

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FRESH PRODUCTS, LLC,
Petitioner,

v.

SANASTAR, INC. d/b/a WIZKID PRODUCTS,
Patent Owner.

IPR2025-01339 (relating to U.S. Patent No. 10,036,154)
IPR2025-01366 (relating to U.S. Patent No. 10,294,649)

**PATENT OWNER'S MOTION FOR
DISCRETIONARY DENIAL UNDER 35 U.S.C. § 314(a)**

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LIST OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>DESCRIPTION OF DOCUMENT</u>
Exhibit 2001	2018 Master Contract Manufacturing Services Agreement between WizKid and Fresh Products.
Exhibit 2002	Complaint (ECF 1) and Exhibits, including Claim Charts at Exhibit D, filed by WizKid in the matter of <i>Sanastar, Inc. d/b/a WizKid Products v. Fresh Products LLC</i> , Case No. 25-cv-00418-JZ (N.D. Ohio Mar. 3, 2025).
Exhibit 2003	2016 Buy/Sell Agreement between WizKid and Fresh Products.
Exhibit 2004	October 26, 2023 Cease and Desist sent by WizKid to Fresh Products regarding Fresh Products' infringement of the '154 and '649 Patents.
Exhibit 2005	Fresh Products' Answer to Complaint and Counterclaims (ECF 22) filed in the matter of <i>Sanastar, Inc. d/b/a WizKid Products v. Fresh Products LLC</i> , Case No. 25-cv-00418-JZ (N.D. Ohio Apr. 30, 2025).
Exhibit 2006	Court Order regarding Initial Zoom Conference (ECF 21) filed in the matter of <i>Sanastar, Inc. d/b/a WizKid Products v. Fresh Products LLC</i> , Case No. 25-cv-00418-JZ (N.D. Ohio Apr. 22, 2025).
Exhibit 2007	Joint Status Report filed by WizKid on behalf of WizKid and Fresh Products in the matter of <i>Sanastar, Inc. d/b/a WizKid Products v. Fresh Products LLC</i> , Case No. 25-cv-00418-JZ (N.D. Ohio June 30, 2025).
Exhibit 2008	March 26, 2025 PTAB Memorandum regarding Interim Processes for PTAB Workload Management.
Exhibit 2009	English Translation of Japanese Fushimi Patent 60-190865.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

The instant Petitions present a textbook case for discretionary denial under 35 U.S.C. § 314(a). Petitioner Fresh Products, LLC (“Fresh Products”) seeks institution of *inter partes review* proceedings after years of silence—despite having full knowledge of the asserted patents for nearly 7 years, having previously manufactured products covered by them, and having agreed in writing not to challenge or interfere with Patent Owner Sanastar, Inc. d/b/a WizKid Products’ (“WizKid” or “Patent Owner”) intellectual property rights. Only when WizKid was forced to bring suit to stop Fresh Products’ infringement did Fresh Products respond by filing these IPR Petitions in an effort to avoid judicial scrutiny and undermine the settled expectations of the Patent Owner.

WizKid’s patents, U.S. Patent Nos. 10,036,154 (“the ’154 Patent”) and 10,294,649 (“the ’649 Patent”) (together, the “WizKid’s Patents”), issued in 2018 and 2019, *respectively*, and remain valid and enforceable through November 3, 2036. Fresh Products has known about these patents since at least 2018, when it served as a contract manufacturer for WizKid’s Splash Hog[®] urinal screens and, in that capacity, Fresh Products marked WizKid’s products with the relevant patent numbers. During that relationship, Fresh Products received confidential design specifications and acknowledged in its manufacturing agreement that WizKid owned the intellectual property. That agreement expressly prohibited Fresh Products

from doing anything to “interfere” with WizKid’s ownership rights. See **Exhibit 2001**, 2018 Manufacturing Agreement, § 14.2 (prohibiting each party from “tak[ing] any action that may interfere with the other Party’s Intellectual Property Rights,” “challeng[ing] any right, title or interest of the other Party in such other Party’s Intellectual Property Rights [,]” or “mak[ing] any claim or tak[ing] any action adverse to such other Party’s ownership of its Intellectual Property Rights[.]”).

When the parties’ business relationship ended in 2022, Fresh Products went silent. But, shortly thereafter, and without WizKid’s knowledge, Fresh Products began marketing and selling its own urinal screen—the “Tsunami”—which copied the core design and functionality of WizKid’s patented products. WizKid was thus forced to send cease-and-desist letters to Fresh Products, and was eventually forced to file a patent infringement lawsuit on April 23, 2025, in the Northern District of Ohio. Only then—seven years *after* first learning of the WizKid Patents and nearly three years *after* ending its relationship with WizKid and commencing its infringement—did Fresh Products suddenly decide to file the instant IPR Petitions challenging the validity of the patents. These Petitions are an obvious attempt to avoid the consequences of its unlawful conduct.

As explored in more detail hereinbelow, Patent Owner WizKid respectfully submits that the Board should exercise its discretion to decline to institute either of the sought IPR proceedings for multiple reasons, *including*:

A. Fresh Products acknowledged WizKid’s intellectual property ownership, and made a contractual commitment not to challenge WizKid’s intellectual property rights. The Board has previously denied institution where petitioners agreed not to interfere with a patent owner’s rights or where their conduct constitutes gamesmanship. Here, Fresh Products’ prior contractual acknowledgments and commitments should bar its current petitions, and its post-agreement infringement only amplifies the abuse of process and the waste of resources the Board would experience should either proceeding be instituted.

B. Fresh Products’ conduct violates the settled expectations of the Patent Owner. The Director’s March 2025 policy guidance memoranda and recent Board decisions have emphasized the appropriateness of discretionary denials where long-issued patents are challenged. *See, e.g., Belden, Inc. v. Commscope, Inc.*, IPR2025-00833, Paper No. 13 (PTAB Sept. 12, 2025)(discretionarily denying institution where “the challenged patent has been in force for nine years creating strong settled expectations for Patent Owner” and where the “Petitioner has been aware of the challenged patent” for at least 2-3 years prior to filing the Petition.); *see also OnePlus Tech. Co., Ltd. v. Pantech Corp.*, IPR2025-00762, Paper No. 12 (PTAB Sept. 12, 2025)(discretionarily denying institution where “the challenged patent has been in force for nine years, creating strong settled expectations for Patent Owner”). This is especially true where, *as here*, the petitioner has known of the patents since issuance and has only chosen to pursue an IPR challenge *after* the institution of patent litigation. *See id.*; *see also, e.g., Microsoft Corp. v. TS-Optics Corp.*, IPR2025-00767, Paper No. 13 (PTAB Aug. 14, 2025) (discretionary denial where Petitioner was “aware of the challenged patent, having taken a license to it from 2011-2018.”); *Amazon.com, et. al. v. Audio POD*, IPR2025-00757, Paper No. 15 (PTAB Aug. 14, 2025) (finding the petitioner was aware of the patents prior to the IPR attack and the challenged patents had “been in force for approximately seven, eleven, seven, eleven, and nine years, respectively, creating strong settled expectations for Patent Owner.”). Here, despite a keen awareness of the WizKid Patents, Fresh Products sat idle for years while profiting from WizKid’s intellectual property. Its sudden pivot to IPR *only after being sued*—without any material change in circumstances—should not be permitted.

C. Parallel litigation weighs heavily against institution under *Fintiv*. The pending district court case involves the same parties, the same patents, and overlapping issues. Indeed, Fresh Products has filed an Answer and asserted

a counterclaim for invalidity *raising the same grounds* it now presents in the present IPR petitions. In other words, Fresh Products’ IPR filings appear calculated to avoid the court’s jurisdiction and to stall adjudication of its infringement. Although Fresh Products has filed a motion to stay the district court proceedings, as of the date of the instant filing, the motion remains pending without adjudication. That said, WizKid vigorously opposes the requested stay, and the PTAB’s recent emphasis on preserving the integrity of a Patent Owner’s settled expectations should weigh heavily against both institution and the stay.

D. The Merits of the IPR Petitions are Weak. Fresh Products’ IPR Petitions lack merit because they rest almost entirely on a misreading of the Japanese Fushimi reference, which discloses only a fixed, L-shaped urinal frame that cannot bend, whereas the challenged patent claims require a device with a base and body that can flex between parallel and perpendicular positions. Fushimi consistently describes the frame as permanently L-shaped, while the only component identified as “bent freely” are detachable supports—not the frame itself. Fresh Products’ contrary assertions are unfounded and misdirected, leaving their invalidity theories fatally deficient.

Against the foregoing backdrop, institution would undermine the integrity of the PTAB and the public’s confidence in the IPR system. Accordingly, WizKid respectfully submits the Board should exercise its discretion in this instance to deny institution under 35 U.S.C. § 314(a).

II. FACTUAL BACKGROUND

A. The Parties’ Prior Relationship

WizKid is the owner and innovator behind a line of patented, splash-reducing urinal screens marketed under the Splash Hog[®] brand. *See Exhibit 2002*, Complaint ¶¶ 10–12. In May 2016, the parties entered into a manufacturing relationship with Fresh Products, under which Fresh Products was engaged to manufacture the Splash

Hog[®] products for WizKid's sale and distribution. *See generally* **Exhibit 2003**, 2016 Agreement. As part of that arrangement, Fresh Products received confidential design specifications, engineering drawings, and proprietary insights into WizKid's patented screen structures.

Thereafter, following the issuance of the '154 Patent in July 2018, the parties entered into a new manufacturing contract. *See generally* **Exhibit 2001**. Under this new 2018 Agreement, the parties acknowledged WizKid's exclusive ownership of its intellectual property and, per subsection 14.2, Fresh Products agreed that it would not take any action to, *inter alia*, challenge, contest, or otherwise "interfere" with WizKid's intellectual property rights:

14.2 Prohibited Acts. Each of the Parties shall not:

- (a) take any action that may interfere with the other Party's Intellectual Property Rights, including such other Party's ownership or exercise thereof;
- (b) challenge any right, title or interest of the other Party in such other Party's Intellectual Property Rights;
- (c) make any claim or take any action adverse to such other Party's ownership of its Intellectual Property Rights;

Exhibit 2001, at § 14.2.

Fresh Products was also fully aware that the product it was manufacturing *on behalf of WizKid* were protected by the WizKid Patents. Indeed, as part of its obligations under its manufacturing obligations, Fresh Products directly marked

WizKid’s Splash Hog® products with at least the ‘154 Patent number in compliance with 35 U.S.C. §287(a), as depicted below on a product *marked by Fresh Products*:

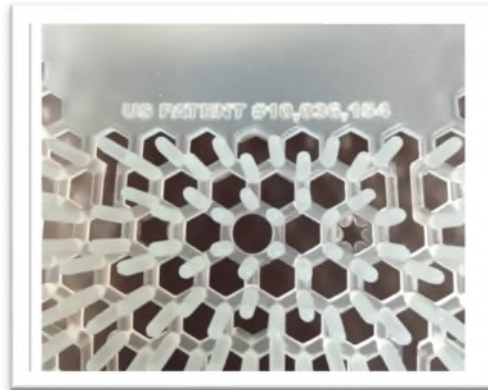


Exhibit 2002 at ¶¶ 17–19. In other words, Fresh Products cannot credibly feign ignorance of the WizKid Patents as it knew of them from the parties’ relationship.

B. The End of the Relationship and Fresh Products’ Copying

In 2022, the parties’ manufacturing relationship came to an end. Shortly thereafter, and unbeknownst to WizKid, Fresh Products began marketing and selling its own competing product—the Tsunami urinal screen, shown below—which bears a striking resemblance to the Splash Hog® in both function and design.



See <https://freshproducts.com/products/urinal-screens/tsunami/>. As depicted in the above illustration, the infringing Tsunami product includes splash deflection protrusions along the length of a flexible structure. The Tsunami includes all of the core innovations covered by the claims of the WizKid Patents. See **Exhibit 2002**, ¶¶ 41–44. Indeed, the inescapable similarities between the competing products confirms that Fresh Products utilized similar mold techniques and structure as the Splash Hog[®], despite knowing that those features were protected by active patents. See **Exhibit 2002** at ¶¶ 22–24.

C. The Cease-and-Desist Effort, followed by Litigation

On October 26, 2023, WizKid sent Fresh Products its first formal cease-and-desist letter detailing the infringement and referencing the parties’ prior relationship and agreements. See **Exhibit 2004**, Cease and Desist Letter. WizKid continued its cessation demand through a series of back-and-forth communications with Fresh Products that spanned through late-June 2024. Throughout the duration of the foregoing communications, Fresh Products did not deny its knowledge of the patents, nor did it dispute its receipt of protected information during its time as WizKid’s manufacturer. Rather, despite repeated demands by WizKid to cease its infringing conduct, Fresh Products refused to comply.

Left with no alternative, on April 23, 2025, WizKid filed an infringement lawsuit against Fresh Products in the Northern District of Ohio. See **Exhibit 2002**.

The Complaint asserts infringement of the WizKid Patents, and includes detailed claim charts mapping Fresh Products' infringing Tsunami product to each element of the asserted claims. *See Exhibit 2002* at 50-57, *i.e.*, Exhibit D of the Complaint.

Fresh Products has since filed an Answer and a counterclaim for invalidity, raising the same prior art and arguments as asserted in the instant IPR Petitions. As alluded to before, Fresh Products has also filed a motion to stay the district court litigation, though that motion remains pending as of this filing. WizKid opposes the requested stay, and the PTAB's recent emphasis on respecting the patent owner's settled expectations where patents have been issued for some time—particularly in circumstances where a petitioner knew of the patents before filing—should weigh heavily against Fresh Product's pursuit of a delay.

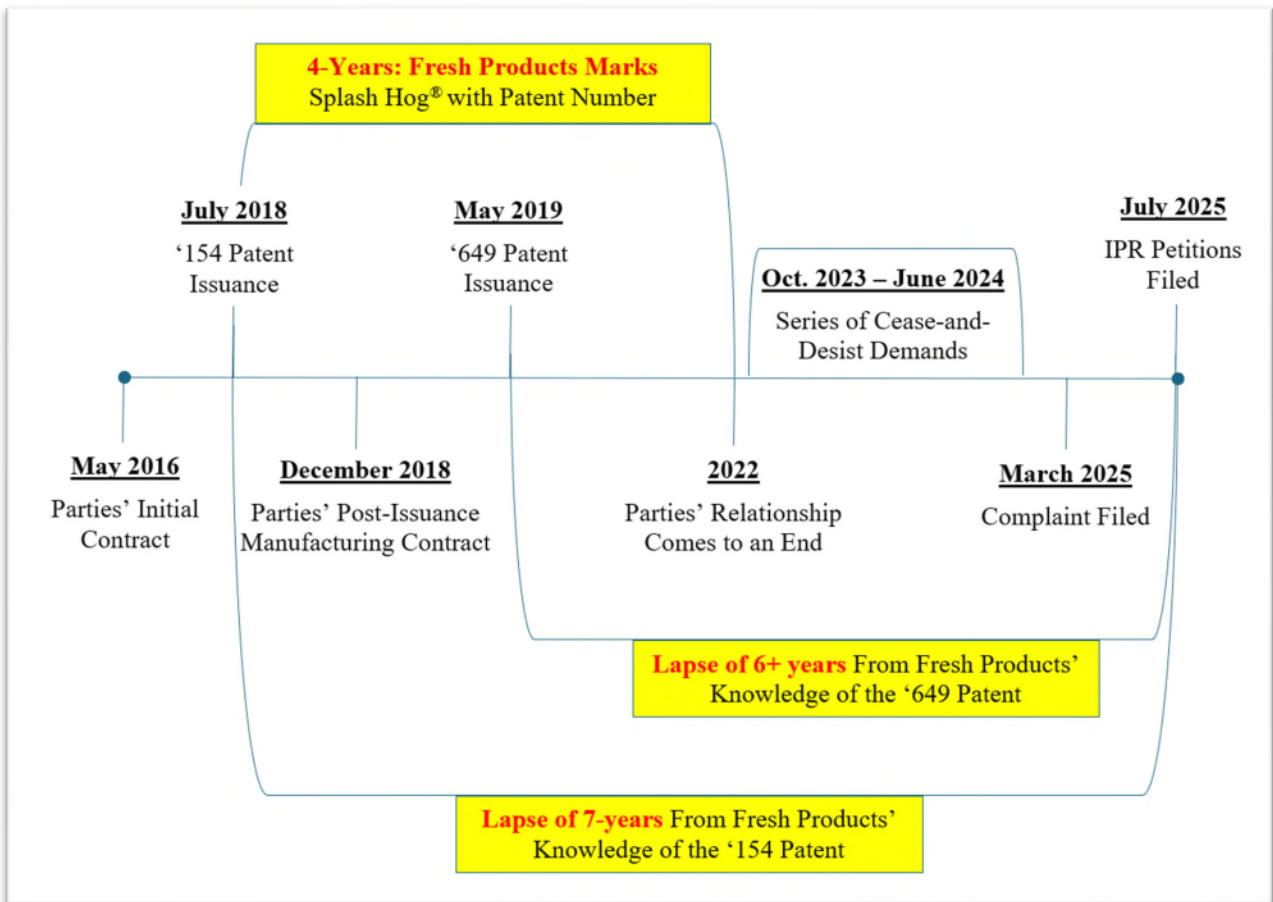
D. The Challenged Patents and Fresh Products' Prior Knowledge

The '154 Patent issued on July 31, 2018. The '649 Patent issued on May 21, 2019. Both patents are directed to innovative structures for splash-reducing urinal screens, and both remain enforceable until November 3, 2036. As discussed above, Fresh Products has known of these patents since at least 2018, when it began marking the '154 Patent number on the Splash Hog[®] products it was manufacturing on behalf of WizKid. *See supra*, Image at 8.

Despite that knowledge, Fresh Products took no action to challenge the validity of the patents during or after the manufacturing relationship—nor did it seek

a license or pursue a declaratory judgment action ahead of WizKid being forced to file the underlying patent litigation. Instead, Fresh Products chose to profit from its position of trust, hoping WizKid would look the other way, and only now—years later, and only *after* being sued—has it decided to file the subject IPR Petitions.

This foregoing timeline of events (illustrated in the chart that follows), coupled with Fresh Products’ calculated delay, strongly supports discretionary denial under 35 U.S.C. §314(a). Indeed, the timeline not only shows the challenged patents to be 6-7 years old, but it also illustrates Fresh Products’ keen awareness of them since their respective issuances:



The foregoing timeline cements the appropriateness of the Board exercising its discretion to deny the instant IPR Petitions in order to preserve the Patent Owner's settled expectations.

III. LEGAL STANDARD

The Board has discretion to deny institution of *inter partes* review under 35 U.S.C. § 314(a) (authorizing institution of an *inter partes* review under particular circumstances, but not requiring institution under any circumstances). *See also SAP America, Inc. v. Cyandia, Inc.*, IPR2024-01496, Paper No. 13 (PTAB April 7, 2025) (citing *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 273 (2016) (“[T]he agency’s decision to deny a petition is a matter committed to the Patent Office’s discretion”); *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1356 (2018) (“[Section] 314(a) invests the Director with discretion on the question whether to institute review” (emphasis omitted)); *Harmonic Inc. v. Avid Tech., Inc.*, 815 F.3d 1356, 1367 (Fed. Cir. 2016) (“[T]he PTO is permitted, but never compelled, to institute an IPR proceeding.”)).

Indeed, in its exercise of the foregoing discretion in recent years, the Board and the Director have articulated a set of non-exclusive factors for evaluating whether institution would be appropriate when parallel litigation is pending or when the petitioner’s conduct calls into question the fairness or efficiency of institution. The seminal case delineating such factors is *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential). In *Fintiv*, the Board

articulated a list of factors to consider in determining whether to discretionarily deny institution based on an advanced stage of a parallel proceeding:

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.

Fintiv, Paper 11, 5–6. In some respect, 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.” *Id.* Importantly, however, as the Board emphasized, in evaluating these factors, it must take “a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review,” such evaluation necessarily considering a totality of the circumstances present in every case. *Id.* (citing Patent Trial and Appeal Board Consolidated Trial Practice Guide at 55 (November 2019)).

To this end, most recently the Director has also issued guidance memoranda to reinforce the Board’s broad discretionary authority to deny institution where a petitioner has undermined the “settled expectations of the patent owner,” especially in cases where the petitioner was aware of the patent for years before filing and waited to file until after litigation was initiated. *See* USPTO Director Memo, *Interim Process for PTAB Discretionary Denials* (Mar. 7, 2025); *see also* Boalick Memo, *Application of Fintiv and Related Guidance* (Mar. 7, 2025). The Board has since explained that,

[a]lthough there is no bright-line rule on when expectations become settled, in general, the longer the patent has been in force, the more settled expectations should be. This approach aligns with other approaches to settled expectations and incentives, for example, for filing infringement lawsuits. *Cf.* 35 U.S.C. § 286 (‘Except as otherwise provided by law, no recovery shall be had for any infringement committed more than six years prior to the filing of the complaint or counterclaim for infringement in the action.’).

Dabico Airport Solutions v. Axa Power APS, IPR2025-00408, Paper No. 21 at 3 (PTAB June 18, 2025) (discretionarily denying institution, noting “the challenged patent has been in force almost eight years, creating settled expectations.”).

Against the foregoing backdrop, and as detailed below, Fresh Products’ conduct—and its calculated timing—falls squarely within the category of behavior that both the Board and the Director have indicated weighs strongly in favor of a discretionary denial. Accordingly, the subject IPR Petitions should be denied

forthwith so that the parallel litigation may proceed without further attempted interruption or encumbrance.

IV. ARGUMENT

A. The *Fintiv* Factors Weigh Heavily Against Institution

As explained above, under *Fintiv*, the Board holistically considers six non-exclusive factors to determine whether to deny institution based on parallel district court litigation. Here, a proper holistic assessment under the totality of the circumstances present *sub judice* weighs decisively in favor of a discretionary denial.

Factor 1: *Whether the Petitioner Seeks a Stay of the District Court Litigation*

Fresh Products has filed a motion to stay, but said request remains unresolved, and WizKid opposed such relief. To this end, although the Northern District of Ohio has at times granted stays even before the PTAB rules on institution, the mere filing of a stay motion should not be given much weight in this instance. Indeed, in view of the PTAB's renewed emphasis on honoring the settled expectations of the Patent Owner, granting a stay would be contrary to the Board's current policy framework, and such is likely to be weighed heavily by the district court in adjudicating the pending stay request. The Board should, thus, not allow the mere pendency of a stay motion to justify institution—particularly where the stay request itself is a direct result of Fresh Products' own delay and strategic gamesmanship and runs contrary

to Patent Owner's settled expectations. The IPR system was never intended to provide defendants with a second bite at the apple through delay tactics that exploit parallel forums. This factor should be weighed in favor of the Board exercising its discretion to deny institution.

Factor 2: *Proximity of the Court's Trial Date*

A trial date has not yet been set, and, while it is entirely possible, Patent Owner does not argue that a decision on IPR would arrive after final disposition of the underlying litigation. At best, this factor weighs slightly against denial of institution.

Factor 3: *The Level of Investment in the Underlying Litigation*

Although no trial date has yet been set, the district court litigation is active and moving forward. Fresh Products has already filed an Answer and asserted a counterclaim for invalidity; said counterclaim raises the same invalidity theories presented in the pending IPR Petitions.

Moreover, while Fresh Products attempts to delay the underlying litigation at every turn, WizKid is actively prosecuting its case. For example, WizKid propounded its first set of discovery, including its First Set of Interrogatories and First Set of Requests for Production on August 8, 2025, and is presently in the process of compelling Fresh Products to properly respond.

Of note, Fresh Products has drawn out the initial stages of this litigation by moving the goal posts of when it would file its IPR, resulting in a still-delayed

Scheduling Order. Indeed, during the Parties' initial conference with the District Court on April 22, 2025, Fresh Products initially indicated it would file IPRs by the end of June. *See Exhibit 2006*, Court Order (ECF 21). June came and went; yet, Fresh Products failed to file any IPR Petition. Instead, in the Parties' Joint Initial Report, Fresh Products indicated it would file its IPRs in July. *See Exhibit 2007*, Joint Status Report (ECF 25). Finally, more than four months after the Complaint was filed, Fresh Products filed its IPR Petition for the '154 Patent on July 23, 2025, followed by its IPR Petition for the '649 Patent on July 31, 2025. These delays are not the result of WizKid's failures to pursue its claims; rather, WizKid's progress towards trial (*or lack thereof*) stems solely from Fresh Products' posturing and delays in preparing and filing the instant IPR Petitions. Fresh Products should not be rewarded for such tactics.

At best, this factor should be weighed in a neutral manner (or not given any weight at all), and not as tipping the scales in either direction.

Factor 4: *Overlap Between Issues Raised in the Petition and in the District Court*

The claims sought to be challenged in the present IPR Petitions are the **same claims** at issue in the district court. Specifically, Fresh Products' counterclaim for invalidity in the litigation raises the same prior art references and arguments. *See Exhibit 2005*, Petitioner's Counterclaim of Invalidity. This redundancy underscores that the instant IPR Petitions are not meant by Fresh Products to supplement

discovery or to narrow the issues involved in the litigation, but to litigate them in multiple forums. This factor thus weighs in favor of the Board exercising its discretion to deny institution.

Factor 5: *The Petitioner and the Defendant Are the Same Party*

Fresh Products is the named defendant in the district court litigation and the sole petitioner in the IPR Petitions. Likewise, the Patent Owner is the sole plaintiff in the pending litigation. *Compare Exhibit 2002 with* Petitions in IPR2025-01339 and IPR2025-01366. This factor thus weighs in favor of denying institution.

Factor 6: *Other Circumstances Warranting Consideration*

There is no question that Fresh Products had notice of the WizKid Patents for up to seven (7) years prior to deciding to file the instant IPR Petitions. It manufactured products for WizKid, and marked the products in accord with 35 U.S.C. §287(a). As previously discussed, Fresh Products also received confidential design files disclosing the inventive features, and, per the parties' contract, it was contractually bound not to interfere with WizKid's intellectual property rights. Yet, it waited until after being sued for patent infringement before filing the instant IPR Petitions.

Fresh Products' conduct—waiting years to challenge patents it long knew about, violating a contractual duty not to interfere with those rights, and only seeking

IPR after being sued—counsels strongly in favor of discretionary denial. The integrity of the IPR process depends on not rewarding such tactics. Moreover, the lack of merit to the pending IPR Petitions should also result in denial of institution. Both of these additional bases for discretionary denial are discussed *in seriatim*.

(i) *Fresh Products’ Conduct Undermines the Settled Expectations of the Patent Owner and Violates Express Contractual Commitments*

As discussed, the Director’s March 2025 policy guidance explicitly and appropriately prioritizes the settled expectations of patent owners—especially when a petitioner had years of notice of the challenged patent and engaged in misconduct. *See Exhibit 2008*, March 2025 Interim Process Memo, at 3–4. Recent cases have likewise emphasized the importance of protecting patent owners from IPR attacks launched after years of the petitioner’s silence. *See, e.g., Microsoft Corp. v. TS-Optics Corp.*, IPR2025-00767, Paper No. 13 (PTAB Aug. 14, 2025) (discretionary denial where Petitioner was “aware of the challenged patent, having taken a license to it from 2011-2018.”); *see also Amazon.com, et. al. v. Audio POD*, IPR2025-00757, Paper No. 15 (PTAB Aug. 14, 2025) (discretionarily denying institution, in part upon finding the petitioner was aware of the patents well prior to the IPR attack). Against the foregoing backdrop, it is clear that the pending IPR Petitions present the very circumstances contemplated by 35 U.S.C. § 314(a) for the Board to exercise its

discretion to deny institution in order to protect the Patent Owner's inescapably settled expectations.

Here, WizKid's expectations were clearly settled long ago. It had two patents that issued in 2018 and 2019, *respectively*, and it entrusted its manufacturer – *the Petitioner, Fresh Products* – with the task of manufacturing products covered by the patents, **and** with marking the manufactured products in accord with 35 U.S.C. §287(a). To memorialize its relationship, WizKid even secured a written agreement outlining Fresh Products' role as manufacturer, wherein Fresh Products promised not to interfere with WizKid's intellectual property rights. WizKid reasonably relied on those representations to conduct its business and protect its innovations.

By contrast, Fresh Products' IPR filings come years *after* its first notice of the patents and only *after* being sued for copying the very inventions that it was once entrusted to manufacture for WizKid, the Patent Owner. Its actions violate not only the reasonable and irrefutable settled expectations of the Patent Owner, but such also runs afoul of Fresh Products' own written promises. The Board has denied institution in similar cases involving such contractual estoppel, and this case is no different. *See, e.g., Microsoft Corp. v. TS-Optics Corp.*, IPR2025-00767, Paper No. 13 (PTAB Aug. 14, 2025) (discretionary denial where Petitioner was "aware of the challenged patent, having taken a license to it from 2011-2018."). WizKid should not be forced to defend its patents in multiple venues against a party who contractually agreed not

to interfere with them in the first instance, and who only launches a belated challenge to avoid the consequences of its infringement.

As alluded to throughout this pleading, numerous recent PTAB decisions have aptly emphasized that institution should be denied where (*as here*) it would disrupt the settled expectations of a patent owner who relied on longstanding patent rights and public conduct by the petitioner.¹ Again, WizKid had every reason to believe

¹ See, e.g., *Cambridge Indus. USA, Inc. v. Applied Optoelectronics, Inc.*, IPR2025-00433, Paper No. 11 (PTAB June 26, 2025) (finding discretionary denial was appropriate due to the patent owner’s settled expectations where the challenged patents had “been in force for nine and seven years, respectively...”); *Jinkosolar Co., Ltd. v. Longi Green Energy Tech. Co. Ltd.*, IPR2025-00859, Paper No. 10 (PTAB Sept. 3, 2025)(discretionarily denying institution where “the challenged patent has been in force for approximately ten years, creating strong settled expectations for Patent Owner”); *Belden, Inc. v. Commscope, Inc.*, IPR2025-00833, Paper No. 13 (PTAB Sept. 12, 2025) (discretionarily denying institution where “the challenged patent has been in force for nine years creating strong settled expectations for Patent Owner” and where the “Petitioner has been aware of the challenged patent” for at least 2-3 years prior to filing the Petition.); *OnePlus Tech. Co., Ltd. v. Pantech Corp.*, IPR2025-00762, Paper No. 12 (PTAB Sept. 12, 2025) (discretionarily denying institution where “the challenged patent has been in force for nine years, creating strong settled expectations for Patent Owner”); *Amazon.com, et. al. v. Audio POD*, IPR2025-00757, Paper No. 15 (PTAB Aug. 14. 2025) (finding the petitioner was aware of the patents well prior to the IPR attack and the challenged patents had “been in force for approximately seven, eleven, seven, eleven, and nine years, respectively, creating strong settled expectations for Patent Owner.”); *Dabico Airport Solutions, Inc. v. Axa Power APS*, IPR2025-00408, Paper No. 21 (PTAB June 18, 2025) (discretionarily denying institution, noting “the challenged patent has been in force almost eight years, creating settled expectations.”); *Kangxi Communications Tech. v. Skyworks Solutions Canada, Inc.*, IPR2025-00912, Paper No. 9 (PTAB Sept. 12, 2025)(discretionarily denying institution where “the challenged patents have been in force for more than eleven years, creating strong settled expectations for Patent Owner”); *Geotab, Inc. v. Fractus, S.A.*, IPR2025-00928, Paper No. 11 (PTAB Sept. 12, 2025) (discretionarily denying institution where “the challenged patent has been in force for over seventeen years, creating strong settled expectations for Patent Owner”); *Volkswagen Group of Am., Inc. v. Longhorn Automotive Group, LLC*, IPR2025-00925, Paper No. 09 (PTAB Sept. 12, 2025) (discretionary denial of IPR where “the challenged patent has been in force for thirteen years creating strong settled expectations for Patent Owner”); *Samsung Electronics Co., Ltd. v. VB Assets, LLC*, IPR2025-00866, Paper No. 13 (PTAB Sept. 12, 2025) (discretionary denial of IPR where “each of the challenged patents has been in force for more than ten years, creating strong settled expectations for Patent Owner”).

that its patent rights would be respected, *especially by Fresh Products*. Again, its patents issued in 2018 and 2019, and Fresh Products knew of those patents at the time, having manufactured products marked in accord with Section 287(a). Importantly, Fresh Products never questioned the patents' validity during the years it profited from the relationship. Indeed, it was not until 2025—years later, and only after WizKid filed suit—that Fresh Products formally raised any invalidity arguments. Allowing institution now would reward a calculated delay strategy, in direct contravention of the PTAB's emphasis on maintaining patent owners' reasonable reliance on their issued rights. Granting institution under this scenario would enable Fresh Products to sidestep accountability in district court while exploiting the IPR process in an effort to delay resolution. In other words, institution here would not only disrupt WizKid's settled expectations, but also send a message to future petitioners that they may ignore contractual commitments and long-standing silence, and then pivot to the PTAB when litigation arises. The Board should continue its trend to reject that precedent.

(ii) *Fresh Products' IPR Petitions Lack Merit*

Even assuming, *arguendo*, the PTAB does not discretionarily dismiss Fresh Products' Petitions under Section 314(a) based on WizKid's settled expectations, the Petitions nonetheless lack the necessary merit upon which Fresh Products can reasonably expect to reach institution. For this additional reason, WizKid urges the

Board to deny institution of Fresh Products' pending IPR Petitions as being without merit.

As will be discussed more thoroughly in Patentee's Preliminary Responses, in both IPRs Fresh Products rests its invalidation attack on the Japanese reference Fushimi (JPS 60-190865). *See Exhibit 2009* (English translation of Fushimi). Fushimi discloses a urinal splash prevention device with a fixed "L-shaped frame [] formed to fit the shape of the inner periphery of the urinal." *Id.* at 2. The frame, which is assigned numeral "1" in the drawings, is always described as "L-shaped" and is always shown in this fixed position.

Dependent Claim 6 and independent claim 11 of the '154 Patent, and independent claim 1 and dependent claims 13 and 20 of the '649 Patent, all recite a urinal anti-splash mat with an upper "body" and a "base" and an ability for the body and the base to be in both an L-shaped position and to flexibly bend to a position where they lay flat, *i.e.*, are parallel to one another. *See, e.g.*, the '154 Patent, independent claim 11 ("a urinal anti-splash device . . . configured to translate the base between a first position including the base oriented in a direction parallel to the anti-splash body and a second position including the base oriented in a direction substantially perpendicular from the base."). This means, that for Fujimi to anticipate the claimed invention, Fujimi's L-shaped frame would have to be able to bend. But

Fujimi makes no such disclosure and Fresh Product's allegations in the IPR Petitions that it does are borne of confusion and/or strategic misdirection.

Fujimi's specification states "the entire surface of the **L-shaped outer frame** formed to match the inside shape of the urinal." *Id.* (emphasis added). Again, the frame is always described as "L-shaped," which makes sense, as all urinals have an "inside shape" that is L-shaped. The specification goes on to disclose that "the main body, which has a brush (3) attached, has engaging parts for each edge that are supported by supports (6) that can be detached and bent freely to make it easy to handle." **Exhibit 2009**, at 3. It is not the "L-shaped frame" that can be "bent freely," as Fresh Products alleges, but it is, instead, "supports" that hold the mat inside the urinal. Thus, Fresh Products is flatly incorrect in both IPR Petitions when it asserts that: "A POSITA would understand the coupling region is configured to translate the base from a position parallel to the anti-splash body to a position substantially perpendicular to the anti-splash body. . . . Fushimi teaches that it can be 'bent freely' at this region 'to make it easy to handle.'"

Simply put, there is no support in Fujimi for Fresh Product's allegations, and their two IPRs depend on Fujimi in each of its claim challenges, except dependent claims 6, 10, 15, and 17 of the '649 Patent. Thus, even if Fresh Products were able to invalidate the four dependent claims of one of the two patents asserted, *which they will not be able to do*, the other patent and other claims will remain intact and the

litigation will **not** be affected in any meaningful way. And, Fushimi's misinterpreted disclosure is just one of several deficiencies in Fresh Product's IPR challenges. Thus, there is no practical basis to institute either IPR proceeding. For these additional reasons, WizKid respectfully submits that the Board should discretionarily deny institution of Fresh Products' pending IPR Petitions.

B. Conclusion

The Board's discretionary authority under 35 U.S.C. § 314(a) exists to preserve fairness, efficiency, and, most recently, the settled expectations of patent owners. Each of those considerations applies with exceptional force here. Fresh Products had full knowledge of the WizKid Patents for years, manufactured products bearing those patent numbers, and contractually pledged not to interfere with WizKid's intellectual property rights. Only after the parties' relationship soured, and only after being sued for infringement, did Fresh Products decide to weaponize the IPR process as a collateral attack against WizKid and its patents. Allowing institution under these circumstances would reward calculated delay, breach of commitments, and promote abuse and misuse of the IPR system.

The PTAB's recent emphasis on honoring the settled expectations of patent owners further confirms that institution would be inappropriate. WizKid reasonably relied on the validity of its patents—issued in 2018 and 2019—in conducting its business and protecting its innovations. To now face IPR challenges from the very

entity that marked its patented products for years would eviscerate those expectations and signal to others that contractual promises and long periods of silence can be ignored until litigation arises.

Even setting aside these discretionary factors, the Petitions also lack substantive merit. They hinge almost entirely on a misreading of the Japanese Fushimi reference, which describes only a fixed, L-shaped urinal frame. Nothing in Fushimi suggests the flexible translation between parallel and perpendicular positions required by the asserted claims. Fresh Products' attempt to recast detachable supports as evidence of a bending frame is both unfounded and misleading. Because nearly all of the challenged claims rest on this flawed premise, the Petitions cannot prevail on the merits.

In short, these IPRs are neither justified by law nor supported by fact. They threaten to waste judicial and administrative resources, to disrupt settled expectations, and to reward a petitioner who acted in contravention of its contractual obligations. Accordingly, Patent Owner WizKid respectfully submits that the Board should deny institution of Fresh Products' Petitions in their entirety.

CERTIFICATE OF WORD COUNT

Pursuant to 37 C.F.R. § 42.24(d), Petitioner certifies that this petition includes 6,102 words, as measured by Microsoft Word, exclusive of the table of contents, mandatory notices under § 42.8, certificates of service, word count, and exhibits.

Dated: **September 23, 2025**

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CERTIFICATE OF SERVICE

Pursuant to 37 CFR §§ 42.8 and 42.105(b), the undersigned certifies that on **September 23, 2025**, a complete and entire copy of this Petition for Discretionary Denial and all supporting exhibits were provided via electronic mail to Petitioner’s counsel as follows:

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