

THE PTAB REVIEW

This issue of the PTAB Review provides an update on the *Arthrex* Appointments Clause decision, the continuing demise of same-party joinder and deference to Patent Trial and Appeal Board (PTAB) precedential decisions, the most recent PTAB precedential and informative decisions, and developments in the PTAB’s discretionary denial practices.

The PTAB on Trial at the Supreme Court...Again

On October 31, 2019, the U.S. Court of Appeals for the Federal Circuit killed the Patent Trial and Appeal Board (PTAB), then promptly brought it back to life. A year later, a dozen petitions involving more than 100 parties and amici curiae are pending at the Supreme Court, testing whether the resuscitation will hold or whether the PTAB never died at all.

In *Arthrex, Inc. v. Smith & Nephew*,¹ the Federal Circuit confronted the question of whether the administrative patent judges (APJs) who enter the final decisions in *inter partes* reviews (IPRs) are constitutionally appointed. The court held that the decision on whether to cancel a patent claim is too important to be entrusted to anyone without Presidential nomination and Senate consent. Rather than destroy



the PTAB permanently, the court held that it could cancel another statute instead, thus leaving the PTAB able to decide future cases. After considering a number of options, the court decided certain statutory protections no longer apply to APJs, rendering them at-will employees of the United States Patent and Trademark Office (USPTO) director (who is a Presidential appointee) so that at least as a legal fiction the director could dictate decisions to the APJs entering a final agency action.

The decision left open what should be done with PTAB decisions already entered. The court drew a bright line between pending cases and those

already decided. The court further distinguished between parties that timely raised the issue early in their appeals and latecomers simply hoping to benefit from the decision. Moreover, the beneficiaries only receive an automatic remand to the PTAB for consideration by a new panel of APJs. The court subsequently extended its holding to other PTAB proceedings, including other trials but significantly also—in an appeal from Boloro Global Ltd.—to appeals from patent examiner rejections.² As a result, scores of cases were remanded. Since the government is seeking relief at the Supreme Court, the PTAB has stayed those cases and the U.S. Solicitor General filed a single

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¹ 941 F.3d 1320 (Fed. Cir. 2019).

² 963 F.3d 1380 (Fed. Cir. 2020).

petition naming patentees in 74 cases³ not already pending at the Court as respondents to avoid violating the Federal Circuit's mandate in those cases.

The *Arthrex* decision left almost no one outside the Federal Circuit happy. Both parties and the federal government (which intervened) filed petitions for certiorari after COVID-19 delays. Curiously, a follow-on case beat the *Arthrex* case to the Supreme Court.

The arguments on petition cluster into three issues. The Solicitor General and many petitioners argue that the whole appointments question was forfeited because the parties did not argue the issue at the PTAB, depriving the agency of an opportunity to address the issue before it spun out of control. They also argue that no constitutional problem exists because the USPTO director retains adequate control over both APJs and pending cases to maintain political accountability in a properly appointed official.

Patentees disagree, although their positions vary depending on how the Federal Circuit applied *Arthrex* in their particular cases. Several also raise case-specific merits issues. Arthrex

itself (which timely raised the issue in its second appeal) argues that there is no remedy and hence no PTAB to cancel its claims. Specifically, Arthrex argues that Congress did not intend to permit the Federal Circuit to strip APJs of employment rights. One amicus goes so far as to argue that the court could not do so without violating *the APJs'* due process.⁴ Arthrex also contends that the remedy is not sufficient because making APJs at-will employees is not enough to shift accountability and control substantially to the director. Patentees who did not timely raise the issue (five petitions, include one from Arthrex for its other appeal) argue that *Arthrex* represented a change in the law that must apply to all pending cases regardless of whether or when they raised the issue.

All but three of the petitions were considered in the Supreme Court's September 29 conference, the first of the Court's 2020 Term. The Court denied certiorari for the two forfeiture petitions that had been fully briefed,⁵ but did not otherwise address the remaining cases in its subsequent order on October 5. Assuming the Court grants the petition

for a writ of certiorari in at least one case, it would likely set an argument for early in 2021. The Court is unlikely to hear all of the petitions; indeed, the Solicitor General has urged the Court to take the lead *Arthrex* case and simply hold the remaining cases pending a decision in *Arthrex*.

The Supreme Court has issued two high-profile decisions holding appointments improper in recent terms, but the facts were very different so it is difficult to predict how the Court would decide the core Appointments Clause issue here. Given the large number of petitions and parties, including two petitions from the Solicitor General, as well as the Court's penchant in recent terms to revisit the PTAB practice, the Court may be likely to grant certiorari. In the unlikely event that the Court decides that the PTAB is broken and unfixable, Congress almost certainly will create a prompt solution. After all, patentees might be happy to be free of the so-called "patent death squad" in post-grant trials, but they will be much less happy to be at the mercy of patent examiners with no route for appeal other than a mandamus action in district court.

³ The IPRs underlying the lead case, *Image Processing Technologies v. Samsung Electronics*, subsequently settled at the PTAB. The United States has moved for a partial dismissal of its petition for the settled cases.

⁴ The effect might be that the APJs must lose their jobs because simply stripping them of job security is unlawful.

⁵ Because the question of whether these petitioners forfeited their Appointments clause argument was independent from whether the argument is correct, this denial does not directly speak to what will happen in *Arthrex*.

Same-Party Joinder Redux

The Federal Circuit in September modified its March 2020 decision on same-party joinder to account for the intervening Supreme Court *Thryv* decision. In *Facebook, Inc. v. Windy City Innovations, LLC*, the Court held earlier this year that the PTAB could not use its statutory authority under the

joinder provision of the A.I.A. (35 U.S.C. §315(c)) to add additional patent claims to already instituted IPRs.⁶ After *Thryv*, the Federal Circuit came to the same conclusion as before.

The PTAB granted Facebook same-party joinder out of a sense of fairness. Facebook found itself at a

strategic disadvantage after Windy City asserted multiple patents against it that collectively contained 830 claims.⁷ The IPR time-bar provision (35 U.S.C. §315(b)) required Facebook to file IPR petitions within one year of being served with the infringement complaint, at which time Windy City

⁶ *Facebook, Inc. v. Windy City Innovations, LLC*, 953 F.3d 1313 (2020).

⁷ *Id.* at 1318-19.

still had not identified the asserted claims.⁸ Facebook's already-instituted petitions addressed only some asserted claims, so Facebook filed petitions to challenge the remaining asserted claims.⁹ Because these petitions were time-barred, Facebook asked for joinder under Section 315(c), which contains an express exception to the Section 315(b) time-bar.¹⁰

Facebook received a short reprieve. The PTAB granted its request, reasoning that PTAB precedent authorized same-party joinder and that it was justified here.¹¹ The PTAB concluded that Facebook's late petitions were justified by the large number of claims in the asserted patents and the delay in identifying asserted claims.¹² The PTAB concluded that joinder was appropriate because the new claims and petitions would not significantly affect the scope of the trials.¹³ The PTAB thus allowed Facebook to add the claims to the instituted IPRs through joinder, effectively circumventing the one year time-bar.¹⁴ In March 2020, the Federal Circuit rejected this approach, holding that the joinder statute only authorizes adding a *party* to an instituted proceeding and thus did not permit using joinder to permit an existing petitioner to add new issues or claims to an instituted IPR.¹⁵

The following month, as reported in the April issue of *The PTAB Review*, the Supreme Court issued the decision in *Thryv, Inc. v. Click-to-Call Techs., LP*,

holding that PTAB determinations that a petitioner is not time-barred are insulated from appellate review because they are tied closely to the institution decision.¹⁶ Appellate review of the institution decision is precluded by the A.I.A. 35 U.S.C. §314(d). In its September rehearing decision, the Federal Circuit considered whether the *Facebook* decision survives *Thryv*.¹⁷

One reasonably might have thought that the PTAB's decision to institute the joinder petitions despite the one-year bar was insulated from appellate review under *Thryv*. But the Federal Circuit sidestepped this question focusing exclusively on the joinder statute. The court held that appellate review was available because the joinder statute governs how an IPR proceeds, not whether it is instituted.¹⁸ The court thus concluded that the joinder decision is not tied closely to the institution decision under *Thryv*.

Finding appellate review available, the court found that the joinder statute was unambiguously limited to adding parties to instituted IPRs, not adding new claims or issues.¹⁹ The court also reasoned that a separate provision (35 U.S.C. §315(e)) authorizes the Patent Office director to consolidate Patent Office proceedings for the same patent but does provide an exception to the one-year time bar.²⁰ The court thus vacated the final written decisions resulting from the joinder petitions.²¹ The court did not

order the PTAB to vacate the institution decisions, as this almost certainly would be prohibited by Section 314(d). Instead, the court, remanded for the PTAB to consider "whether the termination of the instituted proceedings related to the two late-filed petitions finally resolves those proceedings."²²

It remains to be seen whether the Federal Circuit will have the last word on same-party joinder. One reasonably could argue that a joinder decision that permits institution of an IPR despite the one-year time bar is closely tied to the institution decision under *Thryv*. This argument has particular force where the reasoning of the *Thryv* majority emphasized the importance of cancelling claims finally determined to be unpatentable, regardless of whether the proceedings were instituted in compliance with the one-year time bar.²³ The reissued *Facebook* decision does not categorically preclude this result, but instead prohibits the PTAB from doing so under the auspices of the joinder statute. The court thus essentially dared the PTAB to either reinstitute the vacated final written decisions in a situation where all parties agree the petitions were filed too late, or to instead terminate the instituted proceedings to dispense with them. The latter option allows the PTAB to avoid the appearance of engaging in "shenanigans," which may be subject to appellate review.

⁸ *Id.* at 1319.

⁹ *Id.*

¹⁰ *Id.* at 1319-20.

¹¹ *Id.* at 1320.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 1325.

¹⁶ No. 18-916 (April 20, 2020).

¹⁷ *Facebook, Inc. v. Windy City Innovations, LLC*, 2018-1400 et seq, slip op. (Fed. Cir. Sep. 4, 2020).

¹⁸ *Id.* at 13-16.

¹⁹ *Id.* at 18-21, 27.

²⁰ *Id.* at 21.

²¹ *Id.* at 28.

²² *Id.*

²³ *Thryv, Inc. v. Click-to-Call Techs., LP*, No. 18-916, slip op. at 9 (April 20, 2020) ("§315(b) appeals would operate to save bad patent claims").

Recent Precedential and Informative Decisions

The PTAB continues to designate precedential and informative decisions at a brisk pace, designating three additional precedential decisions and five additional informative decisions between April 2020 through the end of September 2020. These decisions address discretionary denial, motions to amend, settlement, and other miscellaneous issues.

Discretionary Denial

The most noteworthy and generally applicable of these decisions is *Apple Inc. v. Fintiv, Inc. (Fintiv)*,²⁴ which addresses the PTAB's discretion to deny institution under 35 U.S.C. § 314(a). The decision was authored by Vice Chief Judge Fink, with Judges Horner and Pettigrew joining. The *Apple* decision is grounded in large part on its decision in *NHK*,²⁵ in which the PTAB exercised its discretion to deny institution on the basis, in-part, that the court in the parallel district court would issue a decision before the PTAB would issue a final written decision.²⁶ *Fintiv* provides factors that the PTAB may consider in deciding whether to exercise its discretion under § 314(a) to deny institution even in those cases where the district court has set a trial date *after* the PTAB's statutory deadline to enter a final written decision.²⁷

The *Fintiv* factors are: 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, according the merits.²⁸ According to the PTAB, it "take[s] a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review."²⁹ After setting forth the factors, the PTAB did not apply them to the facts as presented in the proceeding, but ordered supplemental briefing.³⁰

The PTAB then designated two opinions applying *Fintiv* as informative. The first informative decision came out of the same proceeding and applied the *Fintiv* factors as discussed above (*Fintiv II*).³¹ Particularly, the PTAB noted that "because the identical claims are challenged based on the same prior art in both the Petition and in the District Court, this factor weighs in favor of discretionary denial."³² After taking a holistic view of the evidence, the PTAB declined to institute trial.³³

In *Sand Revolution*,³⁴ from a panel including Vice Chief Judge Weidenfeller, the PTAB granted petitioner's request for rehearing and instituted trial. What

was interesting is that the PTAB looked at evidence that arose after its initial denial of institution.³⁵ In particular, the PTAB noted that the parties had jointly moved to extend district court schedule deadlines twice.³⁶ The PTAB noted further that the district court used the qualifier "or as available," apparently in recognition of the uncertainty of its own schedule. *Id.* at 8-9. The petitioner had also stipulated to the patent owner that if trial was instituted, it would not pursue the same invalidity grounds before the district court that it was pursuing before the PTAB.³⁷ Based on its holistic analysis of all the factors, the PTAB concluded that institution was appropriate, thus granting the request for rehearing.

Many petitions for IPR arise in relation to district court litigation. Thus, as a defendant or possible defendant in district court litigation strategy, a party should be considering any possible IPR strategy as early as practicable to avoid discretionary denial under the *Fintiv* factors. Another important part of the PTAB's holistic decision as to whether it should exercise its discretion to deny the petition is the strength of the grounds. That provides an additional reason to consider any IPR strategy early in order to provide time to craft a well-reasoned, well-supported petition. A petitioner realistically only has one chance to challenge the patentability of the claims of any particular patent.

²⁴ IPR2020-00019, Paper 11 (Mar. 20, 2020) (designated precedential on May 5, 2020).

²⁵ *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 (Sept. 12, 2018) (designated precedential May 7, 2019).

²⁶ *Id.* at 2-3.

²⁷ *Id.* at 3.

²⁸ *Id.* at 6.

²⁹ *Id.*

³⁰ *Id.* at 16-17.

³¹ *Apple Inc., v. Fintiv, Inc.*, IPR2020-00019, Paper 15, 7-8 (May 13, 2020) (designated informative July 13, 2020).

³² *Id.* at 15.

³³ *Id.* at 17.

³⁴ *Sand Revolution II, LLC v. Continental Intermodal Group – Trucking LLC*, IPR2019-01393, Paper 24 (June 16, 2020) (designated informative July 13, 2020).

³⁵ *See, e.g., id.* at 8-9.

³⁶ *Id.* at 8.

³⁷ *Id.* at 11.

Motions to Amend

Another notable decision was *Hunting Titan, Inc. v. DynaEnergetics Europe GmbH*,³⁸ which was decided by the precedential opinion committee (POP), which includes USPTO Director Andrei Iancu. POP review was granted to address the following issues:³⁹

- I. Under what circumstances and at what time during an *inter partes* review may the Board raise a ground of unpatentability that a petitioner did not advance or insufficiently developed against substitute claims proposed in a motion to amend?
- II. If the Board raises such a ground of unpatentability, whether the Board must provide the parties notice and an opportunity to respond to the ground of unpatentability before the Board makes a final determination.

The POP determined for the first question that the PTAB may raise its own ground of unpatentability, that is, it may raise a ground that was not advanced by petitioner, but it should only do so in certain, rare circumstances.⁴⁰ In so holding, the POP noted that the America Invents Act (AIA) established post-grant proceedings that are primarily adversarial.⁴¹ The POP noted also that the proceedings are akin to a specialized agency proceeding, as the ability to amend a claim may only be brought before the USPTO, and not in other fora such as the ITC and district court. The

POP thus concluded that its authority as to amended claims is different than as to the issued, original claims.⁴²

As to whether the PTAB should raise a new ground, the POP concluded that the PTAB should only raise new grounds or address proposed substitute claims that petitioner declined to address “only under rare circumstances.”⁴³ In that regard, the POP noted that although the Federal Circuits decision in *Nike* **allowed** the PTAB to raise new issues, there was nothing in the decision **requiring** the PTAB to raise and address additional arguments.⁴⁴

Neither party argued that some form of notice was not required—rather, the dispute focused on the form required for that notice.⁴⁵ The petitioner argued that the anticipation rejection over the original claims was sufficient notice, but the POP disagreed.⁴⁶ The POP held instead that due process requires that the patent owner receive notice of how the art meets the newly added limitations of the substitute claims, as well as the theory of unpatentability, which could be done through supplemental briefing or at oral hearing.⁴⁷

Hunting Titan is an important case for both patent owners and petitioners, but may be especially important to petitioners. The PTAB is encouraging patent owners to file motions to amend with its pilot motion to amend program. It is not too early at the petition stage to be considering possible amendments

patent owner might make. Moreover, if the petitioner’s challenge of the amended claims falls short, *Hunting Titan* makes clear that it is unlikely that the PTAB will step in with its own rationale to support any deficiencies.

Settlement

The final decision designated precedential during this period was *DTN, LLC v. Farms Technology, LLC*,⁴⁸ from a panel again including Vice Chief Administrative Judge Weidenfeller. The parties in that proceeding filed a joint motion to terminate the proceeding, as well as a confidential settlement agreement.⁴⁹ The settlement agreement referenced two collateral agreements, which the PTAB concluded also needed to be filed.⁵⁰ The parties disagreed that the collateral agreements needed to be filed, but proposed filing the agreements along with a motion to treat them as business confidential, as well as a motion to expunge the agreements.⁵¹

After receipt of the collateral agreements, the PTAB declined to expunge them, concluding that their filing was required by § 317(b).⁵² In so doing, the PTAB declined to construe the statute as limiting collateral agreements as being agreements only between the parties.⁵³

Accordingly, parties should be careful in drafting any settlement agreement that will be filed with the PTAB. *DTN* demonstrates that the PTAB does carefully review those agreements. If there are additional agreements between

³⁸ IPR 2018-00600, Paper 67 (July 6, 2020) (designated precedential July 6, 2020).

³⁹ *Id.* at 3.

⁴⁰ *Id.* at 5.

⁴¹ *Id.* at 6.

⁴² *Id.* at 7-8 (agreeing with the decision in *Nike, Inc. v. Adidas AG*, 955 F.3d 45, 51 (Fed. Cir. 2020) that *SAS* is distinguishable on this basis). The Federal Circuit in *Nike* held that the PTAB may raise a ground of unpatentability as to proposed substitute claims *sua sponte*, but it must provide notice and an opportunity to respond. *Id.*

⁴³ *Hunting Titan* at 9.

⁴⁴ *Id.* at 10-11.

⁴⁵ *Id.* at 14.

⁴⁶ *Id.* at 14.

⁴⁷ *Id.* at 15-16.

⁴⁸ IPR 2018-01525, Paper 21 (June 14, 2019) (designated precedential June 11, 2020).

⁴⁹ *Id.* at 2.

⁵⁰ *Id.* at 3-4.

⁵¹ *Id.*

⁵² *Id.* at 6.

⁵³ *Id.*

the parties, or agreements between a party and a non-party, referenced in the settlement agreement, the PTAB can require those agreements to be filed along with the settlement agreement. The parties might consider simply including all agreements relied upon for settlement into the settlement agreement to avoid having to file third-party agreements with the PTAB.

A motion to terminate in view of settlement was also at issue in the informative decision of *Kokusai Electric Corp. v. ASM IP Holding B.V.*,⁵⁴ from a panel including Vice Chief Judge Tierney. The parties in that case filed a motion to terminate the proceeding, but also requested that the PTAB grant-in-part the motion to amend before termination. The settlement agreement was not contingent on the motion to amend being granted and the parties sought termination before issuance of a final written decision.⁵⁵ The PTAB

declined to grant-in-part the motion to amend, concluding that would require a decision on the merits, which would not be a good use of its resources given the parties' desire to terminate before any such decision.⁵⁶ Moreover, the PTAB noted that the parties failed to identify any statutory basis for the PTAB to issue an IPR certificate without first issuing a final written decision, as an IPR certificate is normally issued after a final written decision issues and the time for appeal has expired or terminated.⁵⁷ According to the PTAB, the USPTO has a clear authority to do so in reexamination or reissue proceedings, and the order did not prevent patent owner from pursuing such proceedings.⁵⁸

Miscellaneous Informative Decisions

The two remaining informative decisions address disparate topics. A design patent was at issue in *Sattler Tech Corp. v. Humancentric Ventures, LLC*.⁵⁹ In that case, the Board instituted review under

35 U.S.C. § 171 on the basis that the design claim lacked ornamentality.⁶⁰

Finally, in *Curt G. Joa, Inc. v. Fameccanica.Data S.P.A.*, the PTAB provided guidance about confidential material discussed at the oral hearing.⁶¹ The PTAB has a general policy of making as much of the record of a post grant proceeding as possible publicly available. Thus, the PTAB instructed that the hearing would be initially open to the public on a first-come, first-served basis.⁶² The hearing room would then be closed, and each party would have an allotted period of time to address the confidential material, noting that the transcript of that portion of the transcript would also be marked confidential.⁶³ Thus, to the extent that confidential information needs to be discussed during an oral hearing, the parties should contact the PTAB ahead of the hearing to make arrangements with the PTAB.

⁵⁴ IPR2018-01151, Paper 38 (Aug. 20, 2019) (designated informative June 11, 2020).

⁵⁵ *Id.* at 3.

⁵⁶ *Id.* at 4-5.

⁵⁷ *Id.* at 5.

⁵⁸ *Id.* at 5-6.

⁵⁹ PGR2019-00030, Paper 9 (July 26, 2009) (designated informative June 11, 2020).

⁶⁰ *Id.* at 17-18.

⁶¹ IPR2016-00906, Paper 61 (June 20, 2017) (designated precedential June 11, 2020).

⁶² *Id.* at 2.

⁶³ *Id.*

The PTAB Strikes Back: Discretionary Non-Denial for Rocket-Docket District-Court Litigation

The PTAB has acquired some notoriety for denying institution of patent reviews (IPRs, PGRs, CBMs) as a matter of discretion, particularly when there is co-pending district court litigation. In perhaps the most controversial application of its discretion, the PTAB will at times deny institution for petitions filed within the one-year bar that Congress set after a complaint has been filed. 35 U.S.C. §§315(b), 325(b). The PTAB has reasoned that its proceedings are supposed to increase the efficiency of the patent system, so if the district court and parties have already made significant investments in the civil litigation or if the civil litigation will address similar issues, then instituting review would create—rather than avoid—inefficiency.

Many have criticized this position as ignoring the role of stays in civil litigation. Indeed, a pending suit challenges the PTAB position as improper covert rule-making. *Apple Inc. v. Iancu*, 5:20-cv-6128, dkt. 1 (complaint) (N.D. Cal., Aug. 31, 2020). While an institution decision based on a dubious PTAB practice is insulated from judicial review (35 U.S.C. §§314(d), 324(d)), no such barrier exists for parties likely to be affected by such “rules”—whether petitioners, patent owners, or trade groups—to mount a facial challenge to the rule, provided the challenge occurs reasonably soon after the rule is promulgated.

Some patent owners have started to capitalize on the PTAB’s practice by

filing in so-called rocket dockets, which are district courts with streamlined procedures for reaching trial quickly. Two courts in particular have stood out as not only fast, but also as welcoming to patent suits: the Eastern and Western Districts of Texas. These courts have seemingly facilitated PTAB institution denials by advancing some processes to create the sort of investments that the PTAB has said it considers in denying institution. The PTAB does not like to be gamed, however, regardless of who is doing the gaming. At a recent conference, Vice Chief Judge Bonilla explained that the PTAB was aware of possible gamesmanship in framing litigation as too advanced for a PTAB review. Some recent decisions of the PTAB confirm an awareness—and willingness to discount—the use of rocket dockets to avoid review.

For example, in *Apple Inc. v. Parus Holdings Inc.*, IPR2020-00686, Paper 9 (PTAB 2020), the panel instituted despite activity in the Western District of Texas. The panel noted that the court generally does not stay litigation for PTAB reviews, that the court had set trial before the PTAB would enter its final written decision, and that considerable investments by the parties would be made by the parties in any case before the PTAB reached its final decision—all factors against institution. Yet the panel discounted these facts and opted to proceed, in part because the merits of the challenge at the PTAB were strong. Significantly, the petitioner

stipulated not to pursue the same grounds in district court.

In reaching its decision, the panel relied heavily on *Sand Revolution II, LLC v. Continental Intermodal Group – Trucking LLC*, IPR2019-01393, Paper 24 (PTAB 2020) (informative). Coincidentally, the Federal Circuit reviewed the same district court’s refusal to grant a stay after PTAB institution of an IPR on a petition for a writ of mandamus. *In re Sand Revolution LLC*, App. No. 20-145 (Fed. Cir., Sept. 28, 2020) (nonprecedential). The Federal Circuit denied relief because it was “unable to say that the district court clearly overstepped its authority” in denying the stay. The Federal Circuit was bound by the exacting standards for mandamus. Unfortunately, the issue will likely become moot once the trial is over. Hence, the resulting situation in rocket dockets seems to be the opposite of the efficient alternative to district-court litigation that Congress intended. Instead, patent owners seeking to avoid PTAB reviews and defendants seeking to avoid district-court litigation might end up with both, at least in some district courts. Whether Congress or the Federal Circuit will break this impasse remains to be seen. Petitioners sued in rocket dockets, however, can improve their chances of institution by filing petitions that are strong on the merits as soon as possible after the complaint has been filed.

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