

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC. and FORTINET, INC.,
Petitioners,

v.

INFOEXPRESS INC.,
Patent Owner.

IPR2024-00539
U.S. Patent No. 8,051,460

**PATENT OWNER'S RESPONSE TO
PETITIONERS' REQUEST FOR DIRECTOR REVIEW**

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The Board properly held all challenged claims not unpatentable. Paper 60 (Final Written Decision (“FWD”)). Petitioners’ Request for Director Review (Paper 61) is mere dissatisfaction rather than any genuine legal basis for additional review. The Request—an unsupported “incorporation by reference” challenge—is a mixture of re-litigating old grounds, pushing new theories not before the Board, and a manufactured procedural challenge for appeal.

The Director should deny the Request because *the POR established* conception, reasonably continuous diligence, and reduction to practice (Paper 24 (“POR”))—much of which Petitioners *already conceded* and which the Board understood. Further, the Request is riddled with many never-before-raised arguments, and Petitioners were not prejudiced. The Request should be denied.

I. Background

Patent Owner InfoExpress (“PO”) conceived of the claimed invention no later than November 14, 2002, and exercised reasonably continuous diligence toward a constructive reduction to practice on October 21, 2003. FWD, 12–46; POR, 64–83. Accordingly, the applied references are not prior art. FWD, 46.

The history between the parties is longstanding. Petitioner Cisco tried to create a Network Access Control (“NAC”) product, but failed. POR, 41. After failing, Cisco resorted to mining technical information from PO under the mask of a joint-collaboration effort. *Id.* During that effort, Cisco studied PO’s technical work,

praised it, and copied it. When it had what it needed, Cisco abruptly ended the relationship, and launched its copied NAC. *Id.*, 41–64.

PO sued Petitioners in 2023. *See, e.g.*, Paper 1 (“Pet.”), 1, 3. Petitioners filed their Petition in 2024—twelve years after the 2011 grant of the challenged patent. EX1001. The Board instituted on September 24, 2024. Paper 13.

Petitioners filed seven IPRs collectively challenging six patents. It lost each. The Board and Deputy Director already denied institution in IPR2024-00540 and -00678. IPR2024-00540, Papers 13 & 15; IPR2024-00678, Papers 14 & 16.

PO’s antedating argument relied on declarations from both inventors, an expert, and over 250 *corroborating* exhibits. POR, 65–83 (citing, e.g., EX2564 (Lum Declaration), EX2429 (Lee Declaration), EX2007 (Smith Expert Declaration); EX2011 (“LAN Specification”)). These are *all discussed in the POR body*.

Petitioners took five depositions in this IPR including those of inventors Mr. Lum and Ms. Lee and of expert Dr. Smith. EX1023, EX1025; EX1026.

Petitioners *did not* serve any objections to any of InfoExpress’s evidence. Petitioners *did not* file any motion to exclude. Petitioners *did not* submit competing expert testimony. Petitioners also *did not* object to any demonstratives regarding the antedating evidence. In short, Petitioners agreed to the relevance, authenticity, and allowability of *every exhibit* EX2006, EX2011–272, EX2430–44, and EX2557–63.

After 18 months of briefing, depositions, and oral argument, the Board issued its careful FWD finding that Petitioners failed to “establish[] by a preponderance of the evidence” that either reference is prior art. FWD, 46. The Board reached the same conclusion in the other instituted IPRs. IPR2024-00675, Paper 56; IPR2024-00676, Paper 54; IPR2024-00677, Paper 56; IPR2024-00679, Paper 56.

II. Legal Standard

37 C.F.R. § 42.75(a) provides for Director Review of final decisions under 35 U.S.C. § 318 “limited to [those] presenting (a) an abuse of discretion, (b) important issues of law or policy, (c) erroneous findings of material fact, or (d) erroneous conclusions of law.” U.S. Patent and Trademark Office, *Director Review*.¹ “An abuse of discretion is found if the decision: (1) is clearly unreasonable, arbitrary, or fanciful; (2) is based on an erroneous conclusion of law; (3) rests on clearly erroneous fact finding; or (4) involves a record that contains no evidence on which the Board could rationally base its decision.” *Rembrandt Diagnostics, LP v. Alere, Inc.*, 76 F.4th 1376, 1382 (Fed. Cir. 2023).

III. PO’s antedating evidence and argument was properly set out in its POR.

Petitioners’ entire Request is a misdirected “incorporation by reference” argument. This summarily fails. **First**, the body of the POR details the antedating evidence and argument. This alone is dispositive (as the Board already found).

¹ <https://www.uspto.gov/patents/ptab/decisions/director-review-process>

Second, the Board relied on the POR and its accompanying exhibits and evidence. It is permitted to do this, and it understood PO’s antedating argument. Nothing in FWDs suggests that the panel felt forced “to play archeologist with the record.” *Third*, Petitioners relied upon the same evidence it now complains about in their Reply. *Fourth*, Petitioners never objected to this before. Now—at the Director Review stage—is too late.

A. The POR details conception evidence and argument for the claims.

While the Request is a sweeping attack on “every feature or limitation of the claimed invention,” it only identifies a single limitation purportedly missing from the POR analysis: “[a] method of granting access to a protected network.” *Id.*, 7, 8.

But the POR is replete with discussions of how EX2011 and Dr. Smith’s technical analysis (EX2007 and EX2009) showed conception of all claimed inventions, including the preamble (which neither party argued was limiting). Indeed, Petitioners never challenged this limitation at the Board, and had no expert analyze any evidence.

The POR explains that the LAN Specification (EX2011) included the claimed protected network comprising a “less-restricted” and “restricted” subset and a request for “access.” POR, 66.

On November 14, 2002, co-inventor Lee e-mailed "CyberGatekeeper LAN Based Policy Enforcement Engineering Specification" (EX2011) demonstrating that the claimed inventions were conceived of at least by then. EX2012; EX2564 (Supplemental Lum Declaration), ¶12; EX2520; EX2429 (Lee Declaration), ¶13.

Conception is demonstrated in Dr. Smith's claim chart mapping the EX2011 to the Challenged Claims as set forth in EX2009. EX2007.

EX2011 details a method and system involving a network having:

- a "less-restricted" subset (a "trusted network" in EX2011 as discussed at EX2007, ¶28a);
- a "restricted" subset (an "untrusted network" in EX2011 as discussed at EX2007, ¶28b); and
- requests for "access" as discussed, e.g., at § 2. EX2007, ¶28.

Figures 1-2 describe an "Access Point" and "Switch." EX2007, ¶29a;

Smith's analysis (EX2007) *in the POR* explains this access to a protected network: "an access device would not be able to communicate with the CGS...if the CGS was located within the 'less-restricted' / 'trusted' subset." POR, 67.

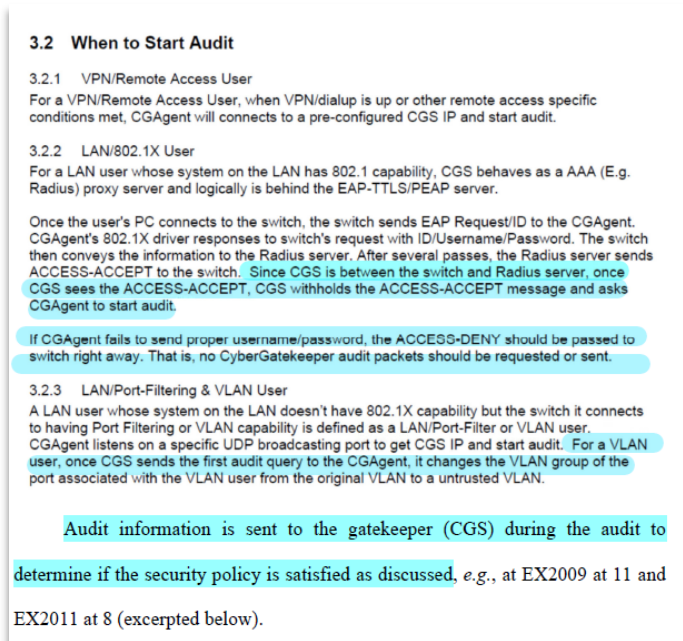
CGS can be located outside of the "restricted" subset of the network. EX2007, ¶29c. E.g., EX2011, 7 ("everyone connects to the switch can only access to the untrusted network"). Given that the access point can restrict access to the "less-restricted"/"trusted" network until the audit is completed, an access device would not be able to communicate with the CGS (e.g., for an initial audit, for a further audit if the initial audit fails) if the CGS was located within the "less-restricted"/"trusted" subset. Therefore, it must be in the "restricted"/"untrusted" subset. EX2007, ¶29d.

Petitioners identify no other supposedly missing claim limitations. This is telling because the POR explains them. For example, claim 1 also recites:

- "applying a security policy to the access device in response to the request". EX1001, 16:11–12 ("security policy" limitation).

- “using the gatekeeper to determine if requirements of the security policy are satisfied by the access device”. *Id.*, 16:13–14 (“gatekeeper” limitation).

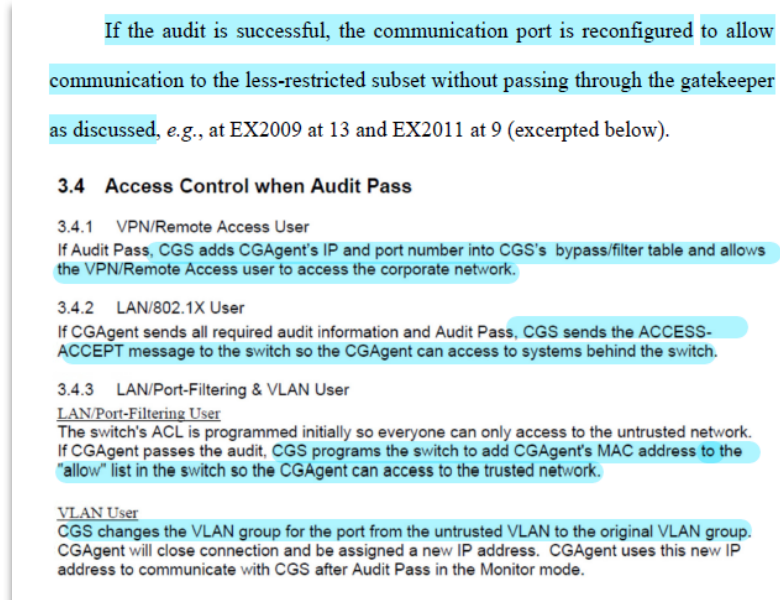
The POR explains conception of each: “Since CGS [gatekeeper] is between the switch and Radius server, once CGS sees the ACCESS-ACCEPT, CGS withholds the ACCESS-ACCEPT message and asks CGAgent to start audit [security policy].” POR, 68; *id.* (“the switch it connects to having Port Filtering or VLAN capability”).



Claim 1 also has “reconfiguring,” “less-restricted” and “restricted” subset limitations.² Once again, *the POR* sets out evidence from both Dr. Smith (EX2007)

² Claim reciting: “reconfiguring the communication port for communicating data between the access device and the less-restricted subset of the protected network without passing the data through the gatekeeper, when the requirements of the security policy are satisfied.”

and the LAN Specification (EX2011). (E.g. “CGS changes the VLAN group for the port from the untrusted VLAN to the original VLAN group.”):



The same is true for the dependent claims, which Petitioners never challenged before the Board. E.g., claim 2 recites “authenticating a user” and EX2011 §3.2.2 disclosing that “CGS behaves as a AAA [Authentication, Authorization, and Accounting] (E.g., Radius) proxy server”. EX1001, 16:20-21; POR, 68. Indeed, Petitioners have not identified any elements in the Request not supported in the POR. Regardless, courts have long recognized, “It cannot be the law that the same affidavit is insufficient to remove the same reference applied against the slightly narrower claims.” *In re Stryker*, 435 F.2d 1340, 1341–42 (C.C.P.A. 1971).

B. The Board is permitted to review exhibits when the POR sets forth the evidence and argument.

Petitioners push a brightline rule to prohibit the Board from looking at anything outside the four corners of the POR. Request, 1. This, of course, is not the law.³ 37 C.F.R. § 42.6(a)(3) provides that “[a]rguments must not be incorporated by reference.” Legal arguments must be made in the brief, by marshaling evidence supporting a proposition. PO argued conception in its POR by doing exactly this: describing how each claim element was present in EX2011, supported by citations to portions of EX2011 and expert testimony in EX2007 and EX2009. The Federal Circuit deemed this approach proper. *Guardant Health, Inc. v. Vidal*, 2023 WL 3262962 at *5 n.4 (Fed. Cir. May 5, 2023) (not improper when “response brief *map[ped]* claim [] elements to [embodying product] by relying on the evidence and expert declaration, **not by incorporating legal arguments**”). The PTAB agrees. *See W. Digital Techs., Inc. v. Godo Kaisha IP Bridge 1*, IPR2024-01384, 2025 WL 808198, at *16 (PTAB Mar. 13, 2025) (no improper incorporation when “[the p]etitioner *ma[de]* arguments and cite[d] to portions of [a] declaration, which is evidence—not argument”) (citing *Guardant*); *Expedia, Inc. v. IBM Corp.*, IPR2018-01136, 2019 WL 2511366, at *2 (PTAB June 17, 2019).

³ *Sage Prods., LLC v. PureWick Corp.*, IPR2020-01426, Paper No. 30 at 50 (PTAB Feb. 14, 2022) (“[N]othing in our rules forbids the declaration from having more detail and reasoning to support the testimony of the declarant.”)

Petitioners’ authority is the opposite situation—where the Board refused to review baldly cited evidence. *Apple Inc. v. Spacetime 3D, Inc.*, IPR2023-00344, Paper 47 at 70 (PTAB July 2, 2024) (*see* Request, 7–8), had a patent owner conceding that “nexus” arguments in its sur-reply were not in its POR. In *Parus* (Request, 3), the Board refused to consider the patent owner’s assertion of conception in a single paragraph with a bald citation to an inventor declaration. *Google LLC v. Parus Hldg Inc.*, IPR2020-00846, Paper 14 at 31-32 (PTAB Jan. 13, 2021).

Unlike *Parus* and *Spacetime*, the Board here had no problem understanding the evidence in the POR and exhibits. Indeed, PO’s conception argument spans pages and contains multiple details and citations about EX2011 as well as multiple citations to Smith’s declaration. The POR does not have an incorporation problem.

C. Petitioners rely on uncited portions of the Smith Declaration (EX2007) and the LAN Specification (EX2011) in their reply.

Petitioners claim of “prejudice[]” (Request, 15) is belied by the fact that their Reply (Paper No. 41) relies expressly on *uncited* portions of EX2011 and Dr. Smith (EX2007). The Reply creates an argument around an *uncited and not relied on* “Figure 3” of EX2011. Reply, 26. It further contorts other *uncited* portions of EX2007:

- “InfoExpress’s experts agree...[that the patented solution] was to reconfigure the access point so that network traffic ‘can pass from the access device to the

less-restricted subset of the network without needing to pass through the gatekeeper.” *Id.*, 24 (quoting Smith Decl. (EX2007), 13).

- “InfoExpress’s expert Smith...opines that the ‘untrusted network’ is a ‘restricted subset of a protected network’...” *Id.*, 27 (quoting EX2007).
- “Smith even states the ‘CGS can be located outside of the ‘restricted’ subset of the network...” *Id.* (quoting EX2007).
- “Smith’s opinion that ‘a DMZ is an example of a ‘restricted subset’” (sic) is also incorrect.” *Id.*, 28 (quoting EX2007).

Put differently, Petitioners scoured the evidence, relied on it, and argued it. They cannot claim that the Board cannot as well.

D. Petitioners agreed that PO’s demonstratives included conception arguments and evidence in the POR.

As set forth in Section V, Petitioners waived all the arguments they now try to shoehorn into their Request. In addition to never raising *any* evidentiary objections, they also never objected to PO’s conception demonstratives (Paper 51), which detail, *e.g.*, conception of a less-restricted subset and access to a protected network (slides 117–120, 129), a restricted subset (121–28), switches and/or access points (130–32), applying a security policy and auditing (137–39), reconfiguring (140), using a single gatekeeper (141–42), and updating and monitoring (143–44).⁴ Slide 118 is EX2011 showing possession of a less-restricted subset of a protected

⁴ Petitioners carefully scrutinized PO’s demonstratives for alleged extensions beyond the POR, but did not lodge any objections to any of the antedating slides.

network by citation, e.g., to EX2011’s disclosure of VLANs “to break up your existing LAN into multiple logical segments[...].”

EX2011 Shows the Inventors’ Possession of a Less-Restricted Subset

2 Overview

Users can access the corporate network from their systems on the LAN that may have the following security capability:

- **Port Filtering**
Switches have ports that connect all the nodes on a network, and allow communication between them. The switch’s Access Control List (ACL) can be programmed to allow users to access the trusted network only if connections are from ports with certain IP addresses (IP Port Filtering) or MAC addresses (MAC-address Port Filtering).
- **VLAN**
Switches provide dedicated bandwidth at every port. They can also be used for segmenting your network. You can use VLANs (Virtual Local Area Network) to break up your existing LAN into multiple logical segments, which are isolated from each other so that traffic from one cannot flow into the other. A VLAN can be created based on ports, MAC address, Layer 3 protocols, or IP multicast. E.g. with port-based VLANs you can take several ports from a switch or switches, and put them in one VLAN. Each VLAN would be isolated from the rest and the traffic won’t flow out of it.
- **802.1X**
Extensible Authentication Protocol (EAP) defines a standard message exchange that allows a server to authenticate a client based on an authentication protocol agreed. It’s a general protocol to support multiple authentication mechanisms over wired and wireless network. Supported authentication mechanisms include EAP-MD5, EAP-TLS, EAP-TTLS, PEAP, LEAP. IEEE 802.1X is a standard for passing EAP over a wired or wireless LAN for port-based network access control. The following shows mixed 802.1X protocol deployment in a LAN network with EAP-MD5, EAP-TTLS and LEAP authentication mechanisms supported.

See ‘460 Patent POR at 66; ‘460 Patent Sur-Reply at 21-23; ‘444 Patent POR at 68; ‘444 Patent Sur-Reply at 19-21; ‘450 Patent POR at 63; ‘450 Patent Sur-Reply at 18-20; ‘484 Patent (-00675 IPR) POR at 66; ‘484 Patent (-00675 IPR) Sur-Reply at 21-23; ‘484 Patent (-00679 IPR) POR at 65; ‘484 Patent (-00679 IPR) Sur-Reply at 21-23.

EX2011 at 5 (annotated); see also EX2007 (Hugh Smith Report), ¶ 28(a) (460 Patent), ¶ 33(a) (other IPRs).

Cisco Systems, Inc. and Fortinet, Inc. v. InfoExpress Inc., IPR2024-00539, -00675, -00676, -00677, -00679
Patent Owner’s DEMONSTRATIVE EXHIBIT – NOT EVIDENCE

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Thus, the Board, Petitioners, and Patent Owner thoroughly discussed these issues.

E. Each and every diligence exhibit is detailed in the POR as corroborating PO’s diligence.

The POR cites Inventor Lum’s ground-breaking idea in October 7, 2002:

“All, it may be possible to use 802.1x to audit [enforce] a system rather than switching them between VLANs. There’s an authentication specific component in 802.1x, so we might be able to use that instead of VLANs.” POR, 69–70 (quoting EX2015, EX2016).

These inventions were memorialized in EX2011. The POR then explains that “InfoExpress diligently reduced the inventions to practice from conception until constructive reduction to practice... Diligence is shown by evidence including:

i. emails, ii. technical specifications and analyses; and iii. the declarations of [inventors] Lum (EX2564) and Lee (EX2429).” POR, 70.

Indeed, Petitioners concede applicability of a significant amount of the diligence evidence, *i.e.*, everything after “late March[.]” Paper 58, 123:5–9.⁵ Notwithstanding, Petitioners backtrack to now characterize the diligence evidence as “generic.” Request, 12. But InfoExpress identified, relied, and *explained how all* 250+ exhibits in its POR related to the claim limitations. For example, the POR explained the following for diligence towards the “reconfiguring” limitation:

- “InfoExpress tested and experimented with Cisco switches to evaluate potential authentication and **802.1X functionality [reconfiguring] for use with the claimed gatekeeper**. EX2200; EX2201.” POR, 73.
- “InfoExpress continued to work with GTI on the **port-reconfiguration solution eventually relating to reconfiguring of access point**. GTI corresponded regarding updated status and design document on March 3, 2003. EX2290-EX2295. GTI provided a status report and source code on March 10, 2003. EX2296-EX2301. InfoExpress responded on March 11, 2003. EX2110. *See also* EX2111; EX2112. GTI provided updated a status report and source code on March 17, 2003. EX2113; EX2114; EX2116; EX2117. InfoExpress responded on March 18 and 19, 2003. EX2118-EX2120. GTI provided updated a status report and source code on March 24, 2003. EX2121-EX2123. Follow-up occurred on March 25, 26 and 31, 2003. EX2124-EX2128.” POR, 75

⁵ Petitioners at oral hearing: “Certainly, we don’t dispute that in July, or later, they were working on a CyberGatekeeper product and certainly showed some diligence in those later times...” Paper 58, 123:5–9.

The other corroborating diligence in the POR is similarly detailed and complete.

Lastly, the Request spins confusion around reference “NDCA.” *Id.*, 14. But PO’s citation to the NDCA on sur-reply was proper given Petitioners’ challenges on Reply, and considering the evidence itself included this specific acronym.⁶ Further, all of the PO and GTI exhibits are independently detailed in the POR.

IV. The Board determined that claim construction was not necessary.

Petitioners’ new construction-based argument at Director Review is inapt. Request at 10. Petitioners’ claim-construction position was that “the Board *need not expressly construe the claim terms.*” Pet., 7. The Board ruled that it “*need not expressly construe any claim terms[.]*” FWD, 10. Petitioners got exactly what they wanted. In any event, their “protected network” and “reconfiguring” claim-construction issues make little sense. PO established conception of a protected network having “subsets,” *see* POR, 66–69; *see also id.* at 82 (“a protected network including a ‘RESTRICTED LAN’ and ‘CORPORATE LAN’”). And as discussed above, the POR expressly details conception of “reconfiguring.” POR, 69.

⁶ Petitioners identify a single exhibit that is directed to a different PO product called CyberArmor. Request, 14. As explained, it is the only CyberArmor exhibit in the record and it was only included because it was part of the correspondence PO had with its patent attorneys that happened to be discussing both the products.

V. Petitioners waived or forfeited these arguments.

An observer—or the Board—having read the briefs and record would be shocked to see this “incorporation-by-reference” challenge. Petitioners’ Request at 4–5 vaguely reference a footnote in their Reply at 23 n.7 (“InfoExpress’s arguments as to the inventors’ conception and diligence are also improperly incorporated by reference for the same reasons described above[.]”), which footnote they followed by exclusively arguing about the positioning of the gatekeeper, *id.*, 23–28. *See also* EX1029, 79–80 (Petitioners’ demonstratives); Paper 58, 123:10–124:4 (Hearing Tr.). But this unspecific footnote provides no notice. Put differently, nothing in the Request was ever before the Board.

“[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are...waived.” *Radar Indus., Inc. v. Cleveland Die & Mfg. Co.*, 424 F. App’x 931, 936 n.5 (Fed. Cir. 2011) (citing precedent across circuits); *see also*, *Aortic Innovations LLC v. Edwards Lifesciences Corp.*, No. 24-1145 at 14-15 (Fed. Cir. Oct. 27, 2025) (find forfeiture where brief below “did not otherwise develop any argument”). Even if not so perfunctory as to be waived, the Board was not required to address every issue—or anticipate Petitioners’ novel permutations on Director Review—and “failure to explicitly discuss every issue or every piece of evidence does not alone establish that the tribunal did not consider it.” *QuikTrip West, Inc. v. Weigel Stores, Inc.*, 984 F. 3d 1031, 1036 (Fed. Cir. 2021).

Petitioners’ attempt to incubate a single-sentence footnote into a 15-page litany of alleged faults is fundamentally unfair to the Director, the Board, and PO to attempt to litigate alleged deficiencies for the first time upon Director Review.

VI. Petitioners were not prejudiced.

Petitioners’ “prejudice” section is nothing more than a word-count dispute. Request, 15. Petitioners received additional words. *See* Reply at 33. Indeed, the Board commended the parties for their self-resolution of the word count issue, noting it “appreciate[d] the parties’ candor and efforts to resolve the word-count issue amicably” and “approved” the proposed additional words for both parties.

Petitioners identify no other “prejudice.”⁷ After upsetting settled expectations by challenging a patent twelve years after grant, Petitioners lay in wait and now seek to prolong the IPR and manufacture issues for appeal by advancing arguments never developed in their briefs, demonstratives, or oral advocacy. Petitioners cannot use Director Review for a second bite at the apple.

⁷ Petitioners knew PO’s critical date early. In November 2023—well before IPR petitions, PO explained to Petitioner Cisco that “inventors Stacey Lum and Alice Lee conceived of the inventions [...] on or around October 25, 2002.” Petitioners knew Krantz and Herrmann were not prior art but decided to use them anyway.

Respectfully submitted,

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Certification of Service Under 37 C.F.R. § 42.6(e)(4)

The undersigned hereby certifies that the foregoing was served in its entirety by filing through the Patent Trial and Appeal Board P-TACTS, as well as providing a courtesy copy via e-mail to the attorneys of record.

Date: October 27, 2025

/Brian R. Landry/
Reg. No. 62,074