UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC.,
Petitioner

v.

PORTSMOUTH NETWORK CORP.,
Patent Owner

Case No. IPR2024-00954

U.S. Patent No. 8,199,637

PATENT OWNER'S PRELIMINARY RESPONSE

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Pursuant to 37 C.F.R. § 42.107, Patent Owner Portsmouth Network Corporation ("Portsmouth") submits this Preliminary Response to the Petition for *Inter Partes* Review ("IPR") of U.S. Patent No. 8,199,637 (the "'637 Patent") (Paper 1).

I. INTRODUCTION

The '637 Patent provides improved methods for rapidly initiating the diversion of network traffic from a topology with a failed network link to a backup topology. The methods outlined in this patent overcome the limitations of prior art systems, which relied on the upper layers of a network to identify a loss of connectivity before transferring traffic to a backup set of links, which was a slow process and often took several minutes. The '637 Patent's invention reduces the time for this switchover to mere seconds, thus providing an improved system for traffic diversion process.

Petitioner challenges independent claims 1 and 16 in Ground 1 under Mitchell. While Mitchell does teach failover mechanisms, the methods taught by Mitchell are incongruent with those taught by the '637 Patent, as discussed further below. Thus, Petitioner fails to show that the independent claims of the '637 Patent are invalid.

In addition to the Petition's failure to establish unpatentability of the '637 Patent's independent claims, institution should be denied under 35 U.S.C. § 314

based on the *Fintiv* factors. As explained in detail below, four factors weigh strongly in favor of discretionary denial, whereas one factor is neutral and one factor only marginally favors not exercising discretion to deny institution. Importantly, the district court trial is currently set to occur approximately *six* months before the projected statutory deadline for a final written decision in this IPR, which heavily weighs against institution. Accordingly, Patent Owner respectfully requests that the Board exercise its discretion and deny institution.

II. CLAIM CONSTRUCTION

A court "'look[s] to the words of the claims themselves...to define the scope of the patented invention.'" *Phillips v. AWH Corp*., 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (quoting *Vitronics Corp. v. Conceptronic, Inc*., 90 F.3d 1576, 1582 (Fed. Cir. 1996)). A claim term is generally given its "ordinary and customary meaning," which is "the meaning that the term would have to a person of ordinary skill in the art in question at the time of the invention." *Id*. at 1312-13. While courts may deviate from the plain and ordinary meaning in some circumstances, there is a "heavy presumption that a claim term carries its ordinary and customary meaning." *CCS Fitness, Inc. v. Brunswick Corp*., 288 F.3d 1359, 1366 (Fed. Cir. 2002) (internal quotations omitted). Under this "exacting" standard, any departure from a claim's ordinary meaning must be based on language that is "so unmistakable as to be unambiguous[.]" *Dealertrack Inc. v. Huber*, 674 F.3d 1315, 1322 (Fed. Cir. 2012)

(citations omitted). Here, at this stage in the proceeding, Patent Owner will apply the ordinary and customary meaning to the '637 Patent's claim terms.

III. PERSON OF ORDINARY SKILL IN THE ART

Petitioner contents that a person having ordinary skill in the art ("POSITA") in November 2005 "a bachelor's degree in computer science, computer engineering, electrical engineering, or an equivalent field, or approximately two years of experience working in the field of information technology and networking." Pet. at 9. The Petition further notes that "[l]ack of professional experience can be substituted by additional education, and vice versa." *Id*.

For the purposes of this Preliminary Response, Patent Owner does not dispute Petitioner's definition of a POSITA.

IV. ARGUMENT

Petitioner challenges all the '637 Patent's claims across grounds 1-6. Independent claims 1 and 16 are only challenged under Ground 1.

As it pertains to this Patent Owner's Preliminary Response, claim 1 (a method claim) is representative of claim 16 (an apparatus claim). Claim 1 recites:

> [1.0] A method for handling a communication failure in a network, comprising:
>
> [1.1] provisioning different first and second instances of a multipoint-to-multipoint (MP-MP) communication service over respective first and second alternative sets of links that connect a plurality of endpoints in the network, each of the sets traversing a plurality of network nodes, which provide physical layer resources for operating the links;

[1.2] providing the communication service to the endpoints over the first set of links using the first instance;

[1.3] upon detecting a failure in the first set of links by a detecting node of the plurality of network nodes:

[1.4] propagating failure information by the detecting node to each node of the other nodes of the plurality of network nodes traversed by the first set of links;

[1.5] for each node of the other nodes of the plurality of network nodes traversed by the first set of links:

[1.6] receiving the failure information; and

[1.7] deactivating a physical layer of the first set of links connected thereto, thereby causing a loss of connectivity in the first set of links; and

[1.8] responsively to sensing the loss of connectivity, resuming the communication service over the second instance by automatically transferring communication among the endpoints to the second set of links.

As demonstrated below, Ground 1 of the Petition fails to teach limitations outlined in independent claims 1 and 16. The Petition fails to establish a reasonable likelihood that Petitioners would prevail in showing the unpatentability of the '637 Patent's independent claims, and therefore also the claims which depend therefrom. 35 U.S.C. § 314(a). Accordingly, the Board should deny institution.

A. Petitioner's Cited References Fail to Render Obvious Claims 1 and 16

Petitioner fails to show a "reasonable likelihood" that independent claims 1 and 16 are obvious under Ground 1, the only basis for Petitioner's challenge to these claims. 35 U.S.C. § 314(a).

1. Ground 1 should be denied because Mitchell fails to disclose "propagating failure information by the detecting node to each node of the other nodes of the plurality of network nodes traversed by the first set of links" (claim limitations [1.e] and [16.e])

[1f] for each node of the other nodes of the plurality of network nodes traversed by the first set of links:

[1g] receiving the failure information; and

Petitioner argues that Mitchell renders obvious limitations [1.e], [16.e], [1f], and [1.g], which disclose that in the claimed invention the detecting node propagates failure information "to each node of the other nodes of the plurality of network nodes traversed by the first set of links, and for each node of the other nodes of the plurality of network nodes traversed by the first set of links: receiving the failure information" Pet. at 23, 35. Petitioner misconstrues the nature of the system disclosed in Mitchell, and fails to show that Mitchell's disclosure renders the above claim limitations obvious.

The '637 Patent teaches an improved method for detecting loss of connectivity in a network by allowing any node in a network system to detect "a local failure or other loss of connectivity" and "propogate[] [that] information to the other nodes of the primary topology." Ex. 1001, 7:10-12. This is achieved by distributing a "remote fault indication" message to each node in the primary topology. *Id.*, 7:13-15. By distributing the responsibility of detecting and sharing information regarding link failure, the '637 Patent allows for a more rapid response to such failure compared to

prior art systems which only allowed failures to be identified by "the application layer of the endpoint that is physically connected to the failure point." *Id*., 7:1-6.

Petitioner's primary reference, Mitchell, provides a system in which "a failure of a first link between a network element and an upstream portion of a communications network is detected and a second link…between the network element and a downstream portion of the communications network is responsively disabled." Ex. 1005, 3:35-41. Disabling this second link serves to "notify network elements of the ***downstream*** portion of the communications network that a failure has occurred on an upstream link." *Id*., 3:48-51.

Mitchell does not disclose the propagation of failure information to ***each*** node in the network topology, rather, Mitchell only teaches that "failure information is propagated ***downstream***." *Id.*, 4:10-15. In each embodiment disclosed by Mitchell, failure information is only propagated downstream of the failed link. *See, e.g.*, *id*., 4:10-11 ("[a]s the link state or link failure information is propagated downstream…"); 5:52-55 ("link failure propagation module 204 of primary switch 104a is used to detect the failure and responsively disable one or more of primary downstream links 110a-110n."); 5:56-59 ("all downstream links or ports of primary switch 104a are disabled in response to the detection of a failure of primary upstream link 108a."); 7:50-53 ("a failure such as that illustrated on a link between primary network switch 410a and core router 404a may be propagated downstream to one or

more of end stations 414."). In fact, Mitchell discloses that even after the downstream network elements "failover to alternate, redundant links," "one or ***more*** connections or communications channels with the upstream portions(s) of a communications network may be preserved." *Id*., 2:24-33. Petitioner's argument that "core router 404a may also be equipped with a link failure propagation module to allow the core router 404a to propagate the failure information to each of network switch 410a and primary ethernet switch 412a that are traversed by the group of links," does not remedy this issue. Pet., at 24, Fig. 4. Even if core router 404a propagates link failure, it does so for network elements ***downstream*** of the core router. Nothing in Mitchell's disclosure suggests the deactivation of links upstream of the link failure.

Thus, Mitchell fails to teach that failure information is propagated to "each node of the other nodes of the plurality of network nodes traversed by the first set of links" by the detecting node, and that "each node of the other nodes of the plurality of network nodes traversed by the first set of links" "receiv[es] the failure information."

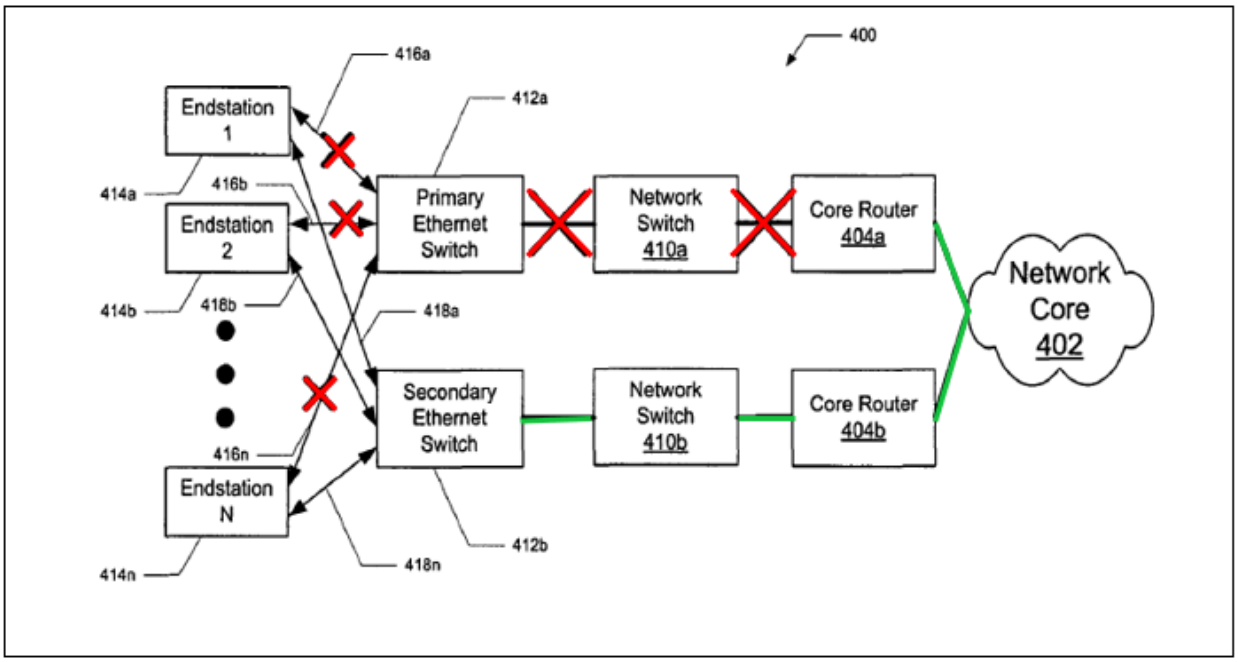
2. Ground 1 should be denied because Mitchell fails to teach "deactivating a physical layer of the first set of links connected thereto, thereby causing a loss of connectivity in the first set of links; and" (claim limitations [1.h] and [16.g])

Petitioner fails to argue that Mitchell renders obvious "deactivating a physical layer of the first set of links connected thereto, thereby causing a loss of connectivity

in the first set of links." The '637 Patent teaches that a link failure results in "[d]iverting the entire network traffic from the primary topology to the backup topology." Ex. 1001, 7:46-47.

As discussed above, Mitchell, on the other hand, only teaches propagating link failure information downstream, and thus, any failover mechanisms provided by Mitchell are only implemented downstream of the detected network failure. *See e.g.*, Ex. 1005, 5:56-67 (upon propagation of the failure information to the downstream nodes, "all downstream links or ports of primary switch 104a are disabled in response to the detection of a failure of primary upstream link 108a.") The claim limitation, on the other hand, requires that "***each*** node" "deactivat[e] a physical layer of the first set of link connected thereto."

Figure 4 of Mitchell clearly shows that the entire first set of links is not deactivated upon a link failure "between primary network switch 410a and core router 404a." *Id*., 7:50-51.



Ex. 1005, Fig. 4 (annotated).

Upon failure of the link between the "Network Switch 4410a" and "Core Router 404a", Mitchell teaches that failure information is "propagated downstream to one or more of endstations 414." *Id.*, 7:49-53. The failure information is propagated by deactivating links downstream of the link failure, as illustrated in figure 4. However, the link between "Core Router 404a" and "Network Core 402" is not disabled. Thus, Mitchell does not teach "deactivating a physical layer of the first set of links connected thereto, thereby causing a loss of connectivity in the first set of links."

Petitioner does not present any argument to the contrary, and simply annotating Mitchell's figure 4 to alter the teaching of the reference is not sufficient

to render this limitation obvious. *See*, Pet., 30 (adding red cross on link between core router (404a) and network core (402)).

Thus, Petition fails to render this claim limitation obvious.

1. Independent Claim 16

Petitioner argues that claim 16 "is defective under § 112 as it may be subject to different inconsistent interpretations," particularly with regards to the interpretation of the terms "first message" and "second message". Pet., 30. This is incorrect. The language of claim 16 has sufficient support in the '637 Patent's specification, which provides an embodiment that comprises:

> a processor, which is arranged to provide a communication service to one or more of the endpoints over the local link using a first instance of the service, to send a ***first message*** notifying other nodes in the network upon detecting a local failure in the local link, and to deactivate the physical layer resource provided to the local link upon accepting ***a second message*** from another node **i**ndicating a remote failure in the first set of links, in order to cause a loss of connectivity in the first set of links and thus cause an automatic transfer of communication among the endpoints to the second set of links and a resumption of the communication service using a second instance of the service different from the first instance over the second set of links.

Ex. 1001, 3:4-16.

The specification clearly provides that the first message is sent upon detecting a failure in a local link and the second message is provided to indicate a remote failure in the first set of links. However, regardless of the interpretations and

constructions that Petitioner put forth, claim 16 is still not rendered invalid based on the discussion above in Sections IV.A.1 and IV.A.2.

B. Grounds 2, 3, 4, 5, 6 do not address any independent claims

Petitioner's remaining grounds only address dependent claims. Accordingly, they do not remedy the deficiencies in Petitioners' arguments with regards to the independent claims 1 and 16, as described above with respect to Ground 1.

C. The Board should use its discretion and deny institution under the *Fintiv* factors

Efficiency, fairness, integrity of the system, and the merits support the Board's exercise of its discretionary denial authority under 35 U.S.C. § 314(a). Seeking to minimize duplication of work, the Board has set forth a set of nonexclusive factors for determining whether to deny a petition in view of parallel litigation (i.e., the "*Fintiv* factors"). *See Fintiv I*, IPR2020-00019, Paper No. 11. As explained in detail below, the Fintiv factors weigh in favor of discretionary denial in this case.

1. *Fintiv* Factor 1: The district courts have not granted a stay

Patent Owner agrees with Petitioners that this factor is neutral because no motion to stay has been filed, so the Board should not infer the outcome of such a motion. *Sand Revolution II LLC v. Continental Intermodal Group – Trucking LLC*, IPR2019-01393, Paper No. 24 at 7 (P.T.A.B. June 16, 2020) (informative).

2. *Fintiv* Factor 2: Trial is scheduled to take place before the projected deadline for a final written decision.

Fintiv Factor 2 weighs against institution because trial in the corresponding district court litigation is set to occur on June 2, 2025. Ex. 1016 at 1. The Final Written Decision in this IPR is not expected until December 2025; *after* the scheduled trial date.

This factor weighs against institution. *See Fintiv I*, IPR2020-00019, Paper No. 11 at 9 ("If the court's trial date is earlier than the projected statutory deadline, the Board generally has weighed this fact in favor of exercising authority to deny institution under NHK."). The timeframe set by the district court is consistent with the statistical median time to trial for the Eastern District of Texas. *See* Ex. 2001. Those statistics indicate that, over the past two years the median time to trial for the district was 20 months after filing. *Id*. Here, trial is conservatively set at 22 months after the case was filed, which is more than the median time to trial in this district. *See* Ex. 1016 at 1. Furthermore, the Board has denied institution in similar cases. *See, e.g., EClinicalWorks, LLC v. Decapolis LLC*, IPR2022-00229, Paper No. 10 at 9 (P.T.A.B. Apr. 13, 2022) (finding this factor weighed in favor of discretionary denial and denying institution where "the beginning of the jury trial in the WDTX Cases is roughly ***one or two months*** before any final decision would have been due had inter partes review been instituted") (emphasis added); *Fintiv I,* IPR2020-00019, Paper No. 15 at 13 (P.T.A.B. May 13, 2020) (informative) (finding this factor

weighed in favor of discretionary denial and denying institution where the district court trial was scheduled to occur two months before the deadline for the Board to reach a final written decision) (emphasis added). Thus, this factor weighs in favor of discretionary denial.

3. *Fintiv* Factor 3: The parties will have invested significant resources in cases

Fintiv factor 3 weighs in favor of the Board exercising its discretionary denial authority. Petitioner wrongly limits its analysis of the parties' investment in the district court proceedings to the stage of those proceedings at the time the petition was filed. Pet. at 83. However, *Fintiv* dictates that the proper timeframe for this factor is the investment in the parallel proceeding at the time of the institution decision. *Fintiv I*, IPR2020-00019, Paper No. 11 at 9–10.

In this case, the parties will have expended signification resources by the time the Board issues an Institution Decision in this case in December 2024. The parties have already exchanged claim constructions for the '637 Patent, and the parties' opening claim construction brief is due in October 2024. Fact discovery is already underway under the District Court schedule, and the parties have already produced volumes of documents to each other. Substantial completion of document production is in October 2024, and fact discovery is set to close and expert discovery is set to open early January 2025.

Thus, because the parties will be well underway with the fact and expert discovery process, and will have expended significant resources by the time the Institution Decision is due, this factor weighs in favor of discretionary denial.

4. *Fintiv* Factor 4: The issues in the petition and District Court proceeding significantly overlap

This factor only marginally favors not exercising discretion to deny institution because the issues in the Petition and the parallel district court proceeding overlap and Petitioner has not provided a *Sotera*-style stipulation. *Fintiv* Factor 4 considers the overlap between issues raised in the petition and in the parallel proceeding. *Fintiv I*, IPR2020-00019, Paper No. 11 at 6. The Petitioner's stipulation to not assert the same references in the co-pending litigation is only a limited compromise, which the PTAB has previously found to be just "marginally in favor of not exercising discretion to deny institution." *Sand Revolution II*, IPR2019-01393, Paper No. 24 at 9–10. Accordingly, based on Petitioners' *Sand Revolution*-style stipulation, this factor only marginally favors not exercising discretion to deny institution.

5. *Fintiv* Factor 5: Petitioner is a defendant in the District Court proceedings

Fintiv Factor 5 favors denial of institution because Petitioners are defendants in the parallel district court proceedings. *Fintiv* Factor 5 considers whether the petitioners and the defendants in the parallel proceeding are the same party. *Fintiv I*, IPR2020-00019, Paper No. 11 at 6. Petitioner is a defendant in the district court litigation. Pet. at 74.

Petitioner argues that despite the fact that it is the Defendant in the parallel litigation, this factor should not be a basis for denying institution. Pet. at 74. However, Petitioner's argument is without merit. The Board has previously held that where "Petitioner is the defendant in the parallel proceeding…this factor weighs in favor of exercising our discretion to deny the Petition." *Nokia of America Corp. and Ericcon, Inc.v. Godo Kaisha IP Bridge 1*, IPR2022-00755, Paper No. 9 at 13. Thus, this factor weighs in favor of denying institution.

6. *Fintiv* Factor 6: Petitioner's grounds do not rise to the level of "compelling evidence of unpatentability"

Factor 6 weighs against institution because, as shown above, the merits of the petition are weak and include numerous deficiencies, which cannot meet the high compelling merits standard needed to overcome Fintiv Factors 1–5, strongly favoring denial of institution.

To meet the standard for a compelling unpatentability challenge, the Petition must present challenges "in which the evidence, if unrebutted in trial, would plainly lead to a conclusion that one or more claims are unpatentable by a preponderance of the evidence." *Commscope Techs. LLC v. Dali Wireless, Inc*., IPR2022-01242, Paper No. 23 at 3 (P.T.A.B. Feb. 27, 2023) (citing Interim Procedure for Discretionary Denials in AIA Post-Grant Proceedings with Parallel District Court Litigation at 4. (June 21, 2022) ("Guidance Memo").) "[T]he compelling merits standard is a higher standard than the standard for institution set by statute."

Commscope Techs., IPR2022-01242, Paper No. 23 at 3 (citing Guidance Memo at 4–5). Under the compelling merits standard, "[a] challenge can only 'plainly lead to a conclusion that one or more claims are unpatentable' if it is ***highly likely*** that the petitioner would prevail with respect to at least one challenged claim." *Id*. at 3-4 (quoting *OpenSky Indus., LLC v. VLSI Tech. LLC*, IPR2021-01064, Paper No. 102 at 49–50 (P.T.A.B. Oct. 4, 2022) (precedential)) (emphasis added).

The compelling merits determination does not replace a *Fintiv* analysis; rather, "PTAB panels … only consider compelling merits if they first determine[] that Fintiv factors 1-5 favor[] a discretionary denial." *Commscope Techs, LLC*, IPR2022-01242, Paper No. 23 at 4 (P.T.A.B. Feb. 27, 2023). Where the Board finds compelling merits, it "must provide reasoning to explain and support its determination as to compelling merits sufficient to allow the parties to challenge that finding and sufficient to allow for review of that decision." *Id.* at 5–6. Here, *Fintiv* Factors 1-5 plainly favor discretionary denial thus requiring Petitioner to show compelling merits, which it cannot do. As discussed above, Petitioner's prior art grounds contain critical deficiencies and do not demonstrate a reasonable likelihood of—let alone plainly lead to—a conclusion that at least one claim is unpatentable. *See supra* §§ IV.A and IV.B.

In sum, four factors (2, 3, 5, and 6) weigh strongly in favor of discretionary denial, whereas one factor (1) is neutral and one factor (4) only marginally favors

not exercising discretion to deny institution. Accordingly, Patent Owner respectfully requests that the Board exercise its discretion and deny institution.

V. CONCLUSION

For the foregoing reasons, the Board should deny institution.

Respectfully submitted,

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CERTIFICATION UNDER 37 C.F.R. § 42.24(d)

This Preliminary Response complies with 37 C.F.R. § 42.24(b)(2). As calculated by the "Word Count" feature of Microsoft Word 2010, it contains 4,533 words, excluding the words contained in the following: Table of Contents, Table of Authorities, List of Exhibits, Certification Under 37 C.F.R. § 42.24(d), and Certificate of Service.

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies service of PATENT OWNER'S PRELIMINARY RESPONSE on the counsel of record for the Petitioner by filing this document through PTAB E2E system on September 16, 2024 and served a true and correct copy of the foregoing by electronic mail on the following counsel:

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