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Establishment and Use of Non-Exclusive Factors to Deny Institution Under §§ 314(a) and 325(d)

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314(a) and 325(d)**

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INTRODUCTION

Institution of *inter partes* review is discretionary and several precedential decisions enshrine non-exclusive factors the Board considers when exercising discretion under §§ 314(a) and 325(d):

- *General Plastic*, which sets forth non-exclusive factors to consider under § 314(a) relating to follow-on petitions;¹
- *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, which sets forth non-exclusive factors to consider under § 325(d) relating to petitions raising arguments previously presented to the office;²
- *NHK*, which states that the advanced state of district court litigation may favor denying institution under § 314(a);³ and
- *Fintiv*, which sets forth non-exclusive factors to consider under § 314(a) relating to parallel district court litigation.⁴

1. *Gen. Plastic Inds. Co. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 (P.T.A.B. Sept. 6, 2017) (precedential, designated: October 18, 2017).

2. *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 (P.T.A.B. Dec. 15, 2017) (precedential, designated: Aug. 2, 2019).

3. *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 (P.T.A.B. Sept. 12, 2018) (precedential, designated: May 7, 2019).

4. *Apple Inc. v. Fintiv Inc.*, IPR2020-00019, Paper 11 (P.T.A.B. March 20, 2020) (precedential, designated: May 5, 2020).



Figure 1: Timeline of cases where the PTAB Board uses discretion of non-exclusive factors under §§ 314(a) and 325(d).⁵

These cases suggest the Board is likely to deny petitions under § 325(d) where the petition raises arguments or art previously considered by the Office without a showing that the Office erred; and under § 314(a) where a district court will likely begin trial before the deadline for issuing a final written decision, where a petition’s merits are weak, or where a petitioner files multiple petitions against the same claims.

This article reviews the evolution of the law in this area including these precedential decisions which bind future panels, two informative decisions building on this precedential framework, and some additional cases providing insight into the Board’s analysis.

DISCRETIONARY INSTITUTION AND BINDING PRECEDENT

Several decisions governing the Board’s⁶ exercise of discretion under 35 U.S.C. §§ 314(a) and 325(d) have been designated precedential.⁷ Precedential decisions “establish binding authority concerning major policy, procedural, or other issues of exceptional importance.”⁸ Therefore, these precedential decisions will guide future institution decisions under §§ 314 and 325(d).

5. * Scott and Tim are the founders of Eastgate IP, a boutique IP firm with a practice focused on post-grant proceedings, such as *inter partes* review, and patent prosecution.

See *Apple Inc. v. Fintiv Inc.*, IPR2020-00019, Paper 11 (P.T.A.B. March 20, 2020)(precedential, designated: May 5, 2020); *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 (P.T.A.B. Sept. 12, 2018) (precedential designated: May 7, 2019); *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 (P.T.A.B. Dec. 15, 2017) (precedential, designated: Aug. 2, 2019); *Gen. Plastic Indus. Co. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 (P.T.A.B. Sept. 6, 2017) (precedential, designated: October 18, 2017);

6. The discretion lies with the Director and has been delegated to the Board. See 37 C.F.R. § 42.4(a) (2012) (“The Board institutes the trial on behalf of the Director.”).

7. See, e.g., *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (P.T.A.B. March 20, 2020) (precedential, designated: May 5, 2020); *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8 (P.T.A.B. Dec. 15, 2017) (precedential, designated: Aug. 2, 2019).

8. Patent Trial & Appeal Board, Standard Operating Procedure 2 (Revision 10): Precedential opinion panel to decide issues of exceptional importance involving policy or procedure 3 (2018), <https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf>.

These sections have differing scopes. § 314(a) generally indicates that institution of *inter partes* review is discretionary, stating “the Director *may not* authorize an inter partes review to be instituted unless . . .”⁹ However, § 325(d) is much more specific, directly stating that “when determining whether to institute or order a proceeding . . . the Director may take into account whether . . . substantially the same prior art or arguments previously were presented to the Office.”¹⁰ Accordingly, § 325(d) is addressed first.

Precedent Under § 325(d)

Becton

Turning first to the relatively narrow grant of discretion under 35 U.S.C. § 325(d), *Becton* guides the Board in exercising discretion to deny a petition raising the same art or arguments previously presented to the Office.¹¹ The first paragraph of Section III.C.5—the only section designated precedential—provides six non-exclusive factors:

1. the similarities and material differences between the asserted art and the prior art involved during examination;
2. the cumulative nature of the asserted art and the prior art evaluated during examination;
3. the extent to which the asserted art was evaluated during examination, including whether the prior art was the basis for rejection;

9. 35 U.S.C. § 314(a) (2011) (“Threshold.— The Director may not authorize an inter partes review to be instituted unless the Director determines that the information presented in the petition filed under section 311 and any response filed under section 313 shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.”)

10. 35 U.S.C. § 325(d) (2011) (“Multiple Proceedings.— Notwithstanding sections 135(a), 251, and 252, and chapter 30, during the pendency of any post-grant review under this chapter, if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the post-grant review or other proceeding or matter may proceed, including providing for the stay, transfer, consolidation, or termination of any such matter or proceeding. In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.”)

11. *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, IPR2017-01586, Paper 8, at 17-18 (P.T.A.B. Dec. 15, 2017) (precedential, designated: Aug. 2, 2019).

4. the extent of the overlap between the arguments made during examination and the manner in which Petitioner relies on the prior art or Patent Owner distinguishes the prior art;
5. whether Petitioner has pointed out sufficiently how the Examiner erred in its evaluation of the asserted prior art; and
6. the extent to which additional evidence and facts presented in the Petition warrant reconsideration of prior art or arguments.¹²

The Board clarified *Becton* in *Advanced Bionics*, indicating that factors (1) and (2) actually extend to “any proceeding, including prior AIA proceedings.”¹³ Additionally, *Advanced Bionics* states that the Board may deny institution where a petition raises substantially the same art or arguments previously presented to the Office unless the Petitioner demonstrates that the Office made an error material to patentability, such as misconstruing a claim term or overlooking specific teachings of relevant prior art.¹⁴

Precedent Under § 314

The grant of discretion under 35 U.S.C. § 314 is less specific than § 325(d). Accordingly, the Board has cited § 314 to deny institution under a broader array of circumstances, such as to deny institution of follow-on petitions and to deny institution in view of co-pending proceedings, as discussed below.

General Plastic

General Plastic guides the Board when exercising discretion concerning follow-on petitions under § 314(a).¹⁵ Follow-on petitions include petitions filed against the same claims of a previously challenged patent.¹⁶ Only Section II.B.4.i is precedential.¹⁷ This section—entitled “Applying Factors to Evaluate the Equities of Permitting Follow-on Petitions is a Proper Exercise of Discretion Under 35 U.S.C. § 314(a)”—

12. *Id.*

13. *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6, at 10 (P.T.A.B. Feb. 13, 2020) (precedential, designated: March 24, 2020).

14. *Id.* at 21.

15. *General Plastic Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19 at 15-16 (P.T.A.B. Sept. 6, 2017) (precedential, designated: October 18, 2017).

16. *Id.* at 3.

17. *Id.* at 1.

cites the permissive language of § 314(a)¹⁸ to support the Board’s use of discretion to deny follow-on petitions under § 314(a), and then recites seven non-exclusive factors previously recited in *NVIDIA Corp. v. Samsung Elec. Co.*, including:

1. whether the same petitioner previously filed a petition directed to the same claims of the same patent;
2. whether at the time of filing of the first petition the petitioner knew of the prior art asserted in the second petition or should have known of it;
3. whether at the time of filing of the second petition the petitioner already received the patent owner’s preliminary response to the first petition or received the Board’s decision on whether to institute review in the first petition;
4. the length of time that elapsed between the time the petitioner learned of the prior art asserted in the second petition and the filing of the second petition;
5. whether the petitioner provides adequate explanation for the time elapsed between the filings of multiple petitions directed to the same claims of the same patent;
6. the finite resources of the Board; and
7. the requirement under 35 U.S.C. § 316(a)(11) to issue a final determination not later than 1 year after the date on which the Director notices institution of review.¹⁹

The Board later expanded its use of discretion under § 314(a), additionally denying institution in view of advanced parallel litigation in *NHK* and *Fintiv*, discussed below.

NHK

NHK states that the Board may consider the advanced state of a parallel district court proceeding to deny institution under § 314(a).²⁰ The

18. 35 U.S.C. § 314(a) “The Director *may not* authorize an inter partes review to be instituted unless. . .” (emphasis added).

19. *General Plastic Co., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19, at 15-16 (P.T.A.B. Sept. 6, 2017) (precedential, designated: October 18, 2017), citing *NVIDIA Corp. v. Samsung Elec. Co.*, IPR2016-00134, Paper 9 at 6-7 (P.T.A.B. May 4, 2016).

20. *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 20 (P.T.A.B. Sept. 12, 2018) (precedential, designated: May 7, 2019).

Board first weighed the *Becton* factors under 35 U.S.C. § 325(d) and denied institution, finding that the petition raised the same art and arguments considered by the Examiner during prosecution.²¹

The Board then considered additional factors under § 314(a).²² Citing the August 2018 Update to the Office Patent Trial Practice Guide, the Board stated “simply because we exercise our discretion to deny the Petition under § 325(d) does not mean that we cannot consider and weigh additional factors that favor denying institution under § 314(a).”²³ The Board’s § 314(a) analysis found the advanced state of a parallel district court proceeding weighed in favor of denying institution, noting that the district court’s expert discovery concluded November 2018; a 5-day jury trial would begin March 2019; and the *inter partes* review would not conclude until September 2019.²⁴

Fintiv

Fintiv expands upon *NHK* and guides the Board in exercising discretion to deny institution in view of a parallel court proceeding under § 314(a).²⁵ The *Fintiv* Order identified six non-exclusive factors:

1. whether the Court granted a stay or evidence exists that one may be granted if a proceeding is instituted;

21. *Id.* at 18 (“Thus, we deny institution under § 325(d). Although a weighing of the § 325(d) factors alone is sufficient to support an exercise of our discretion to deny institution, we also consider Patent Owner’s additional arguments under § 314(a).”)

22. *Id.* at 19.

23. *Id.* at 20. *See also, Patent Trial and Appeal Board Trial Practice Guide Update (August 2018)*, U.S. PATENT & TRADEMARK OFFICE 11, 13 (August 13, 2018) https://www.uspto.gov/sites/default/files/documents/2018_Revised_Trial_Practice_Guide.pdf (stating “[P]arties may wish to address in their submissions whether any other such reasons exist in their case that may give rise to additional factors that may bear on the Board’s discretionary decision to institute or not institute, and whether and how such factors should be considered along with the General Plastic factors . . . parties may wish to address additional factors they consider relevant to the Board’s exercise of discretion to deny institution under 35 U.S.C. § 325(d).”).

24. *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 20 (P.T.A.B. Sept. 12, 2018) (precedential, designated: May 7, 2019).

25. *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 3 (P.T.A.B. March 20, 2020) (precedential, designated: May 5, 2020). Since this article was drafted in October 2020, the Board has designated two additional cases applying the *Fintiv* factors as precedential as of June 2021. In the first, *Sotera Wireless, Inc. v. Masimo Corporation*, IPR2020-01019, Paper 12 (P.T.A.B. Dec. 1, 2020) (precedential, designated: Dec. 17, 2020), the Board found the petitioner’s broad stipulation not to pursue in district court any ground that it raised, or could have raised, in the *inter partes* review weighs strongly in favor of institution. In *Snap, Inc. v. SRK Technology LLC*, IPR2020-00820, Paper 15 (P.T.A.B. Oct. 21, 2020) (precedential, designated: Dec. 12, 2020) the Board found that a stay of district court litigation pending an *inter partes* review denial or final written decision weighs strongly in favor of institution.

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.²⁶

The Board enumerated these factors in an Order requesting briefing on whether the Board should apply discretion under § 314(a) to deny institution.²⁷ The Board ultimately denied institution in the informative decision discussed below.

Informative Decisions

In *Apple Inc. v. Fintiv, Inc.* the Board denied institution, concluding that instituting the trial would be an inefficient use of Board resources in view of co-pending district court litigation.²⁸ Notably, the Board rejected Petitioner's argument that the advanced state of a parallel case is not sufficient in itself to deny institution, instead stating "a parallel proceeding in an advanced state implicates considerations of efficiency and fairness, which can serve as an independent reason to apply discretion to deny institution."²⁹

Conversely, in *Sand Revolution II, LLC v. Continental Intermodal Group – Trucking LLC*, the Board instituted review despite co-pending district court litigation.³⁰ The Board concluded, "we are not persuaded that the interests of the efficiency and integrity of the system would be best served by invoking our authority under 35 U.S.C. § 314(a) to deny institution of a potentially meritorious Petition."³¹

26. *Id.* at 6.

27. *Id.* at 2.

28. *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 15 at 17 (P.T.A.B. Mar. 20, 2020) (informative, designated: July 13, 2020).

29. *Id.* at 11.

30. *Sand Revolution II, LLC v. Continental Intermodal Group*, IPR2019-01393, Paper 24 at 8, 57 (P.T.A.B. June 16, 2020) (informative, designated: July 13, 2020).

31. *Id.* at 14.

The Board weighed the six *Fintiv* factors in each of these two cases as detailed below.

<i>Apple</i>	<i>Sand Revolution II</i>
Neither party has requested a stay of the co-pending district court case;	No stay has been requested or ordered in the co-pending district court case;
The district court scheduled trial to begin two months before the Board would reach a final decision;	The trial date is 4-7 months before a final written decision would be due, the court granted two joint motions to extend schedule deadlines, the trial date had been rescheduled several times with each trial date accompanied by “or as available,” indicating continued uncertainty;
The district court has issued a 34-page claim construction order, the parties have exchanged final infringement and invalidity contentions, and discovery is under way;	The District Court and the parties have invested little in the merits of the case aside from the District Court issuing a two-page Markman Order stating the proper construction for each disputed claim term is the term’s plain and ordinary meaning;
Identical claims are challenged based on the same prior art in both the district court and the proposed <i>inter partes</i> review;	Petitioner stipulated that it would not raise the same patentability issues in the district court litigation if the Board instituted <i>inter partes</i> review;
The Petitioner and the district court defendant are the same party; and	The Petitioner and the district court defendant are the same party; and
The Board found that Petitioner’s arguments contained weaknesses—the merits weighed in favor of discretionary denial. ³²	The Board noted that Petitioner has set forth a reasonably strong case for the obviousness of most challenged claims. ³³

Table 1. Six *Fintiv* Factors applied to *Apple* and *Sand Revolution II* Cases.

32. Apple Inc. v. Fintiv, Inc., IPR2020-00019, Paper 15 at 12-17 (P.T.A.B. Mar. 20, 2020) (informative, designated: July 13, 2020).

33. Sand Revolution II, LLC v. Continental Intermodal Group, IPR2019-01393, Paper 24 at 7-14 (P.T.A.B. June 16, 2020) (informative, designated: July 13, 2020).

In each case, the Board noted the strength of the petition. The Board also considered the uncertainty in the court’s use of “or as available” when setting trial dates in *Sand Revolution II*. The Board also noted the length and detail of completed claim construction and whether the parties had exchanged final invalidity and infringement contentions. Finally, Sand Revolution II’s stipulation to not raise instituted grounds was helpful to the decision to institute.

Additional Decisions

The decisions summarized below are useful to show how the Board has applied the above factors.

In *Samsung Elecs. Co., LTD. v. BiTMICRO, LLC*, a co-pending International Trade Commission (ITC) investigation did not weigh against institution.³⁴ The Board declined to exercise discretion under § 314(a) to deny institution, noting that the ITC lacks the authority to invalidate the patent in the co-pending proceeding, and that the ITC decision does not necessarily pertain to the issues raised in an *inter partes* review petition “because of the difference in evidentiary standards and burdens.”³⁵

Broad stipulations to not pursue instituted grounds in parallel litigation favor institution. In *Google LLC v. Personalized Media Comms.*, the Board applied *NHK* and *Fintiv* to deny institution under § 314(a) despite Petitioner’s stipulation to not pursue instituted grounds in parallel litigation.³⁶ The Board noted that no stay had been requested, the jury trial would begin ten months *before* the Board would issue a final written decision, and the district court had completed claim construction and expert discovery concerning complicated validity issues.³⁷ Notably, the Board found Petitioner’s stipulation to withdraw “identical grounds from the district court” marginally disfavored denial, but interpreted it narrowly—opining that a “broader stipulation that Petitioner would not ‘pursue any ground raised *or that could have been reasonably raised* in an IPR’ might have weighed more heavily in favor of institution, but ultimately denied the petition.³⁸ Indeed, in *Sotera Wireless, Inc. v. Masimo Corporation*,

34. *Samsung Elecs. Co., LTD. v. BiTMICRO, LLC*, IPR2018-01410, Paper 14 at 18 (Jan. 23, 2019) (Kalan, joined by Barrett, and Trock), *but see* *Supercell OY v. Gree, Inc.*, PGR2020-00034, Paper 13 (Sept. 3, 2020) (Wicker, joined by Browne and Jung) (denying institution of a post-grant review in view of parallel litigation).

35. *Id.*

36. *Google LLC v. Personalized Media Comms.*, IPR2020-00719, Paper 16 at 17 (Aug. 31, 2020) (Braden, joined by Jurgovan and Horvath).

37. *Id.* at 9-13, 16.

38. *Id.* at 13-14.

Petitioner submitted such a stipulation, disclaiming any ground raised or that could have been reasonably raised. The Board found that petitioner's broad stipulation weighs strongly in favor of not exercising discretion to deny institution under § 314(a).³⁹

Conversely, in *Nanocollect Biomedical, Inc. v. Cytonome/ST, LLC* the Board declined to exercise discretion under § 314(a) to deny institution where Petitioner stipulated in district court to not pursue any ground raised or that could reasonably have been raised in the *inter partes* review, even though its final written decision would be due four months *after* the current district court trial date.⁴⁰ Additionally, the Board noted that the *inter partes* review petition challenged claims that were not at issue in district court.⁴¹ The Board also found that much of the district court's investment related "to ancillary matters unrelated to the validity issue itself."⁴² Finally, the Board noted a reasonable likelihood that several claims were unpatentable.⁴³ This point was affirmed in *Snap, Inc. v. SRK Technology LLC*, now precedential, where the Board found that a district court stay pending *inter partes* review weighs strongly against exercising discretion to deny institution.⁴⁴

Recent Developments

Apple, Cisco, Google, and Intel have sued the Director of the USPTO, asserting the Director inappropriately established a new rule by designating the *NHK* and *Fintiv* decisions precedential.⁴⁵ The complaint challenges the validity of the purported new rule under the Administrative Procedure Act (APA), alleging that the Director exceeded his statutory authority in adopting and using the *NHK-Fintiv* rule; that the *NHK-Fintiv* rule is final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" and that even if the *NHK-Fintiv* rule was lawful, the Director cannot adopt such a rule without notice-and-comment rulemaking as required by the APA.⁴⁶ While these arguments

39. *Sotera Wireless, Inc. v. Masimo Corporation*, IPR2020-01019, Paper 12 at 19 (P.T.A.B. Dec. 1, 2020) (precedential, designated: Dec. 12, 2020).

40. *Nanocollect Biomedical, Inc. v. Cytonome/ST, LLC*, IPR2020-00551, Paper 19 at 15, 23-24 (Aug. 27, 2020) (Worth, joined by Browne and Kokoski).

41. *Id.* at 23.

42. *Id.* at 20.

43. *Id.* at 24-25.

44. *Snap, Inc. v. SRK Technology LLC*, IPR2020-00820, Paper 15 at 9 (P.T.A.B. Oct. 21, 2020) (precedential, designated: Dec. 12, 2020).

45. *Apple Inc., Cisco Sys., Inc., Google LLC, and Intel Corp. v. Iancu*, No. 5:20-cv-6128 (N.D. Cal. filed Aug. 31, 2020).

46. *Id.* at 1-2.

have merit, it is worth noting that some rules such as interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice do not always require notice-and-comment rulemaking.⁴⁷ Interestingly, after the suit was filed, the USPTO published a request for comment “on considerations for instituting AIA trials as it relates to serial and parallel AIA petitions, as well as proceedings in other tribunals.”⁴⁸

CONCLUSION

The Board established factor tests to guide discretionary institution under 35 U.S.C. §§ 314(a) and 325(d). While these tests provide an idea of what the Board considers in making institution decisions, it is difficult to predict how individual panels weigh the various non-exclusive factors in their analysis, and no single factor is dispositive. However, practitioners should note that to date, denial is more likely under § 314(a) where multiple petitions challenge the same claims, where a district court trial date is set before the deadline for a final written decision, or where a petition’s merits are weak. Denial is more likely under § 325(d) where the petition raises art or arguments previously considered by the office without showing the Office erred. The recent lawsuit challenging the establishment of the alleged “*NHK-Fintiv* rule,” along with the Office’s request for comment concerning the same, raise additional questions including whether these precedential cases with their associated guidance will survive or change going forward.

47. 5 U.S.C. § 553(b)(A).

48. Request for Comments on Discretion To Institute Trials Before the Patent Trial and Appeal Board, 85 Fed. Reg. 66,502 at 66503 (October 20, 2020) (requesting comments on considerations for instituting a petition “as it relates to serial and parallel AIA petitions, as well as proceedings in other tribunals . . . such as a U.S. district court or the ITC.”).