

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ZTE CORPORATION, ZTE (USA), INC., AND ZTE (TX), INC.
Petitioners

v.

WSOU INVESTMENTS, LLC D/B/A BRAZOS LICENSING AND
DEVELOPMENT
Patent Owner

IPR2021-00695
U.S. PATENT NO. 8,147,071

PATENT OWNER PRELIMINARY RESPONSE TO PETITION

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EXHIBIT LIST

2001	Order Appointing Technical Advisor, <i>WSOU Investments LLC d/b/a Brazos Licensing and Development v. ZTE Corp.</i> , No. 6:20-cv-492 (W.D. Tex. filed Apr. 1, 2021).
2002	Defendants' Invalidity Contentions (including Exhibit K2), <i>WSOU Investments LLC d/b/a Brazos Licensing and Development v. ZTE Corp.</i> , No. 6:20-cv-492 (W.D. Tex. served Jan. 6, 2021).
2003	Defendants' Responsive Claim Construction Brief, <i>WSOU Investments LLC d/b/a Brazos Licensing and Development v. ZTE Corp.</i> , No. 6:20-cv-492 (W.D. Tex. filed Apr. 9, 2021).
2004	Defendants' Sur-Reply and Supplemental Reply Claim Construction Brief, <i>WSOU Investments LLC d/b/a Brazos Licensing and Development v. ZTE Corp.</i> , No. 6:20-cv-492 (W.D. Tex. filed May 7, 2021).

I. INTRODUCTION

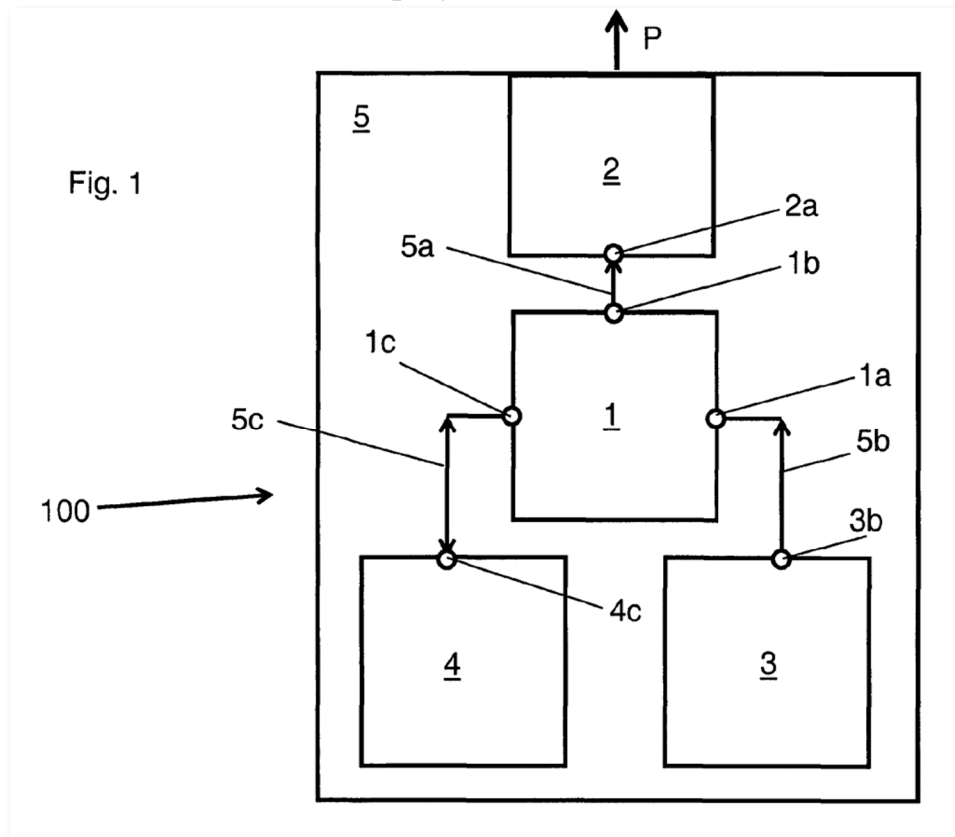
WSOU Investments, LLC d/b/a/ Brazos Licensing and Development (the “Patent Owner”) submits this Preliminary Response to the Petition for *Inter Partes* Review (“Petition”) of United States Patent No. 8,147,071 (“the ’071 patent”) filed by ZTE Corporation, ZTE (USA), Inc., and ZTE (TX), Inc. (collectively, “Petitioner”). The Petition purports to challenge the validity of claims 1-14 of the ’071 patent.

As a threshold procedural matter, the Board should exercise its discretion to deny institution under 35 U.S.C. § 314(a). Among other relevant factors favoring denial, the Parallel Litigation (defined below) involving the same parties has already been fully briefed in the *Markman* proceedings, has been assigned a Technical Advisor to assist with *Markman* and other matters, is currently in the fact discovery stage, raises overlapping issues, and trial is scheduled to be complete prior to the statutory deadline for a final written decision.

Because denial is independently warranted under at least 35 U.S.C. § 314(a), the Board need not reach the substantive merits of the Petition. A substantive analysis is nevertheless presented herein because the Board has held that “weakness on the merits” or even a “closer call” also weigh in favor of discretionary denial under § 314(a), particularly where other factors supporting denial are present. To the extent the Board reaches the merits, Petitioner fails to meet its burden to establish it is more likely than not that it would prevail with respect to any challenged claim. The Board should decline institution.

II. THE '071 PATENT

The '071 patent is entitled “Processor for an Apparatus, an Apparatus and Associated Methods.” The '071 patent issued on Apr. 3, 2012 from U.S. Patent Application No. 12/387,313 filed on Apr. 29, 2009. Certain embodiments teach novel techniques for “allowing the processor to interpret the movement signalling as an instruction to provide image data signalling that may correspond in some way to the movement experienced by the projector.” Ex. 1001 at 1:60-63. Figure 1 (reproduced below) illustrates an exemplary “diagram of ... a processor 1 in combination with the connected projector 2.” *Id.* at 4:29-30.



The “apparatus 100 comprises the processor 1, projector 2, [and] movement sensor 3.” *Id.* at 4:34-35. The processor 1 includes an “input 1a” and an “output 1b.”

Id. at 4:39. The input 1a is “configured to be connected to the movement sensor 3 and to receive movement signalling that is provided by the movement sensor 3.” *Id.* at 40-42. The output 1b is “configured to be connected to the projector 2 and to provide image data signalling as an output signal.” *Id.* at 4:42-44.

III. RELATED PROCEEDINGS

The '071 patent is involved in the following proceedings:

Filing Date	Case Name	Case Number	Court
June 3, 2020	<i>WSOU Investments LLC v. ZTE Corporation, et al</i> (“Parallel Litigation”)	6-20-cv-00492	WDTX

IV. GIVEN THE UPCOMING TRIAL IN PARALLEL LITIGATION, THE BOARD SHOULD EXERCISE DISCRETION UNDER 35 U.S.C. § 314(A), *NHK SPRING*, AND *APPLE V. FINTIV* TO DENY INSTITUTION

As a threshold and dispositive issue, discretionary denial is warranted under 35 U.S.C. § 314(a) because institution would be an inefficient duplication of multiple pending litigations. Under § 314(a), the Director has discretion to deny institution. *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016). As shown in the table above, the '071 patent is asserted the Parallel Litigation involving the same parties before the Western District of Texas.

The Board considers the presence and status of parallel district court litigation in determining institution. *NHK Spring Co., Ltd. v. Intri-plex Technologies*, IPR2018-00752, Paper 8 (PTAB Sept. 12, 2018) (precedential) (“*NHK*”) and *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential)

(“*Fintiv*”); *see also* *General Plastic Industrial Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 at 16–17 (PTAB Sept. 6, 2017) (“[W]e recognize that an objective of the AIA is to provide an effective and efficient alternative to district court litigation.”).

The precedential *Fintiv* opinion sets forth a non-exhaustive list of factors that balance considerations of system efficiency and fairness when a patent owner raises an argument for discretionary denial due to the advanced state of a parallel proceeding(s). *Fintiv*, IPR2020-00019, Paper 11 at 5–6. The factors are:

1. whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted;
2. proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision;
3. investment in the parallel proceeding by the court and the parties;
4. overlap between issues raised in the petition and in the parallel proceeding;
5. whether the petitioner and the defendant in the parallel proceeding are the same party; and
6. other circumstances that impact the Board’s exercise of discretion, including the merits.

Id.

These factors relate to whether efficiency, fairness, and the merits support the exercise of authority to deny institution in view of an earlier trial date in the parallel proceeding. As explained below, there is some overlap among these factors. Some facts may be relevant to more than one factor. Therefore, in evaluating the factors, the Board takes a holistic view of whether efficiency and integrity of the system are

best served by denying or instituting review. *See* Consolidated Trial Practice Guide November 2019 (“TPG”) at 58 (quoting 35 U.S.C. § 316(b)).

A holistic view of the factors set forth in *Fintiv* reveals the present circumstances favor discretionary denial.

1. whether a stay exists or evidence exists that one is likely to be granted if a proceeding is instituted (Factor 1)

The first factor favors denial. Factor 1 asks whether “evidence exists that [a stay] may be granted if a proceeding is instituted.” *Fintiv*, Slip. Op. 6. The Parallel Litigation is pending before Judge Albright in the Western District of Texas. While Petitioner moved to stay (Pet. at 72), there is no evidence a stay would likely be granted in this case even if trial is instituted. Patent Owner has opposed the motion to stay. Parallel Litigation, Dkt. 48. Indeed, Petitioner has not cited even one instance in which Judge Albright granted an opposed motion to stay after IPR institution.

Nevertheless, Petitioner argues this factor is “neutral” ostensibly because “there remains no indication that the district court will grant or deny the motion to stay.” *Id.* Petitioner’s suggestion of uncertainty is not ***evidence of likelihood*** that a stay would be granted if a proceeding is instituted. Moreover, Petitioner incorrectly suggests analysis of this factor requires speculation here.¹ It does not.

No speculation is required because the only evidence before the Board clearly shows that Judge Albright does ***not*** grant opposed motions to stay trials under the

¹ Emphasis is added unless otherwise noted.

circumstances here. Indeed, Judge Albright has declined to *even consider* a stay request brought after IPR institution and shortly before the claim construction hearing, explaining, “I’m not going to stay the case based on the IPR institution and we are set for trial.” *MV3 Partners, LLC v. Roku, Inc.*, No. 6:18-cv-00308-ADA, Dkt. 83 at 53 (W.D. Tex. July 22, 2019).

While Petitioner has not cited even one instance in which Judge Albright granted an opposed motion to stay after IPR institution under similar circumstances, the cases in which the Court denied such a motion are legion. For example, in *Kerr Machine Co. d/b/a Kerr Pumps v. Vulcan Industrial Holdings, LLC*, the Court listed the following reasons (all equally applicable here) for denying the motion to stay:

- (1) The PTAB has not instituted the PGR.
- (2) Even if the PTAB institutes, the Court anticipates that the trial date will occur before the PGR’s final written decision.
- (3) Allowing this case to proceed to completion will provide a more complete resolution of the issues including infringement, all potential grounds of invalidity, and damages.
- (4) The Court believes in the Seventh Amendment.
- (5) Plaintiff opposes the stay.

No. 6-20-cv-00200, (W. D. Tex. Aug. 2, 2020).

The defendant in that case subsequently petitioned the Federal Circuit for mandamus review, stating that Judge Albright has adopted rules that set an “impossible barrier” for infringement cases to be stayed while they are under review at the PTAB. The Federal Circuit denied the Petition. *In re Vulcan Indus. Holdings, LLC*, 830 F. App’x 318, 319 (Fed. Cir. 2020). Even after the PTAB instituted the

parallel PGR, the Court **again** denied a motion to stay for all the same reasons of its prior order (with the sole exception that, by that time, the PTAB had instituted the PGR). *Kerr Machine Co. d/b/a Kerr Pumps v. Vulcan Industrial Holdings, LLC*, No. 6-20-cv-00200, Dkt. 76 (W. D. Tex. Apr. 7, 2021).

Judge Albright offered consistent reasoning in other matters in denying similar motions to stay pending IPR. *See, e.g., Continental Intermodal Group - Trucking LLC v. Sand Revolution LLC et al.*, No. 7-18-cv-00147 (W.D. Tex. July. 22, 2020); *Multimedia Content Management LLC v. DISH Network LLC*, No. 6-18-cv-00207 (W.D. Tex. Mar. 30, 2019) (also emphasizing that the litigation had progressed past the *Markman* hearing).

There is no need to speculate how Judge Albright might rule on Petitioner's stay motion. This is because the Court's repeated and consistent reasoning is equally applicable here: (1) even if an IPR is instituted, the Parallel Litigation trial date is scheduled to occur before the statutory deadline for a final written decision; (2) allowing this case to proceed to completion will provide a more complete resolution of the issues including infringement, all potential grounds of invalidity, and damages; (3) nothing here changes the Court's oft-repeated expression of belief in the Seventh Amendment; and (4) Patent Owner opposes the stay.

The proper analysis under Factor 1 of *Fintiv* does not require **absolute certainty** as to what the Court will do. Rather, the *Fintiv* analysis requires examining whether **evidence exists** that a stay is **likely** to be granted if a proceeding is instituted. There simply is no evidence before the Board, nor is there **even one** speculative

factor, to suggest that a stay would *likely* be granted if trial is instituted. On the other hand, the general practice of the District Court and all its prior rulings only underscores the *unlikelihood*, or as one defendant put it, the virtual impossibility that a stay would be granted if trial is instituted. Accordingly, this factor is not neutral, as Petitioner argues, but rather it weighs in favor of denial.

2. proximity of the court's trial date to the Board's projected statutory deadline (Factor 2)

The second factor favors denial because trial in court would precede a final written decision if an IPR trial is instituted here. The District Court has set a trial date for June 20, 2022 (admitted at page 72 of the Petition). The projected statutory deadline for the final written decision is October 8, 2022, which is almost four months after the trial date. This is the *original* trial date set by the Court, it has not been moved since being set by the Court, and no party has requested that the Court move the trial date. Moreover, the Petitioner *twice* stipulated to this trial date in joint submissions to the District Court. Parallel Litigation, Dkt. 29 at 1 (stating that the parties “jointly submit an Agreed Proposed Scheduling Order”); Dkt. 42-4 (submitting a joint motion for entry of disputed amended scheduling order but noting that the “parties are in agreement concerning the remaining dates” including the trial date). The procedures of Judge Albright in the Parallel Litigation explicitly state that “the Court will not move the trial date except in extreme situations.” *See* Order Governing Procedures (W.D. Tex. Feb. 21, 2021).²

² *See* <https://www.txwd.uscourts.gov/>

The *Fintiv* panel noted that the Board “generally take[s] courts’ trial schedules at face value absent some strong evidence to the contrary.” *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 15, Slip. Op. at 13 (PTAB May 13, 2020) (informative) (“*Fintiv II*”). The Board has found this factor favors denial under similar circumstances. *Id.* (“Because the currently scheduled District Court trial is scheduled to begin *two months before* our deadline to reach a final decision, this factor weighs somewhat in favor of discretionary denial in this case.”) (emphasis added).

Petitioner argues the established trial date is “subject to delays” allegedly because of the speculative possibility that its stay and transfer motions will be granted. Pet. at 72. This factor does not turn on self-serving assumptions; and presuming that there may be a future delay in trial date would be mere conjecture at this time. Moreover, Petitioner cannot escape the fact that the Court has not moved the Parallel Litigation trial date. The record simply lacks “strong evidence” to not take the Court’s scheduled trial date at face value. *Fintiv II*, Slip. Op. at 13. This factor favors denial.

3. *investment in the parallel proceeding by the court and parties*
(Factor 3)

The third factor favors denial because, at the time of the anticipated decision on institution, the investment in the Parallel Litigation will already have been significant. Under the Parallel Litigation Scheduling Order, the parties have already

[wpcontent/uploads/Standing%20Orders/Waco/Albright/Order%20Governing%20Proceedings%20-%20Patent%20Cases%20022321.pdf](#)).

exchanged preliminary infringement contentions and invalidity contentions. In addition, the parties have already fully briefed the *Markman* issues (including a round of supplemental briefing).³ In addition, over three months ago, the Court appointed a Technical Advisor to “assist the Court with technical issues related to the claim construction process and advise the Court regarding preliminary and final claim constructions.” Ex. 2001 at 1. The Technical Advisor “serves essentially as a law clerk to the Court and will be familiar with the claim construction issues in this case” and his role is to assist the Court in drafting a claim construction order, motions for summary judgment, *Daubert* motions, at trial, and with post-trial motions. *Id.* It is also significant that merits discovery in the parallel litigation is already underway. Fact discovery opened on May 24, 2021 and closes on December 17, 2021. Parallel Litigation, Dkt. 43 at 12. Patent Owner has served written discovery requests on the merits and Petitioner served written responses. Each one of these circumstances weigh in favor of denial under this factor—collectively they make a compelling case for exercising statutory discretion under Section 314(a).

4. *overlap between issues raised in the petition and in the parallel proceeding (Factor 4)*

The fourth factor weighs in favor of denial under the circumstances. *Fintiv* states, “if the petition includes the same or substantially the same claims, grounds,

³ The District Court cancelled the *Markman* hearing “until further order of the court.” Parallel Litigation, Dkt. 81 at 1. Notably, however, the District Court did not move the trial date or any other deadlines in this case. *See id.*

arguments, and evidence as presented in the parallel proceeding, this fact has favored denial.” Slip. Op. 12. Petitioner does not deny that there is complete overlap between these parallel proceedings at least in that all grounds raised in the Petition are also raised in the parallel litigation involving the same parties. The overlap is shown, for example, by the two comparative screenshots reproduced below.

K. The '071 Patent

The following prior art references, and any products, devices, or methods known or used in the prior art that embody the subject matter disclosed in those prior art references, anticipate and/or render obvious the Asserted Claims of the '071 Patent:

Prior Art Patent References

Patent Number	Country of Origin	Date of Issue/Publication
7,500,758	U.S.	March 10, 2009
2006/0256298	U.S.	November 16, 2006
2010/0031201	U.S.	February 4, 2010
2009/0079945	U.S.	March 26, 2009
2009/0091710	U.S.	April 9, 2009
4872411	JP	February 8, 2012
2006/0103811	U.S.	May 18, 2006
6,764,185	U.S.	August 7, 2003

Ex. 2002 at 33. The above screenshot captures a relevant portion from Petitioner’s Invalidity Contentions served in the Parallel Litigation.

Ground	References	Basis	Challenged Claim(s)
1	<i>Huebner</i>	§ 102, § 103	1-5, 7-11, 13, and 14
2	<i>De Haan</i>	§ 102, § 103	1-14

Pet. at 8. As shown above, the Petition relies on the same two references asserted in Petitioner's Invalidity Contentions served in litigation: Huebner (U.S. Publication No. 2010/0031201) and De Haan (U.S. Publication No. 2009/0091710).

Petitioner attempts to neutralize the undisputed overlap between proceedings stating that "ZTE will stipulate that, if this IPR is instituted, it will not pursue the specific grounds identified in this Petition (Sections VII-VIII) before the district court." Pet. at 74. Petitioner's "stipulation" is unavailing for the following reasons.

First, Petitioner also offers no evidence to establish (1) that its "stipulation" was ever filed in District Court (it was not) or (2) that the district court, even if given the opportunity to consider the document, would consider it binding on all named defendants in the event an IPR is instituted here. Under the circumstances, Petitioner's "stipulation" should not be considered part of the record and should be afforded no weight.

Second, even if Petitioner's "stipulation" were taken at face value, it is expressly limited in scope to the "specific grounds identified in this Petition." Pet at 74. Nothing in Petitioner's "stipulation" appears to preclude the named defendants from raising validity challenges in litigation by formulating different prior art grounds, including minor variations. For instance, one might argue that the "stipulation" does not, on its face, preclude the named defendants from raising § 103 invalidity arguments based on a combination of Huebner and De Haan. Nor would Petitioner's "stipulation" seemingly preclude the named defendants from asserting either Huebner or De Haan as a primary reference, and then relying on other prior

art for secondary features. Presumably, this is why Petitioner took care to limit the grounds to just two references, while keeping their powder dry on over 30 alleged prior art patents and printed publications listed on Petitioner's Invalidity Contentions. Ex. 2002 at 33-34. For instance, in the parallel litigation, Petitioner alleges that De Haan "anticipates ... and/or renders the asserted claims obvious under 35 U.S.C. § 103 either alone, in combination with the general knowledge of one of ordinary skill in the art, and/*or in combination with the references identified in ZTE's invalidity contentions*, including as set forth in this chart [and then listing six prior art references]." Ex. 2002 (Ex. K2) at 1. Unlike *Sotera*, therefore, the "stipulation" does *not* mitigate all concerns of "duplicative efforts between the district court and the Board, as well as concerns of potentially conflicting decisions." *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12 at 19 (Dec. 1, 2020) (precedential). For instance, the *Sotera* petitioner filed a stipulation in district court that Petitioner "will not pursue in [the District Court] the specific grounds [asserted in the inter partes review], or on any other ground . . . that was raised *or could have been reasonably raised in an IPR (i.e., any ground that could be raised under §§ 102 or 103 on the basis of prior art patent or printed publications)*." See *id.* at 13-14. Petitioner's stipulation here lacks the force of the critical emphasized language from the quoted portion of *Sotera*. One can only speculate as to how Judge Albright would resolve a dispute as to the alleged preclusive effect of Petitioner's "stipulation" if Petitioner were to bring such a document to the attention of the Court, which Petitioner has yet to do.

Third, Petitioner limits its declaration to “**the** district court.” Pet. at 74. But as Petitioner notes it has sought transfer to a different district court. *Id.* at 72. Presumably, if the named defendants appear before a different district court (through transfer or other mechanism), the named defendants will argue that their “stipulation” is not binding in any district court except the Western District of Texas. Thus, the “stipulation” has the potential to have no binding effect.

Accordingly, given at least (1) the undisputed overlap between the parallel proceedings, (2) the multiple defects of the “stipulation,” and (3) the failure of Petitioner to properly apply *Sotera*, the fourth factor weighs in favor of denial.

5. *whether the petitioner and the defendant in the parallel proceeding are the same party (Factor 5)*

The fifth factor considers “whether the petitioner and the defendant in the parallel proceeding are the same party.” *Fintiv*, Slip. Op. 5–6, 13–14. The dispositive question is clear, and the answer should be deemed admitted by Petitioner’s concession that “the parties here and in the District Court are the same.” Pet. at 72. This factor clearly favors denial.

Without even mentioning the controlling instruction in *Fintiv* concerning the fifth factor, Petitioner alleges this factor is neutral. *Id.* Petitioner cites no authority for its position and fails to articulate any reasoning. Pet. at 74.

In an opinion designated informative after *Fintiv*, the Board instructed that “this [fifth] factor weighs in favor of discretionary denial” where “a petitioner in inter partes review and defendant in a parallel district court proceeding are the same.” *See Sand Revolution II, LLC v. Continental Intermodal Group – Trucking*

LLC, IPR2019-01393, Paper 24 at 12-13 (June 16, 2020) (designated informative July 13, 2020) (citing *Fintiv*, Slip. Op. at 13–14). As was the case in *Sand Revolution II*, the District Court here “is *scheduled* to go to trial before the Board’s final decision would be due.” *Id.* Under controlling authority, which Petitioner ignores, this factor clearly favors denial.

6. *other circumstances that impact the Board’s exercise of discretion, including the merits (Factor 6)*

The sixth factor favors denial. *Fintiv* states, “if the merits of the grounds raised in the petition are a closer call, then that fact has favored denying institution when other factors favoring denial are present.” Slip. Op. 15 (citations omitted). As discussed below, the Petition is deficient, and institution would be an inefficient use of the Board’s resources. And as discussed above, the district court will begin a jury trial approximately four months before the projected statutory deadline for the final written decision. Moreover, Petitioner in the Parallel Litigation raises several invalidity defenses (including those based on §§ 101 and 112) that are beyond the scope of the Board’s IPR review powers. *See* Ex. 2002 at 49-50, 59-60, 66. Given all of these defenses have the potential to intertwine with at least claim construction, it would be more efficient for the District Court to resolve the Grounds raised in the IPR. The pervasive nature of Petitioner’s indefiniteness allegations (described *infra*) would also make the District Court a better forum to resolve all invalidity issues, including those raised in the Petition. As more fully explained below, the Petitioner cannot maintain that a claim is both indefinite and anticipated / rendered obvious. *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1332 (Fed. Cir. 2010) (“As a

preliminary matter, we observe that a claim cannot be both indefinite and anticipated.”). Having the District Court resolve invalidity (including those issued raised in this Petition and indefinites) would eliminate the possibility of conflicting rulings.

Holistic assessment of the Fintiv factors

For the convenience of the Board, the above analysis of the *Fintiv* factors may be generally summarized as follows:

1. Factor 1 **favours denial**, given at least that no evidence exists that a stay would be granted if an IPR proceeding is instituted and *all* record evidence before the Board only underscores the *unlikelihood* that the District Court would grant an opposed motion to stay *if* one is filed;
2. Factor 2 **favours denial** because the court’s *unchanged* trial date is scheduled to precede the Board’s projected statutory deadline for a final written decision;
3. Factor 3 **favours denial**, given the significant investment in the parallel proceeding by the Court and the parties, including, for example, the (1) completion of *Markman* briefing, (2) the appointment of a Technical Advisor, (3) service of invalidity and infringement contentions, and (4) ongoing discovery efforts;
4. Factor 4 **favours denial**, given the undisputed overlap between the parallel proceedings, and further given the defects and deficiencies of Petitioner’s so-called “stipulation;”
5. Factor 5 **favours denial** because the Petitioner here and the named defendants in the parallel litigation are the same parties; and

6. Factor 6 **favours denial** due to other circumstances, including weakness of the Petition on the merits.

As shown by the analysis summarized above, a holistic view of the factors set forth in *Fintiv* reveals the present circumstances favor discretionary denial.

V. LEVEL OF ORDINARY SKILL IN THE ART

The Petition proposes a person of ordinary skill in the art at the time of the '071 patent ("POSITA") "would have had a Bachelor of Science degree in Electrical Engineering or an equivalent field, with two years of academic or industry experience in computer systems or comparable industry experience." Pet. at 6. Patent Owner does not offer a competing definition at this preliminary stage because, even if it were appropriate to apply Petitioner's definition for a POSITA, Petitioner would still not meet its burden to prove unpatentability of any challenged claim.

VI. CLAIM CONSTRUCTION

The standard for claim construction applicable here is the "ordinary and customary meaning of such claim as understood by one of ordinary skill in the art and the prosecution history pertaining to the patent." 37 C.F.R. §42.100(b) (effective November 13, 2018); 83 Fed. Reg. No. 197, 51340 (Oct. 11, 2018). This is the same standard applied by Article III courts. *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005).

In its Invalidity Contentions and *Markman* briefs in the Parallel Litigation, the Petitioner asserted that the following terms are indefinite:

Term	Patent Owner's Construction	Petitioner's Construction
“the processor” / “wherein the processor is configured to”	Plain and ordinary meaning	Indefinite under 35 U.S.C. § 112(b)
“movement signaling” / “receiv[ing] movement signaling associated with the movement of the projector” / “corresponding movement signaling”	Plain and ordinary meaning	Indefinite under 35 U.S.C. § 112(b)
“discriminate” / “discriminate a movement criterion” / “the processor is configured to discriminate a movement criterion”	Plain and ordinary meaning	Indefinite under 35 U.S.C. § 112(b)
“provide associated image data signaling to project associated image data”	Plain and ordinary meaning	Indefinite under 35 U.S.C. § 112(b)

Ex. 2003 at 13-16; Ex. 2002 at 59-60.

Notably, Petitioner does not allege that the above-listed terms are indefinite in the alternative—*i.e.*, by asserting a definition or plain and ordinary meaning and then arguing in the alternative that the claims are indefinite. Rather, the **only** claim construction position that Petitioner has taken in the Parallel Litigation is that the above-listed terms are indefinite. Ex. 2003 at 13-16; Ex. 2002 at 59-60; Ex. 2004 at 7-12. While Petitioner in the Parallel Litigation claims that this IPR “petition[] expressly reserve the right to advance this very indefiniteness position in the

litigation” (Ex. 2004 at 7, n.2), the Petition lacks any “express reserve[ation]” and the Petitioner identifies no specific reservation in the Parallel Litigation. *See generally* Ex. 2004.

Petitioner’s sole allegiance to its indefiniteness theory is further compounded by the pervasive nature of Petitioner’s indefiniteness allegations, which is evident when mapping the purportedly indefinite terms onto the claims (done below in emphasized text for claim 1):

1. A processor for providing image data signalling to a projector, the image data signalling representing an image to be projected by the projector, *the processor* comprising:

an input to *receive movement signalling associated with movement of the projector*;
and

an output configured to provide image data signalling to the projector, and *wherein the processor is configured to provide image data signalling to the projector based on received movement signalling*, wherein the *movement signalling* provides an indication of one or more movement criterion of the projector, the movement criterion representing one or more of displacement and movement speed of the projector, and *wherein the processor is configured to discriminate a movement*

criterion and to *provide associated image data signalling to project associated image data.*

Petitioner does not purport to apply the same claim constructions in its Petition that Petitioner applied in the parallel litigation. Pet. at 7.

VII. THE PETITION SHOULD BE DENIED AS DEFICIENT UNDER 37 C.F.R. § 42.104(B)(4) GIVEN PETITIONER’S CLAIM CONSTRUCTION CONTENTION OF INDEFINITENESS AND PETITIONER’S STATEMENTS IN THE PARALLEL DISTRICT COURT PROCEEDING

As discussed below, the Petition should be denied at least because Petitioner fails to comply with 37 C.F.R. § 42.104(b)(4) given Petitioner’s express statements in the parallel district court proceeding regarding the claim terms listed on page 18, *supra*. In effect, Petitioner proposes that Petitioner can exempt itself from the requirements of 37 C.F.R. § 42.104(b)(4) without providing notice to the Board or Patent Owner in the Petition.

For instance, with respect to the term, “wherein the processor is configured to” Petitioner claims that the term is “insolubly ambiguous and has no ascertainable meaning.” Ex. 2003 at 13. Moreover, with respect to the same term, Petitioner argued in its *Markman* briefs that “[a] PHOSITA would not have been able to ascertain whether a processor is configured in any particular way because it is impossible for a PHOSITA to determine with reasonable certainty what a configured processor is.” Ex. 2004 at 7. The Petitioner similarly argued that other terms in claim 1 are “impossible for a PHOSITA to determine with reasonable certainty.” *Id.* at 9 (with respect to the “movement signalling” terms); *id.* at 10 (with respect to the

“discriminate” terms); *id.* at 11 (with respect to the “provide associated image data signalling ...” term).

Yet, in the instant Petition (filed on March 26, 2021, just two weeks before Petitioner’s filed their Opening *Markman* Brief), Petitioner argues that all challenged claims (including Claim 1) of the ’071 patent are either *anticipated* or rendered obvious, and Petitioner purports to map alleged prior art references against each of the elements of the ’071 patent, including “processor configured to” and the other terms that Petitioner claims are indefinite on page 18, *supra*. But as matter of Black-letter law, Petitioner cannot maintain that a claim is both indefinite and anticipated / rendered obvious. *Enzo Biochem, Inc. v. Applera Corp.*, 599 F.3d 1325, 1332 (Fed. Cir. 2010) (“As a preliminary matter, we observe that a claim cannot be both indefinite and anticipated.”).

And therefore, the Petition does not “set forth . . . where each element of the claim is found in the prior art . . . relied upon.” 37 C.F.R. § 42.104(b)(4). Further, by taking the position that no formal claim construction is necessary in this proceeding but arguing that this term is indefinite in the parallel district court proceeding, the Petition fails to set forth “[h]ow the challenged claim *is to be construed*”. 37 C.F.R. § 42.104(b)(3) (emphasis added).

Petitioner bushes off its statutory obligations in this IPR proceeding by expressly opining that “given the similarities between the prior art [sic] the disclosure of the ’071 patent, no express construction of these terms is needed to determine whether the claims are unpatentable.” Pet. at 7-10. In other words,

Petitioner is taking the position that while Petitioner maintains that this claim term is indefinite, it is not necessary to inform the Board in its Petition because of the *subjective belief by Petitioner* regarding the “similarities” between the IPR prior art and the ’071 patent. Put differently, and by taking Petitioner’s own words in the district court proceeding into account, as a result of Petitioner’s insistence that this term is indefinite, it necessarily means that Petitioner (and its Declarant) cannot map to the cited prior art references to this term in the Petition.

Petitioner’s own words above shows that Petitioner appears to hold the belief that Petitioner need not “set forth... where each element of the claim is found in the prior art... relied upon” as required under 37 C.F.R. § 42.104(b)(4) or set forth “[h]ow the challenged claim *is to be construed*” (37 C.F.R. § 42.104(b)(3) (emphasis added)), ostensibly *because of a subjective belief Petitioner holds regarding the “similarities” between the IPR prior art and the “ disclosure of the ’071 patent”*. Pet. at 7-8.

Petitioner, however, fails to cite to any authority for its proposition that just because Petitioner subjectively believes enough “similarities between the prior art [and] the disclosure of the ’071 patent” means that Petitioner can unilaterally deem sections of 37 C.F.R. § 42.104 to ignore despite (expressly) stating that the Petition complies with all requirements of 37 C.F.R. § 42.104. For this reason alone, the Petition should be denied.

**VIII. THE PETITIONER’S IDEFINITENESS POSITION IN THE
PARALLEL LITIGATION IRRECONCILABLY CONFLICTS WITH
ITS DECLARANT’S OPINIONS IN THIS IPR**

Petitioner’s position that the allegedly indefinite terms are “impossible for a PHOSITA to determine with reasonable certainty” directly contradict its Declarant in this IPR. The table below compares Petitioner’s legal and factual positions from *Markman* briefing in the Parallel Litigation with those of its Declarant in this IPR:

Terms	Petitioner's <i>Markman</i> Brief in the Parallel Litigation	Petitioner's Declarant's Opinion
<p>“the processor” / “wherein the processor is configured to”</p>	<p>“A PHOSITA would not have been able to ascertain whether a processor is configured in any particular way because <i>it is impossible for a PHOSITA to determine</i> with reasonable certainty what a configured processor is.” Ex. 2004 at 7.</p>	<p>“It is my opinion that <i>Huebner</i> discloses the claimed <i>processor is configured to provide</i> image data signaling to the projector based on received movement signaling in two ways.” Ex. 1003, ¶70.</p> <p>“Because controller 315 [of De Haan] receives gesture and non-gesture information, including path information and speed measurements, it is my opinion that controller 315 corresponds to the claimed ‘<i>wherein the processor is configured to discriminate a movement criterion.</i>’” Ex. 1003, ¶160.</p>

<p>“movement signaling” / “receiv[ing] movement signaling associated with the movement of the projector” / “corresponding movement signaling”</p>	<p>“A PHOSITA would not have been able to ascertain whether movement signaling was being received or not because <i>it is impossible for a PHOSITA to determine</i> with reasonable certainty what movement signaling is in the context of the patent.” Ex. 2004 at 9.</p>	<p>“In my opinion, <i>Huebner</i> teaches this claim limitation because <i>Huebner</i> discloses a control unit (i.e., claimed processor) modifying the image based on the sensed movement signals (i.e., claimed movement signaling).” Ex 1003, ¶60.</p> <p>“In my opinion, <i>De Haan</i> teaches this claim limitation because <i>De Haan</i> discloses its control unit (i.e., claimed processor) modifying an image based on the movement information (i.e., the claimed movement signaling) received from an accelerometer.” Ex. 1003, ¶146.</p>
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<p>“the processor is configured to discriminate a movement criterion”</p>	<p><i>“A PHOSITA would not have been able to ascertain whether discriminate was being conducted or not because it is impossible for a PHOSITA to determine with reasonable certainty what it means to ‘discriminate’ is in the context of the patent.”</i> Ex. 2004 at 10.</p>	<p>“In my opinion, <i>Huebner</i> also discloses the claimed ‘processor configured to discriminate a movement criterion.”” Ex. 1003, ¶84.</p> <p>“In my opinion, <i>De Haan</i> teaches this claim limitation because <i>De Haan</i> discloses a controller (i.e., claimed processor) that distinguishes movement information from an accelerometer, and the controller uses the gesture/non-gesture information to determine image compensation information that is used by the projector in projecting an image.” Ex. 1003, ¶157.</p>
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<p>“provide associated image data signaling to project associated image data”</p>	<p>“This claim is ambiguous because <i>it is impossible for a PHOSITA to discern which of these associations is correct.</i> As such, a PHOSITA would be unable to ascertain the meaning of the claims.” Ex. 2004 at 11.</p>	<p>“In my opinion, <i>Huebner</i> further discloses the claimed processor is configured to <i>provide associated image data signaling to project associated image data.</i>” Ex. 1003, ¶86.</p> <p>“Additionally, in my opinion, <i>De Haan</i> discloses the claimed processor is configured to provide associated image data signaling to project associated image data.” Ex. 1003, ¶162.</p>
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For each of the terms above, Petitioner has made the admission that “it is *impossible for a PHOSITA to discern,*” that “*it is impossible for a PHOSITA to determine,*” or that a “PHOSITA would *not have been able to ascertain.*” Ex. 2004 at 7, 9, 10, 11. Yet Petitioner’s Declarant is somehow miraculously able to formulate an opinion and find each of these limitations present in the prior art. *See* Ex. 1003, ¶¶60, 70, 84, 86, 146, 157, 160, 162. ***Petitioner’s own statements*** and its Declarant creates a fundamental and irreconcilable conflict. Petitioner’s statements that it is “impossible” for a POSITA to “determine” or “discern” or that a POSITA “would not have been able to ascertain,” undercut the credibility of Petitioner’s Declarant,

Mr. Gray, that he understood these claim terms.⁴ In particular, Mr. Gray does not even acknowledge the possibility that the claims terms on which he opines may or may not be indefinite. The entirety of Mr. Gray’s Declaration, for instance, does not even reference “indefiniteness” or in any way suggest that a POSITA would not “discern,” “determine,” or “ascertain” the claim language.

It is unclear if Mr. Gray was or was not made aware of Petitioner’s allegations in the parallel litigation. Under the heading “Materials Considered,” he does not list Petitioner’s Invalidity Contentions, Petitioner’s *Markman* briefs, or otherwise mention any document where Petitioner alleged indefiniteness. Ex. 1003, ¶9. In any event, his opinions are incomplete for not referencing and accounting for the material facts regarding indefiniteness set forth above, including positions taken by Petitioner in the Parallel Litigation. For instance, Mr. Gray would presumably want to know that Petitioner took the position that multiple claim terms are “*impossible*” for a POSITA discern while at the same time stating that in his “opinion” the same terms purportedly exist in the prior art references. Accordingly, Mr. Gray’s opinions are not credible and should be given no weight. This is particularly true where Petitioner’s unequivocal statements regarding “impossibil[ity]” conflict with Mr. Gray’s equally unequivocal statements regarding the same claim terms being disclosed in the prior art.

⁴ And as noted above, Petitioner in the Parallel Litigation does not allege indefiniteness an alternative claim construction position.

This is also not a case where Petitioner initially took a position in the Petition (*i.e.*, that the claim terms are indefinite) and then subsequently changed its position before the District Court (*i.e.*, that the claims are indefinite). Here, the Petition was filed on March 26, 2021. Both before and after Petitioner filed the Petition, Petitioner asserted that the terms identified in the table above were indefinite. *See* Ex. 2002 at 59-60 (served on Jan. 26, 2021); Ex. 2003 at 13-16 (filed Apr. 9, 2021); Ex. 2004 at 7-12 (filed May 7, 2021). And Petitioner has never retracted its indefiniteness position post filing its Petition as evinced by its continued assertion in *Markman* briefs. Ex. 2003 at 13-16; Ex. 2004 at 7-12.

Nor is this a situation where different counsel asserted incompatible theories before the Board and the District Court. Here, Petitioner's Lead Counsel before the Board also serves as a lead counsel role before the District Court. *Compare* Pet. at 76 *with* Ex. 2004 at 19. Thus, while not an excuse for taking self-contradictory positions, the Petitioner cannot claim ignorance of the positions taken in the Parallel Litigation.

IX. PETITIONER DOES NOT PROVE IT IS MORE LIKELY THAN NOT THAT ANY CHALLENGED CLAIM IS UNPATENTABLE

"Petitioner has the burden of proof to establish entitlement to relief. 37 C.F.R. § 42.108(c) ("review shall not be instituted for a ground of unpatentability unless . . . there is a reasonable likelihood that at least one of the claims challenged . . . is unpatentable"). The Petition should be denied as failing to meet this burden. The Petition fails to meet this burden in presenting the following grounds:

Ground	Alleged Statute	References	Challenged Claims
1	35 U.S.C. §§ 102, 103	Huebner	1-5, 7-11, 13, and 14
2	35 U.S.C. §§ 102, 103	De Haan	1-14

A. Petitioner fails to establish it is more likely than not that Huebner anticipates or renders obvious any challenged claim (Ground 1)

1. Example deficiencies arising from “image data”

Among other deficiencies, the Petition fails to establish it is more likely than not that Huebner *anticipates* because Huebner does not disclose “image data,” as recited in claim 1. Petitioner is forced to concede that “Huebner discloses control units that sends *video data* or content to its projector system.” Pet. at 11 (citing Ex. 1005, ¶¶[0124], [0125], [0144], [0172]). Petitioner then relies on its Declarant (who in turned relied on an extrinsic dictionary definition) that a POSITA “would have understood that video is a series of images.” Pet. at 11.

But the Petition fails to recognize that the ’071 patent makes a distinction between “images” and “video.” For instance, under the Technical Field section, the specification describes “portable electronic devices/apparatus” (types of apparatus in which the claimed invention may be implemented in) may “provide one or more audio/text/video communications functions (*e.g.*, telecommunications, video communications, and/or text transmission [and] image capture function (*e.g.*, using a (*e.g.*, in-built) digital camera).” Ex. 1001 at 1:14-25. The term “video” is not subsequently referenced in the specification. *See generally id.* In particular, the ’071 patent lacks any disclosure of video being projected.

In subsequent portions, the specification describes the concept of “image sets:”

In this embodiment, the processor 1 is provided with *image data representing number of stored images of an application* (e.g., PowerPoint™) in a set. There is an *order to the images* of the set in a manner similar to a slideshow. In the figures, the set has a first image ‘A’ and the second image ‘B’. The processor 1 is configured to have an association between directional movement of the apparatus 100 (via said movement signalling) and movement between image data representing the images to be projected. By this it is meant that the processor 1 will provide image data signalling for the *next or previous image in the image set* upon receiving movement signalling associated with such an instruction. In this embodiment, an abrupt movement of the apparatus to the right cause *an incremental (i.e., one image at time)* or *continuous (i.e. smooth scrolling through the sequence of images)* forward cycling through the image set whilst an abrupt movement of the apparatus to the left cause an incremental or continuous backward cycling through the image set

Id. at 6:62-7:11.

Read in light of these and other portions of the specification, it is clear that the term “image” is used in the ’071 Patent to refer to discrete still images or screens. This is consistent with the plain meaning. Petitioner’s implied construction of “images” that would encompass video, would make no sense when reading the above-quoted portion of the specification. In particular, the discussion of

“incremental” and “continuous” cycling of “images” only makes sense when applying the understanding of “images” that is limited to still or non-moving images. This comports with the plain and ordinary meaning of “images,” which is reflected in the disparate use of “video” and “image” in the Technical Field section. *Id.* at 1:14-25.

The Petition points to reference in Huebner’s disclosure that a “projector 42 that is in operative communication with control unit 24 and is operable to project an image from the image projecting device.” Pet. at 11 (quoting Ex. 1005, ¶[0066]). But those references to “image” are clearly intended to being limited to video and not include still images, and thus Huebner does not use “image” in the plain and ordinary sense. For instance, the Field of Invention is described as “generally relat[ing] to interactive **video** entertainment devices.” Ex. 1005, ¶[0001]. And the Background of the Invention section, describes how there “have been many different types of interactive **video** entertainment devices...” (*id.*, ¶[0002]), how “manufacturers and product developers are working on **video** projectors that are very small in size” (*id.*, ¶[0003], and concludes that “an opportunity exists for the use of small and compact **video** projectors in a hand held device for use in playing games and other interactive opportunities.” *Id.*, ¶[0003].

Accordingly, for each of the reasons discussed above, the Petition fails to establish it is more likely than not that Huebner anticipates claim 1. The above example deficiency concerning the “image data” of claim 1 are also fatal to the anticipation challenges of claims 2-12, which depend directly or indirectly from

claim 1. Analogous deficiencies also arise from the recitation of claim 13 and 14 to “image data.” Accordingly, the example deficiencies identified herein taint the entirety of Ground 1 of the Petition with respect to anticipation.

Petitioner recognizes at least the potential of Huebner being interpreted as not disclosing “image data.” Pet at 11 (anticipating that Patent Owner will “argue[] that ‘send[ing] video data’ or ‘video content,’ as taught by Huber, does not disclose providing the claimed ‘image data’”). As a fallback, Petitioner relies on its Declarant’s opinion that it would be obvious to “send images from control unit 24 to projector 42 because the video data/content comprise single image data.” Pet. at 11 (citing Ex.1003, ¶58). But the Petitioner’s (and its Declarant’s) logic fails to recognize the differentiated use of “image” and “video” in the ’071 Patent discussed above. Rather than indicate that video and images are interchangeable, the ’071 patent treats “video” and “images” as separate conceptual subjects. Moreover, the Petitioner and its Declarant misread the use of “images” in Huebner as still images and fail to note that the background and objectives of the purported invention of Huebner is limited to “video” gaming. This is reflected throughout Huber. Ex. 1005, Fig 7b (“Project *Video* and Play Sound”); Fig. 9a (“Generate *Video* and Sound Response”); ¶[0124] (“the control unit sends video content to its projector”). Huebner uses “image” to refer only to animated or moving images. *Id.*, [¶0139] (“For example, if the device's projected image was a dog, and the video display subject matter was a garden of flowers, a player may sweep the hand-held projector device in a horizontal motion, and see an animated dog go rollicking through the

garden of flowers.”). Thus, there is no motivation to modify Huebner (which is limited to video) to encompass still images. Although Petitioner cites to the declaration of Mr. Gray (Pet. at 11 citing Ex. 1003, ¶58), such citation is unavailing because the cited paragraph merely repeats the same conclusion verbatim, without providing any rational basis for why this is allegedly so. The Petition and its Declarant only points to the references in Huebner to “images,” which as noted above are limited to video (and do not contemplate or envision still images).

Accordingly, for each of the reasons discussed above, the Petition fails to establish it is more likely than not that Huebner alone renders claim 1 obvious. The above example deficiencies concerning the “image data” term of claim 1 are also fatal to the challenges of claims 2-12, which depend directly or indirectly from claim 1. Analogous deficiencies also arise from the recitation of claims 13 and 14, which also recite “image data.” Accordingly, the example deficiencies identified herein taint the entirety of the Ground 1 of the Petition with respect to obviousness.

B. Petitioner fails to establish it is more likely than not that De Haan anticipates any challenged claim (Ground 2)

1. Example deficiencies arising from “the movement criterion representing one or more of displacement and movement speed of the projector”

With respect to this limitation, the Petition asserts that “[t]his limitation requires only one of (1) displacement or (2) movement speed of the projector.” Pet. at 48. This statement is legally incorrect.

The plain meaning of “one or more of displacement and movement speed of the projector” is a conjunctive phrase that requires “one or more of displacement of the projector *and* one or more of movement speed of the projector.” The Federal Circuit’s addressed a similar claim term. *See SuperGuide Corp. v. DirecTV Enters., Inc.*, 358 F.3d 870, 552+56 (Fed. Cir. 2004). *SuperGuide* dealt with an analogous conjunctive phrase “at least one of A and B.” Relying on grammatical conventions, the Federal Circuit held that the plain meaning of “at least one of A and B” is the conjunctive phrase “at lease one of A and at least of B.” Here, the same logic applies given that the conjunctive “and” is used. Accordingly, the Petition is flawed by asserting that this limitation only requires one of (1) displacement or (2) movement speed.

The Petition goes onto argue that De Haan “discloses both” displacement and movement speed. This is factually incorrect as De Haan fails to disclose at least displacement. In support, the Petition relies solely on reference to the accelerometer providing gesture or non-gesture information that includes “length of movement” or “trace or path information.” Pet. at 49 (citing Ex. 1006, ¶¶[0056]-[0057]).

With respect to the phrase “length of movement,” the Petition incorrectly equates “length of movement” with displacement. But length is a scalar and not a vector quantity, and does not disclose directional information. For instance, a length of 12 inches would not inform a POSITA which direction (up, down, right, left, forwards, backwards, or some combination of these directions). The movement criterion of the ‘071 patent describe movement in a direction. Ex. 1001 at 7:7 (“an

abrupt movement of the apparatus to the right”); 7:10-11 (“abrupt movement of the apparatus to the left”); 7:17 (“abrupt movement to the right and back again to its approximate starting point”); 8:24 (“abrupt downward movement”).

De Haan’s disclosure of “length of movement” also fails to teach the concept of “rotational,” “curvilinear,” and “tilting” displacement all of which are expressly disclosed in the ’071 patent as types of displacement. Ex. 1001 at 2:7-9; 5:15-24 (“The detected displacement may be the ... curvilinear displacement with respect to the projection axis; rotational displacement about the projection axis, such as angling, as well as tilting displacement.”). The Petition fails to explain how “length” would cover these other forms of displacement.

With respect to the phrase “trace or path information,” De Haan provides no explanation of what this information might entail. For instance, all paths arguably have end points, but the end points by themselves will not provide any information as to the translational displacement, particularly when end points coincide. If the “trace or path information” merely consisted of coincident end points, it would provide no information regarding displacement. Notably, neither the Petition or Mr. Gray point to any well understood or recognized meaning for the phrase “trace or path information” or even the phrases “trace” or “path.” *See* Pet. at 49. Instead, the Petition claims baldly (relying on a conclusory statement by its Declarant without any objective support) that “[a] POSA would have understood that the measuring trace or path information would include determining the difference of De Haan’s device position at one point and the other position of the device at another point,

corresponding to the claim “displacement.” Pet. at 49 (citing Ex. 1003, ¶154). The Petition points to no disclosure of De Haan that the trace or path information consists of multiple “points.” *See id.* Nor does the Petition point to any disclosure of De Haan that determines the difference between these non-existent points. Even if “trace or path information” were to include points, there would be no teaching of “displacement” without an understanding of the order of the points. For instance, did the displacement occur from point A and B to the right or from point B or A to the left? As explained above with respect to “length of path,” displacement needs direction. And De Haan’s obtuse reference to “trace or path information” provides no teaching of the other types of “displacement” disclosed in the ’071 patent, namely the “rotational,” “curvilinear,” and “tilting” displacement all of which are expressly disclosed in the ’071 patent as types of displacement. Ex. 1001 at 2:7-9; 5:15-24.

Accordingly, for each of the reasons discussed above, the Petition fails to establish it is more likely than not that De Haan anticipates claim 1. The above example deficiency concerning the “the movement criterion representing one or more of displacement and movement speed of the projector” of claim 1 are also fatal to the anticipation challenges of claims 2-12, which depend directly or indirectly from claim 1. Analogous deficiencies also arise from the recitation of claim 13 and 14 to “the movement criterion representing one or more of displacement and movement speed of the projector.” Accordingly, the example deficiencies identified herein taint the entirety of Ground 2 of the Petition with respect to anticipation. Moreover, the Petition relies solely on anticipation for this element. Pet. at 48-49.

Thus, the Petitioner cannot argue that it would have been obvious to modify De Haan to satisfy this element.

X. CONCLUSION

For the foregoing reasons, WSOU respectfully requests that institution be denied.⁵

Date: July 8, 2021

Respectfully submitted,

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⁵ WSOU does not concede, and specifically denies, that there is any legitimacy to any arguments in the Petition that are not specifically addressed herein.

CERTIFICATE OF COMPLIANCE

Pursuant to 37 C.F.R. § 42.24(d), I certify that this Preliminary Response to Petition complies with the type-volume limitation of 37 C.F.R. § 42.24(b)(1) because it contains fewer than the limit of 14,000 words, as determined by the word-processing program used to prepare the brief, excluding the parts of the brief exempted by 37 C.F.R. § 42.24(a)(1).

Date: July 8, 2021

By: /Ryan Loveless /
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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e), I certify that I caused to be served an electronic copy of the foregoing PATENT OWNER'S PRELIMINARY RESPONSE, along with any accompanying exhibits filed via the PTAB E2E system, to Petitioner's counsel at the following addresses identified in the Petition's consent to electronic service:

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