

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FORTINET, INC.,

Petitioner,

v.

NETSKOPE, INC.,

Patent Owner.

U.S. Patent No. 8,327,426

Case No.: IPR2026-00026

NETSKOPE, INC.'S BRIEF FOR DISCRETIONARY DENIAL

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EXHIBIT LIST

No.	Exhibit Description
Ex. 2001	Scheduling Order for <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case No. 4:25-cv-02360-HSG, pending in the United States District Court for the Northern District of California.
Ex. 2002	Fortinet Inc.’s Preliminary Invalidity Contentions in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case No. 4:25-cv-02360-HSG, pending in the United States District Court for the Northern District of California.
Ex. 2003	Exhibit E-1 of Fortinet Inc.’s Preliminary Invalidity Contentions in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case No. 4:25-cv-02360-HSG, pending in the United States District Court for the Northern District of California.
Ex. 2004	Exhibit E-5 of Fortinet Inc.’s Preliminary Invalidity Contentions in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case No. 4:25-cv-02360-HSG, pending in the United States District Court for the Northern District of California.
Ex. 2004	Exhibit Appendix C of Fortinet Inc.’s Preliminary Invalidity Contentions in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case No. 4:25-cv-02360-HSG, pending in the United States District Court for the Northern District of California.
Ex. 2005	Plot from Docket Navigator – Profile of Judge Haywood S. Gilliam Motion Success To Stay Pending IPR
Ex. 2006	Plots from Docket Navigator – Profile of Judge Haywood S. Gilliam Time to Milestones (annotated)
Ex. 2007	Website blog on Fortinet.com, titled: “Fortinet is Leading Innovation in the Security Industry with More Than 1,500 Patents” https://www.fortinet.com/blog/business-and-technology/fortinet-is-the-security-innovation-leader-more-than-1500-patents-either-awarded-or-pending
Ex. 2008	Website article on Wikipedia.org, titled: “Fortinet” https://en.wikipedia.org/wiki/Fortinet
Ex. 2009	Inventor assignment to Novell, Inc. of U.S. Patent Application No. 11/395,725, that is Petitioner’s asserted reference “Burch”
Ex. 2010	Inventor assignment to Novell, Inc. of U.S. Patent Application No. 11/444,944, that was granted as U.S. Patent No. 8,327,426

I. Introduction

Under the October 17 *Open Letter* and *Memorandum* by the Director of the United States Patent and Trademark Office (the “October Memorandum”), the decision to institute an *inter partes* review is reclaimed by the Director who will decide, based on two briefings, whether (i) discretionary factors or (ii) merits and other non-discretionary issues warrant denial of the petition. Regarding the discretionary factors, the October Memorandum explained that “[t]he Office has issued more than 580 decisions under the Interim Processes, providing substantial guidance on how the Director will handle discretionary considerations.” October Memorandum at 5. Pursuant to the October Memorandum, Patent Owner, Netskope, Inc., requests that the Director discretionarily deny Petitioner’s, Fortinet Inc.’s, Petition for *Inter Partes* Review (“IPR”) of U.S. Patent No. 8,327,426 (the “’426 patent”) for the reasons below.

Discretionary denial is warranted here for several reasons. First, the ’426 patent was issued on December 4, 2012 and has been *in force for thirteen years*, creating strong settled expectations for Patent Owner. The Director’s office has made clear that “the longer the patent has been in force, the more settled expectations should be.” *Dabico Airport Sols. Inc. v. AXA Power ApS*, IPR2025-00408, Paper 21 at 2 (Director Decision, June 18, 2025).

Furthermore, institution would waste the Patent Office's valuable resources in a duplicable effort with the district court. The '426 patent's validity is being adjudicated in a parallel proceeding, *Netskope, Inc. v. Fortinet, Inc.*, Case No. 4-25-cv-02360 (N.D.Cal., Mar. 7, 2025) (the "District Court Litigation"), which will require the district court to evaluate many of the same validity questions raised in the Petition, regardless of the Director's decision on whether to institute an IPR trial or not. Notably, the District Court Litigation is already moving at a steady pace, with preliminary invalidity contentions having been served back in August 2025 and the *Markman* hearing on claim construction to be held in about two months. Petitioner wants it both ways, as no *Sotera* stipulation has been filed in this IPR matter.

The Petition is also substantively flawed and lacking in merit. Grounds 1 and 2 are amalgamated in a way that fails to distinguish between Petitioner's § 102 and § 103 challenges, and Petitioner impermissibly relies on the knowledge of a person of ordinary skill in the art ("POSITA") for limitations that the Petition's references fall short of disclosing or teaching.

Thus, the totality of circumstances strongly favors discretionary denial.

II. Strong Settled Expectations Favor Discretionary Denial

Many prior decisions by the Office, in compliance with the Interim Process guidelines, have established that “[s]ettled expectations of the parties, such as the length of time the claims have been in force,” is a relevant factor when determining whether to deny institution. *See* Memorandum re: Interim Processes for PTAB Workload Management (Mar. 26, 2025) at 2. Here, this factor is not only relevant but compelling.

Patent Owner's expectations of the '426 patent are clearly well settled. The '426 patent was issued in December 2012, which by the time of Director's review, it will be over 13 years old. The Office has consistently denied IPRs challenging such longstanding patents, making the age of the '426 patent reason enough to warrant discretionary denial. *See Google LLC v. Cellular South, Inc.*, IPR2025-00875, Paper 10 at 2-3 (denying institution for a 7-year-old patent). *See also Amazon.com, Inc. et al. v. Soundclear Technologies LLC*, IPR2025-01067, Paper 15 at 2 (denying institution for a 10-year-old patent). *See also Intel Corp. et al. v. General Video, LLC*, IPR2025-01036, Paper 14 at 3 (denying institution for a 10-year-old patent). *See also TankLogix, LLC v. SitePro, Inc.*, IPR2025-00648, Paper 10 at 2-3 (denying institution for 11-year-old patent). *See also Microsoft Corp. v. TS-Optics Corp.*, IPR2025-00767, Paper 13 at 2 (denying institution for a 17-year-old patent despite having previously expired due to nonpayment of maintenance fee

by prior owner and subsequent revival by the present patent owner TS-Optics Corporation¹).

Moreover, discretionary denial due to a patent owner's settled expectations does not require a petitioner's prior knowledge or awareness of the patent. "Actual notice of a patent or of possible infringement is not necessary to create settled expectations." *Dabico*, Paper 21 at 3. There, the Acting Director reminded parties, like Petitioner, that issued patents are always "publicly available to provide notice to the public, other inventors, competitors, and commercial interests" and capable of finding "using the Office's automated search systems as well as publicly available resources on the Internet." *Id.* Here, Petitioner, Fortinet, Inc., is a sophisticated actor with a substantive patent portfolio in network communications and security,² having acquired more than a dozen companies and their IP in the relevant technology space since 2009 (Ex. 2008 at 2-3), and thus is likely aware of patent activity by its competitors in that technology area.

Therefore, all evidence supports Patent Owner's strong settled expectations for the '426 patent, which has been in force for 13 years.

¹ *Microsoft Corp. v. TS-Optics Corp.*, IPR2025-00767, Paper 13 at 2-3.

² By their own account, Fortinet, Inc. has more than 1,500 patents. Ex. 2007 at 1.

III. The *Fintiv* Factors Favor Denial

As established in the precedential case of *Apple v. Fintiv*, the Director considers six factors when exercising discretion whether to deny an *inter partes* review in view of a parallel proceeding. *Apple v. Fintiv*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential). Those factors are: (1) whether the district court granted a stay or evidence exists that one may be granted if a proceeding is instituted; (2) proximity of the court's trial date to the projected statutory deadline for a final written decision; (3) investment in the parallel proceeding by the district court and the parties; (4) overlap between issues raised in the petition and in the parallel proceeding; (5) whether the petitioner and the defendant in the parallel proceeding are the same party; and (6) other circumstances that impact the exercise of discretion, including the merits. *Id.*

The majority of these *Fintiv* factors, i.e., factors 3-6, weighs in favor of the Director denying institution of this IPR in view of the ongoing District Court Litigation.

A. *Fintiv* Factors 1-2

Factors 1 and 2 are either neutral or favor Petitioner. The district court case has been assigned to District Court Judge, Haywood S. Gilliam, who has demonstrated propensity to stay the litigation pending IPR institution. *See Ex. 2005*. Here, Petitioner's motion to stay the litigation is opposed by Patent Owner, with a

hearing schedule on this issue, *inter alia*, on January 8, 2026. Ex. 2001 at 2. Yet, in prior decisions, even for IPR cases in which the parallel district court case has already been stayed, the Office has denied institution due to patent owner's strong settled expectations, as is the case here for the '426 patent. *See again Amazon*, IPR2025-01067, Paper 15 at 2-3 (discretionarily denying institution based on holistic assessment of all arguments and evidence, including a stay in parallel district court proceeding and the patent owner's "strong settled expectations" of three patents in force for ten, eight, and ten years).

Also, it is possible—albeit not certain—that the district court trial would begin after a final written decision ("FWD") by the Patent Trial and Appeal Board ("PTAB") if an IPR trial was instituted. *See* Ex. 2006, showing Judge Gilliam's average time to trial of 2 years, 10.6 months. Regardless of that potential outcome, the Director's office has shown this factor is not weighted as heavily when there are strong settled expectations. *See again TS-Optics*, IPR2025-00767, Paper 13 at 2 (where Director discretionarily denied IPR based primarily on "strong settled expectations" despite the petitioner's arguments on the anticipated trial date in the parallel district court proceeding being "nearly 8-10 months after the anticipated final written decision" (*id.*, Paper 12 at 28-29)).

B. *Fintiv* Factors 3-5

Factors 3-5 strongly favor Petitioner because the two parallel proceedings deal with the same parties, substantial investment by both, and multiple overlapping issues.

The parties are the same (factor 5). Patent Owner is the plaintiff that brought an action for patent infringement of nine patents, including the '426 patent, in the district court against the defendant, Petitioner.

There has already been significant investment by the parties in the parallel district court proceeding to date with significantly more investment by the time of the institution decision in April 2026 (factor 3). For instance, both parties have served their initial claim constructions on the opposing party months ago, and the *Markman* hearing will be concluded by February 6, 2026. *See* Ex. 2001 at 2. Moreover, Petitioner already challenged the validity of all claims of the '426 patent in the District Court Litigation and served their preliminary invalidity contentions on Patent Owner on August 15, 2025 (Ex. 2002 at 2, 80), nearly two months before filing the Petition for *inter partes* review at the PTAB on October 7, 2025. Critically, Petitioner did not file any stipulations per *Sand Revolution* or *Sotera* for this IPR matter and continues pursuit of the same and additional invalidity challenges in the District Court Litigation. Therefore, the institution of this IPR proceeding would result in duplicative adjudication of the same issues, risk divergent results, and waste

of judicial resources and the parties' investments in both the district court and at the PTAB.

With respect to factor 4, the Petition's invalidity grounds substantially overlap with Petitioner's preliminary invalidity contentions served on Patent Owner. Ex. 2002 at 2, 21-26. In the District Court Litigation, Petitioner contends most of the same claims (Claims 1-7) among the IPR-challenged claims (Claims 1-13) are invalid based on the same grounds in the Petition, as well as several other parallel grounds. *Compare* Petition at 12 (table listing "Grounds of Rejection") *with* Exhibit E-1 claim chart (Ex. 2003 at 1)³ and Exhibit E-5 claim chart (Ex. 2004 at 1)⁴ of Petitioner's preliminary invalidity contentions.

³ Petitioner's Exhibit E-1 asserts on pg. 1: "[a]s illustrated in the chart below, Hinton 1 anticipates the asserted claims of the '426 Patent. To the extent the Hinton 1 is found not to expressly disclose certain limitations in the asserted claims, such limitations are inherent. To the extent the Hinton 1 is found not to anticipate any asserted claims or claim elements of the '426 Patent, the reference nevertheless renders those claims or claim elements obvious under 35 U.S.C. § 103, either alone or in combination with other art identified in the cover pleading or herein."

⁴ Petitioner's Exhibit E-5 asserts on pg. 1: "[a]s illustrated in the chart below, Burch anticipates the asserted claims of the '426 Patent. To the extent the Burch is found

Because Petitioner is asserting the same grounds (Hinton alone and Hinton in combination with Burch) in both proceedings, Petitioner has created redundancy that risks divergent results and amount to a waste of resources—avoidable through discretionary denial.

C. *Fintiv* Factor 6

Finally, for factor 6, there are other circumstances that should impact the Director's exercise of discretion to deny the IPR. The Petition's three invalidity grounds lack merit even under a cursory review, and close examination reveals significant flaws that cause each ground to fail. While those shortcomings will be described in detail in the forthcoming Patent Owner Preliminary Response ("POPR"),⁵ the following provides a few highlights that illustrate significant deficiencies of the Petition.

not to expressly disclose certain limitations in the asserted claims, such limitations are inherent. To the extent the Burch is found not to anticipate any asserted claims or claim elements of the '426 Patent, the reference nevertheless renders those claims or claim elements obvious under 35 U.S.C. § 103, either alone or in combination with other art identified in the cover pleading or herein."

⁵ "[A] patent owner may direct attention to an anticipated POPR and evidence for a discussion of the merits." See Q25 in FAQs for Interim Processes for PTAB

1. The Grounds fail to delineate between § 102 and § 103 arguments or properly assert either category.

Grounds 1 and 2 of the Petition assert unpatentability under the anticipation standard of § 102 and the obviousness standard of § 103, respectively, but are presented together in a manner that fails to fully or clearly articulate either theory, particularly for independent Claims 1 and 8 of the '426 patent. *See* Petition at 12 (“VI. Grounds 1 and 2 – Claims 1-4, 6-11, 13 are anticipated by Hinton and Claims 1-13 are rendered obvious by Hinton alone”). Due to this lack of clarity, the grounds of the Petition are substantively deficient and noncompliant with 35 U.S.C. § 312(a)(3),⁶ thereby favoring discretionary denial.

First, it is unclear whether the Petition intends to raise both § 102 and § 103 arguments. Within this combined hetero-ground, the Petition uses boilerplate

Workload Management (<https://www.uspto.gov/patents/ptab/faqs/interim-processes-workloadmanagement>).

⁶ 35 U.S. Code § 312(a) Requirements of Petition.—A petition filed under section 311 *may be considered only if*— . . . (3) the petition identifies, in writing *and with particularity*, each claim challenged, *the grounds on which the challenge to each claim is based*, and the evidence that supports the grounds for the challenge to each claim, . . . (emphasis added)

language to imply—but not specify—both anticipation and obviousness theories for the parsed claim elements, e.g., for element 1[b]: “Hinton discloses” and/or “it would have been obvious to a POSITA.” *Id.* at 17. Yet, for anticipation under § 102, Petitioner fails to map **each element and limitation** of the claim to the disclosures in the cited prior art reference, i.e., Hinton, so any § 102 argument fails from the start. And, for obviousness under § 103, not only does Petitioner fail to show the requisite teaching or suggestion in the prior art of each claimed feature, Petitioner fails to explain any reasoning for why any claim would be obvious within the framework for objective analysis articulated in *Graham v. John Deere Co.*, 383 U.S. 1 (1966) and reiterated in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007). The court has “repeatedly emphasized that an obviousness inquiry requires examination of all four *Graham* factors and that an obviousness determination can be made only after consideration of each factor.” *Nike, Inc. v. Adidas AG*, 812 F.3d 1326, 1335 (Fed. Cir. 2016).

Here, for every claim element of the challenged claims, the Petition lacks any articulation of the second *Graham* factor (ascertaining the differences between the claimed invention and the prior art). While arguing such differences risks undercutting one’s anticipation arguments, Petitioner in this case chose to avoid taking the risk at the expense of ignoring the legal standard of obviousness.

The improper ground not only requires Patent Owner to respond to multiple incomplete arguments but also would impel the Board, if the Petition is instituted, to analyze multiple unarticulated invalidity grounds under multiple legal standards. Furthermore, gaps in Petitioner's claim mapping (discussed briefly below) raise doubts that any § 102 argument was made in good faith. Yet Patent Owner is forced to respond to both anticipation and obviousness arguments within the limited word count requirements, despite neither theory being sufficiently explained for Patent Owner to appropriately rebut. Petitioner has improperly shifted the burden to the Board and to Patent Owner, which warrants dismissal of the Petition based on discretionary considerations.

2. Petitioner improperly relies on POSITA's knowledge instead of disclosure or teaching in the prior art reference.

On July 31, 2025, the Director's office issued a memorandum (the "July Memorandum") putting all practitioners on notice that the Office "will enforce and no longer waive the requirement of 37 C.F.R. § 42.104(b)(4) (Rule 104(b)(4)) that a petition for inter partes review (IPR) "must specify where each element of the claim is found in the prior art patents or printed publications relied upon"" and prohibiting reliance on "applicant admitted prior art (AAPA), expert testimony, common sense, and other evidence that is not "prior art consisting of patents or printed publications" ... to supply a missing claim limitation." July Memorandum at 1. The July

Memorandum makes clear that reliance on a “general knowledge,” such as by a POSITA, to fill in missing claim limitations from prior art reference(s) was impermissible and is limited to supporting motivation to combine and demonstrating the knowledge of a POSITA. *Id.* at 1-2. This change applies to any petition filed on or after September 1, 2025 (*id.* at 3) and, thus, applies to the instant Petition.

Petitioner disregarded the Director's instructions. The Petition impermissibly relies on the knowledge of a POSITA to substitute for missing '426 patent claim limitations in the cited references, namely Hinton. Particularly, the Petition fails to show that Hinton discloses, teaches, or suggests multiple claim elements and limitations in Claim 1, including but not limited to 1[f] and 1[d].

For 1[f], the Petition does not provide any mapping in Hinton's disclosure for the claimed “*the principal's access sessions occur ... transparently to the principal.*” Instead, Petitioner relies solely on a POSITA to substitute for Hinton's silence on this feature, stating “[a] POSITA would have further understood that, in the context of Hinton, Enterprise B POC/TP would be transparent to users, and a user would not know that such access was indirect,” citing Petitioner's expert's declaration at ¶85. Petition at 22. Importantly, neither the Petition nor Petitioner's expert's declaration make a single citation to Hinton. *See id.*; *see also* Ex. 1003 at ¶¶84-85. As such, Petitioner makes no showing of what in Hinton corresponds to transparently-

occurring access sessions for the principal. The July Memorandum was clear that failures like this cannot be covered up by reliance on a POSITA knowledge.

The same problem occurs in 1[d]. Earlier in the ground, Petitioner maps the claimed “*authentication message*” introduced in 1[c] to Hinton’s teaching of a “federation single-sign-on token ...that is formatted to be understood or trusted.” Petition at 17. The claimed “*authentication message*” is recited in 1[d] as “*serv[ing] as a new authentication request and as a new authentication response for single sign-on access of the principal.*” Petitioner maps nothing in Hinton’s disclosure to the “*new authentication request*” and the “*new authentication response*” for the principal’s single sign-on access. *See id.* at 18-19.

Instead and impermissibly, Petitioner substitutes a POSITA’s knowledge for the missing limitations in Hinton, explaining first “[a] POSITA would have understood that the user’s request to the POC/TP of Enterprise A is a first request and the subsequent request from the POC/TP of Enterprise A sent to the POC/TP of Enterprise B would be a new, different message.” *Id.* at 18. Putting aside that this explanation is unclear, the Petition provides no support in Hinton to substantiate this assumption of what a POSITA would understand. *See id.* at 18-19, notably citing only to Petitioner’s expert’s declaration at ¶¶78-79, which just parrots the Petition. Ex. 1003 at ¶¶78-79.

Then, the Petition states “[a] POSITA would have further understood that the token itself serves as the new authentication response.” Petition at 19. Again, Petitioner fails to point to any disclosure in Hinton to support these suppositions about a POSITA’s knowledge, and the Petition’s citations to the expert declaration do not compensate in any way since the expert also pointed to nothing in Hinton. *See* Ex. 1003 at ¶¶80-81. In fact, the Petition goes so far to even expressly state that it is “using that general knowledge [of a POSITA about] authentication messages.” Petition at 19.

Like 1[f], Petitioner fails to map the claimed limitations of 1[d] to anything other than what Petitioner claims a POSITA would understand. This cannot stand.

Petitioner’s disregard for Rule 104(b)(4) provides a compelling reason for the Director to exercise discretion by denying the Petition.

IV. Additional Considerations Favor Denial

A. Ground 3 Fails Because Burch Cannot Preclude Patentability of the '426 Patent Under Pre-AIA 35 U.S.C. § 103(c)

Ground 3 of the Petition necessarily fails because Burch is precluded as prior art in a § 103 obviousness-type rejection, as in Ground 3. The Petition asserts Burch *qualifies* as prior art under pre-AIA 35 U.S.C. § 102(e). *See* Petition at 12 (“[Burch] is prior art to the '426 patent under at least 35 U.S.C. §102(e).”). However, the

Petition ignored the statutory exception under pre-AIA 35 U.S.C. § 103(c)⁷ for § 102(e) prior art that is “owned by the same person or subject to an obligation of assignment to the same person.”

Here, both Burch and the invention claimed in the '426 patent were owned by the same person, Novell Inc., at the time when the claimed invention was made. Burch is a publication of U.S. Patent Application No. 11/395,725 (“’725 Burch Application”) filed on March 31, 2006 and published as US 2007/0234408 A1 on October 4, 2007. Ex. 1005 at 2 (Burch’s cover sheet). The ’725 Burch Application lists co-inventors **Lloyd Leon Burch** and Stephen R. Carter, who both assigned their rights in the ’725 Burch Application to assignee Novell, Inc. on March 30, 2006. *See* Ex. 2009 at 3-4.

The ’426 patent stems from U.S. Patent Application No. 11/444,944 (“’944 Application”) filed on June 1, 2006. Ex. 1001 at 2 (’426 patent cover sheet). The

⁷ “Subject matter developed by another person, which qualifies as prior art only under one or more of subsections (e), (f), and (g) of section 102, shall not preclude patentability under this section where the subject matter and the claimed invention were, at the time the claimed invention was made, owned by the same person or subject to an obligation of assignment to the same person.” Pre-AIA 35 U.S.C. § 103(c)(1).

'944 Application lists co-inventors Stephen Hugh Kinser, **Lloyd Leon Burch**, and Cameron Craig Morris, who each assigned their rights in the '725 Burch Application to assignee Novell, Inc. on either May 30, 2006 or June 1, 2006—before or on the same day as the filing date of the '944 Application. *See* Ex. 2010 at 3-5.

As demonstrated by the evidence, the “same person,” Novell, Inc., owned both the subject matter of Burch and the claimed invention of the '426 patent at the time the claimed invention was made. Failed Ground 3 is yet but another circumstance that should impact the exercise of discretion to deny this Petition.

V. Conclusion

Patent Owner's settled expectations alone warrant discretionary denial of instituting *inter partes* review of the '426 patent. Yet, this taken together with the *Fintiv* factors and other considerations discussed herein further weigh in favor of the Director exercising discretion to deny this IPR.

Dated: December 9, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of December, 2025, true and correct copies of the foregoing NETSKOPE, INC.'S BRIEF FOR DISCRETIONARY DENIAL and EXHIBITS were served via electronic mail on Petitioner's counsel at the following address:

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