

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC.,

Petitioner,

v.

CENTRIPETAL NETWORKS, INC.

Patent Owner.

Case IPR2022-01151
Patent No. 9,917,856

**PETITIONER'S MOTION FOR JOINDER
UNDER 35 U.S.C. § 315(c), 37 C.F.R. §§ 42.22, and 42.122(b)**

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I. STATEMENT OF PRECISE RELIEF REQUESTED

Petitioner Cisco Systems, Inc (“Cisco”) respectfully submits this Motion for Joinder together with a Petition for *Inter Partes* Review of U.S. Patent No. 9,917,856 (“Cisco’s Petition”). On November 18, 2021, Palo Alto Networks, Inc. (“PAN”) filed *Palo Alto Networks, Inc. v. Centripetal Networks, Inc.*, IPR2022-00182 (“the PAN IPR”) that also challenges U.S. Patent No. 9,917,856. The Board instituted trial for the PAN IPR on May 25, 2022. Cisco requests *inter partes* review and joinder with the PAN IPR pursuant to 35 U.S.C. § 315(c) and 37 C.F.R. § 42.122(b). Joinder is appropriate because Cisco’s Petition is substantively identical to the petition in the PAN IPR; the Petition challenges the same claims of the ’856 patent on the same grounds and relies on the same prior art, arguments, and evidence (i.e., Cisco’s Petition is a “copycat” petition). Joinder is also appropriate because Cisco’s request is only for the opportunity to join with the PAN IPR as an “understudy” to PAN, and as Cisco would only assume an active role in the event PAN settles with Patent Owner.

In making this request, Cisco seeks to maximize efficiency in two ways. First, by requesting joinder rather than pursuing another independent patentability review by the Office (e.g., *ex parte* reexamination), Cisco seeks to reduce the number of parallel challenges to the ’856 patent pending before the Office. Second, Cisco seeks to represent the public interest in having the Office review claims of

the '856 patent that Patent Owner Centripetal Networks, Inc. (“Centripetal”) has suggested are widely used within the industry. *See* IPR2022-00182, Paper 9 at 1-2 & Paper 11 at 18; EX1103, 1625:2-1626:16; *see also General Plastic Indus. Co. v. Cannon Kabushiki Kaisha*, IPR2016-01357, Paper 19 at 16 (PTAB Sept. 6, 2017) (precedential) (“In exercising discretion...we are mindful of the goals of the AIA—namely, to improve patent quality and make the patent system more efficient by the use of post-grant review procedures.”); *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, Paper 11 at 6 (PTAB Mar. 20, 2020) (precedential) (“the Board takes a holistic view of whether efficiency and integrity of the system are best served by denying or instituting review”).

Cisco’s request for joinder is timely because it is filed less than one month since the institution of the PAN IPR. If joinder is granted, and as identified above, Cisco will take an “understudy role” so long as PAN continues to participate in the PAN IPR. Accordingly, joinder will not unduly burden or prejudice the parties to the PAN IPR and will provide for a just, speedy, and inexpensive determination of related proceedings.

Counsel for Cisco has conferred with counsel for PAN, and PAN does not oppose joinder.

II. BACKGROUND AND RELATED PROCEEDINGS¹

1. On March 29, 2018, Centripetal Networks, Inc.—the Patent Owner—filed an amended complaint asserting the ’856 patent against Cisco in the U.S. District Court for the Eastern District of Virginia (Case No. 2:18-cv-00094). Following a bench trial, the court ruled in favor of Centripetal on October 5, 2020. The Federal Circuit vacated the court’s ruling and remanded the case for further proceedings before a different judge on June 23, 2022.

2. Centripetal has also asserted the ’856 patent against Keysight Technologies, Inc. (“Keysight”) in 2:17-cv-00383 (E.D. Va.) based on an amended complaint filed June 13, 2018.

3. On November 18, 2021, PAN filed a Petition for *Inter Partes* Review challenging claims 1, 24, and 25 of the ’856 patent (“PAN’s Petition”). *See Palo Alto Networks, Inc. v. Centripetal Networks Inc.*, IPR2022-00182, Paper 2 (PTAB Nov. 18, 2021).

III. STATEMENT OF REASONS FOR RELIEF REQUESTED

Cisco’s motion for joinder should be granted because the motion is timely, and the *Kyocera* factors favor joinder.

¹ Additional background facts and related proceedings are summarized in the Petition, Section II.B.

A. Legal Standard

The Board may join as a party to an instituted *inter partes* review a person who has properly filed a petition for *inter partes* review that warrants institution. 35 U.S.C. § 315(c). Any request for joinder must be filed “no later than one month after the institution date of any *inter partes* review for which joinder is requested.” 37 C.F.R. § 42.122(b). A petition for *inter partes* review is not subject to the one-year statutory time bar if the petition is accompanied by a request for joinder. 35 U.S.C. § 315(b); 37 C.F.R. § 42.122(b).

“A motion for joinder should: set forth the reasons joinder is appropriate; identify any new grounds of unpatentability asserted in the petition; and explain what impact (if any) joinder would have on the trial schedule for the existing review.” *Hyundai Motor Am. V. Stratosaudio, Inc.*, IPR2022-00224, Paper 11 at 7 (PTAB June 2, 2022) (citing *Kyocera Corp. v. Softview LLC*, IPR2013-00004, Paper 15 at 4 (PTAB Apr. 24, 2013)).

B. Petitioner’s Motion for Joinder is Timely.

Cisco’s Motion for Joinder is timely because it is being filed pre-institution and is thus no later than one month after an institution decision is due by the Board in the PAN IPR. *See* 37 C.F.R. § 42.122(b).

C. The *Kyocera* Factors Favor Joinder.

1. Factor 1: Joinder is appropriate.

Joinder with the PAN IPR is appropriate because Cisco's Petition involves the same patent, challenges the same claims, and is based on the same grounds and evidence relied upon in PAN's Petition. In short, Cisco's Petition is substantively identical to the PAN IPR petition with respect to the prior art challenges. Only minor changes were necessary to properly identify the filing party and to update the analysis of discretionary denial and secondary consideration factors in light of Cisco's different circumstances.² As such, Cisco's Petition does "not present new issues that might complicate or delay" the existing PAN IPR. *See Enzymotec Ltd.*

² *See* Sections V and X of Cisco's Petition. Cisco preemptively addresses those secondary considerations arguments it can reasonably foresee Centripetal raising (and which PAN could not). *See* IPR2022-00182, Paper 2 at 50 ("Petitioner [PAN] does not have access to such [secondary considerations] evidence"). The Board's actual evaluation of secondary considerations will be driven by the arguments that Centripetal actually makes (if any) in its Patent Owner Response. *Fox Factory, Inc. v. SRAM, LLC*, 944 F.3d 1366, 1378 (Fed. Cir. 2019) ("...the patentee retains the burden of proving the degree to which evidence of secondary considerations tied to a product is attributable to a particular claimed invention.").

v. Neptune Techs & Bioresources, Inc., IPR2014-00556, Paper 19 at 6 (July 9, 2014) (“we are mindful of a policy preference for joining a party that does not present new issues that might complicate or delay an existing proceeding”).

Nor does joinder present a risk of duplicative efforts between the PTAB and the district court litigation between Centripetal and Cisco. The district court considered only system art and did not review the invalidity issue with respect to any prior art patents or printed publications. *See* EX1027, 57-59. Nor will there be any duplication, even if the district court case is re-tried,³ as Cisco makes a *Sotera*-style stipulation not to pursue, in any further proceedings at the district court, any ground that was raised or could have been reasonably raised in an IPR. *See* Petition at 22-23.

Joinder of this proceeding with the PAN IPR, and allowing Cisco to assume an understudy role to PAN, does not unduly burden or negatively impact the trial schedule in the PAN IPR in any meaningful way. Patent Owner will not be

³ The Federal Circuit’s remand to the district court leaves it to the discretion of the newly assigned judge whether to order a new trial or to issue a new decision based on the existing trial transcript and evidence. *Centripetal Networks, Inc. v. Cisco Systems, Inc.*, No. 21-1888, slip op. at 19 n.13 (Fed. Cir. June 23, 2022).

required to provide any additional analysis or arguments beyond what it will already provide in responding to the PAN Petition.

Joinder, and allowing Cisco to assume an understudy role to PAN, will also have little, if any, impact on the PAN IPR because no new grounds will be added, the schedule will not be affected, no additional briefing or discovery will be required, and no additional burdens will be placed on Patent Owner.

Additionally, Cisco is currently involved in litigation based on Patent Owner's allegation that a specific combination of Cisco's products infringe claims 24 and 25 of the '856 patent. Cisco therefore has a particular interest in the substantial questions of invalidity surrounding the '856 patent. Joinder is appropriate for the additional reason that the invalidity grounds as to the challenged claims can be resolved through Cisco's limited "understudy" role in the IPR process as long as PAN remains in the joined IPR, and through Cisco's assumption of an active role in the event that PAN were to reach a settlement with Centripetal or otherwise cease being an active party in that instituted proceeding.

Centripetal has intimated that other industry participants allegedly infringe the '856 patent (besides its accusations to date against Cisco and Keysight), and thus there is substantial public interest in "permitting full and free competition in the use of ideas which are in reality a part of the public domain." *Lear, Inc. v. Adkins*, 395 U.S. 653, 670 (1969); *see* IPR2022-00182, Paper 9 at 1-2 (quoting

testimony from Centripetal’s witness that the “industry” has “sought to imitate the Cisco solutions that are described as infringing the patents in this suit”); EX1103, 1625:2-1626:16. That public interest in having the ’856 patent claims reviewed for invalidity favors allowing joinder in this case, as joinder would allow Cisco to assume an active role in the IPR process, from its otherwise limited “understudy” role, if PAN ceases being an active party to the IPR. As Cisco has been accused of infringing the ’856 patent, Cisco is well positioned to assume the representation of the public interest from PAN if such a circumstance should arise.

Accordingly, joinder is appropriate because it avoids the possibility of duplicate efforts, supports the just, speedy, and inexpensive review of the ’856 patent claims by the Office, and promotes the public interest in remedying the unjustified taking of public domain ideas for one party’s exclusive control.

2. Factor 2: Cisco’s Petition proposes no new grounds of unpatentability.

Cisco’s Petition does not present any new grounds or arguments regarding unpatentability. It is substantively identical to PAN’s Petition in that regard. The Board “routinely grants motions for joinder where the party seeking joinder introduces identical arguments and the same grounds raised in the existing proceeding.” *BlackBerry Corp. v. Uniloc 2017 LLC*, IPR2019-01283, Paper 10 at 8

(PTAB Nov. 5, 2019) (quoting *Samsung*, IPR2016-00962, Paper 12 at 9)

(emphasis added). This factor therefore favors joinder.

3. Factor 3: Joinder will not unduly burden or negatively impact the PAN IPR.

Joinder will not unduly burden Patent Owner. Because Cisco’s Petition presents the same grounds and arguments as PAN’s Petition, and because Cisco agrees to assume an “understudy” role unless PAN ceases to be a party to the IPR, there are no new issues for Patent Owner to address. *See Sony Corp. v. Memory Integrity, LLC*, IPR2015-01353, Paper 11 at 6 (PTAB Oct. 15, 2015) (granting motion for joinder and instituting IPR where “joinder should not necessitate any additional briefing or discovery from Patent Owner beyond that already required in [the original IPR]”).

Likewise, joinder will not negatively impact the trial schedule of the PAN IPR. Cisco expressly consents to the trial schedule issued in the PAN IPR. Cisco also agrees to take an “understudy” role in the joined proceeding, so long as PAN remains an active party in the joined proceeding. *See, e.g., Apple Inc. v. INVT SPE LLC*, IPR2019-00958, Paper 9 at 5-8 (PTAB May 30, 2019) (granting motion for joinder where the movant presented a substantively identical petition and agreed to take an “understudy” role in the joined proceeding); *Intel Corp. v. Alacritech, Inc.*, IPR2018-01352, Paper 11 at 3–5 (PTAB Jan. 8, 2019) (same). To be clear, Cisco

only contemplates assuming the role of primary petitioner in the instituted PAN IPR if (i) PAN is terminated as a party to the proceeding, or (ii) PAN ceases participating in the proceeding such that the proceeding is no longer “meaningfully adversarial,” contrary to the public interest. *See ZTE (USA), Inc. v. CyWee Group Ltd.*, IPR2019-00143, Paper 50 at 7-9 (PTAB July 17, 2020) (allowing a joinder petitioner to assume the role of primary petitioner with respect to a motion to amend because the “trial no longer appears to be meaningfully adversarial” given the primary petitioner’s decision not to oppose revised amended claims).

As an understudy in the PAN IPR, Cisco agrees to the following conditions regarding the joined proceeding, so long as PAN remains an active party in the joined proceeding:

- Cisco’s positions and interests in the joined proceeding will be represented by the filings of PAN unless a filing solely concerns issues that do not involve PAN;⁴
- Cisco shall not be permitted to raise any new grounds not already instituted by the Board in the PAN IPR, or introduce any argument or discovery not

⁴ Circumstances may require Cisco to request and file separate papers with respect to Cisco’s individual status as petitioner in the proceeding—*e.g.*, a motion to terminate.

already introduced by PAN;

- Cisco shall be bound by any agreement between Patent Owner and PAN concerning discovery and/or depositions in the PAN IPR;
- At deposition, Cisco shall not receive any direct examination, cross-examination, or redirect time beyond that permitted in this proceeding for PAN alone under either 37 C.F.R. § 42.53 or any agreement between Patent Owner and PAN.

See Apple, IPR2019-00958, Paper 9 at 7–8 (granting a motion for joinder where the movant proposed the above limitations on its role as understudy); *see also Intel Corp.*, IPR2018-01352, Paper 11 at 4–5 (granting a motion for joinder with such limitations on the understudy).

Additionally, with respect to any oral hearing, PAN will be responsible for the presentation before the Board. Cisco, when in the understudy role, will not request any additional time to independently argue before the Board or attempt to submit its own demonstratives.⁵

Accordingly, if joinder is granted, briefing and discovery in the joined proceeding will be no more complex than if Cisco had never been joined.

⁵ While Cisco will not materially participate in calls with the Board, depositions, and any oral hearing, Cisco anticipates that its counsel will attend such events.

Consolidated briefing and discovery will ensure a simplified and efficient joined proceeding.

IV. CONCLUSION

For the reasons above, Cisco respectfully requests that the Board (i) institute Cisco's concurrently filed Petition for *Inter Partes* Review of U.S. Patent No. 9,917,856; and (ii) grant joinder.

Respectfully submitted,

Dated: June 24, 2022
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