Filed on behalf of: GoSecure, Inc.

Entered: August 25, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CROWDSTRIKE, INC.,
Petitioner,

v.

GOSECURE, INC.,
Patent Owner.

Case IPR2025-00070
Patent 9,954,872

PATENT OWNER'S REQUEST FOR DIRECTOR REVIEW

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I. Introduction

The Director already vacated one institution decision in this case because the Board abused its discretion and failed to follow PTAB policy regarding multiple petitions. *CrowdStrike, Inc. v. GoSecure, Inc.*, IPR2025-00070, Paper 25 (Stewart June 25, 2025) (informative). On remand, the Board has again flouted binding policy and precedent, which again demands reversal (and termination of this proceeding).

First, the Board abused its discretion by finding Examiner error from the Petition's use of the exact language the Director held to be insufficient in *Ecto World*. The Board refused to apply binding precedent *Ecto World* on the theory that it would be "retroactive" to hold Petitioner to the new standard. Institution Decision, Paper 28 ("ID") at 17 n.8. That rationale is indefensible. The Director has repeatedly applied intervening guidance at the institution stage. In doing so, the Director recognized that binding precedent and policy apply immediately to all pending institution decisions, regardless of when briefing was filed. The Board had no authority to carve out an exception for this case. There is also no dispute that the Petition parroted the same language that the Director found insufficient to show Examiner error—the "strength of the Proposed Grounds." Pet. 75. Yet, the Board took the approach that *Ecto World* expressly forbids. The Director should not allow the Board to undermine binding precedent in this fashion. And although the Director

previously noted that the POPR in this case (which was filed before *Ecto World* and before the recent guidance on discretionary denials) did not include arguments for discretionary denial (Paper 25 at 2 n.3), the Director has since underscored that the Director's discretion to institute is not limited to arguments presented in the parties' briefs. *Dabico Airport Solutions Inc. v. AXA Power ApS*, IPR2025-00408, Paper 24 at 2-3 (Stewart Aug. 21, 2025).

Second, the Board abused its discretion by failing to consider that this proceeding is a waste of Board resources in view of its previous denial of IPR petitions against the parent of the '872 patent and discovery that will need to be conducted in parallel litigation regardless of the outcome of this proceeding.

Finally, the Board abused its discretion by failing to consider GoSecure's settled expectations based on the age of the '872 patent and CrowdStrike's knowledge and conduct, which amount to unfair dealings. The '872 patent has been in force for more than seven years, Petitioner has had knowledge of the priority applications for over 13 years through its co-founder and CTO's service as a member of GoSecure's Board of Directors, and surreptitiously founded CrowdStrike to compete with Patent Owner. Ex. 2012, Ex. 2013, Ex. 2100 at 36. CrowdStrike demonstrated its knowledge of the '872 patent in 2022, when it used the published application as prior art in an IPR petition against OpenText, and specifically

identified the '872 patent as relevant prior art in a third-party subpoena to GoSecure as part of that litigation.

The Director should vacate the Institution Decision and terminate this proceeding.

II. Legal Standards

The Director of the USPTO is "responsible for providing policy direction and management supervision for the Office." 35 U.S.C. § 3(a)(2)(A). "The Director has an interest in creating binding guidance to increase fairness and efficiency, and for establishing consistency across Board proceedings." USPTO, *Director Review Process*, § 1, https://www.uspto.gov/patents/ptab/decisions/director-review-process.

Director Review of a Board's decision on institution aims to "correct errors at the institution stage, for example, to avoid unnecessary trials for patent owners." Dir. Rev. Process, §2.B (updated Mar. 18, 2025). The Director has discretion to deny institution when "the same or substantially the same prior art or arguments previously were presented to the Office." 35 U.S.C. § 325(d). The § 325(d) analysis employs a two-prong framework: (1) whether the prior art and arguments presented in the petition are the same or substantially the same as those previously presented to the Office; and (2) if so, whether the petitioner has demonstrated a material error by the Office in its prior consideration of those prior art and

arguments. *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 at 7 (Feb. 13, 2020) (precedential). "[G]eneralized statements as to the strength of [a] Petition fail to identify sufficiently a material error." *See Ecto World, LLC v. RAI Strategic Holdings, Inc.*, IPR2024-01280, Paper 13 at 6 (Stewart May 19, 2025) (precedential).

III. Background

GoSecure was founded in 2004 as NeuralIQ, and brought a new approach to the cybersecurity industry. Unlike common antivirus systems that require constant updating to ensure the software is patched to block known threats, GoSecure developed an agile approach focused on monitoring activity and detecting threats on the endpoints that constitute the entry points for modern security threats.

In June 2011, GoSecure (relaunched as CounterTack) filed U.S. Application 13/163,590 ("the '590 application"), which issued as U.S. Patent 9,106,697 ("the '697 patent"). Later that year, Dmitri Alperovitch joined GoSecure as a member of GoSecure's Board. Ex. 2012. Six months later, he left to join CrowdStrike, which copied the innovations of the '590 application in its first products to massive commercial success, to GoSecure's detriment. Ex. 2013 at 1. The '872 patent claims priority to the '590 application.

CrowdStrike's Petition challenges the '872 patent, which issued April 24, 2018. The Petition asserts that the claims of the '872 patent are obvious based on

Capalik—an earlier application by co-inventor of the '872 patent and GoSecure (then CounterTack) co-Founder, Alen Capalik. *Capalik* figured prominently during prosecution, as shown by the face of the '872 patent. The '872 patent incorporates *Capalik* by reference. Ex. 1001, 1:30-40. During prosecution of the '872 patent, GoSecure submitted no fewer than 17 office actions from *Capalik* and its foreign counterparts. The face of the '872 patent lists these numerous Office Actions considered by the Examiner during prosecution. Ex. 1001 at 2 ("Other Publications"). In an IDS with 115 citations, Capalik and its related applications constituted 15% of the IDS—roughly 1 in 7 citations. Ex. 1002 at 212-214.

The Petition did not dispute that Capalik was previously presented to the Office. Pet. 74-75. Yet the Petition failed to articulate an error by the Examiner. *Id.* Instead, Petitioner merely referenced "the strength of the Proposed Grounds," asserting that the Examiner "did not appreciate *Capalik's* qualifications as prior art, its disclosures, and how this reference in combination with other references… render the Challenged Claims obvious." *Id.* at 75.

CrowdStrike's petitions challenging the '697 patent—parent of the '872 patent—were both denied on the merits. IPR2025-00067, Paper 13; IPR2025-00069, Paper 14.

IV. Director Review Should Be Granted To Correct The Board's Abuse Of Discretion And Enforce Consistency To Board Decisions.

Just like it did in its first set of institution decisions, the Board failed to apply binding USPTO policy to this case, abusing its discretion.

A. The Board abused its discretion by contradicting binding requirements for petitioners under § 325(d).

1. The Board flouted the precedential *Ecto World* decision.

Petitioner's discussion of § 325(d) and the Board's decision are nearly identical to the approach that the Director held to be improper in *Ecto World*. There is no dispute that *Capalik* was previously presented to the Office based on its incorporation by reference into the '872 patent and the disclosure, by the Applicant, of several Office Actions from that application. Pet. 74-75. Step 1 of *Advanced Bionics* is therefore met, and Petitioner bears the burden to show Examiner error in step 2. But Petitioner made no attempt to meet its "burden to demonstrate material error." *Ecto World* at 6 n.2. Just like the petition in *Ecto World*, CrowdStrike's Petition acknowledged that the prior art had been submitted to the Office during prosecution but "did not address whether, nor even allege that, the Office materially erred in its decision to allow the application." *Ecto World* at 3 (quotation omitted). And also as in *Ecto World*, Petitioner shifted its burden onto the Board, referencing "the strength of the Proposed Grounds" to assert that the Examiner "did not appreciate *Capalik's* qualifications as prior art, its disclosures, and how this reference in combination with other references… render the

Challenged Claims obvious." Pet. 75; *see Ecto World* at 6 n.2. Thus, Petitioner made nothing more than generalized statements as to the strength of its Petition. *Ecto World* at 6.

But the Board accepted these arguments and found Examiner error in these generalized statements—directly contradicting *Ecto World*. Paper 28 at 17. The Board pointed to the Petition's general contention (in its remand brief) that *Capalik* discloses limitation 1(d)—a contention that Patent Owner disputed in its Preliminary Response and Preliminary Sur-Reply. Paper 7 (POPR) at 20-27; Paper 10 (Sur-Reply) at 1-3. Notably, there was no finding that the number of references submitted to the Office had any impact on the § 325(d) decision. *See* ID at 14-18; Paper 26 at 9-10 (*Capalik* constituted one in seven submissions to the USPTO); *cf. Ecto World*, Paper 16 at 14. Thus, the Board improperly absolved Petitioner of its requirement to "provide an analysis even when the asserted prior art is on an IDS, but the Examiner did not apply the reference." *Ecto World* at 5. At bottom, the Board had no valid explanation for failing to apply *Ecto World* beyond merely "disagree[ing]" with Patent Owner. ID 17 n.8.

What's more, the Board did not even find that Petitioner had met its burden under *Ecto World*. To the contrary, the Board acknowledged Petitioner's apparent deficiency, but declined to apply *Ecto World* retroactively: "To the extent the Petition's § 325(d) discussion does not follow exactly the same form that *Ecto*

World clarifies is correct, we disagree with Patent Owner's suggestion that we should reject the Petition retroactively on that basis." ID 17 n.8.

That holding is an abuse of discretion. As a precedential decision, *Ecto World* was the law of the PTAB for the Institution Decision. Patent Trial and Appeal Board, *Standard Operating Procedure 2 (Revision 11)* at 3 ("A precedential decision establishes binding authority."). *Ecto World* became the law of the PTAB for the remanded decisions. SOP 2 at 7 ("A precedential decision is binding Board authority in subsequent matters involving similar facts or issues."); *see, e.g., Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-00864, Paper 35 at 18 (Sep. 9, 2019) (Board need not address contentions contradicting precedential decisions) (citing SOP 2 at 7).

Moreover, the Director has repeatedly applied new precedents and rules to already-filed petitions. *Cf.* ID 17 n.8. For example, in *Ecto World*, the Petition was denied on remand based on *Fintiv* even though the patent owner never made a *Fintiv* argument in its POPR. *Ecto World*, Paper 16 at 15-17. That denial was based on an intervening recission of a 2022 Director memorandum, which occurred after the POPR was filed but before institution. *Id.* As another example, the Director denied a petition based on a new policy of "settled expectations" that the patent owner never raised in its POPR or pre-institution discretionary denial request. *Dabico*, Paper 21 at 2-3. Indeed, the USPTO has published guidance stating that discretionary

denials are not limited to issues raised by parties in their briefs, because it is important to "maintain consistency with Discretionary Decisions that the Director has already issued." USPTO, *Interim Director Discretionary Process*, https://www.uspto.gov/patents/ptab/interim-director-discretionary-process. In short, the Director "retains broad authority to determine whether to institute an *inter partes* review." *Dabico*, Paper 24 at 2 (Stewart Aug. 21, 2025) (citing *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 273 (2016)).

It does not matter that this institution decision was made outside of the Interim Director Discretionary Process. For this case, the Director delegated institution authority to the panel. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1977 (2021). But the Director did not permit the panel to stray from USPTO policy, nor did she delegate her authority to set USPTO policy on discretionary denial. The Board cannot substitute its own policy for discretionary denial in place of the Director's.

The facts here counsel in favor of the Director using her broad discretion to reverse the Board and deny institution. Here, just as in *Ecto World* and *Dabico*, the USPTO changed a policy on discretionary denial after the POPR but before this institution decision, which should bind further institutions. Indeed, Petitioner here has even less cause to complain than the petitioners did in *Dabico*. Unlike the petitioner there, Petitioner got to brief § 325(d) on remand. *See* Paper 26 at 6-10; Paper 27 at 4-5. The Board thus abused its discretion by not applying *Ecto World*

resulting in a decision that runs directly contrary to the Director's precedential decision.

2. The Board's finding of Examiner error is rooted in a flawed claim construction.

The Board also erred by finding Examiner error in alleged disclosure by *Capalik* of a highly disputed construction of the claims. ID at 17; *Advanced Bionics* at 9 ("If reasonable minds can disagree regarding the purported treatment of the art or arguments, it cannot be said that the Office erred in a manner material to patentability.").

In its remand brief, Petitioner speculated, with no evidence, that the Examiner must have failed to appreciate *Capalik's* alleged disclosure of limitation 1(d) "or even that *Capalik* was prior art to the '872 Patent at all." Paper 27 at 5. To find disclosure of limitation 1(d) in *Capalik*, however, Petitioner and the Board had to stretch the construction of that limitation beyond its ordinary meaning and effectively read "computer system" as a "computer network."

Limitation 1(d) recites transmitting information to "one or more computer systems other than the first computer system . . . for preventing future attacks, to the one or more computer systems." This limitation reflects a novel aspect of the '872 patent: transmitting the information to protected network devices that are actually the subject of future attacks, rather than merely sending the information to an intrusion detection system. '872 patent 18:44-47.

The Board, however, construed "computer system" to encompass "a *network* that includes protected network devices and one or more other components." Paper 15 at 13; ID at 17 (citing Paper 15). In this way, the claim only requires transmitting the information to *any* device in a network that includes protected network devices. This construction is wrong for many reasons, but the claim language is especially instructive. Claim 1 expressly distinguishes "computer system" from a "computer network," reciting "a first computer system attached to a computer network." Dependent claim 4 further recites "receiving data through the network." By construing the term "computer system" to refer to any network that includes a device, the Board contradicted Federal Circuit law. *Bd. of Regents of the Univ. of Texas Sys. v. BENQ Am. Corp.*, 533 F.3d 1362, 1371 (Fed. Cir. 2008) ("Different claim terms are presumed to have different meanings."). The specification reinforces this distinction. *See* '872 patent, 2:44–47, 14:61–64 (describing "a computer system (e.g., the virtual machine…) attached to a computer network" as distinct from the network itself). *See SAS Inst., Inc. v. ComplementSoft, LLC.*, 825 F.3d 1341, 1348 (Fed. Cir. 2016), (construing "program flow" to be distinct from "data flow" because the specification distinguished between those terms).

In any event, the Director need not resolve the claim construction dispute to find an abuse of discretion. The key point is that reasonable minds can—and do—

disagree about whether *Capalik* discloses limitation 1(d). *Advanced Bionics* at 9. The Examiner reasonably could have reviewed *Capalik* and determined that it did not render the claims obvious, because it did not disclose limitation 1(d) under a reasonable construction of the claim. *See* POPR at 20-28. That merits denial.

B. The Board abused its discretion by failing to consider the inefficient use of Board resources after denying petitions against the parent '697 patent.

The Board failed to consider that the present proceeding is not an efficient use of Board resources. The Board has previously denied two IPR petitions against the parent of the '872 patent based on *Capalik*. *See* IPR2025-00067, Paper 13; IPR2025-00069, Paper 14. *See Liberty Energy Inc. v. U.S. Well Services, LLC*, IPR2025-00778, Paper 10 at 2 (Stewart July 31, 2025) (inefficient for Board to review patents related to other patents that survived IPR based on similar grounds). The district court litigation will proceed—including on validity—regardless of the outcome of this case. So will the separate Texas state court trade secret litigation, which remains unaffected by any proceedings here. Further, Patent Owner intends to renew its Motion for Additional Discovery in relation to objective indicia of non-obviousness (*see* Paper 24), and it would be significantly more efficient to conduct such discovery in district court rather than both district court and here. "[T]he Director is free . . . to determine that for reasons of administrative

efficiency an IPR will not be instituted." *Mylan Labs. Ltd. v. Janssen Pharmaceutica, N.V.*, 989 F.3d 1375, 1382 (Fed. Cir. 2021).

C. The Board abused its discretion by failing to apply settled expectations and unfair dealings.

The Board abused its discretion by not denying the Petition based on Patent Owner's settled expectations and Petitioner's unfair dealings. The Director can consider these arguments even though they were not presented in Patent Owner's POPR. *See Dabico*, Paper 24 at 2-4; *Mylan*, 989 F.3d at 1382. The age of the '872 patent (more than 7 years in force) has created settled expectations, and Petitioner does not provide any persuasive reasoning why an IPR is an appropriate use of Board resources. *See Intel Corp. v. Proxense LLC*, IPR2025-00327, Paper 12 at 2 (Stewart June 26, 2025) (denying institution based on age of patent and lack of Petitioner reasoning); *see also, e.g.*, *Cambridge Indus. USA, Inc. v. Applied Optoelectronics, Inc.*, IPR2025-00433, Paper 11 at 3 (Stewart June 27, 2025) (finding settled expectations for patent in force for seven years).

Additionally, CrowdStrike has had knowledge of the applications leading to the '872 patent for more than 13 years, creating significantly stronger settled expectations. *See iRhythm Techs, Inc. v. Welch Allyn, Inc.*, IPR2025-00363, Paper 10 at 3 (Stewart June 6, 2025) (denying institution based on Petitioner's 12-year knowledge of patent and failure to seek early review). CrowdStrike's Co-Founder and former Chief Technology Officer, Dmitri Alperovitch, was a member of

GoSecure's (then named CounterTack) Board of Directors at the time he co-founded CrowdStrike as its CTO. Ex. 2012; Ex. 2013. During his time on GoSecure's Board of Directors, Mr. Alperovitch gained detailed knowledge about GoSecure's technology, including detailed information about GoSecure's pending patent applications, including the '590 application to which the '872 patent claims priority. *See, e.g.*, Ex. 2100 at 36. CrowdStrike further demonstrated its knowledge of the '872 patent in 2022 when it subpoenaed GoSecure as part of litigation with OpenText—identifying the '872 patent as relevant prior art in that case—and used the published application as prior art in an IPR petition against OpenText. *See CrowdStrike, Inc. v. Webroot Inc.*, IPR2023-00126, Paper 1 at 35 (Oct. 31, 2022). GoSecure has also accused CrowdStrike of trade secret misappropriation in Texas state court. The Petition arises from CrowdStrike's unfair dealings with GoSecure and is not an efficient use of Board resources.

The Director should vacate the institution decision and deny the Petition to "establish[] consistency across Board proceedings." USPTO, *Director Review Process*, § 1, https://www.uspto.gov/patents/ptab/decisions/director-review-process. Settled expectations have been a basis for discretionary denial at the USPTO since at least June 6. Since then, the Director has repeatedly denied petitions based on the patent owner's settled expectations, including for patents that have been in force for six or more years—even without any briefing or

previous request by the parties. *Dabico Airport Solutions Inc. v. AXA Power ApS*, IPR2025-00408, Paper 21 at 2-3 (Stewart June 18, 2025) (denying based on settled expectations for patent enforced for 8 years without patent owner requesting such denial). Institution here is inconsistent with *Dabico* and current USPTO policy as set by the Director.

The Board's disregard for settled expectations, including the age of the '872 patent, was an abuse of discretion that the Director should correct.

V. Conclusion

For the reasons set forth above, the Director should vacate the institution decision and terminate this proceeding.

Respectfully submitted,

Dated: August 25, 2025

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that on this 25th day of August, 2025, a true and correct copy of the foregoing **Patent Owner's Request for Director Review** was served by electronic mail on Petitioner's lead and backup counsel at the following email addresses:

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