

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PALO ALTO NETWORKS, INC.,
CISCO SYSTEMS, INC., and
KEYSIGHT TECHNOLOGIES, INC.
Petitioners,*

v.

CENTRIPETAL NETWORKS, INC.,
Patent Owner.

Case IPR2022-00182
Patent 9,917,856

**PATENT OWNER'S REQUEST FOR REHEARING
(DECISION GRANTING INSTITUTION OF CISCO'S IPR PETITION)**

* Cisco Systems, Inc. filed a petition and a motion for joinder in IPR2022-01151 and has been joined as a petitioner in this proceeding. Keysight Technologies, Inc. filed a petition and a motion for joinder in IPR2022-01199 and has been joined as a petitioner in this proceeding.

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Patent Owner, Centripetal Networks, Inc., (“Centripetal” or “Patent Owner”) respectfully requests rehearing of the Board’s Institution Decision (Paper 39, “DI”) under 37 C.F.R. § 42.71(d). The panel’s decision in favor of Petitioner, Cisco Systems, Inc., (“Cisco”) was signed by an APJ who recused himself over his conflicts with Cisco the very next day. See Paper 43. The deliberations over the DI were not only tainted by the presence of a conflicted APJ, but the conflicted APJ shockingly signed the DI as his last act before recusal. This remarkable act, issuing a substantive ruling in favor of Cisco as his parting toast before recusal, violates black letter law prohibiting a judge on the verge of recusal from issuing anything other than ministerial orders associated with transferring the case to another judge.

Rehearing is also necessary because the DI shows evidence that actual bias tainted the panel’s deliberations. Responding to Centripetal’s observation that Buruganahalli does not disclose the key limitation in dispute—applying the claimed packet-filtering rules to encrypted packets—the Board concocted a new argument, citing evidence never raised by any of the Petitioners in this now-joined proceeding. This decision by a recused APJ raising new arguments on behalf of the very party that created the disqualifying conflict violates due process and Supreme Court precedent. Worse, the panel’s argument intentionally avoids key context that disproves its own conclusion. Even if the Board’s new theory is taken

seriously, it also means that Buruganahalli could not possibly satisfy the routing element of the Challenged Claims. Rehearing is thus necessary because the panel's litigation on behalf of Petitioner flouts the law and misapprehends, if not misrepresents, Buruganahalli.

I. REHEARING IS REQUIRED TO VACATE THE INSTITUTION DECISION BECAUSE APJ MCNAMARA SHOULD HAVE RECUSED HIMSELF BEFORE ISSUING THE OPINION

APJ McNamara entered the Institution Decision after he should have recused himself. His presence in the deliberations over this case taints the entire panel.¹ APJ McNamara admitted that he was aware of his pecuniary interest in Cisco for a decade before recusing himself from this matter. Paper 43 at 3. Each decision made in favor of Cisco during this time period, including this Institution Decision, must be vacated as a matter of law.

Once a judge becomes aware of a conflict that warrants recusal, that judge may not take any further action in the case “other than the ministerial act of transferring the case to another judge.” *Shell Oil Co. v. U.S.*, 672 F.3d 1283, 1289-

¹ Centripetal's Motion to Vacate the underlying Institution Decision on this latter basis remains pending. Paper 37. Centripetal has requested—but has not yet been granted—an opportunity to file a Reply to the Opposition of Petitioner, Palo Alto Networks. Ex. 2045.

91 (Fed. Cir. 2012) (citing *United States v. O'Keefe*, 128 F.3d 885, 891 (5th Cir.1997)). In the District Court case between Centripetal and Cisco, for example, the Federal Circuit vacated each decision issued by disqualified judge after the date he became aware of his wife's ownership of less than \$5,000 in Cisco stock. See *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025, 1039 (Fed. Cir. 2022) (vacating each decision "issued after Judge Morgan learned of his wife's financial interest in Cisco, on August 11, 2020").

Like Judge Morgan's wife, APJ McNamara also holds stock in Cisco. Paper 37 at 3; Exs. 2030-2035. He also shares in partnership profits from his former law firm, which represents Cisco. Paper 37 at 4; Ex. 2031 at 6, Ex. 2033 at 7. According to APJ McNamara, these pecuniary interests in Petitioner date back for at least a decade, during which time he made no effort to make the parties aware of his interest. Paper 43 at 3. Accordingly, APJ McNamara was aware of the pecuniary interest in Cisco that led to his recusal before he decided the Institution Decision. *Id.* Federal Circuit precedent therefore requires that the Institution Decision be vacated because entering an institution decision is a "discretionary act, not a ministerial act." *Shell Oil*, 672 F.3d at 1290-91 (quoting *O'Keefe*, 128 F.3d at 891); *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016) ("And the agency's decision to deny a petition is a matter committed to the Patent Office's discretion.").

Although APJ McNamara's Withdrawal document disparages Centripetal's Motion to Recuse and Vacate as being "without merit," that document does not purport to be an order ruling on the Motion, which remains pending, and does not begin to address the significant issues raised in the Motion. Paper 43 at 3. His self-serving opinions about the merits of the Motion do not alter the fact that the allegations set forth in the Motion—which implicate him personally and include allegations of actual bias that he did not dispute—were sufficient for him to recuse himself.² Paper 37 at 4-5. Because APJ McNamara admits that each of these factual predicates for recusal predate the Institution Decision, he should never have accepted assignment to this case, and his presence on the panel that issued the Opinion must be vacated. *Shell Oil*, 672 F.3d at 1290-91.

Unfortunately, the conflicts that led to APJ McNamara's recusal also cast a shadow over the entire panel of judges who decided the three Institution Decisions

² In addressing a prior alleged financial conflict, APJ McNamara provided a thorough discussion of the substantive allegations when declining to recuse in light of ownership of a mutual fund and stock ownership in a non-party. *See, e.g., SAP Am., Inc., v. Arunachalam*, No. IPR2014-00413, Paper 26 at 2-6 (P.T.A.B. Aug. 17, 2015). Here, APJ McNamara did not substantively address the Cisco financial conflict and rightly recused himself. *Id.*

issued in this case, as well as the Decision Denying Centripetal's Request for Rehearing of the underlying Institution Decision.³ Paper 40. "The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates necessarily imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 831 (1986) (Brennan, J., concurring); *see also Williams v. Pennsylvania*, 579 U.S. 1, 14-15 (2016) (citation omitted) (when faced with "a due process violation arising from the participation of an interested judge," the Supreme Court has held that it does not matter "whether the judge's vote was dispositive," and that "it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decision making process"). The institution decision in this IPR—likely the latest in a long string of decisions affecting Cisco by APJ McNamara while owning Cisco stock and sharing in Foley's partnership profits—was made jointly by the panel of judges who likely "exchanged ideas and arguments in deciding the case" in the course of "the collective process of deliberation which shapes the [Board's] perceptions of which issues must be addressed and, more importantly, how they must be addressed." *Aetna Life*, 475 U.S. at 831 (Brennan, J., concurring).

³ At least one other APJ has already recused himself. Paper 47.

Precedent requires vacatur of any orders issued by a judge after the date that the judge should have recused himself. Because APJ McNamara's conflict based on a pecuniary interest in Cisco led to his recusal and predated this Institution Decision, rehearing is necessary, and the Institution Decision must be vacated.

II. THE PANEL EXCEEDED ITS AUTHORITY WHEN ADOPTING AN ARGUMENT ON BEHALF OF PETITIONER THAT PETITIONER DID NOT RAISE AND WHICH MISSTATES THE EVIDENCE

Rehearing of the DI is necessary because the panel exceeded its authority, instituting trial based on an argument not raised by any party to these joined proceedings. Making matters worse, the panel's conclusion overlooks key context about the disclosure relied upon, which undermines the Board's conclusion and introduces entirely new problems, including that the claimed "routing" step would not be performed. Neither Cisco nor any of the other Petitioners to this joined proceeding made the argument that the Board did.

Regarding the key "filtering... encrypted packets" claim limitation at dispute in these joined proceedings, the Board has attempted to fix Petitioner's vague assertions about how Buruganahalli allegedly discloses this claim element to a specific "filtering" step that allegedly occurs between Buruganahalli's flow processing step and the subsequent decryption of encrypted traffic. See DI at 21 ("Further, filtering the newly received packet with encrypted data by forwarding it to a decryption engine results from applying a packet-filtering rule (a blacklisted

destination domain) to the packet and corresponds to limitation [1.g] and the similar limitations in claims 24 and 25.” (citing Ex. 1003, ¶¶ 109, 134-135)); *see also* DIat 22 (citing Ex. 1003, ¶¶ 109, 127; Ex. 1004 at 10:15-20).

These unexplained citations do not support the Board's conclusion that any packet-filtering rules involving “a blacklisted destination domain” are applied to encrypted packets in the time between the “flow processing” step and the decryption of encrypted traffic. *See* Ex. 1003 ¶ 109 (discussing a whitelist/blacklist policy based on domain names, but not asserting that any encrypted packets are subject to filtering based on the domain name prior to decryption); *id.* at ¶ 127 (discussing URL-based filtering but never asserting that such rules are applied to encrypted packets); *id.* at ¶¶ 134-135 (providing a string citation to portions of Buruganahalli that disclose applying policies to encrypted traffic only after decryption); Ex. 1004 at 10:15-20 (disclosing “firewall policies... applied to the monitored network traffic... to match signatures” but not applying such policies to encrypted packets without decrypting them first). On the contrary, and as observed in the Preliminary Response, Buruganahalli is explicit that “techniques for decrypting such secure communications are needed in order to monitor such encrypted data communications and to apply filtering based on a policy.” IPR2022-01151, Paper 10 (“POPR”) at 40 (quoting Ex. 1004 at 4:19-22).

Accordingly, while these citations agree with Dr. Weissman's conclusion that "encrypted data communications are filtered *after* it is determined that information extracted from the handshake traffic matches with those on a blacklist," each of these citations also makes clear that this filtering also occurs after decryption. See POPR at 34-41; Ex. 1003 ¶ 135 (emphasis added). Buruganahalli discloses that the decision to decrypt an encrypted communications flow is made at the policy check engine/flow processing engine based on the IP address and port number associated with the encrypted packet, not any of the criteria recited in the claimed packet-filtering rules. See POPR at 41-45. In response to these observations, the Board departed from the record and invented a new argument on behalf of Petitioners, namely that Buruganahalli discloses an embodiment in which policies are applied without first sending encrypted traffic for decryption. DI at 26 ("Contrary to Patent Owner's argument, however, security device 402 may apply policies to a packet with encrypted data either (1) without processing by decryption engine 610 or (2) after processing by decryption engine 610. Ex. 1004, 14:33–38, 14:43–44, 14:50–57, Fig. 6.").

As an initial matter, none of the Petitioners in this joined proceeding made this argument or even cited this portion of Buruganahalli. *In re Magnum Oil Tools Int'l, Ltd.*, 829 F.3d 1364, 1381 (Fed. Cir. 2016) (The PTO's "authority is not so broad that it allows the PTO to raise, address, and decide unpatentability theories

never presented by the petitioner and not supported by record evidence.”). In this case, the Board apparently plumbed the record for a disclosure that could justify its conclusion that an otherwise undisclosed packet-filtering rule is applied to encrypted packets between Buruganahalli’s flow processing and decryption steps and developed its own argument based on that newly-found evidence. DI at 26. The Board’s action here is contrary to the law because if the Board is permitted to raise such arguments on behalf of a petitioner, *inter partes* review becomes a game with moving goal posts violates Supreme Court precedent. *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1356 (2018) (“[P]etitioner’s petition, not the Director’s discretion, is supposed to guide the life of the litigation.”).

On the merits, it is understandable why Petitioners never relied on this portion of Buruganahalli to draw the conclusion that it teaches applying the claimed packet-filtering rule at some point between flow processing and decryption: Petitioner would have faced a demand for sanctions under 37 C.F.R. § 42.12 for misrepresentation of fact. The relevant portion of Buruganahalli, which is the *only* portion of Buruganahalli cited for the premise that such filtering rules are applied to encrypted packets without decryption, is reproduced below and says nothing about applying the claimed packet-filtering rules to encrypted packets:

Flow 608 identifies the packets as being part of a new session and creates a new session flow. Subsequent packets will be identified as belonging to the session based on a flow lookup. As described herein, an initial TLS handshake exchange of that flow can be parsed to extract a hostname to facilitate destination domain extraction for secure protocols (e.g., and to apply one or more policies if applicable based on the extracted destination domain) using various techniques described herein. *If applicable (e.g., using one or more policies based on the extracted destination domain), SSL decryption is applied by SSL decryption engine 610 using various techniques as described herein.* Otherwise, processing by SSL decryption engine 610 is omitted.

Ex. 1004 at 14:25-38 (emphasis added). The Board pointed to the last sentence in this passage, uncited in any of the Petitions, to draw the conclusion that “security device 402 may apply policies to a packet with encrypted data either (1) without processing by decryption engine 610 or (2) after processing by decryption engine 610.” DI at 26. In concocting this new argument, and based on its mischaracterization or misapprehension of the art, the Board made two obvious errors.

First, the full context of the passage states that when “using one or more policies based on the extracted destination domain[], SSL decryption is applied by SSL decryption engine 610 using various techniques as described herein.” Ex. 1004 at 14:33-36. Both the Petition and the Institution Decision clearly rely solely on these extracted domain embodiments. *See, e.g.,* IPR2022-01151, Paper 2

(Petition) at 34-35; DI at 18, 33. That means, by Buruganahalli's own terms—which the Board omitted in its *sua sponte* discussion of the passage—that decryption won't be “omitted” in any embodiments of Buruganahalli that are relevant to the patentability of the Challenged Claims. Ex. 1004 at 14:33-38. Indeed, the Board's omission of this key context represents evidence of actual bias in favor of Petitioners because it shows how the Board developed its own unpatentability theory that is contradicted by the very evidence cited in its favor.

Second, even assuming that the Board drew an accurate conclusion from this disclosure, then Buruganahalli could not meet other claim elements. If decryption is “omitted,” then Buruganahalli would not route any packets to the alleged proxy for decryption after applying these “rules.” See '856 Patent, Claims 1, 24, and 25 (reciting “routing, by the packet-filtering system, filtered packets to a proxy system based on a determination that the filtered packets comprise data that corresponds to the one or more network-threat indicators.”). Thus, the Board's theory suggests that after determining that decryption should be “omitted,” Buruganahalli's security device would nonetheless send those encrypted packets for decryption. DI at 26 (determining that the relevant packet-filtering rule must determine whether to send an encrypted packet for decryption).

This makes no sense and does not, as the Board believed, “refute Patent Owner's assertion that Figure 6's security device 402 ‘performs decryption before

using policies for filtering' and does not apply policies to packets with encrypted data," as the panel concluded. DI at 25; *id.* at 26 ("So, security device 402 may apply policies to a packet with encrypted data that bypasses decryption engine 610, i.e., 'decryption engine 610 is omitted.'" [Ex. 1004] at 14:37-38."). Instead, this disclosure confirms that Buruganahalli's flow analysis step is responsible for determining whether to send encrypted communications for decryption and there is no intermediate "filtering" step before decryption that involves applying the claimed-packet filtering rules to encrypted packets. POPR at 22-23.

Whether the Board's action here is evidence of actual bias or just a particularly pernicious example confirmation bias, the result is the same. The Board "raise[d], address[ed], and decide[d] unpatentability theories never presented by the petitioner and not supported by record evidence," and *at least* misapprehended the very evidence in support of its *sua sponte* unpatentability theory. *Magnum Oil*, 829 F.3d at 1381.

III. CONCLUSION

For at least the foregoing reasons, Centripetal respectfully submits that the rehearing is necessary to vacate a decision issued by a conflicted judge after the judge became aware of the conflict that led to his recusal. Rehearing is also necessary because the Board instituted trial on an unpatentability theory never raised by any of the Petitioners to this joined proceeding. Moreover, the Board's

new theory shows either a misapprehension or mischaracterization of the
underlying evidence, resulting in nonsensical and internally inconsistent Institution
Decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies, in accordance with 37 C.F.R. § 42.6(e), and pursuant to agreement by the parties that filing with the Board through the Patent Trial and Appeal Case Tracking System (P-TACTS) constitutes electronic service, that service was made on Petitioner as detailed below.

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<i>Documents served</i>	PATENT OWNER'S REQUEST FOR REHEARING (DECISION GRANTING INSTITUTION OF CISCO'S IPR PETITION)

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