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Paper 16
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ALLERGAN, INC., ALLERGAN LIMITED, ALLERGAN USA, INC., ZELTIQ AESTHETICS, INC., ZELTIQ IRELAND UNLIMITED COMPANY, AND REMED CO. LTD.,
Petitioner,

v.

BTL HEALTHCARE TECHNOLOGIES A.S.,[1]
Patent Owner.

PGR2021-00016
Patent 10,709,895 B2

Before JOSIAH C. COCKS, BARBARA A. PARVIS, and DAVID COTTA, *Administrative Patent Judges.*

PARVIS, *Administrative Patent Judge*.

DECISION
Denying Institution of Post-Grant Review
35 U.S.C. § 324

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[1] Further to Patent Owner's request, we have changed the case caption to reflect that former patent owner BLT Medical Technologies S.R.O assigned the '895 patent to BLT Healthcare Technologies A.S. Ex. 3002.

I. INTRODUCTION

Allergan, Inc., Allergan Limited, Allergan USA, Inc., Zeltiq Aesthetics, Inc., Zeltiq Ireland Unlimited Company, and Remed Co. Ltd. (collectively "Petitioner") filed a Petition (Paper 1 ("Pet.")) requesting post-grant review of claims 1–29 ("challenged claims") of U.S. Patent No. 10,709,895 B2 (Ex. 1001, "the '895 Patent"), along with the supporting Declaration of Dr. Pedro Irazoqui (Ex. 1023). The predecessor in interest of BTL Healthcare Technologies A.S. ("Patent Owner"), BTL Medical Technologies S.R.O., filed a Preliminary Response. Paper 7 ("Prelim. Resp."). With our authorization (Paper 9), Petitioner filed a Reply to Patent Owner's Preliminary Response (Paper 10, "Pet. Reply") and Patent Owner filed a Sur-Reply (Paper 13, "PO Sur-reply").

After considering the Petition, the Preliminary Response, the Reply, and the Sur-reply, as well as all supporting evidence, we exercise our discretion under 35 U.S.C. § 324(a) to deny institution for the reasons stated below.

II. BACKGROUND

A. Real Parties-in-Interest

Petitioner identifies as the real parties-in-interest the following: AbbVie Inc., Allergan, Inc., Allergan Limited, Allergan USA, Inc., Zeltiq Aesthetics, Inc., Zeltiq Ireland Unlimited Company, and Remed Co. Ltd. Pet. 122. Patent Owner names itself, BTL Medical Technologies S.R.O., and BTL Industries, Inc. as the real parties-in-interest. Paper 15, 1.

B. Related Matters

As required by 37 C.F.R. § 42.8(b)(2), each party identifies a judicial matter that would affect, or be affected by, a decision in this proceeding. In particular, the parties inform us that the '895 Patent is asserted in the

following district court case: *BTL Industries, Inc. v. Allergen Ltd.*, Case No. 1:20-cv-01046 (D. Del.) ("parallel district court proceeding"), which was filed August 5, 2020, and is stayed. Pet. 122–123; Paper 5, 2. The parties additionally identify the following proceeding as a related matter: Certain Non-Invasive Aesthetic Body Contouring Devices, Components Thereof, and Methods of Using the Same, Inv. No. 337-TA-1219 (ITC), filed August 5, 2020 ("the ITC proceeding"). Pet. 122–123; Paper 5, 2.

The '895 Patent is also the subject of PGR2021-00015. Paper 3, 2; Paper 5, 1. For the reasons given in our decision in PGR2021-00015, issued concurrently, we exercised our discretion under 35 U.S.C. § 324(a) to deny institution. Here, we turn to Petitioner's second ranked Petition. Paper 3, 2.

Petitioner also has filed contemporaneously petitions for *inter partes* review as follows: (1) a petition for *inter partes* review of U.S. Patent No. 10,493,293 (IPR2021-00296); and (2) a petition for *inter partes* review of U.S. Patent No. 10,478,634 (IPR2021-00312). Petitioner further has filed contemporaneously petitions for post-grant review of U.S. Patent No. 10,632,321 (PGR2021-00017 and PGR2021-00018); U.S. Patent No. 10,695,575 (PGR2021-00020 and PGR2021-00021); U.S. Patent No. 10,709,894 (PGR2021-00022 and PGR2021-00023); and U.S. Patent No. 10,695,576 (PGR2021-00024 and PGR2021-00025). Paper 5, 1.

C. The '895 Patent

The '895 Patent relates to devices and methods using the influence of magnetic and induced electric field on biological structure. Ex. 1001, 1:66–2:1. A circuit for providing high power pulses to the stimulating magnetic field generating device is shown in Figure 5b, reproduced below.

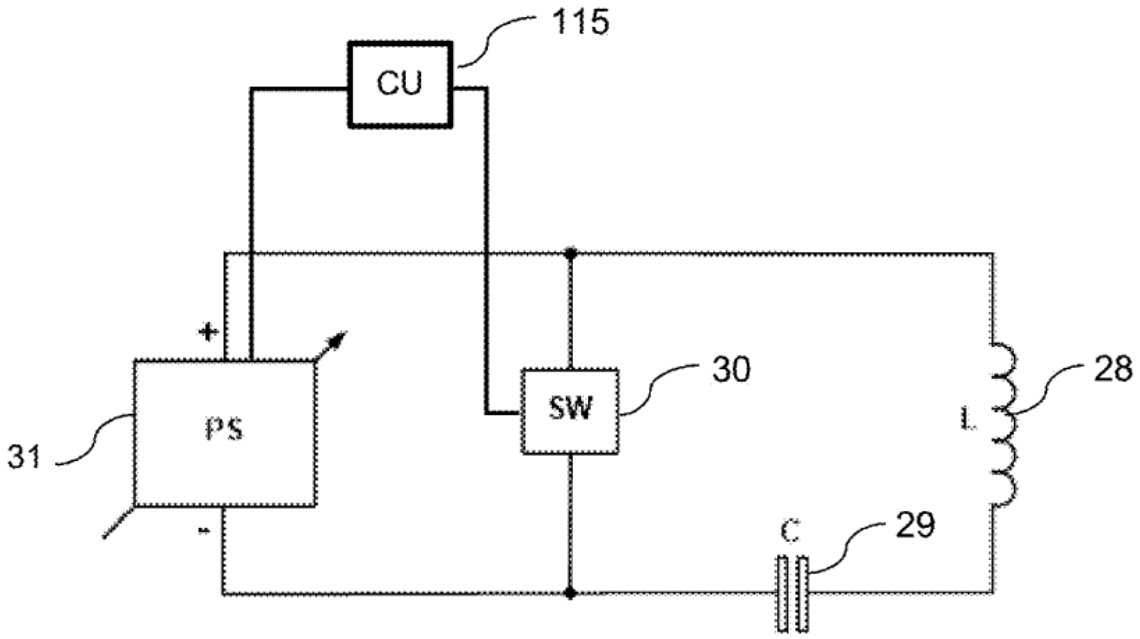

Figure 5b

Figure 5b, above, shows a circuit for providing high power pulses for improved function of a treatment device. *Id.* at 15:58–59.

Figure 5b, above, includes magnetic field generating device 28 and energy storage device 29 connected in series and disposed in parallel to switch 30. *Id.* at 15:59–62. To provide an energy pulse, controlled shorting of energy source 31 takes place through the switch 30. *Id.* at 15:63–65. Energy source 31 or switch 30, or alternately both, may be regulated by control unit 115. *Id.* at 16:2–6.

An exemplary embodiment of a magnetic treatment device including two independent magnetic field generating circuits is shown in Figure 12, reproduced below.

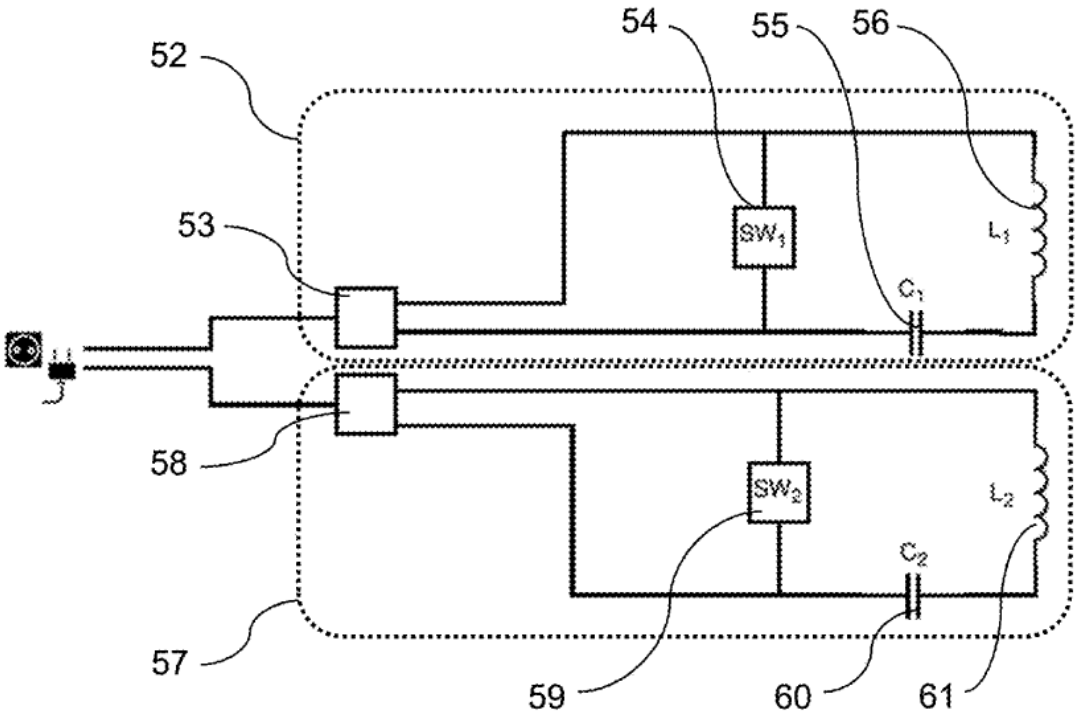

Figure 12

Figure 12, above, shows an embodiment of the magnetic treatment device including two independent magnetic field generating circuits. *Id.* at 19:41–43.

The circuit shown in Figure 12 above includes magnetic field generating circuit 52 and magnetic field generating circuit 57. *Id.* at Fig. 12, 19:43–49. Magnetic field generating circuit 52 includes energy source 53, switching device 54, energy storage device 55, and magnetic field generating device 56. *Id.* at 19:43-46. Magnetic field generating circuit 57 includes energy source 58, switching device 59, energy storage device 60, and magnetic field generating device 61. *Id.* at 19:46–49. A control unit controls providing energy from the energy storage devices to the coils to generate magnetic impulses by the coils. *Id.* at 20:7–10.

D. Illustrative Claims

Petitioner challenges claims 1–29 of the '895 Patent. Pet. 4. Claims 1, 6, 14, and 21 are the independent claims. Claims 2–5 depend directly from claim 1. Claims 7–13 depend, directly or indirectly, from claim 6. Claims 15–20 depend, directly or indirectly, from claim 14. Claims 22–29 depend, directly or indirectly, from claim 21. Independent claim 1, reproduced below, is illustrative of the claimed subject matter.

> 1. A method for toning a body region of a patient by applying a treatment using a treatment device which generates a time-varying magnetic field, the method comprising:
>
> coupling a first applicator and a second applicator of the treatment device to the body region of the patient by a belt;
>
> wherein the body region comprises one of a buttocks or an abdomen,
>
> wherein the first applicator has a first magnetic field generating coil disposed in the first applicator and the second applicator has a second magnetic field generating coil disposed in the second applicator,
>
> wherein the first magnetic field generating coil has a first inductance and the second magnetic field generating coil has a second inductance, wherein the first inductance is equal to the second inductance, and
>
> wherein the first applicator and the second applicator are independently positionable, and independently coupled to the body region of the patient by the belt;
>
> charging a first capacitor and a second capacitor of the treatment device;
>
> discharging the first capacitor to the first magnetic field generating coil to generate a first time-varying magnetic field having a magnetic flux density in a range of 0.5 Tesla to 7 Tesla, an impulse duration in a range of 3 μs to 1 ms, and a maximal value of a magnetic flux density derivative in a range of 0.5 kT/s to 400 kT/s;

discharging the second capacitor to the second magnetic field generating coil to generate a second time-varying magnetic field having a magnetic flux density in a range of 0.5 Tesla to 7 Tesla, an impulse duration in a range of 3 μs to 1 ms, and a maximal value of a magnetic flux density derivative in a range of 0.5 kT/s to 400 kT/s;

generating a plurality of pulses of the first time-varying magnetic field;

generating a first pulse of the first time-varying magnetic field such that the first pulse lasts for a time period, wherein the time period lasts from a beginning of a first impulse of the first time-varying magnetic field to a beginning of a next consecutive impulse of the first time-varying magnetic field;

generating a second pulse of the second time-varying magnetic field such that the second pulse lasts from a beginning of a first impulse of the second time-varying magnetic field to a beginning of a next consecutive impulse of the second time-varying magnetic field, such that the first impulse of the second time-varying magnetic field is generated during the time period of the first pulse,

wherein the plurality of pulses of the first time-varying magnetic field comprises a first plurality of pulses, a second plurality of pulses, and a third plurality of pulses,

wherein the first plurality of pulses comprises a first repetition rate in a range of 1 Hz to 100 Hz,

wherein the second plurality of pulses comprises a second repetition rate in a range of 10 Hz to 30 Hz, and wherein the first repetition rate differs from the second repetition rate,

wherein the third plurality of pulses comprises a third repetition rate, wherein the third repetition rate differs from the first repetition rate and the second repetition rate,

wherein the impulses are sinusoidal and biphasic; and

applying the first time-varying magnetic field including the first, the second, and the third pluralities of the pulses of the first time-varying magnetic field to a muscle fiber, a neuromuscular plate, or muscle within the body region of the patient such that a muscle contraction within the body region is caused by each of the first, the second, and the third pluralities of the pulses of the first time-varying magnetic field.

Ex. 1001, 108:7–109:13.

E. Evidence

Petitioner relies on the patent document references summarized in Table 1 below.

Name	Patent Document	Exhibit
Burnett '585	US 2003/0158585 A1	1039
Burnett '821	US 2012/0302821 A1	1040
Johari	US 2011/0172735 A1	1041
Anderson	US 8,834,547 B2	1021
Jalinous	US 5,718,662	1016
Phillips	US 7,591,776 B2	1018
Mo	US 2006/0187607 Al	1017

Petitioner relies on the non-patent literature references summarized in Table 2 below.

Name	Non-Patent Literature Title	Author	Exhibit
Magstim	*The Guide to Magnetic Stimulation*, The Magstim Company (July 2006).	Chris Hovey BSc, Reza Jalinous PhD	1015
Porcari	*Effects of Electrical Muscle Stimulation on Body Composition*, Muscle Strength, and Physical Appearance, Journal of Strength and Conditioning Research 165–172 (2002).	John P. Porcari, et al.	1019

Finally, Petitioner relies on the Declaration of Dr. Irazoqui (Ex. 1023) as supporting that the challenged claims are unpatentable.

F. Asserted Grounds

Petitioner asserts that the challenged claims of the '895 Patent are unpatentable based on the following grounds summarized in Table 3 below:

Claims Challenged	35 U.S.C. §[2]	References/Basis
1–4, 14–17, 19–26, 28, 29	103	Burnett '585, Johari
1, 4–13, 18, 27	103	Burnett '585, Burnett '821, Johari
5	103	Burnett '585, Burnett '821, Johari, Anderson
1, 3, 4	103	Magstim, Porcari, Jalinous
2, 14–17, 19–26, 28, 29	103	Magstim, Porcari, Jalinous, Mo
5–8, 10–12	103	Magstim, Porcari, Jalinous, Phillips
9, 18, 27	103	Magstim, Porcari, Jalinous, Mo, Phillips

[2] Because the challenged claims of the '895 Patent have an apparent effective filing date on or after March 16, 2013, the 35 U.S.C. §§ 102 and 103 provisions of the Leahy-Smith America Invents Act ("AIA"), Pub. L. No. 112-29, §§ 3(b)–3(c), 3(n)(1), 125 Stat. 284, 285–87, 293 (2011) apply and we apply the AIA versions of these statutes. The '895 Patent's filing date also is after the effective date set for the AIA's changes to § 112 and we apply the AIA version of that statute. *See* AIA § 4(e). Our application of the AIA law is not an affirmative ruling on the actual effective filing date of this patent.

III. DISCRETIONARY DENIAL OF THE PETITION

A. Overview

1. Background

Patent Owner contends we should exercise our discretion under 35 U.S.C. § 324(a) to deny post-grant review because the '895 patent is involved in parallel district court and ITC proceedings involving the same parties, claims, grounds, arguments, and evidence as presented in the Petition. Prelim. Resp. 4–21 (citing, *e.g.*, *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential) ("*Fintiv*")). Petitioner argues that we should not exercise discretion to deny institution because *Fintiv* should not apply to post-grant review proceedings, among other reasons. Pet. 104–105.

We begin by considering whether *Fintiv* should apply to the instant proceeding.

2. Legal Standards

35 U.S.C. § 324(a) states that

> [t]he Director may not authorize a post-grant review to be instituted unless the Director determines that the information presented in the petition filed under section 321, if such information is not rebutted, would demonstrate that it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable.

The portion of the statute reading "[t]he Director may not authorize . . . unless" mirrors the language of 35 U.S.C. § 314(a), which concerns *inter partes* review. This language of sections 314(a) and 324(a) provides the Director with discretion to deny institution of a petition. *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) ("[T]he agency's decision

to deny a petition is a matter committed to the Patent Office's discretion."); Consolidated Trial Practice Guide November 2019 ("TPG")[3] at 55.

In exercising the Director's discretion under 35 U.S.C. §§ 314(a) and 324(a), the Board may consider "events in other proceedings related to the same patent, either at the Office, in district courts, or the ITC." TPG at 58 (footnote omitted). The Board's precedential *NHK* decision explains that the Board may consider the advanced state of a related district court proceeding, among other considerations, as a "factor that weighs in favor of denying the Petition under § 314(a)." *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 at 20 (PTAB Sept. 12, 2018) (precedential) ("*NHK*").

The Board's precedential decision in *Fintiv* sets forth the following factors the Board balances when determining whether to exercise its discretion to deny institution:

> 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.

[3] Available at https://www.uspto.gov/TrialPracticeGuideConsolidated.

Fintiv, Paper 11 at 5–6. "[I]n evaluating the factors, the Board takes a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review." *Id.* at 6.

Petitioner argues that *Fintiv* does not apply to post-grant proceedings, distinguishing post-grant review proceedings from *inter partes* review proceedings on the basis that "the AIA provides only nine months in which to bring a PGR." Pet. 104. In the instant proceeding, however, the Petition was filed after institution of the ITC proceeding. *Id.* at 107. Petitioner asserts that applying the *Fintiv* factors "would be contrary to the policies underlying PGRs." *Id.* at 105. However, several Board decisions have already rejected policy-based arguments, like those advanced by Petitioner, that *Fintiv* should not apply to PGRs. *See, e.g., Apple Inc. v. Pinn, Inc.* PGR2020-00073, Paper 15 at 9–10 (PTAB Dec. 8, 2020) ("[T]he pertinent statutory language is the same in both section 314(a) and section 324(a). Moreover, the overall policy justifications associated with the exercise of discretion—inefficiency, duplication of effort, and the risk of inconsistent results—apply to post-grant review proceedings under 35 U.S.C. § 324(a)."); *TCO AS v. NCS Multistage Inc.,* PGR2020-00077, Paper 16 at 9–10 (PTAB Feb. 18, 2021). Petitioner does not provide persuasive reasoning why we should reach a different decision than was reached in these cases. To the extent Petitioner's arguments apply more generally to the application of *Fintiv* to any proceeding, we note that *Fintiv* has been designated as a precedential decision of the Board.

Accordingly, we apply the factors set forth in *Fintiv* to the facts here. *See*, *e.g.*, *Supercell Oy v. GREE, Inc.*, PGR2021-00014, Paper 10 at 4–7, 13 (PTAB May 19, 2021) (weighing *Fintiv* factors and denying institution of post-grant review); *Teva Pharms. USA, Inc. v. Corcept Therapeutics, Inc.*,

PGR2019-00048, Paper 19 at 11–12 (PTAB Nov. 20, 2019) (analyzing *NHK* and instituting trial).

B. Analysis of Fintiv *Factors*

1. Fintiv *Factor 1: Stay in the Parallel Proceeding*

Although the district court case is stayed until the ITC proceeding becomes final, Petitioner acknowledges that "[n]o stay has been requested in the ITC proceeding, and as a matter of course, the ITC does not stay investigations." Pet. 105. Under these circumstances, this factor is neutral.

2. Fintiv *Factor 2: Trial Date in the Parallel Proceeding*

Although a new schedule has been set in the ITC proceeding, under that schedule the ITC hearing concludes on July 6, 2021, which is shortly after the June 22, 2021 statutory deadline for this decision. Pet. Reply 6–7; PO Sur-reply 2. The Initial Determination in the ITC proceeding is due October 8, 2021, and the target date for the Final Determination is February 9, 2022. Pet. Reply 6–7 (citing Ex. 1112); PO Sur-reply 3.

Under factor 2, we consider the "proximity of the court's trial date to the Board's projected statutory deadline for a final written decision." *Fintiv*, Paper 11 at 5–6. The projected statutory deadline for a final written decision in this proceeding is June 22, 2022. If a court's trial date is earlier than the projected statutory deadline of a final written decision, "the Board generally has weighed this fact in favor of exercising authority to deny institution under *NHK*." *Id.* at 9. The hearing, Initial Determination, and the Final Determination in the ITC proceeding are scheduled ahead of the projected statutory deadline for a final written decision in this proceeding. Indeed, the Final Determination is more than four months before a final written decision would be due if we did institute a post-grant review.

Thus, this *Fintiv* factor favors the exercise of discretion to deny institution of post-grant review.

3. Fintiv *Factor 3: Investment by the Court and the Parties in the Parallel Proceeding*

With respect to the third *Fintiv* factor, Petitioner argues that its diligence in filing the Petition three months after institution of the ITC proceeding favors institution. Pet. 107. Patent Owner responds that "[t]he August 5, 2020 ITC Complaint put Petitioner on notice of the asserted claims more than four months before Petitioner filed the Petition." Prelim. Resp. 13. In its Reply, Petitioner does not dispute the timing of the ITC Complaint, but instead asserts that it "diligently prepared and filed twelve PGR petitions on more than 200 claims across seven patents in response to 85 claims across six patents asserted in the ITC." Pet. Reply 8.

Patent Owner argues that the third factor weighs heavily in favor of discretionary denial because, by the June 22, 2021 projected institution deadline, both the parties and the ITC will have invested significant time and resources in the parallel proceeding. Prelim. Resp. 12. Patent Owner's arguments in its Preliminary Response pertain to investments that would have been made based on the prior schedule that has been revised. *Id.* at 12–13. Petitioner responds that the investment by the parties in the ITC proceeding to date includes investment in resolving discovery disputes and investments relating to claims that have been withdrawn from the ITC proceeding. Pet. Reply 6, 8. Petitioner further asserts that claim construction in the ITC proceeding will not be addressed until post-hearing briefing and not decided until the Initial Determination. *Id.* at 7 (citing Ex. 1112). Patent Owner responds that even under the new ITC schedule before the projected statutory deadline for this decision "the parties will have completed fact and

expert discovery, fully briefed all claim construction issues, filed rehearing briefs, and completed six of seven days of the ITC hearing on all issues." PO Sur-reply 4 (citing Ex. 2023; Ex. 1112). Patent Owner also asserts

> [t]o date, there has been significant investment in the relevant validity issues: expert discovery on validity is complete; Allergan served opening witness statements on validity and the response is due May 17, 2021; the parties' pretrial briefs addressing all issues including validity will be filed May 19, 2021; and the parties are currently preparing for a six-day hearing next month.

Id. at 5 (citing Ex. 1112, 1–3).

We recognize that *Fintiv* provides that a petitioner's diligence in filing a petition may be relevant under the third *Fintiv* factor. *Fintiv*, Paper 11 at 11–12. Nevertheless, under the circumstances present here including investment that has been made in the ITC proceeding and the overlap in this and the ITC proceeding (*see infra* § III.B.4), we find that the timing of the filing of the Petition here does not outweigh the investment by the parties in the ITC proceeding that will address many of the same issues presented here if we were to institute. As discussed above, before the projected statutory deadline for this decision, the ITC hearing on all issues will be nearly complete, as well as discovery, pre-trial briefs addressing validity, and preparation for the hearing. Thus, the parties have invested time and effort addressing patent validity on the same prior art in preparing for and conducting a trial in the ITC proceeding. Accordingly, this factor is neutral.

4. Fintiv *Factor 4: Overlap Between Issues Raised in the Petition and Parallel Proceeding*

Patent Owner argues that "the Petition includes the same grounds, arguments, and evidence that Petitioner submitted in its ITC invalidity contentions." Prelim. Resp. 14 (citing Pet. 107). In its Sur-reply, Patent

Owner argues that "Petitioner raises the same § 112 issues in its top-ranked Petitions as in the ITC" and "Petitioner asserts the same art and arguments in its Petitions and at the ITC." PO Sur-reply 6. Patent Owner further argues

> the ITC will resolve overlapping and ***dispositive*** issues that cut across all the patents. As to the top-ranked Petitions, the ITC will address whether Pop is prior art. POPR, 51–73. It will also address the overlapping § 112 issues. *Id.*, 41–51. As to the second-ranked Petitions, the ITC will address whether Burnett '585 teaches two capacitors, *see*, *e.g.*, '016 POPR, 38-44, and whether Magstim teaches magnetic stimulation using separate applicators, *id.*, 46–50.

PO Sur-reply 7.

Petitioner does not dispute Patent Owner's contentions that the same grounds, arguments, and evidence are presented in the Petition and in the ITC proceeding. *See generally* Pet. Reply. Petitioner argues that Patent Owner withdrew all but five claims in the ITC proceeding, whereas in the instant proceeding all 29 patent claims are challenged. Pet. Reply 2. Petitioner also asserts that the claims asserted in the ITC proceeding "do not recite significant limitations of the other '895 claims." *Id.* at 3. Petitioner identifies the following limitations as significant (1) cooling the coils (claims 11, 18, and 27), (2) using flat and/or circular coils (claims 3, 15, and 25), and (3) simultaneously applying the time-varying magnetic fields (claims 17 and 23). *Id.*

The claims of the '895 Patent are lengthy and the Petition includes cross-references indicating that the same contentions apply to both asserted and non-asserted claims, which is consistent with Patent Owner's position that Petitioner does not dispute that the non-asserted claims are substantially similar to the claims asserted in the ITC proceeding. *See generally* Pet. Petitioner identifies single limitations in only some non-asserted claims as

significant, but Petitioner's analysis regarding the significance is conclusory. Pet. 3–4. On this record, Petitioner has not persuaded us that any of the limitations it identifies as significantly meaningful differentiates the claims challenged in this proceeding from those asserted in the ITC proceeding.

The fourth *Fintiv* factor involves consideration of inefficiency concerns and the possibility of conflicting decisions. *Fintiv*, Paper 11 at 12. Therefore, "if the petition includes the same or substantially the same claims, grounds, arguments, and evidence as presented in the parallel proceeding, this fact has favored denial." *Id.* "Conversely, if the petition includes materially different grounds, arguments, and/or evidence than those presented in the district court, this fact has tended to weigh against exercising discretion to deny institution." *Id.* at 12–13.

As discussed, the Petition challenges the same five claims that are asserted in the ITC proceeding. The claims not asserted in the ITC proceeding raise similar issues as the asserted claims. Under these circumstances, we view this factor as weighing in favor of denial.[4]

5. Fintiv *Factor 5: Whether Petitioner is the Defendant in the Parallel Proceeding*

Petitioner asserts that Remed Co. Ltd. has an interest in challenging the '895 patent and is not a party to the ITC proceeding. *See* Pet. 107. Petitioner does not dispute that the remaining Petitioners, i.e., Allergan, Inc.,

[4] Patent Owner provides a stipulation that Patent Owner will not assert additional or invalid claims against current defendants in the parallel district court proceeding. Prelim. Resp. 18. Petitioner argues the stipulation should be given no weight because the parties in the proceedings are not identical. Pet. Reply 5–6. Patent Owner's stipulation is not necessary for our determination and, because the parties in the proceedings are not identical, we do not make further determinations regarding the stipulation.

Allergan Limited, Allergan USA, Inc., Zeltiq Aesthetics, Inc., and Zeltiq Ireland Unlimited Company are involved in the parallel proceedings. *Id.*

Because the Petition was filed after institution of the ITC proceeding (Pet. 107), Remed Co. Ltd. was aware that the other petitioners are parties to the ITC proceeding. Nevertheless, the parties in this proceeding and the ITC proceeding are not identical.

Under these circumstances, we view this factor as neutral.

6. Fintiv *Factor 6: Other Considerations*

Under the sixth *Fintiv* factor, which takes into account any other relevant circumstances, Petitioner argues that the merits favor institution. Pet. 108. We have considered Petitioner's arguments and do not find the merits of Petitioner's arguments to be so strong as to weigh in favor of institution.

In its Reply, Petitioner also argues that ongoing prosecution of similar claims in other applications favors institution. Pet. Reply 4–5. Petitioner was not authorized to include these arguments in its Reply. *See* Paper 9, 2–3. Under these circumstances, we are not persuaded that even if true this fact weighs towards not exercising discretion.

Under these circumstances, we view this factor as neutral.

C. Conclusion

Based on the particular circumstances of this case, we determine that instituting a post-grant review would be an inefficient use of Board resources. As discussed above, the Final Determination in the ITC proceeding is more than four months before a final written decision would be due if we did institute a post-grant review and the issues presented in this proceeding overlap significantly those issues in the ITC proceeding. Two

factors weigh in favor of exercising discretion to deny institution and four factors are neutral. No considerations weigh against the exercise of discretionary denial in this case.

On balance, after a holistic consideration of the relevant facts and the particular circumstances of this case, we conclude that efficiency and integrity of the system are best served by denying institution. Thus, we exercise our discretion under § 324(a) to deny institution.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that the Petition is denied, and no trial is instituted.

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