

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SUPERCELL OY,
Petitioner,

v.

GREE, INC.,
Patent Owner.

IPR2020-00513
Patent 9,774,655 B2

Before MICHAEL W. KIM, LYNNE H. BROWNE, and
AMANDA F. WIEKER, *Administrative Patent Judges*.

WIEKER, *Administrative Patent Judge*.

DECISION
Denying Institution of *Inter Partes* Review
35 U.S.C. § 314

I. INTRODUCTION

A. *Background*

Supercell Oy (“Petitioner”) filed a Petition requesting *inter partes* review of claims 1–8 (“challenged claims”) of U.S. Patent No. 9,774,655 B2 (Ex. 1001, “the ’655 patent”). Paper 1 (“Pet.”). GREE, Inc. (“Patent Owner”) filed a Preliminary Response. Paper 6 (“Prelim. Resp.”). With our authorization, Petitioner filed a Preliminary Reply (Paper 8, “Prelim. Reply”), and Patent Owner filed a Preliminary Sur-reply (Paper 10, “Prelim. Sur-reply”), to address, *inter alia*, 35 U.S.C. § 314(a).

Having considered the arguments and evidence of record, and for the reasons explained below, we exercise our discretion under 35 U.S.C. § 314(a) and deny institution of *inter partes* review.

B. *Related Proceedings*

The parties identify the following matters related to the ’655 patent:

GREE, Inc. v. Supercell OY, No. 2:19-cv-00070 (E.D. Tex.) (the “parallel proceeding”);

Supercell OY v. GREE, Inc., No. 3-19-cv-01106 (N.D. Cal.);

U.S. Patent Application Number 15/638,730; and

U.S. Patent Application Number 16/418,728.

Pet. 1–2; Paper 4, 2–3.

C. *The ’655 Patent*

The ’655 patent is titled “Server and Method for Transferring an Object Between Users in a Service Provided by the Server,” and issued on September 26, 2017, from U.S. Patent Application No. 14/428,251. Ex. 1001, codes (21), (45), (54).

The '655 patent discloses a method of transferring an object from a first user to a second user, in the context of a social game, to encourage users to purchase items or give them as gifts. *Id.* at code (57).

D. Illustrative Claim

Of the challenged claims, claims 1, 7, and 8 are independent. Claim 1 is illustrative and is reproduced below.

1. A server for providing a service to a plurality of devices respectively used by a plurality of users, and communicating with the plurality of devices, the server comprising:

a storage medium for storing possessed objects respectively possessed by the plurality of users, acquired in the service and used in the service, wherein the storage medium stores, for each of the plurality of users, transfer information indicating a transfer or a user who has transferred an object to any of the plurality of the users;

a communication module for sending, to a device of a first user among the plurality of users, display data for selecting a first object from the possessed objects possessed by the first user and selecting a second user from the plurality of users, wherein the communication module receives from the device of the first user a request for transfer of the selected first object from the first user to the second user; and

a processor configured to:

update the transfer information of the second user in response to the request for transfer, for determining;

determine whether the transfer information of the second user satisfies a condition for granting a second object when the first object is transferred in response to the request for transfer, for granting;

grant the second object used in the service to the second user if the transfer information of the second user satisfies the condition for granting the second object; and

for notifying control notifying the device of the second user that the first object is transferred, or that the second object is granted.

Ex. 1001, 17:11–43.

E. Applied References

Petitioner relies upon the following references:

Mahajan et al, U.S. Patent No. 8,727,887 B2, filed Sept. 26, 2011, issued May 20, 2014 (Ex. 1005, “Mahajan”);

FarmVille for Dummies, Wiley Publishing, Inc., Angela Morales and Kyle Orland (2011) (Ex. 1006, “FarmVille”);

Williams et al., U.S. Patent Application Publication No. US 2017/0300987 A1, filed July 5, 2017, published Oct. 19, 2017 (Ex. 1007, “Williams”); and

Beares, U.S. Patent Application Publication No. 2008/0034061 A1, filed Aug. 7, 2007, published Feb. 7, 2008 (Ex. 1008, “Beares”).

Pet. 10. Petitioner also relies upon the Declaration of Jose P. Zagal, Ph.D. Ex. 1003.

F. Asserted Grounds of Unpatentability

Petitioner challenges the patentability of claims 1–8 of the ’655 patent based on the following grounds. Pet. 3.

Claim(s) Challenged	35 U.S.C. §	Reference(s)/Basis
1, 2, 4–8	103	Mahajan, FarmVille, Williams
3	103	Mahajan, FarmVille, Williams, and Beares

II. DISCUSSION

A. Discretion under 35 U.S.C. § 314(a)

1. Legal Standards

Institution of an *inter partes* review under 35 U.S.C. § 314(a) is discretionary. *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.”). In exercising that discretion, 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); *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 5–6 (PTAB Mar. 20, 2020) (precedential) (“the *Fintiv* Order”).¹

The precedential *Fintiv* Order identifies several factors to be considered in analyzing § 314(a) issues, with the goal of balancing efficiency, fairness, and patent quality. *See Fintiv* Order, Paper 11 at 5–6. These factors include: 1) whether a stay exists or is likely to be granted if a proceeding is instituted; 2) proximity of the court’s trial date to the Board’s projected statutory deadline; 3) investment in the parallel proceeding by the court and 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 and

¹ The *Fintiv* Order was designated precedential on May 5, 2020, after the Petition was filed, but prior to the Preliminary Response, Reply, or Sur-reply.

considerations that impact the Board's exercise of discretion, including the merits. *Id.*

2. *Factual Background*

The record before us presents the following facts related to the parallel proceeding, which are pertinent to discretion under 35 U.S.C. § 314(a).

On February 27, 2019, Patent Owner filed its complaint against Petitioner in the Eastern District of Texas. Ex. 1011, 2 (docket #1).

On September 19, 2019, Petitioner served invalidity contentions. Exs. 2002–2005; Prelim. Reply 4.

On December 18, 2019, Patent Owner served amended infringement contentions.² Ex. 1013; Prelim. Reply 4.

On February 3, 2020, Petitioner filed its Petition in this proceeding. Paper 1.

Throughout February and March 2020, the parties submitted claim construction briefing in the parallel proceeding. *See* Ex. 1010, 1 (briefing between February 25, 2020 and March 17, 2020); Ex. 2006 (joint claim construction chart filed March 24, 2020). On April 14, 2020, a *Markman* hearing was conducted. Ex. 1010, 1. On May 11, 2020, the Magistrate Judge issued a Claim Construction Memorandum Opinion and Order. Ex. 1010; Ex. 2009.³

² The record does not indicate when Patent Owner filed initial infringement contentions.

³ On May 26, 2020, Petitioner objected to the Claim Construction Memorandum Opinion and Order and, on June 10, 2020, Patent Owner responded. Ex. 3001, 38 (docket #185), 44 (docket #220). The district court has not ruled on the objection.

On April 23, 2020, Petitioner filed a motion in the parallel proceeding to continue all case deadlines for 45 to 60 days, “in view of the extraordinary impact caused by the COVID-19 virus on the Parties.” Ex. 2007, 1–2; Prelim. Resp. 15–16 n.3. On May 20, 2020, that motion was denied. Ex. 2011.⁴

On May 4, 2020 and May 26, 2020, opening and rebuttal expert reports were due. Ex. 2001, 3; Prelim. Resp. 14. On June 8, 2020, expert discovery closed and dispositive motions were due. Ex. 2012. Responses to the dispositive motions were due on June 22, 2020. *Id.* Motions *in limine* were also due on June 22, 2020. *Id.*

Trial is scheduled to begin in the parallel proceeding on August 3, 2020. Ex. 2008; Prelim. Resp. 14.

3. Analysis

With this background, we consider each of the factors set forth in the precedential *Fintiv* Order.

Factor 1: whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted

Patent Owner argues that Petitioner has not moved for a stay of the parallel proceeding. Prelim. Resp. 18; Prelim. Sur-reply 3. Petitioner does not dispute this fact. Prelim. Reply 3. Accordingly, we have no evidence in the record that either party has moved for, or intends to move for, a stay of the parallel proceeding, that the district court has granted a stay, or that the

⁴ On May 26, 2020, Petitioner objected to the denial of its Motion. Ex. 3001, 38 (docket #184). Patent Owner responded, Petitioner filed a Reply, and Patent Owner filed a Sur-reply. Ex. 3001, 39 (docket #189), 43 (docket #214), 45 (docket # 226). The district court has not ruled on the objection.

district court has otherwise commented on the possibility of a stay in this case.

Petitioner argues it is unfair to consider whether it has moved for a stay because the district court typically denies such motions if filed before the Board has determined whether to institute an *inter partes* review. Prelim. Reply 3. Therefore, Petitioner argues this “presents an unfair chicken or egg scenario in which both the Board and the court decline to act based on the other’s inaction.” *Id.*

We recognize there are many legitimate reasons that may lead a party *not* to file a motion to stay a parallel proceeding prior to the Board’s institution decision, including because such a motion may be viewed as premature. Be that as it may, our precedential guidance instructs us to consider whether the court has granted a stay, or whether evidence exists that a stay may be granted upon institution. *Fintiv* Order, Paper 11 at 5–6. As it stands, the record lacks any evidence to suggest that a stay has been granted, or may be granted in the future. Moreover, Petitioner has not indicated that it would, in fact, seek a stay if an *inter partes* review were instituted.

For these reasons, we determine that the facts underlying this factor are neutral.

Factor 2: proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision

Patent Owner states that a jury trial is scheduled to begin on August 3, 2020, which is approximately twelve months before a final written decision would be due in this proceeding, if instituted at the institution due date. Prelim. Resp. 14. According to Patent Owner, the Board has consistently

denied institution with even smaller periods of time between trial and a final written decision. *Id.* at 14–15 (identifying denials where six months, nine months, or “several” months existed between trial and a final written decision deadline).

The record shows that, on May 7, 2020, the district court accelerated the trial date in the parallel proceeding by two weeks, such that trial is scheduled to begin on August 3, 2020. *Compare* Ex. 2001, with Ex. 2008. If we were to institute an *inter partes* review in this proceeding, our Final Written Decision would be due in late June of 2021—nearly eleven months *after* trial in the parallel proceeding. These facts create a cognizable risk of inconsistent results across the proceedings. *See also infra* pages 13–14.

Petitioner argues that trial in the parallel proceeding may not occur at the scheduled date, for example, due to complications arising from COVID-19. Prelim. Reply 5–6. However, Petitioner already sought—and was denied—a continuance in the district court on this basis. Ex. 2011 (denying 45–60 day continuance requested to account for difficulties caused by COVID-19); *see supra* n.4 (identifying Petitioner’s objection to the district court’s order); Prelim. Sur-reply 4. Even if the district court were to reconsider its position and grant Petitioner’s requested 60-day continuance, trial in the parallel proceeding would still occur nearly nine months before our Final Written Decision is due. Prelim. Resp. 16; Ex. 2007 (“[Petitioner] moves for a 45- to 60-day continuance of the remaining case deadlines, including the pretrial and trial dates”). In keeping with precedent, a jury trial set to begin nine months before a statutory deadline would weigh in favor of denial.

Petitioner also argues that our consideration of the trial date in a parallel proceeding is unfair because, when sued in fast-moving jurisdictions, the Board's statutory due date for the final written decision will almost always occur after trial in the parallel proceeding *even if* a petitioner filed its petition on the *same day* it is served in district court. Prelim. Reply 2.

We appreciate that, when sued in a fast-moving jurisdiction, this factor may often weigh toward denial, even if a petitioner files its petition very quickly.⁵ We note, however, that this factor is not dispositive and is not considered in isolation, but holistically along with other factors. *Fintiv* Order, Paper 11 at 6. Further, 35 U.S.C. § 314(a) affords the Director discretion in determining whether to institute an *inter partes* review. The Director has shaped some contours of that discretion through the precedential guidance offered in *NHK Spring* and the *Fintiv* Order. As such, we are constrained to follow that guidance, regardless of Petitioner's argument regarding the practicalities of lawsuits filed in fast-moving jurisdictions.

For these reasons, where trial in the parallel proceeding is scheduled to occur nearly eleven months prior to our Final Written Decision, we determine that the facts underlying this factor weigh strongly toward denying institution.

⁵ Here, despite being sued in a fast-moving jurisdiction, Petitioner filed its petition eleven months after being served with the Complaint. *See supra* page 6.

Factor 3: investment in the parallel proceeding by the court and the parties

Patent Owner contends that “the parties and the district court have each already invested, and will have invested even more, substantial resources in the parallel proceeding—including preparing for and holding a jury trial—by the time this Board decides whether to institute.” Prelim. Resp. 13–14. Patent Owner also alleges that Petitioner delayed in filing the Petition in this proceeding and “was undisputedly aware of the asserted prior art months before the filing of the Petition.” *Id.* at 17–18.

Petitioner does not dispute the investments identified by Patent Owner, but instead argues that Patent Owner “withheld its actual infringement theory from Petitioner . . . until December 18, 2019, when it served amended infringement contentions,” and explains that the Petition was filed within six weeks of those contentions. Prelim. Reply 3–4. Petitioner argues that Patent Owner has not articulated any harm with respect to Petitioner’s “so-called delay” in filing its Petition and “any unfair costs” are a result of Patent Owner’s choice to sue Petitioner in a fast-moving jurisdiction. *Id.* at 4.

As an initial matter, we note that 35 U.S.C. § 315(b) affords petitioner one year to file a petition after being served with a complaint in district court. Petitioner complied with § 315(b). However, the fact remains that although Petitioner filed within the statutory period, substantial investments in the parallel proceeding have been made since the complaint was filed. For example, claim construction has been briefed and argued, and the district court issued its Opinion and Order. Ex. 1010. Fact discovery closed on May 8, 2020, and expert discovery closed on June 8, 2020. Ex. 2001;

Ex. 2012. Pretrial disclosures and dispositive motions were due on June 8, 2020, and responses to the disclosures and motions were due on June 15, 2020, and June 22, 2020, respectively. Ex. 2012. Motions *in limine* were also due on June 22, 2020. *Id.*; *see also* Prelim. Sur-reply 5–7.

Activity appears to be ongoing in the time that remains before trial. For example, on July 6, 2020, the parties must file a Joint Pretrial Order, Proposed Jury Instructions, and a Proposed Verdict Form, and must respond to motions *in limine*. *Id.* And, on July 20, 2020, a pretrial conference is scheduled. *Id.* Moreover, we are cognizant that there are significant resources associated with conducting the trial itself, as well as potential post-trial proceedings. Nonetheless, to date, substantial resources have been expended by both the district court and the parties. The date on which Petitioner was served with amended infringement contentions is certainly a fact that weighs in favor of Petitioner. It does not alone, however, change the fact that these significant resources have already been expended. Prelim. Reply 3–4.

As explained in the *Fintiv* Order, “[t]his investment factor is related to the trial date factor, in that more work completed by the parties and the court in the parallel proceeding tends to support the arguments that the parallel proceeding is more advanced, a stay may be less likely, and instituting would lead to duplicative costs.” *Fintiv* Order, Paper 11 at 10. In this case, the work already completed by the parties and the court in the parallel proceeding are facts underlying this factor that collectively weigh strongly in favor of denying institution.

Factor 4: overlap between issues raised in the petition and in the parallel proceeding

Patent Owner argues that “Petitioner relies on the same prior art (Mahajan, FarmVille, Williams, and Beares) in its district court Invalidity Contentions as that asserted in the Petition,” and “articulate[s] substantially the same arguments.” Prelim. Resp. 7, 9. Patent Owner acknowledges that claims 2–4 are challenged only in the Petition, not in district court, but alleges that each depends from claim 1 such that “resolution of Petitioner’s challenges to all independent claims of the ’655 Patent, including claim 1, at the district court will necessarily resolve key issues in the instant Petition, including with respect to dependent claims 2–4.” *Id.* at 11, 12 (claims 2–4 not asserted in district court). Petitioner does not dispute this overlap but, instead, argues that this factor unfairly “casts a chilling effect on defendants from offering prior art in a district court just to increase the chances of IPR institution,” and disserves the public interest “by requiring petitioner-defendants to argue distinct and different invalidity theories and withhold prior art necessary to show the public already had access to the alleged invention.” Prelim. Reply 3.

Ultimately, we agree with Patent Owner. Petitioner does not dispute that the Petition presents substantially identical prior art and arguments as presented to the district court. Under the *Fintiv* Order, “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” because “concerns of inefficiency and the possibility of conflicting decisions [are] particularly strong.” *Fintiv* Order, Paper 11 at 12. We recognize Petitioner’s policy arguments against this factor but, as discussed

earlier, we are constrained by binding Board precedent, which dictates that we consider this factor in this manner.

On this record, we determine that the facts underlying this factor weigh in favor of denying institution. *Id.*

Factor 5: whether Petitioner and the defendant in the parallel proceeding are the same party

This *Fintiv* Order factor requires that “[i]f a petitioner is unrelated to a defendant in an earlier court proceeding, the Board has weighed this fact against exercising discretion to deny institution under *NHK*.” *Fintiv* Order, Paper 11 at 13–14. The parties do not dispute that Petitioner is the defendant in the parallel proceeding. Prelim. Resp. 7; Prelim. Reply 3.

Petitioner argues that this factor “should be given little weight because almost all IPRs in which § 314(a) issues arise naturally involve the same parties.” Prelim. Reply. 3. Be that as it may, as discussed earlier, we are constrained by binding Board precedent, which dictates that we consider this factor in this manner.

For the reasons discussed above, we find a strong likelihood, on this record, that the district court will reach the same invalidity issues in the parallel proceeding involving the same parties prior to the Board reaching a final decision on the Petition. *See supra* pages 13–14. Thus, the fact that the Petitioner here is the same as the defendant in the parallel proceeding weighs in favor of denying institution.

Factor 6: other circumstances that impact the Board’s exercise of discretion, including the merits

Petitioner’s asserted grounds of unpatentability turn on the combination of the teachings of Mahajan, FarmVille, and Williams, in further combination with Beares with respect to claim 3. Pet. 36–63.

Petitioner presents a section of the Petition titled “Motivations to Combine the Prior Art References,” which asserts that each reference “expressly teaches modifications, variations[,] and improvements to social networking services and social games,” and that a skilled artisan “would know of various games features and techniques from which he or she could draw when creating new social network games or services,” including the “concept of sending or transferring items amongst users,” “games played on social networks on various devices (web-based, app-based, etc.) providing user interface elements commonly,” and “the hardware elements of social network servers and user devices.” *Id.* at 35–36. Petitioner contends that “[n]othing in these references teaches away from their combination.” *Id.* at 36.

With respect to the merits of the asserted grounds, Patent Owner argues, *inter alia*, that “Petitioner fails to answer the essential question of *why* or *how*” a skilled artisan “would combine the teachings of the prior art in the ways Petitioner alleges.” Prelim. Resp. 29; *see also id.* at 24–29 (arguments regarding printed publication status), 29–39 (arguments regarding motivation to combine), 39–46 (arguments regarding specific claim limitations). Without conducting a full analysis, *see Fintiv Order*, Paper 11 at 14–16, we see merit in Patent Owner’s argument. The “Motivations to Combine the Prior Art References” section of the Petition simply asserts that the references are analogous, the references provide well understood teachings regarding social games, and the references do not teach against their combination. Pet. 35–36. We are persuaded that is insufficient to establish obviousness here. For the particular combination set forth here, we are persuaded that an affirmative rationale or reason to combine specific

teachings of the references needed to have been provided. *See, e.g., KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007); *In re Nuvasive, Inc.*, 842 F.3d 1376, 1382–83 (Fed. Cir. 2016) (“[T]he PTAB must articulate a reason why a PHOSITA would combine the prior art references. . . . ‘[C]onclusory statements’ alone are insufficient and, instead, the finding must be supported by a ‘reasoned explanation.’”). Generic conclusions that the references *could* have been combined is insufficient. *Belden Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1073 (Fed. Cir. 2015) (“[O]bviousness concerns whether a skilled artisan not only could have made but would have been motivated to make the combinations or modifications of prior art to arrive at the claimed invention.”).

Petitioner also relies upon the Declaration of Dr. Zagal to support its contentions. *See* Pet. 36–63 (citing Ex. 1003, *passim*). In some instances, Dr. Zagal appears to provide specific, affirmative reasons why a skilled artisan would have found a proposed combination to be obvious, although such reasoning is not provided in the Petition. *Compare* Pet. 45–46 (asserting that the references “are in the same field of endeavor with similar features for transferring virtual items amongst players, and incorporating these features is nothing more than a combination of prior art elements according to known methods to yield predictable results”), *with* Ex. 1003 ¶ 165 (Dr. Zagal’s opinion that the proposed combination would allow the system to “keep track of all objects transferred in the game”); *but see* 37 C.F.R. § 42.6(a)(3) (“Arguments must not be incorporated by reference from one document into another document.”). In other instances, however, both the Petition and Dr. Zagal’s declaration appear to fail to provide a specific reason why the proposed combination would have been obvious. *Compare*

Pet. 49–50 (asserting that the references are “both directed to implementations of social network games and improving user social interactions . . . and their combination is simply a combination of prior art elements according to known methods to yield predictable results”), *with* Ex. 1003 ¶¶ 187–191, 265, 278 (substantially similar testimony). Thus, an initial review of the merits of the Petition suggests that the merits are not particularly strong.

As an additional circumstance relevant to this factor, Petitioner states that Patent Owner

has two continuations of the ’655 patent pending, one of which is allowed. Since it is impossible for Petitioner to obtain an FWD deadline before a scheduled trial date in this situation, a holistic view considering efficiency and integrity favors institution now to “protect the public’s ‘paramount interest in seeing that patent monopolies . . . are kept within their legitimate scope.’”

Prelim. Reply 5. These facts do weigh in Petitioner’s favor. As discussed above regarding the second *Fintiv* Factor, however, we are constrained to follow the guidance set forth in *NHK Spring* and the *Fintiv* Order, which do not allow us to accord dispositive weight to Petitioner’s argument regarding the practicalities of challenging, through *inter partes* review, those patents that have been asserted in lawsuits filed in fast-moving jurisdictions.

For these reasons, the merits of the proceeding weigh in favor of denying institution, and Petitioner’s additional argument does not change that outcome.

Holistic Analysis of Fintiv Order Factors

A balancing of the facts and circumstances discussed above leads us to conclude, on this record, that the possibility of duplication of efforts here is high and the potential for inconsistent results due to both tribunals

considering overlapping issues is present. Specifically, a jury trial is currently scheduled to begin nearly eleven months before the statutory deadline for our final written decision; substantial resources already have been invested by the district court and the parties in the parallel proceeding, regarding claim construction, fact discovery, expert discovery, and dispositive motions; there is substantial—but not complete—overlap in the invalidity issues raised in the Petition and in the parallel proceeding, which involves the same parties; and Patent Owner has identified weaknesses in the merits of Petitioner’s asserted grounds of unpatentability. The other policy issues raised by Petitioner are not within our purview to consider, in light of binding precedent.

Accordingly, we determine that the circumstances presented strongly weigh in favor of denying institution under 35 U.S.C. § 314(a).

III. CONCLUSION

Taking account of the information presented in the Petition, the Preliminary Response, and the evidence of record, we exercise our discretion under 35 U.S.C. § 314(a) and deny institution of an *inter partes* review. Accordingly, the Petition is denied, and no trial is instituted.

IV. ORDER

Upon consideration of the record before us, it is:

ORDERED that the Petition is *denied* as to all challenged claims, and no trial is instituted.

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