

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.

IPR2024-00676
U.S. Patent No. 8,677,450

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

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The Board properly held all challenged claims not unpatentable. Paper 54 (Final Written Decision (“FWD”)). Petitioners’ Request (Paper 57) is mere dissatisfaction rather than any genuine basis for additional review. The Request—an unsupported “incorporation by reference” challenge—pushes newly raised theories and tries to manufacture a procedural challenge for appeal.

The Director should deny the Request—a retread of its others. This is because *the POR established* conception, reasonably continuous diligence, and reduction to practice (Paper 20)—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.

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, 14–35; POR, 62–79. Accordingly, the applied references are not prior art. FWD, 35.

The history between the parties is long. Petitioner Cisco tried to create a Network Access Control (“NAC”) product, but failed. POR, 38–39. Then, Cisco resorted to mining technical information from PO under the mask of a collaboration. *Id.* Cisco studied PO’s technical work, praised it, and copied it. Having what it needed, Cisco abruptly ended the link and launched its copied NAC. *Id.*, 38–61.

PO sued Petitioners in 2023. *See, e.g.*, Paper 1 (Petition (“Pet.”)), 1. Petitioners filed their Petition in 2024—ten years after the 2014 grant of the challenged patent. EX1401. The Board instituted on October 23, 2024. Paper 13. Petitioners filed—and lost—seven IPRs collectively challenging six of PO’s patents.

PO’s antedating argument relied on declarations from both inventors, an expert, and over 250 *corroborating* exhibits. POR, 62–79 (citing, e.g., EX2564 (Lum Decl.), EX2429 (Lee Decl.), EX2007 (Smith Expert Decl.), EX2011 (“LAN Specification”)). These are *all discussed in the POR body*.

Petitioners took five depositions including those of inventors Mr. Lum and Ms. Lee and of expert Dr. Smith. EX1423; EX1425; EX1426.

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, EX2011–410, 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 was prior art. *See* FWD, 35. The Board reached the same conclusion in the other instituted IPRs. IPR2024-00539, Paper 60; IPR2024-00675, Paper 56; IPR2024-00677, Paper 59; 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 [] an abuse of discretion...” among other reasons. 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) (cleaned up). This is a “highly deferential” standard of review, *LeFevre v. Sec’y, Dept. of Veterans Affairs*, 66 F.3d 1191 (Fed. Cir. 1995), for the reason that “as a matter of the sound administration of justice, deference [is] owed to the judicial actor better positioned than another to decide the issue in question.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403 (1990) (cleaned up).

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

Petitioners’ Request is a misdirected “incorporation by reference” argument. This summarily fails. **First**, the body of the POR details the antedating evidence and argument. This is dispositive. **Second**, the Board relied on the POR and its accompanying exhibits and evidence. It is permitted to do this, and it understood

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

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 in their Reply, which they now complain of in their Request—thus undermining their argument that PO's evidence was buried or inaccessible. ***Fourth***, Petitioners never raised any of these issues 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," *id.*, 6–7, it only identifies a single limitation purportedly missing from the POR analysis: "configuring the access point." *Id.*, 8. Petitioners never challenged this during the IPR. *See* Reply (Paper 35), 22–27. And the POR details "configuring...":

EX2011 discloses facilitating updates to software on the device by tunneling network traffic as discussed, *e.g.*, at EX2009 at 18 (excerpted below).

3.5 Access Control when Audit Fail

3.5.1 VPN/Remote Access User

If Audit Fail, CGS removes CGAgent's IP and port number from CGS bypass/filter table and blocks the VPN/Remote Access user from accessing the corporate network. CGAgent disconnects the TCP connection.

3.5.2 LAN/802.1X User

There are two approaches we can take when CGAgent fails the CyberGatekeeper audit:

- CGS sends ACCESS-ACCEPT to the switch but programs the port so that CGAgent can only access to the untrusted network. To do that CGS either uses Port Filtering or VLAN approach to accomplish that:
 - * Add a "deny" rule to ACL of the switch so the agent can only access certain network.
 - * Program the port so the CGAgent belongs to a untrusted VLAN.
- CGS sends ACCESS-DENY to the switch so CGAgent cannot access the network. If we go with this approach then CGAgent must send EAPOL-Start to the switch 30 (or any proper number) seconds later. If CGAgent fails the audit and the switch receives ACCESS-DENY, CGAgent cannot access to any network at all. If CGAgent needs to download all necessary software or data in order to pass the audit, one way to do that is to tunnel VPN traffic through EAPOL (EAP Over LAN) protocol.

POR, 65 (annotated) (citing EX2011, 9). Petitioners make much of the fact that the Board's FWD cites to Dr. Smith's analysis in EX2009, and not to the POR itself. *See* Request, 8–9 (citing FWD, 18). But the cited portion of Dr. Smith's analysis in the FWD (EX2009, 14) includes pincites to EX2011/LAN Specification, including page 9—the very same page pasted into the POR. Thus, the POR made out the argument, the Board relied on it, and Petitioners' "gotcha" on the citations is hollow.

Petitioners specify no other purportedly missing limitations in their Request (let alone challenged them before the Board). But to be sure, that same page of POR explains the conception of the following:

- "updates to software on the device" from claim 2 and similar phraseology in

claims 16 and 27, through EX2011's discussion of "download[ing] all necessary software or data"

- "wherein configuring the access point includes assigning a VLAN" (claim 4),
- "less restricted network" (claims 16, 22) through E2011's discussion of an "untrusted VLAN".

The preceding page of the POR too explains the conception of other claim elements, including "applying a security policy" (claims 1, 16, 22), authentication (claims 1, 16) including through EAP and RADIUS protocols (claims 7, 8), and a "less restricted network" (claims 16, 22):

EX2011 applies a security policy to the access device by auditing the device as discussed, *e.g.*, at EX2009 at 10 and EX2011 at 8 (excerpted below).

3.2 When to Start Audit

3.2.1 VPN/Remote Access User

For a VPN/Remote Access User, when VPN/dialup is up or other remote access specific conditions met, CGAgent will connect to a pre-configured CGS IP and start audit.

3.2.2 LAN/802.1X User

For a LAN user whose system on the LAN has 802.1 capability, CGS behaves as a AAA (E.g. Radius) proxy server and logically is behind the EAP-TTLS/PEAP server.

Once the user's PC connects to the switch, the switch sends EAP Request/ID to the CGAgent. CGAgent's 802.1X driver responds to switch's request with ID/Username/Password. The switch then conveys the information to the Radius server. After several passes, the Radius server sends ACCESS-ACCEPT to the switch. Since CGS 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.

If CGAgent fails to send proper username/password, the ACCESS-DENY should be passed to switch right away. That is, no CyberGatekeeper audit packets should be requested or sent.

3.2.3 LAN/Port-Filtering & VLAN User

A LAN user whose system on the LAN doesn't have 802.1X capability but the switch it connects to having Port Filtering or VLAN capability is defined as a LAN/Port-Filter or VLAN user. CGAgent listens on a specific UDP broadcasting port to get CGS IP and start audit. For a VLAN user, once CGS sends the first audit query to the CGAgent, it changes the VLAN group of the port associated with the VLAN user from the original VLAN to a untrusted VLAN.

POR, 64 (annotated) (citing EX2011, 8); *see also id.*, 63 (access point and switch).

Indeed, Petitioners have not identified any claim elements in their Request that are unsupported in the POR. This also holds true for the dependent claims, which get a passing mention in Petitioners' Request. *Cf. In re Stryker*, 435 F.2d 1340, 1341–42 (C.C.P.A. 1971) (“It cannot be the law that the same affidavit is insufficient to remove the same reference applied against the slightly narrower claims.”).

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 beyond the four corners of the POR. Request, 1. This is not the law.² 37 C.F.R. § 42.6(a)(3) provides that “[a]rguments must not be incorporated by reference.” Legal arguments are 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 EX2011 and expert testimony in EX2009. The Federal Circuit approves. *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. *W.*

² *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.”).

Digital Techs., Inc. v. Godo Kaisha IP Bridge 1, IPR2024-01384, 2025 WL 808198, at *16 (PTAB Mar. 13, 2025) (no improper incorporation when “[p]etitioner *ma[de]* *arguments* and cite[d] to portions of [a] declaration, which is evidence—not argument”) (citing *Guardant*).

Petitioners’ authorities describe 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 patentee conceding on sur-reply that its “nexus” arguments were not in its POR. In *Parus* (Request, 3, 12), the Board refused to consider the patentee’s assertion of conception in a single paragraph with a bald citation to a 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. Indeed, PO’s conception argument spans pages and contains multiple details from and citations to both Smith’s analysis and EX2011. The POR does not have an incorporation problem.

C. Petitioners’ reliance on uncited portions of the Smith Declaration (EX2007) and the LAN Specification (EX2011) shows they had no trouble accessing the evidence.

Petitioners’ claim of “prejudice[,]” *see* Request, 13, is belied by the fact that their Reply relies expressly on *uncited* portions of EX2011 and Dr. Smith (EX2007).

The Reply argues around an *uncited and not relied-on* “Figure 3” of EX2011. Reply,

24. 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.*, 23 (quoting Smith Decl. (EX2007), 13).,
- “InfoExpress’s expert Smith...opines that the ‘untrusted network’ is a ‘restricted subset of a protected network,’ and the ‘trusted network’ is a ‘less-restricted subset[.]’” *Id.*, 26 (quoting EX2007, 14).
- “Smith’s opinion that ‘a DMZ is an example of a “restricted subset”’ is also incorrect.” *Id.* (quoting EX2007, 16).

Put differently, Petitioners scoured the evidence, relied on it, and argued it. They cannot now claim that that same evidence was off-limits to the Board.

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

As set forth in Section V, Petitioners forfeited all the brand-new arguments they try to shoehorn into their Request. In addition to never raising *any* evidentiary objections, they also never objected to PO’s conception demonstratives (Paper 44), which detail, *e.g.*, conception of a less-restricted subset and access to a protected network (slides 117–20, 129), a restricted subset (121–28), EAP authentication (130–32), switches and/or access points (130–32), applying a security policy and

auditing (137–39), configuring (140), using a single gatekeeper (141–42), and updating and monitoring (143–44).³

Slide 140 is EX2011 showing possession of (re)configuring by citation, *e.g.*, to EX2011’s disclosure that the CyberGatekeeper Server (“CGS”) “sends the ACCESS-ACCEPT message to the switch...” for a LAN/802.1X user, and that it “changes the VLAN group for the port from the untrusted VLAN to the original VLAN group”:

EX2011 Shows the Inventors’ Possession of Reconfiguring

3.4 Access Control when Audit Pass

3.4.1 VPN/Remote Access User
If Audit Pass, CGS adds CGAgent’s IP and port number into CGS’s bypass/filter table and allows the VPN/Remote Access user to access the corporate network.

3.4.2 LAN/802.1X User
If CGAgent sends all required audit information and Audit Pass, CGS sends the ACCESS-ACCEPT message to the switch so the CGAgent can access to systems behind the switch.

3.4.3 LAN/Port-Filtering & VLAN User
LAN/Port-Filtering User
The switch’s ACL is programmed initially so everyone can only access to the untrusted network. If CGAgent passes the audit, CGS programs the switch to add CGAgent’s MAC address to the “allow” list in the switch so the CGAgent can access to the trusted network.

VLAN User
CGS changes the VLAN group for the port from the untrusted VLAN to the original VLAN group. CGAgent will close connection and be assigned a new IP address. CGAgent uses this new IP address to communicate with CGS after Audit Pass in the Monitor mode.

See ‘460 Patent POR at 69; ‘484 Patent (-00675 IPR) POR at 69; ‘484 Patent (-00679 IPR) POR at 68.

EX2011 at 9; see also EX2007 (Hugh Smith Report), ¶135(b).

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Patent Owner’s DEMONSTRATIVE EXHIBIT – NOT EVIDENCE

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³ Petitioners carefully scrutinized PO’s demonstratives for alleged extensions beyond the POR, but did not lodge any objections to any of the antedating slides.

Thus, these issues were all discussed by the Board, Petitioners, and PO. Indeed, Petitioners never raised any incorporation by reference issue to the Board at oral hearing because there was none.

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

The POR quotes Inventor Lum's ground-breaking idea from 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, 66 (quoting EX2015, EX2016).

These inventions were memorialized in EX2011. The POR explains, "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)." *Id.*

Indeed, Petitioners already conceded applicability of a significant amount of the diligence evidence, *i.e.*, everything after "late March[.]" Paper 51, 123:5–9.⁴ Notwithstanding, Petitioners now backtrack to re-characterize the diligence

⁴ 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 51, 123:5–9.

evidence as “generic.” Request, 11. But InfoExpress identified, relied, and *explained how all* 250+ exhibits in its POR related to the claim limitations and corroborated diligence. For example, the POR explained the following for diligence towards the “configuring” limitations:

- “InfoExpress tested and experimented with Cisco switches to evaluate potential authentication and **802.1X functionality [i.e. configuring] for use with the claimed gatekeeper**. EX2200; EX2201.” POR, 69.
- “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, 71.

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

Lastly, the Request spins confusion around “NDCA” correspondence. *Id.*, 13. 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.⁵ Further, all of the PO and GTI exhibits are independently explained in the POR at 67–77.

⁵ Petitioners identify correspondence directed to a different PO product called CyberArmor. Request, 12. As PO explained, the CyberArmor correspondence was

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

Petitioners’ new construction-based argument made at Director Review is inapt. Request, 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 construe any claim terms.*’” FWD, 10. Petitioners got exactly what they wanted. Notwithstanding, they raise a new claim construction issue regarding “configuring the access point.” Request, 10. This claim-construction issue makes little sense. As discussed above on pages 4–5, the POR at page 65 details conception of “configuring.” This analysis includes excerpting EX2011, portions of which discuss instances of “configuring” such as the “CGS remov[ing] CGAgent’s IP and port number from the CGS bypass/filter table[,]” “send[ing] ACCESS-ACCEPT to the switch...[,]” and/or “send[ing] ACCESS-DENY to the switch...” See EX2011, 9 (cited by POR, 65).

There is no issue with the construction that Petitioners sought.

V. Petitioners forfeited these arguments.

Petitioners never raised any of these arguments. All Petitioners can do is point to a conclusory footnote in their Reply. *Id.*, 22 n.8 (“InfoExpress’s arguments as to

included because it was part of the correspondence PO had with its patent attorneys that was discussing both products. Paper 51, 119:2–120:7 (cited in FWD, 33).

the inventors' conception and diligence are also improperly incorporated by reference for the same reasons described above.") (cited in Request, 4–5). But this brief footnote provides no notice. And nothing in the Request was before the Board.

As explained by the Federal Circuit, "issues 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) (cleaned up); *Aortic Innovations LLC v. Edwards Lifesciences Corp.*, 2025 WL 2999367 at *6 (Fed. Cir. Oct. 27, 2025) (forfeiture where brief below "did not otherwise develop any argument"); This holds especially true for "arguments raised in footnotes, [which] are not preserved." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). Even if Petitioners had not forfeited these arguments, the Board was not required to address every issue—or anticipate Petitioners' novel permutations on Director Review—and "failure to explicitly discuss every issue...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 to be litigated for the first time upon Director Review is fundamentally unfair to the Director, the Board, and PO.

VI. Petitioners were not prejudiced.

Petitioners’ “prejudice” section is nothing more than a word-count dispute. Request, 13–14. Petitioners received additional words. *See* Reply, 32. Indeed, in the very same email chain that Petitioners cite, *see* Request, 13–14, the Board’s final word on the issue was to commend the parties for their self-resolution of the issue, noting it “appreciate[d] the parties’ candor and efforts to resolve the word-count issue amicably.”

Petitioners identify no other “prejudice.”⁶ Instead, after upsetting settled expectations by challenging a patent ten years after its grant, Petitioners laid in wait and now seek to delay and to manufacture issues they never developed during the IPR. Petitioners cannot use Director Review for a second bite at the apple.

⁶ Petitioners knew early on of PO’s critical date. In November 2023—well before the 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,

<p>Dated: <u>November 25, 2025</u></p> <p>Mailing address for all correspondence: Saul Ewing LLP 1735 Market Street, Suite 3400 Philadelphia, PA 19103-7504</p>	<p><u>/Brian R. Landry/</u> Brian R. Michalek (Reg. No. 65,816) Saul Ewing LLP 161 North Clark Street, Suite 4200 Chicago, IL 60601 Tel: (312) 876-7151 brian.michalek@saulewing.com</p> <p>Joseph M. Kuo (Reg. No. 38,943) Saul Ewing LLP 161 North Clark Street, Suite 4200 Chicago, IL 60601 Tel: (312) 876-7151 joseph.kuo@saulewing.com</p> <p>Brian Landry (Reg. No. 62,074) Saul Ewing LLP 131 Dartmouth Street, Suite 501 Boston, MA 02116 Tel: (617) 912-0969 Brian.Landry@saulewing.com</p> <p>Andrew Schwerin (Reg. No. 72,999) Saul Ewing LLP 1735 Market Street, Suite 3400 Philadelphia, PA 19103 7504 Tel: (215) 972-7184 Andrew.Schwerin@saulewing.com</p> <p>Counsel for Patent Owner</p>
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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: November 25, 2025

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