

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE OFFICE OF THE UNDER SECRETARY OF COMMERCE
FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE
UNITED STATES PATENT AND TRADEMARK OFFICE

OPENSKY INDUSTRIES, LLC,
INTEL CORPORATION,
Petitioners,

v.

VLSI TECHNOLOGY LLC,
Patent Owner.

IPR2021-01064¹
Patent 7,725,759 B2

Before KATHERINE K. VIDAL, *Under Secretary of Commerce for
Intellectual Property and Director of the United States Patent and
Trademark Office.*

ORDER

Restoring OpenSky as a Party
Awarding Reasonable Fees as Sanctions Against Petitioner
Authorizing Patent Owner to File Motion for Fees

¹ Intel Corporation (“Intel”), which filed a petition in IPR2022-00366, has been joined as a party to this proceeding. Paper 43.

I. INTRODUCTION

On October 4, 2022, I issued my decision on Director review of the institution decision in this proceeding. Paper 102 (“Decision” or “Dec.”). In my Decision, I determined that Petitioner OpenSky Industries, LLC (“OpenSky”) abused the *inter partes* review (“IPR”) process in an attempt to extract payment from both Patent Owner VLSI Technology LLC (“VLSI”) and Petitioner Intel, who was joined to the proceeding. *Id.* at 3. I also determined that OpenSky engaged in discovery misconduct and unethical conduct, and violated my express orders in the Director review process. *Id.* at 2–4. Due to OpenSky’s actions, I ordered “OpenSky to show cause as to why it should not be ordered to pay compensatory damages to VLSI, including attorney fees, to compensate VLSI for its time and effort in this proceeding.” *Id.* at 4. I further ordered “OpenSky to address the appropriate time period for which any fees should be assessed.” *Id.*

On November 17, 2022, OpenSky and VLSI submitted briefs pursuant to my order to show cause. Paper 116 (OpenSky); Paper 117 (VLSI). The parties submitted reply briefs on December 5, 2022. Paper 119 (VLSI); Paper 120 (OpenSky). For the reasons set forth below, I determine that it is appropriate to award attorney fees to VLSI for the time spent addressing OpenSky’s abusive behavior, including the Director review process in its entirety. I do not award attorney fees for responding to the merits of the case, as I have determined that compelling merits were presented in the Petition. *See* Paper 121.

II. RESTORING OPENSKY TO THE PROCEEDING

I previously dismissed OpenSky from this proceeding, subject to the Director, Board, and USPTO retaining authority over the issuance of sanctions. *See* Paper 121, 2–3. In IPR2021-01229, an ongoing proceeding challenging another patent owned by VLSI, I restored dismissed petitioner Patent Quality Assurance, LLC to the proceeding. *See Patent Quality Assurance, LLC v. VLSI Technology LLC*, IPR2021-01229, Paper 108, 4 (PTAB Jan. 27, 2023). Similarly, I vacate the portion of my decision (Paper 121) dismissing OpenSky from this proceeding. This restores OpenSky as a petitioner in this proceeding.

III. SANCTIONS ANALYSIS

OpenSky argues that: (1) it cannot and should not be subject to any attorney fees sanction in this proceeding; (2) the order to show cause does not show any harm to VLSI due to OpenSky’s misconduct; and (3) compensatory fees, if any, must be limited to specific time periods during the proceeding. Paper 116, 1, 23–24. I disagree with the first two arguments and address the proper assessment of fees below.

A. OpenSky Is Subject to Attorney Fees in This IPR

OpenSky raises a number of arguments as to why it cannot and should not be subject to an attorney fees sanction. Paper 116, 7–23. First, OpenSky argues that under the “American Rule,” each litigant pays their own fees unless otherwise provided by statute. *Id.* at 7–11 (citing *Peter v. NantKwest*, 140 S. Ct. 365, 370 (2019)). OpenSky argues that no statute authorizes attorney fees during an IPR proceeding. *Id.* at 8–9. OpenSky further argues that the relevant statute regulating the conduct of IPRs (35 U.S.C. § 316(a))

“specifically delegates to the Director authority to ‘prescribe sanctions for abuse of discovery, abuse of process, or any other improper use of the proceeding,’ but does not mention attorneys’ fees.” *Id.* at 9.

OpenSky incorrectly refers to my order as “fee shifting.” *Id.* at 8. The order to show cause is not directed to fee shifting; it is a sanction order. *Cf. Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46 (1991) (stating that an exception to the American Rule is “when a party has ‘acted in bad faith, vexatiously, wantonly, or for oppressive reasons.’”) (quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 259 (1975)). The fees are commensurate with the harm caused by OpenSky’s abuse. *Id.* at 53 (“[t]he award of attorney’s fees for bad faith serves the same purpose as a remedial fine . . .”) (quoting *Hutto v. Finney*, 437 U.S. 678, 691 (1978)). It is not intended to reward VLSI as a prevailing party, as OpenSky seems to imply, but to punish OpenSky for its abusive conduct. *Cf. id.* (“the imposition of sanctions . . . depends not on which party wins the lawsuit, but on how the parties conduct themselves during the litigation.”)

By awarding attorney fees, I am acting pursuant to express statutory and regulatory authority. *See* 35 U.S.C. § 316(a)(6); 37 C.F.R. § 42.12. 35 U.S.C. § 316 directly empowers the Director to prescribe regulations setting forth sanctions for abuse of discovery, abuse of process, or any other improper use of the proceeding. 35 U.S.C. § 316(a)(6); *see* Paper 119, 1–2. Acting pursuant to that authority, the United States Patent and Trademark Office (“USPTO” or “Office”) promulgated Rule 42.12, which expressly authorizes the Patent Trial and Appeal Board (“PTAB” or “Board”) to issue sanctions to punish and deter a wide range of misconduct. 37 C.F.R. § 42.12. Those sanctions include, among others, an award of “compensatory

expenses, including attorney fees.” 37 C.F.R. § 42.12(b)(6). The Court of Appeals for the Federal Circuit has recognized this regulatory power to award attorney fees as a “means for regulating litigation misconduct.” *See Amneal Pharmaceuticals LLC v. Almirall, LLC*, 960 F.3d 1368, 1372 n.* (Fed. Cir. 2020) (“§ 42.12 allows the Board to impose sanctions including ‘attorney fees’”). Accordingly, there is both statutory and regulatory authority to apply attorney fees as a sanction in this case. *See also Apple Inc. v. Voip-Pal.com, Inc.*, 976 F.3d 1316, 1323 (Fed. Cir. 2020) (affirming the Board’s sanction under § 42.12 and noting that it has the ability to “issue sanctions not explicitly provided in the regulation.”).

In its second argument as to why it cannot and should not be subject to an attorney fees sanction, OpenSky argues that it was denied due process required by the Constitution and the Administrative Procedure Act. Paper 116, 12–16. OpenSky argues that it did not receive notice that the Director review would consider abuse of process as a legal issue, and did not receive notice of the factual basis for the abuse of process charge. *Id.* at 12–14. More specifically, OpenSky argues that it was not provided with “standards of what constituted abuse of process and meaningful opportunity to respond to the serious allegation that it had committed an abuse of process during the IPR proceeding.” *Id.* at 13. Additionally, OpenSky argues that it “was never apprised that the Director believed . . . that the filing of the IPR Petition would be an abuse of process because of ‘bad’ motivation, that OpenSky was being accused of extracting payments from multiple parties, or that there was a charge of a lack of willingness to participate in the IPR.” *Id.* at 14 (citing Dec. 3, 43–44). Finally, OpenSky argues that because the Director review Scheduling Order precluded new declaratory evidence,

OpenSky was deprived of a fair opportunity to submit evidence in its defense. *See id.* at 15–16 (citing Paper 47, 8, 11).

OpenSky’s argument as to lack of notice and opportunity to respond is unavailing. *See* Paper 116, 12–16. My Scheduling Order unambiguously explained that I would be investigating VLSI’s claims of abuse of process by OpenSky. *See* Paper 47, 7–8. My interrogatories specifically asked, “[d]oes the evidence in this proceeding demonstrate an abuse of process or conduct that otherwise thwarts, as opposed to advances, the goals of the Office and/or the [America Invents Act] and, if so, which evidence and how should that evidence be weighted and addressed?” *Id.* at 8. OpenSky responded to this interrogatory by citing a single piece of evidence already of record (Ex. 2055), and offered no other supporting evidence. *See* Dec. 23.

Although my Scheduling Order did not permit new declaratory evidence, OpenSky did not request permission to file such evidence or raise an objection to the absence of new declaratory evidence, despite several opportunities to do so. *See* Papers 51 (Two-week extension to exchange Mandated Discovery), 52 (Addressing the scope of Mandated Discovery), 54 (OpenSky’s Notice of Objections that did not object to the exclusion of new declaratory evidence). Not only did OpenSky not request permission to file new declaratory evidence, it also failed to produce responsive evidence that was already in its possession. *See* Dec. 21–25 (OpenSky failed to produce numerous communications between itself and VLSI or Intel). Accordingly, OpenSky was provided notice and opportunity to respond to VLSI’s allegations of abuse of process, and I made my decision on Director review based on the briefs and evidence presented by the parties. *See Rates Tech., Inc. v. Mediatrice Telecom, Inc.*, 688 F.3d 742, 749 (Fed. Cir. 2012) (“[T]he

opportunity to submit written briefs may be sufficient to provide an opportunity to be heard.”).

In its third argument as to why it cannot and should not be subject to an attorney fees sanction, OpenSky argues that the Decision “erred by applying a negative inference across the board without any plausible evidence that the allegedly missing documents had information relevant to the inferences made.” Paper 116, 17. Specifically, OpenSky argues that “a negative or adverse inference based on the lack of production requires a showing . . . that the missing documents actually exist.” *Id.* at 16 (citing *Klotzbach-Piper v. Nat’l R.R. Passenger Corp.*, No. 18-1702, 2021 WL 4033071, at *7 (D.D.C. Sept. 3, 2021)). OpenSky further argues that the Decision ruled on OpenSky’s objection to providing a privilege log without giving OpenSky an opportunity to cure. *Id.* OpenSky argues that the lack of opportunity to cure is contrary to previous USPTO practices. *Id.* at 17–18 (citing *Ventex Co. Ltd. v. Columbia Sportswear No. Am., Inc.*, IPR2017-00651, Paper 98 at 5 (PTAB Nov. 19, 2018)).

OpenSky’s arguments against the adverse inferences taken in my Decision fail for several reasons. First, OpenSky filed its objections to the Mandated Discovery on the day it was due, despite having had the opportunity to object previously. *See* Paper 54. Thus, OpenSky’s late objection eliminated any period for curing. Second, and more importantly, OpenSky indicated that it did not intend to produce a privilege log *regardless* of any ruling on its objections. *See* Paper 91, 20. Third, at least some of the missing documents existed, as they were produced by VLSI and Intel. *See* Dec. 40–42. Finally, I specifically warned OpenSky that I might draw adverse inferences based on the failure to comply with my order. *See*

Paper 52, 4. Despite that explicit warning, OpenSky chose noncompliance. *See* Dec. 19–25. For at least these reasons, OpenSky’s arguments are unavailing.

B. OpenSky’s Misconduct Harmed VLSI

OpenSky separately argues that its misconduct did not harm VLSI, and, therefore, attorney fees are not an appropriate sanction. Paper 116, 18–23. First, OpenSky argues that the *Noerr-Pennington* doctrine precludes “awarding attorney’s fees to compensate VLSI for defending against OpenSky’s compelling, meritorious IPR challenge.” *Id.* at 18–20. OpenSky argues that because the Petition itself was not “objectively baseless,” there should be no sanctions, despite its “impermissible motive.” *Id.* at 20 (citing *BE&K Construction Co. v. National Labor Relations Board*, 536 U.S. 516, 519–20, 522, 524, 536 (2002)). OpenSky then broadly argues that “[m]onetary sanctions cannot be levied against a party who files a meritorious IPR Petition (even if it had a profit motive).” Paper 120, 6–7.

OpenSky’s argument for blanket immunity from sanctions for filing a meritorious Petition mischaracterizes the nature of the sanctions and would negate the purpose of imposing sanctions for misconduct before the Board as expressly provided in 35 U.S.C. § 316(a)(6). As an initial matter, OpenSky’s argument ignores one of the congressional intents that undergirds the America Invents Act (“AIA”) itself—“the integrity of the patent system”—which considers interests broader than just patentability. *See* 35 U.S.C. § 316. Accordingly, OpenSky’s litigation misconduct cannot be excused simply because the Petition itself, which was substantively prepared by Intel, was meritorious. Case law further supports imposing sanctions for litigation misconduct, despite a meritorious suit. *See BE&K Construction*,

536 U.S. at 537 (“[N]othing in our holding today should be read to question the validity of common litigation sanctions imposed by courts themselves—such as those authorized under Rule 11 of the Federal Rules of Civil Procedure.”); *see also* 37 C.F.R. § 42.11(c) (Board counterpart to Rule 11). More importantly, OpenSky’s argument for blanket immunity mischaracterizes the basis for these attorney fee sanctions. I am not sanctioning OpenSky based on whether it filed a meritorious Petition. I am imposing sanctions because of the manner in which OpenSky conducted itself after the Petition was filed, as explained further below.

OpenSky contends that its misconduct—offering to undermine the IPR (what it calls “settlement negotiations”) and failing to comply with Mandated Discovery—did not harm VLSI. Paper 116, 20–23. VLSI responds that “OpenSky’s actions caused extraordinary harm to VLSI, the Office, and the patent system. OpenSky abused the IPR process for the sole purpose of attempting to extort money from VLSI and Intel.” Paper 119, 9–10 (citing Dec. 43). More specifically, VLSI argues that “OpenSky’s misconduct caused VLSI massive harm by forcing it to spend extraordinary amounts of time and money.” Paper 117, 8. As to the damage to the Office and the patent system, VLSI argues that “OpenSky’s violation of the Director’s orders and its non-responsive and misleading interrogatory responses are alone sufficient to justify a fee award.” *Id.* at 10. Accordingly, VLSI argues that “[a]n award of attorneys’ fees and costs is necessary to deter future misconduct by OpenSky and its like.” *Id.* at 11.

OpenSky responds that:

If OpenSky had filed the same meritorious IPR Petition, but not as an “attempt to extract payment” and had not sent the February 23 e-mail, VLSI would have incurred the exact same attorneys’

fees and costs. Those expanded [sic] were not “solely” caused by the misconduct and cannot be awarded as monetary sanctions.

Paper 120, 4.

OpenSky ignores that VLSI raised arguments against OpenSky’s misconduct—even apart from its motives in filing its petition—throughout the proceeding and that the entire Director review process was brought about due to that misconduct. *See* Paper 9, 1–29; Paper 16, 1–7; Paper 20, 1–10; Paper 45. My review was not limited solely to OpenSky’s intent in filing the Petition, but instead considered whether to revisit the institution decision based on the totality of OpenSky’s conduct and a number of factors. *See* Dec. 36–43. As a result, I concluded that OpenSky abused the IPR process. *Id.* at 43–44. As I explained:

Seeking an AIA trial for the primary purpose of extorting money, while being willing to forego or sabotage the adversarial process, does not comport with the purpose and legitimate goals of the AIA and is an abuse of process. Opportunistic uses of AIA proceedings harm the IPR process, patent owners, the Office, and the public. To safeguard the proper functioning of the patent system, and the confidence therein, it is incumbent on me and the USPTO to protect against that harm.

Id. at 44 (internal citations omitted). My conclusion and related sanctions were based on the totality of OpenSky’s conduct. That its intent informed my analysis does not make its intent the basis of these sanctions. Instead, it was just one of many factors that I considered in reaching my decision to impose sanctions for OpenSky’s behavior in this proceeding. *See* Dec. 36–43. But even if I were to set aside OpenSky’s improper motive in filing its petition to institute this IPR, I would reach the same decision based solely on

its misconduct revealed and committed in the course of my review of that institution decision.

In addition, OpenSky's failure to comply with Mandated Discovery further harmed VLSI during the Director review. I explained that "[a]s a result of OpenSky's failure to comply with my ordered Mandated Discovery provisions, I, VLSI, and Intel do not have a complete record to fully examine OpenSky's assertion that it has not committed an abuse of the IPR process, or to evaluate whether its allegation of 'harassment' is supported." *Id.* at 27.

OpenSky further seeks to excuse its discovery misconduct by arguing that the Director review is "ancillary to the Board's consideration of the Petition on its merits" and "[a]ttorneys' fee recoveries are not permitted for ancillary litigation, such as the process of sanctioning." Paper 116, 22 (citing *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 407 (1990)). Contrary to OpenSky's argument, the Director review process is not ancillary to the IPR process; it is an exercise of the Director's unilateral authority over the institution phase of that process. The Court in *Cooter*, cited by OpenSky, determined that Rule 11 sanctions were limited to actions at the trial level and did not apply to expenses incurred defending the award on appeal, because Federal Rule of Appellate Procedure 38 separately provided for appellate fees. *See* 496 U.S. at 407. *Cooter* is inapposite because it addressed successive phases of litigation, before separate levels of Article III courts, governed by different sets of federal rules. Here, Director review regarding whether to reverse the initial institution decision is central to the IPR process, as well as to investigating whether allegations of misconduct warrant such a reversal.

C. OpenSky's Misconduct Took Place Throughout the Proceeding and Was the Basis for Director Review

OpenSky argues that “sanctions must be tied to harm ‘solely’ caused by the misconduct and may not be based on temporal limitations alone.” Paper 116, 23–24 (citing *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1184 (2017)). OpenSky identifies two specific periods of misconduct identified by the Decision. *Id.* at 24–25. The first is the nine-day period starting with the February 23, 2022, email from OpenSky’s counsel to VLSI’s counsel (Ex. 2055) and ending with VLSI’s rejection of OpenSky’s offer on March 2, 2022 (Ex. 2094). *Id.* at 24. The second is the “sixty-one-day period between when the Mandated Discovery was due and when the Director issued sanctions precluding OpenSky from further participating in the IPR: from August 4, 2022 to October 4, 2022.” *Id.* (citing Paper 51, 4; Paper 102, 4).

As discussed above, OpenSky’s misconduct was not so limited. *See supra*. Indeed, VLSI raised objections to OpenSky’s misconduct throughout the proceeding. *See* Paper 9, 1–29; Paper 16, 1–7; Paper 20, 1–10; Paper 45; *see also Monolithic Power Sys., Inc. v. O2 Micro Int’l Ltd.*, 726 F.3d 1359, 1369 (Fed. Cir. 2013) (“[T]he litigation misconduct finding by the district court was not of isolated instances of unprofessional behavior by O2 Micro. Rather, O2 Micro’s extensive misconduct was enough to comprise an abusive ‘pattern’ or a vexatious ‘strategy’ that was ‘pervasive’ enough to infect the entire litigation.”). And the Director review process was initiated to examine OpenSky’s misconduct and determine whether to reverse the institution decision. *See* Paper 47. But for OpenSky’s misconduct, VLSI

would not have incurred the fees necessary to address OpenSky's misconduct in the case and upon Director review.

Accordingly, I determine that the appropriate sanction is for OpenSky to compensate VLSI for the reasonable attorney fees incurred in addressing the issue of OpenSky's misconduct during the proceeding, and for the Director review process in its entirety. I authorize VLSI to file a Motion for Fees that includes specific information as to the total amount of fees requested, details regarding the tasks performed underlying those fees, and reasons why the amounts of those fees are reasonable. Any privileged information may be redacted from billing information submitted with the Motion. The Motion must be filed no later than two weeks after the entry of this Decision and is limited to twenty pages. Detailed billing statements may be filed as exhibits to the Motion and excluded from the page limit. OpenSky is authorized to file an Opposition to the specific fees requested that is limited to twenty pages and must be filed no later than two weeks after the date on which VLSI files its Motion. The same parameters regarding privileged information and exhibits provided for VLSI's Motion apply to any filed Opposition.

D. Sanctions Are Limited to This Proceeding

VLSI also seeks attorney fees as they relate to all three IPRs filed by OpenSky (i.e., IPR2021-01056, IPR2021-01064, and IPR2022-00645) and the IPRs with requests to join OpenSky's -1064 Petition (i.e., IPR2022-00366 (Intel) and IPR2022-00480 (Patent Quality Assurance, LLC ("PQA"))). Paper 117, 13. VLSI argues "[b]ut for OpenSky's filings and the PQA IPR it potentially inspired, Intel would not have been able to file

joinder petitions and attack VLSI's patents yet again nor could PQA have sought to join the present IPR." *Id.*

As discussed above, I distinguish the merits of this proceeding from the misconduct of OpenSky. *See supra.* This distinction between the merits and misconduct applies to the joinder requests. For example, IPR2022-00366 deals entirely with the merits, and there is no evidence of misconduct by Intel. *See* IPR2021-01064, Paper 43. Rather, Intel appears to be another target of OpenSky's misconduct. *See* Dec. 48. Accordingly, fees relating to IPR2022-00366 are not included in this sanction. I apply the same analysis to IPR2022-00480 (now terminated) in which PQA sought to join this IPR on the merits. *See* IPR2022-00480 Papers 2, 3. PQA's alleged misconduct in IPR2021-01229 is the subject of a different Director review. *See* IPR2021-01229, Paper 31. Accordingly, fees relating to IPR2022-00480 also are not included in this sanction.

OpenSky's other two Petitions may raise misconduct issues similar to this case. For example, in IPR2021-01056 (institution denied), OpenSky's failure to engage the expert on whom its petition relied may suggest that OpenSky was attempting to file a petition with the lowest possible cost in an effort to generate leverage against VLSI, but without the intent or expectation of litigating the proceeding through trial. *See* Dec. 43. OpenSky's Petition in IPR2022-00645 was dismissed before institution. *See* IPR2022-00645, Paper 13. Nevertheless, neither of these cases was raised in the Director review, and thus I exercise my discretion to limit the sanctions order to this proceeding.

E. Sanctions Are Assessed Against OpenSky

VLSI argues that “OpenSky’s attorneys were directly responsible for OpenSky’s misconduct and should be found jointly and severally liable with OpenSky for VLSI’s fees and costs.” Paper 117, 15. VLSI argues that “[c]ourts have routinely held a party’s attorneys jointly and severally liable for the sanctionable conduct of their clients when they have assisted in advancing the sanctionable conduct.” *Id.* at 16–17. VLSI further argues that OpenSky’s attorneys repeatedly misrepresented OpenSky’s motives, conducted OpenSky’s improper negotiations with VLSI and Intel, and blocked inquiries into the true relationship between OpenSky and its counsel. *Id.* at 17–20.

At this time, I decline to resolve VLSI’s request to hold OpenSky’s attorneys “jointly and severally liable” for VLSI’s attorney fees. The Board’s authority extends to both “a party,” 37 C.F.R. § 42.12(a), and to “individuals involved in the proceeding,” *Id.*, § 42.11(a). The latter “individuals” expressly includes “any attorney [or] registered practitioner” appearing before it. *Id.*, § 42.11(d). Consistent with that regulation, the Director review process examined OpenSky’s misconduct as a party to the proceeding. *See* Paper 47, 7–9. I did not examine, however, whether OpenSky’s counsel individually committed misconduct, and I reserve judgment on that issue. *See* Dec. 4. Accordingly, I decline to sanction OpenSky’s counsel individually at this time.

IV. ORDER

Accordingly, based on the foregoing, it is:

ORDERED that OpenSky is restored as a petitioner;

FURTHER ORDERED that VLSI is awarded reasonable fees incurred in this proceeding in raising issues of misconduct by OpenSky before the Board, and the Director review process in its entirety;

FURTHER ORDERED that VLSI is authorized to file a Motion for Fees, in accordance with my instructions herein. Any such Motion must be filed no later than two weeks after the entry date of this Order and is limited to twenty pages;

FURTHER ORDERED that OpenSky is authorized to file an Opposition to VLSI's Motion for Fees. Any Opposition must be filed no later than two weeks after the date on which VLSI files its Motion, and is limited to twenty pages.

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