

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CROWDSTRIKE, INC.,
Petitioner

v.

GOSECURE, INC.,
Patent Owner

Case Nos. IPR2025-00070
U.S. Patent No. 9,954,872

**RESPONSE TO PATENT OWNER'S SECOND REQUEST FOR
REHEARING BY THE DIRECTOR**

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I. INTRODUCTION

Patent Owner's ("PO") second Request for Director Review ("Second Request") is an abuse of process, raising discretionary denial arguments that have already been expressly and categorically rejected by the Director. Ruling on PO's first Request for Director Review ("First Request"), the Director expressly acknowledged that PO "requested authorization to submit supplemental briefs raising discretionary denial arguments[.]" Paper 25 at 2, fn3. The Director rejected those requests because PO waived existing discretionary denial arguments by failing to advance any in its Preliminary Response ("POPR"). *Id.* The Director further observed that the interim processes provided no basis to introduce new discretionary denial arguments because this proceeding is not subject to the discretionary denial interim processes. *Id.* ("Those requests were denied because Patent Owner failed to raise any basis for discretionary denial in its Preliminary Responses and because these proceedings are not subject to the Interim Processes for PTAB Workload Management.").

In that order, the Director authorized PO to "file a ten-page brief explaining how the Board should construe the term "association[.]" *Id.* at 4. Ignoring the

Director’s limited mandate, PO dedicated only two pages to “association”¹ and over half its brief to discretionary denial “under §325(d) and *Ecto World*.” Paper 26. On remand, the Board held PO’s discretionary arguments exceeded the Director’s authorization and were waived. Paper 28 at 16; *id.* at 16-17 (further finding that, even if they had not been waived, PO’s discretionary arguments are unpersuasive).

Undeterred, PO’s now Second Request re-raises the same rejected *Ecto World* discretionary denial and settled expectations arguments (pursuant to *iRhythm*), and further introduces a new discretionary denial argument. Paper 33. PO’s stubborn refusal to follow the Director’s clear instructions and to comply with the Director’s prior rulings wastes the Office’s limited resources and unnecessarily increases costs for the parties.² PO’s improper re-request is also particularly troubling in light of the

¹ Notably, PO failed to address the construction of “association” Petitioner proposed in this proceeding—either favorably or unfavorably. Instead, it only briefly discussed (and rejected) the narrower construction on which a related proceeding (IPR2025-00068) was based. Paper 26 at 1-3.

² Petitioner believes sanctions against PO are appropriate for its abuse of process. “The Director may impose sanctions, for example, for ‘[f]ailure to comply with an applicable rule or order in the proceeding’; ‘[a]dvancing a misleading or frivolous argument or request for relief’; . . . ‘abuse of process’; or ‘[a]ny other improper use of the proceeding, including actions that harass or cause unnecessary delay or an unnecessary increase in the cost of the proceeding.’” *Patent Quality Assurance, LLC*

Director's recent efforts to preserve the Office's limited resources, ensuring the PTAB can continue to satisfy its statutory obligations for AIA proceedings. *Interim Processes for PTAB Workload Management Memorandum* (Mar. 26, 2025) ("Interim Processes Memo").

The Director has already ruled that PO may not advance discretionary denial arguments in this proceeding, and the Second Request advances *only* discretionary denial arguments. Accordingly, it should be denied.

II. PROCEDURAL HISTORY

PO's Preliminary Response ("POPR") was filed on February 5, 2025. Paper 7. Accordingly, the interim processes established on March 26, 2025 do not apply to this proceeding. *Interim Process Memo* at 3 ("The processes described herein will be implemented in IPR and PGR proceedings where the deadline for the patent owner to file a preliminary response has not yet passed").

The POPR did not advance any discretionary denial arguments. It focused entirely on the merits. Paper 7. Similarly, the Preliminary Reply and Preliminary Sur-Reply addressed only a single claim construction issue underlying the POPR's merit-based challenge. Papers 9, 10.

v. VLSI Technology LLC, IPR2021-01229, Paper 131 at 42 (Director review decision citing 37 C.F.R. §§ 42.12(a)).

Following institution, PO filed its First Request on May 16, 2025. Paper 19. In its First Request, PO focused its arguments narrowly on claim construction issues, again omitting any discretionary denial arguments. *Id.* Petitioner filed a timely response addressing PO's claim construction arguments. Paper 20. PO then contacted the Director on May 30, 2025, seeking authorization to file supplemental briefing on §325(d) discretionary denial issues, citing the *Ecto World* decision. Ex. 3101. Petitioner's authorized response established the shortcomings of PO's §325(d) arguments. *Id.*; *see also infra* Sec. III.A.2 (distinguishing the present case from *Ecto World*). The Director denied PO's request for additional briefing on the matter. Ex. 3101.

Just over two weeks later, PO again filed a request for supplemental briefing. Ex. 3102. This request included adding new, previously unasserted discretionary denial arguments for settled expectations and unfair dealings. *Id.* Again, Petitioner provided an authorized response rebutting the arguments. *Id.* And again, the Director denied PO's request for supplemental briefing. *Id.*

On June 25, 2025, the Director granted Director Review and remanded this institution decision and a related IPR institution decision to the Board for further proceedings. Paper 25. The Director narrowly identified the issue on remand: “[W]here two different claim constructions were advanced in two petitions, the

Board should have construed the claim term [“association”] and instituted review of, at most, one of the petitions.” *Id.* at 3. The Director also addressed the reasoning for denying both of PO’s requests for supplemental briefing:

While its request was pending, ***Patent Owner requested authorization to submit supplemental briefs raising discretionary denial arguments***, including arguments based on the recent decision in *iRhythm Technologies, Inc. v. Welch Allyn, Inc.*, IPR2025-00363, Paper 10 (June 6, 2025). *See* Exs. 3101, 3102. ***Those requests were denied because Patent Owner failed to raise any basis for discretionary denial in its Preliminary Responses and because these proceedings are not subject to the Interim Processes for PTAB Workload Management.***

Id., at 2, fn3 (emphases added). To permit the parties to be heard on the claim construction dispute, the Director authorized PO to “file a ten-page brief explaining how the Board should construe the term ‘association[.]’” *Id.* at 4. Petitioner was permitted a five-page response to PO’s claim construction brief. *Id.*

Expanding well beyond the scope of the Director’s remand, and in defiance of the Director’s instructions, PO attempted for the third time to raise discretionary denial arguments in its Brief on Remand. Paper 26 at 6-10. This included requesting “discretionary denial under *Ecto World*” and “a new policy of ‘settled expectations.’” *Id.* The Board granted institution and—like the Director—rejected any discretionary denial argument because “Patent Owner’s unauthorized § 325(d) arguments are waived.” Paper 28 at 16. The Board additionally observed that, “even

if Patent Owner had not waived its § 325(d) arguments, we find Petitioner’s § 325(d) arguments more persuasive.” *Id.* at 16-17.

III. DIRECTOR REVIEW SHOULD BE DENIED

A. Patent Owner Waived Discretionary Arguments

Much of PO’s Second Request focuses on §325(d) in light of *Ecto World*. Paper 33 at 6-12. In addition, PO re-raises settled expectations and unfair dealings (*id.* at 13-15) and advances a new discretionary denial argument based on alleged efficiency (*id.* at 12-13). These arguments have been categorically rejected by the Director.

1. *The Director and Board Have Already Ruled that Patent Owner may not Raise §325(d) Discretionary Denial Arguments*

As recognized by PO in its Brief on Remand, the purpose of the original Director Remand was to “submit whatever arguments are necessary for the panel to *make a claim construction determination*” for the term “association.” Paper 26 at 1 (emphasis added) (citing Paper 25 at 4). Disregarding this directive, PO presented discretionary denial arguments that the Director had already ruled were waived. Paper 26 at 3-10 (spending a majority of its brief on discretionary issues).

PO’s presentation of waived discretionary denial arguments directly contradicted the Director’s remand ruling and reasoning. In the order vacating

institution and remanding for claim construction briefing, the Director explained why no discretionary denial issues could be briefed:

Patent Owner failed to raise any basis for discretionary denial in its Preliminary Responses and . . . these proceedings are not subject to the Interim Processes for PTAB Workload Management.

Paper 25 at 2, fn3.

Instituting on remand, the Board also recognized that PO's discretionary arguments were waived:

Prior to our Institution Decision, Patent Owner did not argue we should deny under § 325(d). *See generally* Prelim. Resp.; Pet. Resp. Br. 4. Patent Owner first raised § 325(d) while its Request for Director Review was pending, emailing the Office with a request to brief § 325(d) in view of *Ecto World*. Ex. 3101, 4–5. The Office did not grant that request. *Id.* at 1. Nor did the Director Review Decision authorize Patent Owner to brief § 325(d). It only authorized Patent Owner “to file a ten-page brief explaining how the Board should construe the term ‘association.’” DR Dec. 4. ***In sum, Patent Owner’s unauthorized §325(d) arguments are waived.***

Paper 28 at 16 (emphasis added).

The Director and the Board have both expressly and uniformly ruled on this matter. PO waived discretionary denial arguments by advancing none in its POPR,

and the Board's interim process provides no new opportunity to address discretionary denial arguments because it does not apply to this proceeding.

2. *Settled Expectations and Unfair Dealings are Also Waived*

PO's request to make discretionary denial arguments related to settled expectations and unfair dealings were also expressly rejected by the Director. On June 16, 2025, PO emailed the Director, requesting permission to submit briefing on these issues:

Patent Owner requests supplemental briefing for its Director Review Requests in the above-captioned cases in view of two recent decisions, *iRhythm Techs, Inc. v. Welch Allyn, Inc.*, IPR2025-00363, Paper 10 (Stewart June 6, 2025) and *Tessell, Inc. v. Nutanix, Inc.*, IPR2025-00322, Paper 14 (Stewart June 12, 2025), both of which issued after Patent Owner filed its Director Review Requests. Specifically, ***Patent Owner requests supplemental briefing to address Patent Owner's settled expectations and Petitioner's unfair dealings.***

Ex. 3102 (emphases added). As set forth above, the Director expressly denied PO's request for supplemental briefing, "because Patent Owner failed to raise any basis for discretionary denial in its Preliminary Responses and because these proceedings are not subject to the Interim Processes for PTAB Workload Management." Paper 25 at 2, fn3. Accordingly, these discretionary denial arguments, like §325(d), have already been rejected by the Director.

3. *PO's New Arguments Based on Alleged Efficiency Concerns Are Also Waived*

PO now advances a new discretionary denial argument that it had not previously raised. PO argues that efficiency concerns merit vacating institution because Petitioner's *inter partes* review petition challenging a related patent was denied institution.³ Paper 33 at 12-13. PO does not even attempt to explain why the Director's and Board's findings that PO waived discretionary denial arguments should be ignored, and does not explain why this new argument for discretionary denial should be permitted where the others were not. Nor does it explain why it did not raise this argument sooner. The related patent institution denials issued before PO filed its First Request (Paper 19), its first request for supplemental briefing (Ex. 3101), its second request for supplemental briefing (Ex. 3102), and its brief on remand to the merits panel (Paper 26). Even if this new discretionary argument is somehow not captured by the Director's prior ruling finding all discretionary denial arguments waived (it is), it should be deemed waived because PO did not advance it prior to its Second Request.

³ PO does not acknowledge that the institution denial decisions concerning the related patent are currently pending requests for rehearing before the merits panel, having been based on an unsupported claim construction. *See* IPR2024-00069, Paper 16.

B. PO Provides the Director No Reason to Reconsider the Prior Ruling that Discretionary Denial Arguments Have Been Waived

PO never directly addresses the Director's prior ruling finding that all discretionary denial arguments waived. Instead, PO targets the Board's decision that accepted the Director's prior ruling. Paper 33 at 6-10. PO raises two primary arguments for its position that that the Board was *required* to consider the discretionary denial arguments the Board and Director found waived. Neither has merit.

First, PO argues that “[a]s a precedential decision, *Ecto World* was the law of the PTAB for the Institution Decision” and the Board was obligated to properly apply its newly clarified standard for §325(d) discretion. *Id.* at 8. But this ignores that the Director expressly found PO had waived *all* discretionary denial arguments, including §325(d) arguments, by having failed to raise any discretionary denial arguments in its POPR. Paper 25 at 2, fn3. There is no dispute that the Petition addressed the Board's discretion under §325(d) and that PO could have addressed this issue in its POPR. It did not, and the Director correctly ruled that the argument has been waived.

Second, PO argues that the Director's decision in *Dabico Airport Solutions Inc. v. AXA Power ApS*, IPR2025-00408, Paper 24 at 2-3 (Stewart Aug. 21, 2025) mandates considering discretionary denial arguments not previously raised by the

parties. Paper 33 at 8 (citing *Dabico* at 2-3 and claiming that “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”). PO’s reliance on *Dabico* fails because that case and the Director’s analysis of that case turned on applying the Interim Processes (*Dabico* at 2-3), which the Board and Director have confirmed do not apply here. PO is correct that the Director ultimately found settled expectations merited discretionary denial even though the parties had not briefed the argument. Critically, she explained that the Petitioner had an opportunity to brief the issue and ***should have*** explained why “its own settled expectations (or the absence of settled expectations for Patent Owner)” weighed against discretionary denial. *Dabico* at 3. In stark contrast, the Interim Processes ***do not apply here*** and the Director has already expressly rejected PO’s request to submit briefing on the issue. Paper 25 at 2, fn3.

C. Supplemental Briefing Would be Required to Properly Assess PO’s Discretionary Denial Arguments, But Even the Limited Record Shows Such Briefing Would Fail to Support Discretionary Denial

Should the Director reverse her prior ruling finding discretionary denial arguments waived, additional briefing is necessary to complete the record regarding the issues raised in PO’s Second Request. Indeed, it is routine Office policy to permit additional briefing on discretionary issues where no prior opportunity had been

provided. *See Ecto World*, IPR2024-01280, Paper 13 at 7 (granting Director Review that clarified §325(d) standard and remanding with instructions to allow additional briefing to identify and explain the Office’s material error in issuing the challenged patent).

Petitioner has not had a legitimate opportunity to address these issues. Indeed, because PO failed to raise any discretionary considerations in its POPR and the Board denied both requests for supplemental discretionary briefing, Petitioner’s only post-Petition briefing on discretionary issues was its opposition to PO’s brief on remand. Paper 27. There, Petitioner was provided only five pages because the Director limited the remand issues only to claim construction. But PO ignored the Director’s limited mandate and spent the majority of its ten pages addressing discretionary issues. Petitioner did its best to respond both to the claim construction arguments and discretionary arguments raised in PO’s brief on remand, but additional briefing would be required to fully and fairly develop the record should the Director reverse course and find discretionary denial arguments no longer waived.

1. *The Limited Briefing to Date Establishes that Even a Fully Developed Record Would not Support Discretionary Denial*

Stated succinctly by the Board, “even if Patent Owner had not waived its § 325(d) arguments, we find Petitioner’s § 325(d) arguments more persuasive.” Paper

28 at 16. The Board recognized that Petitioner provided arguments showing Examiner error, even before institution. *Id.* at 17 (citing Petition at 74-75 for demonstrating Examiner error). Within the five pages allotted, Petitioner attempted to elaborate on its position in response to PO's allegation that no error was established. Specifically, Petitioner established that Capalik teaches "transmit[ing] identifying information," which the Examiner found was lacking in the prior art of record. Paper 27 at 5. The Board agreed that "the arguments and evidence entered so far weigh in favor of...Capalik disclos[ing] limitation 1(d)," the same limitation the Examiner "reason[ed] as the basis for allowing the claims." Paper 28, 17-18. Should the Director reverse course and determine that PO did not waive its discretionary denial arguments, Petitioner's elaboration on its positions in response to PO's newly presented allegations was preserved pre-institution and provides sufficient evidence of Examiner error. Additional briefing on this record would further solidify that the Examiner failed to appreciate that Capalik was prior art and that it disclosed the limitation the Examiner found missing from the other art of record.

PO's most recently formulated allegations of settled expectations and unfair dealings similarly lack foundational support and would fail if considered. Presently, PO has not shown evidence to support CrowdStrike's awareness of the '872 Patent

or its related applications. Prior to the Director's order vacating this proceeding in response to the First Request, PO filed a motion to additional discovery targeting this exact issue. That request was rendered moot by the Director's order vacating and remanding the proceeding. Ex. 3001. Although PO has recently indicated that it intends to seek permission to re-file its request for additional discovery, the existing record remains undeveloped.

PO also fails to wrestle with the unique factual record here. PO suggests that the record will reveal a CrowdStrike founder gained knowledge of the application that ultimately issued as the parent to the '872 Patent (the "'872 Parent Application") and that this knowledge established settled expectations that favor discretionary denial. But this ignores that the '872 Patent improperly seeks to recapture subject matter dedicated to the public by the publication of Capalik—a patent application publication that was also assigned to PO and its predecessors. Paper 27 at 4-5. PO does not attempt to argue that the record will show a CrowdStrike founder gained knowledge of the '872 Parent Application without also gaining knowledge of Capalik. But knowledge of *only* the '872 Parent Application is critical to PO's position. Assuming, for the sake of argument, that CrowdStrike's founder did know of both Capalik and the '872 Parent Application, Petitioner would have had long settled expectations that GoSecure would not have been permitted to recapture claim

scope previously dedicated to the public by Capalik's publication. Such knowledge strongly disfavors discretionary denial. Accordingly, to establish settled expectations that *favor* discretionary denial, PO would have to show CrowdStrike's founder learned of the '872 Parent Application without also learning of Capalik. The record does not show *any* knowledge, let alone the requisite isolated knowledge.

Furthermore, evidence suggests that PO lacked any settled expectations given that its related EP Patent was finally refused by the European Patent Office less than one year after issuance of the '872 Patent. Ex. 1028 (EPO refusing related EP11729826). This contradicts the exact idea of a *settled* expectation. Indeed, the claim scope sought in the European proceedings is narrower than the presently challenged '872 Patent claims. *Compare*, Ex. 1029 Claim 1 *with* Ex. 1001, Claim 1. If anything, such rejection should have settled PO's expectations of invalidity of the '872 Patent. For at least these reasons, both Petitioner's and PO's settled expectations, if anything, were, or should have been, that the claims of the '872 Patent were public knowledge and therefore unpatentable.

IV. CONCLUSION

Petitioner respectfully requests that the Board deny PO's request for rehearing by the Director.

Dated: September 2, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE ON PATENT OWNER
UNDER 37 C.F.R. § 42.105

Pursuant to 37 C.F.R. §§ 42.6(e) and 42.105, the undersigned certifies that on September 2, 2025, a true and correct copy of the foregoing Response to Patent Owner's Second Request for Rehearing by the Director was served electronically on counsel for Patent Owner at the following address:

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