

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TREND MICRO, INC.,

Petitioner,

v.

TAASERA LICENSING LLC,

Patent Owner.

Patent No. 8,990,948

Filing Date: July 27, 2012

Issue Date: March 24, 2015

Inventors: Srinivas Kumar and Dennis Pollutro

Title: SYSTEMS AND METHODS FOR ORCHESTRATING RUNTIME
OPERATIONAL INTEGRITY

PATENT OWNER'S PRELIMINARY RESPONSE

Case No. IPR2023-00800

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Exhibit No.	Description of Document
2001	Eighth Amended Docket Control Order, Dkt. 278, <i>In re: Taasera Licensing LLC, Patent Litigation</i> , No. 2:22-md-03042-JRG (E.D. Tex. Sept. 7, 2023)
2002	Defendants' Joint Patent L.R. 3-3 Invalidity Contentions and Subject Matter Ineligibility Contentions, <i>In re: Taasera Licensing LLC, Patent Litigation</i> , No. 2:22-md-03042-JRG, served March 28, 2023
2003	Joint Patent L.R. 4-5 Joint Claim Construction Chart, Dkt. No. 276-1, <i>In re: Taasera Licensing LLC, Patent Litigation</i> , No. 2:22-md-03042-JRG, filed September 1, 2023

I. INTRODUCTION

On April 5, 2023, Trend Micro, Inc. (“Petitioner”) submitted a petition (Paper 2, “Petition” or “Pet.”) to institute *inter partes* review (“IPR”) of U.S. Patent No. 8,990,948 (Ex. 1001, the “’948 Patent”), challenging claims 1-5 (the “Challenged Claims”). The Petition asserts that the Challenged Claims are obvious over “Network Intrusion Detection” by Biswanath Mukherjee, L. Todd Heberlein, and Karl N. Levitt (“Mukherjee”) in view of U.S. Patent No. 7,451,488 to Cooper *et al.* (“Cooper”). Pet. at 2. However, the Board should deny the Petition for at least two reasons: (1) the Petitioner fails to identify how certain elements of the Challenged Claims are obvious over Mukherjee in combination with Cooper; and (2) the Board should exercise its discretion to deny the Petition under 35 U.S.C. § 314(a).

Mukherjee does not disclose any matrix, let alone both the claimed event correlation matrix and risk correlation matrix. Petitioner also fails to show how either Mukherjee or Cooper disclose a *plurality* of runtime dashboards, since both references are only directed towards network traffic or the network as a whole, instead of indicating the integrity of an application. As such, a PHOSITA would not be motivated to combine Mukherjee and Cooper to teach, disclose, or suggest the claimed invention because none of these two references are directed towards determining the real-time operational integrity of the application.

The Board should exercise its discretion to deny this Petition for at least the following reasons: (i) There exists a parallel District Court Litigation between the same parties or real-parties-in-interest; (ii) the District Court Litigation involves the same subject patent (the '948 Patent) with substantially the same claims; (iii) the District Court's trial will be almost *seven months before* the projected statutory deadline; (iv) the parties have heavily invested in the District Court proceeding since claim construction briefing is complete, fact discovery closes in approximately three months on November 6, 2023, and a trial date is set for April 15, 2024, which is only about seven months away; and (v) there is no stay of the parallel District Court Litigation.

II. THE '948 PATENT

The '948 Patent "relates to the field of data center virtualization and, more particularly, to systems and methods for providing dynamic operational integrity attestation of application security and a user reputation at runtime." '948 Patent, 1:16-19.

The '948 Patent addresses several problems in existing attestation systems:

Existing attestation systems are often narrowly focused and generally aimed at specific use-cases limited to system components such as hardware and applications and therefore typically lack flexibility to dynamically address more general attestation problems. Further, existing definitions of attestation focus primarily on describing specific, narrow, and particular properties desirable in

specific use-cases. Additionally, current attestation systems are created to work with one particular measurement system targeting one particular system of interest without considering the reputations of users or operators of the system of interest.

Id., 3:63-4:6.

The claimed invention of the '948 Patent provides several benefits that address the problems described above:

Accordingly, what the present inventors have identified as desirable are technology based attestation architectures, systems, and methods that perform a calculus of risk to determine a level of trust of systems that are not necessarily monolithic and can be made up of diverse hardware and software platforms and can be accessed by users with varying credentials and reputations. Accordingly, what the inventors have identified as being desirable are attestation architectures, systems, and methods that can be flexible enough to accommodate varying concepts of attestation, including taking the reputation of users that access targeted systems into account. What the present inventors also see as desirable are attestation systems and architectures that can dynamically handle complex attestation scenarios and provide more complete runtime attestation than is currently achievable. What the present inventors additionally see as desirable are methods and systems for performing evidence based automated application binary analysis.

Id., 4:7-25.

The '948 Patent describes a risk correlation matrix and an event correlation matrix. For example, the event correlation matrix correlates (and maps) “integrity warnings [] to endpoint events”:

Referring to FIG. 6, the exemplary correlation system 600 includes . . . an event correlation matrix 633 that maps integrity warnings 634 to endpoint events 520 for dispatch to a trust orchestrator 430.”

Id., 15:10-19.

[I]ntegrity alerts 632 are generated and mapped to a cell in an event correlation matrix grid 633 (analogous to the risk correlation matrix 411 of FIG. 4 and grid 721 of FIG. 7C) to generate system level integrity warnings 634. The rows in the event correlation matrix 633 represent an application instance on the device 560 (analogous to rows in the risk correlation matrix 411 that represent a device by machine identifier).

Id., 17:17-34.

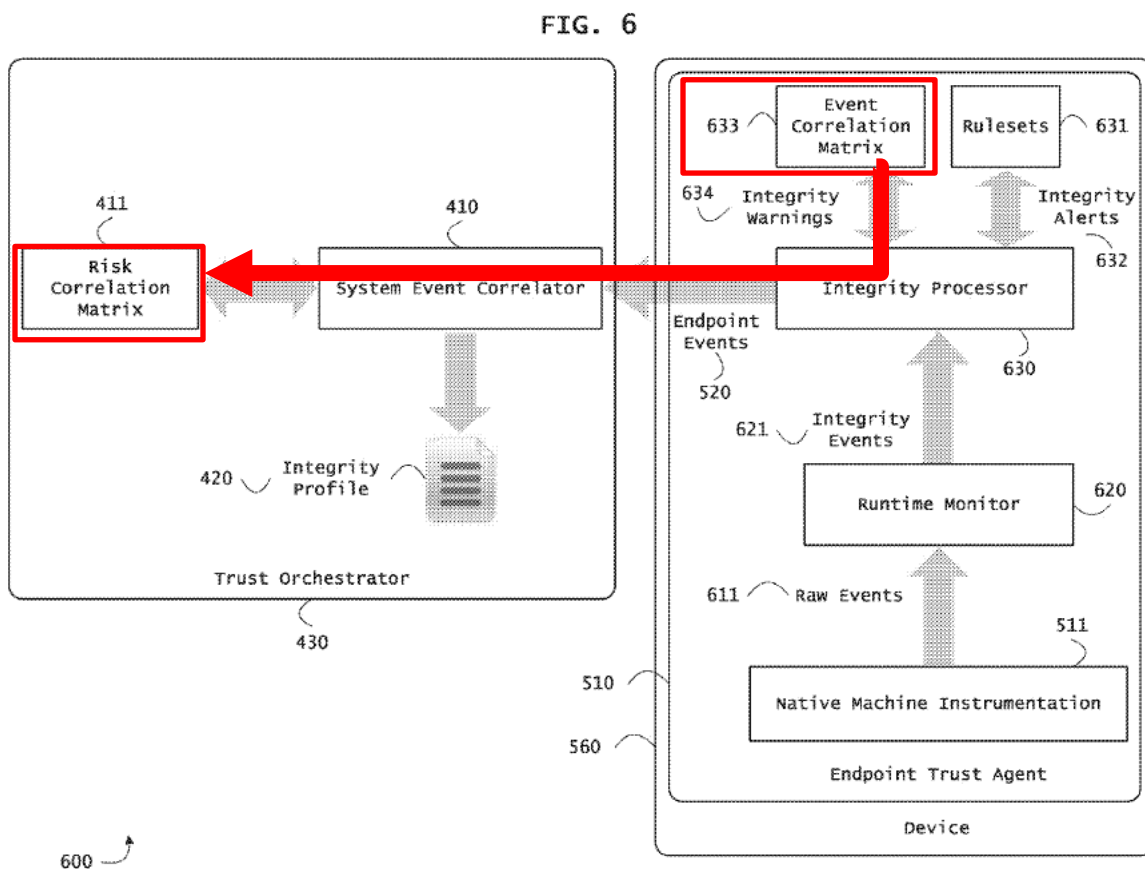
For further example, the risk correlation matrix correlates system warnings to system warning classes.

The risk correlation matrix 721 can comprise a universally unique identifier (UUID) for the system, system warnings 723 mapped to at least one system warning class 722, and at least a system warning class 722 to diagnose system deviations (i.e., system deviated integrity warnings 724), system duress, system vulnerable and system infections (i.e., system infected integrity warnings 724). . . . In FIG. 7C, the exemplary risk correlation matrix 721 illustrates that for each device 560 (or application) uniquely identified by a machine identifier (e.g., a virtual machine universally unique identifier (UUID), IP address) or

application instance identifier (application UUID), a different set of alerts may trigger different system warnings that map to a common system warning class. By mapping alerts to a behavior model (or cluster), unknown (such as emerging or polymorphic) threats may be classified and identified without requiring image or wire level signatures.

Id., 16:38-60.

The relationship between the event correlation matrix to the risk correlation matrix is shown by the visual representation of the '948 Patent's Fig. 6.



Id., Fig. 6 (annotated).

The event and correlation matrices are ultimately used to provide real-time status indications that are displayed on each of the claimed “various dashboards” (*i.e.*, a plurality of runtime dashboards).

FIGS. 14-18 illustrate an exemplary data center administration console interface comprising ***various dashboards*** for displaying data related to operational integrity, resource utilization, application integrity, and network activity, in accordance with embodiments of the invention.

Id., 26:35-46 (emphasis added).

III. THE ALLEGED PRIOR ART

A. Mukherjee

In Mukherjee, “several host-based and network-based IDSs are surveyed, and the characteristics of the corresponding systems are identified. The host-based systems employ the host operating system’s audit trails as the main source of input to detect intrusive activity, while most of the network-based IDSs build their detection mechanism on monitored network traffic, and some employ host audit trails as well. An outline of a statistical anomaly detection algorithm employed in a typical IDS is also included.” Ex. 1005, 1.

The disclosure of Mukherjee confirms that its NSM (Network Security Monitor) services do not assess an endpoint. For example, “[t]he NSM analyzes traffic on a broadcast LAN to detect intrusive behavior.” Ex. 1005, 8. Mukherjee

further confirms describes that network connections are assessed rather than endpoints: “During a particular two-month test period, the NSM analyzed more than 111,000 connections on the Computer Science LAN segment at UC Davis, and it correctly identified more than 300 of these connections as intrusive.” *Id.* at 11. Therefore, Mukherjee’s NSM (***network security*** monitoring) services monitor and assess a network to determine whether there is intrusive behavior on that network.

B. Cooper

Cooper “relates generally to the field of network security management. More particularly, the invention relates to scanning for vulnerabilities on a continuous basis and interpreting the resulting traffic in the context of policy. Ex. 1006, 1:21-25.

Specifically, Cooper is directed to determining vulnerabilities in traffic and identifying problems with the network as a whole instead of indicating the integrity of an application:

The invention relates generally to the field of ***network security management***. More particularly, the invention relates to scanning for vulnerabilities on a continuous basis and ***interpreting the resulting traffic*** in the context of policy.

Id., 1:21-25.

Because a vulnerability scanner produces large amounts of ***information about the network***, much of which is redundant, it would be advantageous to provide a

mechanism to automatically remove such redundant information. It would also be advantageous to overcome the difficult task of turning such output of the vulnerability scanner into a workflow that helps *remediate identified problems with the network*.

Id., 2:35-42.

Cooper mentions that “one embodiment of the invention adds vulnerability scanning capabilities to detect application-level vulnerabilities.” *Id.*, 4:10-16. Cooper’s vulnerabilities are scanned in the context of “detect[ing] network services which contravene policy” and conducting “policy-based vulnerability scanning to minimize false positives.” *Id.*

IV. CLAIM CONSTRUCTION

For the purposes of this Preliminary Response only, Patent Owner believes that claim construction is not required to resolve any issues. Petitioner also notes that it believes that claim construction is not otherwise warranted. Pet. at 11-12; However, there are several terms that both Petitioner and Patent Owner have proposed constructions for in the District Court Litigation:

<u>Claim Term</u>	<u>Patent Owner’s Proposed Construction</u>	<u>Petitioner’s Proposed Construction</u>
“runtime” '948 Patent Claims 1 and 5	“the time the application is running”	“the time the application is running”

<u>Claim Term</u>	<u>Patent Owner's Proposed Construction</u>	<u>Petitioner's Proposed Construction</u>
“real-time” “real time” ’948 Patent Claims 1 and 2	“without intentional delay, given the processing limitations of the system”	“immediate”
“which includes a network analyzer, an integrity processor, an event correlation matrix, a risk correlation matrix, and a trust supervisor” ’948 Patent Claim 1	Plain and ordinary meaning	Indefinite
“operational integrity of the application” ’948 Patent Claim 1	Plain and ordinary meaning	the level of threat or contextual trustworthiness of the application
“an event correlation matrix” ’948 Patent Claim 1	Plain and ordinary meaning	“A matrix which maps integrity warnings to endpoint events, and the rows or columns represent an application instance on the monitored system.”

<u>Claim Term</u>	<u>Patent Owner's Proposed Construction</u>	<u>Petitioner's Proposed Construction</u>
“a risk correlation matrix” ’948 Patent Claim 1	Plain and ordinary meaning	“A matrix which maps endpoint events to system warning classes, system warnings, and/or integrity warnings, and the rows or columns represent a machine identifier or application instance identifier of the monitored system.”
“correlating, by the event and risk correlation matrix” ’948 Patent Claim 1	Plain and ordinary meaning	Indefinite
“the event and behavior correlation engine” ’948 Patent Claim 3	Plain and ordinary meaning	Indefinite

Ex. 2003 at 45-54, 165-167, 174-183. This, in addition to the plethora of other outstanding issues that affect validity, weighs in favor of the Board using its discretion to deny institution of this Petition so that all validity issues could be resolved in the District Court Litigation.

V. LEVEL OF ORDINARY SKILL IN THE ART

For the purposes of this Preliminary Response only, Patent Owner utilizes Petitioner's proposed level of skill in the art: "a bachelor's degree in computer science, or a related field, or an equivalent technical degree or equivalent work experience, and an additional one to two years of education or experience in the field of computer security topics. More education can supplement practical experience and vice versa." Pet. at 11 (citations omitted).

VI. PETITIONER HAS NOT DEMONSTRATED A REASONABLE LIKELIHOOD OF SUCCESS FOR THE GROUNDS ADVANCED IN THE PETITION, AND THE PETITION SHOULD BE DENIED

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) so-called secondary considerations where in evidence. *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1, 17-18 (1966); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question is not whether the differences themselves would have been obvious, but whether the claimed invention as a whole would have been obvious. *Stratoflex, Inc. v. Aeroquip Corp.*, 713 F.2d 1530, 1537 (Fed. Cir. 1983).

The Board has held that a failure to identify the differences between the claimed subject matter and the prior art is fatal to an obviousness challenge. *See, Apple, Inc. v. Contentguard Holdings, Inc.*, IPR2015-00355, Decision Denying Institution of *Inter Partes* Review, Paper 9 at 9-10 (P.T.A.B. June 26, 2015) (denying institution for failure to identify the differences between the claimed subject matter and the prior art).

In arriving at an obviousness determination, the Board must sufficiently explain and support the conclusions that the prior-art references disclose all the elements recited in the Challenged Claims and a relevant, skilled artisan not only could have made, but would have been motivated to combine all the prior art references in the way the patent claims and reasonably expected success. *Pers. Web Techs., LLC v. Apple, Inc.*, 848 F.3d 987, 994 (Fed. Cir. 2017). That is, even if all the claim elements are found across a number of references, an obviousness determination must consider whether a person of ordinary skill in the art would have the motivation to combine those references. *Intelligent Bio-Sys., Inc. v. Illumina Cambridge Ltd.*, 821 F.3d 1359, 1368 (Fed. Cir. 2016); *Los Angeles Biomedical Rsch. Inst. at Harbor-UCLA Med. Ctr. v. Eli Lilly & Co.*, 849 F.3d 1049, 1067 (Fed. Cir. 2017) (vacating and remanding an obviousness determination, in part, because the Board did not make factual finding as to whether there was an apparent reason to combine all three prior art references to achieve the claimed invention and whether

a person of skill in the art would have had a reasonable expectation of success from such a combination). This combinability determination, as supported by an articulated motivation to combine, requires a plausible rationale as to why those prior art references would have worked together. *Broadcom Corp. v. Emulex Corp.*, 732 F.3d 1325, 1335 (Fed. Cir. 2013). Absent some articulated rationale, a “common sense” finding is no different than the conclusory statement “would have been obvious.” *In re Van Os*, 844 F.3d 1359, 1361 (Fed. Cir. 2017). Of additional importance, “knowledge of a problem and motivation to solve it are entirely different from motivation to combine particular references. . . .” *Innogenetics, N.V. v. Abbott Lab’ys.*, 512 F.3d 1363, 1373 (Fed. Cir. 2008).

A. Claim 1 is Not Obvious Over Mukherjee in Combination with Cooper

1. Mukherjee in Combination with Cooper Does Not Disclose “generating real-time behavior based events for determining the real-time operational integrity of the application executing on the native computing environment which includes a network analyzer, an integrity processor, an event correlation matrix, a risk correlation matrix, and a trust supervisor,” as Required by Claim 1

Claim 1 of the ’948 Patent recites “generating real-time behavior based events for determining the real-time operational integrity of the application executing on the native computing environment which includes a network analyzer, an integrity processor, an event correlation matrix, a risk correlation matrix, and a trust

supervisor.” Mukherjee in combination with Cooper does not render this claim limitation obvious, as Petitioner incorrectly asserts. Pet. at 35-46.

This claim limitation requires both an event correlation matrix and a risk correlation matrix. Petitioner argues that the fifth layer of Mukherjee’s DIDS expert model discloses the claimed risk correlation matrix while the fourth layer of Mukherjee’s DIDS expert model discloses the claimed event correlation matrix. Pet. at 44-46 (citing Ex. 1005, 13). But Mukherjee explains that DIDS utilizes a rule-based expert system called Intrusion Detection Model (IDM), which “consists of six layers, with each layer representing the result of a transformation performed on the data.” Ex. 1005, 12-13. In arguing that separate layers or transformations performed by the same DIDS IDM structure discloses both the event and risk correlation matrices, Petitioner ignores that the claimed event correlation matrix and risk correlation matrix are distinct components with distinct structures. *See Becton, Dickinson & Co. v. Tyco Healthcare Grp., LP*, 616 F.3d 1249, 1254 (Fed. Cir. 2010) (“Where a claim lists elements separately, ‘the clear implication of the claim language’ is that those elements are ‘distinct component[s]’ of the patented invention.”) (citing *Gaus v. Conair Corp.*, 363 F.3d 1284, 1288 (Fed. Cir. 2004)); *see also HTC Corp. v. Cellular Commc’ns Equip., LLC*, 701 F. App’x 978, 982 (Fed. Cir. 2017) (“The separate naming of two structures in the claim strongly implies that the named entities are not one and the same structure.”).

Even if Mukherjee's DIDS expert model can disclose two distinct claim elements, Petitioner does not show how either the DIDS expert model's fourth or fifth layers disclose a matrix, let alone two matrices. As described above, Mukherjee describes that DIDS's IDM "consists of six layers, with each layer representing the result of a transformation performed on the data." Ex. 1005, 12-13. Petitioner fails to demonstrate how transformations performed on a data corresponds to a correlation or how the results of transformations on data are equivalent to a matrix. The Petition is deficient for this reason alone.

In the District Court Litigation, Petitioner's real-party-in-interest took a claim construction position that a "matrix" has rows and columns. In particular, Petitioner asserted that "event correlation matrix" should be construed as "a *matrix* which maps integrity warnings to endpoint events, and *the rows or columns* represent an application instance on the monitored system," and a "risk correlation matrix" should be construed as "a *matrix* which maps endpoint events to system warning classes, system warnings, and/or integrity warnings, and *the rows or columns* represent a machine identifier or application instance identifier of the monitored system." *See supra* Section IV (citing Ex. 2003, 178-181). Putting aside the portions of these constructions which define whether the given matrix is an "event correlation" matrix or "risk correlation" matrix, Petitioner's constructions assume that a matrix includes rows and columns. Nevertheless, the Petition makes no

showing that Mukherjee's DIDS director's expert model includes two matrices comprised of rows and columns of data.

For these reasons, the Petition does not show how Mukherjee or Cooper discloses the claimed matrices, particularly under Petitioner's own constructions, and Petitioner does not argue that such a disclosure exists. Therefore, Mukherjee in combination with Cooper does not render obvious this claim limitation.

2. Mukherjee in Combination with Cooper Does Not Disclose “correlating, by the event and risk correlation matrix, threat classifications based on the temporal sequence of the generated real-time behavior based events,” as Required by Claim 1

Claim 1 of the '948 Patent recites “correlating, by the event and risk correlation matrix, threat classifications based on the temporal sequence of the generated real-time behavior based events.” Mukherjee in combination with Cooper does not render this claim limitation obvious, as Petitioner asserts. Pet. at 46-50.

In order to have antecedent basis, the claimed “event and risk correlation matrix” that correlates threat classifications refer to both the “event correlation matrix” and the “risk correlation matrix” of the previous claim limitation. Since Petitioner fails to show how Mukherjee discloses, teaches, or suggests the claimed “event correlation matrix” and “risk correlation matrix,” it cannot now disclose, teach, or suggest “*correlating, by the event and risk correlation matrix*, threat

classifications based on the temporal sequence of the generated real-time behavior based events.” *See supra* Section VI.A.1.

Therefore, Mukherjee in combination with Cooper does not render obvious this claim limitation.

3. Mukherjee in Combination with Cooper Does Not Disclose “displaying, in a plurality of runtime dashboards of an administrative console of the computing environment, real-time status indications for operational integrity of the application,” as Required by Claim 1

Claim 1 of the ’948 Patent recites “displaying, in a plurality of runtime dashboards of an administrative console of the computing environment, real-time status indications for operational integrity of the application.” Mukherjee in combination with Cooper does not render this claim limitation obvious, as Petitioner incorrectly asserts. Pet. at 50-59.

Petitioner admits that Mukherjee does not disclose this claim element. Pet. at 58 (“As noted above, Mukherjee discloses a user interface (UI) that gives the System Security Officer ‘interactive access to the entire system.’ However, Mukherjee does not provide details on how such a user interface would be constructed.”) (citations omitted). Petitioner also fails to show how Mukherjee discloses a *plurality* of runtime dashboards, but only points to Mukherjee disclosing the functionality of “displaying data related to network traffic.” Pet. at 51. As the ’948 Patent explains, and Petitioner admits (Pet. at 51), network activity and, application integrity and

operational integrity are considered separate. '948 Patent, 26:37-46 (“data related to operational integrity, resource utilization, application integrity, and network activity”).

Petitioner also admits that Cooper does not disclose “displaying, in a plurality of runtime dashboards..., real-time status indications for operational integrity *of the application.*” Instead, as Petitioner notes, “Cooper discloses displaying real-time vulnerability information along with associated risks *for individual systems*, which a PHOSITA would understand to be real-time displays of ‘operational integrity’ of *those systems.*” Pet. at 52. This understanding is confirmed by the disclosure of Cooper, which is directed to determining vulnerabilities in traffic and identifying problems with the network as a whole instead of indicating the integrity of an application:

The invention relates generally to the field of *network security management*. More particularly, the invention relates to scanning for vulnerabilities on a continuous basis and *interpreting the resulting traffic* in the context of policy.

Ex. 1006, 1:21-25.

Because a vulnerability scanner produces large amounts of *information about the network*, much of which is redundant, it would be advantageous to provide a mechanism to automatically remove such redundant information. It would also be advantageous to overcome the difficult task of turning such output of the vulnerability

scanner into a workflow that helps *remediate identified problems with the network*.

Id., 2:35-42. Even as Cooper mentions that “one embodiment of the invention adds vulnerability scanning capabilities to detect application-level vulnerabilities,” Cooper is silent on determining the integrity of the application. *Id.*, 4:10-16. Cooper’s vulnerabilities are only scanned in the context of “detect[ing] network services which contravene policy” and conducting “policy-based vulnerability scanning to minimize false positives.” *Id.*

In the District Court Litigation, Petitioner’s real-party-in-interest took a claim construction position that “operational integrity of the application” means specifically “the level of threat or contextual trustworthiness of *the application*.” Ex. 2003, 176-178. Nevertheless, the Petition makes no showing that Cooper is directed towards indicating the level of threat or trustworthiness of an application. Cooper’s disclosure is completely devoid of the words “threat” or “trust,” further showing that under Petitioner’s own understanding of “operational integrity of the application,” Cooper does not disclose the claimed limitation.

Therefore, Mukherjee in combination with Cooper does not render obvious this claim limitation.

B. Dependent Claims 2-5

Claims 2-5 are dependent on Claim 1. Therefore, Claims 2-5 are not rendered

obvious by any combination of Mukherjee and Cooper for at least the same reasons as Claim 1.

C. A PHOSITA Would Not Be Motivated to Combine Mukherjee and Cooper

A PHOSITA would not be motivated to combine Mukherjee and Cooper to teach, disclose, or suggest the claimed invention because none of these two references are directed towards determining the real-time operational integrity of the application. Both Mukherjee and Cooper describe systems directed to the network traffic or network activity. Petitioner admits that “Mukherjee discloses displaying data related to network traffic, which a PHOSITA would understand to be “network activity” while Cooper’s vulnerabilities are only scanned in the context of “detect[ing] network services which contravene policy.” Ex. 1006, 4:10-16. A PHOSITA would not look to the combination of two systems monitoring network traffic and services to yield the claimed determination of real-time operational integrity *of the application*.

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

Based on Petitioner’s reasons regarding § 314(a), the Board should exercise its discretion to deny this Petition.

The circumstances of the parallel District Court Litigation 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 petitioner and the defendant in the parallel proceeding are the same party”; (b) “overlap between issues raised in the petition and in the parallel proceeding” (c) “proximity of the court’s trial date to the Board’s projected statutory deadline for a final written decision”; (d) “investment in the parallel proceeding by the court and the parties”; (e) “whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted”; and (f) “other circumstances that impact the Board’s exercise of discretion, including the merits.”).

As set forth below, these factors collectively demonstrate that efficiency and integrity of the AIA are best served by denying review. First, the Petitioner is the Defendant in the parallel proceeding. *See infra* Section VII.A. Second, the asserted claims in the District Court Litigation are all at issue in the Petition. *See infra* Section II.B. Third, trial in the District Court Litigation is set for April 15, 2024, eight months earlier than the projected statutory deadline for a final written decision of this Petition in December 16, 2024. *See infra* Section VII.C. Fourth, the parties (and Patent Owner in particular) have invested significant resources on developing legal and factual issues of validity and infringement in the District Court Litigation and will have invested substantially more resources before any decision on this Petition. *See infra* Section VII.D. Fifth, the Court has neither granted nor denied a stay

pending this Petition. *See infra* Section VII.E. Finally, no other factors favor institution. *See infra* Section VII.F.

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., Ltd. v. Canon Kabushiki Kaisha*, IPR2016-01357, Paper 19, at 16–17 (P.T.A.B. Sept. 6, 2017) (precedential)).

A. The Parallel District Court Proceeding and the Petition Involve the Same Parties

As noted in Patent Owner’s Mandatory Notice, there exists a parallel District Court Litigation between the same parties regarding the same subject patent (the ’948 Patent). *Trend Micro, Inc., v. Taasera Licensing LLC*, IPR2023-00800, Paper 3 at 2-3 (P.T.A.B. April 27, 2023); Pet. at 74. Petitioner is a party to the District Court Litigation captioned as *In re: Taasera Licensing LLC, Patent Litigation*, No. 2:22-md-03042-JRG (E.D. Tex. Aug. 3, 2022) (the “District Court Litigation”). Accordingly, this factor weighs in favor of discretionary denial.

B. The District Court Litigation Involves Substantially the Same Claims

The asserted claims in the District Court Litigation are all at issue in the Petition, since this Petition involves all of the '948 Patent's claims. "In at least these ways, the parallel proceedings would duplicate effort. This is an inefficient use of Board, party, and judicial resources and raises the possibility of conflicting decisions." *Cisco Sys., Inc. v. Ramot at Tel Aviv Univ. Ltd.*, IPR2020-00122, Paper 15 at 10 (P.T.A.B. May 15, 2020). Accordingly, this fact weighs in favor of discretionary denial.

C. Proximity of The District Court's Trial Date

The proximity of the District Court Litigation's trial date to the Board's projected statutory deadline for a final written decision strongly weighs in favor of discretionary denial.

The parties' trial is scheduled for April 15, 2024. Exhibit 2001 (Eighth Amended Docket Control Order, Dkt. 278, *In re: Taasera Licensing LLC, Patent Litigation*, No. 2:22-md-03042-JRG (E.D. Tex. September 7, 2023)). Pursuant to 35 U.S.C. §§ 314(b)(1) and 316(a)(11), the projected statutory deadline for a final written decision of this Petition is December 16, 2024.¹ As the District Court's trial

¹ The statutory deadline for institution is December 14, 2023, "three months after receiving a preliminary response to the petition under section 313." *See* 35 U.S.C. § 314(b)(1). If instituted, the statutory deadline for final written decision is December 16, 2024, "not later than 1 year after the date on which the Director notices the institution of a review," because December 14, 2024 falls on a Saturday.

will be almost *eight months before* the projected statutory deadline, this factor weighs strongly in favor of denying institution. *See Supercell Oy v. Gree, Inc.*, IPR2020-00513, Paper 11 at 10-12 (P.T.A.B. June 24, 2020) (denying institution where the jury trial was scheduled to conclude approximately ten months before the statutory deadline); *Edward LifeSciences Corp. v. Evalve, Inc.*, IPR2019-01479, Paper 7, at 6-13 (P.T.A.B. Feb. 26, 2020) (denying institution where jury trial would conclude more than nine months before a final decision would be due); *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.*, IPR2020-00122, Paper 15 at 8 (“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.”).

Petitioner does not contest that the proximity of the trial favors denial of institution. Thus, this factor also weighs in favor of discretionary denial.

D. Significant Investment and Petitioner’s Delay in Filing the Petition

The parties' investment in the parallel proceeding weighs in favor of discretionary denial. In the District Court Litigation, the Court has already entered nine Docket Control Orders (Dkts. 8, 15, 46, 84, 209, 225, 239, 257, 278), Discovery Order (Dkt. 137), Protective Order (Dkt. 162), and E-Discovery Order (Dkt. 195). Discovery is also well under way. The parties have already exchanged claim construction briefing, infringement contentions pursuant to P.R. 3-1, and invalidity contentions pursuant to P.R. 3-3, fact discovery closes in less than three months on November 6, 2023, and a trial date is set for April 15, 2024, which is less than seven months away. Ex. 2001. Thus, the parties' and Court's substantial investment in this proceeding weighs in favor of denial of institution under this factor.

E. No Stay of the Parallel District Court Litigation

There is no stay of the parallel District Court Litigation. Even if the Petition were instituted and Petitioner filed a motion to stay the District Court Litigation, prejudice, tactical disadvantage to Taasera, the late stage of the litigation, and the lack of potential simplification would weigh strongly against such a motion. *See Lennon Image Techs., LLC v. Macy's Retail Holdings, Inc.*, 2:13-CV-00235-JRG, 2014 WL 4652117, at *1 (E.D. Tex. Sept. 18, 2014). The statutory deadline for institution is not until after the district court's claim construction hearing and the

deadline to complete fact discovery,² placing any motion for a stay close to trial. Ex. 2001; *see Intell. Ventures II v. FedEx Corp.*, No. 2:16-cv-00980-JRG, Dkt. 141 at 5 (E.D. Tex. Oct. 24, 2017) (“The Court agrees that the Parties have already invested substantial effort and resources during discovery and in preparing claim construction briefing. . . . These circumstances weigh against staying this case”).

Moreover, a stay would not decrease the burden on the Court and the parties since any instituted IPR would not cover any of the references that Petitioner raised in the District Court Litigation for both anticipation or any of the combinations of obviousness, and do not include Petitioner’s challenges under § 112 or § 101. *See generally* Ex. 2002, at 25-28, 35, 50-56, 68, 151-192, 283-286, and 378-379. *Intell. Ventures II*, No. 2:16-cv-00980-JRG, Dkt. 141 at 3-4 (“[T]he instituted IPRs only cover a narrow slice of the invalidity arguments Defendants have raised in this case. For example, Defendants have argued that the ’715 Patent is invalid under § 102 with respect to at least eight references . . . under § 103 with respect to at least twenty-six combinations . . . under § 112 [], and under § 101.”).

Accordingly, it would be unlikely for the Court to hold that a stay would streamline the litigation and this factor supports denial of institution.

² As noted above, the statutory deadline for institution is December 14, 2023. *See supra* n. 1. Per Ex. 2001, the claim construction hearing is October 11, 2023, and the deadline to complete fact discovery is November 6, 2023.

F. Other Factors Favor Discretionary Denial

Petitioner does not present a strong case on the merits, further supporting denial of institution. *See supra* Section VI. Petitioner also does not identify any other factors which weigh against discretionary denial. Pet. at 61-63.

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

VIII. THE BOARD SHOULD REJECT ANY LATE SOTERA STIPULATION

Petitioner has not made a *Sotera*-style stipulation that “if IPR is instituted, [Petitioner] will not pursue in the District Court Litigation any ground raised or that could have been reasonably raised in an IPR” in its Petition, which weighs further in favor of discretionarily denying institution. *See Sotera Wireless, Inc. v. Masimo Corp.*, IPR2020-01019, Paper 12, 13-14 (P.T.A.B. Dec. 1, 2020) (designated Dec. 17, 2020).

The Board should not accept any late *Sotera* stipulation after this Patent Owner Preliminary Response. Petitioner has known about the related District Court Litigation since Patent Owner filed a complaint asserting infringement of the '948 Patent against Trend Micro Incorporated (November 30, 2021) approximately 16 months before this Petition (April 5, 2023), and has had several docket control orders for the District Court Litigation, which originally anticipated a trial date for October

30, 2023. Docket Control Order, Dkt. 17, *Taasera Licensing LLC v. Trend Micro Incorporated*, No. 2:21-cv-00441-JRG (E.D. Tex. August 3, 2022). Any withholding of the *Sotera* stipulation in its Petition is gamesmanship and prejudicial to Patent Owner in this proceeding, and is inconsistent with 37 C.F.R. § 42.1(b)'s mandate to "secure the just, speedy, and inexpensive resolution of every proceeding."

Both the Board and Director are abundantly clear that Petitioner cannot wait until after the Board renders its Institution Decision to address the issue of *Fintiv*, the Board's discretionary authority, and to submit a *Sotera* stipulation. *NXP USA, Inc. v Impinj, Inc.*, IPR2021-01556, Paper 12, 5-6 (P.T.A.B. Aug. 25, 2022); *see also id.*, IPR2021-01556, Paper 13, 3-4 (P.T.A.B. Sept. 7, 2022) (the Director *finding* "that the Board correctly determined 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;" "[p]ermitting a petitioner to wait and see if the Board denies institution under *Fintiv*, and then offer such a stipulation for the first time on rehearing, frustrates these goals [of avoiding conflicting decisions] and would open the door to gamesmanship;" "***the only appropriate time for a petitioner to offer a stipulation related to the Fintiv factor 4 analysis is prior to the Board's decision of whether to institute review.***").

IX. CONCLUSION

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

Respectfully submitted,

Dated: September 14, 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 specified in 37 C.F.R. § 42.24 has 6,921 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.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

A copy of PATENT OWNER'S PRELIMINARY RESPONSE and EXHIBITS 2001 through 2003 have been served on Petitioner's counsel of record as follows:

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