United States District Court
Northern District of California

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

INFOEXPRESS, INC.,

Plaintiff,

vs.

CISCO SYSTEMS, INC.

Defendant.

INFOEXPRESS, INC.,

Plaintiff,

vs.

FORTINET, INC.,

Defendant.

Case Nos.: 4:23-CV-02698-YGR
4:23-CV-04389-YGR

CLAIM CONSTRUCTION ORDER

Plaintiff InfoExpress, Inc. ("InfoExpress") brings these two patent infringement actions against defendants Cisco Systems, Inc. ("Cisco") and Fortinet, Inc. ("Fortinet"), asserting five patents. Now before the Court are the parties' claim construction disputes as to three[1] sets of terms

[1] The parties originally disputed the construction of seven terms in the Asserted Patents, but defendants withdrew their indefiniteness challenges to two terms: "policy auditor" and "the protected network." (*See* Dkt. No. 112; Dkt. No. 113 at 2 n.1.) Subsequently, the parties have stipulated to a construction for "a wireless access point configured to support an 802.1x standard / an access point configured to use an 802.1x protocol." (*See* Dkt. No. 119.)

of the Asserted Patents. Having carefully considered the papers submitted, the parties' arguments presented at the claim construction hearing on September 18, 2024, and the pleadings in this action, and for the reasons below, the Court adopts the constructions set forth herein.

I. BACKGROUND

A. PROCEDURAL HISTORY

These are two patent infringement actions brought by InfoExpress against Cisco and Fortinet on May 31, 2023, and August 5, 2023, respectively. (*See InfoExpress, Inc. v. Cisco Systems, Inc.*, No. 23-CV-02698-YGR *("Cisco")*, at Dkt. No. 1 (N.D. Cal. May 31, 2023); *InfoExpress, Inc. v. Fortinet, Inc.*, No. 23-CV-04389-YGR *("Fortinet")*, at Dkt. No. 1 (N.D. Cal. Aug. 5, 2023).) InfoExpress asserted that Cisco and Fortinet infringe its U.S. Patent Nos. 7,523,484 (the "'484 patent") (Dkt. No. 1-1[2]); 8,051,460 (the "'460 patent") (Dkt. No. 1-2); 8,677,450 (the "'450 patent") (Dkt. No. 1-3); 8,578,444 (the "'444 patent") (Dkt. No. 1-4); 8,347,350 (the "'350 patent") (Dkt. No. 1-5) (collectively, the "Asserted Patents"), as well as U.S. Patent No. 8,117,645 (the "'645 patent") (Dkt. No. 1-6), which is no longer asserted.

Previously in the *Cisco* case, Cisco moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), arguing that the Asserted Patents are invalid under 35 U.S.C. § 101. (Dkt. No. 48.) This Court partially granted Cisco's motion, finding that claims 1–7, 10–14, and 17 of the '444 patent, claims 1–4, 7–9, 11, and 14 of the '450 patent, and claims 1–2 and 5–6 of the '645 patent were patent ineligible. (Dkt. No. 78.)

On December 20, 2023, the parties stipulated to a consolidated claim construction schedule for discovery, filings, and hearings. (*See* Dkt. No. 62.) On April 19, 2024, defendants moved to stay these actions pending *inter partes review* of the Asserted Patents. (*See* Dkt. No. 80.) The Court granted a limited stay of the proceedings on June 3, 2024, but ordered that claim construction briefing proceed. (*See* Dkt. No. 101.) Subsequently, the Court set a technology tutorial on September 11, 2024, and a claim construction hearing on September 18, 2024. (*See* Dkt. No. 108.)

[2] For ease of reference, the Court refers to the *Cisco* docket numbers where applicable to both cases.

B. THE ASSERTED PATENTS

The Asserted Patents relate to "specific core and foundational inventions for, and associated with [Network Access Control ("NAC")] technology." (Dkt. No. 38 ¶¶ 22–33.) According to InfoExpress, the Asserted Patents "solve technological problems that existed relating to the capabilities of controlling access to computing networks in the face of growing user demand for accessing secure networks over the Internet and from personal devices such as laptop computers and other mobile devices." (*Id.* ¶ 23.)

'484 patent independent claim 41[3] recites:

A method of granting access to a protected network, the method comprising:

> receiving a request for access to a less-restricted subset of the protected network from an access device, the request being received through a communication port of an access point, the communication port configured for communicating between the access device and a restricted subset of the protected network, the restricted subset including a gatekeeper;
>
> applying a security policy to the access device, responsive to the request;
>
> 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, if requirements of the security policy are satisfied; and
>
> updating the access device if requirements of the security policy are not satisfied.

'460 patent independent claim 1 recites:

A method of granting access to a protected network, the method comprising:

> receiving a request for access to a less-restricted subset of the protected network from an access device, the request received through a communication port of an access point, the communication port configured for communicating between the access device and a

[3] The Court reproduces claim 41 of the '484 patent as the parties agreed that claim was most representative of other claims in the Asserted Patents, including claims 27, 28, 33, 34, 35, 41, 48, 49, 50, 53, 57, 65, 71, 82 of the '484 patent and claims 1, 2, 10, 11, 12, 16, 17, 22 of the '460 patent. (*See* Dkt. No. 66.)

> restricted subset of the protected network, the restricted subset including a gatekeeper;
>
> applying a security policy to the access device in response to the request;
>
> using the gatekeeper to determine if requirements of the security policy are satisfied by the access device, and
>
> 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.

'350 patent independent claim 1 recites:

> A method for network access control, the method comprising:
>
> receiving audit data pertaining to a device that does not have access to a less-restricted subset of a network;
>
> auditing the device in accordance with a security policy based at least in part on the audit data;
>
> reconfiguring an access point to allow access to the less-restricted subset of the network in response to the security policy audit;
>
> receiving updated audit data pertaining to the device subsequent to reconfiguring the access point; and
>
> monitoring continued compliance of the device with the security policy using the updated audit data.

'450 patent independent claim 16[4] recites:

> A method of providing access over a communication network, the method comprising:
>
> receiving at an access point a request for access to a less-restricted network, the request coming from an access device;
>
> applying a security policy to the access device in response to the request, application of the security policy including performing an audit of the access device;

[4] The Court reproduces independent claim 16 of the '450 patent as it previously held independent claim 1 of the '450 patent invalid under 35 U.S.C. § 101. (*See* Dkt. No. 78.)

> providing information to the access device to improve compliance of the access device to the security policy, in response to the audit;
>
> granting access to the less-restricted network based on satisfaction of the security policy by the updated access device; and
>
> authenticating a user of the access device, wherein granting access is further based on the authentication.

'444 patent independent claim 22[5] recites:

A method for auditing a device, the method comprising:

> performing an authentication using an EPA protocol from the device, the device being connected to an access point configured to use an 802.1x protocol;
>
> sending a request for audit data to an agent running on the device;
>
> receiving the audit data at a gatekeeper configured to control access to a network, from the agent, the audit data pertaining to the device and having been obtained by the agent;
>
> applying a security policy that includes at least one requirements pertaining to the audit data and at least one requirement pertaining to the authentication, the applying of the security policy taking place under control of the gatekeeper, where applying the security policy includes configuring the access point;
>
> receiving, from the agent, updated audit pertaining to the device while the device has access to a less-restricted subset of the network; and
>
> re-auditing the device in accordance to the security policy using the received updated audit data.

The parties agreed upon claim constructions for two terms in the Asserted Patents: "system data" and "a computer network." (*See* Dkt. No. 112 at 3.) The parties currently dispute the construction of three sets of terms: (i) "gatekeeper," (ii) "access to the restricted subset of the protected network [is / being] responsive to a VLAN configured to communicate with the protected

[5] The Court reproduces independent claim 22 of the '444 patent as it previously held independent claim 1 of the '444 patent invalid under 35 U.S.C. § 101. (*See* Dkt. No. 78.)

network subject to the access control list,"[6] and (iii) "audit data"/ "audit" / "auditing." (*See* Dkt. No. 112-1.)

II. LEGAL STANDARD

A. CLAIM CONSTRUCTION

Claim construction is a question of law for the Court. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996). "The purpose of claim construction is to determine the meaning and scope of the patent claims asserted to be infringed." *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008) (internal quotation marks omitted). "When the parties raise an actual dispute regarding the proper scope of the[] claims, the court, not the jury, must resolve the dispute." *Id*. However, claim construction need only resolve the controversy; it is not "an obligatory exercise in redundancy" where no dispute exists. *Id*. at 1361; *see also Vivid Techs., Inc. v. Am. Sci & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir. 1999).

Claim terms are generally given the "ordinary and customary meaning" that they would have to a person of skill in the art ("POSITA") at the time of the invention. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312–13 (Fed. Cir. 2005) (en banc). The ordinary and customary meaning is not the meaning of the claim term in the abstract. *Id*. at 1321. Rather, it is "the meaning to the ordinary artisan after reading the entire patent." *Id*.; *see also Trs. of Columbia U. v. Symantec Corp.*, 811 F.3d 1359, 1363 (Fed. Cir. 2016) ("The only meaning that matters in claim construction is the meaning in the context of the patent.").

To determine the ordinary meaning, the court examines the claims, specification, and prosecution history of the patent, which form the "intrinsic evidence" for claim construction. *Phillips*, 415 F.3d at 1313; *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1582 (Fed. Cir. 1996). "[T]he context in which a term is used in the asserted claim can be highly instructive." *Phillips*, 415 F.3d at 1314. Additionally, "[d]ifferences among claims can also be a useful guide in understanding the meaning of particular claim terms." *Id*. However, a person of ordinary skill in the art is "deemed to read the claim term not only in the context of the particular claim in which the

[6] "VLAN," as used in the Asserted Patents, refers to "virtual local area networks." (*See* '484 patent at 2:6.)

disputed term appears, but in the context of the entire patent, including the specification." *Id*. at 1313. The specification "is always highly relevant to the claim construction analysis" and is usually "dispositive." *Id*. at 1315 (quoting *Vitronics*, 90 F.3d at 1582). Nevertheless, it is improper to limit the claimed invention to the preferred embodiments or to import limitations from the specification unless the patentee has demonstrated a clear intent to limit claim scope. *Martek Biosciences Corp. v. Nutrinova, Inc.*, 579 F.3d 1363, 1381 (Fed. Cir. 2009).

In addition to the claims and specification, the prosecution history may be used "to provide[] evidence of how the PTO and the inventor understood the patent." *Phillips*, 415 F.3d at 1317. "Any explanation, elaboration, or qualification presented by the inventor during patent examination is relevant, for the role of claim construction is to 'capture the scope of the actual invention' that is disclosed, described and patented." *Fenner Inv., Ltd. v. Cellco P'ship*, 778 F.3d 1320, 1323 (Fed. Cir. 2015) (quoting *Retractable Techs., Inc. v. Becton, Dickinson & Co.*, 653 F.3d 1296, 1305 (Fed.Cir.2011)). Finally, a court may consider extrinsic evidence—such as dictionaries, inventor testimony, and expert opinion—if it is helpful. *Phillips*, 415 F.3d at 1319. However, extrinsic evidence "is unlikely to result in a reliable interpretation of patent claim scope unless considered in the context of the intrinsic evidence." *Id*.

There are two exceptions to the ordinary meaning construction: "1) when a patentee sets out a definition and acts as his own lexicographer," and "2) when the patentee disavows the full scope of a claim term either in the specification or during prosecution." *Thorner v. Sony Comp. Entm't Am. LLC*, 669 F.3d 1362, 1365 (Fed. Cir. 2012) (citing *Vitronics*, 90 F.3d at 1580). To act as a lexicographer, the patentee "must 'clearly set forth a definition of the disputed claim term' other than its plain and ordinary meaning." *Id*. (quoting *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002)). To disavow claim scope, the specification or prosecution history must "make[] clear that the invention does not include a particular feature" even though the language of the claims "might be considered broad enough to encompass the feature in question." *CCS Fitness, Inc.*, 288 F.3d at 1366 (quoting *SciMed Life Sys., Inc. v. Adv. Cardiovascular Sys., Inc.*, 242 F.3d 1337, 1341 (Fed. Cir. 2001)).

B. INDEFINITENESS

Under 35 U.S.C. § 112, patent claims must "particularly point[] out and distinctly claim[] the subject matter" regarded as the invention. In order to be valid, claims must, when viewed in light of the specification and prosecution history, "inform those skilled in the art about the scope of the invention with reasonable certainty." *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 910 (2014). A party arguing that a claim is invalid for indefiniteness bears the burden of proving indefiniteness by clear and convincing evidence. *BASF Corp. v. Johnson Matthey Inc.,* 875 F.3d 1360, 1365 (Fed. Cir. 2017); *see also Dow Chem. Co. v. Nova Chemicals Corp. (Canada)*, 809 F.3d 1223, 1224 (Fed. Cir. 2015) (Moore, J., concurring) ("[T]he burden of proving indefiniteness, as with any allegation of invalidity, remains on the party challenging validity who must establish it by clear and convincing evidence.").

III. CLAIM CONSTRUCTION

A. WAIVER OF INDEFINITENESS CHALLENGES

As a threshold issue, InfoExpress argues that the Court should reject defendants' indefiniteness challenges to the terms "gatekeeper," "access to the restricted subset of the protected network [is / being] responsive to a VLAN configured to communicate with the protected network subject to the access control list," and "802.1x standard / 802.1x protocol" because defendant failed to include these theories in their invalidity contentions as required by the Patent Local Rules and have therefore waived them. (*See* Dkt. No. 109 at 7–9; Dkt. No. 113 at 2–4.) Defendants do not dispute that their indefiniteness challenges to these terms were not disclosed in their invalidity contentions, but argue that InfoExpress had ample notice of them during the claim construction meet and confer process, including when defendants served their Patent Local Rule 4-2 Identification of Preliminary Claim Constructions and Evidence in March of 2024. (*See* Dkt. No. 111-2.) Defendants also argue that both the Federal Circuit and this district permit an accused infringer to raise indefiniteness challenges at or after claim construction. (*See* Dkt. No. 111 at 3–7.)

N.D. Cal. Patent Local Rule 3-3 provides that "[n]ot later than 45 days after" service of infringement contentions, "each party opposing a claim of patent infringement, shall serve on all parties its 'invalidity contentions' which shall contain . . . (d) Any grounds of invalidity based on

35 U.S.C. § 101, indefiniteness under 35 U.S.C. § 112(2) or enablement or written description under 35 U.S.C. § 112(1) of any of the asserted claims." Patent L.R. 3-3. "The Northern District of California's Patent Local Rules exist to further the goal of full and timely discovery and provide all parties with adequate notice and information with which to litigate their cases." *Verinata Health, Inc. v. Sequenom, Inc.*, No. 12-CV-00865 SI, 2014 WL 4100638, at *1 (N.D. Cal. Aug. 20, 2014) (internal quotation marks omitted). "The rules are designed to require parties to crystallize their theories of the case early in the litigation and to adhere to those theories once they have been disclosed." *Id*.

To start, defendants have plainly failed to comply with the Patent Local Rules. Their defense, in part, is that plaintiffs asserted so many claims, they were doing as best they reasonably could to narrow the issues. Defendants served their invalidity contentions in November of 2023, and both Cisco and Fortinet disclosed *different* indefiniteness challenges in those contentions. (*See* Dkt. Nos. 109-9 (Fortinet invalidity contentions); 109-10 (Cisco's invalidity contentions)). Ultimately, defendants provide no reason why they did not seek to amend those contentions to include these newly raised indefiniteness challenges, despite having ample opportunity to do so in the intervening months.[7] Indeed, Cisco *did* move for leave to amend its invalidity contentions on March 8, 2024—shortly before it served its Patent Local Rule 4-2 disclosures—yet inexplicably did not include their new indefiniteness challenges in their amended invalidity contentions. (*See* Dkt. Nos. 72 (motion for leave to amend); 109-11 (Cisco's amended invalidity contentions).) Compliance with this District's Local Rules is not optional, and defendants' failure here is not well taken.

However, the Court is also "'extremely reluctant' to dispose of substantive invalidity attacks based on procedural defects." *Huawei Techs., Co, Ltd v. Samsung Elecs. Co, Ltd.*, 340 F. Supp. 3d 934, 998 (N.D. Cal. 2018). Defendants' procedural failure does not appear to have been in bad faith or an attempt at gamesmanship. To the extent that InfoExpress has been prejudiced as a result

[7] Defendants' argument that they could not move for leave to amend because of the limited stay imposed by the Court is likewise not well taken. Even if the limited stay precluded defendants from moving to amend their contentions, defendants have no excuse for why they did not seek leave in the almost nine months preceding the stay.

of defendants' failure to disclose, such prejudice is minimal at best. As defendants argue, their newly raised indefiniteness challenges were disclosed in their March 25, 2024 Identification of Preliminary Claim Constructions and Evidence, and were further disclosed to InfoExpress during the claim construction meet and confer process—facts that InfoExpress does not materially dispute. (*See* Dkt. No. 113 at 3 (acknowledging disclosure of these positions during claim construction meet and confer).) In fact, InfoExpress represented at the hearing that it did not discover defendants' noncompliance until *after* the simultaneous exchange of claim construction expert reports, despite having been on notice of the challenges for the preceding three months. Defendants' failure to include those indefiniteness challenges in their invalidity contentions thus had no material impact on the way InfoExpress prosecuted this case up until the service of claim construction expert reports, *including* InfoExpress's preparation of its own expert report and decision whether to depose defendants' expert on these issues. At best, this represents a lack of diligence on InfoExpress's part for failing to confirm whether the indefiniteness challenges identified in defendants' Patent Local Rule 4-2 disclosures were adequately disclosed in their invalidity contentions. While the Court agrees that "[i]t is not InfoExpress's job to police Defendants' compliance[,]" (Dkt. No. 113 at 2,) it is hard for the Court to credit InfoExpress's claims of substantial prejudice when InfoExpress itself admits it did not even recognize that any prejudice existed until after it received defendants' expert report. *See Huawei*, 340 F. Supp. 3d at 998 (finding no waiver of new indefiniteness challenges where "the patentee never objected to the new challenges during expert discovery.").

Finally, what minimal prejudice InfoExpress can claim here is mitigated by this order. Defendants have withdrawn their indefiniteness challenges as to all but two terms, based on the parties' agreements. As to those two remaining challenges, this order defers ruling on the first—as to the "gatekeeper" term—and denies the second—as to the "responsive to . . ." term. (*See* Sections III(B)(1)–(2), *infra*.) InfoExpress is now clearly and indisputably on notice of defendant's indefiniteness position as to "gatekeeper," and will have ample opportunity to conduct whatever discovery is necessary to respond to the challenge at summary judgment, should the issue arise.

B. DISPUTED TERMS

1. "gatekeeper" ('484 Patent, claims 1–5, 11–13, 15–20, 23–25, 27, 28, 41, 43, 56, 57, 68;'460 Patent, claims 1, 5, 16, 20, 22; '444 Patent, claim 22)

Claim Term	InfoExpress's Proposal	Defendants' Proposal	Court Construction
"gatekeeper"	Plain and ordinary meaning; no construction necessary	Indefinite	Deferred to summary judgment

The parties dispute whether the term "gatekeeper" is indefinite. Defendants argue that "[t]he term "gatekeeper" has no ordinary and customary meaning" and "[w]hen a claim term has no ordinary and customary meaning in the art, its definiteness turns on 'whether the intrinsic evidence provides objective boundaries.' " (Dkt. No. 111 at 8 (quoting *IQASR LLC v. Wendt Corp.*, 825 Fed. App'x 900, 904 (Fed. Cir. 2020).) Defendants argue that the Asserted Patents' specification describes a "gatekeeper" that "can be implemented in any number of (and contradictory) ways, without any objective boundaries regarding what does, and does not, constitute a 'gatekeeper.' " (Dkt. 111 at 8.) InfoExpress argues that the term "gatekeeper" is well defined in the intrinsic record, and that the extrinsic record shows that the term has a plain and ordinary meaning to a person of skill in the art. (*See* Dkt. 109 at 10–16.)

In order to prevail on its indefiniteness challenge, defendants must prove that the term "gatekeeper" is indefinite by clear and convincing evidence. *See BASF*, 875 F.3d at 1365. The Court finds that, on the record before it at claim construction, defendants have not met "such an exacting standard[.]" *Halliburton Energy Servs., Inc. v. M-I LLC,* 514 F.3d 1244, 1249 (Fed. Cir. 2008). In particular, defendants rely upon the declaration of their expert witness Dr. Reddy, whose opinion that "[a]s an initial matter, 'gatekeeper' is not a term of art" (Dkt. No. 111-12 ("Reddy Report") ¶ 34) is perfunctory and contradicted by the extrinsic record, as cited by InfoExpress's expert Dr. Striegel. (*See* Dkt. No. 109-36 ("Striegel Report") ¶¶ 77–84 (describing state-of-the-art references using the term "gatekeeper").) Dr. Reddy's further opinions that the specification describes how the gatekeeper might be implemented in contradictory ways or in contradictory locations are likewise insufficient to prove indefiniteness by clear and convincing evidence. That the gatekeeper may be implemented a number of ways in different embodiments disclosed in a

specification does not render that term indefinite. Otherwise, any device that could perform multiple functions or be implemented in different hardware/software would necessarily be indefinite. Similarly, defendants' argument that the specification does not clearly define "where" the gatekeeper is located does not convince; the specification's disclosures are all described using optional or exemplary language, and therefore describe embodiments in which the gatekeeper may be located in different locations on the network. That also does not prove that the term "gatekeeper" is indefinite by clear and convincing evidence.

However, InfoExpress's arguments in its briefing and at the hearing raise serious concerns as to the scope of the term "gatekeeper." In particular, the Court is concerned that InfoExpress's expert, Dr. Striegel, was unable (or unwilling) to expressly state what the plain and ordinary meaning of a "gatekeeper" is, despite opining that it "was readily understood in the art with reasonable certainty." (Striegel Report ¶ 73; *see also id.* ¶¶ 77–84.) Instead of providing the Court with a clear definition of what that plain and ordinary meaning would be, InfoExpress and Dr. Striegel couch their construction in permissive and noncommittal language of what a "gatekeeper" *could* be, or by citing to *examples* in the specification or extrinsic evidence that describe what the "gatekeeper" *could* do. (*See* Striegel Report ¶ 51 (opining that a gatekeeper was "known with reasonable certainty, and that it *could* refer to a device that would assist in determining whether an endpoint . . . complied with a security policy, before granting that endpoint access to network resources." (emphasis added)); Dkt. No. 111-20 ("Striegel Depo.") at 59:13–66:17 (testifying that he "believe[d] a 'gatekeeper' could refer to" the device described in paragraph 51 of his expert report); Dkt. No. 109 at 11–12 (citing to specification stating that "Gatekeeper 225 *can* include" certain components, or "explaining how the gatekeeper (through its Policy Auditor 325) can obtain and analyze system data[.]"); *id.* at 15 ("The extrinsic evidence demonstrates *examples* of "gatekeeper" in the technological field from the time of the invention." (emphasis added).) It could well be that at the time of the invention, the term "gatekeeper" was well-understood in the art, but neither InfoExpress nor Dr. Striegel have informed the Court of what that understanding *was*, such that the Court can adequately instruct a jury.

InfoExpress's failure to provide an express statement of the plain and ordinary meaning of "gatekeeper" is especially concerning in light of its other arguments on this issue, which appear incompatible with its proposed "plain and ordinary meaning" construction. For example, InfoExpress appears to argue in its briefing and the hearing that the term, at least in regard to when it appears in the preamble of the claims, should be defined by the subsequent claim limitations describing what the "network gatekeeper" "comprises." (*See* Dkt. No. 109 at 10–13.) Taken logically, this argument would require (as InfoExpress suggested at the hearing) that the meaning of the term depends upon the particular claim at issue, "[b]ut the principle that the same phrase in different claims of the same patent should have the same meaning is a strong one, overcome only if 'it is clear' that the same phrase has different meanings in different claims." *In re Varma*, 816 F.3d 1352, 1363 (Fed. Cir. 2016) (quoting *Fin Control Sys. Pty, Ltd. v. OAM, Inc.*, 265 F.3d 1311, 1318 (Fed Cir. 2001)). Indeed, while InfoExpress does not expressly argue this, its reasoning here would almost suggest that the term "network gatekeeper" in the preamble of these claims is not limiting, a position wholly inconsistent with its proposed "plain and ordinary meaning" construction.

InfoExpress's briefing also repeatedly argues that the meaning of "gatekeeper" is clear because the specification describes what a gatekeeper can comprise, or what functions a gatekeeper can be configured to perform in the context of the claimed invention. (*See* Dkt. No. 109 at 11–12 (citing to specification stating that "Gatekeeper 225 can include" certain components, "explaining how the gatekeeper (through its Policy Auditor 325) can obtain and analyze system data[,]" or describing the various functions (e.g., enforcing security policies) that it can be configured to perform in certain embodiments).) This argument essentially takes the position that the term should be defined by its functions as stated in the specification, which verges on a means-plus-function construction under 35 U.S.C. § 112(6)—again, a position that InfoExpress does not expressly take and one that is incompatible with its proposed "plain and ordinary meaning" construction.

These concerns are not trivial—InfoExpress's arguments seem to present three distinct and incompatible constructions for the term "gatekeeper," and its stated "plain and ordinary meaning" construction is presented in such vague and noncommittal language that the Court cannot conclude that, as a matter of law, the term is *not* indefinite. The Court cannot on this record adopt a

construction that will provide the jury with the necessary clarity it needs to evaluate issues of infringement or validity at trial. *See Sulzer Textil A.G. v. Picanol N.V.,* 358 F.3d 1356, 1366 (Fed. Cir. 2004) ("[T]he district court must instruct the jury on the meanings to be attributed to all disputed terms used in the claims in suit so that the jury will be able to 'intelligently determine the questions presented.' " (quoting *Shad v. Dean Witter Reynolds, Inc.*, 799 F.2d 525, 532 (9th Cir. 1986)). In light of these issues, the Court **DEFERS** ruling on this term until summary judgment. *See Takeda Pharm. Co. v. Handa Pharms., LLC*, No. 11-CV-00840 JCS, 2012 WL 1243109, at *16 (N.D. Cal. Apr. 11, 2012) (deferring indefiniteness challenge raised at claim construction to summary judgment); *Nortek Air Sols., LLC v. DMG Corp.*, No. 14-CV-02919-BLF, 2015 WL 6674705, at *7 (N.D. Cal. Nov. 2, 2015) (same); *DuraSystems Barriers Inc. v. Van-Packer Co.,* No. 1:19-CV-01388-SLD-JEH, 2021 WL 4037826, at *6 (C.D. Ill. Sept. 3, 2021) (deferring ruling on indefiniteness and related claim construction of claim term until summary judgment).

2. "access to the restricted subset of the protected network [is / being] responsive to a VLAN configured to communicate with the protected network subject to the access control list" ('484 Patent, claim 56;'460 Patent, claim 30)

Claim Term	InfoExpress's Proposal	Defendants' Proposal	Court Construction
"access to the restricted subset of the protected network [is / being] responsive to a VLAN configured to communicate with the protected network subject to the access control list"	Plain and ordinary meaning; no construction necessary	Indefinite	Plain and ordinary meaning; no construction necessary

Defendants argue that the Asserted Patents "fail to inform a POSITA with reasonable certainty what it means for 'access' to be 'responsive to' a VLAN (which stands for virtual local area network) or how access could be 'responsive to' a VLAN." (Dkt. No. 111 at 14.) Defendants' argument is that the specification describes a gatekeeper being responsive to a request or command, which is consistent with the plain meaning of the term "responsive to," but the claim language

requires being " 'responsive to' a ***thing*** (i.e., a VLAN) instead of an ***action***, which is nonsensical." (*Id.* (emphasis in original).)

Defendants' argument is, as they concede, grammatical. They argue that the plain and ordinary meaning of "responsive to" must be a response to a ***request or action***, and that being "'responsive to' a thing (i.e. a VLAN) . . . is nonsensical." (Dkt. No. 111-14 (emphasis in original).) The Court disagrees—as the specification describes, certain embodiments of the claimed invention involve a VLAN and Access Control List ("ACL") being used together to control access to a restricted network. (*See* '484 Patent at 8:51–63, 10:55–61.) In such embodiments, access to the restricted subset could be described as being responsive to the VLAN in the sense that access can be granted or controlled based upon directives or action taken by the VLAN subject to the ACL. While the claim language could have been drafted with more grammatical elegance, defendants present no authority as to why such an embodiment cannot be reasonably described as being "responsive to a VLAN," such that a person of skill in the art would not be reasonably informed as to the scope of the claim. *See AbCellera Biologics Inc. v. Bruker Cellular Analysis, Inc.*, No. 20-CV-08624-JST, 2024 WL 4227595, at *12 (N.D. Cal. Sept. 17, 2024) (slip copy) (rejecting indefiniteness challenge based on grammatical error, where "Plaintiffs' common-sense interpretation of the claims [is] sufficient for a POSITA to understand with reasonable certainty.").

For the foregoing reasons, the Court **DENIES** defendants' indefiniteness challenge as to this term and **ADOPTS** InfoExpress's proposal that no construction is necessary.

3. "a wireless access point configured to support an 802.1x standard" ('484 patent, claim 17) / "an access point configured to use an 802.1x protocol" ('444 Patent, claim 22)

The parties have resolved their dispute as to this claim term and have submitted an agreed proposed construction that "802.1x [standard/protocol] is construed to mean 802.1x [standard/protocol] as defined in IEEE 802.1X (2001) standard and remaining in later versions of the 802.1X standard." (Dkt. 119.) Accordingly, the Court **ADOPTS** that construction.

4. "audit data" ('350 patent, claims 1, 6, 8, 9, 10, 13, 18, 19; '460 Patent, claim 1; '444 patent, claim 22); "audit/auditing" ('484 patent, claims 1, 13, 39, 42; '350 Patent, claims 1, 6, 8, 9, 10, 13, 18, 19; '450 patent, claims 16, 22, 23, 25; '444 patent, claim 22)

Claim Term	InfoExpress's Proposal	Defendants' Proposal	Court Construction
"audit data"	Data relating to compliance for a security policy	Information about a device used in determining compliance of the device with a security policy	Information about a device used in determining compliance of the device with a security policy
"audit" / "auditing"	To evaluate the compliance of a security policy	Evaluat[e/ing] information about [a device / the access device] for determining its compliance with a security policy	Evaluat[e/ing] information about [a device / the access device] for determining its compliance with a security policy

Initially, it is not clear to the Court whether the parties actually have a "fundamental dispute regarding the scope of [this] term." *O2 Micro*, 521 F.3d at 1362. Defendants' claim construction brief notes that "InfoExpress's brief proceeds as though it is arguing in favor of Defendant's proposals . . . . [and that the parties] are in absolute agreement on the fundamental understanding of the invention . . . ." (Dkt. No. 111 at 18.) InfoExpress, in its reply brief, notes that "in view of Defendants' disclaimer in their brief that 'audit data' and 'audit/auditing' cannot be construed to include 'authentication' . . . InfoExpress reserves its rights and construction position and looks forward to discussing them at the hearing." (Dkt. No. 113 at 2 n.1.) Based on these statements, the Court instructed the parties to meet and confer as to whether they could agree on a construction, which they could not. (*See* Dkt. No. 117.)

At the claim construction hearing, InfoExpress proposed a compromise construction, which adopted defendants' proposals with the additional limitation that "audit data" / "audit" / "auditing" are "distinct from the separate authentication of a user." Defendants object to the proposed language on the grounds that it is a negative limitation, and that such limitations are disfavored and

"must find support either in 'the words of the claim' or through 'express disclaimer or independent lexicography in the written description that would justify adding that negative limitation.' " *Ethicon LLC v. Intuitive Surgical, Inc.*, 847 Fed. App'x 901, 907 (Fed. Cir. 2021) (quoting *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323 (Fed. Cir. 2003)).

The Court agrees with defendants that InfoExpress's new proposal incorporates a negative limitation, as the claim that "audit data" / "audit" / "auditing" are "distinct from the separate authentication of a user" is materially identical to saying that they are "not the separate authentication of a user." The Court also agrees that the limitation here does not find support in the "words of the claim" or through express disclaimer or independent lexicography. *See Ethicon*, 847 Fed. App'x at 907. Indeed, the words of the claim, as reflected in '444 Patent claim 22, suggest the opposite—that "auditing a device" may comprise "performing an authentication." *See* '444 Patent cl. 22. As such, the Court declines to adopt InfoExpress's proposal to incorporate such language into the construction.

InfoExpress's only argument in favor of the negative limitation (aside from arguing that it is not a negative limitation, which the Court rejects) is that their proposed limitation is pulled directly from arguments made in defendants' own claim construction brief, which stated that the "device auditing process is decidedly distinct from the separate 'authentication' of a 'user' " and argues that this is the "thrust of the invention." (Dkt. No. 111 at 19.) However, arguments made in the parties' briefs or at the hearing are not intrinsic evidence of the patent, which the Federal Circuit has stated is required to justify a negative limitation.[8]

Accordingly, the Court **ADOPTS** the constructions of "audit data" as "information about a device used in determining compliance of the device with a security policy" and "audit / auditing" as "evaluat[e/ing] information about [a device / the access device] for determining its compliance with a security policy."

[8] To the extent that this issue becomes relevant for the purposes of infringement or invalidity, InfoExpress is free to make the argument, including by arguing that defendants should be precluded from taking positions contrary to their prior representations at claim construction. However, it appeared that the Court was not briefed on the entirety of the issue and does not prejudge the issue here.

IV. CONCLUSION

Based on the foregoing, the Court provides the following constructions of the claim terms.

Term	Construction
"gatekeeper"	Deferred to summary judgment.
"access to the restricted subset of the protected network [is / being] responsive to a VLAN configured to communicate with the protected network subject to the access control list"	Plain and ordinary meaning; no construction necessary.
"a wireless access point configured to support an 802.1x standard" / "an access point configured to use an 802.1x protocol"	802.1x [standard/protocol] is construed to mean 802.1x [standard/protocol] as defined in IEEE 802.1X (2001) standard and remaining in later versions of the 802.1X standard.
"audit data"	"information about a device used in determining compliance of the device with a security policy"
"audit" / "auditing"	"evaluat[e/ing] information about [a device / the access device] for determining its compliance with a security policy."

IT IS SO ORDERED.

Date: September 25, 2024

YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

CourtAlert® Case Management

From: ECF-CAND@cand.uscourts.gov
Sent: 9/25/2024 8:26:48 PM
To: efiling@cand.uscourts.gov
Subject: Activity in Case 4:23-cv-02698-YGR InfoExpress Inc. v. Cisco Systems, Inc. Order

---

EXTERNAL EMAIL - This message originates from outside our Firm. Please consider carefully before responding or clicking links/attachments. This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended. ***NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply. U.S. District Court California Northern District Notice of Electronic Filing The following transaction was entered on 9/25/2024 1:25 PM and filed on 9/25/2024 Case Name: InfoExpress Inc. v. Cisco Systems, Inc. Case Number: 4:23-cv-02698-YGR https://ecf.cand.uscourts.gov/cgi-bin/DktRpt.pl?413477 Filer: Document Number: 121 Copy the URL address from the line below into the location bar of your Web browser to view the document: https://ecf.cand.uscourts.gov/doc1/035124913678?caseid=413477&de_seq_num=329&magic_num=81701079 Docket Text: **CLAIM CONSTRUCTION ORDER. Signed by Judge Yvonne Gonzalez Rogers on 9/25/2024. (eac, COURT STAFF) (Filed on 9/25/2024) 4:23-cv-02698-YGR Notice has been electronically mailed to: Andrew F. Schwerin , I andrew.schwerin@saul.com, judith.ferraro@saul.com Brenda Helen Entzminger bentzminger@bdiplaw.com Brian Raymond Michalek brian.michalek@saul.com, julie.dillner@saul.com, laura.disanto@saul.com, litigationdocketing@saul.com, rodney.johnson@saul.com Casey T. Grabenstein casey.grabenstein@saul.com David Lesht dlesht@sperling-law.com David P. Enzminger denzminger@winston.com, david-enzminger-5388@ecf.pacerpro.com, ecf_sf@winston.com, gmontoya@winston.com Eamon Padraic Kelly ekelly@sperling-law.com, cagnos@sperling-law.com Joseph M. Kuo joseph.kuo@saul.com, julie.dillner@saul.com, laura.disanto@saul.com, litigationdocketing@saul.com Krishnan Padmanabhan kpadmanabhan@winston.com, ecf_sf@winston.com, krishnan-padmanabhan-6052@ecf.pacerpro.com Michael E Flynn-O'Brien mflynnobrien@bdiplaw.com, 7121937420@filings.docketbird.com, bdipdocketing@bdiplaw.com Patrick D Clark pclark@winston.com, ECF_SF@winston.com, patrick-clark-0510@ecf.pacerpro.com Scott M Border sborder@winston.com, ECF_SF@winston.com, scott-border-4111@ecf.pacerpro.com William Mitchell Logan wlogan@winston.com, ECF_SF@winston.com, william-logan-1248@ecf.pacerpro.com 4:23-cv-02698-YGR Please see Local Rule 5-5; Notice has NOT been electronically mailed to: The following document(s) are associated with this transaction: Document description: Main Document Original filename: C:\fakepath\23-2698 23-4389 InfoExpress Draft Claim Construction Order v4.pdf Electronic document Stamp: [STAMP CANDStamp_ID=977336130 [Date=9/25/2024] [FileNumber=21725121-0]**

[7e23735fa06133b85de1d48a663a44d560247a4fea626e2d62ea0c08ed2e76d35cc251055db5e0a57c43512da727a4ecac6af54f7c16fbbeef833a66b262f102]]