amounts of binder are present in the examples Petitioner relies on, Examples 1 and 2, and thus these examples do not have pores formed by a binder either. For example, Examples 1 and 2 only have 3 parts by weight of binder mixed with 100 parts by weight of inorganic particle. There is nothing in either example to suggest that there are pores formed by this very minimal amount of binder.

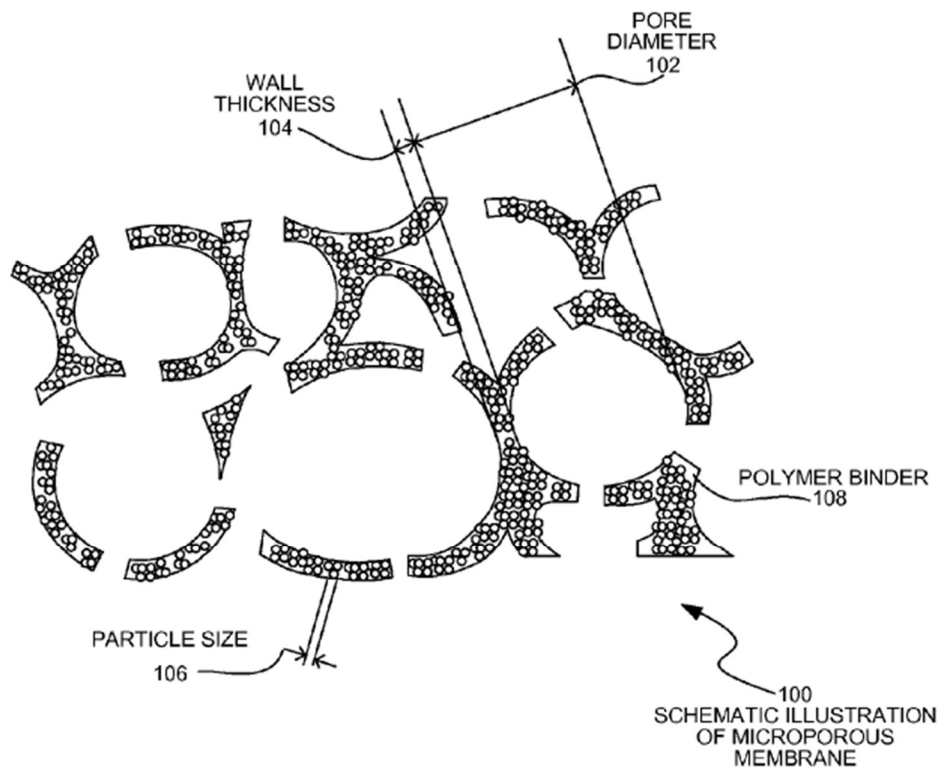
at least significantly change the particle sizes as a result of high-energy collisions (e.g. from the “3-pass” 100MPa impact tests). Ex. 1005 ¶ [0141].

Murakami measures the particle size distribution (D10, D50, and D90) of the filler *before* creating the mixture and dispersing the porous layer. *See, e.g.*, Ex. 1005 ¶ [0140] (“As a binder resin, sodium carboxymethyl cellulose(CMC) (manufactured by Daicel Corporation; CMC1110) was used. As a filler, α -alumina (D10: 0.22 Lum, D50: 0.44 um, D90: 1.03 um) was used.”). Then the binder (CMC), inorganic particles (alumina), and a solvent are mixed to make an alumina dispersion, and then that alumina dispersion is dispersed by high pressure. Ex. 1005 ¶ [0141]. The use of a high-pressure dispersing device would have a significant impact on particle sizes, specifically changing the D10, D50, and D90 values in the final porous layer or separator. Neither Petitioner nor its expert address the impact of the high-pressure dispersing device in Murakami.

Murakami is therefore fundamentally different from the ’148 Patent, which describes and claims the particle size distributions of its porous film once finished, not the distributions of the filler before being mixed and dispersed via high-pressure dispersing techniques. *See, e.g.*, Ex. 1001 at 12:16-35 (describing the particle size distribution *after* the porous film is finished).

To solve the deficiencies of Murakami, Petitioner attempts to cherry pick disclosures from **Beard** and fill in the remaining gaps with its expert’s testimony.

But Beard does not solve the deficiencies of Ground 1. Petitioner relies on what appears to be a handwritten and not-to-scale cartoon figure in Beard that assumes what its pores look like:



But even if this conceptual or notional drawing were an accurate depiction of Beard’s pores, it shows that Beard does not meet the other requirement of the independent claims that the “pores at least comprise[] a part of the inorganic particles.” Instead, it shows the inorganic particles are packed exclusively in the *walls* and are not extending into the pores themselves.

Moreover, even if Beard did disclose the required pore structure limitations, a POSITA would not have been motivated to combine Murakami and Beard with any reasonable expectation of success because the two references have (a) incompatible particle sizes (and distributions) and (b) incompatible bonding and dispersing forms. Beard teaches that, for its pore structure to work, the particle sizes must be “on the order of or smaller than the cell wall thickness 208,” which is 0.02 microns or less. Ex. 1010 ¶ [0037], Abstract. Beard states that “a densely packed filler material may have an average diameter of less than 0.005 microns.” *Id.* at Abstract. This means Beard requires much smaller particle sizes than Murakami uses.

As such, because Petitioner is relying on the pore structure of Beard in Ground 4, a POSITA would have to significantly reduce the particle size of Murakami to what is disclosed in Beard. Even if a POSITA were to do this, despite the teachings of Murakami to the contrary, the particle sizes in Beard are *not* the particle size distributions of the '148 Patent because the '148 Patent requires particle sizes much greater than the 0.02 micron maximum of Beard. *See* Claim 1.5-1.7 (“wherein the inorganic particles have particle sizes that Dv10 is in a range of 0.015 μm to 3 μm , Dv50 is in a range of 0.2 μm to 5 μm , and Dv90 is in a range of 1 μm to 10 μm ”). Alternatively, if a POSITA stuck with the much larger particle sizes in Murakami (on the order of 0.44-1.03 μm), then they would not be able to achieve the bonding

and dispersing properties of Beard, whose particle size is 0.02 μm or less. In other words, the pore structure would still not be “formed by the binder.”

As such, Petitioner cannot have it both ways—the particle size of Murakami to allegedly meet one limitation of the claims and a different particle size of Beard to allegedly meet one limitation of the claims. No matter what, Petitioner’s argument fails.

This same failure applies to Ground 7: Beard and Akiike. Akiike discloses much larger particle sizes than Beard. Ex. 1011 ¶¶ [0011]-[0013] (describing D10 as 0.2 microns to 0.4 microns, D50 as 0.5 microns to 0.9 microns, and D90 as 1.0 microns to 3.0 microns). A POSITA would have understood that using the much larger particle sizes of Akiike would impact the pore structure of Beard, which as explained above, depends on very small particle sizes. The result of using these bigger particle sizes would fail to meet the requirements that the pores be “formed by the binder” *and* “at least comprise[] a part of the inorganic particles.” Or, if a POSITA chose to use the particle sizes of Beard instead, they would run into the same issue articulated above: that Beard does not disclose the particle size limitations. But once again, Petitioner cannot have it both ways, and cannot use particle sizes from Beard for one limitation and different particle sizes from Akiike for another limitation.

These are just a few high-level examples of the weak merits of the Petition. Additional details as to the merits will be presented in Patent Owner's Preliminary Response and accompanying expert declaration.

G. Memo Factor 1: Whether the PTAB or Another Forum Has Already Considered the '148 Patent Is Neutral

Memo Factor 1 asks “whether the PTAB or another forum has already adjudicated the validity or patentability of the challenged patent claims.” While the '148 Patent has not been previously adjudicated, it is currently at issue in the Second Texas Litigation and will very likely have been adjudicated by the time a final written decision is expected to issue. Ex. 2002 (Second Texas Litigation Scheduling Order). Thus, this factor favors discretionary denial.

H. Memo Factor 2: No Material Changes In The Law Since The Claims Were Allowed By The Examiner Favors Denial

Memo Factor 2 favors denial of institution because there have been no material changes in the law since the Examiner evaluated the challenged claims and ordered their allowance after finding them patentable in October 2022. Ex. 1002 at 15-23. This lack of a change in the law favors denial, or is (at most) neutral.

The Board should not revisit and second-guess the Examiner's decisions on patent allowability less than three years after the claims' issuance, because the Examiner can be safely assumed to have done their job, and Petitioner fails to

identify any actual material error. Accordingly, this factor strongly favors denial of institution.

I. Memo Factor 4: Heavy Reliance on Expert Testimony, Including to Fill Gaps in the Prior Art’s Teachings, Favors Denial

Memo Factor 4 relates to the “extent of the petition’s reliance on expert testimony.” The FAQs further explain:

While the Board may consider expert testimony, as a matter of efficiency, extensive reliance on expert testimony and/or reasonable disputes between experts on dispositive issues may suggest that the questions are better resolved in an Article III court. The statute and our reviewing court require that petitions be based on prior art patents and printed publications. As the judges have technical and legal expertise, it is not necessary for an expert to explain every aspect of the prior art. It is most helpful if an expert is providing focused testimony, for example to provide helpful context or to explain terms of art. The failure to provide focused expert testimony may weigh against institution.

FAQs at Q.21.

This factor favors denial because, as explained above with respect to *Fintiv* Factor 6 and Memo Factor 3, Petitioner relies heavily on expert argument,

assumptions, and inferences to fill in the gaps of the prior art and allegedly arrive at the claimed pore structure limitations and particle size distributions. Moreover, Patent Owner relies on cursory (but lengthy) expert testimony for every cited claim limitation and every ground, rather than providing a focused expert declaration addressing the limitations for which expert testimony is necessary. Ex. 1003. Patent Owner, in its POPR, will present competing expert testimony explaining why Petitioner's arguments, assumptions, and inferences are incorrect and do not meet the claim limitations. Because of the extensiveness of the expert testimony and the Petition's reliance on that testimony to establish the claimed pore structure and particle size distribution limitations, and because Petitioner's own expert will provide testimony that the prior art does not disclose or suggest the claimed invention, this dispute is better suited to resolution in an Article III district court, and this factor favors denial of institution. FAQs at Q.21.

J. Memo Factor 5: Settled Expectations are Neutral

Memo Factor 5 is directed to the "settled expectations of the parties, such as the length of time the claims have been in force." These patent claims issued in February 2023, and accordingly this factor is neutral. Ex. 1001.

K. Memo Factor 6: Compelling Interests are Neutral

Memo Factor 6 is directed to "[c]ompelling economic, public health, or national security interests." While ATL (which is a subsidiary of Japanese company

TDK) provides a large percentage of the lithium-ion batteries used in smartphones, portable computers, and other portable electronics in the United States, and has an interest in protecting its U.S.-granted intellectual property from an adjudicated infringer (CosMX), this factor is neutral.

L. Memo Factor 7: Other Factors to Consider

Memo Factor 7 is directed to any other factors the Director should consider when evaluating whether to apply discretionary denial. This last factor slightly favors denial.

The numeracy of the Grounds raised by Petitioner in this Petition for each claim favors denial. Rather than present a targeted Petition raising a single Ground for each claim, Petitioner raises three Grounds for each claim (and eight grounds overall), which would force the Board to consider all three Grounds for every claim (and all eight Grounds overall), even if only one of the Grounds were found to have merit (though, in fact, none do). This approach favors denial of institution compared to a Petition asserting a single strong Ground for each challenged claim. *See, e.g., Adaptics Ltd. v. Perfect Co.*, IPR No. 2018-01596, Paper 20 at 17-18 (PTAB Mar. 6, 2019) (designated informative) (“For example, where a petition contains voluminous or excessive grounds, Office guidance indicates the panel will evaluate the challenges and determine whether, in the interests of efficient administration of the Office and integrity of the patent system (*see* 35 USC § 316(b)), the entire

petition should be denied under 35 USC § 314(a).”) (internal quotations and citations omitted).

V. CONCLUSION

Taken together, the *Fintiv* factors and Memo factors weigh strongly in favor of discretionary denial. Each of the factors either favor denial or are neutral:

Factor	Outcome
<i>Fintiv</i> 1: Stay	No stay; favors denying institution
<i>Fintiv</i> 2: Proximity of Trial Date	Before FWD; favors denying institution
<i>Fintiv</i> 3: Investment in District Court	Extensive; favors denying institution
<i>Fintiv</i> 4: Overlap in Issues	Significant; favors denying institution
<i>Fintiv</i> 5: Same Parties	Same parties; favors denying institution
<i>Fintiv</i> 6 /Memo 3: Strength of the Merits	Weak; favors denying institution
Memo 1: Already Adjudicated	No but pending; favors denying institution
Memo 2: Changes in the Law	None; favors denying institution
Memo 4: Reliance on Expert Testimony	Extensive; favors denying institution
Memo 5: Settled Expectations	Neutral
Memo 6: Compelling Interests	Neutral
Memo 7: Any other Considerations	Numerous Grounds; slightly favors denying institution

For the reasons noted above, Patent Owner respectfully submits that the Board should deny institution of all Grounds of the Petition.

Dated: May 6, 2025

Respectfully submitted,

By: / Christopher TL Douglas /
Christopher TL Douglas, Reg. No. 56,950

CERTIFICATION UNDER 37 C.F.R. §42.24

Pursuant to 37 C.F.R. §42.24(d), I certify that this brief complies with the type-volume limits of 37 C.F.R. §42.24 and the Director Memo because it contains 7,694 words, according to the word-processing system used to prepare this brief, excluding the parts that are exempted by 37 C.F.R. §42.24 (including the table of contents, a table of authorities, a listing of facts which are admitted, a certificate of service or this certificate word count, and appendix of exhibits).

Dated: May 6, 2025

By: / Christopher TL Douglas /
Christopher TL Douglas

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §42.6(e), the undersigned hereby certifies that true and correct copies of the foregoing **PATENT OWNER'S DISCRETIONARY DENIAL BRIEF and NINGDE AMPEREX TECH. EXHIBITS 2001-2010** were served in its entirety on May 6, 2025 by filing this document through the PTAB's P-TACTS Filing System as well as delivering a true and correct copy by electronic mail on Petitioner's lead and backup counsel at the following email addresses (as agreed by counsel for Petitioner):

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