

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

U.S. Patent No. 9,917,856

**PETITIONER'S OPPOSITION TO
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.

Patent Owner's ("PO") Motion to Stay ("Mot.," Paper 61) is PO's second bite of the apple. In opposing the USPTO's request for an extension of time to respond to PO's petition for mandamus, PO made to the Federal Circuit the same timing arguments it makes here. PO also requested, if the extension were granted, that the Federal Circuit stay these IPR proceedings pending resolution of the mandamus petition. *See* Ex. 1057 (PO's opposition). The Federal Circuit granted the USPTO's requested extension the very next day and ***did not*** stay these proceedings—consistent with the lack of merit in PO's timing arguments. *See* Ex. 2049. PO's latest request, which remarkably fails to inform the Board of PO's unsuccessful timing arguments to the Federal Circuit, is equally unpersuasive and should be denied for lack of good cause.

Putting aside PO's lack of candor here, its motion is legally unsupported, fails to demonstrate that its petition for mandamus is likely to succeed, and ignores PO's deliberate delays. Indeed, PO created the very timing issue it now complains of, which undermines its assertion of good cause. As the Board already found, PO delayed in bringing its recusal motion while it argued the exact opposite position to the Supreme Court. PO should not now benefit from its unclean hands.

PO's motion also fails to show any irreparable harm and ignores the Congressional mandate and public interest that the proceeding be completed quickly. In sum, the motion should be denied because PO fails to carry its "burden of proof

to establish that it is entitled to the requested relief.” 37 C.F.R. § 42.20(c).

I. The Board should not stay its final written decision

By statute, a final written decision “in an inter partes review [must] be issued not later than 1 year after the date on which the Director notices the institution of a review.” 35 U.S.C. § 316(a)(11). Here, all briefing on the merits and the oral argument are already completed. The only substantive event left is for the Board to issue its final written decision. For the Board to delay its final written decision and extend the statutory 1-year period requires a party seeking an extension to show “good cause” why that action is warranted. 35 U.S.C. § 326(a)(11); 37 C.F.R. § 42.5(c)(2). The Board should deny the instant motion because PO has failed to carry its burden to show good cause.

A. Requests to stay instituted IPRs are rarely granted

PO’s assertion that its petition for mandamus “raises questions of extraordinary importance” and that under such circumstances “IPR proceedings [are] routinely” stayed, cannot be squared with the Federal Circuit having extended the mandamus briefing schedule without staying these proceedings—despite PO’s request it do so. Mot. 5-6 (emphasis added); Exs. 1057, 2049. Moreover, the Board rarely grants stays and it should not do so here. *Miami Int’l Holdings, Inc. v. Nasdaq, Inc.*, CBM2018-00032, Paper 31 at 12 (P.T.A.B. Jan. 17, 2019) (denying motion to stay and noting that “[s]tays at the Board are very rare”); *Google Inc. v. TLI*

Commc'ns LLC, IPR2015-00283, Paper 9 at 3 (P.T.A.B. Feb. 26, 2015) (“A stay generally is undesirable”); *Comcast Cable Commc'ns v. Rovi Guides, Inc.*, IPR2019-01434, Paper 14 at 40-41, (P.T.A.B. Feb. 12, 2020) (denying motion to stay and noting that the “Board generally declines to stay proceedings pending an appeal to the Federal Circuit or the Supreme Court”).

The cases PO cites are readily distinguishable because: (i) the present case does not involve an ongoing Director review or sovereign immunity, while (ii) the cited cases did not involve prior unsuccessful requests to the Federal Circuit to stay the PTAB proceeding. Of course, filing a petition for mandamus alone does not warrant the requested relief. *Google Inc. v. Patrick Zuili*, CBM2016-00021, Paper 29 at 2-3 (P.T.A.B. Nov. 16, 2016) (denying request for a stay “until the completion of the Federal Circuit’s proceeding regarding his request for mandamus relief.”). PO cites no case supporting the proposition that the issues it raises in its petition for mandamus warrant a stay.

And as the Board explained in denying PO’s recusal motion, PO’s position would change the basic rules by which all APJs evaluate conflicts in all IPR proceedings. Paper 55, 21. Accordingly, the same justification PO urges here (flawed as it is) could then be used to stay many other IPRs. That outcome would be antithetical to the Board’s precedent regarding stays.

B. PO cannot show good cause where PO's own delays created the timing issues about which it now complains

Any alleged timing issue at this late stage in the proceeding is of PO's own creation. As a result, PO cannot show there is "good cause" for a stay. PO chose to wait more than three months after learning of APJ McNamara's stock ownership before raising any concerns with the Board regarding an alleged conflict. *See* Ex.2029, ¶2; Paper 37, 15. As the Board found, PO's "unjustified delay" appears strategically deliberate as PO awaited (1) the Supreme Court to consider its petition for certiorari, (2) the Precedential Opinion Panel to decide whether to review the institution of this proceeding, and (3) the original panel to decide Centripetal's request for rehearing. *See* Paper 55, 5 & 22; Paper 31. PO could have raised its concerns sooner but chose not to. Next, PO waited nearly two months from the denial of its recusal motion to file its petition for mandamus, and instead of promptly seeking Board authorization to file a stay motion, PO sought such authorization only after the appeals did not enter a stay as PO requested.

Had PO timely raised its purported conflicts concerns after learning of them in September 2022, its stay motion would have been obviated. The Board already addressed PO's "highly inappropriate" delay tactics in denying PO's motion for recusal and vacatur. *See* Paper 55 at 21-22. For the same reasons that the Board found that PO's unjustified delay warranted denial of the relief it sought in the

vacatur motion, Paper 55 at 22, the Board should also deny the current stay motion.

C. The mandamus petition will likely be denied

PO also fails to carry its burden because its mandamus petition is likely to fail. In considering whether to grant a stay pending appellate review, the movant's likelihood of success must be considered. *See E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 835 F.2d 277, 278 (Fed. Cir. 1987). A writ of mandamus is "reserved for really extraordinary causes," such as "a clear abuse of discretion." *Cheney v. United States Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (cleaned up). PO fails to demonstrate any likelihood that the Board abused its discretion, and thus, fails to demonstrate that its mandamus petition is likely to be granted.

As a threshold issue, PO's failure to timely bring its recusal motion is an independent basis for the Federal Circuit to deny the mandamus petition. The record establishes that PO knew of the facts underlying its recusal motion in September 2022 (Ex.2029, ¶2), but then waited to raise any issue with the Board until December 30, 2022. Paper 37, 15. In addition to the recusal motion's lack of substantive merit, PO's "unjustified delay in raising the issue would bar the relief" it sought. Paper 55, 22. PO does not and cannot show that the Board abused its discretion in finding PO's recusal motion untimely.

Instead of addressing its decision to engage in strategic delay, PO argues that the "facts of this case justify" vacatur of the institution decision, thus making a stay

appropriate. Mot. 7. In support of this argument, PO contends that in denying vacatur, “the Board overlooked” a regulation requiring recusal when a “reasonable person with knowledge of the relevant facts would question [their] impartiality.” Mot. 7 (quoting 5 C.F.R. § 2635.502). PO’s mandamus petition, however, does not argue that the Board overlooked 5 C.F.R. § 2635.502.

Nor could PO have reasonably made such an argument, as the Board’s earlier decision referenced that rule *twice*. In denying PO’s request for vacatur of the institution decision, the Board addressed that the rule “concerns ‘Personal and Business Relationships,’ including matters such as employment relationships and [property] leases” and that it “applies only where the ‘employee *knows* that a particular matter involving specific parties is likely to have a direct and predictable effect.’” Paper 55 at 9 n.7, 12 n.9. The Board also thoroughly considered 5 C.F.R. §§ 2640.202, 2638.101, 2638.102, and 2638.501, plus all relevant statutes and facts, in concluding that “[t]he Cisco stock is plainly not disqualifying under the rules” and “that APJ McNamara’s relationship with Foley also would not be disqualifying.” Paper 55 at 11-13. The Board further found PO’s arguments “frivolous” and that “there is no competent, good faith argument that the Cisco stock does not fall into exemptions, and the argument concerning the Foley payments is glaringly deficient on its face.” *Id.* Plainly, PO’s argument that the Board “overlooked” the relevant rules relating to APJ recusals is unsupported by the record.

In contrast, PO “overlooks” its own change of heart regarding the permissibility of APJs holding stock in companies appearing before them. In November 2022, PO told the Supreme Court that

Federal regulations permit government employees to participate in matters involving parties in which they possess a financial interest if (1) “[t]he securities are publicly traded” (or are long-term government bonds) and (2) the value of the interest “does not exceed \$15,000.” 5 C.F.R. §2640.202(a). This rule by its terms *applies to the PTAB and its APJs*.

Ex.1054, 11 (emphasis in original).

Neither PO’s petition for mandamus nor its motion to stay even mentions PO’s previous argument that APJs are expressly permitted to own some stock in parties appearing before them. Far from demonstrating the sort of extraordinary circumstance that would justify the relief PO seeks, the record shows that PO itself once agreed with the position the Board now takes—until it became strategically advantageous for PO to reverse course. PO fails to explain its about-face on this issue. Because a stay is a form of equitable relief, PO’s flip-flopping—which appears to be gamesmanship—should weigh against granting its motion. At the very least, it shows that PO’s newly-minted position is far from being so clearly correct that it could justify the relief PO seeks.

In summary, PO fails to demonstrate a reasonable expectation that its

mandamus petition is likely to succeed, particularly since it largely recycles the same arguments the Board rejected. *Aristocrat Techs. Inc. v. IGT*, IPR2016-00181, Paper 11 at 3 (P.T.A.B. June 14, 2016) (“We do not discern that the speculative potential of some possible outcome that is germane to the related IPR proceedings lends itself reasonably to a conclusion that [the movant] can demonstrate ‘good cause’ for the extraordinary relief.”). Instead, PO’s mandamus petition is likely to fail because mandamus is a “drastic and extraordinary” remedy “reserved for really extraordinary causes.” *Cheney*, 542 U.S. at 380-81. On this record, PO cannot carry its burden of showing that its mandamus petition presents a “really extraordinary cause” that is likely to receive “extraordinary” relief. Staying this case is unjustified.

II. A stay is inappropriate and contrary to the public interest

PO further attempts to justify a stay by arguing that it is necessary “to ensure that the Federal Circuit can devote whatever time is necessary” and “to give the Board sufficient time to ‘analyze the guidance’ provided by the Federal Circuit,” which is yet another argument incompatible with the Federal Circuit’s extending the mandamus briefing schedule while not staying this proceeding (despite PO’s request). Mot. 9. Moreover, PO fails to explain how or why a stay would impact the Federal Circuit’s timing. PO also ignores that the Board will be able to assess any impact at the time of the Federal Circuit’s decision without granting a stay. *Google Inc. v. Patrick Zuili*, CBM2016-00021, Paper 29 at 3 (P.T.A.B. Nov. 16, 2016)

(denying motion to stay and explaining that “to the extent that a decision [from] the Federal Circuit may impact these proceedings, it is not apparent why such impact cannot be assessed at the time it manifests without the need for a stay”).

The weight of equities also overwhelmingly favors denying a stay. As explained above, any alleged timing issue at this late stage in the proceeding is directly attributable to PO’s own unexplained delays. Furthermore, PO acknowledges that if the Board issues a decision canceling one or more claims and the Federal Circuit then issues a writ of mandamus (which is highly unlikely), PO will have an immediate remedy. Mot. 9. Additionally, APJ McNamara—the only judge with an alleged conflict—has already been replaced, thereby removing any alleged bias. Paper 46 at 9. PO fails to identify any prejudice it faces from the current panel of APJs, none of whom PO alleges to have a financial conflict.

On the other hand, a stay would prejudice Petitioner. PO’s suggestion that PAN “currently face[s] no allegations of infringing the ’856 Patent,” ignores its own public assertions that other industry participants are infringing the claims at issue. Mot. 9-10; Paper 9, 1-2. A stay would thus delay resolution on the merits, thereby prejudicing PAN, which faces both ongoing litigation against PO (on other patents) and these threats of potential further litigation on the ’856 patent.

Delaying a decision on the merits is also contrary to the public’s interest in a timely conclusion of this proceeding. *See* 35 U.S.C. § 316(a)(11). The public

deserves to be relieved of the burden of patent claims that should never have been granted. Here, that burden is not general or hypothetical: Patent Owner made statements during the Cisco trial indicating that it could assert the '856 patent against additional companies in the future. IPR2022-01151, EX1103, 40:4-7 (“as Cisco goes, so goes the industry”).

In addition to the statutory deadline of § 316(a)(11), the Board’s rules reflect a strong public interest in securing speedy resolution of *inter partes* review proceedings. See 37 C.F.R. § 42.1(b) (providing that the rules “shall be construed to secure the just, speedy, and inexpensive resolution of every proceeding”), § 42.5(c)(1) (“Any modification of times will take any applicable statutory pendency goal into account.”). Consistent with the statutory deadline and the public interest, the Board has refused to stay IPR proceedings pending a Supreme Court decision on what patent owner argued was a threshold constitutional issue, because “the outcome of the Supreme Court’s decision is too speculative to overcome our mandate to ‘secure the just, speed, and inexpensive resolution of every proceeding.’” *Apotex Inc. v. Novartis AG*, IPR2017-00854, Paper 21 at 6 (P.T.A.B. Aug. 30, 2017). The remote possibility of PO obtaining the mandamus relief it seeks is at least as speculative and fails to outweigh the broader public interest in timely receiving the Board’s final written decision on the challenged claims of the '856 patent.

For the foregoing reasons, PO’s motion should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO STAY, was served in its entirety by filing through the Patent Trial and Appeal Case Tracking System (PTACTS), as well as providing a courtesy copy via e-mail to the following attorneys of record for Patent Owner listed below:

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