

IPR2025-00644
Patent No. 9,208,423

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO., LTD., and
SAMSUNG ELECTRONICS AMERICA, INC.,
Petitioners,

v.

ICASHE, INC.,
Patent Owner.

Case IPR2025-00644

Patent No. 9,208,423

**PATENT OWNER'S AUTHORIZED
RESPONSE TO PETITIONER'S REQUEST FOR DIRECTOR REVIEW**

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INTRODUCTION

Last month, the Director¹ denied institution of seven related *inter partes* review proceedings brought by Petitioners Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. (“Samsung”). Paper 11. These discretionary denial decisions rested on years of precedent and a “holistic assessment of all of the evidence and arguments presented,” including that the related district court trial would conclude prior to a final written decision in these proceedings and that five of the seven patents had been in force for many years. *Id.* at 2-3. Yet Samsung asks the Director for Director Review of those denials, taking issue with the rescission of the Vidal Memo² in favor of the more recent Boalick Memo,³ asserting that both the

¹ At the time of discretionary denial in this matter, the USPTO was headed by Acting Director Stewart, who delegated authority to Acting Deputy Chief Administrative Patent Judge Kalyan Deshpande due to recusal. *See* Paper 11 at 1, n.1. For simplicity, this brief refers to the discretionary denial decisionmaker as the “Director.”

² Director Vidal’s June 21, 2022 Memorandum on Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings With Parallel District Court Litigation (“Vidal Memo”).

³ Chief Judge Boalick’s March 24, 2025 Memorandum on Guidance on USPTO’s rescission of “Interim Procedure for Discretionary Denials in AIA Post-Grant

Boalick Memo and the Stewart Memo⁴ were misapplied, and arguing that Samsung's due process rights were violated along the way. Paper 12. But Samsung is wrong on all counts: the recent memoranda were properly promulgated and correctly applied here, and Samsung had no property right to violate. Indeed, the Director merely applied longstanding discretionary principles to determine that the district court represented the proper venue to resolve the validity of Patent Owner iCashe's patents. Because the Director's discretionary decision was proper and because Samsung points out no error, iCashe respectfully requests that the Director deny Samsung's request for Director Review.

BACKGROUND

iCashe sued Samsung in the Eastern District of Texas on June 6, 2024, asserting seven patents involving similar subject matter. *iCashe, Inc. v. Samsung Electronics Co., Ltd.*, No. 2:24-cv-00429-JRG, Dkt. 1 (E.D. Tex. Jun. 6, 2024); Ex. 2001. The district court scheduled trial for April 6, 2026. Ex. 1050. Samsung asserts invalidity of all asserted claims, and it served invalidity contentions on November 20, 2024. Ex. 2002 at 42; Ex. 2007. Over three months later, on March 10 and 11,

Proceedings with Parallel District Court Litigation" ("Boalick Memo").

⁴ Acting Director Stewart's March 26, 2025 Memorandum on Interim Processes for PTAB Workload Management ("Stewart Memo").

2025, Samsung filed seven IPR petitions challenging iCashe's patents. IPR2025-00639; IPR2025-00640; IPR2025-00641; IPR2025-00642; IPR2025-00643; IPR2025-00644; IPR2025-00645. All claims and art at issue in Samsung's IPR petitions duplicate arguments in Samsung's invalidity contentions. *See* Exs. 2003; 2021; 2023. On May 1, 2025, the district court (Judge Rodney Gilstrap) denied Samsung's motion to stay the litigation. Ex. 2004.

On August 14, 2025, the Director granted discretionary denial of all seven IPR petitions. Paper 11. The Director based these decisions on the totality of the evidence and arguments the parties presented, including that the trial date suggests trial would begin before a final written decision and that the length of time in force of five of seven patents created settled expectations for Patent Owner. *Id.* at 2-3. On September 12, 2025, Samsung filed its request for Director Review. Paper 12.

ARGUMENT

At bottom, Samsung raises two grievances: (1) that its *Sotera* stipulation was not adequately weighed by the Director and (2) that the consideration of settled expectations was given too much weight. For each complaint, Samsung asserts that the relevant memorandum from the Director was improperly promulgated, that the guidance in the memoranda somehow stripped Samsung of an amorphous due process right, and that the memoranda were improperly applied. But Samsung makes much out of nothing: the Director's memoranda and the guidance contained therein

were properly promulgated and properly applied—and Samsung had no due process rights to violate.

Institution of *inter partes* review is a matter of discretion, and “no petitioner has a right to such institution.” *Mylan Lab ’ys Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1382 (Fed. Cir. 2021); *Cuozzo Speed Techs. v. Lee*, 579 U.S. 261, 273 (2016) (citing 35 U.S.C. § 314 (no mandate to institute review)). The Director should not disturb the previous institution decisions made in the exercise of sound discretion, and Samsung’s requests for Director Review should be denied.

A. Samsung’s *Sotera* stipulation was adequately considered under the proper legal framework.

Samsung complains that its *Sotera* stipulation was considered under the recent Boalick Memo and not under the rescinded Vidal Memo, asserting that the update in guidance constituted violations of the Administrative Procedure Act (“APA”) and Samsung’s due process rights. But Samsung admits the Vidal Memo was already rescinded when Samsung filed its petitions, and the recission and promulgation of the memoranda were proper under both APA and due process principles.

1. The Director properly rescinded the Vidal Memo, properly issued the Boalick Memo, and did not violate the APA.

Issued in 2022 by former Director Vidal, the Vidal Memo characterized itself as an “Interim Procedure for Discretionary Denials” to serve “[i]n the meantime” while the “Office [wa]s planning to soon explore potential rulemaking.” Vidal

Memo at 1-2. It stated that, for that interim period, “[c]onsistent with *Sotera Wireless, Inc.*, the PTAB will not discretionarily deny institution in view of parallel district court litigation where a petitioner presents a stipulation not to pursue in a parallel proceeding the same grounds or any grounds that could have reasonably been raised before the PTAB.” *Id.* at 3.

Although the Vidal Memo “intended to provide guidance while the USPTO explored potential rulemaking, ... the USPTO did not subsequently propose a final rule” related to discretionary denial of institution. Boalick Memo at 1. Therefore, on February 28, 2025, as the Office explained, “[i]n the absence of rulemaking, the USPTO rescinded the Interim Procedure to restore policy in this area to the guidance in place before the Interim Procedure.” *Id.* Returning to the status quo ante, the Office made clear that “a timely-filed *Sotera* stipulation ... is highly relevant, but will not be dispositive by itself.” *Id.* at 2-3.

Samsung argues that the rescission of the Vidal Memo’s guidance deeming a *Sotera* stipulation dispositive violated the APA because it effectuated substantive rule change without notice and comment or reasoned explanation. Paper 12 at 7-8. Not so. First, the Vidal Memo was not a rule requiring notice and comment—rather, it was a “general statement of policy”—that is, a “statement[] issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” *Lincoln v. Vigil*, 508 U.S. 182, 197 (1993); *see also*

5 U.S.C. § 553(b)(4)(A) (notice and comment process not required for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice”); *see also, e.g., Arizona v. Biden*, 40 F.4th 375 (6th Cir. 2022) (deeming prospective prioritization guidance general statement of policy). Here, the Vidal Memo advised the public as to the manner in which the Director would decide institution of *inter partes* review proceedings—a decision accorded by Congress to the Director’s discretion. *See, e.g., SAS Inst., Inc. v. Iancu*, 584 U.S. 357, 366 (2018); *Mylan Lab ’ys Ltd.*, 989 F.3d at 1382. This includes advising the public of the manner in which the Director would account for a *Sotera* stipulation. Thus, the Vidal Memo is definitionally a “general statement of policy,” which did not require notice and comment. *Cf. Apple Inc. v. Vidal*, No. 20-CV-06128-EJD, 2024 WL 1382465, at *13 (N.D. Cal. Mar. 31, 2024) (holding *Fintiv* rule describing factors for determination of discretionary denial was a “general statement of policy” exempt from notice and comment procedures). And where notice and comment procedures were not required for issuance, nor were they required for rescission. *See Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 101 (2015). The rescission of the Vidal Memo’s *Sotera* guidance did not violate the APA’s notice and comment provisions.

Second, the rescission of the Vidal Memo did not violate the change-in-position doctrine. That doctrine states that “agencies are free to change their existing policies as long as they provide a reasoned explanation for the change, display

awareness that they are changing position, and consider serious reliance interests.” *Food & Drug Admin. v. Wages & White Lion Invs., L.L.C.*, 604 U.S. 542, 568 (2025) (citation modified). Here, the USPTO did provide a reasoned explanation, displaying awareness that it was changing position with regard to its process for weighing discretionary denial. In the Boalick Memo, the Office explained that the Interim Procedure in the Vidal Memo “was intended to provide guidance while the USPTO explored potential rulemaking, but the USPTO did not subsequently propose a final rule....” Boalick Memo at 1. Because there had been no rulemaking, the USPTO rescinded the Interim Procedure “to restore policy in this area to the guidance in place before the Interim Procedure, including the Board’s precedential decisions” in the *Fintiv* and *Sotera* decisions. *Id.* Further, the Boalick Memo explains how changes due to the rescission of the Vidal Memo apply to various circumstances, demonstrating an “awareness that they are changing position.” *See id.* at 2-3; *Wages & White Lion Invs.*, 604 U.S. at 568. Finally, there is no “serious reliance interest” in the manner in which the Director makes discretionary denial determinations. Where a prior “guidance may have led respondents to *believe* that the [agency] was more likely to” decide in their favor, “such a belief about how an agency is likely to exercise its enforcement discretion is not a ‘serious reliance interest.’” *Wages & White Lion Invs.*, 604 U.S. at 585 (citation modified). Indeed, where the Vidal Memo was in effect for less than three years, Samsung cannot rely on it under the change-

in-position doctrine, since “change-in-position cases” require “decades of industry reliance on [an agency’s] prior policy.” *Id.* Therefore, the rescission of the Vidal Memo did not violate the change-in-position doctrine.

Likewise, the Boalick Memo and its guidance that a *Sotera* stipulation will be “highly relevant” though “not dispositive” is a “general statement of policy” exempt from notice and comment procedures. Boalick Memo at 2-3. The Boalick Memo’s *Sotera* guidance is a “statement[] issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power.” *Lincoln*, 508 U.S. at 197. Here, the Office made clear that the Boalick Memo would apply to cases where discretionary denial decisions had not yet been finalized—i.e., prospectively. Boalick Memo at 2. That Samsung had already filed its IPR petitions or its *Sotera* stipulation does not render the guidance retroactive. Paper 12 at 9-10. Instead, the Boalick Memo provided prospective guidance about “the manner in which the [USPTO] propose[d] to exercise [its] discretionary power” to institute the IPRs. *Lincoln*, 508 U.S. at 197. The institution decision here was not made until August 14, 2025—after the guidance had issued, and after Samsung had had ample opportunity to brief its arguments under the clarified framework.

2. The rescission of the Vidal Memo in favor of the Boalick Memo did not violate Samsung’s due process rights.

In passing, Samsung asserts a violation of its due process rights because

“Samsung began investing money and resources in preparing its IPR petitions well ahead of the USPTO’s rescission of the Vidal Memo” in reliance on the Vidal Memo’s *Sotera* guidance, though it concedes it did not pay its filing fees or file its petitions until after the Vidal Memo’s rescission, due its own delay in filing its petitions nine months after iCashe’s complaint. Paper 12 at 9; Paper 7 at 8. But more importantly, Samsung can only have a due process property right if they have a “legitimate claim of entitlement to it.” *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (citations omitted). And “a benefit is not a protected entitlement if government officials may grant or deny it in their discretion.” *Id.*; *see also, e.g., Bloch v. Powell*, 348 F.3d 1060, 1069 (D.C. Cir. 2003) (“[W]hen a statute leaves a benefit to the discretion of a government official, no protected property interest in that benefit can arise.”) (collecting cases).

As explained above, whether or not to institute Samsung’s IPRs is a discretionary determination by the Director, regardless of how the Director weighs Samsung’s *Sotera* stipulation. Here, instituting IPR and applying guidance about institution criteria are entirely discretionary matters and thus cannot support Samsung’s asserted property interest. “The Director is permitted, but never compelled, to institute an IPR. And no petitioner has a right to such institution.” *Mylan Lab’ys Ltd.*, 989 F.3d at 1382. In any event, because the Petitions were denied, Samsung’s *Sotera* stipulation did not take effect and Samsung is free to

pursue its invalidity positions in the district court. Samsung therefore has no protectable interest in having its Petitions resolved under a particular articulation of the Director's discretionary denial considerations.

3. The Director properly considered Samsung's *Sotera* stipulation.

Samsung also complains, because the *Sotera* stipulation is not explicitly mentioned in the discretionary denial decision, that the Director failed to adequately consider it under the Boalick Memo, which states that *Sotera* stipulations are relevant though not dispositive. Paper 12 at 11-12. But Samsung ignores the Director's statements that discretionary denial was appropriate "based on the totality of the evidence and arguments the parties have presented" and that although "certain arguments are highlighted above, the determination to exercise discretion to deny institution is based on a holistic assessment of all of the evidence and arguments presented." Paper 11 at 2-3. This includes arguments related to Samsung's *Sotera* stipulation. *See* Paper 7 at 11-13 (iCashe's brief explaining that Samsung's *Sotera* stipulation was insufficient to moot district court invalidity proceedings due to assertion of system art and explaining that the IPR proceedings would not be a "true alternative" to the district court); Paper 8 at 12-13 (Samsung opposition arguing the IPRs would "largely moot" the district court and discussing its *Sotera* stipulation).

Because the Director's decision made clear the decision was based on "the totality of the evidence and arguments the parties have presented" and "a holistic

assessment of all of the evidence and arguments presented,” even those not “highlighted” in the decision, the Director did in fact incorporate analysis of the parties’ *Sotera* arguments. Paper 11 at 2-3; *Novartis AG v. Torrent Pharms. Ltd.*, 853 F.3d 1316, 1328 (Fed. Cir. 2017) (“[F]ailure to explicitly discuss every issue or every piece of evidence does not alone establish that the tribunal did not consider it.”) (collecting cases). The Director was entitled to credit both parties’ arguments that, despite Samsung’s stipulation, the district court would need to address invalidity, and to agree with iCashe that Samsung’s *Sotera* stipulation was inadequate to render the PTAB a “true alternative” to the district court. Paper 7 at 12; Paper 8 at 12. There is no reason to disturb that decision.

Samsung’s *Sotera* stipulation was properly considered, among all evidence and factors, as part of the discretionary denial calculus related to IPRs filed after the Vidal Memo was already rescinded. The Director properly determined the stipulation did not outweigh other discretionary factors weighing in favor of denial of institution. Samsung’s request for Director Review should be denied.

B. The Director correctly relied on the Stewart Memo and properly considered the settled expectations of the parties.

Samsung also complains that the addition of the consideration of “settled expectations of the parties” to the discretionary denial calculus via the Stewart Memo was both a violation of the APA and its due process rights, and additionally,

that the Director misapplied the settled expectations factor.

For the same reasons that the Boalick Memo demonstrated no APA violation, nor does the Stewart Memo. The Stewart Memo, issued on March 26, 2023, lays out a bifurcated procedure for discretionary and merits briefing prior to institution, and reaffirms prior discretionary denial considerations and precedents, while also adding the consideration of the “[s]ettled expectation of the parties, such as the length of time the claims have been in force.” Stewart Memo at 1-2. This, again, is a prospective statement regarding “the manner in which the agency proposes to exercise a discretionary power”—and therefore, a general statement of policy exempt from notice and comment procedures. *Lincoln*, 508 U.S. at 197. And a prospective clarification on a process that had not yet taken place—consideration of discretionary factors related to institution—did not have a “retroactive effect” on Samsung. Paper 12 at 11.

Similarly, the addition of a new discretionary denial briefing procedure and the articulation of several discretionary factors including “settled expectations” is not a due process violation. Samsung does not make clear how the new procedure or the articulation of the “settled expectations” factor deprives it of a property interest or what that property interest is. *See id.* at 9-10; *Cuozzo Speed Techs.*, 579 U.S. at 273; *Mylan Lab’ys Ltd.*, 989 F.3d at 1382 (“[N]o petitioner has a right to [IPR] institution.”). In any event, “no protected property interest ... can arise” “when a

statute leaves a benefit to the discretion of a government official.” *Bloch*, 348 F.3d at 1069. Samsung had no protectible due process property interest, and none was violated.

Nor did the Director commit an abuse of discretion in determining that five of the seven patents in IPR being in force for many years created strong settled expectations for Patent Owner iCashe, even though iCashe has not enforced them other than against Samsung. Paper 11 at 2; Paper 12 at 12-14. An abuse of discretion requires a decision that is “clearly unreasonable, arbitrary, or fanciful,” is based on an erroneous finding of fact or conclusion of law, or lacks a rational basis. *See, e.g., Redline Detection, LLC v. Star Envirotech, Inc.*, 811 F.3d 435, 441–42 (Fed. Cir. 2015). Samsung can point to nothing that meets the standard and cites no case where the fact that longstanding patents had not been enforced merited going forward with institution. Two of its cited cases do not address settled expectations at all, and Samsung does not explain why it cites them. Paper 12 at 13 (citing *Tesla, Inc. v. Intell. Ventures II LLC*, IPR2025-00217, Paper 9, at 2-3 (P.T.A.B. June 13, 2025); *Tesla, Inc. v. Navy*, IPR2025-00341, Paper 12, at 2-3 (P.T.A.B. June 13, 2025)). A third merely states in dicta “[t]here may be persuasive reasons why the Board should review challenged claims several years after their issuance date” where “a patent may have been in force for years but may not have been commercialized, asserted, marked, [or] licensed.” Paper 12 at 12-13 (quoting *Intel Corp. v. Proxense LLC*,

IPR2025-00327, Paper 12, 2025 WL 1772860, at *2-3 (P.T.A.B. June 26, 2025)). But, in that case, the settled expectations weighed in favor of discretionary denial—which was granted. *Id.* Only in the fourth did settled expectations weigh against discretionary denial—and there because four of five patents had “not been in force for a significant period of time,” and although the single longstanding patent “creat[ed] strong settled expectations for Patent Owner,” it had “never been ‘commercialized, asserted, marked, licensed, or otherwise applied’ in Petitioner’s ‘particular technology space.’” *Shenzhen Tuozhu Tech. Co., Ltd. v. Stratasys, Inc.*, IPR2025-00438, Paper 10 at 2-3 (P.T.A.B. July 17, 2025). Because four of five patents created no settled expectations, and because the last was effectively dormant, other factors prevailed. Here, however, the majority of the patents are longstanding, and Samsung does not argue that iCashe’s patents have never been “commercialized, ... marked, licensed, or otherwise applied” in Petitioners’ particular technology space. *Id.* It is unsurprising—and not an abuse of discretion—that the Director reached a different result in these IPRs versus those in *Shenzhen Tuozhu Tech. Co.*, with its disparate facts.

In any event, the Director has in fact previously denied institution due to the settled expectations in non-enforced patents. *See Kahoot! As v. Interstellar Inc.*, No. IPR2025-00696, 2025 WL 2176613, at *1 (P.T.A.B. July 31, 2025) (“Petitioner’s argument that Patent Owner does not have settled expectations because Patent

Owner did not previously assert the challenged patent against Petitioner does not defeat Patent Owner's settled expectations."); *Datadome S.A. v. Arkose Labs Holding, Inc.*, No. IPR2025-00693, 2025 WL 2368856, at *1 (P.T.A.B. Aug. 14, 2025) (rejecting the petitioner's argument that the petitioner "had settled expectations that the challenged patents would not be asserted against it because the previous patent owner never asserted the challenged patents."); *see also id.* (lack of commercialization irrelevant where Petitioner aware of Patent Owner's portfolio in general). The Director's reliance on "settled expectations" is therefore consistent with previous decisions and is reasonable.

Settled expectations is one factor among many. The Director considered that factor, along with time to trial and all of the other arguments and evidence submitted by the parties, in reaching the discretionary denial decision. There was no violation of the APA or Samsung's due process rights, nor was there an abuse of discretion. The Director's decision should not be disturbed, and Samsung's request for Director Review should be denied.

CONCLUSION

For the foregoing reasons, discretionary denial was appropriate, and the Director should deny Samsung's request for Review.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing Patent Owner's Authorized Response to Petitioner's Request for Director Review was served on September 22, 2025, by electronic mail to Petitioners' counsel at the following addresses indicated in Petitioners' Mandatory Notices:

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