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Paper 55
Date: February 3, 2023

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 for Recusal and Vacatur and Denying, in Part, Patent Owner's Motions for Rehearing
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

This Decision addresses Patent Owner's Motion for Recusal and Vacatur and, to the extent the issues overlap, Patent Owner's Requests for Rehearing of the decisions instituting and joining the Petitions filed in IPR2022-01151 and IPR2022-01199.

For the reasons detailed below, we find that the conduct of which Patent Owner complains (a) was fully compliant with the applicable ethical regulations, and (b) does not give rise to due process concerns. We further find no evidence of "actual bias" on the part of APJ McNamara, that there is no "inconsistency" between our result and the Federal Circuit's decision in the *Cisco* case, and that Patent Owner failed to timely raise the issues.

Patent Owner's Motion for Recusal and Vacatur is accordingly denied. Patent Owner's Requests for Rehearing of the decisions instituting and joining the Petitions filed in IPR2022-01151 and IPR2022-01199 are denied to the extent they are based on the alleged conflict.

II. BACKGROUND

A. This Proceeding

On November 18, 2021, Palo Alto Networks, Inc. ("Petitioner") filed a Petition requesting *inter partes* review of claims 1, 24, and 25 of U.S. Patent No. 9,917,856 B2 (Exhibit 1001, "the '856 patent"). *See* Paper 2. The Petition alleged that the subject claims were unpatentable over United States patents previously issued to Buruganahalli and Baehr, which had not been considered by the Office when examining the claims of the '856 patent. *See id.* at 7, 9. Centripetal Networks, LLC ("Patent Owner") filed a Preliminary Response, Petitioner filed a Preliminary Reply, and Patent Owner filed a Preliminary Sur-reply. *See* Papers 6, 9, 10.

On May 25, 2022, the panel determined, in a ninety-page decision, that Petitioner had shown a reasonable likelihood of proving claims 1, 24, and 25 unpatentable under § 103, and instituted an *inter partes* review. *See* Paper 11 ("Institution Decision"). However, the panel explained that the decision was not "a final determination about the patentability of any challenged claim, the construction of any claim term, phrase, or limitation, or any other legal or factual issue." *Id.* at 90.

On June 8, 2022, Patent Owner requested rehearing of the Institution Decision, arguing that the Board misapprehended or overlooked various matters. *See* Paper 13 ("First Rehearing Request"). In that request, Patent Owner asked the Precedential Opinion Panel ("POP") to consider whether the Board should "entertain IPR petitions that collaterally attack a district court judgment when the totality of the circumstances indicates that the petition was filed to harass the patent owner." *Id.* at 1; *see* Ex. 3005.

On December 6, 2022, the POP denied the request for POP review, advising that "the original panel maintains authority over all matters, including considering the submitted rehearing request." Paper 31, 2.

On Friday, December 30, 2022, Patent Owner filed a Motion for Recusal and Vacatur (Paper 37, "Recusal Motion"), seeking recusal of the panel that issued the Institution Decision and an order vacating the Institution Decision.[2]

[2] The Recusal Motion was filed without authorization. It was also signed by an attorney, Paul Andre, who is neither registered to practice before the Office nor admitted *pro hac vice*. We allowed the briefing due to the gravity of the allegations, but Patent Owner is advised that future filings that are not in compliance with our rules will be expunged, and that relief sought by way of such filings may be denied, with prejudice, for non-compliance. A

On Wednesday, January 4, 2023, the second business day after the filing of the recusal motion, the panel issued an order denying the First Rehearing Request and decisions instituting and joining follow-on petitions in IPR2022-01151, filed by Cisco Systems, Inc., and IPR2022-01199, filed by Keysight Technologies, Inc. *See* Paper 40, 14 ("Rehearing Denial"); Papers 39 and 41 ("Joinder Decisions").

On January 5, 2023, APJ McNamara withdrew from the case "[i]n order to reduce the number of issues and simplify the briefing" and, on January 18, 2023, APJ Amundson also withdrew, identifying similar reasons. *See* Papers 43 and 47.

Also, on January 18, 2023, but after APJ Amundson's withdrawal, Patent Owner filed Requests for Rehearing of the Joinder Decisions. *See* Papers 48 and 48 ("Joinder Rehearing Requests").

On January 19, 2023, the Board entered a Panel Change Order, reconstituting the panel to include the undersigned and APJs Michelle N. Wormmeester and Nabeel U. Khan.

The Recusal Motion is now fully briefed, *see* Paper 46 ("Recusal Opposition"), Paper 54 ("Recusal Reply"), and the Hearing in this matter is scheduled for February 15, 2023. *See* Paper 53.

B. The Cisco Litigation

In February of 2018, Patent Owner filed a complaint against Cisco Systems, Inc. ("Cisco") in the Eastern District of Virginia ("the *Cisco* case") alleging infringement of a number of patents, including the '856 patent. *See*

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motion for admission of Mr. Andre has since been filed and a decision will issue in due course.

Ex. 1027, 1–2. In May and June of 2020, Judge Henry C. Morgan, Jr. conducted a bench trial in which Patent Owner asserted infringement of ten claims in five patents, including ’856 patent claims 24 and 25. *See id.*[3]

In October of 2020, Judge Morgan issued an opinion with findings of fact and conclusions of law. *See* Ex. 1027. He found that Cisco had infringed claims in four of the five patents, including the ’856 patent, determined that Cisco failed to prove the patents invalid,[4] and awarded Patent Owner damages and interest of approximately $1.9B, plus royalties for six years. *See Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 492 F. Supp. 3d 495, 604–608 (E.D. Va. 2020). Cisco appealed. *See* Ex. 1028.

The Federal Circuit did not reach the merits of the case; instead, on June 23, 2022, it vacated the judgment because it found that Judge Morgan was disqualified due to his wife’s ownership of Cisco stock. *See Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025, 1027 (Fed. Cir. 2022). Patent Owner petitioned for a writ of certiorari, and the petition was denied on December 5, 2022. *See Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 143 S. Ct. 487 (2022).

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[3] Specifically, Centripetal asserted infringement of claims 63 and 77 of U.S. Patent No. 9,137,205, claims 9 and 17 of U.S. Patent No. 9,203,806, claims 11 and 21 of U.S. Patent No. 9,560,176, claims 18 and 19 of U.S. Patent No. 9,686,193, and claims 24 and 25 of the ’856 Patent. *See* Ex. 1027, 2.

[4] The validity defense presented by Cisco for the ’856 patent at trial was that the accused products were in the prior art. *See* Ex. 1027, 60 (“Dr. Schmidt, in his invalidity testimony, assumed the infringement analysis by Dr. Cole and opined that all of the same functionality that Dr. Cole relies on for infringement was in the accused products prior to the priority date of the ’856 Patent.”).

The Federal Circuit decision turned on 28 U.S.C. § 455(b), which requires that an Article III judge "shall . . . disqualify himself" if "he knows that he . . . or his spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome." 28 U.S.C. § 455(f) allows a judge who only learns of a conflict "after substantial judicial time has been devoted to the matter" to avoid disqualification by "divest[ing] himself or herself of the interest that provides the grounds for the disqualification."

While he was drafting his decision, Judge Morgan learned that his wife owned Cisco stock. *See* 38 F.4th at 1028. He promptly disclosed that to the parties and placed the stock in a blind trust, evidently believing that to be divestiture under § 455(f) that would avoid disqualification. *See id.* The Federal Circuit, however, determined that placing the stock in a blind trust was insufficient, because "divestiture" requires one to relinquish ownership, which did not happen with a blind trust. *See* 38 F.4th 1031–1033. As a result, Judge Morgan was disqualified. *See id.* at 1033. The Court further determined that the trial decision had to be vacated because the disqualification was not harmless error. *See id.* at 1034–1039.

III. ANALYSIS

Patent Owner contends that APJ McNamara's ownership of a small amount of Cisco stock and receipt of payments from Foley & Larder LLP are conflicts that violate the applicable regulations and create a due process problem, requiring recusal of the entire panel and that the original and joinder institution decisions be vacated. We do not agree.

A. Motion for Recusal and Vacatur

According to Patent Owner, APJ McNamara "has owned Cisco stock and also has been paid a significant amount of money . . . from one of Cisco's lobbyist law firms while he was deciding IPR petitions against patents that Centripetal has asserted against Cisco in litigation" and that "[d]ue 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]—a willful infringer with potentially billions of dollars hinging on the result of this IPR proceeding." Recusal Motion 1.[5]

Patent Owner argues that the alleged conflicts "cannot be reconciled with Federal Circuit precedent," as "[t]he 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." Recusal Motion 1 (emphasis omitted). According to Patent Owner, "[i]t 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." *Id.*

Patent Owner further argues that "[w]ildly different institution rates for Centripetal's patents following the Cisco judgment between panels

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[5] Given that Judge Morgan's decision has been vacated, it does not appear that Cisco is, for now at least, accurately described as a "willful infringer."

including APJ McNamara (87.5%) and those without him (20%) raise the unfortunate specter of actual bias and contamination of the deliberative process." Recusal Motion 2; *see id.* at 4–5.

Patent Owner concludes that "[t]he entire [original] panel is now tainted with APJ McNamara's conflict" and "should be recused," and that "the decision to institute should be vacated." Recusal Motion 2.

Executive Branch Ethical Standards

Administrative Patent Judges are governed by the Standards of Ethical Conduct for Employees of the Executive Branch (the "Executive Branch Ethical Standards"), codified beginning at 5 C.F.R. § 2635. Employees of the executive branch must "endeavor to avoid any actions creating the appearance that they are violating the law or the ethical standards," where "[w]hether 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." 5 C.F.R. § 2635.101(b)(14).[6]

Under 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 [their] knowledge, [they] or any person whose interests are imputed to [them] . . . has a financial interest, if the particular matter will have a direct and predictable effect on that interest." A matter will not have a "direct effect" if "the chain of causation is attenuated or is contingent upon the occurrence of events that are

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[6] Notably, APJs are entitled to a "presumption of honesty and integrity." *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1030 (Fed. Cir. 2016) (rejecting allegations of improper bias against the Board).

speculative or that are independent of, and unrelated to, the matter" and there must be "a real, as opposed to a speculative possibility that the matter will affect the financial interest." 5 C.F.R. § 2635.402(b)(1)(i–ii).[7]

Pursuant to the authority granted in 18 U.S.C. § 208(b)(2), the Office of Government Ethics ("OGE") has issued specific "de minimis exemptions" to the rules regarding disqualifying financial interests. OGE issued those exemptions, which are codified at 5 C.F.R. § 2640, "based on its determination that particular interests are too remote or too inconsequential to affect the integrity of the services of employees to whom those exemptions apply." 5 C.F.R. § 2635.402(d)(1).

Section 2640.202(a) provides that "[a]n employee may participate in any particular matter involving specific parties in which the disqualifying financial interest arises from the ownership by the employee, his spouse or minor children of securities issued by one or more entities affected by the matter, if . . . (1) [t]he securities are publicly traded . . . and (2) [t]he aggregate market value of the holdings of the employee, his spouse, and his minor children in the securities of all entities does not exceed $15,000." That section provides the following example:

> An employee owns 100 shares of publicly traded stock valued at $3,000 in XYZ Corporation. As part of his official duties, the employee is evaluating bids for performing computer maintenance services at his agency and discovers that XYZ Corporation is one of the companies that has submitted a bid.

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[7] 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.

> The employee is not required to recuse himself from continuing to evaluate the bids.

5 C.F.R. § 2640.202(a).

Section 2640.202(b) provides a corresponding exemption for situations in which the "securities [were] issued by one or more entities that are not parties to the matter but that are affected by the matter," where the threshold is raised to $25,000 for a single affected entity or $50,000 for all entities. A similar example is provided:

> A Food and Drug Administration advisory committee is asked to review a new drug application from Alpha Drug Co. for a new lung cancer drug. A member of the advisory committee owns $20,000 worth of stock in Mega Drug Co., which manufactures the only similar lung cancer drug on the market. If approved, the Alpha Drug Co.'s drug would directly compete with the drug sold by the Mega Drug Co., resulting in decreased sales of its lung cancer drug. The committee member may participate in the review of the new drug.

5 C.F.R. § 2640.202(b).

Section 2640.202(a), including the first example above, was originally issued in 1996, following notice and comment rulemaking, although the threshold was $5,000. *See Interpretation, Exemptions and Waiver Guidance Concerning 18 U.S.C. 208*, 61 FR 66841 (Dec. 18, 1996). The rules were updated in 2002, again following the notice and comment procedure, raising the 2640.202(a) threshold to $15,000 and adding Section 2640.202(b). *See Exemption Amendments Under 18 U.S.C. 208(b)(2)*, 67 FR 12443 (March 19, 2002).

Importantly, these exemptions were developed by a body that not only had expertise in ethics, but also was completely impartial and, of course, was unaware of Cisco, Patent Owner, Petitioner, or the '856 patent.[8]

As noted above, Patent Owner argues that APJ McNamara should be disqualified because (a) he owns Cisco stock in an amount between $1,001 and $15,000 and (b) he receives "an annual share of profits from the law firm Foley & Lardner LLP" which "represents Cisco in lobbying efforts and has received fees from Cisco." Recusal Motion 3–4.

Regarding the stock, Cisco was not a party to this proceeding at the time of the Institution Decision, and the value of the holdings falls well below the $25,000 threshold that § 2640.202(b) applies to matters affecting nonparties, and even below the threshold for parties. The Cisco stock is plainly not disqualifying under the rules.

The Foley & Lardner payments are also not a prohibited financial interest. Patent Owner's argument, as we understand it, is that because APJ McNamara receives retirement income from Foley, he would be inclined to favor Cisco because Cisco is a client that pays Foley for legal work. This argument has numerous fatal flaws.

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[8] Patent Owner's argument that the ethical regulations are simply about avoiding criminal prosecution (*see* Recusal Motion 11) is incorrect. The Executive Branch Ethical Standards are consistent with, but exist separately and apart from the criminal statutes, providing a more comprehensive framework "[t]o ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section." 5 C.F.R. § 2635.101(a); *see id.* § 2635.101(c) (explaining that "there are conflict of interest statutes that prohibit certain conduct" "[i]n addition to the standards of ethical conduct").

First, there is nothing in the record to suggest that APJ McNamara was aware that Cisco was a Foley client, and knowledge is required for disqualification. *See* 5 C.F.R. § 2635.402 ("to his *knowledge*, he or any person whose interests are imputed to him . . . has a financial interest"). APJ McNamara certainly cannot have favored Cisco because it was a Foley client if he did not know Cisco was a Foley client.[9]

Second, there is simply nothing, at all, to suggest that the retirement payments were dependent on the firm's receipts from Cisco, which means that there is no evidence of a possible "direct effect" on a financial interest. *See* 5 C.F.R. § 2635.402(b)(1)(i) (explaining that a matter will not have a "direct effect" on a financial interest if "the chain of causation is attenuated or is contingent upon the occurrence of events that are speculative or that are independent of, and unrelated to, the matter").

Finally, there is nothing to suggest that a decision about the validity of a patent being asserted against Cisco would have any effect on the amount of work Foley was doing for Cisco, particularly given that the work appears to have nothing to do with patents, or even intellectual property. Patent Owner tries to fill that hole with a claim that "[t]he Foley firm recently listed Cisco as 'its most lucrative contract.'" Recusal Motion 4. That assertion, however, is based on a misunderstanding (or misrepresentation) of Patent Owner's Exhibit 2037, which actually is limited to a survey of fees received for *executive branch lobbying* in *Florida*. *See* Ex. 2037, 1 ("Florida Politics parsed the reports submitted by firms that lobby the state government in

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[9] Because Patent Owner cites § 2635.502, we note that it also applies only where the "employee *knows* that a particular matter involving specific parties is likely to have a direct and predictable effect."

order to compile a definitive list of the state's top lobbying shops, at least in terms of revenues."). Cisco may have been Foley's "most lucrative" client in 2021 for the narrow category of executive branch lobbying in Florida, but the $100,000 that Cisco paid Foley for that work was surely insufficient to make Cisco the "most lucrative" client across Foley's many offices and practices, which generated more than $1B in revenue in 2021. *See* Paper 43, 2 n.2. Moreover, Patent Owner does not provide any explanation of how a decision regarding the validity of the '856 patent might affect Cisco's desire to have Foley assist with lobbying Florida legislators on "health services," "matters related to state procurement law and processes," and "matters related to Smart Cities transportation efforts." *See* Ex. 2039.

For these reasons, we conclude that APJ McNamara's relationship with Foley also would not be disqualifying under the regulations.

We further find that Patent Owner's argument that APJ McNamara's participation in this case ran afoul of "executive-branch ethics regulations" (Recusal Motion 1, 7–8) is frivolous. Patent Owner was aware of the exemptions,[10] 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, as explained above.[11]

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[10] *See* Ex. 1054, 9 (Patent Owner acknowledging the "the relaxed stock-ownership rules APJs appear to enjoy under 5 C.F.R. §2640.202(a)").

[11] Patent Owner's argument that APJ McNamara was biased in favor of Cisco is also undercut by its "actual bias" argument, discussed below, in which Patent Owner acknowledges that the institution rate on the 2018 Cisco petitions by panels including APJ McNamara was "roughly consistent with the Board's overall institution rate in the relevant timeframe." Recusal Motion 4.

That these arguments are so lacking in substance is especially concerning given their aim, as "[t]he assertion that a judge improperly participated in a case from which he or she should have recused constitutes a charge most grave." *Maier v. Orr*, 758 F.2d 1578, 1583–84 (1985). The Federal Circuit has made clear that counsel should not seek disqualification "precipitously or recklessly, nor on unsupported rumor, conjecture, and speculation" because "[t]o do so is to trifle with the court and the administration of justice." *Id.*; *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 827–28 (1986) ("Charges of disqualification should not be made lightly."). Patent Owner is advised that further baseless arguments directed at the Board, its members, or its process may be met with sanctions.

Due Process: Cisco

Patent Owner argues that "[i]t 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," citing *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973), to the effect that "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes." Recusal Motion 5. Patent Owner argues that "[d]ue 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." *Id.* at 6 (quoting *Tumey v. State of Ohio*, 273 U.S. 510, 522 (1927)).

We certainly agree that Patent Owner, like any other party that appears before the Board, is entitled to due process, the essential ingredients of which are notice and an opportunity to be heard by a disinterested decision-maker. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876–81 (2009). But we do not agree that the ethical regulations under which the executive branch has operated since 1996 are inconsistent with due process.

The passage Patent Owner quotes from *Gibson v. Berryhill* states "those with ***substantial*** pecuniary interest in legal proceedings should not adjudicate these disputes." *Gibson*, 411 U.S. at 579 (emphasis added); *see also id.* (affirming that a board of optometrists had a pecuniary interest of "sufficient substance" that it could not preside over a hearing against competing optometrist). Similarly, Patent Owner's quotation from *Tumey v. State of Ohio* identifies as problematic "a direct, personal, ***substantial*** pecuniary interest." *Tumey*, 273 U.S. at 523 (emphasis added).

These cases identified by Patent Owner thus tell us that not *every* financial interest demands recusal; instead, recusal is required where the financial interest is *substantial*. *See also Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 59 (1972) (finding a due process violation where the revenue produced from the mayor's court provided "a substantial portion of a municipality's funds"); *Aetna*, 475 U.S. at 825–827 (finding "no basis" to conclude that certain justices were disqualified even though they "might conceivably have had a slight pecuniary interest").

Determining whether an interest might qualify as "substantial" can be difficult because the term is inherently subjective and highly dependent on the facts of a particular situation. *See Aetna*, 475 U.S. at 822 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955), to the effect that what degree or kind of interest is sufficient to disqualify "cannot be defined with precision"). In this instance, however, we find that we already have an answer sufficient to dispose of Patent Owner's arguments.

As described above, the Office of Governmental Ethics, an impartial body with particular expertise in this area, promulgated the "de minimus exemptions" for securities in 1996, and then revised them in 2002. This was done at the direction of Congress, and after soliciting public input. Critically, the rules themselves tell us that OGE developed the exemptions "*based on its determination that particular interests are too remote or too inconsequential to affect the integrity of the services of employees* to whom those exemptions apply." 5 C.F.R. § 2635.402(d)(1) (emphasis added).

We conclude that the "remote" and "inconsequential" interests falling within the "de minimis exemptions" of Section 2640.202 are *not* "substantial" interests that would give rise to the types of due process concerns raised in the Recusal Motion.[12] That conclusion is buttressed by the fact that the dollar limits in the regulations were deemed "too remote" and "too inconsequential" in *2002*, and the passage of twenty years has only made them *more* remote and inconsequential.

Because APJ McNamara's Cisco stock holdings fall within the exemption, and because we conclude that interests within the exemptions do not give rise to due process concerns, Patent Owner's due process arguments regarding the Cisco stock fail.

We pause to point out that Patent Owner is essentially asking us to decide that the ethical framework developed by OGE at Congress' direction, and with public input, and that has been in place for the last twenty-seven

[12] We don't know, but strongly suspect, that OGE would have been aware of the relevant authorities, such as *Gibson*, *Tumey*, and *Ward*, and that the exemptions were specifically crafted to be consistent with the law.

years, across most of the Executive Branch, is unconstitutional. We decline to do that.

The Foley payments do not fall within the exemptions, but, for the reasons explained above, Patent Owner's theory about how they might have influenced decision-making has no support and is far too remote and tenuous to support a due process argument.

For these reasons, Patent Owner has not shown that the Cisco relationships give rise to a due proces violation that would require recusal of any APJ on the original panel, or vacatur of the Institution Decision.

Due Process: Alleged Actual Bias

Patent Owner also argues that a "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*." Recusal Motion 5 (emphasis added).

As an initial matter, it is unclear what "appearance of actual bias" means—the relevant inquiry looks for *either* "an appearance of bias" *or* "actual bias." *See, e.g.*, *Bixler v. Foster*, 596 F.3d 751, 762 (10th Cir. 2010) ("To demonstrate a violation of due process because of judicial bias, a claimant must show either actual bias or an appearance of bias."). However, because "a litigant is not denied due process by either the 'appearance' of partiality or by circumstances which might lead one to speculate as to a judge's impartiality," but *only* "if he is in fact treated unfairly," *Margoles v. Johns*, 660 F.2d 291, 296 (7th Cir. 1981), we will assume Patent Owner means to argue that its analysis provides evidence of *actual* bias.

The Supreme Court explained in *Aetna* that disqualification for personal bias would be constitutionally required "only in the most extreme of cases" and, as in *Aetna*, Patent Owner's arguments "fall well below that level." 475 U.S. at 821.

The mere fact that a judicial decision, or decisions, went against a party is insufficient alone to show bias. *See, e.g.*, *Bixler*, 596 F.3d at 762 ("Adverse rulings alone do not demonstrate judicial bias."). Thus, APJ McNamara's presence on panels that instituted IPRs on Patent Owner's patents, or found claims of Patent Owner's patents unpatentable, does not itself show bias against Patent Owner.

Presumably because it cannot show personal bias from the decisions themselves, Patent Owner argues, as noted above, that bias can be seen in "[t]he discrepancy between the post-judgment institution rates for panels with and without APJ McNamara." Recusal Motion 5. That argument has absolutely no basis in fact.

We first note that any "actual bias" supposedly indicated by the post-judgment cases would be against Patent Owner, not in favor of Cisco, because the record indicates that all but one of the patents in the eight post-judgment IPRs that are the subject of the higher institution rate argument have only been asserted against Petitioner, not Cisco. *See, e.g.*, IPR2021-01147, Paper 3, 1 (identifying as related only *Centripetal Networks, Inc., v. Palo Alto Networks, Inc.*, 2:21-cv-137 (E.D. Va.)).

Patent Owner has thus *pivoted* from arguing that APJ McNamara was biased *in favor of Cisco* for financial reasons to arguing that, following the *Cisco* verdict, he became biased *against Patent Owner* for some personal reason. But Patent Owner does not even try to explain *why* APJ McNamara would have a personal bias against Patent Owner. Patent Owner does not point to *any* conduct, statement, or anything else during the first set of cases, or arising in any other context, that would reflect or explain any personal animosity. As noted above, adverse decisions do not show bias.

Notably, of the five patents asserted in the *Cisco* case, three—US 9,137,205, US 9,560,176, and US 9,686,193—were the subject of 2018 IPR petitions, and panels that included APJ McNamara instituted IPRs on the '205 patent, but denied institution of IPRs on both the '176 patent and '193 patents. *See* IPR2018-01443 and -01444 ('205 patent); IPR2018-01654 and -01655 ('176 patent); IPR2018–01559 ('193 patent). That panels including APJ McNamara *declined to review* two of the patents being asserted by Patent Owner against Cisco undercuts any argument of bias against Patent Owner, or in favor of Cisco.

Were the failure to provide any explanation for the alleged personal bias not itself fatal to this argument, we find Patent Owner's "statistics" completely inadequate to show bias. Patent Owner has not shown that the sample size is large enough to be statistically significant (particularly given that two of the cases in the second group are the joinder petitions), and the petitions involved different petitioners, entirely different patents, entirely different prior art, and were prepared by different firms. This is not an apples-to-apples comparison.

Perhaps the biggest problem, however, is that Patent Owner fails to account for the fact that the pre- and post-verdict panels were very different. To promote consistency, the Board assigns related cases to "the fewest total judges as is practicable." *See* PTAB Standard Operating Procedure 1, 9. The fourteen 2018 cases were thus assigned to panels drawn from a group of six APJs. But because some of those APJs were no longer available, the panels for the 2021 and 2022 cases have been drawn from a very different group of seven APJs. Thus, even if the pre- and post-verdict Petitions were equivalent on the merits (and there is no reason to think that), the most logical explanation for a difference in institution rates (if there was a statistically significant difference, which Patent Owner has not shown) would be the influence of *new* APJs on the panels, not a sudden (and, again, completely unexplained) change of heart on the part of APJ McNamara.

Patent Owner's argument about institution rates does not even begin to approach the strict standard identified in *Aetna* for a showing of personal bias but, instead, is just another "reckless" attack based on "unsupported rumor, conjecture, and speculation." *Maier*, 758 F.2d at 1583–84.

Alleged Inconsistency Between the Federal Circuit Case and this One

Patent Owner repeatedly argues there is a serious conflict between the Federal Circuit's decision vacating the *Cisco* judgment because Judge Morgan's wife owned a small amount of Cisco stock, and APJ McNamara being a member of the panel while owning a small amount of Cisco stock. *See, e.g.*, Recusal Motion 1, 10. That is not correct.

As explained above, the Federal Circuit reversed Judge Morgan because 28 U.S.C. § 455(b) prohibits ownership of *any* stock, and the blind trust was not a sufficient divestiture under § 455(f). But 28 U.S.C. § 455(b) does not apply to the Board,[13] and Patent Owner does not argue that it does. As also explained above, the regulations that *do* apply to the Board allow

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[13] *See Chianelli v. Env't Prot. Agency*, 8 F. App'x 971, 980 (Fed. Cir. 2001) (explaining that § 455 "does not apply to . . . administrative judges").

ownership of up to $15,000 of stock in a party and up to $25,000 of stock in a non-party that may be affected by a matter handled by an APJ.

There is no "conflict[] [that] cannot be reconciled" (Recusal Motion 1) for the simple reason that the District Courts and the Board operate under different rules, and the Federal Circuit's decision did not address due process at all.[14]

Patent Owner is essentially making a policy argument, that, like Article III judges, APJs should not be permitted to own *any* stock in parties or affected entities.[15] But that is not the current policy and, critically, it was not the policy *at the time of the Institution Decision*. Patent Owner cannot reasonably or logically argue that an APJ was unethical or should have recused themselves from a panel *in the past* because the applicable standards should be different *in the future*. Under the standards that have been in place throughout this proceeding, there is no colorable argument for recusal.

Patent Owner's Unexplained Delay

Patent Owner admittedly became aware of the facts underlying its conflict arguments at least as early as *September 29, 2022*. *See* Ex. 2029 (Andre Affidavit) ¶ 2. Patent Owner then sat on that information for more than *three months*.

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[14] Notably, the standard for disqualification under the Due Process Clause is *less demanding* than that imposed by § 455, because § 455 "requires disqualification when others would have reasonable cause to question the judge's impartiality," but "[t]he Due Process Clause requires a judge to step aside [only] when a reasonable judge would find it necessary to do so." *U.S. v. Couch*, 896 F.2d 78, 82 (1990) (citing *Aetna*, 475 U.S. at 822).

[15] As noted above, Patent Owner is fully aware of the current policy. *See* Ex. 1054, 9 (acknowledging "the relaxed stock-ownership rules APJs appear to enjoy under 5 C.F.R. §2640.202(a)").

The extended delay, during which the panel was working on the rehearing request decision and the decisions on the joinder petitions, strongly suggests that Patent Owner was waiting to see if the original panel would issue a favorable decision on the reconsideration motion or, as Petitioner argues, that Patent Owner was waiting to see if it might receive a favorable decision from the Supreme Court. *See* Recusal Opposition 7. But no matter which it was, it was highly inappropriate, because a matter as serious as a conflict requiring recusal of multiple APJs should have been raised *immediately*, not held for strategic reasons.

We find that, even if there had been a conflict at institution, Patent Owner's unjustified delay in raising the issue would bar the relief now being sought, because "[t]imeliness is an essential element of a recusal motion." *U.S. v. Owens*, 902 F.2d 1154, 1155 (4th Cir. 1990); *see In re United Shoe Machinery Corp.*, 276 F.2d 77, 79 (1st Cir. 1960) ("One of the reasons for requiring promptness in filing [recusal motions] is that a party knowing of a ground for requesting disqualification, cannot be permitted to wait and decide whether he likes the treatment that he receives.").

Withdrawal of APJs McNamara and Amundson

In its reply brief, Patent Owner suggests that APJs McNamara and Amundson withdrew from the case due to undisclosed conflicts. *See* Recusal Reply 4–5. That is not correct. Had there been a conflict requiring them to withdraw, the panel change order would have listed "recusal," not "unavailability," as the reason. *See* PTAB Standard Operating Procedure 1, 13; Paper 51. Unavailability is an open-ended category that includes any reason for an APJ's withdrawal other than conflicts or deadlines.

B. Motions for Rehearing

In the Joinder Rehearing Requests, Patent Owner argues that the Cisco and Keycite institution decisions must be vacated because APJ McNamara had a "conflict based on a pecuniary interest in Cisco." Paper 48, 6; Paper 49, 6.

Because, for the reasons discussed in Section II.A above, we find no conflict requiring recusal, Patent Owner's argument fails, and the rehearing requests are denied to the extent they are based on that argument. The panel will address other arguments made in the rehearing requests in due course.

IV. ORDER

For the foregoing reasons, it is ORDERED that

(a) Patent Owner's Motion for Recusal and Vacatur (Paper 37) is denied; and

(b) Patent Owner's Requests for Rehearing of the decisions instituting and joining the Petitions filed in IPR2022-01151 and IPR2022-01199 (Papers 48 and 49) are denied-in-part.

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