

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AMERICAN AIRLINES, INC. AND SOUTHWEST AIRLINES CO.,
Petitioners,

v.

INTELLECTUAL VENTURES I, LLC,
Patent Owner.

IPR2025-00987
U.S. Patent No. 8,407,722

**PETITIONERS' BRIEF IN OPPOSITION TO PATENT OWNER'S
REQUEST FOR DISCRETIONARY DENIAL**

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EXHIBIT LIST

Exhibit No.	Description of Document
1001	U.S. Patent No. 8,407,722
1002	Prosecution File History of U.S. Patent No. 8,407,722 (Application No. 11/396,251)
1003	Expert Declaration of Dr. William C. Easttom II (Chuck Easttom), Ph.D., D.Sc.
1004	Curriculum Vitae of Dr. William C. Easttom, Ph.D., D.Sc.
1005	U.S. Patent No. 5,721,825, entitled “System and method for global event notification and delivery in a distributed computing environment,” filed 10/3/1996 and issued 2/24/1998, issued to Lawson et al. (“Lawson”)
1006	U.S. Patent No. 6,480,883, entitled “Real-Time Information Transmission System,” filed 6/29/1999, issued 11/12/2002, issued to Tsutsumitake (“Tsutsumitake”)
1007	U.S. Patent No. 5,951,694, entitled “Method of redirecting a client service session to a second application server without interrupting the session by forwarding service-specific information to the second server,” filed 2/3/1997, issued 9/14/1999 to Choquier et al. (“Choquier”)
1008	European Patent Application Publication No. EP1043671, entitled “Message broker providing a publish/subscribe service and method of processing messages in a publish/subscribe environment,” filed 3/17/2000, published 10/11/2000 to Bird et al. (“Bird”)
1009	U.S. Patent No. 5,754,939, entitled “System for generation of user profiles for a system for customized electronic identification of desirable objects,” filed 10/31/1995, issued 5/19/1998 to Herz et al. (“Herz”)
1010	File History for U.S. Patent Application No. 60/256,613
1011	File History for U.S. Patent Application No. 60/276,847
1012	File History for U.S. Patent Application No. 60/278,303
1013	File History for U.S. Patent Application No. 60/279,608
1014	File History for U.S. Patent Application No. 60/280,627
1015	File History for U.S. Patent Application No. 10/017,182
1016	File History for U.S. Patent Application No. 10/105,018
1017	Notice of Intent to Issue Reexamination Certificate, dated March 11,

	2025, from Reexamination of U.S. Patent No. 08,407,722 (Control No. 90/019,662)
1018	U.S. Patent No. 6,230,173
1019	U.S. Patent No. 5,907,837
1020	U.S. Patent No. 6,199,082
1021	Claim Listing
1022	Complaint, <i>Intellectual Ventures I LLC et al. v. Southwest Airlines Co.</i> , No. 7:24-cv-00277 (W.D. Tex. Nov. 2, 2024)
1023	Complaint, <i>Intellectual Ventures I LLC et al. v. American Airlines, Inc.</i> , No. 4:24-cv-980-ALM (E.D. Tex. Nov. 2, 2024)
1024	Claim Chart Exhibit to Complaint, <i>Intellectual Ventures I LLC et al. v. Southwest Airlines Co.</i> , No. 7:24-cv-277 (W.D. Tex. Nov. 2, 2024)
1025	Cornell University, Nodes; Parallel Programming Concepts and High Performance Computing (https://cvw.cac.cornell.edu/parallel/hpc/nodes)
1026	Northeastern, ECE 333: Introduction Communication Networks Fall 2002 (http://users.ece.northwestern.edu/~rberry/ECE333/Lectures/lec1.pdf)
1027	Zen and the Art of the Internet, Glossary (https://www.ou.edu/research/electron/internet/zen-glos.htm)
1028	Microsoft Computer Dictionary, 5th Edition, 2002
1029	Internetworking Technologies Handbook, Routing Basics, Chapter 5 (http://magrawal.myweb.usf.edu/dcom/Ch9_Routing-Basics.pdf)
1030	Juniper Networks, Inc., Routing Protocols Overview (https://www.juniper.net/documentation/us/en/software/junos/routingoverview/routing-overview.pdf)
1031	CloudFlare, What is Routing? IP routing (https://www.cloudflare.com/learning/network-layer/what-is-routing/)
1032	Barrons, Dictionary of Computer and Internet Terms, 10th Edition
1033	NYU Networks at ITP, Proxies (https://itp.nyu.edu/networks/explanations/proxies/)
1034	Amended Complaint, <i>Intellectual Ventures I LLC et al. v. American Airline, Inc.</i> , No. 4:24-cv-980-ALM (E.D. Tex. Aug. 25, 2025)
1035	Second Amended Complaint (redacted), <i>Intellectual Ventures I LLC et al. v. Southwest Airlines Co.</i> , No. 7:24-cv-277 (W.D. Tex. Sept. 10, 2025) (Dkt. 67)

1036	Defendant Southwest Airlines Co.’s Disclosure of Preliminary Proposed Claim Constructions, <i>Intellectual Ventures I LLC et al. v. Southwest Airlines Co.</i> , No. 7:24-cv-277 (W.D. Tex. May 9, 2025)
1037	Defendant American Airlines, Inc.’s Rule 4-3 Disclosures, <i>Intellectual Ventures I LLC et al. v. American Airline, Inc.</i> , No. 4:24-cv-980-ALM (E.D. Tex. Aug. 4, 2025) (Dkt. 67-2)
1038	American Airline’s Case Schedule, <i>Intellectual Ventures I LLC et al. v. American Airline, Inc.</i> , No. 4:24-cv-980-ALM (E.D. Tex. Sept. 8, 2025) (Dkt. 81)
1039	Defendant Southwest Airlines Co.’s Motion to Transfer Venue, <i>Intellectual Ventures I LLC et al. v. Southwest Airlines Co.</i> , No. 7:24-cv-277 (W.D. Tex. Feb. 28, 2025) (Dkt. 21)
1040	Time to Trial Statistics for Judge Mazzant
1041	Complaint, <i>Intellectual Ventures II LLC v. Southwest Airlines Co.</i> , No. 7:25-cv-252 (W.D. Tex. May 30, 2025) (Dkt. 1)
1042	Scheduling Order, <i>Intellectual Ventures II LLC v. Southwest Airlines Co.</i> , No. 7:25-cv-252 (W.D. Tex. Sept. 8, 2025) (Dkt. 21)
1043	IV’s Disclosure of Preliminary Infringement Contentions, <i>Intellectual Ventures I LLC, et al. v. American Airlines, Inc.</i> , No. 4:24-cv-980-ALM (E.D. Tex. Mar. 28, 2025) (cover pleading only) (redacted)
1044	IV’s Disclosure of Preliminary Infringement Contentions, <i>Intellectual Ventures I LLC, et al. V. Southwest Airlines Co.</i> , No. 7:24-cv-277 (W.D. Tex. Feb. 10, 2025) (cover pleading and exhibit 2 only)

I. INTRODUCTION

The '722 Patent's validity should be resolved by the PTAB, not in court. Patent Owner sued Petitioners in two different district courts on November 2, 2024, as part of a litigation campaign involving twelve patents (including the '722 Patent) from ten different families, asserted against various products from at least a dozen vendors. Petitioners—who are not in the '722 Patent's technology space—had no reason to know of or to challenge the '722 Patent before these suits. PTAB review in this posture is exactly what Congress envisioned when it created inter partes review: an efficient, expert forum for testing validity and preventing the burden of litigating improvidently granted claims across multiple Article III courts.

Congress enacted IPRs to improve patent quality and provide a faster, less costly alternative to litigation. That mandate applies equally to old patents as to new ones. Shielding the oldest patents from review is contrary to Congress's design. An invalid patent does not become stronger simply by surviving untested for years; if asserted after dormancy, it imposes even greater burdens on innovation and unsuspecting operating companies. Nothing in the AIA suggests such patents should be insulated from review. To the contrary, denying institution based on "settled expectations" would thwart Congress's purpose by leaving the patents most in need of scrutiny beyond reach. Here, institution will conserve substantial resources and resolve validity well before any trial.

The record confirms that discretionary denial is unwarranted. First, as the Director recently explained in *Intel Corp. v. Proxense, LLC*, IPR2025-00327, Paper 12 at 3 (PTAB June 26, 2025), the “settled expectations” inquiry looks to how the patent has actually been applied. The ’722 Patent has never been commercialized, licensed, or marked in Petitioners’ industry; it was first asserted against Petitioners only on November 2, 2024, after years of dormancy. Whatever expectations might have existed in other contexts, Petitioners’ reasonable reliance on freedom from such surprise assertions in their business outweighs Patent Owner’s supposed settled expectations. *See Home Depot v. H2 Intellect LLC*, IPR2025-00480, Paper 11 at 2–3 (PTAB Sept. 4, 2025).

Second, PTAB review will promote efficiency across this sprawling litigation. The parallel cases involve a dozen patents from ten different families, covering disparate technologies and multiple vendors. No single trial could reasonably adjudicate all those claims together. PTAB review, by contrast, allows one patent at a time to be addressed by a specialized tribunal, narrowing what remains for Article III courts to infringement and damages, if any claims survive. The Director has expressly recognized this systemic efficiency as a key consideration. *See Am. Airlines, Inc., et al. v. Intellectual Ventures I LLC*, IPR2025-00785, Paper 11 at 3 (Director Aug. 29, 2025).

Third, Petitioners' claim-construction positions are not inconsistent. The Petition demonstrates unpatentability under Phillips "under any reasonable interpretation," fully consistent with preserving alternative § 112 defenses in district court. This practice is both commonplace and proper.

Fourth, the *Fintiv* factors either favor institution or are neutral. A Final Written Decision will predate any district court trial, and the schedules remain in flux—particularly given Patent Owner's own recent expansion of the American case to add six more patents and over sixty claims. Petitioners have also offered a *Sotera* stipulation, eliminating any risk of duplicative validity litigation.

Finally, 35 U.S.C. § 325(d) does not apply. The Unified reexamination relied on different art, and Patent Owner's argument that a listed reference was "considered" in prosecution is unsupported. There is no basis to conclude that the Office materially examined the references at issue here.

Taken together, these circumstances align with Congress's design for IPRs: improving patent quality, conserving judicial resources, and preventing dormant patents from burdening industry without merits review. The Director should deny Patent Owner's request for discretionary denial and allow the Petition to be decided on the merits.

II. THE DIRECTOR SHOULD ALLOW THE PETITION TO PROCEED ON THE MERITS

A. **“Settled Expectations”: The ’722 Patent’s dormancy and its first assertion against Petitioners’ airline technology space provide a persuasive reason for Board review.**

Patent Owner argues that the age of the ’722 Patent and its purportedly licensed portfolio establish “settled expectations” favoring discretionary denial. Request at 4–8. But Director guidance recognizes that the Board may have “persuasive reasons” to review claims years after issuance where, among other things, the patent has not been “commercialized, asserted, marked, licensed, or otherwise applied in a petitioner’s particular technology space.” *Intel*, IPR2025-00327, Paper 12 at 2–3. Here, Patent Owner has identified no evidence that any airline has taken a portfolio-wide license to its patents (including the ’722 Patent). The record instead shows that the ’722 Patent was first asserted against these Petitioners—commercial airlines—on November 2, 2024. Petition at 2; Exs. 1022, 1023.

Moreover, the ’722 Patent itself lay dormant for years. Patent Owner’s own Exhibit 2002 shows Patent Owner was not assigned the ’722 Patent until November 2, 2023, and only thereafter was the patent asserted in any industry, much less the airline space. Patent Owner thus cannot credibly claim “settled expectations” when it chose to revive and assert a previously dormant patent. To the contrary, it should have expected validity challenges in response.

Even if there were “settled expectations” surrounding the ’722 Patent, those expectations were that the patent did not cover open-source software. The ’722 Patent, in particular, is asserted against Petitioners’ use of Kafka—open-source software available since 2011 (before the ’722 Patent issued) and widely used in the U.S. and internationally. Petitioners had no reason to know of the ’722 Patent or to suspect that ordinary reliance on Kafka would trigger a patent suit and a demand for royalties. Their settled expectation was freedom from harassment by dormant patents suddenly aimed at ubiquitous open-source technology.

Congress created IPRs precisely for this scenario—where long-issued patents are unexpectedly deployed against established, industry-wide practices. Shielding older patents from review would invert Congress’s design, leaving the patents most in need of scrutiny beyond reach. At a minimum, fairness and sound economics require that Petitioners be permitted to defend themselves on the merits before the Office. Otherwise, under Patent Owner’s view, anyone who has used Kafka could be sued, yet none could challenge the ’722 Patent in IPR. That outcome would subvert the very purpose of the AIA.

In short, Patent Owner offers no evidence that, before these lawsuits, the ’722 Patent was commercialized, asserted, marked, licensed, or otherwise applied in the airline technology space. That absence of evidence weighs decisively against Patent Owner’s claim of settled expectations. *See Home Depot*, IPR2025-00480, Paper 11

at 2–3; *Shenzen Tuozhu Tech. Co. v. Stratasys, Inc.*, IPR2025-00438, Paper 10 at 3 (Director July 17, 2025).

B. The complexity of the parallel litigations weighs against discretionary denial.

Patent Owner argues that the six challenged patents in IPR proceedings “focus on two tightly related technical domains.” Request at 25–27. But the Director has already rejected this exact contention in related cases. *See Am. Airlines*, IPR2025-00785, Paper 11 at 3 (“Although Patent Owner argues that six of the asserted patents involve only two technology areas, the challenged patents appears to be directed to a diverse range of subject matter (*e.g.*, Internet hotspots, distributed networking, transceiver operation, computer clusters).” (internal citations omitted)). As the Director explained there, “[t]he large number and wide scope of the patents asserted in the district court litigation weighs against discretionary denial, as the Board is better suited to review a large number of patents involving diverse subject matter.” *Id.* (citing *Tesla, Inc. v. Intellectual Ventures II LLC*, IPR2025-00217, Paper 9 at 2–3 (Director June 13, 2025)).

That reasoning applies with even greater force here. Patent Owner asserts twelve patents spanning ten families. These patents are asserted against a diverse range of products that would require a jury to understand a vast range of technologies, including five different open-source platforms (Spark, Hadoop, Kafka,

Kubernetes, and Docker), LTE-based wireless systems, 802.11-based wi-fi access points, and onboard satellite internet systems:

U.S. Patent No.	Description	Notes	Patent Classification
7,257,582	“Load Balancing With Shared Data”	Accusing Spark/Hadoop software	(51) Int. Cl. <i>G06F 17/30</i> (2006.01) (52) U.S. Cl. 707/10; 707/104.1 (58) Field of Classification Search 707/1–10, 707/100–104.1, 200–206; 718/105; 719/316; 703/23; 705/35; 711/147.3, 133
7,324,469	“Satellite Distributed High Speed Internet Access”	Accusing onboard satellite internet systems	(51) Int. Cl. <i>H04B 7/185</i> (2006.01) (52) U.S. Cl. 370/316; 370/351; 370/352; 455/428 (58) Field of Classification Search 370/316, 370/474, 475, 352, 321, 390, 432, 351, 355, 370/356; 455/13.3, 12.1, 428, 445; 714/752, 714/791, 794, 800
7,712,080	“Systems and Methods for Parallel Distributed Programming”	Accusing Spark software	(51) Int. Cl. <i>G06F 9/44</i> (2006.01) <i>G06F 9/45</i> (2006.01) <i>G06F 15/00</i> (2006.01) (52) U.S. Cl. 717/119; 717/107; 717/108; 717/149; 712/10; 712/23; 712/32 (58) Field of Classification Search None
7,721,282	“Block-Level I/O Subsystem for Distributed Application Environment Management”	CIP of '844 Patent; Accusing Docker software	(51) Int. Cl. <i>G06F 9/445</i> (2006.01) <i>G06F 9/44</i> (2006.01) (52) U.S. Cl. 717/176; 717/175; 709/203 (58) Field of Classification Search 717/172–177, 717/149; 709/203–204
7,822,841	“Method and System for Hosting Multiple, Customized Computing Clusters”	Accusing Kubernetes software	(51) Int. Cl. <i>G06F 15/16</i> (2006.01) <i>G06F 15/173</i> (2006.01) <i>G06F 15/177</i> (2006.01) (52) U.S. Cl. 709/223; 709/224; 714/4; 705/6 (58) Field of Classification Search 709/217–228; 714/4; 705/6
7,949,785	“Secure Virtual Community Network System”	Accusing Kubernetes	(51) Int. Cl. <i>G06F 15/16</i> (2006.01) (52) U.S. Cl. 709/245; 726/15 (58) Field of Classification Search 709/245; 726/15

		software	
8,027,326	“Method and System for High Data Rate Multi-Channel Wlan Architecture”	Accusing 802.11-based wi-fi access points	(51) Int. Cl. <i>H04J 1/00</i> (2006.01) (52) U.S. Cl. 370/343; 370/210; 370/480 (58) Field of Classification Search 370/208, 370/343, 480
8,332,844	“Root Image Caching and Indexing for Block-Level Distributed Application Management”	Accusing Docker software	(51) Int. Cl. <i>G06F 9/445</i> (2006.01) (52) U.S. Cl. 717/176 (58) Field of Classification Search 345/557; 717/176
8,352,584	“System for Hosting Customized Computing Clusters”	Continuation of '841 Patent; Accusing Kubernetes software	(51) Int. Cl. <i>G06F 15/16</i> (2006.01) <i>G06F 15/173</i> (2006.01) <i>G06F 15/177</i> (2006.01) (52) U.S. Cl. 709/223; 713/153; 719/311; 726/11; 726/12; 709/224 (58) Field of Classification Search 709/223, 709/224; 713/153; 719/311; 726/12, 11
8,407,722	“Asynchronous Messaging Using a Node Specialization Architecture in the Dynamic Routing Network”	Accusing Kafka software	(51) Int. Cl. <i>G06F 3/00</i> (2006.01) <i>G06F 15/16</i> (2006.01) (52) U.S. Cl. 719/316; 709/206 (58) Field of Classification Search 709/203, 709/219; 719/309
10,103,845	“Dual Mode Communication Systems and Methods”	Not asserted against Petitioner	(51) Int. Cl. <i>H04J 1/00</i> (2006.01) <i>H04L 1/06</i> (2006.01) (Continued) (52) U.S. Cl. CPC <i>H04L 1/06</i> (2013.01); <i>H04B 7/04</i> (2013.01); <i>H04B 7/0697</i> (2013.01); <i>H04J 9/00</i> (2013.01); (Continued)

		Southwest; accusing 802.11- based wi-fi access points	(58) Field of Classification Search CPC H04L 1/12; H04L 25/0248; H04L 1/0656; H04L 5/0046; H04L 1/0003; H04L 1/0009; H04L 25/02; H04W 28/06; H04W 24/00; H04W 52/42; H04W 28/18; H04B 7/0837; H04B 7/0613; H04B 7/0417; H04B 7/0632; H04B 7/0443 USPC 370/203, 204–215, 229–240, 310–337, 370/338–350, 351–394, 395.1, 395.3, 370/395.4, 395.41, 395.42, 395.5, 395.52, 370/431–529 (51) Int. Cl. <i>H04B 7/04</i> (2017.01) <i>H04B 7/06</i> (2006.01) <i>H04J 9/00</i> (2006.01) <i>H04L 1/04</i> (2006.01) <i>H04B 7/0404</i> (2017.01) <i>H04L 27/26</i> (2006.01) (52) U.S. Cl. CPC <i>H04L 1/04</i> (2013.01); <i>H04B 7/0404</i> (2013.01); <i>H04L 27/2601</i> (2013.01)
11,032,000	“Communications In a Wireless Network”	Accusing LTE- based wireless systems	(51) Int. Cl. <i>H04B 7/26</i> (2006.01) <i>H04W 72/04</i> (2009.01) <i>H04W 52/14</i> (2009.01) <i>H04J 3/16</i> (2006.01) <i>H04L 5/00</i> (2006.01) <i>H04W 52/54</i> (2009.01) (52) U.S. Cl. CPC <i>H04B 7/2643</i> (2013.01); <i>H04J 3/1694</i> (2013.01); <i>H04L 5/0053</i> (2013.01); <i>H04W</i> <i>52/146</i> (2013.01); <i>H04W 72/042</i> (2013.01); <i>H04W 72/0406</i> (2013.01); <i>H04W 72/0446</i> (2013.01); <i>H04W 52/54</i> (2013.01) (58) Field of Classification Search CPC H04B 7/2643; H04J 3/1694; H04L 5/0053; H04W 52/146; H04W 72/0406; H04W 72/042; H04W 72/0446

Exs. 1034, 1035. As shown by the table above, the twelve asserted patents in the district court litigations cover a broad range of subject matter, accused technologies, and PTO patent classifications. See

<https://www.uspto.gov/patents/search/classification-standards-and-development>

(“Patent classification is a system for organizing all U.S. patent documents and other technical documents into specific technology groupings based on common subject matter.”). As the Director has determined, given the number and scope of the patents

asserted in the district court actions, the Board is better suited to resolve questions of the '722 Patent's validity. *See Am. Airlines*, IPR2025-00785, Paper 11 at 3.

C. There is no inconsistency between Petitioners' claim construction positions that would warrant discretionary denial.

Patent Owner accuses Petitioners of “gamesmanship” because the Petition demonstrates that the challenged claims are unpatentable “under any reasonable construction” applying *Phillips* (Petition at 12), while Petitioners' preliminary invalidity contentions in the district court preserve indefiniteness defenses. Request at 23–24 (citing Ex. 2006 at 37; Ex. 2007 at 190). That argument fails for multiple reasons.

First, neither the Board nor either district court has issued a claim construction order, and Patent Owner relies solely on preliminary contentions. *See* Exs. 2006, 2007. It is entirely proper for Petitioners to proceed under *Phillips* here while preserving alternative defenses in Article III litigation. The Board has repeatedly recognized that such dual-track arguments are not inconsistent. *See, e.g., Chanel, Inc. v. Molo Design, Ltd.*, IPR2022-00543, Paper 7 at 9 (PTAB Aug. 12, 2022) (explaining it is “neither uncommon nor impermissible” to advance different arguments before district court and PTAB where the issues differ); *Target Corp. v. Proxicom Wireless, LLC*, IPR2020-00904, Paper 11 at 12–13 (PTAB Nov. 10, 2020) (declining to deny institution where petitioner argued indefiniteness in district court); *Samsung Elecs. Co. v. Collect, LLC*, IPR2020-00476, Paper 14 at 12 (PTAB

July 31, 2020) (holding petitioner need not align claim constructions across forums); *CrowdStrike, Inc. v. Open Text Inc.*, IPR2023-00124, Paper 11 at 12 (PTAB June 15, 2023) (noting it is “not unusual” for a defendant to pursue an IPR on a broader construction while advocating narrower constructions in court); *10x Genomics, Inc. v. Bio-Rad Lab’ys, Inc.*, IPR2020-00086, Paper 8 at 18 (PTAB Apr. 27, 2020) (finding no prohibition on relying on a construction petitioner believes is incorrect to show unpatentability).¹

Second, Petitioners’ actual proposed claim constructions in both litigations do not assert indefiniteness for the ’722 Patent terms. Exs. 1036, 1037. Patent Owner’s rhetoric therefore rests on preliminary contentions and fails to account for the fact that claim construction has not yet occurred.

In short, Petitioners’ positions are consistent with Board practice and precedent, and Patent Owner’s claim of “gamesmanship” provides no basis for discretionary denial.

¹ Patent Owner’s reliance on *Cambridge Mobile Telematics, Inc. v. Sfara, Inc.* (“*Cambridge*”), IPR2024-00952, Paper 12 at 8 (PTAB Dec. 13, 2024) does not help its position. Setting aside Patent Owner’s misquotation of that decision, *Cambridge* applies to means-plus-function constructions and clarifies that the Board’s “rules do not necessarily prohibit petitioners from taking inconsistent claim construction positions before the Board and a district court.” *Cambridge*, IPR2024-00952, Paper 12 at 8.

D. The *Fintiv* factors favor institution, not discretionary denial.

Patent Owner’s *Fintiv* arguments rest largely on projected district court schedules and an asserted “overlap” narrative. Yet the only fixed date in this record is the Board’s Final Written Decision deadline, which will arrive before either district-court action could proceed to trial.

In the Southwest District Court Litigation, the current trial date is January 11, 2027, but time-to-trial statistics suggest trial could begin even later, in September 2027. Ex. 2003; Petition at 98–99. That schedule is far from certain: Southwest has moved to transfer the case to the Northern District of Texas, where it is headquartered, and if granted, transfer will require a new case schedule. Regardless, the Final Written Decision (“FWD”) here is due December 13, 2026—well before the earliest possible trial setting in Southwest.

In the American District Court Litigation, the Court has now entered a revised scheduling order. On September 8, 2025, Judge Mazzant reset the *Markman* hearing to January 22, 2026, and the final pretrial conference to January 19, 2027. Ex. 1038. No trial date has been set. *Id.* With the final pretrial conference more than a year away and any trial an undetermined time after that, there is a realistic prospect that the Final Written Decision in this IPR will also issue before a trial in the American case. These circumstances confirm that the American schedule remains long and

unsettled, and they eliminate any genuine concern about duplicative work or inconsistent outcomes.

On this record, the Final Written Decision will issue before either district court trial. That is the relevant benchmark under *Fintiv*, and it strongly favors institution. *See Am. Airlines*, IPR2025-00785, Paper 11 at 3 (“[I]t is likely that a final written decision in this proceeding will issue before a district court trial occurs”).

1. Factor 1 (likelihood of a stay) is neutral.

Patent Owner’s claim that this factor weighs in favor of denial is contrary to Board precedent. The relevant inquiry into *Fintiv* Factor 1 is “whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted.” *Apple, Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 15 at 12 (PTAB May 13, 2020) (informative).

Patent Owner contends that, even if the Board institutes the Petition, it is “unlikely” that Judge Albright would grant a stay in the Southwest litigation. Request at 10. But Patent Owner fails to address whether Judge Mazzant would “likely” grant a stay with respect to the ’722 Patent in the American case. In fact, Patent Owner concedes that a stay has not been requested based on the Petition, but instead argues that Judge Mazzant denied a stay of certain claims under the customer-suit exception. Request at 9. In any event, speculation about how district courts might rule on hypothetical stay requests—if and when a stay is sought—is

premature. The Board has repeatedly stated, “in the absence of specific evidence, [it] will not attempt to predict how the district court in the related district court litigation will proceed.” *Sand Revolution II, LLC v. Continental Intermodal Grp.-Trucking LLC*, IPR2019-01393, Paper 24 at 7 (PTAB June 16, 2020) (informative); *Fintiv, Inc.*, IPR2020-00019, Paper 15 at 12 (same). That is especially true in the Southwest case, where Southwest has moved to transfer the action to the Northern District of Texas. Ex. 1039 (Dkt. 21). If transfer is granted, a different judge will preside and issue a new schedule, rendering Patent Owner’s prediction about Judge Albright irrelevant.

At any rate, there are ample examples of Judges Albright and Mazzant granting a stay after an IPR petition is instituted. *See, e.g., Parkervision v. Mediatek Inc.*, No. 6:23-cv-00375 (W.D. Tex. July 3, 2025); *Proxense, LLC v. Microsoft Corp.*, No. 6:23-cv-00319 (W.D. Tex. June 24, 2025); *SB IP Holdings, LLC v. Vivint, Inc.*, No. 4:21-cv-00912 (E.D. Tex. May 22, 2023); *Onpoint Systems, LLC v. Protect Animals with Satellites, LLC*, No. 4:20-cv-657 (E.D. Tex. July 12, 2022).

Accordingly, it is speculative and presumptuous to predict how any Article III judge will exercise discretion on a stay motion. Federal judges evaluate such requests on the merits and apply their own balancing of equities. Any attempt to forecast the outcome in advance is nothing more than conjecture. With no stay requested or granted based on the Petition, Factor 1 is neutral.

2. Factor 2 (proximity of trial) favors institution, not discretionary denial because a Final Written Decision will predate any trial.

Patent Owner incorrectly asserts it is “unclear” whether the Final Written Decision due December 13, 2026, would precede trial in the district court cases. Request at 10. But the current Southwest schedule sets trial for January 11, 2027—weeks (and likely longer, based on time-to-trial data) after the FWD deadline. Ex. 2010; Petition at 98–99. This timing weighs against discretionary denial. *See Am. Airlines*, IPR2025-00785, Paper 11 at 2–3. Southwest has also moved to transfer the case to the Northern District of Texas, where it is headquartered. If transfer is granted, a new schedule will issue, further ensuring that the Board’s decision will precede trial.

The American litigation likewise does not support denial. On September 8, 2025, Judge Mazzant entered a new scheduling order in which jury selection and trial remain “TBD.” Ex. 1038 (Dkt. 81). The *Markman* hearing has been reset for January 22, 2026, and the final pretrial conference is now set for January 19, 2027—already after the Board’s FWD deadline of December 13, 2026. *Id.* In short, there is no trial date in the American case, and the events on the current schedule confirm that any trial would occur well after the FWD.

Moreover, docket analytics show that the shortest time to trial before Judge Mazzant has been 35.1 months, placing any realistic trial date in late 2027 or beyond.

Ex. 1040. On this record, as the Director has previously concluded, “it is likely that a final written decision in this proceeding will issue before a district court trial occurs[.]” *Am. Airlines*, IPR2025-00785, Paper 11 at 3.

The Director’s interim guidance confirms that discretionary denial is a balancing inquiry in which schedule certainty and the Office’s statutory timelines are relevant considerations.² Where, as here, the Board’s decision will precede any realistic trial date and the Article III schedules remain in flux, the balance favors institution rather than denial on proximity grounds.

Patent Owner also argues under Factor 2 that multiple tribunals will perform claim construction. Request at 11. But Factor 2 concerns the proximity of trial, while Factor 3 addresses court investment. *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 9–11 (PTAB Mar. 20, 2020) (precedential).

Accordingly, Factor 2 weighs against discretionary denial.

3. Factor 3 (investment by courts) favors institution, not discretionary denial.

Patent Owner contends that “by December 13, [2025 → 2026] the claim construction process in both the Southwest and American District Court Litigations will be complete (or nearly complete)[.]” Request at 12. That focus is misplaced.

² Acting Director of the United States Patent and Trademark Office Coke Morgan Stewart, *Interim Processes for PTAB Workload Management* (Mar. 26, 2025) (hereinafter, “Director’s interim guidance”).

Although the Southwest litigation's *Markman* hearing is currently scheduled to take place days before the Petition's projected institution date, the schedule could shift: Patent Owner filed a second amended complaint on September 2, 2025, continuing to pursue claims under the '841 Patent. Ex. 1035. Intellectual Ventures II LLC separately filed a new complaint on the '841 patent in May 2025 and Judge Albright recently entered a scheduling order on September 8, 2025, setting the *Markman* hearing in the second lawsuit against Southwest for March 25, 2026, and trial for June 14, 2027. Exs. 1041 and 1042. Southwest's pending motion to transfer venue, filed in February 2025, could also alter the case schedule.

In the American case, the court has already entered a new schedule following Patent Owner's addition of six patents and over 60 claims. On September 8, 2025, Judge Mazzant reset the *Markman* hearing for January 22, 2026, and the final pretrial conference for January 19, 2027, with jury selection and trial still "TBD." Ex. 1038 (Dkt. 81). With no trial date, and deadlines already extended, any pre-institution investment remains limited. Under these facts, neither court is likely to issue substantive orders on the '722 Patent before institution.

Moreover, claim construction is only a small fraction of total investment. Discovery, dispositive motion practice, and trial preparation will pose substantial costs that will occur after institution regardless of the *Markman* date. Exs. 1038, 1042 and 2003. The Board has recognized that Factor 3 weighs against denial even

when a *Markman* hearing has occurred, where “much remains to be done, including expert discovery.” *Samsung Display Co. v. Pictiva Displays Int’l Ltd.*, IPR2024-01222, Paper 12 at 7 (PTAB Mar. 6, 2025).

The Petition presents detailed element-by-element obviousness grounds supported by expert analysis, underscoring why validity should be addressed in this specialized forum rather than duplicating effort across two Article III courts. More broadly, Congress designed IPRs to streamline sprawling, multi-patent disputes like this one. Patent Owner asserts twelve patents from ten families, spanning accused technologies as varied as distributed computing platforms, LTE systems, and onboard satellite internet. No jury could reasonably adjudicate them all in one trial. PTAB review allows validity to be tested one patent at a time, narrowing district court disputes to infringement and damages only for claims that survive.

Finally, Petitioners acted diligently, filing this Petition about three months after service of infringement contentions in Southwest and less than six weeks after contentions in American. Exs. 1043 and 1044. This prompt action further weighs against discretionary denial. See *Samsung Display*, IPR2024-01222, Paper 12 at 7.

On this record, Factor 3 weighs against discretionary denial.

4. Factor 4 (overlap of claims) favors institution, not discretionary denial.

This Petition challenges all claims 1–37 of the ’722 patent. By contrast, in the American and Southwest District Court Litigations, Patent Owner asserts only

claims 14, 16, 17, and 18. Exs. 1043 and 1044. Because the courts will address only a subset of the claims, the mismatch in claim scope reduces overlap and favors institution.

Patent Owner suggests Petitioners engaged in “gamesmanship” by not pursuing all claims in district court, but district courts lack jurisdiction to adjudicate the validity of unasserted claims. *Fox Group, Inc. v. Cree, Inc.*, 700 F.3d 1300, 1308–09 (Fed. Cir. 2012) (“There was no case or controversy with respect to the unasserted claims . . . therefore the district court did not have jurisdiction over the unasserted claims.”). It was Patent Owner’s decision to assert only claims 14, 16, 17, and 18. Neither court could adjudicate unasserted claims 1–13, 15, and 19–37, so there is no “engineering” of overlap by Petitioners.

Patent Owner further speculates that Petitioners might circumvent their *Sotera* stipulation by adding system art to the Petition’s printed-publication grounds. Request at 14–15. That argument is misplaced. Petitioners’ preliminary invalidity contentions identify system art (PointCast, Castanet, and Active Desktop) as primary references combined with Lawson, Tsutsumitake, and Bird. Exs. 2006 (Exs. B-9, B-10, B-11) and 2007 at 105–07 (Exs. 722-9, 722-10, 722-11). Those district-court theories are distinct from the printed-publication combinations presented here, and Petitioners have already provided a *Sotera* stipulation to eliminate overlap on grounds that were or reasonably could have been raised in IPR.

Further, the interim guidance cited to by Patent Owner (Request at 15³) concerns “corresponding system art” which presumably applies to system art that is directly related to a patent, such as when a company files for a patent on technology related to their commercial system. Here, the system art does not “correspond” to the references cited in the Petition.

Finally, the interim guidance focuses on whether any forum has already adjudicated the challenged claims. Here, none has. Instituting review will promote uniform, expert resolution of all 37 claims rather than piecemeal litigation of only four.

On this record—different claim scope, jurisdictional limits on unasserted claims, and a *Sotera* stipulation—Factor 4 weighs against discretionary denial.

5. Factor 5 (identity of parties) is neutral.

When the IPR petitioners are the same parties as the district-court defendants, this factor “adds little if anything to the discretionary denial analysis.” *Aylo Freesites Ltd. f/k/a MG Freesites Ltd. v. WellcomeMat, LLC*, IPR2024-00710, Paper 13, at *17–18 (PTAB Sept. 5, 2024). As the Board observed in *Aylo*, that overlap is commonplace and does not itself favor denial “unless the petitioner is not named as a defendant (or declaratory judgment plaintiff) in parallel district court patent

³ FAQ #15, at <https://www.uspto.gov/patents/ptab/faqs/interim-processes-workload-management>.

litigation.” *Id.* Here, Petitioners are defendants in the related litigations, and this factor therefore adds little to the analysis.

Patent Owner nevertheless raises five “potential scenarios” and argue that they would result in “inefficiency, unfairness, or both.” Request at 17–19. But those scenarios are based upon unsupported (and unrealistic) conjecture and assume away the actual record: they disregard Petitioners’ *Sotera* stipulation that eliminates district-court grounds that were or reasonably could have been raised in IPR; they ignore that this IPR challenges all claims 1–37 while the litigations concern only claims 14, 16, 17, and 18; they discount the fact that Patent Owner chose to sue Petitioners—two companies that are headquartered in the Northern District of Texas—in two separate courts in the Eastern and Western Districts of Texas; and they presuppose parallel adjudication of the same printed-publication grounds despite an IPR schedule that yields a Final Written Decision before the current Southwest trial setting and the absence of any American trial date. *See* Request at 17–19; Ex. 2003. On this record, Factor 5 is neutral.

6. Factor 6 (other circumstances) favors institution, not discretionary denial.

Patent Owner leans heavily on “settled expectations.” But as explained above, the ’722 Patent lay dormant for years, has never been licensed or applied in Petitioners’ airline technology space, and was first asserted against Petitioners only in November 2024. Whatever “expectations” Patent Owner invokes cannot override

Petitioners' legitimate reliance on open-source technologies widely available and used for over a decade without fear of dormant patents suddenly being asserted. These circumstances are precisely those for which Congress created IPRs: to ensure that long-issued but untested patents can be reviewed in an expert forum before they are deployed to impose litigation burdens.

The strength of the Petition likewise favors institution. It presents detailed, element-by-element obviousness showings, supported by specific motivations to combine and corroborated by expert testimony. This record aligns with the Director's interim guidance that the strength of the merits and the presence of expert support weigh against discretionary denial.

Patent Owner's "gamesmanship" refrain also fails. Request at 23–24, 28. Neither the Board nor either district court has issued any claim-construction order, and Patent Owner points only to preliminary contentions. See Exs. 2006, 2007. Proceeding under *Phillips* here while preserving alternative defenses in Article III proceedings is not inconsistent; it is routine. Moreover, in both litigations, Petitioners' operative claim-construction proposals do **not** assert indefiniteness for the '722 patent terms. Exs. 1036, 1037.

Taken together, the balance of equities on "settled expectations," the compelling economic interests at stake, the demonstrated strength of the prior-art grounds, and the absence of any inconsistency all weigh strongly against

discretionary denial under Factor 6. In short, whatever “settled expectations” Patent Owner invokes cannot outweigh Petitioners’ legitimate expectations of non-harassment and the broader statutory purpose of IPRs: to improve patent quality and reduce litigation burdens. Factor 6 therefore favors institution, not denial.

7. 314(a) (catch-all discretion) is neutral.

To the extent IV separately invokes 35 U.S.C. § 314(a) apart from *Fintiv* and § 325(d), that request re-packages the same arguments addressed above. For the reasons already stated—neutral or non-dispositive *Fintiv* factors, § 325(d) inapplicability, and a record that favors merits review—the Board should decline to deny institution under § 314(a). Under the Director’s bifurcated process, discretionary issues are addressed separately from the merits; on this record—where schedule certainty, strength with expert support, absence of prior adjudication, and efficiency all favor PTAB review—there is no basis to exercise catch-all discretion to deny.

E. Discretionary Denial Is Not Appropriate Under § 325(d).

Patent Owner argues in passing—without substantive analysis—that “the Petition is substantially based on references previously presented to the Office,” identifying only Tsutsumitake and Bird (mentioned during reexamination) and Herz (appearing in the file history). Request at 3–4. Patent Owner’s cursory assertion fails to satisfy its burden under 35 U.S.C. § 325(d). *Geotab USA, Inc. v. Omega Patents*,

LLC, IPR2023-00504, Paper 11, at *16 (PTAB July 25, 2023) (Patent owners bear the burden of proof with respect to a request for exercising discretionary denial under § 325(d)). In any event, as discussed below, § 325(d) does not support denial.

1. The *Advanced Bionics* framework favors institution, not discretionary denial.

Under *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, the Board asks: (1) whether the same or substantially the same art or arguments previously were presented to the Office; and, if so, (2) whether the petitioner has shown material error by the Office, guided by the *Becton, Dickinson* factors. See IPR2019-01469, Paper 6 at 8–10 (PTAB Feb. 13, 2020) (precedential); *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 at 17–20 (PTAB Dec. 15, 2017) (informative).

The prosecution history does not reflect substantive consideration of Herz. Rather, Herz was merely listed on an Information Disclosure Statement (IDS) during prosecution but not otherwise used (much less evaluated by the examiner). Petition at 21; Ex. 1002. As the Board has recognized, “mere prior citation of prior art in an IDS will not automatically satisfy the first prong of the analytical framework set forth in *Advanced Bionics*.” *JUUL Labs, Inc. v. NJOY, LLC*, IPR2024-00160, Paper 10, at 11–12 (PTAB May 24, 2024). Tellingly, Patent Owner cites nothing in the prosecution history showing that Herz itself was materially or substantively

considered by the Office—let alone the same, or substantially the same, argument (supported by expert analysis) advanced in the Petition, or any examiner error.

Since part one of the *Advanced Bionics* framework has not been satisfied, Petitioners need not show how the Office erred under part two. Taken together, discretionary denial is not appropriate under 35 U.S.C. § 325(d).

2. The Reexamination is not a basis for § 325(d) denial.

Discretionary denial of institution is inappropriate as Patent Owner’s two-sentence argument fails to articulate any valid basis for denial under § 325(d). The Petition relies on certain references, which were not cited in the *ex parte* reexamination (Control No. 90/019,662), and seeks review of additional claims that are not part of the reexamination. Although Patent Owner argues Tsutsumitake and Bird “were before the Office several months ago in connection with a reexamination of the ’722 Patent,” Patent Owner fails to point out that those references were *not* addressed in detail by the examiner, as the examiner rejected the grounds of the reexamination under a different primary reference not used in the Petition. Ex. 1017 at 2–4. Specifically, the examiner’s analysis mentioned Tsutsumitake and Bird only to note that *Ikeda*—not Tsutsumitake or Bird—failed to disclose the limitations supporting patentability. Patent Owner does not explain how the Office might have relied on Tsutsumitake and Bird during reexamination in the same manner as the Petition’s analysis of Tsutsumitake and Bird (with supporting expert rationales).

Accordingly, this weighs against the exercise of the Director's discretion to deny under § 325(d).

III. CONCLUSION

For the foregoing reasons, the Director should deny Patent Owner's Request for Discretionary Denial and thus allow the Petition to proceed on the merits.

Dated: September 15, 2025

Respectfully submitted,

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

The undersigned certifies that the word count of the foregoing PETITIONERS' RESPONSE TO PATENT OWNER'S REQUEST FOR DISCRETIONARY DENIAL, excluding the table of contents, table of authorities, exhibit list, mandatory notices, certificate of service, certificate of word count, and any appendix of exhibits or claim listing, is 5,288.

Dated: September 15, 2025

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that a copy of the foregoing PETITIONERS' BRIEF IN OPPOSITION TO PATENT OWNER'S REQUEST FOR DISCRETIONARY DENIAL and all exhibits identified therein were served on September 15, 2025 by email on the following counsel of record for Patent Owner:

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