UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
Petitioner

v.

SANDPIPER CDN, LLC,
Patent Owner

Case IPR2025-00952
U.S. Patent No. 8,719,886

PATENT OWNER'S BRIEF ON DISCRETIONARY DENIAL

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77 Fed. Reg. 48,680 (Aug. 14, 2012) 2

PATENT OWNER'S EXHIBIT LIST

Exhibit No.	Description
2001	"Cloud CDN: content delivery network," *Google Cloud*, accessed at https://cloud.google.com/cdn (last accessed July 2, 2025)
2002	*Intentionally Left Blank*
2003	*Sandpiper CDN, LLC v. Google LLC*, 2:24-cv-03951, ECF No. 1 (C.D. Cal. May 10, 2024)
2004	*Intentionally Left Blank*
2005	*Intentionally Left Blank*
2006	*Sandpiper CDN, LLC v. Google LLC*, No. 2:24-cv-03951, ECF No. 82 (C.D.Cal. June 24, 2025)
2007	*Sandpiper CDN, LLC v. Google LLC*, No. 2:24-cv-03951, ECF No. 28 (C.D. Cal. Sept. 16, 2024)
2008	FAQs for Interim Processes for PTAB Workload Management, accessed at https://www.uspto.gov/patents/ptab/faqs/interim-processes-workload-management
2009	*Intentionally Left Blank*
2010	*Intentionally Left Blank*
2011	*Intentionally Left Blank*
2012	*Intentionally Left Blank*
2013	Interim Processes for PTAB Workload Management Memorandum (March 26, 2025)

I. INTRODUCTION

The Petition here challenges one of seven patents presently asserted against Google LLC ("Petitioner") in the Central District of California. All of the asserted patents are also challenged in Petitions before the Board.

IPR2025	Months Petitioner Waited to file IPR	Patent Expiration	Litigation Status
-00806 ('517)	10.5	Expired	Asserted
-00826 ('112)	10.5	Expired	Asserted
-00860 ('573)	11	2029	Asserted
-00846 ('778)	11.25	2032	Dismissed (§ 101)
-00952 ('886)	11.25	2032	Dismissed (§ 101)
-00969 ('903)	11.25	Expired	Asserted
-01010 ('322)	4	2036	Added late

In the parallel district court proceeding, Petitioner successfully moved to dismiss the count asserting the '886 patent on the basis that all claims are invalid under 35 U.S.C. § 101. EX2007, 15 (*Sandpiper CDN, LLC v. Google LLC*, No. 2:24-cv-03951, ECF No. 28 (C.D. Cal. Sept. 16, 2024)). That alone is a basis to deny institution under 35 U.S.C. § 314(a). *See Hulu, LLC v. Piranha Media Distribution, LLC*, IPR2024-01252, Paper 27, IPR2024-01253, Paper 22 (PTAB April 17, 2025) (designated precedential May 7, 2025). The Petition here was filed after the decision in *Hulu* but provides no reason that the institution decision here should not come out the same way. Accordingly, the director should deny institution under § 314(a) on that basis alone.

Even aside from the Board's precedential decision in Hulu, instituting inter partes review of the '886 patent would not be a good use of the Board's limited resources. The patent has been in force nearly 11 years, and was published 15 years ago. Petitioner then waited over 11 months after being served with a compliant to file this Petition. Despite this delay, the Petition is weak on the merits and relies heavily on an expert declaration to fill gaps in the cited prior art. Strong settled expectations and efficiency therefore favor discretionary denial.

Finally, the *Fintiv* factors favor discretionary denial. Instituting review of this Petition is unlikely to streamline any dispute in the parallel litigation or expand the industry's freedom to operate in this space, and therefore does not promote the legislative purpose of IPR proceedings. *See* Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Method Patents, 77 Fed. Reg. 48,680 (Aug. 14, 2012); *see also Hunting Titan, Inc. v. DynaEnergetics Europe GmbH*, 28 F.4th 1371, 1381 (Fed. Cir. 2022) (observing that the "basic purpose of IPR proceedings" is to reexamine an earlier agency decision to "[keep] patent monopolies … within their legitimate scope"). Other reasons supporting discretionary denial are also discussed in detail below.

II. BACKGROUND

The challenged patent arises from pioneering technology directed to delivering content across a network. Content delivery networks (CDNs) provide the critical services that enable content providers like Google to quickly deliver online content to millions of consumers simultaneously over the Internet. The technology underlying these CDNs was made possible through a series of inventions developed by a California start-up called Sandpiper Software Consulting, LLC, a predecessor of Patent Owner Sandpiper CDN, LLC.

In the early 1990s, the World Wide Web saw increasing adoption, becoming a household staple. This mass adoption led to data congestion issues from the ever-growing number of users seeking to simultaneously access Internet content. A typical computer server in the 1990s could only handle a limited number of simultaneous connections before becoming overloaded. Moreover, signals take time to traverse routers and move through content-congested internet cables. Consumers living far from the physical server(s) hosting content experienced sluggish load times and high latency due to problems such as overloaded servers, congested network segments, and geographic separation.

In the mid-1990s, Andrew Swart and David Farber were among the first individuals to develop services that allowed content providers to distribute their content over the Internet, while avoiding the common congestion and performance

issues that plagued Internet transmission at that time. Sandpiper's solution was to deploy CDN servers around the world, replicate appropriate content from customers' origin servers to appropriate CDN servers, and transparently rendezvous end-users requesting that content to the "best" CDN server to deliver that content, all while providing their customers with control over their content and user experience. This service and its architecture was quickly imitated by many others in the industry.

Using solutions developed by Mr. Swart and Mr. Farber, end-users would connect to an optimal edge server—one that that was closer to them or that had available capacity. Distributing content across a network of servers alleviated data congestion issues, and allowing consumers to connect to edge servers located near them reduced latency. Swart and Farber developed and built systems and methods for propagating data from origin servers to edge servers (known as "caching") based on network demand and for seamlessly routing users to the optimal edge server with the correct content. Using caching to perform the replication process within the CDN framework flew in the face of conventional wisdom.

In 1996, Mr. Swart and Mr. Farber founded Sandpiper Networks Inc. to further develop and commercialize their novel concept for a content delivery network. Sandpiper Networks was based in Thousand Oaks, California. There, the inventors designed and built a CDN ultimately referred to as "Footprint." By at

least May 24, 1996, the Sandpiper team had conceived techniques for delivering static and dynamic content, including streaming resources, such as audio and video, using Sandpiper's CDN.

Sandpiper Networks labored not only to build and implement its CDN, but also to protect their groundbreaking innovation through the patent system. Recognizing that its invention could revolutionize content delivery worldwide, Sandpiper Networks (and its successor companies, including Patent Owner) filed numerous patent applications directed to its foundational CDN technology, including the patent challenged in this Petition.

By at least May 1998, Sandpiper Networks was caching content and delivering cached content to end users of content providers using its CDN. Sandpiper Networks' first paying customer was the L.A. Times, which paid Sandpiper Networks to host the report of Independent Counsel Ken Starr on his investigation of President Bill Clinton ("the Starr Report") beginning on September 11, 1998. Sandpiper Networks' CDN was capable of caching, and was used to cache and deliver Internet resources including inter alia, pictures, text files, dynamic resources, and streaming multimedia resources.

In the early-to-mid 2000s, demand for CDNs exploded. Sandpiper Networks continued to commercialize its technology and compete in this expanding market, doing business as various entities including Digital Island, Inc. and a company

called "Level 3." It also created Patent Owner, Sandpiper CDN, LLC. Other businesses also entered the market by misappropriating Sandpiper's innovations and directly competing with Sandpiper for market share.

One such company is Google. Google built its own in-house CDN, which uses technology described and claimed by Sandpiper's patents. Additionally, YouTube, which Google purchased in 2006, relies upon CDN technology to meet its enormous data streaming needs, as well as for Google's video search results (powered by YouTube). EX2001. Google did not license this patented technology from Sandpiper, Level 3, and/or its predecessors. Accordingly, Sandpiper brought suit against Google in district court for patent infringement. Google filed IPR Petitions against all of Sandpiper's asserted patents in response.

III. OVERVIEW OF THE '886 PATENT

The '886 patent overcomes technical obstacles relating to modifying delivery of video streams. EX2003, ¶43. CDN providers at that time sought solutions for modifying video streams, including in cases where playback is desired from more than one source. *Id.* The '886 patent provides concrete solutions for these problems. EX2003, ¶44. The inventor recognized issues relating to both playback of digital content from content publishers and the desire to modify video streams. *Id.*

As an example, the ’886 patent detects a trigger signal within the video stream, processes the trigger signal to determine whether to modify delivery of the video stream, and, if necessary, modifies delivery of the video stream. EX2003, ¶44; EX1001, 1:59-63, 12:20-33, 13:35-50, 14:30-49, 18:38-45, 19:22-38, 19:44-57, 20:35-43, 29:48-64. Another claimed solution involves injecting content into a video stream based on proximity parameters associated with a client of a video stream that specify a geographic location based on querying a server. EX2003, ¶44; EX1001, 15:1-4, 19:44-57, 20:7-12, 24:16-22, 30:34-38, 30:39-48, 30:49-54. These solutions include specific combinations that were not conventional at the time of the ’886 patent. EX2003, ¶44; EX1001, 15:1-4, 19:44-57, 20:7-12, 24:16-22, 30:34-38, 30:39-48, 30:49-54.

IV. LEGAL STANDARDS

The Board should deny institution under *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential) 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, 2025 Memorandum (EX2013, “Director Memo”) and the Board’s latest guidance on the Interim Processes for PTAB Workload Management (EX2008, “FAQs”). 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.

Apple, IPR2020-00019, Paper 11 at 5-6; EX2013, 2. 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) ("Memo Factors") including:

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.

EX2013, 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." EX2008, Q.11.

V. THE BOARD SHOULD EXERCISE DISCRETION TO DENY INSTITUTION UNDER 35 U.S.C. § 314(a).

A district court has found all claims of the '886 patent invalid under 35 U.S.C. § 101. EX2007, 15. That alone is a basis to deny institution under 35 U.S.C. § 314(a). *See Hulu*, IPR2024-01252, Paper 27, IPR2024-01253, Paper 22. Additionally, instituting *inter partes* review of the '886 patent would not be a good use of the Board's limited resources. The patent has been in force nearly 11 years, and was published 15 years ago. Petitioner then waited over 11 months after being served with a compliant to file this Petition. Strong settled expectations and efficiency therefore favor discretionary denial. The *Fintiv* factors also favor discretionary denial because instituting review of this Petition is unlikely to streamline any dispute in the parallel litigation or expand the industry's freedom to

operate in this space. The Petition's heavy reliance on expert testimony and other discretionary considerations also weigh in favor of denial.

A. Institution should be denied under *Hulu*.

The patent challenged in this Petition was asserted in a parallel litigation in district court. *See* EX2003. In that proceeding, Petitioner moved to dismiss the count asserting the '886 patent on the basis that all claims are invalid under 35 U.S.C. § 101. EX2007, 15. The district court granted the motion and found that all claims were invalid as directed to patent ineligible subject matter. *Id.*

Where a district court has already entered judgment invalidating the challenged patent claims under 35 U.S.C. § 101, the PTAB denies institution under 35 U.S.C. § 314(a). *Hulu*, IPR2024-01252, Paper 27, IPR2024-01253, Paper 22. The PTAB denies institution on this basis even where the district court's §101 decision is or will be subject to appeal. *Id.*

The Petition here was filed May 7, 2025—*after* the decision in *Hulu* was published and on the same day that it was designated precedential. Despite post-dating the decision in *Hulu*, the Petition does not address *Hulu* or its reasoning, nor does Petitioner provide any reason that the institution decision here should not come out the same way. Accordingly, the director should deny institution under § 314(a).

B. Settled expectations and efficiency favor discretionary denial

The application leading to the '886 patent published 15 years ago, and the '886 patent itself has been in force 11 years. The Office has indicated that it is not a good use of resources and upsets the settled expectations of patent owners and the marketplace to review patentability challenges for patents that have been in force for eight or nine years. *See, e.g.*, *Dabico Airport Sol'ns Inc., v. AXA Power ApS*, IPR2025-00408, Paper 21 at 2 (PTAB June 18, 2025) (discretionarily denying review for a patent that had been in force for "almost eight years"); *Intel Corp. v. Proxense LLC*, IPR2025-00327, Paper 12 at 2 (PTAB Jun. 26, 2025) ("[T]he challenged patents have been in force over nine years, creating settled expectations, and Petitioner does not provide any persuasive reasoning why an *inter partes* review is an appropriate use of Board resources."). The patent challenged here has been in force for even longer. This factor thus weights in favor of discretionary denial. Contributing to Petitioner's settled expectation is Petitioner's choice to wait over 11 months after service with a complaint before filing the present Petition. That alone is a reason to discretionarily deny institution.

C. The *Fintiv* Factors weigh in favor of denial in view of the parallel district court litigation.

On March 24, 2025, the Office issued new guidance clarifying how the Board will apply the precedential *Fintiv* and *Sotera* decisions to parallel proceedings ("*Fintiv* Guidance"). *See also Apple*, IPR2020-00019, Paper 11

(articulating six non-exclusive factors for determining whether to institute an AIA post-grant proceeding where there is parallel litigation). Every one of the *Fintiv* Factors favors denial, and the balance of the factors heavily favors discretionary denial of this Petition.

***Fintiv* Factor 1 favors denial.** There is no stay of proceedings in the parallel district court case. While the district court extended certain pre-trial deadlines to fall after the Director's expected discretionary denial decisions, the original trial date is still set for September 28, 2026. *See* EX2006, 5 (*Sandpiper CDN, LLC v. Google LLC*, No. 2:24-cv-03951, ECF No. 82 (C.D.Cal. June 24, 2025)).

While the '886 patent has been dismissed from the district court case, the parties' global dispute continues, including through appeal of that dismissal. Progress in the litigation will influence the possibility of global resolution through settlement or adjudication on the merits. This factor thus weighs in favor of denial.

***Fintiv* Factor 2 favors denial.** The projected statutory deadline for a Final Written Decision in this IPR is December of 2026. *See* 35 U.S.C. § 316(a)(11). A jury trial in the parallel litigation is set for September of 2026. *See* EX2006, 5. Accordingly, multiple tribunals (including the district court and Federal Circuit) will be adjudicating the validity of the '886 patent (Federal Circuit appeal) and other related patents (jury trial) at the same time, increasing duplication and

expenses for the parties and the tribunals. Moreover, the jury will render its verdict on the remaining patents three months *before* the PTAB would render its Final Written Decision here.

This weighs against institution. *See, e.g.*, *EClinicalWorks, LLC v. Decapolis LLC*, IPR2022-00229, Paper 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 … is roughly one to 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 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). Factor 2 favors denial.

***Fintiv* Factor 3 favors denial.** Significant work has already been done in the parallel district court litigation. Patent Owner served its infringement contentions in January 2025, and Petitioner served its invalidity contentions in April 2025. Fact discovery opened in March 2025 with the exchange of initial disclosures, and the parties have since propounded written discovery.

Additionally, the parties briefed and the district court already decided multiple substantive motions, including a motion to dismiss the '886 patent and another asserted patent based on subject-matter ineligibility under 35 U.S.C. § 101.

See, e.g., EX2007. In the process of adjudicating these motions, the district court has already become well-versed with the underlying patented technology (per *Alice* step one), and the general state of the art and specific disclosures of the pertinent prior art (per *Alice* step two). *Id.* Instituting review of the Petition will therefore do little to preserve judicial economy compared to other cases.

***Fintiv* Factor 4 favors denial.** In the event the '886 patent is reintroduced into litigation, adjudication of that patent will involve the same claims and defenses as those at issue in the Petition. *See Fintiv* Memo, 7–8 (emphasis added). Petitioner has not executed a *Sotera* stipulation for this patent. *See Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12 at 18–19 (PTAB Dec. 1, 2020) (precedential as to § II.A). Petitioner will therefore assert obviousness combinations in the district court proceeding that are entirely redundant with the invalidity Grounds presented in this Petition. Factor 4 strongly favors denial.

***Fintiv* Factor 5 favors denial.** The parties are the same in both proceedings. *Apple*, IPR2020-00019, Paper 15 at 15 (PTAB May 13, 2020) ("Because the petitioner and the defendant in the parallel proceeding are the same party, this factor weighs in favor of discretionary denial.").

***Fintiv* Factor 6 favors denial.** The merits of the petition are weak, as will be shown in the event the Petition is instituted.

D. Heavy reliance on expert declaration favors denial

Memo Factor 4 favors discretionary denial of the Petition. The Board's FAQs 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.

EX2008, Q.21. Here, Petitioner relies heavily on expert argument and inferences to fill in the gaps of the prior art, and to explain why the prior art would be modified and combined to allegedly arrive at the challenged claims. *Cf. iRhythm Techs., Inc., v. Welch Allyn, Inc.*, IPR2025-00363, Paper 10 at 2-3 (PTAB June 6, 2025) (suggesting that identifying portions of expert testimony to fill gaps in the prior art weighs in favor of denial). Petitioner also relies on 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. *Contra* EX2008, Q.21.

Specifically, for Ground 1, the Petition relies relatively heavily on the Declaration to provide the understanding and interpretation of a POSA, for

example, independent claim elements [1.a], [1.b], [1.c], [1.d], [15.a], and dependent claims 2, 3, 4, 5, 6, 7, [8.b.ii], 9, [12.c]. For Ground 2, the Petition relies relatively heavily on the Declaration to provide the understanding and interpretation of a POSA, for example, dependent claims 2. For Ground 3, the Petition relies relatively heavily on the Declaration to provide the understanding and interpretation of a POSA, for example, the dependent claim 9.

If review is instituted, Patent Owner, in its POR, will present competing expert testimony explaining why Petitioner's arguments and inferences are incorrect and do not meet the claim limitations. The extensiveness of the competing expert testimony better suits this dispute to resolution in district court, where the experts can present live testimony with cross-examination. This factor favors thus favors denial of institution. EX2008, Q.21.

E. Compelling economic and public interest concerns favor denial.

Memo Factor 6 favors denial. Congress enacted the Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112–29, 125 Stat. 284, in 2011 to, *inter alia*, "limit unnecessary and counterproductive litigation costs." H.R. REP. No. 112-98, pt. I at 40 (2011); *see also* 37 C.F.R. § 42.100 (2017) (observing the purpose of IPR as promoting just, speedy, and inexpensive resolution of patent-validity disputes). While promoting judicial economy is among the goals of the IPR

process, the AIA was also a reaction to the financial hardship many smaller defendants faced with complex commercial litigation. *Id.*

Petitioner Google is one of the most prolific patent-infringement defendants in history. On balance, this weighs against institution in view of the fact that Google (as of March 2025) has $345.26 Billion USD in net assets and is the world's 5th wealthiest company. Google is more than capable of litigating its patent challenges in district court. Unlike the smaller defendants Congress may have had in mind, Google does not need to tax the resources of the Patent Office to offload its invalidity defenses or reduce its litigation costs. The Office's limited resources are better used elsewhere.

VI. CONCLUSION

The Board should exercise its discretion to deny institution of *inter partes* review of the '886 patent.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT (37 C.F.R. § 42.24(d))

1. This Patent Owner's Brief on Discretionary Denial complies with the type-volume limitation of 14,000 words, comprising 3,674 words, excluding the parts exempted by 37 C.F.R. § 42.24(a)(1).

2. This Patent Owner's Brief on Discretionary Denial complies with the general format requirements of 37 C.F.R. § 42.6(a) and has been prepared using Microsoft® Word 2016 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE (37 C.F.R. § 42.6(e))

I certify that the above-captioned **PATENT OWNER'S BRIEF ON DISCRETIONARY DENIAL** and associated Exhibits 2001, 2003, 2006-2008, and 2013 were served in their entireties on August 7, 2025, upon the following parties via electronic mail:

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