

The Staying Power of *Fintiv*: The Effect of Parallel Litigation at the PTAB in 2023

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In 2023, *Fintiv*¹—the precedential Order issued in 2020 that established a six-factor framework that the Patent Trial and Appeal Board (PTAB) applies when evaluating whether to exercise its discretion to institute an America Invents Act (AIA) trial when there is co-pending litigation—continued to grab headlines and spark controversy. It has, thus far, survived myriad efforts to curtail the PTAB’s discretion at institution. At the time of our last report,² there were efforts to modify, limit, or abolish the *Fintiv* framework—several of which continue to exist in some form today. First, some stakeholders argued that the PTAB’s application of *Fintiv* to deny institution improperly refuses to review meritorious petitions contrary to the intent of AIA trials as being low-cost alternatives to district court litigation.³ Second, members of Congress had proposed legislation aimed to rein in the PTAB’s discretion.⁴ Third, legal challenges to *Fintiv* were working their way through federal courts.⁵ Fourth, President Biden appointed a new Director of the U.S. Patent and Trademark Office (USPTO), Kathi Vidal, who acknowledged during her Senate committee hearing a desire to address *Fintiv* policy, leaving many open questions as to how she would shape that policy.⁶

So far, Director Vidal’s appointment has shaped *Fintiv*’s impact the most. In June 2022, she issued a Memorandum that provides guidance on how and when panels should apply the *Fintiv* framework (“Guidance Memo”).⁷ And in 2023, she issued the precedential *Commscope*⁸ decision, in which she clarified how the PTAB should apply *Fintiv* factors and evaluate a petition that presents a challenge having “compelling merits.”

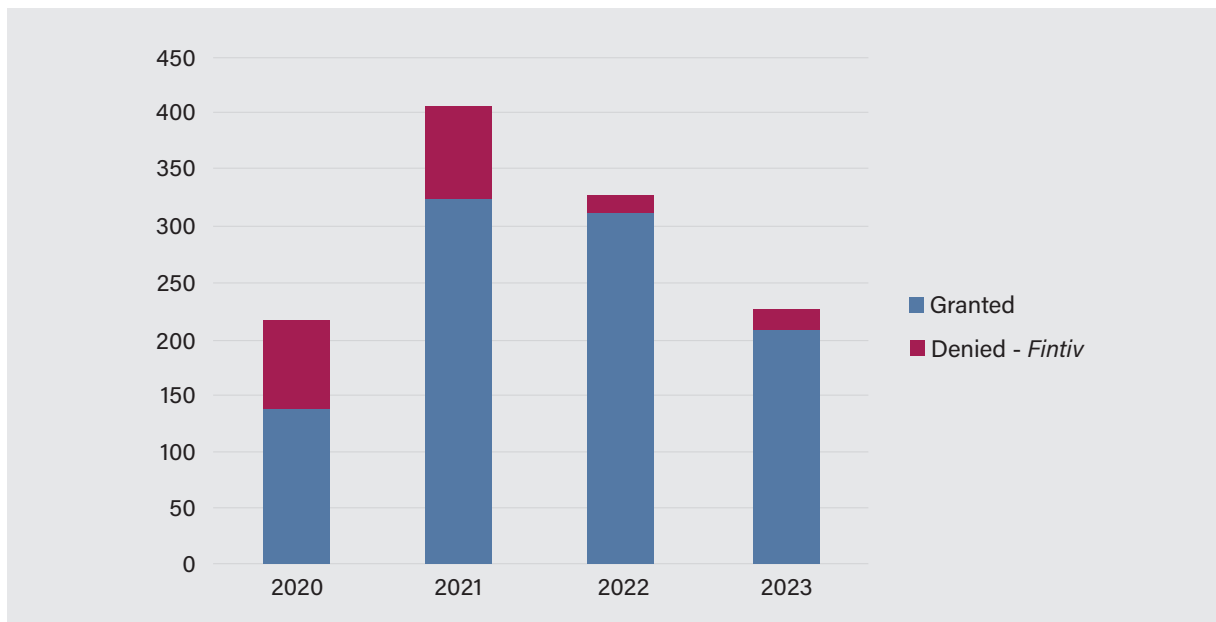
Keeping these developments in mind, we continue here our data-driven analysis of PTAB decisions applying the *Fintiv* framework. Figure 1 shows the number of institution decisions in which the PTAB evaluated the *Fintiv* factors, broken down by year. Out of those cases, Figure 1 delineates between decisions that denied review based on *Fintiv* (indicated by red) and decisions that instituted review (indicated by blue). Figure 1 does not track decisions that denied review for other reasons, such as the merits.

While *Fintiv* denials are nowhere near their peak rate from 2021, *Fintiv* is still a common issue in PTAB proceedings. As indicated above in Figure 1, the PTAB still considers the *Fintiv* factors in a significant number of cases. Given that *Fintiv* is a key issue for any party facing parallel patent litigation, we continued to monitor *Fintiv* denial rates and review recent institution decisions to shed light on how the PTAB applies *Fintiv* following the Director’s Guidance Memo and subsequent precedential PTAB case law. Practitioners should be mindful of the latest statistical trends to accurately gauge *Fintiv*’s influence on litigation strategy. Before analyzing the latest trends, we provide a brief background and recap of the recent developments that have directly shaped how the PTAB applies *Fintiv*.

Fintiv’s Rise

35 U.S.C. §§ 314(a) (IPR) and 324(a) (PGR) set forth the minimum threshold requirements to institute review of petition for IPR or PGR. But since institution is never required, they give broad discretion to the Director to

Figure 1: *Fintiv* Reviews by Year



deny review even if the minimum requirements are met. For example, as explained in the PTAB's Trial Practice Guide, the PTAB interprets these statutes as permitting denial in light of "events in other proceedings related to the same patent, either at the Office, in district courts, or the ITC."⁹ In *Fintiv*, the PTAB enumerated six non-exhaustive factors weighed by the PTAB when determining whether to exercise this discretion in view of parallel litigation: (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 PTAB'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 PTAB's exercise of discretion, including the merits.¹⁰

Following its precedential designation in May 2020, *Fintiv* required the PTAB to consider the proximity of the parallel proceeding's trial date, in addition to other factors (including the merits), which led to a spike of discretionary denials. When the parallel proceeding involved an expedited International Trade Commission (ITC) investigation or a trial in district court that was scheduled to begin before the statutory deadline for the PTAB to issue a final written decision, the PTAB often exercised its discretion to deny institution in the interest of judicial efficiency. Indeed, more than one-third of the institution decisions in 2020 in which the PTAB considered *Fintiv* resulted in the PTAB exercising its discretion to deny institution under *Fintiv*, as shown in Figure 1 above.

In return, petitioners began advancing stipulations that forgo presenting certain invalidity challenges in parallel litigation in order to reduce overlap of issues under *Fintiv*

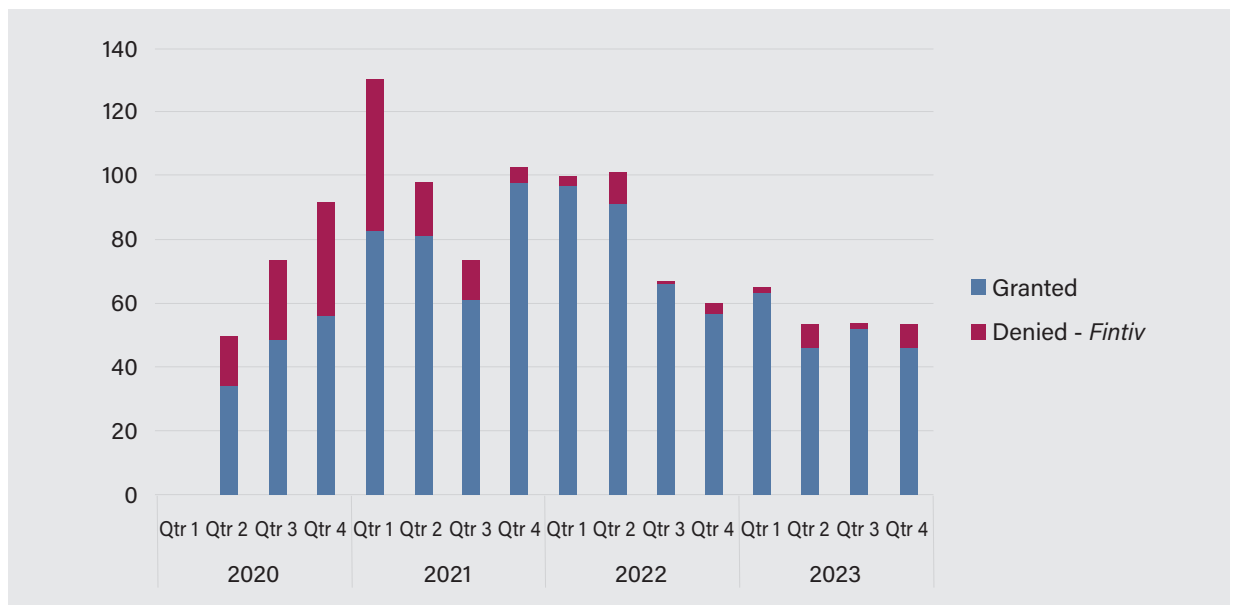
factor 4. These stipulations vary in scope. From narrowest to broadest, these stipulations concede not raising in the parallel litigation: (1) the same grounds raised in the petition,¹¹ (2) the same prior art raised in the petition, or (3) the same grounds or any ground that reasonably could have been raised in the petition. The broadest stipulations, better known as *Sotera* stipulations,¹² track the "raised or reasonably could have raised" language of the estoppel provisions in 35 U.S.C. §§ 315(e) and 325(e). Overall, petitioners' stipulations helped curb *Fintiv* denial rates, which began declining in the second quarter of the 2021 fiscal year, as shown in Figure 2, which shows the number of cases in which the PTAB evaluated the *Fintiv* factors, broken down by quarter. Similar to Figure 1, Figure 2 delineates between decisions that denied review based on *Fintiv* (indicated in red) and decisions that instituted review (indicated in blue).

Even with the availability of stipulations, the PTAB's use of *Fintiv* to deny petitions remained controversial. First, some stakeholders considered the scheduled trial date in parallel litigation to be an unreliable metric for determining the proximity of the trial relative to the PTAB's statutory deadline. Second, deferring invalidity decisions to the ITC was inappropriate, some said, because the PTAB is not bound by the ITC's findings and the ITC lacks authority to invalidate a patent. Third, discretionary denial practice under *Fintiv* raised significant uncertainty as to whether the PTAB would consider petitions on the merits. Again, some stakeholders viewed this uncertainty as contrary to the Congressional intent of the AIA's post-grant proceedings.

Director's Interim Guidance: *Fintiv*'s Decline

On June 21, 2022, Director Vidal issued the Guidance Memo clarifying how panels were to apply the *Fintiv* framework, and, importantly, identifying scenarios in which the PTAB would not exercise its discretion

Figure 2: *Fintiv* Denials by Quarter



under *Fintiv*. Specifically, Director Vidal identified three scenarios in which the PTAB would no longer exercise its discretion to deny institution in view of parallel proceedings:

1. when the petition presents compelling evidence of unpatentability,
2. when the request for denial under *Fintiv* is based on a parallel ITC proceeding, and
3. when the petitioner makes a *Sotera* stipulation.

The first scenario emphasizes *Fintiv* factor 6 over the remaining *Fintiv* factors—pushing the PTAB to consider the merits. Director Vidal defined “compelling evidence” as evidence that “would plainly lead to a conclusion that one or more claims are unpatentable,” which is a higher threshold than the threshold for institution (reasonable likelihood of success in *inter partes* review and more likely than not in post grant review).¹³ According to the Guidance Memo, the purpose of this clarification was to “strike[] a balance among the competing concerns” of stakeholders—avoiding conflicting tribunal outcomes while allowing the PTAB to review the merits of seemingly strong invalidity challenges.¹⁴ The second scenario in the Guidance Memo clarifies that *Fintiv* analysis is directed solely to district court litigation, not ITC proceedings. And the third scenario provides petitioners an opportunity to avoid *Fintiv* if they agree to allow estoppel akin to that under Section 315(e) to apply at institution (as opposed to final written decision).

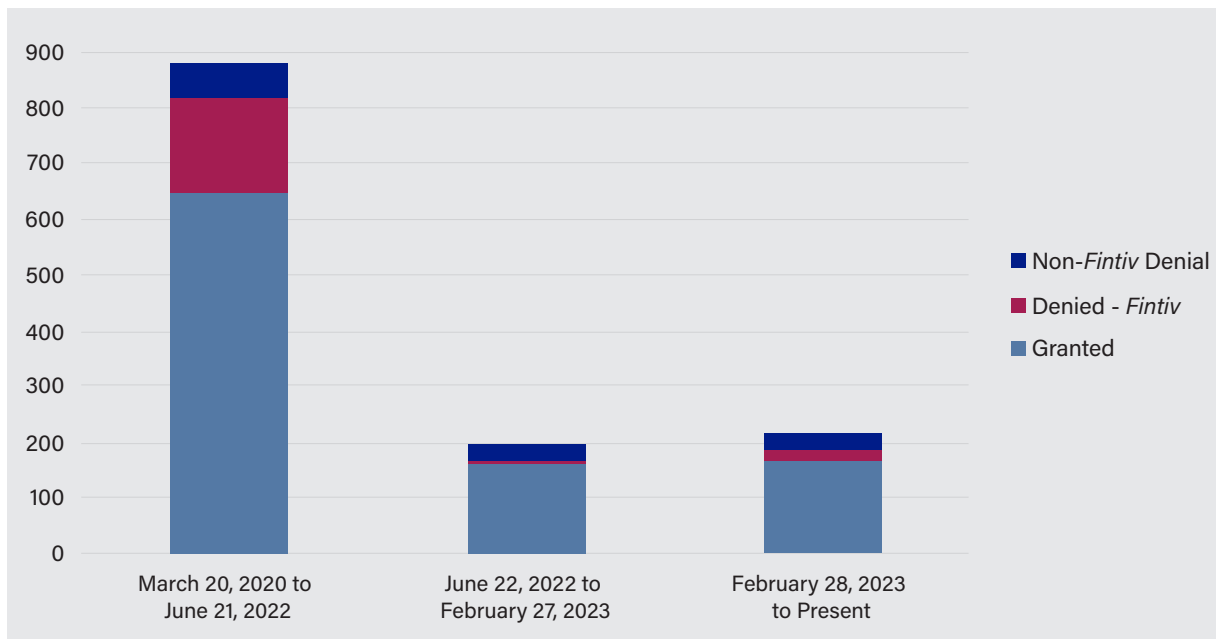
Director Vidal further expanded the considerations of *Fintiv* factor 2 beyond the district court’s scheduled trial date. The Guidance Memo encouraged parties to “present evidence regarding the most recent statistics on median time-to-trial for civil actions” where the

parallel litigation resides.¹⁵ Noting that the scheduled trial dates often change, Director Vidal clarified that the PTAB may “also consider additional supporting factors such as the number of cases before the judge in the parallel litigation and the speed and availability of other case dispositions.”¹⁶ The Guidance Memo clarifies that *Fintiv* factor 2 should not alone outweigh all other factors acting against the PTAB exercising its discretion, which was a criticism that some stakeholders lodged against the PTAB’s application of *Fintiv* (despite panels routinely emphasizing in decisions that factor 2 is not dispositive).

While committing to a *Sotera* stipulation avoids denial under *Fintiv*, Director Vidal also clarified in her *sua sponte* Director Review in *NXP USA, Inc. v. Impinj, Inc.*¹⁷ that the stipulation must be timely—it must be filed before the institution date. In *NXP USA*, Director Vidal affirmed the PTAB’s ruling “that a stipulation, offered by a petitioner for the first time after a decision denying institution, is not a proper basis for granting rehearing of the decision on institution.”¹⁸ Accordingly, the only appropriate time to offer a stipulation related to *Fintiv* factor 4 is prior to an institution date.

Against this backdrop, we tracked PTAB decisions in which *Fintiv* was addressed from March 2020 to November 2023. Particularly, we compared *Fintiv* denial rates over three time periods: (1) *Fintiv*’s rise from March 20, 2020, to June 22, 2022; (2) *Fintiv*’s decline following the release of the Guidance Memo on June 22, 2022; and (3) *Fintiv*’s modest revival following the issuance of the Director’s Review in *Commscope* on February 27, 2023.¹⁹ As for our methodology, the blue bar in Figure 3 (seen below) represents decisions in which *Fintiv* was addressed and review was instituted. The red bar in Figure 3 represents decisions in which *Fintiv*

Figure 3: Tracking *Fintiv* Denials in View of the Guidance Memo and *Commscope*



was addressed and review was denied due to *Fintiv*. The dark blue bar in Figure 3 represents decisions in which *Fintiv* was addressed and review was denied for other reasons (e.g., the merits). Tables 1 and 2 (below) respectively show the number and percentage of decisions addressing *Fintiv* based on the timeframe and categories outlined above.

As shown in Figure 3 (on page 23) and Tables 1 and 2 (below), *Fintiv* denial rates declined significantly in the eight months following the Guidance Memo, while the overall PTAB institution rate climbed to over 80%. From June 22, 2022, to February 27, 2023, the PTAB reviewed 878 total petitions, denying only five petitions based on *Fintiv*.

Notably, four of the five *Fintiv* denials in the June 22, 2022 to February 27, 2023 time frame presented similar circumstances.²⁰ The parallel trial date was scheduled to start less than one month from the PTAB’s institution date—well before the PTAB’s statutory deadline for issuing a final written decision. Petitioners raised narrow ground-based or prior art-based stipulations, not a broad *Sotera* stipulation. And the petitions were found to lack compelling merits. Ultimately, the PTAB found that balancing these factors weighed in favor of denying institution.

Figure 4 (seen on the right page) shows the effect of the Guidance Memo ending the practice of *Fintiv* denials in view of parallel ITC investigations. To compare denials stemming from parallel district court litigation with denials based on parallel ITC investigations, we determined for each *Fintiv* denial whether the subject patent was involved in an ITC proceeding. If so, the case was categorized as “ITC” (even though it may have also involved parallel district court litigation). The remaining cases—those with patents not involved in an ITC

investigation—were categorized as having only parallel district court proceedings. Any case denied for reasons other than *Fintiv* (e.g., based on the merits) was omitted from our statistics.

As shown on page 25, between roughly 2020 and 2022, panels frequently issued *Fintiv* denials based on parallel ITC investigations, which are accelerated proceedings that advance quickly to trial. Although the rate of these denials was decreasing in the 2021-2022 timeframe, they were still more frequent than denials based on parallel district court litigation. Accordingly, ending the practice of *Fintiv* denials in view of parallel ITC investigations has played a significant role in decreasing the overall *Fintiv* denial rate.

Director’s Review: *Fintiv* Staying Alive

While the Guidance Memo clarified the application of *Fintiv* and reduced denials, Director Vidal later issued a precedential *sua sponte* Director Review decision²¹ clarifying that the PTAB should consider all the *Fintiv* factors for any proceedings involving parallel district court litigation. In *Commscope Technologies LLC v. Dali Wireless, Inc.*, Director Vidal vacated a panel’s institution decision for failing to provide an adequate *Fintiv* analysis.²² In its institution decision, the panel assessed whether the petition presented compelling merits “without first determining that the other *Fintiv* factors favor discretionary denial.”²³ Director Vidal clarified in *Commscope* that the Guidance Memo did not intend to make a compelling merits determination a substitute for a *Fintiv* analysis.²⁴ That is, PTAB panels should only consider compelling merits if determining that *Fintiv* factors 1-5 favored discretionary denial.²⁵ Conversely, when determining that *Fintiv* factors 1-5 do not favor discretionary denial, the PTAB does not need to assess

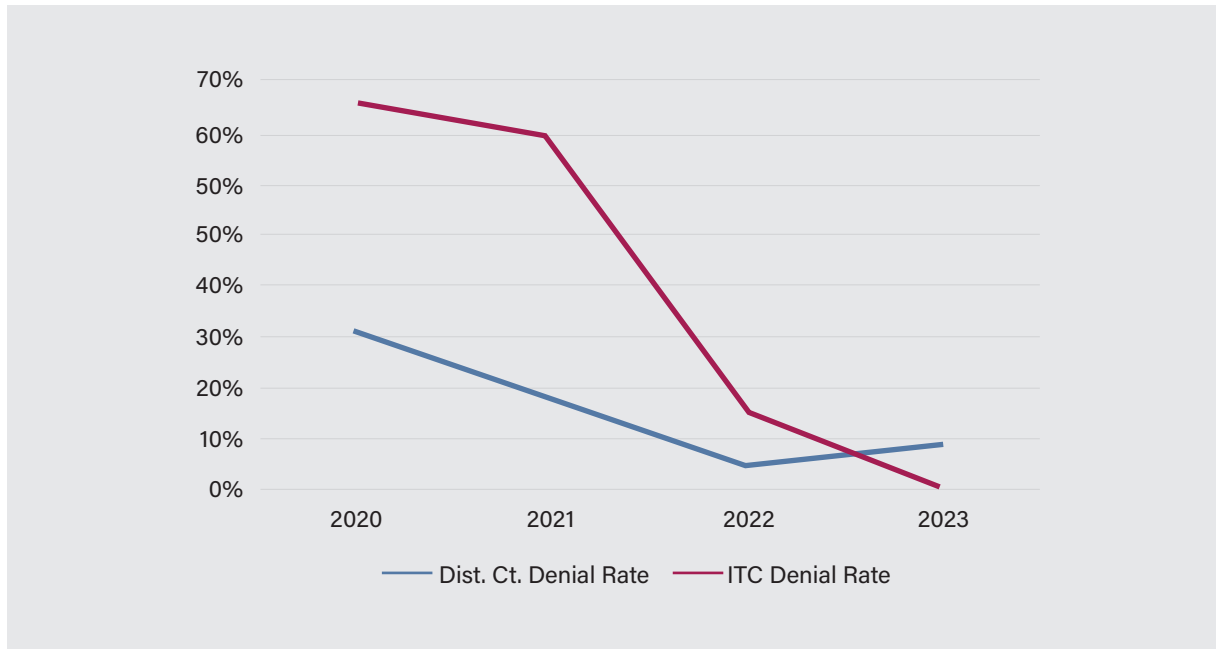
Table 1: *Fintiv* Denial in View of the Guidance Memo and *Commscope*

Time Frame	PTAB Decisions Addressing <i>Fintiv</i>			
	Review Granted	Review Denied: <i>Fintiv</i>	Review Denied: Non- <i>Fintiv</i>	Total PTAB Decisions
Mar. 20, 2020 to June 21, 2022	648	173	57	878
June 22, 2022 to Feb. 27, 2023	164	5	28	197
Feb. 28, 2023 to Dec. 11, 2023	169	18	27	214

Table 2: *Fintiv* Denial Rates in View of the Guidance Memo and *Commscope*

Time Frame	PTAB Decisions Addressing <i>Fintiv</i>		
	Review Granted	Review Denied: <i>Fintiv</i>	Review Denied: Non- <i>Fintiv</i>
Mar. 20, 2020 to June 21, 2022	74%	20%	6%
June 22, 2022 to Feb. 27, 2023	83%	3%	14%
Feb. 28, 2023 to Dec. 11, 2023	79%	8%	13%

Figure 4: ITC vs. District Court *Fintiv* Denials



whether the petition presents compelling merits. Either way, the PTAB must apply *Fintiv* factors 1–5 when deciding a *Fintiv* challenge raised by patent owner.

Director Vidal further found that the panel in *Commscope* failed to provide sufficient reasoning to support its conclusion that the merits were compelling.²⁶ The panel merely pointed to its invalidity analysis under the lower institution standard.²⁷ Director Vidal noted that the PTAB “must provide reasoning to explain and support its determination as to compelling merits sufficient to allow the parties to challenge that finding and sufficient to allow for review of that decision.”²⁸

Accordingly, the Director’s Review of *Commscope* clarified the order in which panels should evaluate the *Fintiv* factors and the heightened burden for making a compelling merits determination. Since the Director’s Review of *Commscope* was issued on February 27, 2023, we have seen an uptick in *Fintiv* denials with the PTAB denying 18 petitions under *Fintiv*—more than three times as many *Fintiv* denials as were issued between the publication of the Guidance Memo and *Commscope*.

Recent PTAB decisions show that the proximity of a district court trial date is still a significant consideration in post-guidance *Fintiv* analysis. And the parties’ use of or lack of evidence to forecast the expected trial date can swing the PTAB’s decision to exercise its discretion under *Fintiv*.

For example, in *Zhuhai Cosmox Battery Co., Ltd. v. Ningde Amperex Tech. Ltd.*, the PTAB exercised its discretion to deny institution under *Fintiv* when the district court trial date was scheduled eight months before the statutory deadline for issuing the final written decision.²⁹ Although petitioner presented median time-to-trial statistics

to indicate a later trial start date, the PTAB still found that *Fintiv* factor 2 weighed heavily in favor of denial because the median time-to-trial data forecasted trial starting three months before the statutory deadline.³⁰ In contrasting its decision from the institution granted in *NetNut Ltd. v. Bright Data Ltd.*,³¹ the PTAB highlighted the petitioner’s failure to provide any other evidence “regarding the caseload of the assigned judge or whether extensions of time have been sought” in the parallel litigation.³² Simply put, petitioner’s lack of evidence to rebut the earlier scheduled trial date was detrimental for institution.

In *Resmed Corp. v. Cleveland Medical Devices Inc.*,³³ the panel decided to exercise its discretion, and its decision turned on the accuracy of the parties’ presented evidence. The trial date in co-pending litigation was scheduled approximately one month before the PTAB’s statutory deadline to issue a final written decision.³⁴ The petitioner presented Delaware’s most recent median time-to-trial statistics, indicating an expected trial date occurring months *after* the PTAB’s statutory deadline.³⁵ The patent owner, however, contended that the court’s median time-to-trial data did “not accurately” reflect the assigned judge’s median time-to-trial, which was eight months *less* than the court’s median time-to-trial.³⁶ The PTAB found that “the scheduled trial date is a better measure of the expected trial date than the median-time-to-trial statistic” because the assigned judge was recently confirmed to the bench and presided over “approximately 24% fewer patent cases than the average number of patent cases for the other judges in the district.”³⁷ Reaching this finding, the PTAB weighed *Fintiv* factor 2, along with factors 3–6, in favor of denial, and thereby exercised its discretion to deny institution.³⁸

These recent PTAB decisions highlight that, for both parties, presenting accurate statistics and other forms of evidence is key for post-guidance *Fintiv* analysis. Accordingly, when addressing *Fintiv* Factor 2, practitioners should be mindful of all relevant circumstances, such as the caseload of the assigned judge and the speed and availability of other case dispositions.

Takeaways from Post-Guidance *Fintiv* PTAB Decisions

Despite the decline of *Fintiv* denials, the PTAB is still willing to exercise its discretion to deny institution, typically when a petition is filed late relative to the state of the parallel case, the parties already expended considerable resources on the parallel case, the petitioner does not advance a *Sotera* stipulation, and the petition lacks compelling merits.

Petitioners can avoid uncertainty as to whether the PTAB will exercise its discretion by making a *Sotera* stipulation. But petitioners should assess the risks and rewards of raising a *Sotera* stipulation. If the scheduled trial date is well beyond the PTAB's statutory deadline for issuing a final written decision, estoppel under § 315(e) will attach in the later district court case if the PTAB institutes review and reaches a final written decision, and therefore, petitioners have little risk in asserting a *Sotera* stipulation. Conversely, if the scheduled trial date is before or close to the statutory deadline, the chances of facing estoppel under § 315(e) at trial is less clear, and thus, petitioners/defendants may be restricting their invalidity options at trial in the parallel proceeding by asserting a *Sotera* stipulation. Stipulating not to raise the same grounds or prior art in district court (that is, something less than a *Sotera* stipulation) will not guarantee immunity from *Fintiv*. The PTAB, however, generally weighs *Fintiv* factor 4 in favor of institution based on art-based stipulations, as highlighted in our previous report.³⁹ Given that the *Fintiv* analysis is highly fact sensitive, petitioners should assess how the PTAB would weigh the remaining *Fintiv* factors in their case when choosing between narrow and broad stipulations.

Patent owners involved in parallel litigation should still ask the PTAB to exercise its discretion under *Fintiv*, especially when the scheduled trial date in the parallel case is proximate to the PTAB's statutory deadline for issuing a final written decision. Because the PTAB must assess *Fintiv* factors 1-5 before assessing compelling merits, patent owners need to address all six *Fintiv* factors in the

Preliminary Response to effectively convince the PTAB to exercise its discretion. A patent owner should determine if any stipulations were raised in the petition and evaluate whether the proffered stipulation truly eliminates overlap between the proceedings. When addressing *Fintiv* factor 6, patent owners should emphasize that "the compelling merits standard is a higher standard than the standard for institution,"⁴⁰ and explain how the petitioner's evidence would not be "highly likely [to] ... prevail with respect to at least one challenged claim."⁴¹ Raising any doubt against petitioners' invalidity challenges could tilt *Fintiv* Factor 6 in favor of denial.

Looking Ahead: Further Proposed Changes to *Fintiv*

Although the Director's Guidance Memo clarified the application of *Fintiv* to post-grant proceedings, the USPTO proposed further actions that would impact discretionary institution practices under 35 U.S.C. §§ 314(a) and 324(a), along with other issues in PTAB practice. On April 21, 2023, the USPTO published an Advanced Notice of Proposed Rulemaking (ANPRN), based on a Request for Comments published in 2020.⁴² The ANPRN proposed rule-based changes that "build on and codify existing precedent and guidance on Director's discretion to determine whether to institute an IPR or PGR."⁴³ The ANPRN garnered thousands of stakeholder responses that the USPTO is parsing to formulate policy intending to provide consistency and predictability in panel decisions.

In addition, Congress proposed legislation that would replace the PTAB's application of *Fintiv*. Senators Coons, Tillis, Durbin, and Hirono introduced a bill, titled "Promoting and Respecting Economically Vital American Innovation Leadership (PREVAIL) Act," to stop duplicative patent invalidity challenges, amongst other objectives.⁴⁴ The PREVAIL Act proposes ending duplicative validity challenges by requiring a party to choose between making its validity challenges either in the PTAB or in district court.⁴⁵ For example, upon institution of an IPR, the petitioner would not be able to raise or maintain in another forum any validity arguments against the patent based on earlier publications or patents.

We expect that the issues pertaining to PTAB discretion and *Fintiv* will continue to play out in 2024, and look forward to seeing what the USPTO and Congress do next.

Sterne Kessler Achieves Top Litigation Rankings in Patexia's 2023 PTAB Intelligence Report

The firm and several individual attorneys earned top rankings in Patexia's 2023 PTAB Intelligence Report. Of particular note, Sterne Kessler was rated the best performing law firm representing patent owners, topping the list of 100 ranked firms in the category. This annual PTAB report provides comprehensive law firm, attorney, petitioner, and patent owner rankings across all proceedings within the US Patent and Trademark Office's Patent Trial and Appeal Board (PTAB). Learn more about our award-winning PTAB Trials Practice by scanning the QR code.



1. *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 (P.T.A.B. Mar. 20, 2020) (designated precedential May 5, 2020).
2. Richard M. Bembem & Steven Pappas, "2021 PTAB Year in Review: Analysis & Trends: *Fintiv* Continues To Take Center Stage: The Effect of Parallel Litigation at the PTAB in 2021," 2021 PTAB Year in Review (2022), available at: https://www.sternekeessler.com/sites/default/files/2022-02/ptab_year_in_review_2021_fintiv_article_final.pdf.
3. See Dani Kass, "Tech Giants Are Putting PTAB's Discretion To The Test," Law360 (Sept. 3, 2020); *Request for Comments on Discretion To Institute Trials Before the Patent Trial and Appeal Board*, 85 Fed. Reg. 66,502 (Oct. 20, 2020).
4. See *e.g.*, "Restoring the America Invents Act," 117th Congress, 1st Sess., S. 2891 (introduced Sept. 29, 2021), available at: <https://www.govinfo.gov/content/pkg/BILLS-117s2891is/pdf/BILLS-117s2891is.pdf>.
5. See, *e.g.*, Petition for a Writ of Certiorari, *Apple Inc. v. Optis Cellular Tech., LLC*, No. 21-118, 2021 WL 3207820, at *3 (2021), cert. denied, 142 S.Ct. 859 (2022). Also note that some legal challenges to the *Fintiv* framework continue to work their way through the Federal Court system, albeit in more limited form. See *Apple Inc. v. Vidal*, 63 F.4th 1 (Fed. Cir. 2023) (ruling that a district court could review whether the Director's instructions on how panels should apply her discretion at institution were improperly issued because they were not promulgated through an APA procedure known as "notice-and-comment rulemaking").
6. Dani Kass, "Patent Policy to Watch In 2022," Law360 (Jan. 3, 2022).
7. Katherine K. Vidal, *Interim Procedure For Discretionary Denials in AIA Post-Grant Proceedings With Parallel District Court Litigation* (June 21, 2022), available at: https://www.uspto.gov/sites/default/files/documents/interim_proc_discretionary_denials_aia_parallel_district_court_litigation_memo_20220621_.pdf ("Guidance Memo").
8. *Commscope Technologies LLC v. Dali Wireless, Inc.*, IPR2022-01242, Paper 23 (P.T.A.B. Feb. 27, 2023).
9. Patent Trial and Appeal Board Consolidated Trial Practice Guide November 2019, p. 58. Note that Director Vidal's Guidance Memo ended the PTAB's practice of applying *Fintiv* to deny institution in light of a parallel ITC investigation. See below.
10. *Fintiv*, Paper 11 at 6.
11. See *Sand Revolution II, LLC v. Continental Intermodal Group – Trucking LLC*, IPR2019-01393, Paper 24 at 11–12, 12 n.5 (June 16, 2020) (informative).
12. *Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12 at 18 (P.T.A.B. Dec. 1, 2020) (precedential as to § 11.A).
13. *Id.* at 4.
14. *Id.* at 5.
15. *Id.* at 8–9.
16. *Id.*
17. IPR2021-01556, Paper 13 (P.T.A.B. Sept. 7, 2022).
18. *Id.* at 3–4.
19. The data of Figure 3 tracks PTAB decisions issued as of December 11, 2023.
20. *Ericsson Inc. et al. v. Godo Kaisha IP Bridge 1*, IPR2022-00725, Paper 10 (P.T.A.B. Nov. 2, 2022); *Ericsson Inc. et al. v. Godo Kaisha IP Bridge 1*, IPR2022-00726, Paper 11 (P.T.A.B. Nov. 2, 2022); *Nokia of America Corporation et al. v. Godo Kaisha IP Bridge 1*, IPR2022-00755, Paper 9 (P.T.A.B. Nov. 2, 2022); *Ericsson Inc. et al. v. Collision Communications, Inc.*, IPR2022-01233, Paper 12 (P.T.A.B. Jan. 19, 2023).
21. *Commscope Technologies LLC v. Dali Wireless, Inc.*, IPR2022-01242, Paper 23 (P.T.A.B. Feb. 27, 2023).
22. *Id.* at 4–6.
23. *Id.* at 4.
24. *Id.*
25. *Id.*
26. *Id.* at 5.
27. *Id.*
28. *Id.* at 5–6.
29. IPR2023-00587, Paper 12 (P.T.A.B. Sept. 22, 2023).
30. *Id.* at 10–12.
31. IPR2021-01492, Paper 12 at 9–16 (P.T.A.B. Mar. 21, 2022) (granting institution even when the co-pending trial date was scheduled six months before the final written decision deadline).
32. *Zhuhai Cosmx Battery*, IPR2023-00587, Paper 12 at 12.
33. IPR2023-00565, Paper 13 (P.T.A.B. Sept. 25, 2023).
34. *Id.* at 11.
35. *Id.*
36. *Id.*
37. *Id.* at 11–12.
38. *Id.* at 12, 18.
39. Richard M. Bembem & Steven Pappas, "2021 PTAB Year in Review: Analysis & Trends: *Fintiv* Continues To Take Center Stage: The Effect of Parallel Litigation at the PTAB in 2021," 2021 PTAB Year in Review (2022).
40. *Commscope Technologies LLC*, IPR2022-01242, Paper 23 at 3 (citing 35 U.S.C. § 314(a)).
41. *Id.* at 4 (quoting *OpenSky Indus., LLC et al. v. VLSI Tech. LLC*, IPR2021-01064, Paper 102 at 49–50 (P.T.A.B. Oct. 4, 2022) (precedential)).
42. *Changes Under Consideration to Discretionary Institution Practices, Petition Word-Count Limits, and Settlement Practices for America Invents Act Trial Proceedings Before the Patent Trial and Appeal Board*, 88 Fed. Reg. 24,503 (Apr. 21, 2023).
43. *Id.* at 24,504.
44. "Senators Coons, Tillis, colleagues introduce bipartisan bill to support American inventors by reforming Patent Trial and Appeal Board" (Aug. 9, 2023), available at: <https://www.coons.senate.gov/news/press-releases/senators-coons-tillis-colleagues-introduce-bipartisan-bill-to-support-american-inventors-by-reforming-patent-trial-and-appeal-board>.
45. "Preval Act," 118th Congress, 1st Sess. (introduced Aug. 9, 2023), available at: https://www.coons.senate.gov/imo/media/doc/prevail_act_bill_text.pdf.