UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Roche Diabetes Care, Inc.
Petitioner

v.

Trividia Health, Inc.
Patent Owner

Case IPR2025-00553

OPPOSITION TO PATENT OWNER'S DISCRETIONARY DENIAL BRIEF

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I. INTRODUCTION

There are compelling reasons why *inter partes* review of the '981 patent is an appropriate use of Office resources and the Petition should not be discretionarily denied. The challenged '981 patent is no longer at issue at trial in the parallel district court action; due to the parties' non-infringement stipulation, any claims relating to the '981 patent have been effectively stayed unless or until appealed, removing any concerns of overlap, inconsistent judgments, or duplicative litigation cost. Further, Patent Owner has not identified any evidence that the '981 patent—which purports to claim the mere use of two conventional focused laser beams to manufacture conventional glucose test strips—has ever been commercialized, marked, licensed, or otherwise applied in the field of glucose test strips. Thus, even assuming constructive notice of the '981 patent, there was no reason for Petitioner to challenge the '981 patent earlier. Indeed, as the district court held, the '981 patent claims are limited based on applicant's prosecution disclaimer, and Patent Owner has conceded that Petitioner does not infringe the '981 based on that finding of disclaimer.

II. SUMMARY OF THE ARGUMENT

As explained below, Patent Owner's request for discretionary denial (Paper 8) should be denied for three primary reasons.

First, the parties' recent stipulation of non-infringement of the '981 patent in the parallel district court action—which essentially stays all claims concerning the '981 patent—has mitigated any concerns of inefficiency, duplicative costs, or inconsistent rulings; accordingly, the *Fintiv* factors weigh strongly against discretionary denial. In its request for discretionary denial, Patent Owner contends that the Final Written Decision will occur after the scheduled trial of September 28, 2026, and that there will be substantial, overlapping work on the '981 patent in the parallel district court action. Paper 8 at 5-8. That is no longer true. The parties have now stipulated to judgment of non-infringement of the '981 patent based on the district court's claim construction order, subject to Patent Owner's right to appeal. EX1082-Stipulation at 3. Any trial involving the '981 patent would now only occur (if at all) ***after appeal and only if the Federal Circuit reverses the district court's claim construction and remands*** to the district court, and only after months of additional discovery. Thus, the earliest possible trial would be long after the Final Written Decision would issue in October 2026. Thus, in view of the stipulation on the '981 patent, there will no longer be any overlapping issues involving the '981 patent in the parallel district court action during pendency of the IPR. Thus, as explained below, the *Fintiv* factors weigh strongly against denial of institution.

Second, despite the age of the '981 patent, discretionary denial would be inappropriate under the particular circumstances here. Patent Owner has not identified any evidence that the '981 patent has ever been previously asserted, commercialized, marked, licensed, or otherwise applied in Petitioner's relevant technology space (glucose test strips), if at all. *Intel Corp. v. Proxense LLC*, IPR2025-00327 (Paper 12) at 2. Moreover, even if Petitioner is deemed to have had constructive notice of the '981 patent when it issued, Petitioner had no reason to challenge the '981 patent due to the clear and definitive statements made in the '981 patent's prosecution history to gain allowance, which the district court recently confirmed applies and limits the '981 patent claims. And Patent Owner concedes that the '981 patent is not infringed under the court's claim construction. Thus, Petitioner's settled expectations—that its business would not be threatened by a baseless assertion of patent infringement—weighs against discretionary denial. Further, the Board's resources would be properly utilized to ensure the integrity of the patent system due to the strength of the Petition and to resolve issues regarding the invalidity of the '981 patent, which may never be resolved absent an IPR.

Finally, Patent Owner fails to refute the strength of the Petition. As demonstrated in the Petition, the '981 claims should never have been issued based

on multiple grounds never before the examiner. Patent Owner fails to show otherwise, and instead repeatedly mischaracterizes the prior art and Petitioner's arguments in the Petition.

III. THE BOARD SHOULD NOT DISCRETIONARILY DENY INSTITUTION

A. *Fintiv* Factors Weigh Heavily Against Discretionary Denial Due to The '981 Non-Infringement Stipulation

The parties' recent non-infringement stipulation renders moot Patent Owner's *Fintiv* arguments. Paper 8 at 4-9. In its request, Patent Owner focuses on the purported overlap of issues between the '981 IPR and the parallel district court action on the assumption that trial in the parallel district court action would occur before the expected Final Written Decision date of October 16, 2025. *Id.* at 5-9. However, the parties recently stipulated to non-infringement of the '981 patent under the district court's claim construction, subject to Patent Owner's right to appeal. EX1082-Stipulation. As a result, all district court claims concerning the '981 patent have, in effect, been stayed through appeal. As explained below, in view of the stipulation, the *Fintiv* factors weigh decidedly against discretionary denial.

1. Factor 1: Whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted

The first *Fintiv* factor weighs strongly against discretionary denial. While Patent Owner contends no stay has been entered in the district court case (Paper 8 at 4-5), the parties' recent non-infringement stipulation effectively stays the case with respect to the '981 patent—unless and until any appeals are taken on the claim construction issue and the case is remanded. The stipulation thus "allays concerns about inefficiency and duplication of efforts" and should "***strongly*** weigh[]" against discretionary denial. *Apple Inc. v. Fintiv, Inc.*, IPR2020-0019 (Paper 11) at 6 (emphasis added).

2. Factor 2: Proximity of the court's trial date to the Board's projected statutory deadline for a final written decision

The second *Fintiv* factor also weighs against discretionary denial. Patent Owner notes that the scheduled trial date in the parallel district court litigation is September 28, 2026. Paper 8 at 5 (citing Ex. 2001 at 28). But now that the parties have stipulated to non-infringement under the district court's claim construction, any scheduled trial will ***not*** include the '981 patent. As explained above, any trial involving the '981 patent would not occur until long after the expected Final Written Decision date of October 16, 2026.

3. Factor 3: Investment in the parallel proceedings by the court and parties

The third *Fintiv* factor also weighs against discretionary denial. This factor is ultimately concerned with "duplicative costs." *Fintiv*, IPR2020-0019 (Paper 11) at 10 ("This investment factor is related to the trial date factor, in that more work completed by the parties and court in the parallel proceeding tends to support the arguments that the parallel proceeding is more advanced, a stay may be less likely, and instituting would lead to duplicative costs."). Here, while the district court issued a *Markman* order regarding the '981 patent, the result of the *Markman* order led to a stay of any further work on the '981 patent until after any appeals on the claim construction ruling, thus eliminating further costs in the parallel litigation. Thus, no "additional substantial work" involving the '981 patent will occur as Patent Owner contends. Paper 8 at 6-7. It is also no longer the case, as Patent Owner argues, that "if this IPR is instituted, the bulk of the IPR work would occur during periods in which substantial efforts will also be on-going in the Litigation." *Id.* at 7.

Further, Patent Owner's contention that Petitioner delayed filing the Petition is without merit. Paper 8 at 7. Contrary to Patent Owner's assertions, Petitioner was diligent and expeditious in preparing a Petition. Patent Owner suggests that merely filing a Petition four months after receiving infringement contentions is untimely.

However, Patent Owner offers no evidence that Petitioner was anything other than diligent during those four months; to the contrary, it is reasonable to spend multiple months analyzing and formulating multiple grounds challenging over 30 claims, supported by over 200 pages of analysis by Petitioner's expert. *See* Petition, EX1002.

4. Factor 4: Overlap between issues raised in the petition and in the parallel proceeding

The fourth *Fintiv* factor also weighs against discretionary denial. As explained above, the parties' non-infringement stipulation has eliminated any possibility of overlap between issues raised in the Petition and the parallel district court action. Thus, there is no longer a concern of "inefficiency and the possibility of conflicting decision," which is what *Fintiv* was concerned with for this factor. *Fintiv*, IPR2020-0019 (Paper 11) at 12.

5. Factor 5: Whether the petitioner and the defendant in the parallel proceedings are the same party

The fifth *Fintiv* factor is neutral. *See Snap, Inc. v. SRK Technology LLC* IPR2020-00820 (Paper 15) at 16 (finding factor 5 neutral where the parties are the same but the parallel proceeding is stayed and where there is no substantial overlap).

In sum, *Fintiv* factors 1-5 collectively weigh overwhelmingly against denial.

B. The Age of the '981 Patent Does Not Favor Discretionary Denial

Patent Owner's argument that the age of the '981 patent favors denial (Paper 8 at 15-16) should be rejected for the following reasons.

First, despite being in force since 2012, Patent Owner has not identified any evidence that the '981 patent has ever been previously asserted, commercialized, marked, licensed, or otherwise applied in Petitioner's relevant technology space (glucose test strips), if at all. *Intel Corp.*, IPR2025-00327 (Paper 12) at 2. For example, none of Petitioner's patents has ever cited the '981 patent, and the only 9 citations are from Patent Owner's own parent company, Sinocare. EX1083-Lexis-Citation-Report (listing 9 forward citations to the '981 patent); EX1081-Lexis-Assignees-Table (showing Sinocare as the assignee of all 9 forward citations). The lack of evidence that the '981 patent has been applied to Petitioner's technology space is a "persuasive reason why the Board should review challenged claims several years after their issuance date." *Intel Corp.*, IPR2025-00327 (Paper 12) at 2.

Second, the Petitioner's settled expectations should also be considered, and weigh against discretionary denial in this case. *See* March 26, 2025 Memorandum, Interim Processes for PTAB Workload Management, at 2 (relevant considerations include "[s]ettled expectations of the ***parties***") (emphasis added). *Dabico Airport*

Solutions v. AXA Power APS found that the patent owner had settled expectations based on the petitioner's constructive notice of a published patent. IPR2025-00408 (Paper 21) at 2. Here, assuming arguendo that Petitioner had constructive notice of the '981 patent upon issuance, Petitioner would have had settled expectations based on the clear and definitive statements made in the prosecution history of the '981 patent, which limit the claim scope. *See* Petition at 12 (describing prosecution history). As the Federal Circuit has long recognized, the prosecution history serves an important public notice function in patent law, and the public has the right to rely on definitive statements made in the prosecution history. *Biogen Idec, Inc. v. GlaxoSmithKline LLC,* 713 F.3d 1090, 1095 (Fed. Cir. 2013) ("Prosecution history disclaimer plays an important role in the patent system. It 'promotes the public notice function of the intrinsic evidence and protects the public's reliance on definitive statements made during prosecution.'") (quoting *Omega Eng'g, Inc, v. Raytek Corp.*, 334 F.3d 1314, 1324 (Fed. Cir. 2003)). The district court agreed with Petitioner, finding that the '981 patent claims are appropriately limited by the statements made during prosecution. EX1080-Markman-Opinion at 39. And Patent Owner conceded that under the Court's claim construction, there is no infringement. EX1082-Stipulation at 3 ("Trividia concedes that, under the Court's construction of the above

terms, none of Roche Accused Products and Methods satisfy the limitations of the asserted claims from the '981 patent."). Thus, based on applicant's prosecution statements—which serve a "public notice function"—there would have been no reason for Petitioner to challenge the '981 patent earlier.

Finally, the age of the patent is outweighed by the "strength of the unpatentability challenge." March 26, 2025 Memorandum, Interim Processes for PTAB Workload Management, at 2. As *Fintiv* recognizes, where the merits are strong on the preliminary record—as demonstrated by the Petition in this case—institution promotes the efficiency and integrity of the patent system by allowing proceedings to continue in the event the parallel proceeding fails to resolve the patentability question. *Fintiv*, IPR2020-0019 (Paper 11) at 14-15. This is the case here: due to the non-infringement stipulation, issues surrounding the invalidity of the '981 patent may never be resolved absent the IPR, despite the strength of the challenge demonstrated in the Petition and explained further below in Section III.C.

C. The Strength of the Petition Weighs Against Discretionary Denial

The Petition demonstrates the strength of the challenge, which weighs against discretionary denial under *Fintiv*. For example, as explained in the Petition, the '981 patent admits that it was already known to use a conventional laser beam to create

glucose strips. EX1001-'981, 1:53-62; Petition at 11-12. The '981 patent merely claims the use of two or more different laser beams in the manufacturing process. EX1001-'981, 9:16-10:33, claim 18, Petition at 12. As explained in the Petition, the prior art explicitly discloses the use of two different laser beams during the manufacture of a test strip. *See, e.g.*, EX1032-Edelbrock [0046] ("[T]he laser used in forming the laser cuts 170 a-c and 114 a-c may be different."); Petition at 55, 84. Petitioner has set forth a strong challenge to the '981 patent, and Patent Owner fails to show otherwise.

First, Patent Owner's arguments regarding Ground I (Bhullar, Boogard, and Angell) are without merit. Patent Owner mischaracterizes the Petition by contending that it seeks to "overhaul" Bhullar, "implement[] an entirely new positioning system," or conduct "a complete redesign of its system" in view of Boogard and Angell. Paper 8 at 10-11. The Petition says no such thing. To the contrary, as explained in the Petition and in the supporting expert declaration, Bhullar expressly teaches and directs a POSITA to use known laser techniques to manufacture the test strips. Petition at 17-18; e.g., EX1007-Bhullar, [0019]. The laser techniques in Boogard and Angell are undisputedly known techniques and were particularly suitable for the creation of Bhullar's test strips, for multiple reasons explained in the

Petition and the supporting expert declaration (Petition at 18-27, EX1002 (Cunningham Declaration) ¶¶ 81-137). Patent Owner omits this entire discussion and quotes only the final summary paragraph from the Petition to argue (incorrectly) a lack of motivation to combine. Paper 8 at 10.

Patent Owner next improperly excerpts a single sentence explaining how "Angell's CO2 laser could be moved with a positioning system and used with scanning techniques to form the larger recess" and incorrectly suggests that Petitioner argued only that Angell "could" have been used in the combination, not that it "would have been used" in the combination. Paper 8 at 11. However, Patent Owner omits the immediately prior sentence, which explains that "[a] POSITA ***would*** have also been motivated by Boogaard's teaching of a positioning system to implement Angell's CO2 laser in the Bhullar-Boogaard method using a positioning system, with a reasonable expectation of success." Petition at 25 (emphasis added). The fact that Angell's laser could work with the Bhullar-Boogard combination is evidence that there was a reasonable expectation of success and does not in any way undermine the motivation to combine.

Patent Owner also is unable to show that the Petition's reasonable expectation of success argument is purportedly "lacking." Paper 8 at 12. Patent Owner omits

the extensive discussions in the Petition and in the expert declaration that demonstrate why there would have been a reasonable expectation of success for the combination, including supporting evidence of such success in the prior art. *See, e.g.*, Petition at 26 (explaining how a prior art reference called Winarta already taught a successful use of a CO_2 laser to ablate both metal and polymer, thus evidencing the reasonable expectation of success a POSITA would have in using Angell's CO_2 laser to ablate both metal and polymer in the Bhullar-Boogaard combination).

Second, Patent Owner's arguments attacking Grounds II and III (based on Edelbrock) also fail. Patent Owner incorrectly contends that Edelbrock does not disclose the use of "different lasers," citing only a portion of the Edelbrock reference. Paper 8 at 12-13 (citing EX1032-Edelbrock at 0039-0041). But Patent Owner again mischaracterizes both the Petition and Edelbrock by cherry picking excerpts. Patent Owner omits the relevant paragraph from Edelbrock described in the Petition, which explicitly discloses two different lasers, one for a first set of laser cuts (170a-c), and a "different" one for a second set of laser cuts (114a-c):

> [L]aser cuts 170 a-c and the laser cuts 114 a-c are performed at distinct times and are considered to be separate acts….It is contemplated that the laser used in

> forming the laser cuts 170 a-c and 114 a-c ***may be different***.

EX1032-Edelbrock [0046], [0049] (emphasis added); Petition at 55, 84. The express disclosure of Edelbrock refutes Patent Owner's attacks.

Patent Owner then makes the same flawed "could" versus "would" argument (Paper 8 at 14) addressed above with respect to Ground I. Again, Patent Owner omits the immediately prior statement that "[a] POSITA ***would*** have also been motivated by Boogaard's teaching of a positioning system to implement Angell's CO_2 laser in the Edelbrock-Boogaard method using a positioning system with a reasonable expectation of success. *See* Petition at 63 (emphasis added).

Finally, Patent Owner's criticisms of the "reasonable expectation of success" arguments for Grounds II-III are without merit. Patent Owner incorrectly suggests that Petitioner's reasonable expectation of success is based solely on each references' disclosure of "laser ablation on metals at a micron scale." Paper 8 at 15. Not only is the ability to ablate metals at a micron scale a strong indicator of reasonable expectation of success because it demonstrates interchangeability and compatibility, Petitioner additionally cites evidence from Hellrung and Boogaard to show that a POSITA would have reasonably expected success in using a CO_2 laser

with a positioning system. Petition at 63. Further, Petitioner explains how all the references use lasers in the same way to produce electrical components—which is all strong evidence that a POSITA would have found reasonable success in substituting well-known lasers in the combinations. Petition at 63-64. Finally, Patent Owner's argument assumes, incorrectly, that Edelbrock is a "single laser system" and thus there is no explanation of a reasonable expectation of success of using multiple lasers. Paper 8 at 15. As explained above, however, Edelbrock is not a "single laser system" and explicitly discloses use of two different lasers—a fact that Patent Owner ignores. EX1032-Edeblock [0046], [0049]; Petition at 55, 84.

In sum, Patent Owner's attacks on the merits of the Petition are based on mischaracterizations of the Petition and prior art. When properly considered, the Petition demonstrates a strong challenge to the patentability of each of the claims of the '981 patent, which weighs against discretionary denial.

IV. CONCLUSION

For the foregoing reasons, Patent Owner's request should be denied.

Respectfully submitted,

/Brian J. Lambson/

Brian J. Lambson, Reg. No. 72,570

Table of Exhibits for U.S. Patent 8,128,981 Petition for *Inter Partes* Review

Exhibit	Description
1001	U.S. Patent No. 8,128,981 ("'981 patent")
1002	Declaration of Dr. David Cunningham Regarding U.S. Patent No. 8,128,981 ("Decl.")
1003	File History for U.S. Patent No. 8,128,981
1004	District Court, Trividia's Counterclaims
1005-1006	RESERVED
1007	U.S. Pub. No. 2004/0200721 ("Bhullar")
1008	RESERVED
1009	U.S. Patent No. 6,875,327 ("Miyazaki")
1010	RESERVED
1011	U.S. Patent No. 6,258,229 ("Winarta")
1012-1030	RESERVED
1031	Henning and Cunningham, "Biosensors for Personal Diabetes Management" In: Commercial Biosensors: Applications to Clinical, Bioprocess and Environmental Samples, G. Ramsay, John Wiley & Sons, 3-46 (1998) ("Henning-Cunningham")
1032	U.S. Pub. No. 2009/0159197 ("Edelbrock")
1033	U.S. App. No. 60/754,141 ("Edelbrock-Prov")
1034	Angell et al., Processing Parameters for Laser Micromachining, SPIE Vol. 2993 (1997) ("Angell")
1035	Boogaard, Precision laser micromachining, SPIE Vol. 611 Laser Processing of Semiconductors and Hybrids (1986) ("Boogaard")
1036-1037	RESERVED

Exhibit	Description
1038	Chryssolouris, Laser Machining Theory and Practice, Chapter 2 (1991) ("Chryssolouris")
1039-1048	RESERVED
1049	U.S. Patent No. 6,531,040 ("Musho")
1050	RESERVED
1051	Claim Construction Chart, Dkt. 61, *Roche Diabetes Care, Inc. v. Trividia Health, Inc*., Case No. 1:24-cv-00668 (DDE), Feb. 6, 2025
1052	Sercel, et al, "Industrial microprocessing applications of excimer lasers," SPIE Vol. 998 Excimer Beam Applications (1988) ("Sercel")
1053-1054	RESERVED
1055	U.S. Pub. No. 2005/0019953 ("Groll")
1056	U.S. Patent No. 5,593,739 ("Kickelhain")
1057	Martin Goosey, "Introduction to Polymers and their Important Properties for Electronic Applications" *Plastics for Electronics*, 2nd ed. (1999) ("Goosey")
1058	Declaration of June A. Munford
1059-1060	RESERVED
1060	Atkin et al., "A Microfabricated Polymer Filter Device for Bio-Applications" Microfluidics, BioMEMS, and Medical Microsystems II, Proceedings of SPIE Vol. 5345 (2004) ("Atkin")
1061	Chrisey et. al, Direct-Write Technologies for Rapid Prototyping Applications: Sensors, Electronics, and Integrated Power Sources, Chapters 1, 3 (2002) ("Chrisey")
1062	File History for U.S. Pub. No. 2004/0200721 ("BhullarFH")
1063	File History for USAN 09/411,940 ("Bhullar'940")

Exhibit	Description
1064	E. Harvey, "Microsensors for Minimimally Invasive Diagnostics," The Institution of Electrical Engineers (1995) ("Harvey")
1065	District Court Time to Trial Statistics ("District-Court-Statistics")
1066	Fisher, J.C, "A Brief History of the Nd:YAG Laser" *in* Advances in Nd:YAG Laser Surgery (1988) ("Fisher")
1067	Vitriol, "Thick Film and Ceramic Technologies for Hybrid Multichip Modules" *in* Multichip Module Technologies and Alternatives: The Basics (1993) ("Vitriol")
1068	RESERVED
1069	O'Leary et al., "A robust procedure for the automated measurement of total serum bilirubin using potassium ferricyanide" Annals of clinical biochemistry 30, no. 2 (1993).
1070	Tiffany, "Drilling, marking and other applications for industrial Nd:YAG laser" SPIE Vol 527 Applications of High Power Lasers (1985) ("Tiffany")
1071	D. Hellrung et. al., "Laser beam removal of micro-structures with Nd:YAG-Lasers" SPIE Vol. 3097 (1997) ("Hellrung")
1072	Martyr and Holt, "High Power Laser Processing of Materials" SPIE Vol. 801 (1987)
1073	Roger Allan, "Lasers in the factory: Nd: YAG and CO2 lasers are growing in popularity for cutting, drilling, welding, scribing, and heat-treating a host of metals and nonmetals" IEEE Spectrum, Vol. 16, Issue 5, (May 1979) ("Allan")
1074	U.S. Patent No. 4,081,653 ("Koo")
1075	Bayer HealthCare Ascensia Breeze User Manual (2003) ("Ascensia")
1076	Memorandum Opinion in Case No. 1:24-cv-00668-GBW, Dkt. 62 ("Memorandum-Opinion")

Exhibit	Description
1077	Judge Gregory B. Williams, Time to Trial Statistics ("Docket-Navigator")
1078	WO Pub. No. 1999022236 ("Heinonen")
1079	U.S. Patent No. 7,547,383 ("Cai")
1080	Markman Opinion in Case No. 1:24-cv-00668-GBW, Dkt. 119 ("Markman-Opinion")
1081	LexisNexis Table of Assignees ("Lexis-Assignees-Table")
1082	Stipulation of Non-Infringement in Case No. 1:24-cv-00668-GBW, Dkt. 132 ("Stipulation")
1083	LexisNexis Citation Report ("Lexis-Citation-Report")

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2025, I caused a true and correct copy of the foregoing materials:

- Petitioner's Opposition to Patent Owner's Discretionary Denial Request
- Updated Table of Exhibits for Petition for *Inter Partes* Review of U.S. Patent No. 8,128,981
- Exhibits 1080 – 1083
- Word Count Certificate of Compliance

to be served, via electronic mail upon the following counsel for Patent Owner,

- Heath J. Briggs – BriggsH@gtlaw.com
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WORD COUNT CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Opposition to Patent Owner's Discretionary Denial Request contains 3,151 words as measured by the word processing software used to prepare the document, in compliance with 37 C.F.R. § 42.24(d).

Respectfully submitted,

Dated: July 16, 2025

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