

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC.,

Petitioner,

v.

NETSOCKET, INC.,

Patent Owner.

Patent No. 7,190,698

Filing Date: December 20, 2001

Issue Date: March 13, 2007

Inventors: Emil Svanberg, Joachim Johansson, Anders Torger,
Joakim Norrgard, and Anders Larsson

Title: NETWORK OPTIMISATION METHOD

PATENT OWNER'S PRELIMINARY RESPONSE

Case No. IPR2023-00607

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EXHIBIT LIST

Exhibit No.	Description of Document
2001	Amended Docket Control Order, Dkt. 47, in <i>NetSocket Inc. v. Cisco Systems, Inc.</i> , Case No. 2:22-cv-00172-JRG, dated February 2, 2023
2002	Cisco Systems, Inc.'s P.R. 3-3 Invalidity Contentions and Ineligibility Contentions in v <i>NetSocket Inc. v. Cisco Systems, Inc.</i> , Case No. 2:22-cv-00172-JRG, dated March 22, 2023

I. INTRODUCTION

On February 17, 2023, Cisco Systems, Inc. (“Cisco” or “Petitioner”) submitted a Petition for *Inter Partes* Review (Paper No. 2, “Petition”) of U.S. Patent No. 7,190,698 (Ex. 1001, “the ’698 Patent”), challenging Claims 1-8 pursuant to §§ 311-319 and § 42.100, *et seq.* (“the Challenged Claims”).

The Petition should be denied because the Petitioner has failed to demonstrate a reasonable likelihood that the Challenged Claims are invalid as obvious under 35 U.S.C. § 103(a) based on the prior art references and obviousness grounds set forth in the Petition. The prior art references and obviousness grounds cannot render the Challenged Claims obvious for at least the following reason. None of the cited references disclose or render obvious “passing resource requests from the Bandwidth Broker (BB) to at least one intra-domain (IDB)¹, wherein each intra-domain broker (IDB) is responsible for admission control and the Label Switched Path, LSP, setup.”

¹ The Claims use the term “(1DB)”, instead of “(IDB).” However, it is clear from the description in the specification that the “1” in “(1DB)” is a patent office transcription error following an examiner’s amendment dated November 8, 2006, and that the claim language in the as-filed application and the Examiner’s amendment both correctly referred to the intra-domain broker as an “(IDB)”. Ex. 1002 at 38. The terms 1DB and IDB are used herein interchangeably.

The proposed combination of at least three prior art references shoehorns the “Administrative Server” of Gibson (Ex. 1006) into the premium delivery service of Xiao (Ex. 1005). In this proposed combination, Petitioner identifies only *one* alleged intra-domain broker (IDB)—the combination of Gibson’s “Administrative Server” with connection managers (CMs). However, the claims recite “each intra-domain broker” and require at least *two* IDBs. The Petitioner does not propose any acceptable modifications of Gibson that would arrive at the claims of the ’698 Patent.

Furthermore, the Board should deny this Petition in its discretion under *Fintiv*. Accordingly, the Board should deny institution.

II. THE ’698 PATENT

The ’698 Patent is entitled “Network Optimisation Method” and issued on March 13, 2007. The ’698 Patent claims priority to U.S. Provisional Patent Application No. 60/197,006, filed on April. 13, 2000. At a high level, the ’698 Patent is directed to a method and arrangement for networking equipment that provides virtual leased lines between different domains. Each domain includes a Bandwidth Broker that has visibility into its corresponding domain. Ex. 1001 at Col. 2, ll. 48-55. Bandwidth Brokers manage policies for bandwidth resources and maintain a database of the domain’s resources. Bandwidth Brokers also provide admission control decisions on Quality-of-Service (“QoS”) requests. Bandwidth Brokers further communicate with one or more Intra-Domain Brokers (IDB), which

are responsible for receiving resource requests, performing admission control, and Label Switched Path “LSP” setup. Col. 7, ll. 10-18.

Figure 4 depicts an exemplary network hierarchy, which shows the Bandwidth Brokers communicating with Intra-Domain Brokers (IDB) within their own network:

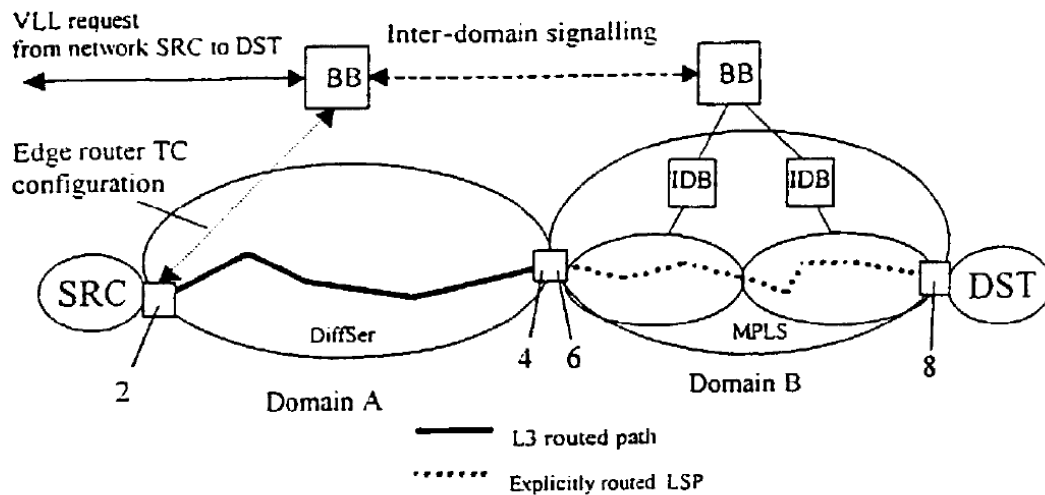


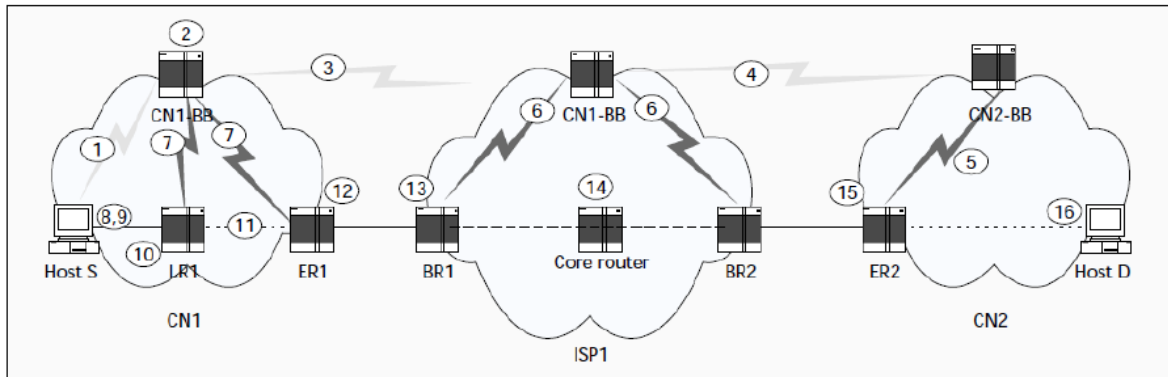
Fig. 4

Ex. 1001 at Fig. 4. The network configuration of the '698 Patent allows the Bandwidth Broker to gain visibility into the routing and other resources of its Domain. This allows for end-to-end virtual leased lines (VLL) and more specifically, guaranteed bandwidth VLLs. *Id.* at Col. 4, ll. 46-53.

III. THE ALLEGED PRIOR ART

To provide the claimed network hierarchy, Petitioner focuses primarily on two prior art references, Xiao (Ex. 1005) and Gibson (Ex. 1006). More specifically,

Petitioner relies on a combination of Xiao’s Figure 4, which discloses communications between “routers” and Bandwidth Brokers:



■ Figure 4. *The delivery process of premium service with a dynamic SLA.*

Ex.1005, Fig. 4.

Ex. 1005 at Fig. 4. The Xiao system lacks the sophistication of the invention described in the '698 Patent. More specifically, the Xiao system merely depicts Bandwidth Brokers (*e.g.* CN1-BB) in communication with edge routers (*e.g.* ER1) in a DiffServ domain. The Bandwidth Brokers described in Xiao do not have any visibility into routing within their own Domain, let alone into other Domains. Therefore, Xiao could not configure the type of guaranteed bandwidth VLLs described in the '698 Patent.

Next, the Petitioner identifies Gibson as filling in Xiao’s communication and configuration gaps. However, Gibson does not relate to the use of a “Bandwidth

Broker” at all. Instead, Gibson proposes an “Administrative Server” to be used across multiple MPLS domains:

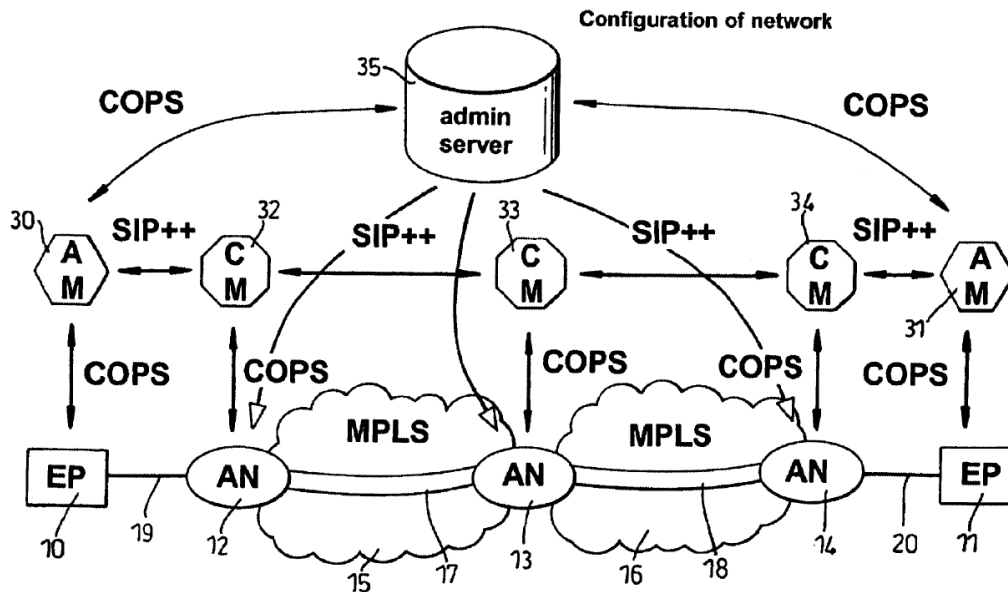


Fig. 1

Ex. 1006 at Fig. 1. As depicted in Figure 1, the Administrative Server spans multiple MPLS domains (e.g. 15 and 16). The Administrative Server of Gibson is incompatible with the teachings of the '698 Patent for numerous reasons. For example, the Administrative Server is only described in the context of MPLS networks and cannot provide visibility into network paths that span domains as set forth in the '698 Patent. Moreover, the Administrative Server is depicted as a

centralized authority across (*inter*) domains, and the Petitioner does not explain how this structure could perform the function of an *Intra*-Domain Broker (IDB).

Petitioner attempts to force the combination of Xiao and Gibson without regard to the aforementioned issues. Even if the references were combinable, Petitioner does not explain how one of skill in the art would arrive at the limitation “passing resource requests from the Bandwidth Broker (BB) to at least one intra-domain (IDB), wherein each intra-domain broker (IDB) is responsible for admission control and the Label Switched Path, LSP setup.” These deficiencies are elaborated below.

IV. LEVEL OF ORDINARY SKILL IN THE ART

For the purposes of this Preliminary Response only, Patent Owner utilizes Petitioner’s proposed level of ordinary skill in the art: “a bachelor’s degree in computer science, computer engineering, electrical engineering, or equivalent training, and approximately two years of experience working in the field of network communications. Additional work experience can substitute for specific educational background, and vice versa.” Pet. at 10.

V. CLAIM CONSTRUCTION

Petitioner identifies one term in its Claim Construction section – “Bandwidth Broker.” Petitioner then identifies several portions of the specification describing the Bandwidth Broker but does not appear to propose a particular construction. For

purposes of this Preliminary Response, Patent Owner does not take a position on the construction of Bandwidth Broker.

VI. LEGAL STANDARD

The question of obviousness is resolved on the basis of underlying factual determinations, including: (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so called secondary considerations. *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17–18 (1966). A claim is only unpatentable under 35 U.S.C. § 103 if “the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.” *KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007) (quoting 35 U.S.C. § 103).

“An invention is not obvious simply because all of the claimed limitations were known in the prior art at the time of the invention. Instead, we ask ‘whether there is a reason, suggestion, or motivation in the prior art that would lead one of ordinary skill in the art to combine the references, and that would also suggest a reasonable likelihood of success.’” *Forest Lab’ys, LLC v. Sigmapharm Lab’ys, LLC*, 918 F.3d 928, 934 (Fed. Cir. 2019). “Of course, concluding that the references are within the scope and content of the prior art to be considered for obviousness does

not end the inquiry. *Graham* makes clear that the obviousness inquiry requires a determination whether the claimed invention would have been obvious to a skilled artisan.” *Apple Inc. v. Samsung Elecs. Co.*, 839 F.3d 1034, 1051 n.14 (Fed. Cir. 2016).

VII. THE BOARD SHOULD DENY INSTITUTION BECAUSE PETITIONER HAS FAILED TO SHOW A REASONABLE LIKELIHOOD OF SUCCESS FOR ANY OF GROUNDS 1-2

Petitioner does not explain how the combination of Xiao and Gibson can arrive at the limitation “passing resource requests from the Bandwidth Broker (BB) to at least one intra-domain (IDB), wherein each intra-domain broker (IDB) is responsible for admission control and the Label Switched Path, LSP setup.” This claim limitation requires a particular network configuration with “*each* intra-domain broker (IDB).”

Petitioner relies only on Gibson to disclose “passing resources requests from the Bandwidth Broker (BB) to at least one intra-domain [broker] (IDB), wherein each intra-domain broker (IDB) is responsible for . . .” limitation. Pet. at 56-70. According to Petitioner, the admission managers 30, 31 of Gibson are analogous to the claimed Bandwidth Brokers (BB) (Pet. at 60). And Petitioner relies on the combination of the connection managers (CMs) 32 and administrative server 35 (shown below in the red dashed box below) of Gibson to disclose or render obvious

an IDB. Pet. at 57. Petitioner's argument is summarized by its annotation of Gibson's Figure 1:

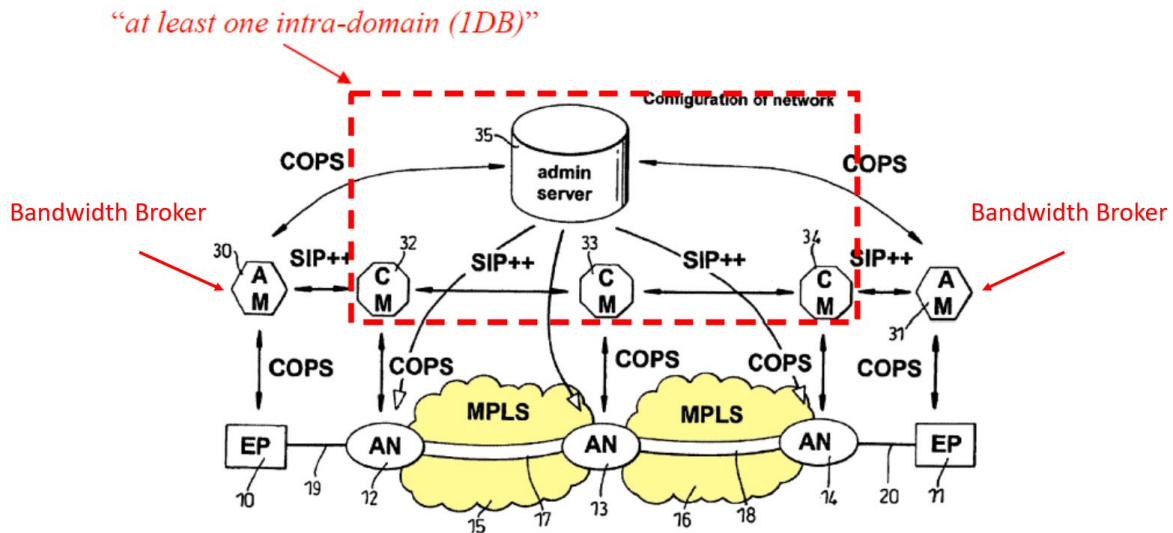


Fig. 1

Ex.1006, Fig. 1 (annotated); Ex.1003, ¶267.

Pet. at 58 (annotations for bandwidth brokers added).

But Petitioner's mapping only identifies *one* alleged intra-domain broker (IDB). As discussed below, however, the claims require at least *two* intra-domain brokers (IDBs), and Petitioner does not explain how one of skill in the art would have modified Gibson's alleged IDB (administrative server 35 in combination with connection managers (CMs) 32) to arrive at the claimed IDBs. Indeed, Petitioner does not even explain how Gibson's administrative server 35/CMs 32, which is across/between domains (*inter* domain) (domains shown in yellow clouds above), functions as an "intra" domain broker ("intra" means within).

Claim 1 of the '698 Patent requires at least two network domains (“Method in packet based communication network **including network domains**”) with each domain being associated with its own Bandwidth Brokers BB (“wherein the bandwidth broker (BB) is **associated to *each* network domain**”). Ex. 1001 at Claim 1 (emphasis added). Thus, there must be at least two Bandwidth Brokers. Indeed, Claim 1 specifically refers to two bandwidth brokers—the claim recites one bandwidth broker communicating with another bandwidth broker BB_A: “each involved bandwidth broker (BB) returns a result of the admission control to [bandwidth broker] BB_A. . . .” *Id.* Each bandwidth broker, in turn, passes resource requests to its own intra-domain broker (IDB). In particular, step (iv) of claim 1 refers to “*each* [] bandwidth broker” performing certain functions. Claim 1 then states that step (iv) further involves the step of “passing resource requests from the Bandwidth Broker (BB) to at least one intra-domain (IDB), wherein each intra-domain broker (IDB) is responsible for admission control and the Label Switched Path, LSP, setup.” Thus, because claim 1 recites at least two bandwidth brokers and each bandwidth broker is associated with at least one IDB, there are at least two IDBs—one for each bandwidth broker. Accordingly, Petitioner’s mapping, which only discloses **one** IDB, is in direct contravention of claim 1 of the '698 Patent, which recites “*each* intra-domain broker (IDB).”

Petitioner then attempts to modify Xiao with Gibson to arrive at the claims, but Petitioner does not explain how one of skill in the art would have modified Gibson so that “each” alleged IDB (Gibson’s administrative server 35 in combination with connection managers (CMs) 32) would communicate with a Bandwidth Broker.

As set forth above, the claims require “each” Bandwidth Broker and “each” Intra-Domain Broker. *See infra* VII.a; Ex. 1001 at Claim 1. But Gibson only discloses a *single* alleged IDB that controls *multiple* MPLS domains across a network. Ex. 1006 at Fig. 1. Petitioner attempts to modify Xiao with Gibson to arrive at the claims, but Petitioner does not explain how one of skill in the art would have modified Gibson’s *single* alleged IDB operating across (inter) domains to be the “each” *Intra*-Domain Broker of the claims.

Accordingly, because Petitioner failed to address the required modifications to Gibson’s configuration, the Petition does not set forth a basis for mapping the prior art to the claimed IDB and the Petition should be denied.

**VIII. THE PETITION SHOULD BE DENIED IN THE DISCRETION
OF THE DIRECTOR UNDER 35 U.S.C. § 314(A)**

The circumstances of the parallel District Court Litigation in Texas (*NetSocket, Inc. v. Cisco Systems, Inc.*, No. 2:22-cv-00172-JRG (E.D. Tex.)) necessitate denial of the Petition under the Board’s precedent, as every factor

considered in relation to efficiency, fairness, and the merits supports denial. *See Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11, at 6 (P.T.A.B. Mar. 20, 2020) (precedential) (considering (a) “whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted;” (b) “proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision;” (c) “investment in the parallel proceeding by the court and the parties;” (d) “overlap between issues raised in the petition and in the parallel proceeding;” (e) “whether the petitioner and the defendant in the parallel proceeding are the same party;” and (f) “other circumstances that impact the Board’s exercise of discretion, including the merits.”). Furthermore, there is no “compelling merit” to Cisco’s Petition that would negate the strong *Fintiv* factors under *Commscope Technologies LLC v. Dali Wireless, Inc.*, IPR2022-01242, Paper 23 (P.T.A.B. Feb. 27, 2023) (precedential).

As set forth below, every *Fintiv* factor demonstrates that efficiency and integrity of the AIA are best served by denying review. First, the Court has not granted a stay and there exists no evidence that it will grant one. Second, trial (set for May 20, 2024) will be complete before the projected statutory deadline for a Final Written Decision in September 2024. Third, the parties have already invested massive resources developing legal and factual issues of validity, and the claim construction will be ongoing before the institution decision on this Petition. Fourth, there is complete overlap between the Challenged Claims and prior art and those at

issue in the parallel proceedings. Fifth, Petitioner and Patent Owner will complete trial, and receive a judgment on the merits, before the projected statutory deadline for a final written decision. Finally, as shown above, Cisco's obviousness combination fails to disclose important limitations of the claims and merely raises art that is largely similar to art that was of record during prosecution.

Accordingly, the Board should exercise its discretion under § 314(a) and deny the Petition because institution of this proceeding would not be consistent with the objective of the AIA to "provide an effective and efficient alternative to district court litigation." *NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8, at 20 (P.T.A.B. Sept. 12, 2018) (quoting *Gen. Plastic Indus. Co. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19, at 16–17 (P.T.A.B. Sept. 6, 2017) (precedential)).

A. No Stay of the Parallel District Court Litigation

Petitioner has not moved to stay the District Court Litigation; moreover, there is no evidence that the District Court would grant such a motion in view of the fact that many of the asserted patents in the Texas Action are not subject to any post-grant proceedings in the PTAB. Accordingly, this factor weighs in favor of discretionary denial.

B. The Board’s Written Decision Deadline Will Come Long After the Trial Date

The Texas Court issued its Scheduling Order on February 2, 2023, setting trial for May 2024. Ex. 2001. Pursuant to 35 U.S.C. § 316(a)(11), the projected statutory deadline for a final written decision is in September 2024, four months later. Even assuming the median 24.5 months to trial in the Eastern District of Texas, which would be July or August 2024, the final written decision is still scheduled to be released after the trial date.

Accordingly, this factor weighs in favor of denying institution. *See Samsung Elecs. Am., Inc. v. Uniloc 2017 LLC*, IPR2019-01218, Paper 7, at 7-10 (P.T.A.B. Jan. 7, 2020) (denying institution where jury selection was scheduled for approximately six months before trial in the Board proceeding would conclude); *Next Caller Inc. v. TrustID, Inc.*, IPR2019-00961, -00962, Paper 10, at 8-16 (P.T.A.B. Oct. 16, 2019) (denying institution where trial was scheduled to conclude “several months,” before a final decision would be due); *Cisco Sys., Inc. v. Ramot at Tel Aviv Univ. Ltd.*, IPR2020-00122, Paper 15 at 8 (P.T.A.B. May 15, 2020) (“Because the trial date is substantially earlier than the projected statutory deadline for the Board’s final decision, this factor weighs in favor of discretionary denial.”).

C. Significant Investment by the Time of Institution Favors Discretionary Denial

The parties' investment in the parallel proceeding weighs in favor of discretionary denial. Significant work in the District Court Litigation has already taken place and claim construction briefing will begin around the time of the Board's institution decision in September 2023.

Pursuant to 35 U.S.C. § 314(b), the Board will issue an institution decision in September 2023. The parties have already served both infringement and invalidity contentions. These substantial investments, including a significant investment in validity, infringement contentions, and discovery, show that this factor weighs heavily against institution.

Thus, the parties' and the Eastern District of Texas's substantial investments strongly weigh in favor of discretionary denial. *See Supercell Oy v. Gree, Inc.*, IPR2020-00513, Paper 11 at 12 (P.T.A.B. June 24, 2020) (denying institution where the district court issued its order on claim construction, fact discovery had closed, parties served opening expert reports, and "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").

Accordingly, this factor weighs in favor of denial.

D. The District Court Litigation Involves the Same Claims and the Same Arguments

The Asserted Claims in the District Court Litigation and the Challenged Claims in this Petition are substantially the same and at least independent Claim 1 is at issue in both proceedings.

Moreover, Petitioner's invalidity contentions, served on March 22, 2023, set out substantially the same arguments, using the same references including Xiao, Gibson, Schelen-1, and Schelen-2 against at least Claim 1. Ex. 2002 at 10-12. "[I]f 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." *Fintiv*, IPR2020-00019, Paper 11 at 12. As the Board has noted, when both the District Court and the Board will consider the same prior art and arguments, "concerns of inefficiency and the possibility of conflicting decisions [are] particularly strong." *Id.* The likelihood of inefficiency and conflicting decisions is particularly significant in this case: the Texas Court will have conducted a claim construction hearing more than a month before the statutory deadline for an institution decision, and the case will have reached a final jury verdict on validity with trial beginning May, 2024, months before the statutory deadline for a Final Written Decision.

This factor accordingly favors discretionary denial.

**E. The Parallel District Court Litigation and the Petition
Involve the Same Parties**

As noted above, the Texas Action is between the same parties. Cisco makes no argument as to this factor. Accordingly, this factor weighs in favor of discretionary denial.

F. Other Circumstances Favor Denial of Institution

As shown above, Cisco fails to show that key limitations are disclosed or rendered obvious by its combinations. As such, it lacks strength on the merits.

Furthermore, the material set forth in the references cited by Petitioner was squarely within the prior art that was already of record and considered by the Office. Petitioner failed to address any of the *Becton Dickinson* factors, such as the similarities and differences between the asserted art and the prior art involved during examination. Petitioner admits that “the Schelen Thesis, which is cited in the ’689 Patent, has some overlap in subject matter with the disclosure of Schelen-1 and Schelen-2.” Pet. at 82. Indeed, this overlap is reasonable considering the common author and timeframe. However, Petitioner’s blanket statement that “the relevant teachings and the evidence were not considered as presented herein” is insufficient to satisfy Petitioner’s burden under 325(d). Petitioner’s failure to address any of the substantive facts of the references in the context of 325(d) should be fatal to its Petition. At the very least, the similarities in subject should preclude any finding that the Petition provides “compelling merit.”

Considering all factors together, the Petition should be denied in the Director's discretion under 35 U.S.C. § 314(a).

IX. CONCLUSION

For the foregoing reasons, Patent Owner respectfully requests that the Board deny institution of the Petition in its entirety.

Respectfully submitted,

Dated: June 28, 2023

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CERTIFICATE OF WORD COUNT

The undersigned hereby certifies that the portions of the above-captioned PATENT OWNER'S PRELIMINARY RESPONSE TO PETITION FOR *INTER PARTES* REVIEW OF U.S. PATENT NO. 7,616,698 specified in 37 C.F.R. § 42.24 has 3,360 words in compliance with the 14,000 word limit set forth in 37 C.F.R. § 42.24. This word count was prepared using Microsoft Word for Office 365.

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CERTIFICATE OF SERVICE

A copy of PATENT OWNER'S PRELIMINARY RESPONSE TO PETITION FOR *INTER PARTES* REVIEW OF U.S. PATENT NO. 7,616,698 and EXHIBITS 2001-2002 have been served on Petitioner's counsel of record as follows:

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