UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

OPTIVER US LLC and OPTIVER TRADING US LLC,
Petitioners

v.

HFT SOLUTIONS, LLC,
Patent Owner.

Case No. IPR2026-00386
U.S. Patent No. 10,771,069

PETITIONERS' DISCRETIONARY DENIAL OPPOSITION

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

TABLE OF EXHIBITS iv

I. INTRODUCTION 1

II. THE ABSENCE OF PARALLEL LITIGATION SUPPORTS INSTITUTION, NOT DENIAL 4

- A. The Director Has Treated The Absence Of A Parallel Proceeding As Counseling Against Denial 4
- B. Patent Owner's Position Fails On Its Own Terms 6
- C. Review Of Untested Grounds, As Here, Is An Appropriate Use Of Office Resources 8
- D. None Of Patent Owner's Three Decisions Turns On The Absence Of Litigation 8

III. THE PETITION'S GROUNDS REST ON THE PRIOR ART AND NOT ON EXPERT TESTIMONY 10

- A. Patent Owner's Criticism Does Not Address Grounds 3 And 4's Separate Reliance On Virtex-UG 10
- B. Giordano Contains Multiple Textual Links To The User Guide 11

IV. CHALLENGING FIVE PATENTS IN ONE FAMILY DOES NOT FAVOR DENIAL 12

- A. Realtek Does Not Support Denial Here 12
- B. The Petitions Are Neither Duplicative Nor Serial 13
- C. The Petition Fully Discloses The Real Parties-In-Interest 14

V. NO SETTLED EXPECTATIONS HAVE DEVELOPED IN THE '069 PATENT 15

- A. The '069 Patent Falls Short Of The Six-Year Benchmark Patent Owner Itself Proposes 16
- B. The Record Reflects No Commercialization, Licensing, Marking, Or Investment In The '069 Patent 18

VI. THE BALANCE OF THE EVIDENCE FAVORS REFERRAL 19

VII. CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases

Amgen Inc. v. Bristol-Myers Squibb Co.,
IPR2025-00603, Paper 9 (July 24, 2025) 1, 5, 7, 18

Analog Devices, Inc. v. Number 14 B.V.,
IPR2025-00550, Paper 10 (July 16, 2025) 9

Cambridge Indus. USA, Inc. v. Applied Optoelectronics, Inc.,
IPR2025-00434, -00436, -00437 17

Corning Optical Commc'ns RF, LLC v. PPC Broadband, Inc.,
IPR2014-00440, Paper 68 (Aug. 18, 2015) 14, 15

Dabico Airport Sols. Inc. v. AXA Power ApS,
IPR2025-00408, Paper 21 (June 18, 2025).....9

HFT Solutions, LLC v. Jump Trading, LLC,
No. 1:24-cv-13214 (N.D. Ill.) 2

Home Depot U.S.A., Inc. v. H2 Intellect LLC,
IPR2025-00480, Paper 11 (Sept. 4, 2025).....18, 19

iRhythm Techs., Inc. v. Welch Allyn, Inc.,
IPR2025-00363, Paper 10 (June 6, 2025).....11

Magnolia Med. Techs., Inc. v. Kurin, Inc.,
IPR2026-00097, Paper 17 (May 14, 2026).....2, 4, 6, 9, 19

PacifiCorp v. Birchtech Corp.,
IPR2025-00687, -00688, -00717, -00718.....14

Padagis US LLC v. Neurelis, Inc.,
IPR2025-00464, -00465, -00466 8

Realtek Semiconductor Corp. v. ParkerVision, Inc.,
IPR2025-00324, Paper 11 (June 25, 2025).....13

Tesla, Inc. v. Bulletproof Prop. Mgmt., LLC,
IPR2026-00204, Paper 14 (June 15, 2026).....5, 6, 8

Statutes

35 U.S.C. § 286 ..... 17, 18

35 U.S.C. § 311(a) 7

35 U.S.C. § 311(b) 14

35 U.S.C. § 312(a)(2) 15

35 U.S.C. § 314(a) 15, 20

TABLE OF EXHIBITS

Exhibit No.	Document
1001	U.S. Patent No. 10,771,069 ("the '069 patent")
1002	File History for U.S. Patent No. 10,771,069
1003	Declaration of Benjamin Carrion Schaefer, Ph.D.
1004	Declaration of Carrie Gardner
1005	R. Giordano and A. Aloisio, *Fixed-Latency, Multi-Gigabit Serial Links with Xilinx FPGAs*, 58-1 IEEE Transactions on Nuclear Science 194 (2011) [Giordano]
1006	*(intentionally omitted)*
1007	U.S. Pat. No. 10,447,463 [Raymond]
1008	*(intentionally omitted)*
1009	Virtex-5 FPGA RocketIO GTP Transceiver User Guide, UG196 (v2.1), December 3, 2009 [Virtex-UG]
1010	U.S. Pat. No. 7,453,301 [Kaviani]
1011	Declaration of Gordon MacPherson
1012	*HFT Solutions, LLC, v. Jump Trading, LLC*, Case No. 1:24-cv-13214 (N.D. Ill.), Dkt. 71 (Defendant Jump Trading, LLC's Response to Plaintiff's Motion to Vacate the *Markman* Hearing)
1013	*HFT Solutions, LLC, v. Jump Trading, LLC*, Case No. 1:24-cv-13214 (N.D. Ill.), Dkt. 78 (Joint Motion to Dismiss)
1014	*HFT Solutions, LLC, v. Jump Trading, LLC*, Case No. 1:24-cv-13214 (N.D. Ill.), Dkt. 79 (Minute Entry Granting Joint Motion to Dismiss)

I. INTRODUCTION

Discretionary denial of the Petition is not appropriate. There is no parallel legal proceeding addressing the invalidity of U.S. Patent No. 10,771,069 (the "'069 patent"). Yet Petitioners face a tangible risk of assertion of the '069 patent. Patent Owner has already launched a patent enforcement campaign against the high-frequency trading industry, including the Petitioners, asserting three patents naming the same inventor as the '069 patent. In addition, there are no settled expectations in light of the relative youth of the '069 patent. The absence of an alternative pending legal proceeding, the immediate threat of assertion, and the lack of settled expectations all support considering the Petition on the merits.

The circumstances that Patent Owner invokes in its request for discretionary denial (*see* Paper 6, "Request") provide reason to institute review rather than deny it. The absence of a parallel proceeding means there is no concern of duplicative efforts or inconsistent outcomes—a consideration the Office has recognized counsels against discretionary denial. Patent Owner cites three decisions for the proposition that the absence of district court litigation favors denial. Request, 2–4. None so holds. Indeed, the Office's prior decisions confirm that absence of a parallel proceeding supports considering the Petition on the merits. *Amgen*, Paper 9, 2.

On the other hand, Patent Owner's lack of commentary on any future potential assertions of the '069 patent shows the need to address the merits of the Petition.

Based on public records, Patent Owner is the assignee of at least two patent families, each naming Mr. Nima Badizadegan as the sole inventor. Patent Owner launched a patent campaign against high-frequency trading participants including Jump Trading, Citadel, and Petitioners Optiver based on one of the two patent families. Recent setbacks in its present campaign[1] only increase the risk that Patent Owner launches another patent assertion campaign, this time including the '069 patent. Tellingly, Patent Owner does not comment on future assertions involving the '069 patent. Resolving the issue of invalidity before multiple defendants are forced to expend substantial resources in district court litigation is precisely what *inter partes* review was designed for. *Magnolia Med. Techs., Inc. v. Kurin, Inc.*, IPR2026-00097, Paper 17, 2 (May 14, 2026) (precedential) ("The purpose of AIA reviews was, and is, to provide a quick and cost-effective alternative to district court patent litigation for resolving disputes over patent validity.").

In addition, no settled expectations have developed regarding the '069 patent, and the Patent Owner has not shown expectations sufficient to warrant denial. The '069 patent issued September 8, 2020, and the Petition was filed June 4, 2026,

[1] In *HFT Solutions, LLC v. Jump Trading, LLC*, No. 1:24-cv-13214 (N.D. Ill.), Jump Trading represented to the court that HFT indicated its "expert's review of Jump Trading's source code gave HFT 'pause' about the viability of its claims." Ex. 1012 (*Jump Trading*, Dkt. 71) at 1. HFT subsequently voluntarily dismissed the case. Ex. 1013 (*Jump Trading*, Dkt. 78) at 1; Ex. 1014 (*Jump Trading*, Dkt. 79) at 1.

making the interim period just five years, eight months, and twenty-seven days. Patent Owner, to enlarge the interim period, measures from the ’069 patent’s issuance to the date its own Request came due, August 10, 2026, and calls the interval five years and eleven months. It then calls that interval “nearly six years.” It is not, and Patent Owner identifies no principle converting a time interval into settled expectations. Request, 9.

Patent Owner’s remaining arguments fail. Regarding prior art Giordano’s incorporation of the Virtex User Guide (“Virtex-UG”), Patent Owner argues that the Petition depends on its declarant to supply disclosure the references do not contain. That is factually incorrect. The Petition’s grounds rest on the prior art itself. Even taking Patent Owner’s criticism at face value, such criticism reaches only Grounds 1 and 2 (which discuss Giordano’s incorporation of Virtex-UG), and Patent Owner leaves entirely unaddressed Grounds 3 and 4’s independent reliance on Virtex-UG—at most raising a merits dispute for the Board. And with respect to Patent Owner’s plea that five petitions—one against each of the patents in the family which includes the ’069 patent—weigh against “fairness,” the only authority Patent Owner cites for this proposition, *Realtek*, concerned a petitioner that was time-barred from filing its own petition and tried to reach the merits anyway by copying another petition and asking to join it. Petitioners here are not time-barred, no petition copies another, and no joinder is sought. And Patent Owner’s real party-in-interest argument fares no

better. Patent Owner's argument rests on disclosed corporate relationships, without identifying any fact showing funding, direction, or an opportunity to control this proceeding.

In sum, the circumstances involving this Petition warrant review on the merits, and Patent Owner's plea for discretionary denial should be denied.

II. THE ABSENCE OF PARALLEL LITIGATION SUPPORTS INSTITUTION, NOT DENIAL

Patent Owner's lead argument is that "[t]his IPR will not act as an alternative to district court litigation" because no district court case involves the '069 patent, and since this proceeding can be an alternative to nothing, it should be denied. Request, 1–2. Patent Owner cites three decisions, none of which so holds. No decision requires a pending case before a petition may be filed. To the contrary, the Office has treated the absence of a parallel proceeding as counseling *against* denial. Should Patent Owner's position hold, *all IPR petitions would be discretionarily denied* due to the existence of a parallel proceeding (which has been denied under the precedents set by the Director) or since there is ***no*** parallel proceeding (which would be denied under Patent Owner's logic).

A. The Director Has Treated The Absence Of A Parallel Proceeding As Counseling Against Denial

Petitioners seek this IPR as an "alternative" to federal district court litigation, which is precisely why there is no parallel proceeding. *See Magnolia Med. Techs.,*

Inc. v. Kurin, Inc., IPR2026-00097, Paper 17, 3 (May 14, 2026) (precedential). Lack of parallel proceedings cannot be the basis for discretionary denial. Rather, it supports referral to the Board for non-discretionary consideration.

The Director has recognized that the absence of a parallel proceeding counsels against discretionary denial. In *Amgen*, the Director found that because "the parties are not currently engaged in a parallel proceeding involving the challenged patents," there was "no concern of inconsistent outcomes and duplication of efforts resulting from two proceedings operating in parallel." *Amgen Inc. v. Bristol-Myers Squibb Co.*, IPR2025-00603, Paper 9, 2 (July 24, 2025) (referring the petition to the Board for non-discretionary considerations). The Director treated reduced duplication concerns the same way in *Bulletproof*, where a vacated trial date and a stipulation "reduce[d] the concern of inconsistent outcomes or significant duplication of efforts," declining patent owner's request for discretionary denial. *Tesla, Inc. v. Bulletproof Prop. Mgmt., LLC*, IPR2026-00204, Paper 14, 2–3 (June 15, 2026).

Patent Owner's own description of the challenged patents removes the duplication concern described above. Patent Owner tells the Office that the five challenged patents "are from entirely different families and cover materially different technology" than the three asserted against the Petitioners in district court. Request, 2. If the challenged patents cover different technology from the asserted ones, this proceeding and the district court case do not turn on the same issues, and

the concern that Petitioners "seek AIA review in parallel with litigation to gain litigation leverage" is absent. *Magnolia*, 3.

B. Patent Owner's Position Fails On Its Own Terms

Filing before any suit is a virtue of this Petition, not a defect. The position Patent Owner urges would leave no petition standing. Where a parallel case exists and will reach trial first, the duplication of effort supplies a reason to deny. Where no parallel proceeding exists, as for this Petition, Patent Owner says the petition serves no purpose and should be denied. Nothing is left. On that view, a petitioner would be worse off for filing before it is sued than after, an outcome squarely inconsistent with the Director's treatment of an early challenge in *Bulletproof*, where the patents had not been in force "for a significant period of time." *Bulletproof*, 4.

Patent Owner's argument rests on there being no infringement dispute over the '069 patent, yet that is a circumstance Patent Owner controls. It says only that it "has not asserted it against Optiver, has not threatened to assert it, and has asserted no claim of the patent against anyone." Request, 1. All statements about the past.

Notably, Patent Owner does not say it will never assert the '069 patent; it says only that it has not asserted it yet. Request, 1. The record, moreover, reflects a live and growing controversy between these parties. As explained above, Patent Owner was assigned at least two patent families listing Mr. Nima Badizadegan as inventor, and with one of the two families launched a patent assertion campaign against three

high-frequency trading companies—Jump Trading, Citadel, and the Petitioners. Patent Owner's campaign recently suffered a setback with its voluntary dismissal in the Jump Trading matter after Jump Trading conveyed its non-infringement positions. Ex. 1012 (*Jump Trading*, Dkt. 71); Ex. 1014 (*Jump Trading*, Dkt. 79) (order granting joint motion to dismiss on June 30, 2026). In light of Patent Owner's faltering campaign, Petitioners are wary of the possibility of yet another patent assertion involving the '069 patent.

Patent Owner adds that "not only is there no district court patent litigation for this IPR to be an alternative to, there is no possibility for Optiver to file a declaratory judgment action to which this IPR could be an alternative." Request, 2. Patent Owner is right that *inter partes* review serves as an alternative to district court litigation, as the Director described. But Patent Owner cites no decision making a parallel proceeding a prerequisite to filing, and the Office has treated the absence of one as counseling against denial rather than for it. *Amgen*, Paper 9, 2. Whether or not a declaratory judgment action is available does not change that.

Title 35 U.S.C. § 311(a) expressly permits "a person who is not the owner of a patent" to petition for *inter partes* review. Nothing in the statute requires pending litigation or threat of suit, and it further does not depend on Article III jurisdiction or declaratory-judgment standing. Pre-suit petitions are well within the express

language of the statute, and the absence of parallel litigation or declaratory-judgment jurisdiction provides no basis to deny institution.

C. Review Of Untested Grounds, As Here, Is An Appropriate Use Of Office Resources

The grounds in this Petition rest on art the Office has never applied. None of the four references raised in the Petition were considered by the Examiner. Ex. 1001, cover.

The Director has referred petitions on that basis. In *Bulletproof*, the Director referred a petition after finding that the grounds relied on "prior art not previously presented to the Office" and that the examiner had "overlooked certain teachings in Joos that appear to disclose allowable subject matter of the challenged claims." *Bulletproof*, 3–4. Patent Owner cannot make even the argument the *Bulletproof* patent owner made, because none of the asserted references were presented at all. And in *Padagis,* the Director found that the petitioner "appears to show a material error by the Office, and it is an appropriate use of Office resources to review the potential error," and referred the petitions. *Padagis US LLC v. Neurelis, Inc.*, IPR2025-00464, -00465, -00466, Paper 12, 3 (July 16, 2025) (informative).

D. None Of Patent Owner's Three Decisions Turns On The Absence Of Litigation

Patent Owner quotes *Magnolia*'s statement that AIA review provides "a quick and cost-effective alternative to district court patent litigation," and treats it as a

condition on who may file. The decision states a purpose, not a prerequisite. Nothing in it says a petition requires a parallel case, and the Director's concern ran the other way: he wrote that "many petitioners seek AIA review in parallel with litigation to gain litigation leverage." *Magnolia*, 2–3. And the Director denied institution there where the petitioner, having already lost a jury verdict of no invalidity, was "using the IPR process to obtain a second bite at the apple after losing in district court." *Magnolia*, 9. Here, there has been no prior adjudication involving the '069 patent, nor a co-pending district court litigation involving it. Request, 2.

Patent Owner's other two decisions turned on failures of proof and materially different facts. *Dabico* denied institution on a record where, among other considerations, "Petitioner does not provide any persuasive reasoning why an inter partes review is an appropriate use of Office resources," while noting that "[t]here may be persuasive reasons why the Office should review the challenged patent." *Dabico Airport Sols. Inc. v. AXA Power ApS*, IPR2025-00408, Paper 21, 3 (June 18, 2025) (informative). In *Analog Devices* the patents had been in force "more than 13 years, creating strong settled expectations," and the petitioner's wholly owned subsidiary had prosecuted and maintained them and paid millions of dollars in royalties on them. *Analog Devices, Inc. v. Number 14 B.V.*, IPR2025-00550, Paper 10, 2–3 (July 16, 2025). Yet neither decision turned on the presence or absence of a parallel case; *Analog Devices* does not mention a district court proceeding at all.

III. THE PETITION'S GROUNDS REST ON THE PRIOR ART AND NOT ON EXPERT TESTIMONY

Patent Owner asserts that "The Petition Depends On Its Declarant To Supply Disclosure The Prior Art Does Not Contain." Request, 4–7. That description does not match the Petition. Patent Owner's expert-reliance criticisms are only applicable to Grounds 1 and 2 (and not to Grounds 3 and 4). In addition, in pursuit of this argument, Patent Owner omits the explicit language in the prior art references that establishes the relationship between these prior art references.

A. Patent Owner's Criticism Does Not Address Grounds 3 And 4's Separate Reliance On Virtex-UG

The Petition presents four grounds based on prior art references Giordano, Kaviani, Raymond, and Virtex-UG. Pet., 3–4. Patent Owner criticizes that the Petition relies on expert testimony to supply disclosures not in the prior art, targeting the Petition's discussion on how features of Virtex-UG are inherent to Giordano, and how Giordano incorporates Virtex-UG by reference. Request, 4–7; Pet., 16–17.

Patent Owner's substantive expert-reliance criticisms are only applicable to Grounds 1 and 2, as those are the only grounds that discuss Virtex-UG as inherent or incorporated by Giordano. Grounds 3 and 4 present Virtex-UG as separate prior art in an ordinary obviousness combination, supported by a motivation to combine and a reasonable expectation of success, and together they reach every challenged

claim. Pet., 72–74; Ex. 1003, ¶¶ 303–314. Virtex-UG published December 3, 2009 and qualifies as prior art in its own right. Ex. 1003, ¶ 79.

B. Giordano Contains Multiple Textual Links To The User Guide

Even Patent Owner's arguments directed to Grounds 1 and 2 do not reflect the factual record. Patent Owner argues that "[t]he only textual link between them is Giordano's statement that the procedure it followed for activating the alignment circuit was the one suggested in the GTP user's guide." Request, 5. Not true. Giordano itself identifies the Virtex-5 FPGA RocketIO GTP Transceiver User Guide as reference [13], builds its design on the GTP transceiver that guide describes, and says its latency estimates came from that guide. Ex. 1005, 194, 198, 201. Dr. Carrion-Schaefer explains these textual links already present in Giordano; he does not supply disclosure the references do not contain. Any dispute over whether Giordano inherently discloses or incorporates Virtex-UG by reference is a merits question for the Preliminary Response, as Patent Owner concedes by reserving those arguments there. Request, 6–7.

This mirrors *iRhythm*, which Patent Owner cites to, where the Director *rejected* an expert's over-reliance argument because the patent owner "does not identify any portions of the expert testimony that suggest Petitioner is using its expert to fill gaps in the prior art." *iRhythm Techs., Inc. v. Welch Allyn, Inc.,* IPR2025-00363, Paper 10, 2 (June 6, 2025). Patent Owner fails to identify even a

single claim limitation for which the expert declaration supplies what the references lack. Its citation counts are not probative either as they show only how often the declaration is cited, not what it supplies. Request, 6.

Ground 3 asserts Giordano in view of Kaviani and further in view of Virtex-UG, and paragraph 305 is where the declarant sets that combination up. Its opening clause, "[w]hile Giordano already inherently discloses and incorporates Virtex-UG, if necessary," is the predicate for that alternative ground, not a concession that Giordano fails to disclose or incorporate Virtex-UG. Ex. 1003, ¶ 305; Request, 6. Pleading a ground in the alternative does not abandon the first.

IV. CHALLENGING FIVE PATENTS IN ONE FAMILY DOES NOT FAVOR DENIAL

Petitioners filed one petition against each of five patents in a single family—precisely the approach the Office's guidance prescribes. Patent Owner protests that "[w]hat Optiver has done is file five petitions on a single day against five patents, none of which has been asserted against it." Request, 7. The five patents are members of one family, Petitioners filed one petition against each, and no patent is challenged twice. The only authority Patent Owner relies on for its plea of unfairness, *Realtek*, turned on a time bar it concedes does not apply here.

A. Realtek Does Not Support Denial Here

Realtek is a time-bar case, as Patent Owner acknowledges: "*Realtek* arose from a time-barred copycat petition and its § 315(b) analysis does not apply here."

Request, 7. Patent Owner nonetheless takes from it a general proposition: that "the Office weighs the fairness of what the petitioner has done." Request, 7. But *Realtek's* § 314(a) fairness discussion turned on the petitioner's litigation conduct, not the parties' relative financial resources or the size of a petitioner's corporate parent. *Realtek Semiconductor Corp. v. ParkerVision, Inc.*, IPR2025-00324, Paper 11, 2–3 (June 25, 2025) (precedential). The *Realtek* decision stands for something far narrower: that "the Office may consider whether it is fair to permit a time-barred party to join an ongoing proceeding," and that "[p]etitions filed by time-barred parties should proceed only in exceptional circumstances." *Realtek*, 3. None of the elements of that holding is present here: Petitioners are not time-barred, no petition copies another, and no joinder is sought.

B. The Petitions Are Neither Duplicative Nor Serial

Petitioners' filings comport fully with the Board's guidance. Patent Owner does not identify a single patent challenged more than once, and the Trial Practice Guide provides that "one petition should be sufficient to challenge the claims of a patent in most situations." Patent Trial and Appeal Board Trial Practice Guide § II.D.2 (Dec. 2025). That guidance addresses multiple petitions challenging the same patent, and Petitioners filed only one against each challenged patent, the four others being "in the same patent family as the '069 patent." Pet., a. *PacifiCorp* enforced that practice by vacating institution where a petitioner had filed two petitions against

each patent and remanding for selection of one. *PacifiCorp v. Birchtech Corp.*, IPR2025-00687, -00688, -00717, -00718, Paper 40, 2–4 (Jan. 12, 2026) (precedential). Petitioners filed no second petition against any challenged patent.

Indeed, filing five petitions burdens Patent Owner less, not more. *Inter partes* review reaches patentability over patents and printed publications alone, 35 U.S.C. § 311(b), on a schedule the Board controls. Litigating the same invalidity questions in district court across five patents would take longer and cost both sides more.

C. The Petition Fully Discloses The Real Parties-In-Interest

The Petition identifies the real parties-in-interest and voluntarily discloses the very corporate relationships on which Patent Owner relies. The decision Patent Owner cites on real party-in-interest, *Corning Optical*, places the burden on Patent Owner. "A patent owner challenging a petitioner's RPI disclosure must provide sufficient evidence to show the disclosure is inadequate." *Corning Optical Commc'ns RF, LLC v. PPC Broadband, Inc.*, IPR2014-00440, Paper 68, 13 (Aug. 18, 2015) (precedential except § II.E.1). Patent Owner offers no evidence beyond the disclosed corporate relationships, and none as to funding, direction, or an opportunity to control this proceeding.

Corning Optical also shows what such evidence looks like. The Board found a sister company and a parent to be real parties-in-interest on evidence that the petitioner had "blurred sufficiently the lines of corporate separation" and that the

parent "funded these IPR proceedings, and also exercised or could have exercised control over Petitioner's participation." *Corning Optical*, 15–16. Those findings followed discovery directed to funding and control, and the Board framed its conclusion as resting "on the particular facts of this case." *Corning Optical*, 19. Patent Owner identifies no evidence that either entity funded, directed, or had the opportunity to control this proceeding.

Indeed, what Patent Owner describes is nothing more than corporate affiliation, disclosed in the Petition itself. Patent Owner acknowledges as much, noting Petitioners "volunteered those relationships." Request, 8. The Petition states that Optiver Services US LLC is an affiliate and is a services entity supporting both Petitioners, and that Optiver Holding BV is the ultimate parent of all three. Pet., a.

At the threshold, an RPI dispute is not one of the enumerated Section 314(a) discretionary-denial considerations. Real-party-in-interest disclosure is a pleading requirement under 35 U.S.C. § 312(a)(2), and even a genuine RPI defect is generally curable rather than a basis for denial. Patent Owner therefore improperly imports a merits or procedural issue into the discretionary analysis.

V. NO SETTLED EXPECTATIONS HAVE DEVELOPED IN THE '069 PATENT

Patent Owner relies on elapsed time, public issuance, and nonassertion. Request, 9–10. Each is something that happened to the '069 patent rather than an

action Patent Owner took with it—and it is action, not the mere passage of time, that the Director has looked for in support of settled expectations.

A. The ’069 Patent Falls Short Of The Six-Year Benchmark Patent Owner Itself Proposes

The correct measuring date for settled expectations is the Petition’s filing date, June 4, 2026—not the later due date for Patent Owner’s Request, August 10, 2026. The ’069 patent issued September 8, 2020, so it had been in force for five years, eight months, and twenty-seven days when Petitioners filed. Patent Owner’s brief instead describes the interval measured to its own Request due date as five years and eleven months, characterizing it as “nearly six years.” Request, 1, 9–10. The line Patent Owner proposes has no stopping place, and its own filings confirm as much. Patent Owner calls a patent in force five years and two and a half months one that “has been in force nearly six years,” and it calls this patent, in force five years and eleven months, one that “Has Been In Force Nearly Six Years” as well. IPR2026-00385, Paper 6, 1, 10; Request, 9. The same phrase cannot describe both a one-month gap and a nine-and-a-half-month one.

Patent Owner supplies the six-year figure itself, from the damages limitation in 35 U.S.C. § 286, while conceding that “there is no bright-line rule for when expectations become settled.” Request, 9. A party that concedes there is no line, then borrows one, and then rounds up toward it has not identified a standard—it has merely identified a direction.

The Office's decision in *Cambridge* directly contradicts Patent Owner's position, finding no strong settled expectations for patents at roughly six years since issuance. *Cambridge Indus. USA, Inc. v. Applied Optoelectronics, Inc.*, IPR2025-00434, -00436, -00437, Paper 11, 2–3 (June 26, 2025). There, the Office found the patent owner has not developed strong expectations for three patents, all around six years since issuance, and ruled against discretionary denial. Patent Owner tries to distinguish *Cambridge* by arguing that the patents there were younger, and that the "decision issued on June 26, 2025, when a patent issued in 2020 had been in force under five years." Request, 9. But *Cambridge*, which was decided on June 26, 2025, covered three patents which were "issued in 2020, 2019, and 2019" where the Office found that "Patent Owner has not developed strong settled expectations" as to all three patents. *Cambridge*, Paper 11, 2–3. Patent Owner's argument that *Cambridge* concerned only patents in force under five years applied, at most, to the 2020 patent, the youngest of the three. The other two include a patent that had been in force for *more than six years*, yet the Office still did *not* find strong settled expectations and ruled against discretionary denial. *Id*.

Patent Owner's remaining authorities likewise provide no support for its position. Patent Owner says the '069 patent "stands at nearly six, at the threshold the Director drew from § 286 in *Dabico*." Request, 10. But its own text puts the '069 patent at "five years and eleven months." Request, 9. By Patent Owner's own

cases, and its own account of how long the ’069 patent has been in force, Patent Owner has not developed strong settled expectations in the ’069 patent either.

B. The Record Reflects No Commercialization, Licensing, Marking, Or Investment In The ’069 Patent

Elapsed time, moreover, is not the only measure for settled expectations. *Home Depot* shows that an established record of non-commercialization, non-assertion, non-marking, and non-licensing can outweigh both a substantially older patent and parallel-litigation considerations: the patent there had been in force “over twelve years, creating strong settled expectations for Patent Owner,” and the Director referred the petition anyway because it “has not been commercialized, asserted, marked, licensed, or otherwise applied in its technology space.” *Home Depot U.S.A., Inc. v. H2 Intellect LLC*, IPR2025-00480, Paper 11, 2–3 (Sept. 4, 2025) (informative).

Patent Owner concedes that it has “asserted no claim of the patent against anyone.” Request, 1. As to the rest, its Request identifies no commercialization, licensing, marking, investment, or other reliance specific to the ’069 patent. *Amgen* explains that a patent owner may establish strong settled expectations in a younger patent by linking extraordinary investment, time, and resources to those expectations; Patent Owner identifies no comparable patent-specific showing. *Amgen*, Paper 9, 2.

Patent Owner attempts to anticipate this argument: "Petitioners may respond that Patent Owner never asserted the '069 patent against them, so no expectations could have settled as between these parties. Dabico forecloses that argument." Request, 9. *Dabico* addresses notice, which Petitioners do not dispute. *Home Depot* separately considered what the patent owner had done with the patent, and Patent Owner identifies no commercialization, licensing, marking, investment, or other application beyond nonassertion.

Finally, denial here would reward waiting: if expectations can settle before six years, a patent owner need only hold its patent past the mark to collect the presumption, and then assert it. Notably, Patent Owner does not say it will never assert the '069 patent—it says only that it has not asserted it yet. Request, 1. A rule that credits expectations at short of six years gives it every reason to wait.

VI. THE BALANCE OF THE EVIDENCE FAVORS REFERRAL

The Director weighs these considerations together, on "a holistic assessment of all of the evidence and arguments presented." *Home Depot*, 3; *see Magnolia*, 2 ("the totality of the evidence and arguments presented"). *Home Depot* shows what that assessment can produce: the patent had been in force more than twelve years, the parallel-litigation considerations favored denial, and the Director referred the petition anyway. *Home Depot*, 2–3.

The absence of a parallel case, the untested art, and the absence of any patent-specific reliance outweigh the patent's age and Patent Owner's fairness argument. There is no parallel proceeding, no prior adjudication of the '069 patent, and no patent challenged twice. The Examiner never saw the asserted art. The strength of the unpatentability showing on art the Office has never considered is itself an affirmative reason to institute, not merely the absence of a reason to deny. And Patent Owner relies on nonassertion to show the absence of a controversy, while *Home Depot* treated nonassertion together with the absence of commercialization, marking, or licensing as weighing against settled expectations.

VII. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Director decline to exercise discretion under 35 U.S.C. § 314(a) and refer the Petition to the Board for review on the merits.

DATED: September 8, 2026

Respectfully Submitted,

By: / *Brian M. Buroker* /

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CERTIFICATE OF SERVICE

The undersigned certifies service pursuant to 37 C.F.R. §§42.6(e) and 42.105(b) on the Patent Owner electronically on the Patent Owner at the following email addresses:

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