No. 2020-1400

United States Court of Appeals for the Federal Circuit

NEW VISION GAMING & DEVELOPMENT, INC.,
Appellant,

v.

SG GAMING, INC. f/k/a Bally Gaming, Inc.,
Appellee,

KATHERINE K. VIDAL, Undersecretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office,
Intervenor.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in No. CBM2018-00006

BRIEF OF *AMICUS CURIAE* CENTRIPETAL NETWORKS, INC. IN SUPPORT OF APPELLANT AND REVERSAL

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CERTIFICATE OF INTEREST

Counsel for Centripetal Networks, Inc. ("Centripetal") certifies the following:

1. The full names of all entities represented by us in this case:

   Centripetal Networks, Inc.

2. The name of the real party in interest for the entity. Do not list the real party if it is the same as the entity:

   None.

3. All parent corporations and any other publicly held companies that own 10 percent or more of the stock of the party or amicus curia represented by us are listed below:

   CNI Holdings, Inc.

4. The names of all law firms, and the partners or associates that have not entered an appearance in the appeal, and (a) appeared for the entity in the lower tribunal; or (b) are expected to appear for the entity in this court:

   N/A.

5. Other than the originating case number(s), the title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

   None.

6. All information required by Fed. R. App. P. 26.1(b) and (c) in criminal cases and bankruptcy cases.

   None.

Respectfully submitted,

Dated: October 24, 2022

By: */s/ Lisa Kobialka*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

STATEMENT OF AUTHORSHIP AND FUNDING

Under Federal Rule of Appellate Procedure 29(a)(4)(E), Amicus Centripetal Networks, Inc. ("Centripetal") states that no party or its counsel authored this brief in whole or part; no party or its counsel contributed money intended to fund preparing or submitting the brief; and, no person other than Amicus, its members or counsel contributed money intended to fund preparing or submitting this brief.

IDENTITY AND INTEREST OF AMICUS

Centripetal Networks, Inc. is a start-up corporation that was founded in 2009 who disrupted the network security industry with its patented innovations that protect networks from advanced security threats. Centripetal invented core networking technologies that meet the scale of the cyber threat intelligence challenge. In recognition of its innovation and expertise—and after enormous investment into inventing new technologies, bringing them to market, and the patent prosecution process—Centripetal has been awarded numerous patents enabling its key technological advances in the network security area.

Centripetal has faced thirty-seven (37) challenges for *inter partes* review ("IPR") and one (1) challenge for post-grant review before the Patent Trial and Appeal Board ("PTAB").

ARGUMENT

A patentee who is denied transparency into the PTAB members who make and control decisions—and into the actual criteria for those decisions—in an IPR or post-grant review, is deprived of its right to due process. This is particularly true for small start-up companies, like Centripetal, who heavily rely on patent protection to continue innovating and marketing their inventions.

Centripetal, a small company that disrupted the marketplace for network security with patented technology that many thought was not possible, relies on its patents to protect its innovations that are the product of years of perseverance and continuous research. The promise that small companies will have the "exclusive right" to their discoveries in exchange for making a comprehensive public disclosure of their invention, makes such efforts and the enormous investment worthwhile.

While Centripetal has thoughtfully protected its innovations with a robust patent portfolio, large companies have unabashedly copied and used its patented technology. They do so because they feel that they can deplete the smaller company's resources through a myriad of favorable procedures available and beat them down without facing the ultimate consequence of their willful infringement. Indeed, these companies are well-aware of the fact that the overwhelming majority of the petitions filed are instituted and reach a decision that invalidates some or all

of a patent's claims. *See* https://www.uspto.gov/patents/ptab/statistics (compiling Patent Trial and Appeal Board statistics from September 6, 2012 through June 30, 2022). Further, the fact that institution decisions are statistically higher in October (when bonus metrics are reset) demonstrates how PTAB judges' pecuniary interests could be factoring into institution decisions, which violates due process for the reasons set forth in Appellant's brief. Dkt. No. 22 at 30-35; *see New Vision Gaming & Development, Inc. v. SG Gaming, Inc.*, No. 20-1399, Dkt No. 45-2 (*Amicus Curiae* US Inventor's Brief) at 2-7 (Fed. Cir. Aug. 3, 2020) (discussing the "October Effect" statistics); *see also* Ron D. Katznelson, The Pecuniary Interests of PTAB Judges—Empirical Analysis Relating Bonus Awards to Decisions in AIA Trials (2021)[1] (showing an annual average APJ pecuniary bias totaling $5,760 out of an average annual APJ bonus of $21,166).

Even more troubling than these statistics is the fact that these unidentified PTAB members who are influencing and making these decisions—and the criteria they employ—are unknown to the parties, thereby depriving them of due process. As Justice Gorsuch wrote:

> After much hard work and no little investment you devise something you think truly novel. Then you endure the further cost and effort of applying for a patent, devoting maybe $30,000 and two years to that process alone. At the end of it all, the Patent Office agrees your invention is novel and issues a patent. The patent affords you

[1] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3871108.

> exclusive rights to the fruits of your labor for two decades. But what happens if someone later emerges from the woodwork, arguing that it was all a mistake and your patent should be canceled?

Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, 138 S. Ct. 1365, 1380 (2018) (Gorsuch, J., dissenting). In *Oil States*, the justices disagreed as to whether the matter can be resolved by PTAB judges instead of an Article III judge. There can be no credible dispute, however, that due process requires the identification of all PTAB judges and decisionmakers trying and resolving the dispute, and the criteria they employed.

"Due Process is predicated upon clarity and transparency" and "depends on the essential guarantees of . . . consistent standards of review, fair procedures, and accountable government." *Lightfoot v. D.C.*, 355 F. Supp. 2d 414, 428 (D.D.C. 2005). However, as applied, these guarantees were absent from the PTAB system. As set forth below, patentees never learned the identities of all PTAB judges—in particular, PTAB management—who decide or influence the decision to institute IPRs or invalidate a patent, or those who comprise the panel adjudicating the review. Nor did the patentee learn the criteria used for those decisions. In essence, patentees were subject to "telephone justice" driven by hidden influences within a bureaucracy, which is contrary to the tenets of the United States Constitution and due process guarantees.

The July 21, 2022 report of the United States Government Accountability Office ("GAO Report") revealed not only that that PTAB management influenced APJs' decisions, but that there is a dearth of transparency about who in management reviews the decisions of the APJs, and the criteria it uses in those reviews. Appx9047. Not even the APJs (let alone the parties) knew "who in management is reviewing the decisions" and "what criteria management use in reviews." Appx9065; *see also id*. (quoting an APJ "I never knew who was responsible for the revisions and/or rewritings"). Indeed, APJs reported that parties "are not likely to know the extent to which directors or PTAB management has influenced or changed an AIA trial[.]" Appx9047, Appx9066. "[W]hen PTAB management influenced a decision, there would be no indication of this involvement to the relevant parties . . . when management rewrites parts of decision for the panel, there would be no record that an issued opinion was management's rather than the three-judge panel." Appx9067. What's worse, the parties did not even know the identities of all members of the panel. The GAO Report described a situation where "management expanded a panel to include members of PTAB executive management; however, the names of the management officials never appeared on the final decision, nor were the parties privy to the expansion." Appx9068-9069.

The clandestine decision-making by unknown PTAB members employing unidentified criteria was entirely at odds with due process. *See Lightfoot,* 55 F. Supp. 2d at 428 (failure to apprise stakeholders of "standards employed in a reconsideration decision" was a violation of due process). This Court has held that "a disinterested decision-maker" is an "indispensable ingredient[] of due process." *Abbott Lab'ys v. Cordis Corp.*, 710 F.3d 1318, 1328 (Fed. Cir. 2013) (citations omitted).[2] Without being apprised of all decisionmakers, a patentee cannot be assured that the decisionmaker is, in fact, one who is disinterested. For example, the "PTAB management" controlling outcomes (as set forth in the GAO Report) may have had a disqualifying personal relationship, or may have been the Chief APJ, Deputy Chief APJ, Vice Chief APJs or other PTAB management who oversee PTAB's finances and budget and, for the reasons detailed in Appellant's brief (and not restated here), have financial incentives to, e.g., grant institutions.

In short, the utter lack of transparency into the decisionmakers and their criteria in IPRs and post-grant review proceedings stripped the patentees in those proceedings of their right to due process.

CONCLUSION

The Court should grant Appellant's appeal on due process grounds.

[2] In *Abbott*, unlike here, the parties did not dispute that IPRs were heard by disinterested decisionmakers. Further, *Abbott* was decided before the GAO Report.

Respectfully submitted,

Dated: October 24, 2022

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitation of Federal Circuit Rule 29 (b). The brief contains 1,314 words, excluding the parts of the parts exempted by Federal Circuit Rule 32(b)(2).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6). The motion has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

Dated: October 24, 2022 */s/ Lisa Kobialka*
Lisa Kobialka