

No. 15-1075

IN THE
Supreme Court of the United States

GEA PROCESS ENGINEERING, INC.,

Petitioner,

v.

STEUBEN FOODS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1) Under the America Invents Act, the Federal Circuit's jurisdiction over appeals from *inter partes* reviews is limited to appeals of final written decisions on patentability. In *Cuozzo v. Lee*, this Court held that an appeal of a decision whether to institute an *inter partes* review is barred by 35 U.S.C. § 314(d). Was the Federal Circuit correct in dismissing GEA's appeals because the Patent Trial and Appeal Board's decisions below were not final written decisions on patentability, but rather decisions whether to institute, which are not appealable under 35 U.S.C. § 314(d)?

2) Administrative agencies, including the Patent Office, have inherent authority to reconsider their own decisions. Was the Federal Circuit correct in denying GEA Process Engineering, Inc.'s petition for writ of mandamus, which argued the Patent Trial and Appeal Board did not have the authority to reconsider and vacate its earlier institution decisions?

RULE 29.6 STATEMENT

Respondent Steuben Foods, Inc. has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	<i>Page</i>
QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS.....	iii
TABLE OF CITED AUTHORITIES	iv
JURISDICTION.....	1
STATEMENT.....	1
REASONS FOR DENYING THE PETITION	5
I. Under this Court’s holding in <i>Cuozzo</i> , GEA’s appeal is plainly barred by 35 U.S.C. § 314(d). . .	7
II. GEA’s appeal was properly dismissed for the additional reason that the order from which the appeal was taken did not address the patentability of any claim.	9
III. With respect to GEA’s petition for writ of mandamus, the Federal Circuit correctly determined that GEA failed to demonstrate that the PTAB lacks the authority to review its institution decisions.	10
CONCLUSION	15

TABLE OF CITED AUTHORITIES

	<i>Page</i>
Cases	
<i>Cuozzo Speed Techs., LLC. v. Lee</i> , 579 U.S. ____ (2016)	<i>passim</i>
<i>GTNX, Inc. v. INTTRA, Inc.</i> , 789 F.3d 1309 (Fed. Cir. 2015)	6
<i>In re Cuozzo Speed Techs., LLC</i> , 793 F.3d 1268 (Fed. Cir. 2015)	10
<i>Tokyo Kikai Seisakusho, Ltd. v. United States</i> , 529 F.3d 1352 (Fed. Cir. 2008)	7, 12, 13
<i>Trujillo v. Gen. Elec. Co.</i> , 621 F.2d 1084 (10th Cir. 1980).....	12
Statutes & Other Authorities:	
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 1295.....	4
28 U.S.C. § 1295(a)(4)(A).....	8
35 U.S.C. § 6(c).....	7
35 U.S.C. § 141(c)	9
35 U.S.C. § 312.....	5, 8

Cited Authorities

	<i>Page</i>
35 U.S.C. § 312(a).....	5
35 U.S.C. § 312(a)(2)	8
35 U.S.C. § 314(d).....	4, 6, 7, 9
35 U.S.C. § 315(b).....	4
35 U.S.C. § 318(a).....	7, 9
35 U.S.C. § 319.....	6
37 C.F.R. § 42.71(d)	12
37 C.F.R. § 42.71(d)(1)	7
37 C.F.R. § 42.104(c)	4

JURISDICTION

The Federal Circuit dismissed the appeals and denied the petition for writ of mandamus filed by GEA Process Engineering, Inc. (“GEA”) on June 23, 2015. Pet. App. B at 8a. On November 24, 2015, the Federal Circuit denied GEA’s motion for reconsideration of the Federal Circuit’s June 23, 2015, order. Pet. App. A at 2a. GEA filed its petition on February 22, 2016. To the extent that GEA’s petition was timely, this Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

On October 9-10, 2013, GEA filed six petitions seeking *inter partes* review of five patents owned by Steuben Foods, Inc. (“Steuben”). The *inter partes* review (“IPR”) petitions listed only GEA as the real party-in-interest (“RPI”). *See* Pet. App. C at 9a (caption). GEA filed its IPR petitions in response to a patent infringement lawsuit Steuben brought against GEA and its sister company GEA Procomac S.p.A. (“Procomac”) in the United States District Court for the Western District of New York. *Id.* at 11a.

After Steuben waived its right to file preliminary responses, the Patent Trial and Appeal Board (“PTAB”) issued decisions instituting the following *inter partes* reviews: IPR2014-00041, IPR2014-00043, IPR2014-00051, IPR2014-00054, and IPR2014-00055. *See id.* at 12a. On March 31, 2014, during the initial conference call with the PTAB, Steuben alleged that Procomac was a real party-in-interest because Procomac appeared to have funded and/or controlled the filing of GEA’s petitions. *Id.* at 12a-13a. The PTAB granted Steuben leave to file a

motion for discovery, but denied that motion because “at that time in the proceedings, there was no evidence that GEA accepted monetary compensation from Procomac.” *Id.* at 13a-14a.

About one and a half months later, Steuben renewed its request for discovery relating to Procomac’s funding and/or control of the proceedings. *Id.* During a May 21, 2014, conference call with the PTAB, GEA “admitted” that Procomac “had been [redacted] invoiced by [GEA] for *IPR petition expenses for the previously filed IPR petitions.*” *Id.* (emphasis in original). The PTAB then authorized Steuben to propound discovery requests and GEA responded with redacted documents. *Id.*

The following month, Steuben asked the PTAB to order GEA to provide unredacted documents. *Id.* GEA refused to do so, but eventually admitted that “GEA [redacted] invoiced Procomac for ‘*all of the IPR expenses ...*’” through May 16, 2014. *Id.* at 15a (emphasis in original). In other words, Procomac had paid for the entirety of GEA’s IPR proceedings to that point.

In June 2014, GEA appears to have replaced its General Counsel Doug Lunenfeld. *Id.* Mr. Lunenfeld was succeeded by Mr. Brian Casto on June 16, 2014, “after the relevant events at issue occurred.” *Id.*

In August 2014, Steuben filed a motion to terminate the proceedings. *Id.* at 10a. In support of its opposition, GEA submitted a declaration of its new General Counsel, Mr. Casto, who had no first-hand knowledge of the events in question. *Id.* at 15a.

In its decision, the PTAB noted that it was “telling” that Mr. Casto “does not aver that any employee of [GEA] ever issued or received instructions to the effect that [GEA] should be bearing the costs of the review proceedings.” *Id.* at 25a. The PTAB further found that “[t]he totality of the circumstances persuades us that there was no discernible boundary between GEA and Procomac in relation to these proceedings, providing Procomac ample opportunity to control GEA’s participation in these proceedings.” *Id.* at 26a. The PTAB thus “determine[d] that Procomac was an RPI of the instant proceedings that was not identified in the Petitions.” *Id.* at 28a.

Under the PTAB’s governing statutes and rules, GEA’s petitions were incomplete because they did not name all RPIs. *Id.* at 29a. In order to bring the petitions into compliance with the governing rules and statutes, GEA was required to update its identification of the RPIs. *Id.* at 29a-30a. The PTAB’s rules allow for a petition to be brought into compliance with the governing rules and statutes without the assessment of a new filing date, but only in the event of a clerical or typographical error. *Id.* at 30a-31a. The question before the PTAB then was whether GEA could update its petitions without losing the original filing date for its petitions. *Id.* at 29a. This question was of critical importance because if GEA’s petitions were given a new filing date, they would be untimely under 35 U.S.C. § 315(b). *Id.* at 29a, 33a.

The PTAB found that GEA could not correct the listing of RPIs without changing the filing date of the petitions because GEA’s decision not to list Procomac as an RPI was neither clerical in nature, nor made in good faith. *Id.* at 31a-32a. As explained by the PTAB,

“GEA did not admit that Procomac funded the IPR expenses, or produce the relevant discovery, until long after Steuben Foods alleged that Procomac was [a real party-in-interest].” *Id.* at 32a. GEA steadfastly asserted that Procomac was not a real party-in-interest “despite the overwhelming evidence of its relationship with GEA and these proceedings” *Id.* The PTAB thus determined that the error in listing the RPIs was not a “clerical or typographical” mistake that could be corrected under 37 C.F.R. § 42.104(c), nor a “good faith” mistake that would be corrected in the PTAB’s discretion. *Id.* Accordingly, the petitions could not be updated without the assessment of a new filing date. *Id.* at 32a. But because GEA waited until the last possible day to file its petitions, assessing a new filing date would have rendered the petitions untimely under 35 U.S.C. § 315(b). *Id.* at 33a. The PTAB therefore ordered that the “Decisions on Institution in IPR2014-00041, IPR2014-00043, IPR2014-00051, IPR2014-00054, and IPR2014-00055 are hereby vacated.” *Id.*

GEA filed an appeal to the Federal Circuit seeking to invoke jurisdiction under 28 U.S.C. § 1295. The Federal Circuit dismissed that appeal on two related grounds. In particular, the Federal Circuit noted that “the Board expressly stated that it was vacating the earlier decisions to institute proceedings and simultaneously determined that the petitions were incomplete and thus could not be considered.” Pet. App. B at 7a. As a result, the Federal Circuit concluded that 35 U.S.C. § 314(d) precluded GEA’s appeal. *Id.* at 7a. The Federal Circuit also found that it lacked jurisdiction over the appeal because only final written decisions on patentability are appealable under 28 U.S.C. § 1295. *Id.* at 6a. “Because the [PTAB’s] decision did not make a determination with respect to patentability,

it [was] outside ... § 1295(a)(4)(A)” and not appealable. *Id.* at 6a.

GEA also filed a petition for writ of mandamus in parallel with its appeal. GEA argued there that “mandamus should issue because the Board did not have authority to vacate the prior institution decisions.” *Id.* at 7a. The Federal Circuit disagreed, explaining that “administrative agencies possess inherent authority to reconsider their decisions,” and noting that GEA “has not made any showing that would clearly deprive the Board of that default authority.” *Id.* at 7a-8a.

REASONS FOR DENYING THE PETITION

With regard to the Federal Circuit’s dismissal of GEA’s appeal, this Court has held that where an appeal is “ground[ed] ... in a statute closely related to [the] decision to institute *inter partes* review, § 314(d) bars judicial review.” *Cuozzo Speed Techs., LLC. v. Lee*, 579 U. S. ____ (2016), slip op. at 12. Here, the PTAB’s decision was premised on GEA’s failure to satisfy the statutory requirements for the grant of a petition for *inter partes* review set forth in 35 U.S.C. § 312. Pet. App. C at 29a (“Specifically, 35 U.S.C. § 312(a)(2) dictates that “[a] petition filed under section 311 may be considered only if ... the petition identifies all real parties in interest.”). Nothing could be more closely related to the decision to institute *inter partes* review than whether the petitioner satisfied the “Requirements of petition” expressly set forth in 35 U.S.C. § 312(a). Pet. App. E at 6a. Indeed, the Federal Circuit found that “it is strained to describe [the PTAB’s decision] as anything but an institution determination because the statutory language was not

limited to an initial determination to the exclusion of a determination on reconsideration.” Pet. App. B at 6a-7a (citing *GTNX, Inc. v. INTTRA, Inc.*, 789 F.3d 1309, 1312 (Fed. Cir. 2015) (quotations omitted). For this reason, and consistent with the Court’s ruling in *Cuozzo*, the Federal Circuit properly dismissed GEA’s appeal as precluded by 35 U.S.C. § 314(d).

The Federal Circuit’s dismissal of GEA’s appeal was alternatively—and correctly—based on the fact that the order from which GEA sought to appeal did not even purport to address the patentability of any claim. The Federal Circuit held that “[r]ead together, 35 U.S.C. §§ 319 and 141(c) authorize appeals only from a ‘final written decision of the [Board] under section 318(a),’ which in turn refers only to ‘a final written decision *with respect to the patentability of any patent claim challenged by the petitioner and any new claim added under section 316(d).*’” Pet. App. B at 5a (emphasis in original). The Federal Circuit noted that “[h]ere, the Board made no decision ‘with respect to the patentability’ of any claim.” *Id.* The Federal Circuit’s decision to dismiss GEA’s appeal, therefore, was also correct for this alternative and separately sufficient reason.

Turning to the Federal Circuit’s denial of GEA’s petition for writ of mandamus, the Federal Circuit properly found that GEA failed to demonstrate that the PTAB lacked inherent authority to review its own decisions. *Id.* at 7a-8a. GEA’s argument, at its core, is that the PTAB is required to issue a final written decision on patentability after deciding to institute an IPR, and cannot revisit its institution decision. Pet. Cert. at 22. If that were true, then the PTAB would not have the authority to grant a

request for rehearing of a decision on institution—but it does. The America Invents Act (“AIA”) expressly permits the PTAB to grant rehearing requests (35 U.S.C. § 6(c)), and the PTAB’s rules expressly permit requests to rehear institution decisions (37 C.F.R. § 42.71(d)(1)). The AIA even expressly provides that petitions may be dismissed before any final written decision on patentability. 35 U.S.C. § 318(a). Even if the AIA were silent on the issue, courts have consistently concluded that administrative agencies possess inherent authority to reconsider their own decisions. *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008). In denying GEA’s petition for mandamus, the Federal Circuit correctly found that GEA failed to establish that it had a clear and indisputable right to the relief requested because GEA made no showing that would clearly deprive the Board of its default authority to review its own decisions. *Id.*

I. Under this Court’s holding in *Cuozzo*, GEA’s appeal is plainly barred by 35 U.S.C. § 314(d).

In *Cuozzo*, this Court carefully considered the meaning of 35 U.S.C. § 314(d) and concluded that appeals directed to issues closely related to the decision to institute are barred by the statute. This Court held, in pertinent part, that:

where a patent holder merely challenges the Patent Office’s “determin[ation] that the information presented in the petition ... shows that there is a reasonable likelihood” of success “with respect to at least 1 of the claims challenged,” § 314(a), or where a patent holder grounds its claim in a statute closely related to

that decision to institute inter partes review, § 314(d) bars judicial review. In this case, Cuozzo’s claim that Garmin’s petition was not pleaded “with particularity” under § 312 is little more than a challenge to the Patent Office’s conclusion, under § 314(a), that the “information presented in the petition” warranted review. Cf. *United States v. Williams*, 504 U. S. 36, 54 (1992) (“A complaint about the quality or adequacy of the evidence can always be recast as a complaint that the ... presentation was ‘incomplete’ or ‘misleading’”). We therefore conclude that § 314(d) bars Cuozzo’s efforts to attack the Patent Office’s determination to institute inter partes review in this case.

579 U. S. ____ (2016), slip op. at 12 (emphasis added). Because Cuozzo’s appeal was grounded in the requirements of 35 U.S.C. § 312, which in turn relates closely to the PTAB’s decision to institute *inter partes* review, this Court concluded that the appeal was statutorily barred.

Here, GEA’s appeal is similarly grounded in 35 U.S.C. § 312. In particular, it is grounded in the PTAB’s application of 35 U.S.C. § 312(a)(2), which states that “[a] petition filed under section 311 may be considered only if ... the petition identifies all real parties in interest.” Because GEA failed to name all RPIs, the PTAB applied its rules and statutes to determine that the institution decisions must be vacated making the PTAB’s decision an “institution determination.” Pet. App. C at 32a-33a; Pet App. B at 6a. Indeed, the dispute presented by GEA “is an ordinary dispute about the application of certain relevant

patent statutes concerning the Patent Office’s decision to institute *inter partes* review.” *Cuozzo* at 7.

Under this Court’s ruling in *Cuozzo*, GEA’s appeal was properly barred under 35 U.S.C. § 314(d) because it was grounded in statutory provisions closely related to the PTAB’s decision to institute. *Cuozzo* at 12.

II. GEA’s appeal was properly dismissed for the additional reason that the order from which the appeal was taken did not address the patentability of any claim.

The Federal Circuit was also correct in finding that “[b]ecause the Board’s decision did not make a determination with respect to patentability, it is outside §§ 141(c), 318(a), 319, and, in turn, outside § 1295(a)(4) (A).” Pet. App. B at 6a. Section 319 states that a “party dissatisfied with the final written decision of the Patent Trial and Appeal Board under section 318(a) may appeal the decision pursuant to sections 141 through 144.” Pet. App. E at 82a. Likewise, 35 U.S.C. § 141(c) states that a “party to an *inter partes* review ... who is dissatisfied with the final written decisions of the Patent Trial and Appeal Board under section 318(a) ... may appeal the Board’s decision only to the United States Court of Appeals for the Federal Circuit.” Pet. App. E at 59a. Section 318(a), in turn, refers to “a final written decision with respect to the patentability of any patent claim” Pet. App. E at 80a. Thus, the statutory provisions for appeals from an *inter partes* review proceeding refer to only one type of decision—a final written decision *on patentability*.

Here, the PTAB’s decision “vacated” the “Decisions on Institution,” and did not address the patentability of

any claim. Pet. App. C at 33a. Whereas *Cuozzo* involved a final written decision on patentability, in this case, GEA attempted to appeal from an order vacating an institution decision, which is not permitted under the statute. Notwithstanding GEA's attempt to characterize the PTAB's decisions as "final written decision(s)" in its Petition, the decisions did not address the patentability of any claim. *See, e.g.*, Pet. Cert. at 1, 5, 7. GEA's appeal was therefore improper for this additional reason.

Importantly, PTAB orders not addressing the patentability of any claim are still reviewable through a petition for writ of mandamus in order to determine whether the PTAB had lawful authority to issue certain decisions in the first place. *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1274 (Fed. Cir. 2015) ("[M]andamus may be available to challenge the PTO's decision to grant a petition to institute IPR after the Board's final decision in situations where the PTO has clearly and indisputably exceeded its authority."). GEA filed such a petition, which the Federal Circuit fully considered and correctly denied for the reasons set forth in the following section.

III. With respect to GEA's petition for writ of mandamus, the Federal Circuit correctly determined that GEA failed to demonstrate that the PTAB lacks the authority to review its institution decisions.

The Federal Circuit summarized GEA's argument as follows: "Relying on § 314(d), GEA Process argues that mandamus should issue because the Board did not have authority to vacate the prior institution decisions." Pet. App. B at 7a. The Federal Circuit denied GEA's petition for writ of mandamus because "GEA Process has not made

any showing that would clearly deprive the Board of th[e] default authority [to review its decisions on institution].” *Id.* at 8a. Indeed, the PTAB has such authority—both expressly and inherently.

The America Invents Act provides that “[o]nly the Patent Trial and Appeal Board may grant rehearings.” 35 U.S.C. § 6(c). One such application of a rehearing would be to “dismiss [an *inter partes* review] under this chapter,” as provided in 35 U.S.C. § 318(a). Pet. App. E at 80(a). Consistent with this statutory authority, the Patent Office promulgated 37 C.F.R. § 42.71(d)(1), which specifically provides that a party may seek rehearing of a decision to institute.

§ 42.71 Decision on petitions or motions.

(d) Rehearing. A party dissatisfied with a decision may file a single request for rehearing, without prior authorization from the Board. The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply. A request for rehearing does not toll times for taking action. Any request must be filed:

(1) Within 14 days of the entry of a non-final decision or a decision to institute a trial as to at least one ground of unpatentability asserted in the petition; or

(2) Within 30 days of the entry of a final decision or a decision not to institute a trial.

37 C.F.R. § 42.71(d) (emphasis added).

GEA's argument—that the AIA makes clear that the PTAB is required to issue a final written decision on patentability after deciding to institute an IPR—is thus demonstrably incorrect. Pet. Cert. at 22. To the contrary, the statute expressly permits rehearing, and the PTAB's rules expressly provide for rehearing of a decision on institution.

Moreover, the Federal Circuit was correct in holding that “administrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so.” Pet. App. B at 7a, citing *Tokyo Kikai*, 529 F.3d at 1360. In *Tokyo Kikai*, the Federal Circuit noted that “[t]he power to reconsider is inherent in the power to decide.” 529 F.3d. at 1360 (citing *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980) (“[T]he power to decide in the first instance carries with it the power to reconsider.”)). The Federal Circuit rightly observed that:

[f]or this reason, the courts have uniformly concluded that administrative agencies possess inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they possess explicit statutory authority to do so. *Macktal*, 286 F.3d at 825-26 (“[I]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider

its decisions.”) (collecting cases); *Alberta Gas Chems., Ltd. v. Celanese Corp.*, 650 F.2d 9, 12 (2d Cir. 1981) (discussing “the inherent power of any administrative agency to protect the integrity of its own proceedings”); *Bookman v. United States*, 197 Ct. Cl. 108, 453 F.2d 1263, 1265 (1972) (“[I]t is the general rule that [e]very tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify its judgment, decree, or order.” (citation omitted)).

An agency’s power to reconsider is even more fundamental when, as here, it is exercised to protect the integrity of its own proceedings from fraud. *Alberta Gas*, 650 F.2d at 12; see also *Elkem Metals, Com. v. United States*, 193 F. Supp. 2d 1314, 1321 (Ct. Int’l Trade 2002) (“A finding that the ITC has the authority to reconsider a final determination is particularly appropriate where after-discovered fraud is alleged.”). As the Second Circuit observed in *Alberta Gas*, “It is hard to imagine a clearer case for exercising this inherent power [to reconsider] than when a fraud has been perpetrated on the tribunal in its initial proceeding.” 650 F.2d at 13.

Tokyo Kikai, 529 F.3d. at 1360-61 (emphasis added). The Federal Circuit has therefore adopted the sound and ubiquitous policy that administrative agencies have inherent authority to review their own actions, especially in situations where there may have been after-discovered fraud or a similar abuse of the system.

Here, the PTAB similarly exercised its discretion to reconsider its institution decision in view of “after-discovered” information to “protect the integrity of its own proceedings.” The Board found that:

[D]iscovery revealed that Procomac funded all the IPR expenses in these cases until May 2014 and that it had the opportunity to control GEA’s participation in these proceedings. GEA did not admit that Procomac funded the IPR expenses, or produce the relevant discovery, until long after Steuben Foods alleged that Procomac was an RPI. Indeed, GEA still asserts that Procomac is not an RPI (Opp. 1) despite the overwhelming evidence of its relationship with GEA and these proceedings

Pet. App. C at 32a. While stopping short of characterizing GEA’s behavior as “fraud,” the PTAB’s decision reflects well-placed skepticism that GEA’s listing of the real parties-in-interest was done in “good faith.” *Id.*

The Federal Circuit was correct in finding that “GEA [] has not made any showing that would clearly deprive the Board of [the] default authority” to review its institution decisions. Pet. App. B at 8a.

CONCLUSION

For the foregoing reasons, GEA's petition for a writ of certiorari should be denied.

Respectfully submitted,

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