

Petitioner's Opposition to Patent Owner's  
Request for Discretionary Denial of Institution  
U.S. Patent No. 8,356,336

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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FORTINET, INC.,  
Petitioner,

v.

NETSKOPE, INC.,  
Patent Owner.

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Case No. IPR2026-00040

U.S. Patent No. 8,356,336

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

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**TABLE OF EXHIBITS**

| <b>Exhibit No.</b> | <b>Document</b>                                                                                                                                                              |
|--------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1001               | U.S. Patent No. 8,356,336 ("the '336 patent")                                                                                                                                |
| 1002               | File History of the '336 patent                                                                                                                                              |
| 1003               | Declaration of Dr. John Black, Jr.                                                                                                                                           |
| 1004               | U.K. Patent Application GB2389010A ("Subbiah")                                                                                                                               |
| 1005               | PCT Publication No. WO 2002/039237 ("Hinton")                                                                                                                                |
| 1006               | U.S. Patent Appl. No. US 2004/0177276 ("MacKinnon")                                                                                                                          |
| 1007               | Crandell et al., A Secure and Transparent Firewall Web Proxy ("Crandell")                                                                                                    |
| 1008               | Bauer et al., Designing and Using DMZ Networks to Protect Internet Servers ("Bauer")                                                                                         |
| 1009               | Webpage from RPX website, available at <a href="http://rpxcorp.com/about">http://rpxcorp.com/about</a> (last accessed, Jan. 7, 2026)                                         |
| 1010               | RPX Corporation Form 10-K for fiscal year 2017                                                                                                                               |
| 1011               | Netskope's Preliminary Infringement Contentions in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case no. 4:25-cv-02360-HSG                                                      |
| 1012               | Netskope's Preliminary Disclosure of Damages Contentions in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case no. 4:25-cv-02360-HSG                                             |
| 1013               | U.S. District Court Time-to-Trial Statistics for NDCA                                                                                                                        |
| 1014               | Netskope's Identification of Proposed Claim Terms for Construction Pursuant to Patent Local Rule 4-1 in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case no. 4:25-cv-02360-HSG |

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| Exhibit No. | Document                                                                                                                                                  |
|-------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1015        | Netskope's Patent L.R. 4-2 Preliminary Claim Constructions and Extrinsic Evidence in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case no. 4:25-cv-02360-HSG |
| 1016        | <i>Sotera Plus</i> Stipulation filed in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case no. 4:25-cv-02360-HSG                                              |
| 1017        | August 2, 2012 Assignment of '336 Patent from Rocksteady Technologies LLC to RPX Corporation ("RPX")                                                      |
| 1018        | July 1, 2024 Assignment of '336 patent from RPX to Netskope                                                                                               |

## 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 '336 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 '336 patent for over ten years, from 2012 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 '336 patent would be asserted and no reason to challenge its validity.

PO similarly had no reason to expect the '336 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 ten years. Moreover, PO has readily admitted in district court that it does not practice the '336 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 '336 IPR petition (the "Petition") is strong on the merits; at least Subbiah discloses and/or renders obvious the Challenged Claims. 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. EX1016. 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 '336 patent: (1) RPX, a *defensive* patent aggregator,

owned the '336 Patent until July 1, 2024, when PO acquired it for purposes of asserting it; and (2) PO admits that the '336 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 '336 Patent From 2016-2024, Effectively Taking the '336 Patent off the Market**

RPX owned the '336 patent from August 2, 2012, until assigning it to PO on July 1, 2024. *See* EX1017; EX1018. 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." EX1009 at 1. RPX represents in SEC filings and public press releases that it *never* asserts its patents in litigation. *See, e.g.*, EX1010 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 '336 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 '336 patent would *not* be asserted. Petitioner, therefore, should not be faulted for

failing to challenge the '336 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 '336 patent against it.

**B. PO Readily Admits it Has Not Commercialized, Licensed, Marked, or Previously Asserted the '336 Patent**

Moreover, PO has alleged it has not commercialized, licensed, marked, or previously asserted the '336 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," EX1011 at 7, and did not produce any documents related to alleged licensed products. The '336 patent was never previously asserted. PO has confirmed it has never licensed the '336 patent either. EX1012 at 6. And PO has not identified any products that were marked, or that should have been marked. *See* EX1011 at 9 (identifying no documents for Patent L.R. 3-2(i), which

requires a production of documents sufficient to show marking).

The Acting Director refused to discretionarily deny petitions under facts similar to those here. *E.g.*, *Shenzhen v. Stratasys, 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 ten 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 *Shenzhen* 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 '336 Patent, or *Proxense***

In its Request, PO wholly fails to acknowledge, let alone address (1) the assignment history of the '336 patent, (2) the fact that it was owned by RPX for ten years, and (3) PO's own admissions in district court as to the lack of commercialization or licensing of the '336 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 '336 patent from the market for ten years and PO only recently acquired the patent in July 2024, PO cannot argue it has "settled expectations" that the '336 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. 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 '336 patent (or any of the other patents at issue in the district court case). EX1011 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.

EX1013 (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 '336 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 for 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.

**First**, PO argues that Grounds 1 and 2 are unclear because Petitioner combined the narrative analysis for §102 and §103. This is wrong. As the title of the grounds lays out, Subbiah alone both anticipates and renders obvious each of the Challenged Claims.

PO further complains that, for three dependent claims, Petitioner sets forth an obviousness position in addition to its anticipation position. Request at 11-12 (identifying claims 3, 10, and 18). But the Petition fully sets forth the basis for both grounds, each of which stands on its own. *See* Petition, 38, 52, 57. And, it is common for petitioners to argue obviousness in the alternative of anticipation because all arguments must be made in the petition, and petitioners do not have the benefit of understanding which limitations the patent owner will challenge. Combining the analysis for readability and brevity is common, and multiple recently instituted petitions have done so. *See* IPR2025-01179, Paper 1 (Grounds 1A and 1B); IPR2025-01264, Paper 1 (Grounds 1 and 2). Moreover, PO's complaints about three dependent claims do not undermine the merits of the petition as a whole or the fact that "there is a reasonable likelihood that the petitioner will prevail with respect to at least" the sole independent claim. *See* 35 U.S.C. 314 (a).

And contrary to PO's unsupported assertion, for each Challenged Claim, Petitioner explicitly mapped each limitation of the claim to disclosures in the prior

art reference to show anticipation and obviousness. *E.g.*, Petition, 38-39 ("**Subbiah** discloses redirecting HTTP requests from a browser to a "splash page" or "home page" of the local network, for example, as pictured in Figure 4. . . . Figure 4 provides an exemplary page with the address 'http://www.futuremall.com/'); 57 (**Subbiah** discloses that "requests for network access are received wirelessly from clients via a wireless access point (*e.g.*, wireless access point 130) coupled to the network."). Indeed, PO's complaints amount to nothing more than frustration that Petitioner's expert explained how the disclosures both anticipate, and at a minimum render obvious, the claim limitations.

**Second**, PO insists that the Petition relies upon a POSITA's knowledge instead of prior art disclosure for dependent claim 18. Not so. For claim 18, the Petition explicitly cites and explains the disclosures of Subbiah teaching how the wireless access point operates, including by "receiv[ing]" all "requests for network access" and "wait[ing] for a wireless client" to connect and send requests. Petition, 56-57 (citing EX1004, 12:14-17, 17:10-11, 4:15-18, 2:22-3:3, 14:15-21, 14:27-15:1). The Petition then explains why a POSITA would have found those teachings to anticipate and/or render obvious the additional limitation of dependent claim 18 that the wireless access point must "continuously monitor for network access from client devices." *Id.* Effectively, PO's complaint is one of claim construction—as it

expressly acknowledges by arguing that "waiting" is not "continuously monitoring." Beyond the fact that this issue is better suited for a merits determination, PO's claim construction argument is undermined by its district court positions, where it has not sought construction of this term. *See* EX1014, 1015.

Thus, the Petition does not rely upon general knowledge of a POSITA to fill in any allegedly missing limitations. Instead, Petitioner relied on Subbiah's express disclosures with a simple and uncontroversial explanation for how a wireless access point waiting, receiving, and handling all network requests discloses "continuously monitoring" for such requests.

**Third**, PO wrongly argues that "errors" in the Petition "materially obscures what Petitioner is actually arguing." Request, 17. Not so. The grounds of the petition are laid out clearly and expressly, and there is no ambiguity regarding which claims are at issue and under what circumstances. PO complains that broken internal cross-references displaying "Error! Reference source not found"<sup>1</sup> throughout Ground 3 (obviousness over Subbiah in view of Hinton and/or Crandell) "make it challenging to reliably trace Petitioner's claim-by-claim theories" (Request, 18) but ignores that each such instance clearly identifies the specific claim and limitation at

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<sup>1</sup> To the extent helpful, Petitioner can re-serve a correctTo the extent helpful, Petitioner can re-serve a corrected Petition that does not change the grounds substantively but fixes the formatting error.

issue from the prior grounds. *E.g.*, Petition, 65 (referring back to "[5pre]," "[5a]"). Given that there is only one prior instance of each such reference (*see* Petition, 42), there is no ambiguity or "challeng[e]" to reliably trace Petitioner's theories. Likewise, each ground clearly sets forth Petitioner's anticipation and obviousness theory on a claim-by-claim basis. Despite a typo in the headers and grounds table, there is no ambiguity that all claims are at issue.

## **VI. 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 20, 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 20, 2026 the foregoing document was served via email on the following counsel of record:

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