

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

EVENFLO COMPANY, INC.,
Petitioner,

v.

BABY JOGGER, LLC
Patent Owner.

U.S. Patent No. 11,731,682

Case No.: IPR2025-01122

**PETITIONER'S OPPOSITION TO PATENT OWNER'S
DISCRETIONARY DENIAL BRIEF**

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I. INTRODUCTION

In June 2024, PO sued three unrelated entities—UPPAbaby, Evenflo, and Mockingbird—in *three separate lawsuits in two different jurisdictions*.

	US 8,955,869	US 9,403,550	US 11,192,568	US 11,505,231	US 11,878,729	US 11,731,682	US 11,577,771
	ISSUED: 2/7/2015	ISSUED: 1/15/2015	ISSUED: 12/7/2021	ISSUED: 11/22/2022	ISSUED: 1/23/2024	ISSUED: 8/22/2023	ISSUED: 2/14/2023
Evenflo 2024-CV-11582 (D. Delaware)	Not Asserted	Not Asserted	1, 7-9	1-3, 15-17, 19-20	1-3, 15-22	1, 8-13, 15	1-4, 13-15
UPPAbaby 2024-CV-00723 (D. Mass.)	1-5, 24-29	1-7	1, 7-9	1-5, 15-17, 19-22	1-5,15-22	Not Asserted	Not Asserted
Mockingbird 2024-CV-00725 (D. Delaware)	1-5, 24-29	1-7	1, 7-9	1-5, 15-17, 19-22	1-5,15-22	Not Asserted	Not Asserted
	IPR2025-01105	IPR2025-01106	IPR2025-01100	IPR2025-01095	IPR2025-01120	IPR2025-01122	IPR2025-01140
	Petitioner: Mockingbird, UPPAbaby	Petitioner: Mockingbird, UPPAbaby	Petitioner: Mockingbird, UPPAbaby, Evenflo	Petitioner: Mockingbird, UPPAbaby, Evenflo	Petitioner: Mockingbird, UPPAbaby, Evenflo	Petitioner: Evenflo	Petitioner: Evenflo

Across the three lawsuits, PO asserted variations of seven (7) related patents. PO did not assert all seven (7) patents against every party. Instead, each lawsuit involved different patents and claims. As shown by the table above, all seven patents were therefore challenged by one or more of the parties in different IPR petitions. Because the lawsuits are proceeding in separate jurisdictions with little overlap among the asserted patents, efficiency favors resolving all seven IPR petitions before the PTAB. *See Berkshire Hathaway Energy Co. v. Birchtech*, IPR2025-00274, Paper 23, p.2 (July 2, 2025).

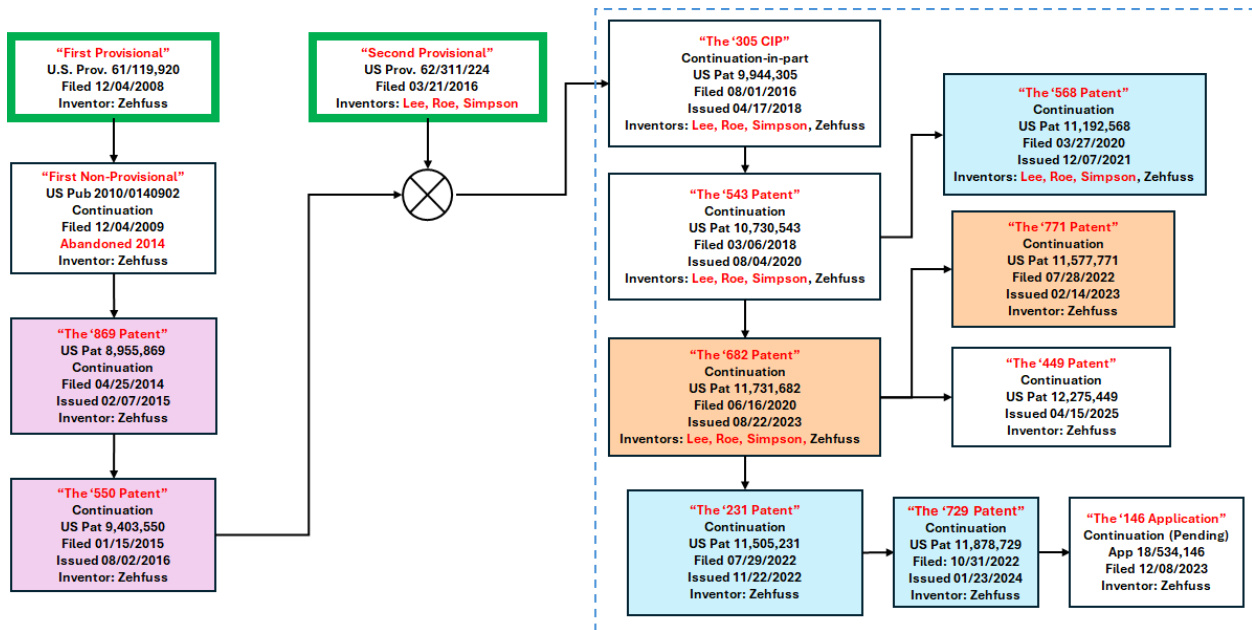
Second, PO’s brief claims that trial is “expected to begin around February 2027.” (Paper 8, p.11). This is incorrect. Case deadlines and a trial date will be set

only after the scheduling conference. PO knows the Delaware actions against Evenflo have been dormant for over a year. The court has not held a Rule 26 conference, and *no case schedule has been entered.* Even if a schedule was issued before the end of 2025, the earliest trial date would not occur until *late 2027.* A final written decision for the '682 Patent would therefore issue well before the trial date.

Third, priority is at issue in all five pending IPR petitions naming Evenflo as “Petitioner.” As shown above, three petitions involving patents were priority is challenged are also asserted in the Mockingbird and UPPAbaby cases. Denying institution would require all three defendants to litigate the same complex priority issue in three separate trials across two jurisdictions—inviting duplicative discovery and inconsistent results. Board review offers the most efficient path forward.

II. PRIORITY IS BEST RESOLVED BY THE BOARD

PO’s patent portfolio began with a 2008 provisional application naming a single inventor, Mark Zehfuss. (Paper 1, p.10; EX1001, ¶¶94-95).



Prosecution of the First Non-Provisional began in 2009 and stretched over five years before being abandoned in June 2014. (EX1001, ¶¶99, 103-104). PO then pursued what became the '869 Patent (EX1001, ¶¶109-113), followed by a continuation in January 2015 that later issued as the '550 Patent. (EX1005).

In 2016, PO's patent family shifted course. A new, second provisional application introduced *new subject matter* and added *three new inventors*—Jon Lee, Megan Roe, and Noel Simpson. (EX1006, p.1; EX1001, ¶¶114-124.) Months later, PO filed a continuation-in-part (the '305 CIP) with a rewritten specification that differed markedly from the pre-2016 disclosure. (EX1001, ¶¶125-135.) Petitioners redline comparison of the '305 CIP and the '869 Patent demonstrates the extensive rewriting and new subject matter. (EX1046.)

The post-CIP prosecution history underscores why the Board should address

Petitioner’s priority challenges. For the ’543, ’568, and ’682 Patents—filed before 2022—PO listed both the 2008 inventor, Mr. Zehfuss, *and the three additional 2016 inventors*, implicitly admitting reliance on subject matter first introduced in 2016. (See EX1008; EX1009; EX1010.) But beginning in 2022, PO abruptly reversed course. For the ’771, ’231, and ’729 Patents, PO omitted the 2016 inventors and listed only Mr. Zehfuss, as if to erase the earlier acknowledgement that later subject matter was essential. This reversal appears designed to reclaim the 2008 priority date. Evenflo, alone or with Mockingbird and UPPAbaby, has challenged this improper attempt to rely on the 2008 priority date in *five of the seven pending IPRs*.¹ (IPR2025-01122, Paper 1, p.17-25; IPR2025-01140, Paper 1, p.13-21; IPR2025-01100, p.16-24; IPR2025-01095, Paper 1, p.9-14; IPR2025-01120, Paper 1, p.8-12.)

The extensive additions of new matter in 2016, coupled with PO’s shifting inventorship positions, raise serious and complex priority issues *detailed in the Petition*. (See Paper 1, p.17-25.) The Board has recognized that resolving such defects is “an appropriate use of Office resources” when determining whether a potential prosecution error occurred. *Padagis US LLC, v. Neurelis, Inc.*, IPR2025-

¹ “Petitioner” for the IPRs challenging the ’682/’771 Patents is Evenflo alone. “Petitioner” for the IPRs challenging the ’568/’231/’729 Patents is Mockingbird, UPPAbaby, and Evenflo.

00464, Paper 12, p.3 (July 16, 2025).

III. PO’S “SETTLED EXPECTATION” ARGUMENT IS MISLEADING

As shown below, the five patents asserted against Evenflo issued between 2021-2024, and therefore have no “settled expectations.” But PO’s assertion also fails given PO has asserted seven patents against three different parties with varying overlap. (Paper 1, p.1; EX1074, ¶2; EX1075 ¶2; EX1076, ¶2).

	US 8,955,869 ISSUED: 2/7/2015	US 9,403,550 ISSUED: 1/15/2015	US 11,192,568 ISSUED: 12/7/2021	US 11,505,231 ISSUED: 11/22/2022	US 11,878,729 ISSUED: 1/23/2024	US 11,731,682 ISSUED: 8/22/2023	US 11,577,771 ISSUED: 2/14/2023
Evenflo 2024-CV-11582 (D. Delaware)	Not Asserted	Not Asserted	1, 7-9	1-3, 15-17, 19-20	1-3, 15-22	1, 8-13, 15	1-4, 13-15
UPPAbaby 2024-CV-00723 (D. Mass.)	1-5, 24-29	1-7	1, 7-9	1-5, 15-17, 19-22	1-5,15-22	Not Asserted	Not Asserted
Mockingbird 2024-CV-00725 (D. Delaware)	1-5, 24-29	1-7	1, 7-9	1-5, 15-17, 19-22	1-5,15-22	Not Asserted	Not Asserted
	IPR2025-01105 Petitioner: Mockingbird, UPPAbaby	IPR2025-01106 Petitioner: Mockingbird, UPPAbaby	IPR2025-01100 Petitioner: Mockingbird, UPPAbaby, Evenflo	IPR2025-01095 Petitioner: Mockingbird, UPPAbaby, Evenflo	IPR2025-01120 Petitioner: Mockingbird, UPPAbaby, Evenflo	IPR2025-01122 Petitioner: Evenflo	IPR2025-01140 Petitioner: Evenflo

Non-Identical Patent Assertions: Only three patents—the ’568, ’231, and ’729 patents—are common to all three lawsuits. Evenflo alone must defend two additional post-CIP ’682 and ’771 Patents, which are not asserted against UPPAbaby or Mockingbird. Likewise, UPPAbaby and Mockingbird face two pre-CIP Patents—the ’869 and ’550 Patents—not asserted against Evenflo.

Non-Identical Claim Assertions: Even for the commonly asserted ’231 and ’729 Patents, PO has asserted claims against UPPAbaby and Mockingbird that it did

not asserted against Evenflo. (EX1074, ¶206; EX1075, ¶168; EX1076, ¶200.)

PO's "mix-and-match" strategy across three lawsuits in two jurisdictions invites inefficiency and inconsistent outcomes. Different courts are likely to reach conflicting conclusions on priority, claim construction, and validity for related patents in the same family. A single, expert validity ruling from the Board on seven asserted patents— across all three defendants, would promote consistency and dramatically simplify the pending court actions. *See Berkshire Hathaway Energy*, IPR2025-00274, Paper 23, p.2 (Holding multiple district court litigations, in different jurisdictions, is more efficiently resolved by the PTAB.); *Harbor Freight Tools USA v. Champion Power Equip.*, IPR2025-00805, Paper 20, p.2 (Sept. 19, 2025).

A. No "Settled Expectations" Exist for the '682 Patent

PO's central argument for denial rests on a manufactured claim of "strong settled expectations" based on the age of the pre-CIP '869 and '550 Patents. (Paper 8, p.6-7). But those patents are irrelevant; *neither is asserted against Evenflo*.

The '**682 Patent** challenged in this Petition has been in force only since **August 22, 2023**. (EX1010). It is an indirect continuation of the '305 CIP and incorporates subject matter first introduced in the 2016 Second Provisional. PO cannot impute the age of earlier, pre-CIP patents to later, post-CIP patents in attempting to create "settled expectations" that do not exist. This is particularly true

because *Petitioner* has challenged whether the *claimed subject matter* is entitled to any priority date before 2016. (Paper 1, p.17-25).

PO's reliance on *Samsung* and *Amazon.com* is misplaced. In both cases, most of the challenged patents had been in force for many years (five of seven patents in *Samsung* and five of six patents in *Amazon*). The Board in each case found it an "inefficient use of Board resources" to institute review on only a few remaining patents. *Samsung Elecs. Co. v. iCasha, Inc*, IPR2025-00639, Paper 11, p.2-3 (Aug. 14, 2025); *Amazon, Inc. v. Audio Pod IP, LLC*, IPR2025-00757, Paper 15, p.2-3 (Aug. 14, 2025). The Board's logic was to avoid a piecemeal review where the central issues concerned older patents.

The facts here are the opposite. The disputes against Evenflo—and the related actions against Mockingbird and UPPAbaby—focus on the *newly issued* post-CIP patents. Five of the seven asserted patents have been in force for less than four years. Indeed, all five patents asserted against Evenflo are less than four years old. It would be improper to attribute the age or alleged "settled expectations" of the *non-asserted*, pre-CIP '869 and '550 Patents to Evenflo, especially given their markedly different disclosures. (*see* Paper 1, p.11; EX1046.)

Applying the reasoning from *Samsung* and *Amazon* compels an opposite result here. Denial would waste, not conserve, Board resources. The efficient course is to review all five recently issued patents that form the core of PO's litigation

campaign. Because most of the asserted patents lack any settled expectations, efficiency and consistency favor the Board's review and resolution of all seven related IPR proceedings.

B. PO Incorrectly Attempts to Age Recently Issued Patents

Fully aware the five patents asserted against Evenflo have been in force for less than four years, PO attempts to create an illusion of age by arguing that Petitioner had “constructive notice” of the '682 Patent through its *pre-issuance* publication. (Paper 8, p.7). This argument improperly conflates the public notice function of publication with the legal and equitable concept of “settled expectations,” and it should be rejected.

The “settled expectations” inquiry is not a general question of what a competitor might have known or when. It is an equitable consideration tied to the existence of an enforceable patent right. The focus is how long a patent “*has been in force.*” *Dabico Airport Solutions Inc. v. AXA Power APS*, IPR2025-00408, Paper 21, p.3 (June 18, 2025). A six-year timeframe is often used because it “aligns with other approaches ... for example, for filing infringement lawsuits.” *Id.* But a published patent application is not “in force.” It grants no right to exclude, and it triggers no statute of limitations for damages.

PO's “constructive notice” theory for the '682 Patent would lead to an untenable result: competitors would have to monitor and possibly challenge

thousands of pending applications, most of which will never issue with claims that pose any risk.

C. PO’S Eight-Year Delay in Enforcement Negates Claim of “Settled Expectations”

PO’s conduct in district court shows a clear lack of urgency, undermining any claim of “settled expectations.” By remaining silent *for nearly a decade*, PO fostered not an expectation of enforcement, but of acquiescence. Its recent litigation campaign is not the act of a patentee defending long-settled rights; it is a “lying-in-wait” strategy, one confirmed by the PO’s own counsel.

1. PO has admitted it has no “Settled Expectations” for the oldest ’869 Patent

As detailed in prior Opposition Briefs,² PO sent a letter in December 2015 alleging that UPPAbaby’s Vista stroller “may be covered by one or more claims in the ’869 patent” (EX1078, p.2). UPPAbaby responded on December 30, 2015, denying infringement and explaining that the Vista stroller had been sold since 2006 and that its RumbleSeat adapter was publicly disclosed before the earliest Baby Jogger application (EX1078, p.4). In a March 15, 2016 letter, PO acknowledged that UPPAbaby had sold an earlier version of the Vista+RumbleSeat and conceded that only the version “launched in ... 2015” might be covered (EX1078, p.7). Yet, PO

² See IPR2025-01100, Paper 11, p.9-10.

admitted in response to UPPAbaby’s counterclaims that it “took no action against UPPAbaby following the 03/15/2016 Letter until filing the complaint in this action on June 18, 2024” (EX1063, p.28; EX1064, p.3). This eight-year delay—despite full awareness of the accused product—shows a deliberate decision not to enforce.

During a Markman hearing, Judge Burroughs questioned PO about “the amount of time that went between the time you all figured out that there was a potential patent violation and the time the lawsuit got filed and why ... you’re all fighting now.” (EX1066, 4:10–13). PO’s counsel admitted litigation had been “on the radar,” but PO “decided to *continue to acquire patents and build up a patent portfolio*” before filing suit. (EX1066, 4:24; 5:20–23). This admission confirms a calculated “lying-in-wait” strategy that undercuts any claim of “settled expectations,” even for PO’s oldest patents, further weighing against PO’s denial request. See, e.g., *Apple Inc. v. Ferid Allani*, IPR2025-00856, Paper 11 at 3 (Sept. 11, 2025) (Eleven-year delay counsels against discretionary denial).

2. No “Settled Expectations” exist for the ’682 Patent

PO admits the accused Evenflo products have been publicly sold since “around 2018.” (Paper 8, p.5.) Yet PO never asserted the then “in force” ’869 or ’550 Patents against those products. PO waited until June 18, 2024 to file a complaint asserting patents that issued between December 7, 2021 (the ’568 Patent) and January 23, 2024 (the ’729 Patent). (EX1067, p.9).

PO's attempt to impute knowledge to Evenflo via an IDS citing the *pre-CIP '869/'550 Patents* is misplaced. Those patents have different disclosures and inventors than the *five post-CIP patents* asserted against Evenflo. (*see e.g.*, Paper 1, p.11; EX1046; *see also* Paper 1, p.17-25). In reality, PO chose to wait six years after Evenflo entered the market before asserting its newer, *post-CIP patents*. A six-year delay in enforcement is fundamentally incompatible with a claim of "settled expectations," especially when the "oldest" asserted patent issued less than four years ago.

D. PO's reliance on *Ericsson* is misplaced

PO is incorrect in suggesting that, under *Ericsson v Procomm*, IPR2024-01455, Paper 15, p.2 (May 16, 2025), Petitioners delayed in filing these petitions, such that denial is warranted. (Paper 8, p.8). The denial in *Ericsson* was a straightforward application of *Fintiv*, based on one decisive fact: the district court trial was scheduled to conclude nine months before the PTAB's projected final written decision. *Ericsson*, IPR2024-01455, Paper 15, p.2. The primary concern was the inefficiency resulting from an IPR decision being issued after the conclusion of a district court trial. *Id.*

The circumstances here are opposite. The Evenflo litigation has been dormant for over a year, *with no scheduling order, no discovery conducted, and no trial date*. (EX1070, EX1072). Evenflo has also filed motions to stay. (EX1068; EX1080-

1081). Unlike *Ericsson*, a final written decision for the '682/'771 Patents will issue long before any potential trial, thereby simplifying—not duplicating—the issues before the courts.

Nor was there any undue delay in filing. (Paper 8, p.8). The challenged patents belong to a complex family, involving an abandoned application, the addition of drawings never present in the original application, new matter introduced through a CIP, and changes to inventorship. Developing a complete, evidence-based priority challenge for all five patents asserted against Evenflo required careful and diligent investigation.

IV. THE FINTIV FACTORS STRONGLY FAVOR INSTITUTION

The *Fintiv* factors also weigh heavily against discretionary denial and in favor of institution.

Factor 1 (Existence of a Stay): Evenflo has moved to stay the Delaware action, courts in that district do grant such motions pre-institution. (EX1068; EX1080-1081). Because no scheduling order has issued and the case remains in early stages, the likelihood of a stay being granted is high. This factor favors institution, or at worst, is neutral.

Factor 2 (Proximity to Trial Date): PO concedes no trial date has been set but speculates the Delaware trial will “begin around February 2027.” (Paper 8, p.11) This claim lacks support, as no scheduling order has been entered. (EX1070;

EX1072) Even if one were issued by the end of 2025, PO's own assertion that the "median" time to trial is two years means trial would not occur until *late 2027 or 2028*—well after the expected final written decision in this proceeding. This factor therefore favors institution.

Factor 3 (Investment in Parallel Proceeding): No scheduling order has been entered, and discovery has not begun, confirming minimal investment in the parallel litigation. (EX1070; EX1072). PO does not dispute this lack of progress. If institution is granted, a stay is also likely, further reducing any district court activity. This factor weighs in favor of institution.

Factor 4 (Overlap of Issues): PO downplays Evenflo's *Sotera* Stipulation, arguing the IPRs are not a "true alternative." (Paper 8, p.12). But the district court case has no case schedule, and Evenflo has not yet served invalidity contentions, making PO's argument speculative. Where the district court litigation *does not* "involve 'substantial investment,'" then "even discounting the weight of Petitioner's *Sotera* stipulation ... the *Fintiv* factors as a whole indicate that the efficiency and integrity of the patent system are best served by instituting review." *Liberty Energy, Inc. v. U.S. Well Svcs. LLC*, IPR2025-00031, Paper 9, p.18-19 (Apr. 29, 2025). Moreover, to the extent any claims survive, the Board's decision will streamline invalidity issues for non-system prior art in district court.. *See Nikon Corp. v. Optimum Imaging Techs. LLC*, IPR2024-01373, Paper 17, p.20-24 (Apr. 23, 2025)

(holding where system art is present, a *Sotera* stipulation still substantially reduces overlap between litigation and the IPR).

Factor 5 (Same Party): PO has filed *three* separate lawsuits, in *two* different jurisdictions, against *three* unrelated *defendants*, asserting seven related patents with differing overlaps. Only the '682/'771 Patents are asserted against Evenflo. (Paper 1, p.1). The remaining three patents asserted against Evenflo (i.e., the '568/'729/'231 Patents) are also asserted against UPPAbaby and Mockingbird. *Id.* Denying institution would multiply proceedings across defendants and courts, increasing the risk of inconsistent rulings. Institution promotes consistency and efficiency across all seven patents challenged by the three parties. *See Berkshire Hathaway Energy*, IPR2025-00274, Paper 23, p.2.

Factor 6 (Other Circumstances): PO failed to indicate on its ADS under CFR §§1.55/1.278 that the '682 Patents (and all post-CIP patents) were transitional applications governed by post-AIA law. (Paper 1, p.17-19; EX1020, p.49). Had PO correctly identified these applications, the Examiner may have questioned the priority claims of all the post-CIP patents. This omission constitutes a “material error” warranting review. The '682 Patent also claims subject matter entitled to a priority date no earlier than 2016. (Paper 1, p.19-25). As in *Padagis*, a potential priority error is an “appropriate use of Office resources to review the potential error.” *Padagis*, IPR2025-00464, Paper 12, p.3. Combined with the efficiencies of resolving

validity across three separate lawsuits, these circumstances strongly support institution.

Finally, PO does not dispute that the pending IPR presents compelling grounds for unpatentability. *PO choice not to file a Preliminary Response* underscores its inability to raise any substantive rebuttal against the strength of the pending petition, and more importantly, Petitioner's priority challenge.³

V. PETITIONER PROPERLY USED EXPERT TESTIMONY

Relying solely on *iRhythm Techs., Inc. v. Welch Allyn, Inc.*, IPR2025-00363, Paper 10, p.2-3 (June 6, 2025), PO argues denial is warranted because the Petition over-relies on "voluminous" expert testimony. (Paper 8, p.9-10). Yet PO fails to identify a single instance where the Petition uses expert testimony to fill gaps in the prior art. Instead, the Petition properly relies on expert testimony to explain knowledge of a POSITA and cites prior art in support, as required by 37 C.F.R. § 42.65(a). As *iRhythm* itself acknowledged, this proper use of expert testimony "weighs against discretionary denial." *iRhythm*, IPR2025-00363, Paper 10, p.2-3.

VI. DENIAL UNDER § 325(d) IS NOT WARRANTED

³ PO elected not to file a Preliminary Response for the other four Petitions to which Evenflo is a "Petitioner." (*i.e.*, IPR2025-01100 ('568 Patent), IPR2025-01140 ('771 Patent), IPR2025-01095 ('231 Patent), and IPR2025-01120 ('729 Patent)).

The record shows USD593,459 (the “Liao Patent”) was never substantively and properly considered—and more importantly, that the Examiner has since acknowledged its relevance. Moreover, PO fails to address Petitioner’s priority challenge based on Rolicki (*i.e.*, Ground 1) nor Petitioner’s obviousness ground based on Offord ’341 and Offord ’797 (Ground 3).⁴

A. PO failed to inform the Examiner of Liao’s materiality

First, the Examiner’s treatment of the Liao Patent (EX1048) evolved over time. In 2019, the Examiner first cited the Liao Patent as a secondary reference during examination of *the ’543 Patent*. (EX1018, p.545-546.) In 2020, Liao again appeared as a secondary reference during examination of *the ’568 Patent*. (EX1019, p.557-559). It was not *until 2024*, during examination of the non-asserted ’449 Patent (*see* chart, §II *infra*), that the Examiner fully recognized Liao’s significance and relied on it as an anticipatory reference. (EX1024, p.1203-1206.) To overcome rejection on the Liao Patent, PO was forced to amend the claims to add limitations absent from all seven asserted patents. (EX1024, p.1389, 1393-1394).

These events show that until 2024, the Examiner did not fully appreciate the

⁴ Contrary to PO’s argument, the U.S.P.T.O.’s August 2025 guidance makes clear the “petition should not address” issues “relating to 35 U.S.C. § 325(d).” *See* <https://www.uspto.gov/patents/ptab/interim-director-discretionary-process>; §III.A.

teachings of the Liao Patent. The Examiner’s 2024 rejection underscores, under *Becton Dickinson* Factors (c) and (f), that earlier examinations erred by failing to rely on Liao more substantively. Under factor (e), the Petition cites both the 2024 rejection and expert’s testimony to detail how the Examiner erred in not more substantively relying on the Liao Patent as a *primary reference*. (Paper 1, p.56-91, 123-125; EX1001, ¶¶353-460, ¶¶463-467).

Second, the Liao Patent and the ’682 Patent disclose virtually identical designs. (See Paper 1, p.28-29.) The Examiner’s failure to recognize the similarity may stem from PO’s omission of material facts. In a separate, non-related—and now abandoned—application (13/418,101), PO admitted to *a different examiner*, a professional working relationship with Mr. Liao involving “stroller designs” and acknowledged awareness that Mr. Liao had invented “approximately one hundred” U.S. patents. (EX1079, p.7-8, ¶¶5-6, p.30, ¶1.) PO even submitted a printout identifying the *same Liao Patent relied on here*. (EX1079, p.40.) Yet, PO never disclosed this information *to the Examiner of the challenged patents*. Thus, under *Becton Dickinson* factor (f), PO’s awareness and failure to inform the Examiner of this material relationship and prior art reinforce the need for the Board’s reconsideration of the Liao Patent’s relevance.

B. Rolicki was never considered “prior art” under §102

As Petitioner explained, the Examiner did not address priority during

prosecution of the '682 Patent because, absent an interference or rejection, the PTO does not determine priority. *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1305 (Fed. Cir. 2008); (Paper 1, p.17-18). Although a related version of Rolicki is cited on the face of the '771 Patent, the Examiner would not have considered even this related Rolicki patent as prior art due to an incorrect assumption that all post-CIP patents should be afforded a 2008 priority date. (*see* EX1010; *citing* USPN 10,556,610 to Rolicki). As a result, the Examiner never assessed *nor relied on Rolicki as prior art* in evaluating the '682 Patent.

Under *Becton Dickinson* factor (c), Rolicki was not substantively reviewed due to this incorrect assumption. Under factor (e), the Petition explains how the Examiner erred in applying a 2008 priority date. (Paper 1, p.17-24). Under factor (f), the Petition and expert declaration provide additional evidence illustrating why the Board should reconsider and substantively review the challenged claims in light of Rolicki. (Paper 1, p.32-56; EX1001, ¶¶265-352.)

Moreover, PO chose not to file a Preliminary Response in any of the five pending IPRs challenging priority. For the '682 Patent, PO did not challenge that Rolicki qualifies as prior art under Evenflo's priority challenge. PO's failure to raise a substantive priority argument confirms that under the *Becton Dickinson* framework, denial under §325(d) is unwarranted.

C. The Examiner never relied on Offord '341 and/or '797

Ground 3 of the Petition asserts the challenged claims of the '771 Patent are unpatentable in view of the combination of Offord '341 and Offord '797. (*see* Paper 1, p.91-123, 125-126; EX1001, ¶¶468-579; ¶¶580-582.) PO offers no argument that substantially the same art was considered by the Examiner during prosecution of the '771 Patent.

Under the first prong of the *Becton Dickinson* framework, the Examiner therefore never: (1) evaluated *or relied on Offord '341 and Offord '797 as prior art* against the '771 Patent; nor (2) considered the arguments and supporting evidence presented in this Petition.

VII. CONCLUSION

Institution will promote efficiency by resolving unpatentability of seven related patents in a single forum rather than through three separate litigations. This is especially true for the '682/'771 Patents which are only asserted against Evenflo. For these reasons, and those discussed above, PO's request for denial should be rejected.

Respectfully submitted,

Dated: October 8, 2025

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e)(1), I hereby certify that on **October 8, 2025**, a copy of the foregoing **PETITIONER’S OPPOSITION TO PATENT OWNER’S DISCRETIONARY DENIAL BRIEF**, including any supporting exhibits filed therewith, was served in its entirety via electronic mail to the following counsel:

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Certificate of Compliance Pursuant

This paper complies with the 20 page limit requirement permitted for Opposition Briefs responding to a Patent Owner’s Discretionary Denial Brief filed after September 1, 2025 (See <https://www.uspto.gov/patents/ptab/interim-director-discretionary-process>, Section III.C.iii “Page Limits”).

This paper also complies with the format and type style requirements of 37 C.F.R. § 42.6(a).

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