

No. 23-127

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

IN RE CENTRIPETAL NETWORKS, LLC,

Petitioner.

On Petition for Writ of Mandamus to the
United States Patent and Trademark Office
Nos. IPR2022-00182, IPR2022-01151, and IPR2022-01199

**CENTRIPETAL NETWORKS, LLC'S RESPONSE IN
OPPOSITION TO THE USPTO'S MOTION FOR
AN EXTENSION OF TIME**

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CERTIFICATE OF INTEREST

Counsel for Petitioner certifies the following:

1. The full name of every party or amicus represented by me is:

Centripetal Networks, LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Not Applicable

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

CNI Holdings, Inc.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

**Kramer Levin Naftalis & Frankel LLP: James Hannah,
Jeffrey H. Price, and Jenna Fuller**

**Baner & Witcoff, Ltd.: Bradley C. Wright, Scott M. Kelly,
and John R. Hutchins**

**Dowd Scheffel PLLC: Matthew J. Dowd and Robert J.
Scheffel**

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary):

None

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6): ***None***

Date: March 26, 2023

/s/ Matthew J. Dowd
Matthew J. Dowd
Counsel for Petitioner

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INTRODUCTION

Centripetal Networks, LLC (“Centripetal”) respectfully opposes the motion of the U.S. Patent & Trademark Office seeking an extension of time of twenty-one days to respond to the petition. For the reasons explained below, Centripetal submits that good cause for an extension has not been established in view of the full context of the case. As explained below, if any extension is granted, it should be done in conjunction with staying the underlying IPR while this Court considers Centripetal’s petition for a writ of mandamus.

The patent at issue in the underlying IPR is being subjected to multiple attacks. In the district court infringement trial, Cisco Systems, Inc. lost on its invalidity defenses, and Centripetal was awarded over \$2 billion in damages. *See Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025, 1029 (Fed. Cir. 2022). Although that ruling was later vacated based on a financial conflict, Cisco did not appeal the validity ruling. *Id.* at 1029–30. Cisco, in effect, had conceded that Centripetal’s patent is valid.

Nonetheless, Cisco has been given a second chance by a PTAB panel that included an APJ who owned a significant amount of Cisco stock.

Centripetal is thus faced with a situation where an Article III judge's thorough rulings on infringement and validity are overturned based on less than \$5,000 worth of stock ownership by his spouse—rulings that were contrary to the financial stock interest—but then Cisco is now granted permission to challenge that patent by an administrative patent judge who owns up to three times the amount of stock in a decision that very much benefits the APJ's stock ownership. This scenario lacks any comparable precedent in U.S. patent law history, and Centripetal therefore respectfully opposes the PTO's motion.

ARGUMENT IN OPPOSITION

I. No Extension is Necessary

In almost every other instance, Centripetal and its counsel would not oppose the PTO's motion for an extension of time. This case is different, however. The circumstances are extraordinary. The only reason Cisco is able to proceed with an IPR against the patent at issue is because a PTAB panel that included an APJ who owned Cisco stock (1) ruled to institute an IPR against the patent, with full knowledge that institution would materially benefit Cisco, and (2) ruled to join Cisco to the instituted IPR, notwithstanding that Cisco was time-barred from challenging the

patent through IPR. These reasons and the additional context below explain why the petition should be ruled on as soon as feasible.

Regarding the PTO's basis for requesting extension, Centripetal respectfully submits that the agency has not established good cause. The PTO's motion acknowledges that three of the four attorneys who signed the motion are available throughout this week to prepare a response by the current deadline. The motion lists a "heavy workload," the upcoming leave of one attorney next week, and the upcoming leave of another attorney the following week, ECF No. 7 at 3, but, given the unique circumstances here, those routine scheduling items do not demonstrate good cause for a three-week extension.

Moreover, a good-cause analysis must consider the potential harm to the non-moving party. *See, e.g., Amgen Inc., v. Hoechst Marion Roussel, Inc.*, 25 Fed. App'x 923, 924 (Fed. Cir. 2001) (listing the "the danger of prejudice to the [other side]" as a relevant factor when considering the issue of excusable neglect or good cause in a motion for an extension of time to file an appeal (quoting *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993))).

Here, the PTO's motion offers no consideration of the prejudice that will be imposed on Centripetal with the proposed 21-day extension. If the time for the PTO's response is extended for three weeks, it runs the risk that the PTAB would issue a decision in the underlying IPR before the Court can fully consider the petition before the PTAB issues a final written decision.

II. If an Extension is Granted, the PTO Should Be Ordered to Stay the IPR to Ensure Sufficient Time for Consideration of the Mandamus Petition

Centripetal maintains that no extension should be granted. Even so, if any extension were to be granted, it should be done only if the underlying IPR proceeding is stayed to permit this Court to first consider the petition.

First, the PTO does not dispute that it has the authority to stay the IPR proceedings.¹ At a minimum, the PTO could simply extend the time by which to issue any decision in the IPR. The Director has the authority to do so. *See* 35 U.S.C. § 316(a)(11) (authorizing that “the Director may, for good cause shown, extend the 1-year period by not more than 6

¹ In an email exchange with Centripetal counsel, PTO counsel confirmed that the PTO does not contend that the agency lacks the authority to stay the IPR.

months, and may adjust the time periods in this paragraph in the case of joinder under section 315(c)).²

Second, the Director has stayed multiple cases. *See, e.g., Samsung Elecs. Co. v. Netlist, Inc.*, IPR2022-00615, Paper 38, at 2 (P.T.A.B. Jan. 5, 2023) (staying an *inter partes* review and granting Director review to consider “issues of particular importance to the Office and patent community”); *Patent Quality Assurance, LLC v. VLSI Tech. LLC*, IPR2021-01229, Paper 100 at 2 (P.T.A.B. Dec. 15, 2022) (staying an *inter partes* review pending an ongoing Director review). There is no reason the PTO could not stay the IPR proceeding here, just as was done in prior cases presenting “issues of particular importance to the Office and patent community.”

Further problems may flow from a 21-day extension and no stay of the IPR proceeding. The PTAB could issue a decision that would later need to be vacated in view of this Court’s decision on the pending

² 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. Paper 31 at 1 n.1

mandamus petition. That result would create unnecessary and duplicative work for all parties involved.

Additionally, if the extension is granted and the PTAB issues a final written decision before a decision on the mandamus petition, that outcome could interfere with the district court's retrial of the case (and this Court's resolution of the serious issues Centripetal has presented). If the Board decides to cancel the claims, Cisco may well ask the district court to modify the current plans to conduct the retrial, which is currently scheduled to begin on June 22, 2023. *See* Scheduling Order in re Rule 63 Hearing, *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, No. 2:18-cv-94 (E.D. Va. Mar. 7, 2023) (ECF 682).

III. The Petitioners Have Not Moved for An Extension

Centripetal also notes that none of the three patent challengers has moved for an extension of time to respond. The PTO's motion notes only that "Palo Alto Networks, Cisco, and Keysight do not oppose the motion." ECF No. 7 at 2.

Accordingly, even if the Court were to grant the PTO's motion, it should extend the time only for the PTO to respond. The parties challenging the patent itself—Palo Alto Networks, along with time-barred

Cisco and Keysight—should still be required to respond within seven days. Centripetal would reply to those three responses within the three days, as ordered by the Court. *See* ECF No. 5. Then, if the PTO needs a full three weeks of additional time (which seems unlikely), Centripetal can reply to the PTO’s response within three days of its filing.

IV. Further Context Underscores that No Extension is Warranted

The need for a prompt response and consideration by the Court is illustrated by additional facts and argument presented in the proceeding below. The petition concisely identifies the troubling issue involving the APJ voting to grant institution while owning Cisco stock. Unnecessary delay may well exacerbated lurking impartiality issues in other PTAB cases, particularly in view of the erroneous arguments and positions advanced by the PTAB and the petitioners below.

A. The Issue of PTAB Financial Conflicts is Critically Important to the Patent Community

As the PTAB has acknowledged in a separate case, “[e]mployees of the executive branch [including 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*, 2022 WL

1617695, No. IPR2022-00112, at *5 (P.T.A.B. May 18, 2022) (quoting 5 C.F.R. § 2635.101(b)(14)). The Board’s acknowledgment in that case appears consistent with the applicable rules. *See, e.g.*, 5 C.F.R. § 2635.101 (“Employees shall not hold financial interests that conflict with the conscientious performance of duty.”); *id.* § 2635.502(e) (counseling recusal where “a member of the employee’s household” has a “financial interest” that “is likely to raise a question in the mind of a reasonable person about his impartiality”).

The PTAB’s prior focus has been on the “appearance” standard: “Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.” *Google*, 2022 WL 1617695, at *5 (quoting 5 C.F.R. § 2635.101(b)(14)); *see id.* (confirming that “[u]nder 5 C.F.R. § 2635.402, executive-branch employees are prohibited ‘from participating personally and substantially in an official capacity in any particular matter in which, to his knowledge, he or any person whose interests are imputed to him . . . has a financial interest, if the particular matter will have a direct and predictable effect on that interest’”).

Notwithstanding the prior recognition of the importance of impartial proceedings, the Board in the present case failed to address or even acknowledge the question of whether the APJ's Cisco stock ownership presented a material risk of the appearance of partiality. *See* Appx007–022 (Paper 55). The Board's refusal to address the distinct appearance-of-partiality concerns warrants a prompt correction by the Court, which will be hampered by a three-week delay of the PTO's response.³

B. Cisco Will Benefit Enormously with Any Delay to the Court's Ruling on the Mandamus Petition

Cisco will benefit from any delay of this petition. PAN is notably attacking only the claims underlying the verdict in the Cisco district court case. Paper 13 at 6. PAN is not being sued for infringing the '856 patent, even though PAN is engaged in ongoing litigation with

³ The need to promptly address the conflict issue is underscored by PAN's erroneous accusation that Centripetal, "in contravention of [its] duty of candor," advanced an "exact opposite" argument to the PTAB. Paper 46 at 2. PAN's contention rests on its apparent misunderstanding of Centripetal's Supreme Court reply brief. There, Centripetal observed that, pursuant to 5 C.F.R. § 2650.202(a), the *de minimis* exception to criminal liability presumably applies to APJs. But, as Centripetal unmistakably explained to the PTAB and in its mandamus petition to this Court, the reasonable-person-impartiality standard of, for example, 5 C.F.R. § 2635.502(e) is equally applicable. *See* Paper 32 at 8. PAN's error is further reason to decide the mandamus position sooner, in order to correct misunderstandings about the need for impartial PTAB proceedings.

Centripetal. PAN thus cannot establish any concrete dispute with the '856 patent. *Id.* The IPR should have been discretionarily denied per *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 6 (P.T.A.B. Mar. 20, 2020) (noting that, in evaluating the discretionary denial factors, “the Board takes a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review.”).

The fact that institution was not discretionarily denied raises additional questions about the impact of APJ McNamara’s Cisco stock ownership. For instance, unlike in a district court case, an APJ must affirmatively decide to grant institution to allow an IPR to begin. The active decision of granting institution in a way that benefits an APJ’s stock ownership creates a significant appearance of impartiality that is remarkably different than what occurred in the district court case.⁴

⁴ Centripetal also explained that the PTAB should have discretionarily denied PAN’s petition under *Fintiv* because PAN’s petition relied on references (Buruganahalli and Baehr) that “are substantially the same as art considered by the Examiner during prosecution of the application that became the '856 Patent,” Paper 6 at 25, and that petitioners Cisco and Keysight had litigated the same art in the district court proceedings but chose to rely on their “best” art during trial. Any reasonable observer could conclude that the decision to not deny under *Fintiv* was not made impartially, given the significant benefit that would inure to Cisco if the '856 patent were later cancelled during the IPR.

Finally, Cisco will no doubt benefit by any disruption of the smooth retrial in the district court. As noted, a Rule 63 hearing is scheduled to begin on June 22, 2023. Having already benefited from the reversal of the district court judgment finding the claims of the '856 patent to be valid, this IPR is yet another chance for Cisco to relitigate an issue that has already been fully litigated. As noted by members of Congress, the IPR process was intended to be “an inexpensive alternative to district court litigation,” but “[a]busive serial petitions were not part of that vision.”⁵

CONCLUSION

For the foregoing reasons, Centripetal respectfully submits that the motion for an extension should be denied. If the Court is inclined to grant an extension, Centripetal does not oppose an extension if the underlying

⁵ Ltr. of Sen. Thom Tillis & Sen. Christopher A. Coons (Apr. 9, 2019), <https://www.tillis.senate.gov/services/files/92450b48-8146-4038-8972-59e8aba023fd>; see also *WesternGeco LLC v. ION Geophysical Corp.*, 889 F.3d 1308, 1317 (Fed. Cir. 2018) (“Congress recognized the importance of protecting patent owners from patent challengers who could use the new administrative review procedures as ‘tools for harassment’ via ‘repeated litigation and administrative attacks on the validity of a patent.’” (quoting H.R. Rep. No. 112-98, pt. 1, at 48)).

IPR proceeding is stayed pending this Court's consideration of the mandamus petition.

Date: March 26, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Rule 27(d)(2) of the Federal Rules of Appellate Procedure because it contains 2,328 words, excluding the parts exempted by Rule 32(f) of the Federal Rules of Appellate Procedure and Rule 32(b) of the Federal Circuit Rules.
2. This brief complies with the typeface and typestyle requirements of Rules 32(a)(5) & 32(a)(6) of the Federal Rules of Appellate Procedure because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2022 in 14-point Century Schoolbook font.

March 26, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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