

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PALO ALTO NETWORKS, INC., CISCO SYSTEMS, INC.,
and KEYSIGHT TECHNOLOGIES, INC.,[†]
Petitioner

v.

CENTRIPETAL NETWORKS, LLC,
Patent Owner.

IPR2022-00182
Patent 9,917,856 B2

Before MICHELLE N. WORMMEESTER, NABEEL U. KHAN, and
AARON W. MOORE, *Administrative Patent Judges*.

MOORE, *Administrative Patent Judge*.

ORDER
Denying Patent Owner's Motion to Stay
37 C.F.R. § 42.5

[†] Cisco Systems, Inc. and Keysight Technologies, Inc. filed petitions and motions for joinder in IPR2022-01151 and IPR2022-01199, respectively, and have been joined in this proceeding.

I. INTRODUCTION

On December 30, 2022, Patent Owner filed a Motion for Recusal and Vacatur, arguing that APJ McNamara had financial conflicts that required the entire panel to recuse and that the institution decision be vacated. *See* Paper 37 (“Recusal Motion”). On February 3, 2023, we entered an order denying the Recusal Motion. *See* Paper 55 (“Recusal Order”).

On March 23, 2023, Patent Owner filed a petition with the Federal Circuit seeking “a writ of mandamus instructing the PTAB to vacate, on an emergency basis, all decisions in IPR2022-00182” based on the alleged financial conflicts. *See* Ex. 2047 (“Mandamus Petition”), 4.

Patent Owner then requested our authorization to file a motion to stay, which we granted, and briefing is now completed. *See* Paper 61 (“Stay Motion”); Paper 63 (“Stay Opposition”).

This order addresses the motion to stay.

II. ANALYSIS

We weigh the traditional stay factors in evaluating a motion to stay in view of a mandamus petition. *See Mehedi v. View, Inc.*, 21-CV-06374-BLF, 2022 WL 1082010, at *2 (N.D. Cal. Apr. 11, 2022) (“The factors considered in determining whether a stay pending a petition for writ of mandamus is warranted are the same as a stay pending appeal.”). Those factors are: (1) whether the movant has made a strong showing that it is likely to succeed on the merits; (2) irreparable injury in the absence of a stay; (3) whether a stay would substantially injure any other parties; and (4) the public interest. *See Standard Havens Prods., Inc. v. Gencor Industries, Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Rohm Semiconductor USA, LLC v. Maxpower Semiconductor, Inc.*,

IPR2020-01674, Paper 26 (PTAB July 6, 2021) (applying the traditional test in weighing a stay in view of a mandamus petition).¹

Likelihood of Success

We understand from a review of the mandamus petition that Patent Owner has limited its argument to the issue of the Cisco holdings and the ethical regulations, and is not pursuing the arguments it made before us about the Foley & Lardner relationship. We thus limit our likelihood of success analysis to Patent Owner’s argument that “executive-branch regulations and appearance-of-impropriety concerns compel recusal and vacatur.” *See* Mandamus Petition 5.

Patent Owner does not specifically address its likelihood of success with the mandamus petition in the motion to stay, but argues that we “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,’” citing 5 C.F.R. § 2638.102, 5 C.F.R. § 2635.101, and 5 C.F.R. 2635.501. *See* Stay Motion 7; *see also* Mandamus Petition 18–19 (citing the same regulations).² We find this to be incorrect because (a) we did not “overlook” those regulations, which are not applicable to financial interests like the Cisco stock, (b) Patent Owner’s arguments are based on

¹ Under 35 U.S.C. § 316(a)(11), a “final determination in an inter partes review [must] be issued not later than 1 year after the date on which the Director notices the institution . . . , except that the Director may, for good cause shown, extend the 1-year period by not more than 6 months.” Because we conclude that a stay is not warranted, we need not consider whether good cause has been shown.

² The regulations are available at <https://www.ecfr.gov/current/title-5>.

language from the inapplicable regulations taken out of context, and (c) Patent Owner essentially ignores the specific regulations that do apply to the Cisco holdings and exempt them as potential conflicts.

For reference, a table of contents for Title 5, Chapter XVI, Subchapter B, “Government Ethics,” is reproduced below, and annotated to identify the location of the pertinent sections.

ECFR CONTENT	
▼ Title 5 Administrative Personnel	Part / Section
▼ Chapter XVI Office of Government Ethics	2600 – 2699
▼ Subchapter B Government Ethics	2634 – 2699
▶ Part 2634 Executive Branch Financial Disclosure, Qualified Trusts, and Certificates of Divestiture	2634.101 – 2634.1008
▼ Part 2635 Standards of Ethical Conduct for Employees of the Executive Branch	2635.101 – 2635.902
Subpart A General Provisions	2635.101 – 2635.107
Subpart B Gifts From Outside Sources	2635.201 – 2635.206
Subpart C Gifts Between Employees	2635.301 – 2635.304
Subpart D Conflicting Financial Interests	2635.401 – 2635.403
Subpart E Impartiality in Performing Official Duties	2635.501 – 2635.503
Subpart F Seeking Other Employment	2635.601 – 2635.607
Subpart G Misuse of Position	2635.701 – 2635.705
Subpart H Outside Activities	2635.801 – 2635.809
Subpart I Related Statutory Authorities	2635.901 – 2635.902
▼ Part 2636 Limitations on Outside Earned Income, Employment and Affiliations for Certain Noncareer Employees	2636.101 – 2636.307
Subpart A General Provisions	2636.101 – 2636.104
Subpart B [Reserved]	
Subpart C Outside Earned Income Limitation and Employment and Affiliation Restrictions Applicable to Certain Noncareer Employees	2636.301 – 2636.307
▼ Part 2638 Executive Branch Ethics Program	2638.101 – 2638.604
Subpart A Mission and Responsibilities	2638.101 – 2638.108
Subpart B Procedures of the Executive Branch Ethics Program	2638.201 – 2638.210
Subpart C Government Ethics Education	2638.301 – 2638.310
Subpart D Correction of Executive Branch Agency Ethics Programs	2638.401 – 2638.403
Subpart E Corrective Action Involving Individual Employees	2638.501 – 2638.504
Subpart F General Provisions	2638.601 – 2638.604
▶ Part 2640 Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208 (Acts Affecting a Personal Financial Interest)	2640.101 – 2640.304
▶ Part 2641 Post-Employment Conflict of Interest Restrictions	2641.101 – 2641.302
Parts 2642-2699 [Reserved]	
ECFR CONTENT	

Annotations:

- Part 2635: Ethical Standards
- § 2635.102 cited by Patent Owner
- Subpart D: Financial Interests
- § 2635.501 cited by Patent Owner
- Part 2638: Ethics Program
- § 2638.102 cited by Patent Owner

Annotated Table of Contents for Title 5, Chapter XVI, Subchapter B

The first regulation Patent Owner cites is 5 C.F.R. § 2638.102, in Part 2638, titled “Executive Branch Ethics Program,” which sets out the officials,

offices, and procedures in the conflict prevention program. The regulation states that “[a]s provided in the *Standards of Conduct at part 2635 of this chapter*,” executive branch employees must act in the public’s interest, act impartially, not misuse their offices for private gain, serve as good stewards of public resources, and comply with ethics laws and regulations. In other words, one satisfies their ethical obligations by complying with the detailed regulations laid out in Part 2635, titled “Standards of Ethical Conduct for Employees of the Executive Branch,” which includes the financial interest provisions. Section 2638.102 is not an overarching regulation that can prohibit conduct specifically authorized by the detailed regulations of Part 2635, and to apply it as Patent Owner suggests would be to override most, if not all, of Part 2635.

Patent Owner next cites § 2635.101, which is in the Part that sets out the detailed ethical standards, and describes the “[b]asic [o]bligations of public service,” including that “[e]mployees shall not hold financial interests that conflict with the conscientious performance of duty,” which is the language cited by Patent Owner. Critically, however, the language Patent Owner cites is a “general principle” that only applies “[w]here a situation is *not covered by the standards set forth in this part*.” Because the financial interests at issue here are specifically addressed elsewhere in Part 2635, the general principle does not control.

As explained in the Recusal Order, financial interests like the Cisco holdings are addressed in 5 C.F.R. § 2635.402—in Subpart D, titled “Conflicting Financial Interests”—which includes the “*de minimis* exemptions” of § 2640.202 into which Judge McNamara’s Cisco holdings clearly fall. *See* Recusal Order, 8–11. Although Patent Owner largely

ignores § 2635.402 and § 2640.202, they are the sections that are applicable to the Cisco holdings, and they have not been violated.

Patent Owner also refers to 5 C.F.R. § 2635.501. This section is in Subpart E, titled “Impartiality in Performing Official Duties,” which concerns “personal and business relationships” in “particular matters involving specific parties.” As the examples show, this generally addresses situations in which an executive branch employee is dealing with a matter, such as work on legislation or a lease, that may affect someone with whom the employee has a personal or business relationship. *See* 5 C.F.R. § 2635.502(b)(3). This is not the appropriate section under which to evaluate financial interests, because they are specifically handled in Subpart D.³ In addition, § 2635.501 does not impose its own limitations, but only explains the steps an employee should take “*if he determines* that a reasonable person with knowledge of the relevant facts would question his impartiality in the matter.” 5 C.F.R. § 2635.501 (emphasis added). Because there is no reason to believe that Judge McNamara ever “determined” that “a reasonable person . . . would question his impartiality,” there is no factual basis for any argument that this regulation either applies or was not followed.

³ This was explained in the recusal decision: “Patent Owner cites 5 C.F.R. § 2635.502, which concerns ‘Personal and Business Relationships,’ including matters such as employment relationships and properly leases. The rules relating to financial interests, such as those raised here, are found in 5 C.F.R. § 2635.401–403.” Recusal Order 9 n.7.

Patent Owner’s mandamus argument essentially attempts to eliminate the “*de minimus* exemptions” of the financial interest regulations with language taken out of context from other parts of the regulatory framework. We conclude that this argument is unlikely to succeed, and that Patent Owner thus has not made a “strong showing” of success on the merits. *See Standard Havens Prods.*, 897 F.2d at 512.

Irreparable Injury

Patent Owner argues that “[a] stay is also appropriate here in view of potential prejudice to [Patent Owner],” because “[w]ithout 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.” Stay Motion 9. This is not persuasive because we fail to see how issuance of a decision that Patent Owner contends would be vacated should the mandamus petition, or an appeal from a final written decision, be successful could be irreparably harmful.

Substantial Injury to Other Parties

Patent Owner argues that “Petitioners face no cognizable prejudice from a modest stay” because “PAN and Keysight . . . currently face no allegations of infringing the ’856 Patent” and “Cisco already passed on the opportunity to file an IPR petition challenging the ’856 Patent” and “also had a full and fair opportunity to contest the validity of the ’856 Patent in district court.” Stay Motion 9–10. Patent Owner also argues that “[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.” *Id.* at 10.

We agree with Patent Owner that Palo Alto and Keysight likely would not suffer material harm from a delay. However, we conclude that a delay would be detrimental to Cisco, as it is presently litigating the validity of the '856 patent in the District Court, and would benefit from finality in this matter, no matter the result.

We also find that additional delay would be particularly inappropriate given that Patent Owner failed to raise the conflict issue immediately. *See* Recusal Order 21–22. Patent Owner now asserts that the motion to vacate was filed “[a]s soon as was practicable” because “Centripetal only had access to the APJ’s financial disclosures through 2020.” Stay Motion 4. This is unpersuasive because the motion to vacate was based on those disclosures *alone*,⁴ indicating that no other research was needed. If the 2015–2020 disclosures were insufficient, Patent Owner should not have brought the motion to vacate in the first place.

The Public Interest

Patent Owner does not address the public interest in the motion to stay, and we conclude that it weighs against a stay because Congress intended *inter partes* reviews to be “quick and cost effective.” *Merck & Cie v. Gnosis S.P.A.*, 820 F.3d 432, 437 (Fed. Cir. 2016) (quoting H.R. Rep. No. 112–98, pt. 1, at 48 (2011)); *see also* 37 C.F.R. § 41.1(b) (contemplating a “just, speedy, and inexpensive resolution of every proceeding”).

⁴ *See* Stay Motion 4 n.2 (“Centripetal sought, but was unable to obtain, the APJ’s current disclosures.”).

Conclusion

For the reasons explained above, Patent Owner has not shown that the mandamus petition is likely to succeed, or a likelihood of irreparable harm, and the other party and public interest factors do not weigh in favor of a stay. Patent Owner thus has not shown that it is entitled to a stay of this proceeding pending the result of the mandamus proceeding.

III. ORDER

For the foregoing reasons, it is ORDERED that Patent Owner's Motion to Stay (Paper 61) is denied.

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