

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

**TOP GLORY TRADING GROUP INC. and
DP DREAM PAIRS INC.,**

Petitioners,

v.

COLE HAAN LLC,

Patent Owner.

Case No. IPR2025-01395
Patent No. D768,969

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

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EXHIBIT LIST

Exhibit No.	Description
1001	U.S. Patent No. D768,969 (“D’969” or “D’969 Patent”)
1002	File History of U.S. Application No. 29/542,318 (“D’969FH”)
1003	Declaration of Mr. Grant Delgatty in Support of Petition for <i>Inter Partes</i> Review of U.S. Patent No. D768,969 (“Delgatty”)
1004	First Mina Ching Declaration on C11947
1005	Folder 002 to Exhibit B of Ex.1004 (C11947 Video)
1006	Second Mina Ching Declaration on C11947
1007	Image Captures of Ex. 1005
1008	C11947 Screen Capture on July 23, 2025
1009	Recommended Videos on March 3, 2014, Wayback Machine capture
1010	Mina Ching Declaration on C12652
1011	Folders 002–007 to Exhibit B to Ex. 1010 (C12652 Images)
1012	Nike EUIPO Design Registration Certificate No. 002413161-0028, Certified Copy
1013	Excerpt of EUIPO REUD Bulletin No. 2014/046, March 10, 2014, Pages 1-2, 383-385
1014	Nike EUIPO Design Registration Application No. 002413161-0028, large-scale images
1015	EUIPO Posting for Nike
1016	Mina Ching Declaration on Skechers
1017	Folders 002–003 to Exhibit B to Ex. 1016 (Skechers Images)
1018	Complaint for Patent Infringement in <i>Cole Haan LLC v. Top Glory Trading Group Inc. et al.</i> , 2:25-cv-00176 (D.N.J.)
1019	J.E. Miller, B.M. Nigg, W. Liu, D.J. Stefanyshyn & M.A. Nurse, Influence of Foot, Leg and Shoe Characteristics on Subjective

Exhibit No.	Description
	Comfort, 21 Foot & Ankle Int'l 759, 759-67 (2000)
1020	Steve Gelsi, Striving for Balance, 37 Brandweek, no. 6, Feb. 5, 1996, 17, available on Gale Academic OneFile
1021	Paul Hekkert, Design Aesthetics: Principles of Pleasure in Design, 48 Psychol. Sci. 157, 163 (2006)
1022	Martyn R. Shorten, Running Shoe Design: Protection and Performance, in <i>Marathon Medicine</i> 162, 162-63 (2000)
1023	Amanda Holpuch, Netflix and YouTube Make Up Majority of US Internet Traffic, New Report Shows, Guardian, Nov. 11, 2013
1024	J. Seabrook, Streaming Dreams, New Yorker, Jan. 8, 2012
1025	National Judicial Caseload Profile, 2024, overall and New Jersey
1026	EUIPO Design Patent 002127563-0013
1027	Chinese Design Patent No. 201530359567
1028	Dorothy Koster Washburn & Donald Warren Crowe, <i>Symmetries of Culture: Theory and Practice of Plane Pattern Analysis</i> 33-34 (Univ. of Wash. Press 1988)
1029	Zlatina Kazlacheva, Symmetry in Nature and Symmetry in Fashion Design, Econ. Manag. Inf. Technol. EMIT, no. 1, 2013, 267-276
1030	Search Disclosure Declaration (Confidential, Board Only)
1031	<i>Cole Haan LLC v. Top Glory Trading Group et al.</i> , 25-cv-00176-ES-SDA, Dkt. No. 54-1 (D.N.J. Oct. 1, 2025)
1032	Peter Lattman, <i>Nike to Sell Cole Haan to Apax Partners for \$570 Million</i> , N.Y. TIMES (Nov. 16, 2012, 10:20 AM), https://archive.nytimes.com/dealbook.nytimes.com/2012/11/16/nike-to-sell-cole-haan-to-apax-partners-for-570-million .

TABLE OF ABBREVIATIONS

Abbreviation	Description
D'969 or D'969 Patent	U.S. Patent No. D768,969 (Ex. 1001)
D'969FH	File History of U.S. Application No. 29/542,318 (Ex. 1002)
Claim / Challenged Claim	Claim 1 of the D'969 Patent
DOSITA	Designer of Ordinary Skill in the Art
IPR	<i>Inter Partes</i> Review
OB	Ordinary Observer
Petitioners	Petitioners Top Glory Trading Group Inc. and DP Dream Pairs Inc.
PO	Patent Owner
POSITA	Person of Ordinary Skill in the Art
PTAB	Patent Trial and Appeal Board
SCOTUS	The Supreme Court of the United States of America
USPTO	United States Patent and Trademark Office

I. INTRODUCTION

This Petition is one of four petitions filed by Petitioners Top Glory Trading Group Inc. and DP Dream Pairs Inc. in September 2025 against four patents assigned to Patent Owner (“PO”). Discretionary denial is not warranted. PO’s request should be rejected and this Petition should be considered on the merits.

First, PO has no settled expectations with respect to the D’969 Patent. The Federal Circuit recently ushered in a sweeping change in the legal framework for design patent invalidity, which the former Acting Director has recognized as a factor that negates settled expectations, even for patents issued over six years ago.

Second, the Examiner materially erred by failing to issue a rejection under §§ 102 and 103 when PO’s own shoes anticipate and at least render obvious the D’969 Patent claim. The Examiner’s error was further exacerbated by PO failing to disclose its own shoe listings from its website in an IDS, despite the website being available for more than one year before the priority date of the D’969 Patent. The Board should not reward PO for its omission, and the Petition should be reviewed on the merits.

Third, the *Fintiv* factors weigh against discretionary denial. The New Jersey Case is still in its infancy—the Court has not set a *Markman* hearing or a trial date, and little substantive work has been completed since PO filed its Complaint. Petitioners’ *Sotera* stipulation will also eliminate potential overlap between the

Petition and district court proceedings, thus minimizing duplicative efforts and inconsistencies.

Fourth, PO's other discretionary considerations fail to demonstrate why discretionary denial is warranted. The Petition appropriately relies on its expert consistent with the Director's past precedent and complies with the rules by setting out a discrete set of grounds.

Discretionary denial is therefore not warranted. PO's request should be denied and the Petition's merits should be considered.

II. DISCRETIONARY DENIAL IS NOT WARRANTED

A. PO Has No Settled Expectations Because a "Significant Change in Law" Affects the Patentability of the D'969 Patent

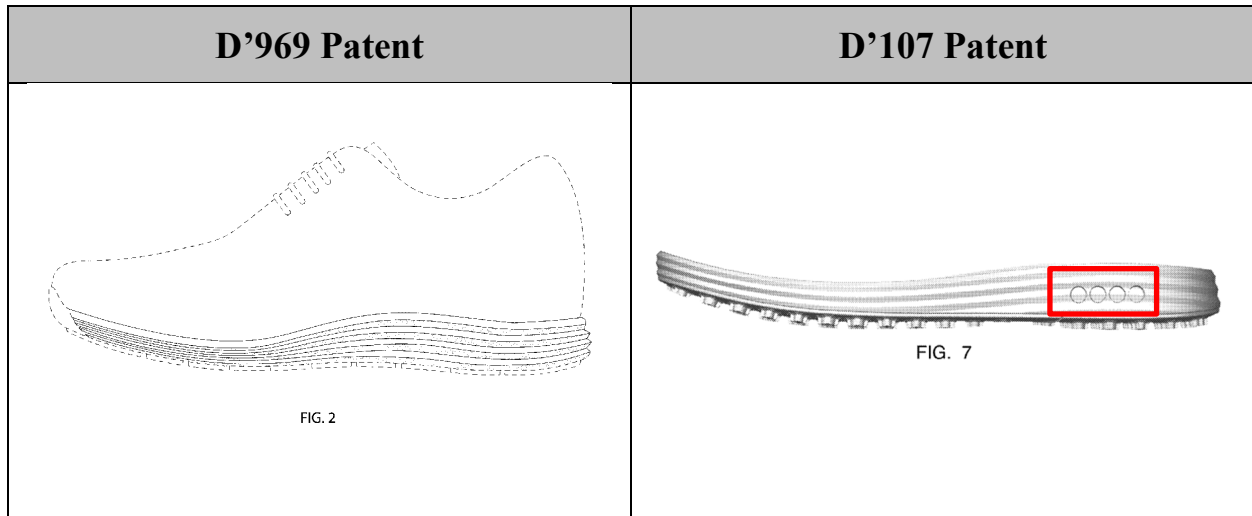
PO has no settled expectations in the D'969 Patent in light of *LKQ Corp. v. GM Global Tech. Operations LLC*, in which the Federal Circuit fundamentally changed the obviousness standard for design patents. 102 F.4th 1280, 1293 (Fed. Cir. 2024). On May 21, 2024, the Federal Circuit abrogated the decades-old *Rosen-Durling* test, which had required a primary reference to be "basically the same" as the claimed design and any secondary reference "so related" to the primary. *Id.* The court recognized that *Rosen-Durling* injected an "improperly rigid" standard that constrained the universe of prior art considered during design patent prosecution. *Id.* In its place, *LKQ* held that design patent obviousness is governed by the more flexible framework applicable to utility patents, including *Graham* and *KSR*. *Id.*

The D'969 Patent was prosecuted and issued on October 18, 2016, under the now-abrogated *Rosen-Durling* regime. Because that framework often excluded relevant prior art and demanded “basically the same” and “so related” references, the D'969 Patent faced a lower level of scrutiny than would apply under *LKQ*'s more flexible analysis. Prosecution under *Rosen-Durling* likely omitted pertinent prior art that would be considered today. With *LKQ* now controlling, any alleged reliance interests or “settled expectations” claimed by PO have been displaced by the requirement to assess the D'969 Patent's validity under the current *Graham/KSR* standard.

As the former Acting Director recognized, “[t]here may be persuasive reasons why the Board should review challenged claims several years after their issuance date” such as “a significant change in law [that] may have occurred since the patent issued” where “a petition can explain how that change in law directly bears on the patentability of the challenged claims.” *Intel Corp. v. Proxense, LLC*, IPR2025-00327, Pap. 12, *2–3 (Director June 26, 2025). Here, the mere fact that the Examiner applied an abrogated legal standard and was not offered the opportunity to consider PO's own prior art shoes that it never disclosed to the Examiner warrants review under *LKQ*'s more flexible framework.

This change in law impacts the validity of the D'969 Patent. The Examiner failed to reject the Challenged Claim in view of any prior art reference pursuant to

the *Rosen-Durling* test. For example, the Examiner never rejected the claim over U.S. Patent No. D742,107 (“D’107 Patent”), because the D’107 Patent was not “basically the same” as the D’969 Patent, at least because it includes four circles on the lateral portion of the sole as depicted below:



See also Section II.B. Unlike the D’107 Patent, the D’969 Patent includes continuous lines without any interruptions. As a result, the figures in the D’107 Patent were not “basically the same” under the *Rosen-Durling* test. Under *LKQ*, however, the Examiner would have been required to conduct an obviousness analysis under *KSR* and *Graham*. Under this more flexible approach, the D’969 Patent should have been rejected as obvious over the D’107 Patent because a DOSITA and an ordinary observer would have understood that the D’107 Patent embodies “the visual impression of the claimed design as a whole.” *See LKQ*, 102 F.4th at 1299.

PO’s lack of settled expectations with respect to a patent validity challenge

from Top Glory weighs against discretionary denial.

B. Denial Under 35 U.S.C. § 325(d) Is Inappropriate¹

Under the two-part *Advanced Bionics* framework, there is no basis for discretionary denial under 35 U.S.C. § 325(d), as the Grounds raised by this Petition are not the same or substantially the same as those raised during the D’969 Patent’s prosecution. *See Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Pap. 6, *8 (P.T.A.B. Feb. 13, 2020) (precedential) (establishing two-part framework for addressing 35 U.S.C. § 325(d)). Petitioners rely on the following Grounds, none of which was considered by the Patent Office:

- Grounds 1–2: Cole Haan C11947 (anticipation and obviousness);
- Grounds 3–4: Cole Haan C12652 (anticipation and obviousness);
- Grounds 5–6: Nike, EUIPO Design Registration Application No. 002413161-0028 (“Nike”) (anticipation and obviousness);
- Ground 7: Cole Haan C11947 in view of Nike;
- Ground 8: Cole Haan C12652 in view of Nike; and
- Ground 9: Skechers Embolden Oxfords (“Skechers”) in view of Nike.

Pet. at 6–8. None of these references was raised during the prosecution of the D’969 Patent. Ex. 1002. In fact, the Examiner never issued a rejection on any prior art

¹ Petitioners submitted a Search Disclosure Declaration. *See* Ex. 1030.

grounds—neither §§ 102 nor 103—during the D’969 Patent’s prosecution.

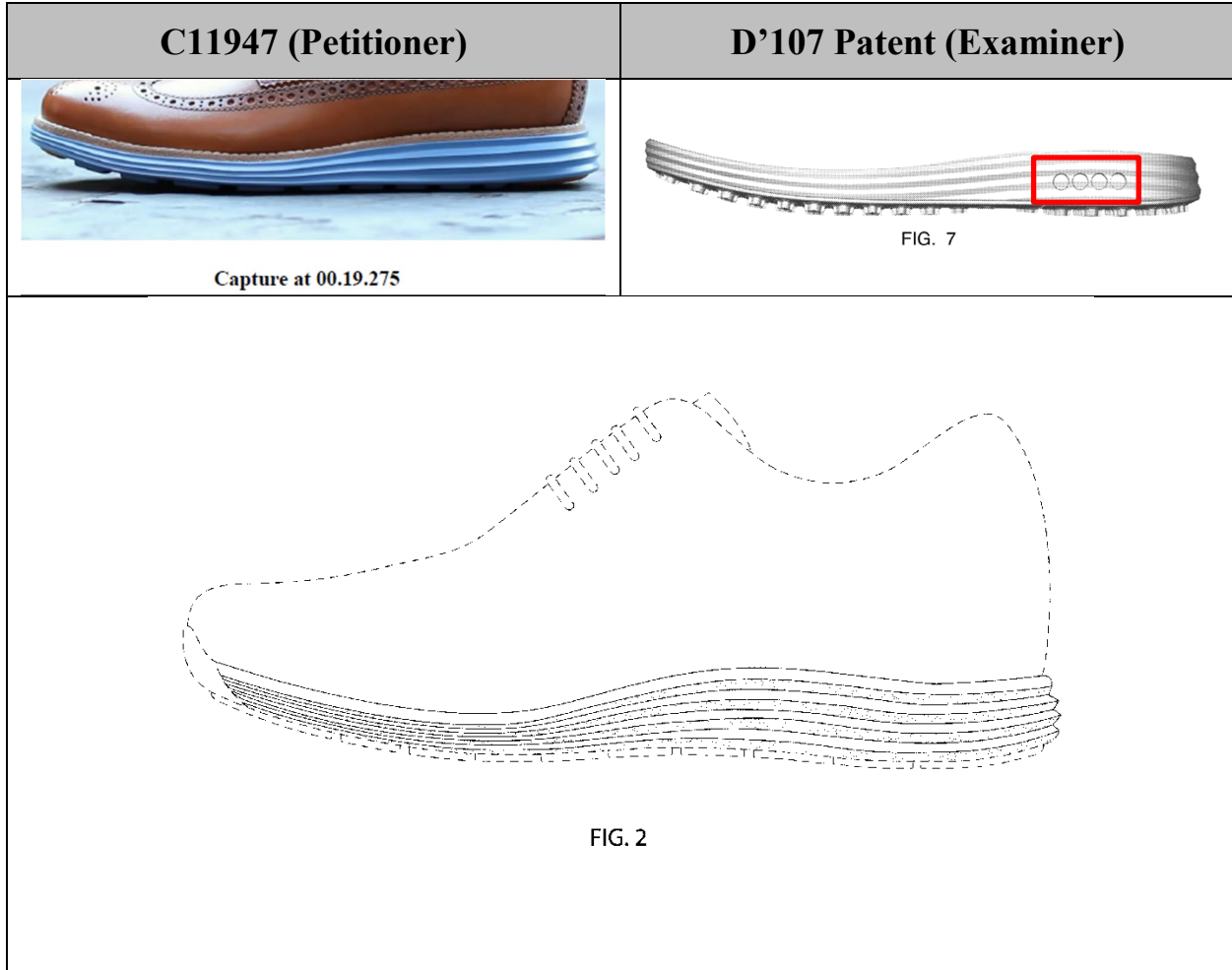
The Examiner materially erred by failing to issue a rejection under §§ 102 and 103 when PO’s own shoes—as demonstrated by printed publications depicting those shoes (Cole Haan C11947 and Cole Haan C12652) more than one year before the priority date of the application leading to the D’969 Patent—anticipate and at least render obvious the Challenged Claim. This error was compounded by PO’s failure to disclose its shoe listings from its own website in an IDS. The Board should not reward PO for omitting its own prior art during prosecution of the D’969 Patent. This Petition should not be discretionarily denied.

None of the art identified by Petitioners was before the Examiner, and the art before the Examiner was not cumulative of the art identified (but never relied upon for rejection) during prosecution. Moreover, PO’s argument that the references are substantially similar—if true—demonstrates that the Examiner erred by not rejecting the claim over the prior art of record.




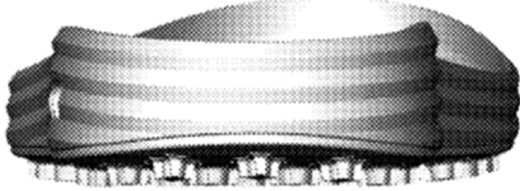
Indeed, PO’s comparison of cherry-picked references from the IDS and the Examiner’s notice of references cited includes ornamental differences that PO fails to acknowledge and explain.

First, Cole Haan C11947, C12652, Nike, and Skechers are not substantially similar to U.S. Patent No. D742,107 (“D’107 Patent”), which PO cites to in its brief. As the exemplary figure below demonstrates, the D’107 Patent includes different

design elements on the sole that are not present in the D'969 Patent or Petitioners' C11947, C12652, Nike, and Skechers references:




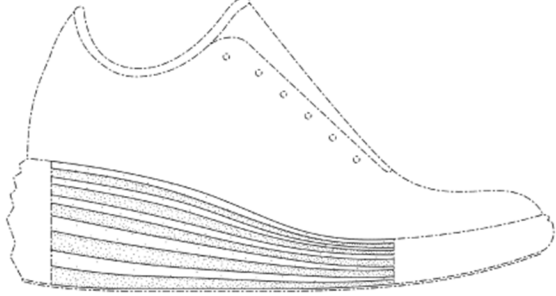
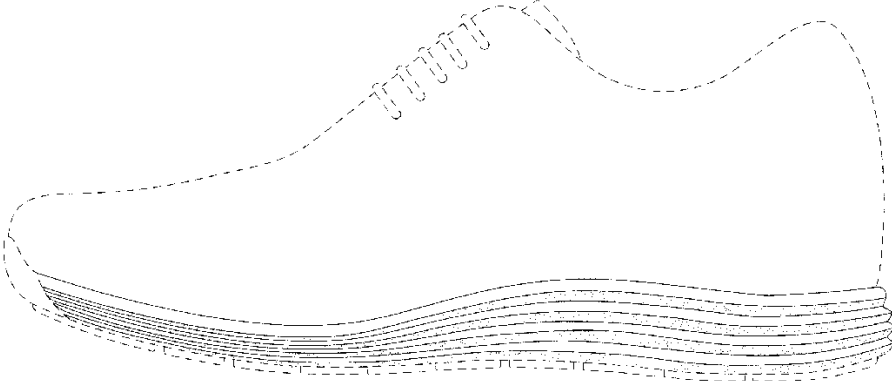
Other views of C11947 and the D'107 Patent confirm this distinction:

C11947 (Petitioner)	D'107 Patent (Examiner)
 <p data-bbox="418 583 581 604">Capture at 02.26.213</p>	 <p data-bbox="1052 655 1149 676">FIG. 3</p>
	 <p data-bbox="1055 978 1192 999">FIG. 5</p>


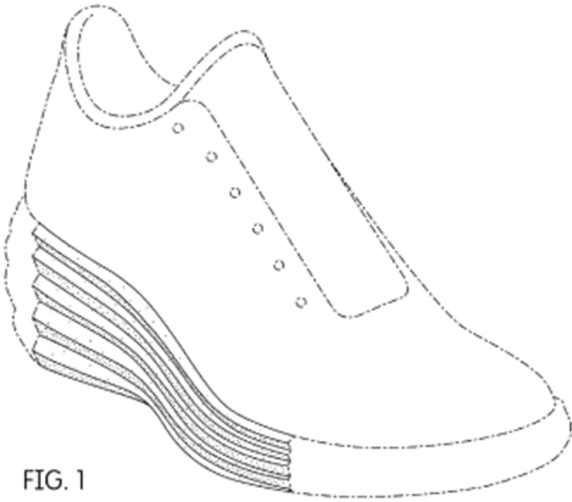

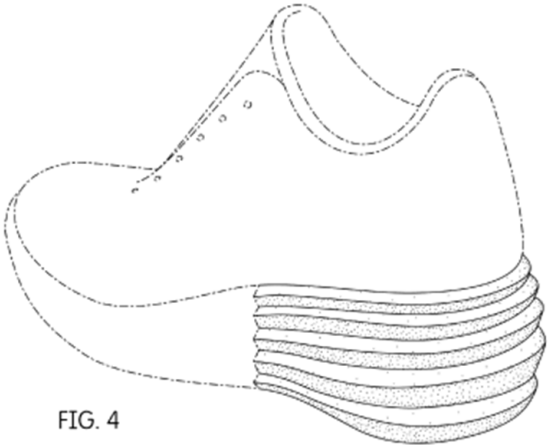
For example, as seen above in Fig. 7 of the D'107 Patent, four circles are present toward the heel, unlike the claim of the D'969 Patent and PO's own C11947 prior art shoe relied upon in the Petition. Thus, the art identified in the Petition is different, at least because it does not include four circles. To the extent that the Examiner believed that the removal of these circles distinguished the claim over the prior art, Petitioners identified new art without circles that renders the claim invalid. Alternatively, if the Examiner did not believe that the removal of the circles distinguished the claim from the prior art, the Examiner erred. For these reasons, Petitioners' new references should be considered on the merits.

Second, Nike is not substantially similar to U.S. Patent Nos. D713,626

(“D’626 Patent”) and D713,625 (“D’625 Patent”), which PO relies on in its brief. As the figures below demonstrate, the D’626 Patent and D’625 Patent include, for example, an overly elevated heel region that does not appear in the D’969 Patent or Petitioners’ Nike reference. Moreover, Petitioners’ Nike reference includes a rounded upper edge—as embodied by the D’969 Patent—as opposed to a pointed edge in the two references identified by the Examiner:

C11947 (Petitioner)	D’626 and D’625 Patents (Examiner)
	 <p data-bbox="1019 1115 1221 1171">FIG. 2 D’626 Patent</p>
 <p data-bbox="776 1709 847 1738">FIG. 2</p>	

Other views of C11947 and the D'626 and D'625 Patents confirm this distinction:

C11947 (Petitioner)	D'626 and D'625 Patents (Examiner)
	 <p data-bbox="857 856 925 886">FIG. 1</p> <p data-bbox="1019 898 1221 928">D'626 Patent</p>
	 <p data-bbox="912 1369 980 1398">FIG. 4</p> <p data-bbox="1019 1432 1221 1461">D'625 Patent</p>

Petitioners' Nike reference also discloses the D'969 Patent claim in a single-reference ground, as opposed to the Examiner's two-reference combination. The Examiner erred by failing to consider a single-reference rejection that existed in the prior art, especially a reference from a company that formerly owned Cole Haan (PO). Ex. 1032. Alternatively, if the Examiner did not believe that the differences

between the D'969 Patent and the D'626 and D'625 Patents cited during prosecution (but never relied upon) did not distinguish the Challenged claim from the prior art, the Examiner erred by not rejecting the claim over this art. For these reasons, Petitioners' new reference should be considered on the merits.

C. The *Fintiv* Factors Collectively Weigh Against Discretionary Denial

The rest of the *Fintiv* factors collectively weigh against discretionary denial.

1. Factor 1 (Stay) Is At Least Neutral

Fintiv factor 1 “weigh[s] against exercising authority to deny institution” where there is no stay but “the district court has denied a motion for stay without prejudice and indicated to the parties that it will consider a renewed motion . . . to stay if a PTAB trial is instituted.” *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Pap. 11, *6–7 (P.T.A.B. Mar. 20, 2020) (precedential). Petitioners' pre-institution motion to stay is currently pending before the district court. PO contends that “[a]ny assertion that a stay will be granted is speculative.” Br. at 15. Not so. Petitioners present compelling evidence in favor of a stay before the Court—Petitioners' motion is likely to be granted based on the merits, not speculation. *See Ex. 1031* at 5–14.

PO's assertion that a stay will likely be denied is mere speculation. PO's only argument is that the District of New Jersey's practice “is to defer any stay until after institution.” Br. at 13. But as explained in Petitioners' motion, the District of New Jersey—along with other courts in the Third Circuit—have granted pre-institution

motions on several occasions, especially where no trial date has been set and “little substantive work will be done before” the Board’s institution decision—as is the case here. Ex. 1031 at 4–5. This factor, therefore, is at least neutral.

2. Factor 2 (Trial Date) Does Not Support Discretionary Denial

If this IPR is instituted, the final written decision would issue in early 2027. There is currently no trial scheduled or *Markman* hearing date set. This factor, therefore, strongly weighs against discretionary denial.

PO argues that “other considerations” such as alleged “settled expectations,” “lack of material error,” and “§ 325(d)” make review “an inefficient use of Board resources, despite no trial date being set.” Br. at 15–16. As explained in Sections II.A–B, D, PO’s arguments with respect to these considerations do not merit discretionarily denying this IPR petition.

3. Factor 3 (Parallel Proceeding) Supports Institution and Factor 4 (Issue Overlap) Supports Institution

The district court has not made a single substantive ruling regarding any of the four challenged patents. This factor strongly weighs against discretionary denial. *Fintiv*, IPR2020-00019, at *9–10 (finding no “orders related to the patent at issue in the petition” weighing against discretionary denial).

The parties have invested little time and resources into the New Jersey Case. Fact and expert discovery will not close until 45 and 180 days after the *Markman*

decision (with a hearing yet to be scheduled, but will occur sometime after May 15, 2026). Thus, fact and expert discovery will not close for at least another 8 to 12 months, at minimum, and no fact or expert deposition has been taken or scheduled.

Petitioners filed a case-dispositive motion to dismiss, but the Court has yet to rule on this motion. Even so, the Board has granted institution in cases far more advanced than here. *See Samsung Display Co. Ltd. v. Pictiva Displays Int'l Ltd.*, IPR2024-01222, Pap. 12, *7 (P.T.A.B. Jan. 23, 2025) (finding that *Fintiv* factor 3 weighs against denial, even after *Markman* because “much remains to be done, including expert discovery”); *SAP Am., Inc. v. Cyandia, Inc.*, IPR2024-01432, Pap. 14, *8–9 (P.T.A.B. Apr. 7, 2025) (finding that *Fintiv* factor 3 favors institution even after *Markman* briefing was complete).

PO’s arguments are also rebutted by Petitioners’ broad *Sotera* stipulation (Pet. at 17–18), which guarantees no overlap between the instant IPR proceedings and the district court litigation. This strongly favors institution.

4. Factor 5 (Same Party) Is Neutral

Petitioners are defendants in the New Jersey Case—making factor 5 “neutral.” *HP Inc. v. Slingshot Printing LLC*, IPR2020-01084, Pap. 13 at 9 (P.T.A.B. Jan. 14, 2021).

5. Factor 6 (Other Considerations) Weighs Against Discretionary Denial

Petitioners’ IPR petition: (1) includes art not previously before the Examiner;

(2) presents compelling grounds and other arguments on the merits that the Examiner did not previously consider; and (3) argues—with clarity and brevity—where the Examiner erred when prosecuting the Challenged Claims. The Board’s efficiency and PO’s lack of settled expectations weigh against discretionary denial. *See* Section II.A.

D. PO’s Other Discretionary Considerations Fail to Demonstrate Why Discretionary Denial is Warranted

PO’s other discretionary considerations—such as alleged overreliance on expert testimony and failure to satisfy 37 C.F.R. § 42.104(b)—fail to demonstrate why discretionary denial is warranted.

1. The Petition Appropriately Relies on Expert Witness Testimony

The Petition properly relied on the testimony of Mr. Grant Delgatty to support its invalidity positions. The Petition carefully walks through each and every claim limitation presented by the figures and analyzes each element against the prior art. Mr. Delgatty’s testimony considers the overall visual impression of the claimed design and “explain[s] the background knowledge of a person of ordinary skill in the art.” *iRhythm, Inc. v. Welch Allyn, Inc.*, IPR2025-00363, Pap. 10, *2–3 (Director June 6, 2025) (finding such reliance proper). Mr. Delgatty does not “cherry-pick[]” highly selective key features to map the asserted references to the claim. Mr. Delgatty instead highlights *all the features of the claimed design* from the

perspective of a DOSITA.

Disagreement between Petitioners and PO is expected, which is why the Board should consider the Petition on the merits. Rather than taking PO's attorney arguments regarding Mr. Delgatty's description and annotations at face value, the Board should analyze the entire breadth of evidence in this case. This includes Petitioners' brief, Mr. Delgatty's opinions, PO's arguments, *and* PO's forthcoming expert declaration. This issue is best considered on the merits, not a discretionary denial request. PO's request should be denied such that the merits can be properly weighed.

2. The Petition Complies with 37 C.F.R. § 42.104(b)

The Petition complies with the regulations governing IPR procedure, including 37 C.F.R. § 42.104(b). The use of color coding in the Petition does not render its arguments improper. This is proper practice, and the Board should not discretionarily deny the Petition for this reason.

III. CONCLUSION

For the above reasons, PO's request for discretionary denial should be denied.

Dated: December 11, 2025

By: */James L. Davis, Jr./*
Name: James L. Davis, Jr.
Registration No. 57,325
Lead Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

Pursuant to § 42.24(d), the undersigned certifies that the foregoing Petitioners' Opposition to Patent Owner's Discretionary Denial Brief contains 15 pages. This page count does not include the items excluded by § 42.24 as not counting towards the page limit. *Interim Director Discretionary Process*, <https://www.uspto.gov/patents/ptab/interim-director-discretionary-process>.

Dated: December 11, 2025

By: /James L. Davis, Jr./
Name: James L. Davis, Jr.
Registration No. 57,325
Lead Counsel for Petitioners

CERTIFICATE OF SERVICE

In accordance with 37 C.F.R. § 42.6(e), the undersigned certifies that on December 11, 2025, a complete and entire copy of this Petitioners' Opposition to Patent Owner's Discretionary Denial Brief and all supporting exhibits were served to the following attorneys of record for the Patent Owner listed below:

Lead Counsel	Backup Counsel
Chad C. Walters Reg. No. 48,022 Baker Botts L.L.P. 2001 Ross Ave., Suite 900 Dallas, TX 75201-2980 Phone: (214) 953-6511 Fax: (214) 661-4511 chad.walters@bakerbotts.com DLTopGloryvColeHaanIPRs@bakerbotts.com	Lindsay Volpenhein Cutié Reg. No. 75,474 Baker Botts L.L.P. 910 Louisiana Street Houston, TX 77002 Phone: (713) 229-1476 Fax: (713) 229-7776 lindsay.cutie@bakerbotts.com Amy E. Bergeron Reg. No. 76,974 Baker Botts L.L.P. 910 Louisiana Street Houston, TX 77002 Phone: (713) 229-1610 Fax: (713) 229-7910 amy.bergeron@bakerbotts.com

Dated: December 11, 2025

By: */James L. Davis, Jr./*
Name: James L. Davis, Jr.
Registration No. 57,325
Lead Counsel for Petitioners