UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PALO ALTO NETWORKS, INC.,
Petitioner,

v.

CENTRIPETAL NETWORKS, INC.,
Patent Owner.

Case IPR2022-00182
U.S. Patent No. 9,917,856

PATENT OWNER'S MOTION FOR RECUSAL AND VACATUR

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I. INTRODUCTION

Due process, executive-branch ethics regulations, and common-sense notions of fairness dictate that the fate of the '856 Patent should not rest in the hands of an administrative judge with a financial stake in Cisco Systems, Inc. ("Cisco")—a willful infringer with potentially billions of dollars hinging on the result of this IPR proceeding. Centripetal Networks, Inc. ("Centripetal") recently learned, however, that APJ Brian J. McNamara has owned Cisco stock and also has been paid a significant amount of money (apparently a share of the profits) from one of Cisco's lobbyist law firms while he was deciding IPR petitions against patents that Centripetal has asserted against Cisco in litigation. APJ McNamara maintained these financial interests for years while adjudicating challenges to Centripetal's patents without notice, divestiture, or any apparent attempt to recuse. These direct financial conflicts violate Centripetal's rights and undermine the integrity of the Board, and the public's confidence in the adjudicatory process.

Furthermore, these conflicts cannot be reconciled with Federal Circuit precedent. The Court recently vacated Centripetal's willful judgment award against Cisco—involving the same '856 Patent at issue here—based on the district court judge's wife holding approximately $4,500 of Cisco stock despite his prompt disclosure, good-faith attempt to divest, and rendering a decision *adverse* to Cisco. It simply cannot be correct that an Article III judge's wife's holding of Cisco stock can nullify his validity determination while an administrative judge can knowingly hold the same Cisco stock and decide a collateral attack on that very judgment.

APJ McNamara's financial conflicts undermine both the appearance and reality of impartial justice, including the public trust in the deliberative process leading to the institution of this IPR. Wildly different institution rates for Centripetal's patents following the Cisco judgment between panels including APJ McNamara (87.5%) and those without him (20%) raise the unfortunate specter of actual bias and contamination of the deliberative process. The entire panel is now tainted with APJ McNamara's conflict; the panel therefore should be recused, and the decision to institute should be vacated.

II. BACKGROUND

A. Cisco Has a Direct and Material Interest in the Patentability of the '856 Patent and Other Centripetal Patents It Has Infringed

Cisco has a direct and material interest in the outcome of this IPR, as evidenced by its pending joinder motion. *See, e.g.*, No. IPR2022-01151, Paper 3 at 9 (P.T.A.B. June 24, 2022) ("Cisco . . . has a particular interest in the substantial questions of invalidity surrounding the '856 patent."). As this panel is well aware, Cisco and Centripetal have been litigating the validity and infringement of the '856 Patent and other Centripetal patents for several years. *See* Ex. 1027 at 1-3. This litigation includes 14 IPR petitions Cisco filed in 2018, as well as a bench trial leading to a historic willful infringement damages award based on Cisco's egregious and pervasive copying of Centripetal's patented technology. *Id.* at 1-2, 149-51, 161-62, 166. The Federal Circuit vacated that judgment based solely on its determination that the district court judge should have recused himself upon discovering that his wife owned approximately $4,500 of Cisco stock, despite his prompt disclosure to

the parties, his attempt to divest that interest by placing it in a blind trust, and despite the fact that his decision adversely affected Cisco. Ex. 1050 at 3-7, 27. The Supreme Court recently denied certiorari.

Meanwhile, apparently seizing on a perceived vulnerability, Palo Alto Networks, Inc. ("PAN") filed a petition for IPR of the '856 Patent, which this panel instituted, and which otherwise time-barred parties Cisco and Keysight have petitioned to join. *See generally* IPR2022-01151; IPR2022-01199. As evidenced by the now-vacated district court judgment, Cisco's attempts to escape liability for willfully infringing Centripetal's patents—including the '856 Patent at issue in this IPR—involve billions of dollars of liability. Ex. 1027 at 149-51, 161-66.

B. APJ McNamara Has Adjudicated Patents Asserted Against Cisco in Litigation Despite Owning Cisco Stock

At least one of the APJs who decided to institute this IPR likely owns stock in Cisco, which is a direct beneficiary of PAN's challenge to the '856 Patent and a potential party, subject to its pending joinder motion. According to his annual public financial disclosures from at least 2015 through 2020, APJ McNamara owned between $1,001 and $15,000 of Cisco stock. *See* Exs. 2030-2035. Based on these contemporaneous disclosures, APJ McNamara has already knowingly decided numerous IPRs involving Centripetal and Cisco while owning Cisco stock. Indeed, he sat on every single panel deciding the 14 petitions Cisco filed in 2018, and he personally authored several institution and final written decisions. *See* Exs. 2030-2035; Ex. 2029 (Affidavit of Paul Andre, filed herewith) at ¶¶ 2, 4.

C. APJ McNamara Has Adjudicated Patents Asserted Against Cisco in Litigation Despite Receiving Payments from Cisco's Law Firm

In addition to owning Cisco stock, APJ McNamara's 2015-2020 financial disclosures also reveal that he continued to receive an annual share of profits from the law firm Foley & Lardner LLP. Ex. 2031 at 6, Ex. 2033 at 7 (disclosing "[c]ontinued participation in earnings of firm as retired partner" with amounts varying each year and ranging from $30,000 to $60,000); Exs. 2030-2035 (similar); Ex. 2029 at ¶ 3. Indeed, the Foley firm still featured APJ McNamara on its website until June of this year. Ex. 2036. The firm represents Cisco in lobbying efforts and has received fees from Cisco. *See* Ex. 2037 at 15-16, Exs. 2038-2041; Ex. 2029 at ¶ 6. The Foley firm recently listed Cisco as "its most lucrative contract." Ex. 2037 at 15.

D. APJ McNamara's Institution Decision Statistics At Least Give the Appearance of Actual Bias

APJ McNamara was empaneled in each of the 14 IPR cases that Cisco filed in 2018 against Centripetal's patents. Ex. 2029 at ¶ 4. The Board instituted trial in 9 of those cases, resulting in an institution rate of 64.2%. That institution rate is roughly consistent with the Board's overall institution rate in the relevant timeframe. Ex. 2029 at ¶ 7; *see also* Ex. 2043 at 6; Ex. 2044 at 6.

The institution decisions statistics following Centripetal's historic judgment against Cisco tell a different story. Of the 18 Petitions filed following the judgment

in 2020, APJ McNamara was empaneled on 8, of which 7 were instituted,[1] resulting in an **87.5%** institution rate. Of the 10 cases decided without APJ McNamara, only 2 were instituted, for an institution rate of **20%**. Ex. 2029 at ¶ 7. The discrepancy between the post-judgment institution rates for panels with and without APJ McNamara—those decided after the extent of Cisco's liability was established—raises at least an appearance of actual bias.

III. ARGUMENT

A. Due Process Requires Recusal from Proceedings in Which a Judge Holds a Financial Interest in the Outcome

It should be beyond debate that a judge with a financial interest that will be impacted materially by the outcome of the case must recuse, particularly if he has made no attempt to mitigate the conflict. *See, e.g.*, *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("[T]hose with substantial pecuniary interest in legal proceedings should not adjudicate these disputes."); *Tumey v. State of Ohio*, 273 U.S. 510, 522 (1927) (affirming the longstanding "general rule" that "officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided") (citations omitted). Indeed, deciding such a case would not comport with the

[1] The only post-judgment IPR petition denied institution by an APJ McNamara panel involved a second petition for a patent that was denied institution pre-judgment and, confirmed patentable in distric court, and confirmed patentable in a subsequent *ex parte* reexamination post judgement. That patent had sustained three validity challenges before its petition to APJ McNamara on the same prior art and arguments.

constitutional guarantee of due process. After all, "a patent is a property right protected by the Due Process Clause," and "[t]he indispensable ingredients of due process are notice and an opportunity to be heard by a disinterested decision-maker." *Abbott Lab'ys v. Cordis Corp.*, 710 F.3d 1318, 1327-28 (Fed. Cir. 2013) (citations omitted). This requirement "preserves both the appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980).

The basic promise of "a fair trial in a fair tribunal" means that "no man is permitted to try cases where he has an interest in the outcome." *In re Murchison*, 349 U.S. 133, 136 (1955). And it is well-established that this rule also applies to administrative agencies, *NEC Corp. v. United States*, 151 F.3d 1361, 1371 (Fed. Cir. 1998) (citing *Gibson*, 411 U.S. at 579), which—pursuant to the Administrative Procedures Act (APA)—must conduct proceedings in an impartial manner. 5 U.S.C. § 556(b); *Hamilton Beach Brands, Inc. v. f'real Foods, LLC*, 908 F.3d 1328, 1338 (Fed. Cir. 2018) (noting that "IPRs are subject to the APA") (citation omitted).

Due process requires recusal here because decisions in the proceeding will directly impact Cisco, and APJ McNamara's stock ownership and partnership profits represent "a direct, personal, substantial pecuniary interest" in Cisco. *Tumey*, 273 U.S. at 523. The patent at issue is part of a case that Centripetal brought against Cisco. In fact, the only party Centripetal has accused of infringing this patent is Cisco. Centripetal did not assert this patent against PAN, the named petitioner. Indeed, Cisco itself understands that it will be impacted by this IPR and recently

petitioned to join it. *See* No. IPR2022-01151, Paper 3. The Board and the APJs on this panel know about this case. *Id.*, Paper 2 at 14-15 (Petition disclosure of related matters). Cisco, PAN, and the panel all understand that invalidating the '856 Patent would have tremendous benefits to Cisco in district court as it seeks to escape liability for willfully infringing Centripetal's patents.

B. The Appearance of Impartial Justice and Executive-Branch Ethics Regulations Require Recusal

Although the post-judgment institution rates for panels with and without APJ McNamara raise at least an inference of actual bias, Centripetal need not prove actual bias to request recusal. "[A]ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 150 (1968). Because avoiding the appearance of bias is fundamental to maintaining public confidence in the rule of law, due process "requires the appearance of fairness and the absence of a probability of outside influences on the adjudicator; it does not require proof of actual partiality." *Utica Packing Co. v. Block*, 781 F.2d 71, 77 (6th Cir. 1986). And for that reason, it "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (citation omitted).

Regulations promulgated by the U.S. Office of Government Ethics (OGE) confirm and codify this principle, requiring executive branch employees to "avoid losing impartiality or appearing to lose impartiality in carrying out official duties."

5 C.F.R. § 2638.102. More specifically, "an employee shall not participate in a particular matter involving specific parties" if "the financial interest of a member of the employee's household . . . is likely to raise a question in the mind of a reasonable person about his impartiality." 5 C.F.R. § 2635.502(e). For that reason, an employee is required to seek counsel when a matter "is likely to have a direct and predictable effect on [his] financial interest," and "the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter." 5 C.F.R. § 2635.502(a). The facts here raise exactly this question.

C. The Conflicts Here Pose Far Greater Threats to Impartial Justice Than the Allegedly Uncured Conflict Involving the Same Stock and the Same Patent That Nullified the Judgment Against Cisco

The Federal Circuit vacated a district court's adjudication of the '856 Patent based on the judge's allegedly improper attempt to divest his wife's ownership of a few thousand dollars of Cisco stock, finding it "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 holding that "vacatur is essential to preserve public confidence." *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025, 1039 (Fed. Cir. 2022). The Federal Circuit relied on a statute requiring a judge to "disqualify himself . . . [if h]e knows that he . . . has a financial interest in the subject matter in controversy or in a party to the proceeding," 28 U.S.C. § 455(b)(4), and defining a "financial interest" to include "ownership of a legal or equitable interest, however small," 28 U.S.C. § 455(d)(4). *Centripetal*, 38 F.4th at 1032.

The concerns underpinning that statute apply with no less force in the administrative adjudication context. *See Gibson*, 411 U.S. at 579 (noting that it has "come to be the prevailing view that most of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators") (internal quotations and citation omitted). "Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication" due to the lack of procedural safeguards. *N.L.R.B. v. Phelps*, 136 F.2d 562, 563 (5th Cir. 1943). After all, "there must be confidence in objective adjudication in any contested proceeding that is entrusted to government," and "[a]n administrative agency performing adjudicative functions is no less subject to these concerns." *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146, 1164 (Fed. Cir. 2021) (Newman, J., concurring in part, dissenting in part).

It is no surprise, then, that several agencies prohibit *any* financial conflicts. For example, the Department of Agriculture prohibits judges from presiding if they have "any pecuniary interest in any matter or business involved in the proceeding." 7 C.F.R. § 1.144(a). Other examples include the Department of Health and Human Services, *see* 42 C.F.R. § 405.1817, and the Social Security Administration, 20 C.F.R. § 416.1440 ("An administrative law judge shall not conduct a hearing if he or she . . . has any interest in the matter pending for decision.").

The Board should hold APJs to the same ethical standard. There is no compelling public policy interest in permitting financially conflicted judges to decide patent trials. At minimum, APJs should not be permitted to decide cases in

which they hold stock in a party or direct beneficiary of the proceeding. This is especially true here, where the Federal Circuit has already vacated a decision on the same patent by a district judge because his wife held stock in Cisco, even though he promptly disclosed to the parties and placed the stock in a blind trust. It just cannot be that APJ McNamara is now permitted to decide the validity of this same patent while directly holding Cisco stock. His participation in this IPR poses even greater risks of undermining the public's confidence in the fairness and impartiality of the Board and the IPR process. *See Mobility Workx*, 15 F.4th at 1162 (Newman, J., concurring in part, dissenting in part) ("The appearance of bias is as important as actual bias, for confidence in the objectivity of adjudication is critical to a nation ruled by law.").

Indeed, APJ McNamara's conflicts are far more egregious. The district court judge did not discover his wife's interest until late in the case, and when he learned of it, he immediately attempted to divest; the case turned on whether a blind trust was an adequate divestment vehicle. *See Centripetal*, 38 F.4th 1030-31. That is nothing like the situation here, where—to Centripetal's knowledge—APJ McNamara knew of his stock interest for years, failed to inform the parties, made no attempt to divest or recuse, and has issued decisions highly favorable to Cisco—including the institution decision in the present case. Permitting this IPR to go forward with the same judges against this backdrop would prejudice Centripetal and needlessly subject the Board to significant, warranted criticism.

D. Regulatory Exemptions Providing Safe Harbor from Criminal Liability Are Not the Measure of Impartial Justice

APJ McNamara has previously defended his ability to decide cases in which he owns up to $15,000 of stock in a party based on a regulatory exemption promulgated by OGE. *See SAP Am., Inc. v. Arunachalam*, No. IPR2014-00413, Paper 26 at 5-6 (P.T.A.B. Aug. 17, 2015). That regulation provides a safe harbor from criminal liability under 18 U.S.C. § 208 for executive branch employees when a "disqualifying financial interest arises from the ownership" of securities that are "publicly traded," so long as the "aggregate market value of the holdings . . . does not exceed $15,000." 5 C.F.R. § 2640.202. That regulation provides no basis to decline recusal in this case.

The fact that a judge is potentially immune from criminal prosecution should not serve as the benchmark for an impartial proceeding. After all, "OGE rules apply to all federal employees and thus may be interpreted and applied in ways that would not be best suited to fostering fair and legitimate agency adjudication." Louis J. Virelli III, *Recusal in Administrative Adjudication*, 64 Ariz. L. Rev. 135, 155 (2022). The Board should not tolerate decisions by judges with pecuniary interests in the proceeding, which are prohibited by the constitutional guarantee of due process and the appearance of partiality regulations discussed above. Indeed, the OGE regulations make clear that the "appearance" prohibition may extend to situations where the employee's participation "would not violate 18 U.S.C. § 208(a), but would raise a question in the mind of a reasonable person about his impartiality." 5 C.F.R. § 2635.502(d).

E. Preserving Confidence in Impartial Justice Requires Recusing the Entire Panel and Vacating the Institution Decision

For all of the foregoing reasons, APJ McNamara should not participate in this IPR. His prior financial disclosures evidence his knowledge of the Cisco conflict, and his participation in this proceeding and other IPRs directly and materially impacting Cisco—and thus his financial interest in Cisco—would at minimum lead a reasonable person to question his impartiality.

Unfortunately, these conflicts also cast a shadow over the entire panel of judges in this IPR. "The participation of a judge who has a substantial interest in the outcome of a case of which he knows at the time he participates necessarily imports a bias into the deliberative process. This deprives litigants of the assurance of impartiality that is the fundamental requirement of due process." *Aetna*, 475 U.S. at 831 (Brennan, J., concurring). The institution decision in this IPR—likely the latest in a long string of decisions affecting Cisco by APJ McNamara while owning Cisco stock and sharing in Foley's partnership profits—was made jointly by the panel of judges who likely "exchanged ideas and arguments in deciding the case" in the course of "the collective process of deliberation which shapes the [Board's] perceptions of which issues must be addressed and, more importantly, how they must be addressed." *Id.*

If the institution decision statistics following the Cisco judgment do not prove that bias tainted the deliberative process, they also provide no comfort. After the extent of Cisco's liability for its "willful and egregious" infringement of Centripetal's patents became known, panels including APJ McNamara instituted

trial in 7 of the 8 cases that have reached institution decisions while panels without APJ McNamara instituted trial in only 2 of 10 cases to reach that stage. Ex. 2029 at ¶ 7. And the lone case denied institution by a panel including APJ McNamara since the Cisco verdict hardly could have been decided otherwise. *See Palo Alto Networks, Inc. v. Centripetal Networks, Inc.*, No. IPR2021-01520, Paper 23 at 25-27 (P.T.A.B. Mar. 22, 2022) (denying institution under 35 U.S.C. § 325(d) where Petitioner raised the same prior art and arguments already rejected in an earlier IPR and reexamination while "neither acknowledg[ing] the reexamination proceeding nor attempt[ing] to demonstrate any error—much less any material error—by the Office"). APJ McNamara did not draft the Decision Denying Institution of *Inter Partes* Review. *Id.* at 1. As the recently released GAO report indicated, APJs often "feel[] pressure from fellow judges on their panel . . . not to file a dissent or concurrence" and "relent to the other panel members at times to prevent potentially poor ratings from their peers in their performance review." Ex. 2042 at 35.

Further, when faced with "a due process violation arising from the participation of an interested judge," the Supreme Court has held that it does not matter "whether the judge's vote was dispositive," and that "it is neither possible nor productive to inquire whether the jurist in question might have influenced the views of his or her colleagues during the decisionmaking process." *Williams v. Pennsylvania*, 579 U.S. 1, 14-15 (2016) (citation omitted). In *Williams*, because the Supreme Court vacated a decision of the full Pennsylvania Supreme Court, it had no choice to remand to a different "panel" of judges. *Id.* at 16. The Court noted that a rehearing by those same judges fell short of a "complete relief for [the] constitutional

violation" because "judges who were exposed to a disqualified judge may still be influenced by their colleague's views when they rehear the case." *Id.* The Court nonetheless remanded the case to the same judges (minus the interested judge, who in any event had retired), because the "inability to guarantee complete relief . . . does not justify withholding a remedy altogether." *Id.* at 7, 16. Here, by contrast, "complete relief" is available because there are well over 200 APJs who have not participated in this proceeding.

Merely assigning the final written decision to a different panel, however, would not remedy the due process violation. The institution decision has already been made, and it is substantive. If not vacated, the tainted institution decision will remain of record and necessarily inform any replacement panel's consideration of the case. Even for an institution decision, Centripetal "is entitled to a neutral and detached judge in the first instance." *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 61-62 (1972) (holding that a state trial court procedure could not "be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication"). An instituted IPR requires Centripetal to litigate the matter for a full year and face an 80% likelihood that at least some claims will be invalidated. *See* Peter J. Cuomo et al., *Avoiding IPR Institution: Your Best Defense to an IPR Challenge* (Oct. 27, 2020), https://www.mintz.com/insights-center/viewpoints/2231/2020-10-27-avoiding-ipr-institution-your-best-defense-ipr-challenge. To protect Centripetal's constitutional rights and restore confidence in the IPR process, the institution decision should be vacated and the entire panel recused.

IV. CONCLUSION

In exercising its congressional mandate to provide an alternative to district court litigation, the Board "must not have its guarantee of neutrality undermined, for the appearance of bias demeans the reputation and integrity not just of one jurist, but of the larger institution of which he or she is a part." *Williams*, 579 U.S. at 15. Congress simply could not have intended "to authorize litigants to submit their cases and controversies to [a Board] that might reasonably be thought biased against one litigant and favorable to another." *Commonwealth Coatings*, 393 U.S. at 150. Even less egregious versions of the conflict here would not be permitted—and indeed were not permitted—in an Article III court adjudicating the validity of the same patent. Due process, consistency with proceedings in Article III courts on this very patent, OGE regulations, and the credibility of the Board require vacatur.

Respectfully submitted,

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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.

Date of service	December 30, 2022
Manner of service	Electronic Filing with the Board
Documents served	PATENT OWNER'S MOTION FOR RECUSAL AND VACATUR
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