

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PALO ALTO NETWORKS, INC., CISCO SYSTEMS, INC.,
and KEYSIGHT TECHNOLOGIES, INC.,
Petitioners,*

v.

CENTRIPETAL NETWORKS, LLC,
Patent Owner.

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

**PATENT OWNER'S REPLY IN SUPPORT OF ITS
MOTION FOR RECUSAL AND VACATUR**

* Cisco Systems, Inc. filed a petition and a motion for joinder in IPR2022-01151 and has been joined as a petitioner in this proceeding. Keysight Technologies, Inc. filed a petition and a motion for joinder in IPR2022-01199 and has been joined as a petitioner in this proceeding.

Two APJs have now withdrawn in light of Centripetal’s pending recusal motion based on Cisco-related conflicts. They did so mere days after ordering Cisco’s joinder to this case. The partial and unexplained recusal and reassignment orders to date are insufficient and only exacerbate the due process violations and underscore the need for vacatur of all orders entered in this IPR to date. In opposition, Petitioner Palo Alto Network’s (“PAN”) turns a blind eye to the significant concerns with allowing this case to continue with a tainted panel.

PAN’s Opposition repeats an inconceivable proposition from APJ McNamara: an admitted financial interest in Cisco—a defendant with billions of dollars in liability on the line for infringing the challenged patent—only matters if Cisco is a formal party to the IPR. *See Opp.* at 1; Paper 43 at 2. Yet PAN does not dispute that APJ McNamara has knowingly owned Cisco stock for a decade, and that he has never disclosed it to the parties. Paper 43 at 3.¹ With that secret knowledge, APJ McNamara presided over numerous IPRs brought by Cisco

¹ Contrary to APJ McNamara’s statement (Paper 43 at 3), his disclosures are not posted publicly, and the USPTO has taken the chilling position that requesting agency records for use in litigation may amount to impermissible “commercial use” subject to criminal liability. *See Hyatt v. USPTO*, No. 18-cv-2800 (TSC), 2022 WL 1718983, at *5 (D.D.C. May 27, 2022); 5 U.S.C. App. § 105(d)(1)(B).

against Centripetal. *See* Mot. at 3. And specific to this case, PAN does not dispute that APJ McNamara knew of Cisco's interest in the '856 Patent when he joined the decision instituting review. *See, e.g.*, Paper 11 at 3. If not enough, APJ McNamara joined Cisco as a party to this very proceeding before recusing himself the next day. *See* Papers 39, 43. The suggestion that there was no conflict because Cisco was not a party from the start is formalism at its worst, but is, in any event, moot.

PAN seemingly believes that the only constraints on APJ McNamara's responsibility to render impartial justice are regulatory safe harbors shielding him from criminal liability. *See* Opp. at 10 (contending that "no controlling regulation was violated"). But due process requires adjudicators do more than avoid criminal behavior. They must be and appear impartial. PAN simply ignores Centripetal's constitutional arguments, referring to due process only once with dismissive quotation marks. *See id.* at 3. PAN sweeps away the importance of public confidence in neutrality, apparently believing it is appropriate to upend a multi-billion dollar infringement judgment based on a judge's wife owning Cisco stock, while an APJ, owning the same stock, adjudicates the same patent against the same party in a collateral attack on that same litigation. For his part, APJ McNamara justifies his admitted conflict by noting the small value of his Cisco stock relative to his overall wealth. Paper 43 at 2 n.1. But being wealthy does not eliminate judicial conflicts. The Federal Circuit was clear that any financial conflict—

“however small”—requires recusal in the context of 28 U.S.C. § 455. *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025, 1032 (Fed. Cir. 2022).

Plus, as Centripetal explained and PAN ignores, the OGE regulations defining the limits of criminal liability are narrow and do not purport to satisfy due process. *See* Mot. at 11.² PAN also ignores the additional OGE rules cited by Centripetal that require recusal here. *See id.* at 7-8 (citing 5 C.F.R. § 2635.502(e)).

The Board’s actions in the few weeks since Centripetal filed its recusal motion underscore the serious due process violations that disqualify APJ McNamara, infect the remaining APJs, and necessitate vacatur of all rulings including the institution and joinder decisions. Once a judge becomes aware of a conflict, he may not take any further action in the case “other than the ministerial act of transferring the case to another judge.” *Shell Oil Co. v. United States*, 672 F.3d 1283, 1291 (Fed. Cir. 2012); *see also Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 866 (1988) (If a judge had learned of information requiring

² Contrary to PAN’s arguments (Opp. at 5-7), Centripetal does not concede that the OGE regulations determine the outcome here. Indeed, Centripetal specifically argued that due process requires more than avoiding criminal liability under OGE rules. *See* Mot. at 11. Nor has Centripetal prejudiced Cisco by filing a recusal motion before the Board held a hearing or issued a final written decision.

recusal “on March 14 or 15, he would have been under a duty to recuse himself *before* he entered judgment on March 16.”). Flouting established law, APJ McNamara participated in hugely consequential decisions *after* Centripetal filed its motion and just days before he recused himself, including denying Centripetal’s request for rehearing of the institution decision (Paper 40) and ordering the joinder of Keysight (Paper 41) and, shockingly, Cisco (Paper 39). Plus, APJ McNamara’s panel expressly carried water for Cisco, raising arguments Cisco itself failed to raise in its Petition and then instituting trial based on their own new arguments. *See* Paper 48 at 6-12. The rest of the panel participated in all these decisions shoulder to shoulder and is therefore infected with the fruits of APJ’s McNamara’s conflict.

The gratuitous commentary of recused APJs McNamara and Amundson magnifies the bias. Both described Centripetal’s Motion—which was not yet fully briefed—as “without merit” (Paper 43) or “lack[ing] merit” (Paper 47). Yet both recused themselves from deciding the motion. This was highly improper. The self-serving comments lack any supporting analysis and are highly prejudicial to Centripetal and a clear attempt at signaling to the rest of the PTAB, exacerbating the taint. The Supreme Court recognized this exact problem: “judges who were exposed to a disqualified judge may still be influenced by their colleague’s views when they rehear the case.” *Williams v. Penn.*, 579 U.S. 1, 16 (2016). This is particularly true when the disqualified judges signal their preferred outcome on the

record. Vacating all rulings to date is the only appropriate remedy.

In addition, APJ Amundson has now also recused with little explanation beyond purported issue simplification. *See* Paper 47. He provided no accounting of any actual or potential conflicts of interest. The public is left to guess the scope of the conflicts, how they infected this proceeding, and for how long. If APJ Amundson recused due to APJ McNamara's conflicts infecting the panel, then why has APJ Moore not also recused? Alternatively, if APJ Amundson recused because of his own conflict—with Cisco, PAN, or some other entity—then the parties must be so informed so that they can assess the impact on this matter. Further confusing the issues, the Board's panel change order pursuant to SOP 1 (Rev. 15) stated that it was for "unavailability" rather than "recusal," even though two APJs had actually recused themselves. *See* Paper 51 at 2. This raises even more questions, including precisely what was the unavailability? None of the examples cited in SOP 1 appear to apply. And these actions all took place in the shadow of a Director recused for her own conflict. *See* Paper 31 at 1 n.1. Centripetal cannot get a fair trial in these circumstances. Impartial justice requires more.

All decisions in this IPR should be vacated, including the institution and joinder decisions. Centripetal also renews its request for untainted adjudicators to decide this Motion. *See* Ex. 3015. Centripetal concurrently submits a request for a stay so the Board can decide this Motion before rendering any additional decisions.

Respectfully submitted,

Dated: January 27, 2023

/Paul Andre/

James Hannah (Reg. No. 56,369)
Paul Andre (*pro hac vice* motion pending)
Jenna Fuller (Reg. No. 74,212)
Kramer Levin Naftalis & Frankel LLP
333 Twin Dolphin Drive, Suite 700
Redwood Shores, CA 94065
Tel: (650) 752-1700 Fax: (650) 752-1800
jhannah@kramerlevin.com
pandre@kramerlevin.com
jfuller@kramerlevin.com

Jeffrey H. Price (Reg. No. 69,141)
Kramer Levin Naftalis & Frankel LLP
1177 Avenue of the Americas
New York, NY 10036
Tel: (212) 715-7502 Fax: (212) 715-8302
jprice@kramerlevin.com

Scott M. Kelly (Reg. No. 65,121)
Bradley C. Wright (Reg. No. 38,061)
John. R. Hutchins (Reg. No 43,686)
BANNER & WITCOFF, LTD.
1100 13th Street, NW, Suite 1200
Washington, DC 20005
Tel: (202) 824-3000 Fax: (202) 824-3001
skelly@bannerwitcoff.com
bwright@bannerwitcoff.com
jhutchins@bannerwitcoff.com

(Case No. IPR2022-00182)

Attorneys for Patent Owner

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.

<i>Date of service</i>	January 27, 2023
<i>Manner of service</i>	E-Mail and Electronic Filing
<i>Document served</i>	PATENT OWNER’S REPLY IN SUPPORT OF ITS MOTION FOR RECUSAL AND VACATUR

Scott A. McKeown
Mark D. Rowland
James Batchelder
Andrew Radsch
Keyna Chow
ROPES & GRAY LLP
scott.mckeown@ropesgray.com
mark.rowland@ropesgray.com
james.batchelder@ropesgray.com
andrew.radsch@ropesgray.com
keyna.chow@ropesgray.com

Counsel for Petitioner, Palo Alto Networks, Inc.

Gerard M. Donovan
Peter J. Chassman
Jonathan I. Detrixhe
Sidharth Kapoor
REED SMITH LLP
gdonovan@reedsmith.com
pchassman@reedsmith.com
jdetrixhe@reedsmith.com
skapoor@reedsmith.com

Counsel for Petitioner Keysight Technologies, Inc.

Theodore M. Foster
David L. McCombs
Gregory P. Huh
HAYNES AND BOONE, LLP
ipr.theo.foster@haynesboone.com
david.mccombs.ipr@haynesboone.com
gregory.huh.ipr@haynesboone.com

*Counsel for Petitioner Cisco Systems,
Inc.*

/Paul Andre/
Paul Andre (*pro hac vice* motion pending)