

Petitioner's Opposition to Patent Owner's
Request for Discretionary Denial of Institution
U.S. Patent No. 8,635,697

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FORTINET, INC.,
Petitioner,

v.

NETSKOPE, INC.,
Patent Owner.

Case No. IPR2026-00031

U.S. Patent No. 8,635,697

**PETITIONER'S OPPOSITION TO PATENT OWNER'S
REQUEST FOR DISCRETIONARY DENIAL OF INSTITUTION**

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TABLE OF EXHIBITS

Exhibit No.	Document
1001	U.S. Patent No. 8,635,697 ("the '697 patent")
1002	File History of the '697 patent
1003	Declaration of Dr. Vijay Madesetti
1004	U.S. Patent Pub. No. 2008/0086773 to Tuvell et al. ("Tuvell")
1005	KR100765340B1 to Lee ("Lee") and Certified Translation
1006	U.S. Patent Pub. No. 2010/0161795 to Deridder et al. ("Deridder")
1007	Request for Comments: 2616, Hyper Text Transfer Protocol – HTTP/1.1, 1999 ("RFC 2616")
1008	Request for Comments: 793, Transmission Control Protocol, September 1981 ("RFC 793")
1009	A Robust Classifier for Passive TCP/IP Fingerprinting, by Beverly
1010	Index of _p0f3_releases_old_2.x, available at https://lcamtuf.coredump.cx/p0f3/releases/old/2.x/
1011	U.S. Patent No. 7,231,665 to McArdle et al. ("McArdle")
1012	Source code for p0f, v. 2.0.8, available at https://lcamtuf.coredump.cx/p0f3/releases/old/2.x/
1013	Source code for p0f, v. 1.7, available at http://lcamtuf.coredump.cx/p0f3/releases/old/1.x/
1014	U.S. Patent No. 5,319,776 to Hile et al. ("Hile")

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Exhibit No.	Document
1015	<i>Sotera Plus</i> Stipulation filed in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case no. 4:25-cv-02360-HSG
1016	USPTO Assignment Records for the '697 patent
1017	July 1, 2024 Assignment of '697 patent from RPX to Netskope
1018	Webpage from RPX website, available at http://rpxcorp.com/about (last accessed, Jan. 7, 2026)
1019	RPX Corporation Form 10-K for fiscal year 2017
1020	Netskope's Preliminary Infringement Contentions in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case no. 4:25-cv-02360-HSG
1021	Netskope's Preliminary Disclosure of Damages Contentions in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case no. 4:25-cv-02360-HSG
1022	U.S. District Court Time-to-Trial Statistics for NDCA
1023	The Parties' Amended Joint Claim Construction and Prehearing Statement in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case no. 4:25-cv-02360-HSG
1024	Netskope's Amended Opening Claim Construction Brief in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case no. 4:25-cv-02360-HSG
1025	Exhibit 4 to Netskope's Amended Opening Claim Construction Brief in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case no. 4:25-cv-02360-HSG
1026	Transcript of the November 7, 2025 Deposition of Aaron D. Striegel, Ph.D.

I. INTRODUCTION

The Director should deny Netskope, Inc.'s ("PO's") request for discretionary denial (Paper 6) ("Request") because PO has no settled expectations, the district court litigation involves a large number and vast scope of patents, and the *Fintiv* factors weigh heavily against denial.

The settled-expectations doctrine does not apply because PO only recently purchased the '697 patent from a third-party broker, RPX Corporation ("RPX"), for the sole purpose of asserting it against Fortinet, Inc. ("Fortinet" or "Petitioner"). RPX had owned the '697 patent for nearly 3 years, from 2021 through 2024. RPX is a defensive patent aggregator—its business model is to effectively take patents off the market so those patents cannot be asserted in litigation. In its public SEC filings, RPX has confirmed that it does *not* assert the patents it acquires. Petitioner had no reason to expect that the '697 patent would be asserted and no reason to challenge its validity.

PO similarly had no reason to expect the '697 patent would go unchallenged when it acquired the patent on July 1, 2024 to assert against Petitioner shortly thereafter. PO acquired the patent after RPX kept it off the market for three years. Moreover, PO has readily admitted in district court that it does not practice the '697 patent, and it has not licensed or otherwise commercialized the patent either. There

are no settled expectations that support discretionary denial.

The *Fintiv* factors also weigh heavily against discretionary denial. Petitioner has moved for a stay of the district court litigation, and PO has admitted that the Judge presiding over the Northern District of California case regularly grants stay motions. No trial date has been set, and any trial would occur long after a final written decision is issued. Petitioner has filed a "*Sotera Plus*" stipulation. And, contrary to PO's mischaracterizations, Petitioner's '697 IPR petition (the "Petition") is strong on the merits because the Petition uses the knowledge of a POSITA in ways sanctioned by the Board. For these reasons, and as discussed below, the Request should be denied.

II. PETITIONER'S *SOTERA PLUS* STIPULATION

On January 9, 2026, Petitioner filed a *Sotera Plus* Stipulation in the district court litigation. EX1015. The stipulation broadly confirms that Petitioner will not pursue in the parallel litigation the grounds it raised or could have reasonably raised, or a combination of system prior art with the prior art asserted in the Petition. *Id.* Accordingly, there is no risk of overlapping issues.

III. SETTLED EXPECTATIONS HEAVILY WEIGH AGAINST DENIAL

There are compelling reasons why the Director should find there are no "settled expectations" for the '697 patent: (1) RPX, a *defensive* patent aggregator,

owned the '697 Patent until July 1, 2024, when PO acquired it for purposes of asserting it; and (2) PO admits that the '697 patent has not been practiced, commercialized, asserted, marked, or licensed. For both of these reasons, the settled-expectations doctrine does not apply. *See Intel Corp. v. Proxense LLC*, No. IPR2025-00327, Paper 12 at 2-3 (P.T.A.B. June 26, 2025) ("*Proxense*").

A. RPX Owned the '697 Patent From 2021-2024, Effectively Taking the '697 Patent off the Market

RPX owned the '697 patent from 2021 until assigning it to PO on July 1, 2024. *See* EX1016; EX1017. RPX is a *defensive* patent aggregator. As RPX explains, it "offer[s] a platform that includes defensive buying of patent rights . . . to mitigate and manage the risk of potential patent assertions for our growing client network." EX1018 at 1. RPX represents in SEC filings and public press releases that it *never* asserts its patents in litigation. *See, e.g.*, EX1019 at 11 ("We have not asserted and *will not assert* our patents. We have *never* initiated patent infringement litigation, and our clients receive guarantees that we will never assert patents against them.").

The '697 patent was effectively taken off the market by RPX, and PO only recently acquired the patent, so PO should not be able to argue that it had settled expectations. If anything, *Petitioner* had a reasonably settled expectation that the '697 patent would *not* be asserted. *Petitioner*, therefore, should not be faulted for failing to challenge the '697 patent earlier. *See, e.g., Home Depot U.S.A. v. H2*

Intellect LLC, IPR2025-00480, Paper 11 at 2-3 (Sep. 4, 2025). In *Home Depot*, the Petitioner "did not have reason to anticipate assertion of the patent against it" because PO had "only previously targeted smartphones, tablets, and watches, whereas Petitioner, Home Depot, is the proprietor of a chain of hardware stores." *Id.* The Acting Director found that "[t]hese considerations weigh against Patent Owner's settled expectations and weigh in favor of Petitioner's expectations and outweigh the considerations favoring discretionary denial." *Id.* The same reasoning applies here: because the patents were assigned to RPX, which does not target *anyone*, there was no reason for Petitioner to anticipate assertion of the '697 patent against it.

B. PO Readily Admits it Has Not Commercialized, Licensed, Marked, or Previously Asserted the '697 Patent

Moreover, PO has alleged it has not commercialized, licensed, marked, or previously asserted the '697 patent. In its infringement contentions and throughout the district court case, PO has repeatedly confirmed it "does not allege that it practices the Asserted Claims," EX1020 at 7, and did not produce any documents related to alleged licensed products. The '697 patent was never previously asserted. PO has confirmed it has never licensed the '697 patent either. EX1021 at 6. And PO has not identified any products that were marked or that should have been marked. *See* EX1020 at 9 (identifying no documents for Patent L.R. 3-2(i), which requires a production of documents sufficient to show marking). Similarly, PO has

not alleged that any of the prior owners of the '697 patent (*i.e.*, the assignees of the '697 patent before it was acquired by RPX) practiced, marked, licensed, asserted, or otherwise commercialized the patent either. *See* EX1020 at 9; EX1021.

The Acting Director refused to discretionarily deny petitions under facts similar to those here. *E.g.*, *Shenzen v. Stratsys, Inc.*, No. IPR2025-00438, Paper 10 at 3 (P.T.A.B. July 17, 2025) ("The patent challenged in [IPR2025-00531] has been in force for approximately 10 years, creating strong settled expectations for Patent Owner. Petitioner, however, presents evidence that the challenged patents have never been 'commercialized, asserted, marked, licensed, or otherwise applied' in Petitioner's 'particular technology space.'") (quoting *Proxense*, Paper 12 at 2-3). Similar to the *Shenzen* matter and for the reasons provided in *Proxense*, the Director should find no settled expectations and deny the Request.

C. PO's Discretionary Denial Request Does Not Address, or Even Acknowledge, the Ownership History of the '697 Patent, or *Proxense*

In its Request, PO wholly fails to acknowledge, let alone address (1) the assignment history of the '697 patent, (2) the fact it was owned by RPX for three years, and (3) PO's own admissions in district court as to the lack of commercialization or licensing of the '697 patent. Instead, the decisions PO cites only stand for the proposition that settled expectations may apply for patents of

similar vintage. *See* Request at 3-4 (citing decisions where settled expectations apply but notably failing to address any of the analysis under *Proxense*).

Because RPX effectively removed the '697 patent from the market for three years and PO only recently acquired the patent in July 2024, PO cannot argue it has "settled expectations" that the '697 patent would not be challenged.

IV. THE DISTRICT COURT CASE INVOLVES A LARGE NUMBER OF PATENTS WITH DIVERSE SUBJECT MATTER

In the district court litigation, PO originally asserted 176 claims across nine patents from eight different patent families. Although PO has since dropped one patent and a handful of other claims, there are still eight asserted patents and 135 asserted claims in the district court litigation. The fact that this is a complex and diverse litigation also weighs against discretionary denial. *See Tesla, Inc., v. Intell. Ventures II LLC*, IPR2025-00217, Paper 9 at 2-3 (P.T.A.B. June 13, 2025) ("*Tesla*") (denying discretionary denial petitions for a nine-patent-family case because "[t]he large number and vast scope of the patents asserted in the district court litigation... weighs against discretionary denial, as the Board is better suited to review a large number of patents involving diverse subject matter.>").

V. PETITIONER HAS NOT TAKEN INCONSISTENT POSITIONS

PO complains that, in Petitioner's Preliminary Invalidity Contentions in the district court litigation, Petitioner reserved the right to allege certain limitations were

indefinite. Request, 6-9. As Petitioner explained in those Preliminary Invalidity Contentions, those contentions were based upon its current knowledge of the Asserted Patents, prior art, and understanding of Plaintiff's infringement allegations. EX2002, 2. In other words, the allegations were necessarily preliminary and over-inclusive so as not to waive any arguments Petitioner may want to raise in the litigation. Raising these terms as potentially indefinite does not warrant discretionary denial.

This is particularly true where, as here, *Petitioner is not pursuing those arguments during claim construction*. PO is well aware of that fact, yet neglected to mention it in their Request. The only disputed terms for the '697 patent at claim construction are "service provider network" and "generating an alert." EX1023, (Dkt. 121, Ex. A), 8; EX1024 (Dkt.123), 21-25. The Petition is fully consistent with Petitioner's proposed constructions for those terms and PO has not alleged otherwise.

PO's citations to Board decisions are readily distinguishable. In *Revvo Technologies v. Cerebrum*, IPR2025-00632, Paper 20, Petitioner argued for a means-plus-function construction at the district court but supported PO's construction in the IPR proceeding. *Id.*, 3-4. Here, Petitioner is seeking consistent constructions in both actions and is not asserting indefiniteness, despite reserving the option in its Preliminary Infringement Contentions. *See* EX1023, (Dkt. 121, Ex.

A), 8; EX1024, (Dkt.123), 21-25.

In *Tesla v. Intellectual Ventures II LLC*, IPR2025-00340, Paper 18, Petitioner actually pursued an indefiniteness argument in its claim construction briefing, instead of just reserving the right to in its Preliminary Infringement Contentions. *Id.*, 3.

VI. THE *FINTIV* FACTORS HEAVILY WEIGH AGAINST DENIAL

The *Fintiv* factors heavily weigh against denial as well. There is no trial date set in the district court action. In fact, there is no schedule at all in that case beyond the February 6, 2026 *Markman* hearing. Most of the work in the parallel case still needs to occur. Petitioner filed a *Sotera* Plus stipulation. And the Petition is strong on the merits.

A. Factor 1: Evidence Confirms Petitioner's Pending Stay Motion Is Likely to Be Granted

Petitioner filed a motion to stay the parallel Northern District of California case (*Netskope, Inc. v. Fortinet, Inc.*, Case No. 4:25-cv-02360-HSG) on October 22, 2025. Although the Court denied that motion pre-institution, the denial was *without* prejudice, and, if the IPRs are instituted, there is a high likelihood that the case will be stayed. The litigation is before Judge Gilliam, who routinely stays cases pending IPR decisions. *See, e.g., DSS Tech. Mgmt., Inc. v. Apple, Inc.*, No. 14-CV-05330-HSG, 2015 WL 1967878 (N.D. Cal. May 1, 2015); *Finjan, Inc. v. Symantec Corp.*,

139 F. Supp. 3d 1032 (N.D. Cal. 2015); *Google LLC v. EcoFactor, Inc.*, No. 21-CV-03220-HSG, 2024 WL 88003 (N.D. Cal. Jan. 8, 2024). Even PO admits that Judge Gilliam "has demonstrated propensity to stay the litigation pending IPR institution." Request at 5.

The Northern District of California Court considers three factors in determining whether to grant a stay: "(1) whether discovery is complete and whether a trial date has been set; (2) whether a stay will simplify the issues in question and trial of the case; and (3) whether a stay would unduly prejudice or present a clear tactical disadvantage to the non-moving party." *DSS Tech.*, 2015 WL 1967878, at *2 (citation omitted). All three factors weigh heavily in favor of a stay.

Stage of the litigation. The early stage of this litigation weighs heavily in favor of a stay. *See, e.g., Google*, 2024 WL 88003, at * 2. In the district court case, the Court has not issued a scheduling order covering events after the *Markman* hearing or set a trial date, a partial motion to dismiss is still pending, Petitioner only recently answered the complaint in October 2025, PO and Petitioner have barely engaged in fact discovery (no fact depositions have even been scheduled), and the Court has not issued a claim construction order—all circumstances the Court consistently finds warrant granting a stay. *See id.* (finding first factor weighed in favor of stay when the Court had not yet issued a claim construction order or set a

trial date, and the parties had "engaged in virtually no discovery"); *see also Finjan*, 139 F. Supp. 3d at 1035-36 (granting stay even though claim construction briefing and hearing had been completed).

Simplification of the issues. As PO admits, Judge Gilliam routinely grants motions to stay pending IPRs under similar circumstances because of the likelihood that the litigation issues will be narrowed. *See DSS Tech.*, 2015 WL 1967878, at *4 ("Were the Court to deny the stay until a decision on institution is made, the parties and the Court would expend significant resources on claim construction proceedings that could eventually be mooted by the IPR decision.").

No undue prejudice. As described above, PO has repeatedly admitted it does not practice the '697 patent (or any of the other patents at issue in the district court case). EX1020 at 7. And Petitioner filed its IPR petitions approximately seven months after the complaint, well within the statutory period. As such, PO has no claim to prejudice. *See DSS Tech.*, 2015 WL 1967878, at *4; *see also CF Traverse LLC v. Amprius, Inc.*, No. 20-CV-00484-RS, 2020 WL 6820942, at *1 (N.D. Cal. Nov. 6, 2020) (granting motion to stay based in part because the court "struggle[d] to imagine any 'undue prejudice'" from a stay when non-moving party did not practice the asserted patents); *Evolutionary Intel. LLC v. Yelp Inc.*, No. C-13-03587-DMR, 2013 WL 6672451 (N.D. Cal. Dec. 18, 2013), at *8 ("If the parties are not

competitors (meaning that the plaintiff does not market any products or services covered by the claims of the patents-in-suit and does not seek a preliminary injunction), the plaintiff does not risk irreparable harm by the defendant's continued use of the accused technology and can be fully restored to the *status quo ante* with monetary relief.").

B. Factor 2: No Scheduled Trial Date

There is no trial date in the district court case. This factor weighs heavily against denial. Even if the Northern District of California Court schedules a trial date, it will be long after the Board's expected Final Written Decision ("FWD") date. EX1022 (time-to-trial average for N. D. Cal. of 34.5 months). PO admits that Judge Gilliam's average time to trial is about 35 months. Request at 6. Moreover, as PO acknowledges, Judge Gilliam also has a propensity to stay cases pending IPR (*id.* at 5), which further confirms that any trial date would be after a FWD. *See, e.g., Google LLC v. Brodti Inc.*, No. IPR2025-00472, Paper 19 at 2 (P.T.A.B. June 25, 2025) (weight towards referral when no trial date is scheduled and median time to trial statistics suggest trial would begin significantly after the projected FWD).

C. Factor 3: Little Investment in the Litigation

Factor 3 weighs against discretionary denial because the district court proceedings are still in their early stages. Investment in the related proceedings has

been minimal, as there is no scheduling order. Per *Fintiv*, "[i]f, at the time of the institution decision, the district court has not issued orders related to the patent at issue in the petition, this fact weighs against exercising discretion to deny institution" *Apple Inc. v. Fintiv, Inc.*, No. IPR2020-00019, Paper 11 at 10 (P.T.A.B. Mar. 20, 2020).

Here, the Court has not yet issued any decisions related to the '697 patent. Petitioner's motion to dismiss PO's second amended complaint remains pending. The Court's *Markman* hearing is not until February 6, 2026.

As PO readily acknowledges in its Request, the work done in the litigation has been primarily limited to the exchange of contentions under the local patent rules and some initial fact discovery. Request at 7. Aside from the deposition of PO's *Markman* expert, no other depositions have occurred. There is no schedule for the close of fact discovery, expert discovery, or trial.

D. Factor 4: Petitioner's Broad *Sotera* Plus Stipulation

Petitioner has filed a broad *Sotera* Plus stipulation, and therefore, this factor weighs against denial and addresses any concerns raised by PO regarding redundancy risks or divergent results. See Request at 7-8; March 24, 2025 Boalick Memo ("[A] timely-filed *Sotera* stipulation . . . is highly relevant"); see, also, e.g., *Tesla*, Paper 9 at 2 (finding that Tesla's broad *Sotera* Plus stipulation "counsel[s]

against discretionary denial"). Especially because there is no trial date in the Northern District of California, there is no risk of overlapping issues. Moreover, none of the references relied on in the Petition were found by, cited by, or relied on by the Examiner during the original prosecution of the patent.

E. Factor 5: Overlapping Parties

Factor 5 does not outweigh the other factors.

F. Factor 6: The Merits of the Petition Are Strong

PO's arguments on the merits would be better suited for review during the merits consideration of the Director's review of the petition, not during discretionary denial. Regardless, PO's arguments are wrong, as explained further below.

PO insists that the Petition improperly relies upon a POSITA's knowledge instead of prior art disclosure for limitations 1[b], 1[c], and 1[d]. Not so. The Board expressly allows general knowledge to "*demonstrate the knowledge of a person having ordinary skill in the art.*" July Memorandum, 1 ("General knowledge may still be used in an IPR to support a motivation to combine or to demonstrate the knowledge of a person having ordinary skill in the art."). That is precisely what Petitioner did here.

For 1[b], the Petition explains that the contents of the different fields in an HTTP header would have been well-known to a POSITA, including the contents of

the User-Agent field. Petition, 27-28. PO cannot reasonably dispute that the header fields defined by the HTTP standard are well within the knowledge of a POSITA. Indeed, PO's expert in the district court admitted as much. EX1025, ¶¶ 92-96; EX1026, 149:3-150:18 (agreeing that the contents of the User Agent field would have been within the skill of a POSITA). The knowledge of a POSITA is a permissible use of general knowledge contemplated by the Board. July Memorandum, 1.

In any event, the Petition shows that limitation 1[b] is rendered obvious in two ways: (a) the TCP fingerprinting technique from Deridder, and (b) the User Agent field from Tuvell and Lee and the general knowledge of the HTTP standard. *See* Petition, 25-26, 27-28. PO's argument only attacks the latter and therefore cannot show any alleged deficiencies in the Petition for this limitation.

For 1[c], the Petition explicitly cites Tuvell as disclosing the use of "malware signature searches [and] hash signature searches." Petition, 28 (quoting EX1004, ¶35). As explained in the Petition, malware signature searches have been well-known for multiple decades and would have been well within the knowledge of a POSITA. Petition, 6. Indeed, Tuvell cites malware and hash signature searches as examples of malware scanning algorithms that were already known. EX1004, ¶35. The Petition's explanation of this general knowledge is, again, permissible based

upon the Board's guidance. *See* July Memorandum, 1.

For 1[d], the limitation recites "generating an alert identifying a network address associated with the access device, the malware ID and the OS ID associated with TCP session that generated the alert." The Petition explains, with explicit cites to the reference, that Tuvell discloses correlating data from a variety of sources and generating a report or an alert. Petition, 29-30. The Petition then explains it would have been obvious to include all of the information from the combination of Tuvell, Deridder, and Lee, given this disclosure. Any references to the knowledge of a POSITA are to show motivation to combine the information from Deridder and Lee into the alert disclosed by Tuvell. Yet again, this is a permissible use of general knowledge. *See* July Memorandum, 1.

VII. CONCLUSION

For the above reasons, Petitioner respectfully requests that the Director refrain from exercising his discretion to deny this petition and instead consider the merits.

Respectfully submitted,

Dated: January 14, 2026

/s/ Andrew D. Gish
Andrew D. Gish (Reg. # 67,562)

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, I hereby certify that on January 14, 2026, the foregoing document was served via email on the following counsel of record:

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