

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, LLC,
Patent Owner.

Case IPR2022-00182
Patent 9,917,856

PATENT OWNER'S MOTION TO STAY

* 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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I. INTRODUCTION

Centripetal Networks, LLC, respectfully requests that the Board stay this proceeding pending the resolution of Centripetal’s Petition for Writ of Mandamus (the “Mandamus Petition”),¹ which raises important issues concerning the appearance of partiality in AIA trials that may directly affect these proceedings and a short stay will not prejudice any party. Just weeks before the Federal Circuit vacated a willful infringement verdict against Cisco because the Judge discovered that his wife owned less than \$5,000 in Cisco stock, an APJ who also owns Cisco stock instituted IPR on a third-party collateral attack against that judgment—and then voted to allow Cisco to join the proceeding. Unlike the district court Judge, who discovered the conflict after deciding nearly all of the issues before him, the APJ knowingly owned Cisco stock when he signed the Institution Decision and the Joinder Decision. A stay is necessary to ensure that the Federal Circuit has adequate time to resolve the Mandamus Petition before any Final Written Decision will be issued in this case.

II. PROCEDURAL BACKGROUND

After Cisco launched infringing products featuring Centripetal’s patented technology, Centripetal sued Cisco for copying its patented technology, including

¹Petition for Writ of Mandamus, *In re: Centripetal Networks, LLC*, No. 23-127, Dkt. No. 2-1 (Fed. Cir. Mar. 23, 2023) (“Mandamus Petition”) (Ex. 2047).

its unauthorized use of the technology claimed in the '856 Patent, which is the subject of this IPR proceeding. Ex. 2023 (complaint dated Mar. 29, 2018) at 8, 184; Ex. 1027 at 150-151. After a lengthy bench trial, the Judge issued a multibillion-dollar judgment for infringement of four Centripetal patents (“the Cisco Judgment”). With respect to the '856 Patent, the Judge found that the '856 Patent was valid and that Cisco had willfully infringed it. Ex. 1027 at 166. Cisco appealed the Judgment, but did not challenge any of the validity determinations.

While the Cisco Judgment was pending on appeal, PAN filed the instant IPR, asserting that the '856 Patent is obvious over the same Buruganahalli reference that Cisco identified, but elected not to pursue, during the underlying district-court litigation. Paper 2. The original panel instituted trial in this case on May 25, 2022. Meanwhile, Keysight and Cisco—both of whom were barred from filing initial Petitions under 35 U.S.C. § 315(b)—filed motions requesting to join this proceeding. *See* IPR2022-1151, Paper 3 (Cisco Joinder Motion); IPR2022-01199, Paper 3 (Keysight Joinder Motion). Centripetal opposed both of those motions, addressing the propriety of joining time-barred parties to an IPR filed by a third party following a significant district court verdict against one of those parties. *See* IPR2022-01151, Paper 8 (Opp. to Cisco Joinder Motion); IPR2022-01199, Paper 8 (Opp. to Keysight Joinder Motion).

On June 23, 2022, the Federal Circuit vacated the Cisco Judgment because the Judge, who did not discover that his wife owned Cisco stock (worth less than \$5,000) until after a “full draft of [his] opinion [on the bench trial] had been prepared” and “[v]irtually every issue was decided,” chose to divest the stock into a blind trust rather than through an outright sale. *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025, 1028 (Fed. Cir. 2022) (citation omitted). Concerned about the apparent appearance of impropriety, the Federal Circuit disqualified the Judge and vacated all decisions issued after he became aware of the conflict. *Id.* at 1039 (“It is seriously inimical to the credibility of the judiciary for a judge to preside over a case in which he has a known financial interest in one of the parties and for courts to allow those rulings to stand.”).

Several months later, but before the Board ruled on Centripetal’s Request for Rehearing and the Motions for Joinder, Centripetal became aware that one of the APJs in this case owned up to \$15,000 in Cisco stock. Exs. 2030-2035; Ex. 2029 ¶¶2, 4. This APJ knowingly owned Cisco stock in 2018 when he decided fourteen IPR petitions Cisco filed against Centripetal. *See* Exs. 2030-2035; Ex. 2029 ¶¶2, 4. Unlike the district court Judge, the APJ took no steps to inform the parties of his financial interest in Cisco or address the appearance of partiality that his interest reasonably raised.

As soon as was practicable² after seeking updated disclosures of the financial information of the APJ, Centripetal prepared and filed a Motion for Recusal and Vacatur of the Institution Decision in this IPR. Paper 37 (“Motion for Vacatur”). The APJ subsequently withdrew from the case (Paper 43), but not before issuing a Decision Denying Centripetal’s Request for Rehearing and decisions granting Cisco’s and Keysight’s joinder motions. Papers 39-41. Centripetal requested rehearing of these decisions. Shortly thereafter, the Board denied Centripetal’s Motion for Vacatur.

Following the Board’s denial of Centripetal’s Motion for Vacatur and its subsequent denial of a *pro hac vice* motion filed by Centripetal’s trial counsel, Centripetal filed the Mandamus Petition on March 23, 2023, seeking vacatur of the original Institution Decision, along with other decisions including those granting Cisco’s and Keysight’s Motions for Joinder. Paper 60. Shortly after filing the Mandamus Petition, the Federal Circuit directed the USPTO, PAN, Cisco, and Keysight to file responses. Thereafter, the USPTO requested, and was granted, a 21-day extension to file its response. *In re: Centripetal Networks, LLC*, No. 23-127, Dkt. Nos. 5 and 9 (Fed. Cir. Mar. 24 & 27, 2023) (Exs. 2048-2049). Because the USPTO’s extension will jeopardize the Federal Circuit’s ability to timely resolve the

² Centripetal only had access to the APJ’s financial disclosures through 2020; Centripetal sought, but was unable to obtain, the APJ’s current disclosures.

Mandamus Petition prior to the Board’s extendable May 25, 2023 deadline to issue a Final Written Decision, Centripetal requested and was granted the opportunity to file the instant Motion to Stay these proceedings while the Mandamus Petition is pending.

III. THE BOARD SHOULD STAY THIS PROCEEDING PENDING RESOLUTION OF THE MANDAMUS PETITION

A. The USPTO Stays Proceedings When Confronting Important Issues Such As Those Raised in the Mandamus Petition

The Director³ enjoys discretion to stay IPR proceedings and routinely does so when confronting issues of exceptional importance to the PTAB and the patent community. *Samsung Elecs. Co. v. Netlist, Inc.*, No. IPR2022-00615, Paper 38 at 2 (P.T.A.B. Jan. 5, 2023); *Patent Quality Assurance, LLC v. VLSI Tech. LLC*, No. IPR2021-01229, Paper 100 at 2 (P.T.A.B. Dec. 15, 2022) (staying an inter partes review pending an ongoing Director review). The issues raised in the Mandamus Petition plainly fit that bill. Indeed, *not* staying these proceedings for the short period in which the Federal Circuit is considering the Mandamus Petition particularly after the USPTO has asked for and received an extension of the time

³ Centripetal notes that the Director has recused herself and delegated her authority to Derrick Brent, Deputy Under Secretary of Commerce for Intellectual Property and Deputy Director of the United States Patent and Trademark Office. See Paper 31 at 1 n.1. Centripetal thus understands that the decision on this Motion may be made by the panel and/or the Chief APJ. 37 C.F.R. § 42.100(c).

within which to respond to the Mandamus Petition, would only add to the appearance problems raised in Centripetal's petition. Ex. 2049.

The Board has also stayed IPR proceedings that involve issues pending resolution of dispositive issues at the Federal Circuit or Supreme Court. See *Minerva Surgical, Inc. v. Hologic, Inc.*, No. IPR2016-00868, Papers 56 (at 2), 57 (P.T.A.B. Oct. 5, 2017) (good cause exists for extending the Final Written Decision deadline given the "limited amount of time for the Board and parties to analyze the guidance" provided by the Federal Circuit); see also *Taiwan Semiconductor Mfg. Co. v. STC.UNM*, No. IPR2019-01410, Paper 8 at 4 (P.T.A.B. Oct. 11, 2019) (staying the case, along with several other cases involving issues of sovereign immunity, pending resolution of the issue at the Federal Circuit and Supreme Court). The reasoning from those cases is equally applicable here, as the Mandamus Petition raises dispositive issues with respect to the IPR.

B. Good Cause Exists to Stay this Case

The Mandamus Petition raises questions of extraordinary importance to the patent community that need to be resolved before the Final Written Decision issues in this case: To what extent are APJs and the USPTO required to avoid the appearance of bias for or against parties appearing before the PTAB? Does the safe harbor provision of 5 C.F.R. § 2640.202 establish that an adjudicator's stock ownership in a party *per se* avoids any appearance of impartiality? These and related issues, which

the Federal Circuit is poised to address, warrant careful consideration by the Court and the USPTO. A modest stay will enable that resolution without further prejudicing Centripetal or interfering with the Board's statutory mandate to issue a Final Written Decision in this case before the statutory deadline.

Furthermore, the facts of this case justify vacatur of the Institution Decision, making a limited stay of the Final Written Decision appropriate. While the Board denied Centripetal's Motion for Vacatur based on 5 C.F.R. § 2640.202, which shields executive-branch employees from criminal prosecution for stock ownership below a certain threshold, the Board overlooked the relevant regulations that require executive-branch officials to recuse themselves when their financial interests would cause "a reasonable person with knowledge of the relevant facts would question [their] impartiality." Paper 55 at 8 (Decision Denying Motion for Vacatur) (citation omitted); 5 C.F.R. § 2638.102; *see also* 5 C.F.R. §§ 2635.101 and 2635.501. Indeed, the USPTO recognizes that AIA trials must be conducted in a manner that APJs must "endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards." *Google LLC v. Defenders of Am. Dream, LLC*, No. IPR2022-00112, Paper 10 at 11-12 (P.T.A.B. May 18, 2022) (quoting 5 C.F.R. § 2635.101(b)(14)); *see also* *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968) (reaffirming that any tribunal "not only must be unbiased but also must avoid even the appearance of bias"). Centripetal's Mandamus Petition,

therefore, asks whether executive-branch regulations and appearance-of-partiality concerns should have required an APJ to refrain from being a panel member in this case. Mandamus Petition at 16-27.

In addition to the Institution Decision, the APJ signed substantive decisions—including Centripetal’s Request for Rehearing of the Institution Decision and a decision granting Cisco’s motion to join this proceeding—on the eve of his withdrawal. All this occurred while the APJ knew that he owned Cisco stock, but then failed to inform the parties of his financial interest in Cisco. The APJ made his decision after he knew that Cisco requested that its multibillion-dollar liability be vacated because the district court Judge’s wife owned less than \$5,000 in Cisco stock. See Paper 6 at 1 (discussing that Petitioner PAN was aware that it “has not been accused of infringing the ’856 Patent but knows that it underlies a significant damages award resulting from massive willful infringement by Cisco” that was then on appeal to the Federal Circuit); *id.* at 13-16; *see also* Papers 9 and 10. “Given that context, sitting on the panel that would decide whether to institute IPR on the ’856 patent while knowingly holding up to three times as much Cisco stock as proved disqualifying for the district judge plainly would raise an appearance of unfairness and partiality in the eyes of the reasonable observer.” Mandamus Petition at 20.

C. A Stay is Appropriate Under the Circumstances

While it remains possible that the Federal Circuit will resolve the Mandamus Petition before the initial May 25, 2023 deadline for the Board to issue its Final Written Decision in this case, a stay is appropriate in these circumstances both to ensure that the Federal Circuit can devote whatever time is necessary to resolve the weighty issues presented in the Mandamus Petition and to give the Board sufficient time to “analyze the guidance” provided by the Federal Circuit. *Minerva Surgical, Inc.*, No. IPR2016-00868, Papers 56, 57. Notably, the USPTO requested, and was granted, a 21-day extension of time to file its Response, which moves the resolution date much closer to the May 25th deadline than it otherwise would have been. Ex. 2049.

A stay is also appropriate here in view of potential prejudice to Centripetal. Absent a stay, the Board runs the risk of issuing a decision in this IPR before the appeal court can resolve the Mandamus Petition, which seeks vacatur of the Institution Decision. Without a stay, the Board could issue a decision on a tainted record canceling one or more claims of the '856 Patent that would itself have to be vacated if the Federal Circuit rules in Centripetal's favor.

On the other hand, Petitioners face no cognizable prejudice from a modest stay pending resolution of the Mandamus Petition. Two of the Petitioners, PAN and Keysight, currently face no allegations of infringing the '856 Patent, and thus they

cannot claim any harm attributable to the '856 Patent. And while the Cisco litigation is currently being considered on remand, Cisco already passed on the opportunity to file an IPR petition challenging the '856 Patent. It also had a full and fair opportunity to contest the validity of the '856 Patent in district court.

A premature decision cancelling one or more claims of the '856 Patent could significantly disrupt the remanded district-court proceeding, which is scheduled to begin on June 22, 2023. Any further delay in the remanded district-court proceeding would be a windfall to Cisco, which has already avoided infringement liability in view of a district court judge's spouse's ownership of its stock while being granted permission to join in a collateral attack filed by a third party against the same patent. Of course, Cisco's participation in the current proceeding was possibly only because the joinder motion was presided over by administrative judge who owned its stock.

IV. CONCLUSION

Good cause exists to stay these proceedings pending the Federal Circuit's resolution of the pending Mandamus Petition in view of the potential prejudice to Centripetal, a lack of any cognizable prejudice to Petitioners, and because the Federal Circuit's resolution of this issue will not impact the Board's statutory obligation to issue a Final Written Decision by November 11, 2023.

Respectfully submitted,

Dated: April 5, 2023

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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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Manner of service E-Mail and Electronic Filing

Documents served PATENT OWNER’S MOTION TO STAY

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