

Dr. Thomas E. Sawyer
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Sandy, Utah 84092

July 27, 2017

The Honorable Wilbur Ross
Secretary of the U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230

The Honorable David P. Ruschke
Chief Judge for the Patent Trial and Appeal Board
Patent Trial and Appeal Board
P.O. Box 1450
Alexandria, VA 22313-1450

Secretary Ross and Judge Ruschke,

I am a former officer and concerned shareholder of VoIP-Pal.com, Inc. (VoIP-Pal). I am writing to express my reservations about the failure of the present PTAB system to provide constitutional protections to patent holders.

I. Legal Background

Since a patent is "property" a patent should be protected by due process of law. The applicable portions of the Bill of Rights that provides that protect are the Fifth and Seventh Amendments.

The Fifth Amendment to the Constitution, in part, provides:

No person shall be... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Seventh Amendment to the Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The America Invents Act (AIA) makes no provision for a “trial by jury” nor does it allow an appeal of a final written institution decision, which is the decision of greatest importance next to the granting of the patent itself.

Since nearly ninety percent of all patent petitions that are instituted by the PTAB result in the invalidation of one or more claims, the lack of *res judicata*, which precludes repeated litigation of issues and claims by a “real party in interest” or its “privy,” would eliminate due process at a stage in the IPR process where it may matter most.

II. The History of the VoIP-Pal Litigation in the PTAB

VoIP-Pal.com has had eight IPR petitions filed against it within the past 14 months, all against the same two patents. The first petition was filed by Unified Patents (“Unified”). Unified is a membership entity that represents itself as a proxy for many computer companies including, presumably, Apple Inc., and AT&T. Since the law requires that all parties filing a petition for an IPR either be parties of interest or their privies, VoIP-Pal can only assume by the fact that Unified’s petition was considered by the PTAB meant that the PTAB panel determined the Unified filed as a privy for the real parties in interest, Apple and AT&T.

III. Real Parties in Interest and Privies

35 U.S.C. 312(a) and 35 U.S.C. 311, which govern the IPR petition process, state that a petition for an IPR must identify all real parties in interest. Unified Patents was allowed to file a petition for an *Inter Partes* review on behalf of an undisclosed membership. Issue and claim preclusion lie at the heart of *Res Judicata* since they serve to limit needless litigation and ensure that the holding has the intended effect on those parties that are actually legally involved. It ensures that members of an industry-focused entity cannot use that entity as a tool to allow members to conduct “practice” litigation through the entity’s litigation before the company has to deal with any of the outcomes of the decision.

My specific concern is that the petition of Unified Patents, which holds its membership list to be a trade secret, forces the litigants in the present case to assume that Unified filed as a “privy” of Apple and AT&T and that such a role was identified by the PTAB panel, although there was no explicit finding to that effect. Consequently, the “real parties in interest” should be bound by the decisions made by the PTAB on the Unified petition.

In other federal courts, the interests of a broader group of similarly situated people or institutions, is facilitated through allowing such groups to file an *amicus curiae* brief with the court. In this way the broader policy issues may be addressed but an entity that is not a “real party in interest” is not allowed to hijack the process. If United Patents petitioners are allowed to file for IPR’s, the PTAB may effectively eliminate the legal protections of “standing.”

IV. Determination of the Elements Required for Unified to be a “Privy”

Since the only lawful basis that Unified could claim as a basis for jurisdiction in filing its petition is as a “privy” for the litigants, it is important to understand how the U.S. Supreme Court defines that role. In Taylor v. Sturgell, 553 U.S. 880 (2008), the D.C. Circuit identified a five-part test used by the Supreme Court to determine whether an individual was acting as a “privy” for another:

A nonparty may be bound by a judgment if there is both:

1. “Identity of interests”
2. “adequate representation” and

at least one of the three other factors:

3. “a close relationship between the present party and his putative representative,”
4. “substantial participation by the present party in the first case,” or
5. “tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment.”

The “identity of interest” and anyone of the last three factors should be cause for concern, since all of them would appear to create a “cabal” that could undermine the purposes of the patent process.

V. Consequences of Unified’s Petition not being Instituted

Unified’s petition was not instituted. Under the doctrines of issue and claim preclusion under *res judicata*, the decision by the PTAB not to institute would have precluded any companies for which it was acting as “privy” from filing on those issues again.

Unified’s petition sought to invalidate claims 1, 2, 7, 27, 28, 29, 34, 54, 72, 73, 74, 92, 93 and 111 of the ‘815 patent. The need to avoid repetitive litigation, both for judicial economy and fundamental fairness to the litigants, is clearly evident as you review the seven petitions subsequently filed by Apple and AT&T, all of which involved the same claims challenged in the Unified petition of VoIP-Pal Patent 8,542,815 (“815”), IPR2016-01082, and/or analogous claims in the continuation patent, 9,179,005 (‘005). Based upon those facts, all of the petitions filed in this case subsequent to Unified, are precluded by the decision in Unified.

VI. Possible Anti-Competitive Relationship between Unified, AT&T and Apple

I have a further concern about the relationship between Unified, Apple and AT&T:

Unified, as a business organization that appears to serve as a “trust” and claims to act on behalf of unidentified member corporations, may also involve violation of anti-trust laws. If an interested entity that is not directly involved in the immediate question before the court is

allowed to drive the IPR process without identifying the business entities that it represents, such actions may conflict with the Sherman Act which outlaws unreasonable "contract(s), combination(s), or conspirac(ies) in restraint of trade," and any "monopolization, attempted monopolization, or conspiracy or combination to monopolize." Unified Patents' position, as an entity driven by the interests of a limited group of undivulged members, might be seen as an "arrangement among competing individuals or businesses to fix prices, divide markets, or rig bids, involving "unfair methods of competition" and "unfair or deceptive acts or practices" which would violate the Clayton Act.

VII. Other nations have revised their laws to protect inventors

While our country prides itself on the fairness of its legal systems, the use of proxies in the IPR review process would not be tolerated under the more progressive patent laws of other countries. For example, while China was one of the last countries to offer meaningful patent protection to its inventors, it has recently recognized the value of the intellectual property of its inventors. That protection is reflected in its patent laws.

Erick Robinson analyzed the difference between the U.S. patent policy on allowing non-parties in interest (such as Unified Patents) to file for *Inter Partes* Review and the new patent policy in China in an article published on April 26, 2017:

China, unlike America, has made innovation a top priority. China's government has also, over the last few years, created the best patent enforcement environment in the world. Unlike the U.S., that makes decisions based on the next fiscal quarter, the Chinese government plays a long game. They make plans of 5, 10, and 25 years. For instance, while China's economic growth has "slowed" (the quotation marks are because the United States would be euphoric with half of China's 6.5% growth), this is because such a lull is a natural consequence of a shift from a manufacturing-based to an innovation- and consumer-based economy.

Because China thinks long-term, its government will be very unlikely to accept attacks on patents by proxy – especially by a foreign company such as Unified. First, patents are essential to China's growth as a technology powerhouse. Chinese companies are no longer the copycat wannabes of yesteryear.

They are leading the world in many areas of technology. Not only are they now directly competing with foreign companies, they are beating their foreign competitors. Huawei, ZTE, Alibaba, Baidu, Tencent, Xiaomi, Oppo, Vivo, Haier, and many others are not just more efficient, they are better. These new hometown heroes need patent protection, as do the next generation of Chinese innovators yet to be created. The Chinese government is not going to be happy if a foreign Troll of Trolls (Unified Patents) comes in to kill patents on behalf of American companies. <http://www.ipwatchdog.com/2017/04/26/unified-patents-model-would-not-work-in-china/id=82399/> (accessed 07/22, 2017)

The PTAB/IPR system appears to have been hijacked by the powerful Silicon Valley Companies that often are infringers seeking to avoid payment for licenses. The technology financial lobby has donated hundreds of millions of dollars to politicians, either directly or funneled through their foundations, presumably to secure some influence with the political process. I am asking you to give serious consideration to the legal flaws of the IPR process that fail to protect our laws and the constitutional rights of patent holders.

VIII The PTAB/ IPR rules have been applied in ways that:

1. Permit companies like Unified Patents, which have no legal standing, to file IPR petitions. This is an anti-competitive and anti-trust practice.
2. Allow infringers to file multiple IPR petitions on the same patent. How is a small inventor or company expected to bear the crippling financial burden of defending themselves against a myriad of IPR's? As mentioned previously, the PTAB has become the "killing fields" of patents.
3. Provide a venue to take away the property rights of patent owners by the canceling of patent claims without a jury.
4. Create a system that does not provide an appeals process for institution decisions.
5. Permit judges to rule on cases in spite of having clear conflicts of interest.

There have been a total of eight IPR petitions filed against Voip-Pal, on the same two of their patents. All of the claims and issues in each of the petitions are precluded by the decision not to institute the Unified Patents petition. The replacement of the original judges alone, does not make Voip-Pal whole. In order for the required due process to be followed, the PTAB must dismiss the two Apple petitions that have been instituted and make a decision not to institute the five pending petitions

"America the free", is the land of opportunity and justice. The world looks up to our great nation. We cannot afford the present PTAB/IPR system to undermine our position in the world. The deficiencies in the present system demand that the process be restructured consistent with the mandates of The Constitution. I hope that you will personally follow up on this serious matter.

Sincerely,



Dr. Thomas E. Sawyer

CC

Donald J. Trump, President of the United States Wilbur
Ross, US Secretary of Commerce
Steven Mnuchin, US Secretary of the Treasury
Dr. Ben Carson, US Secretary Housing and Urban Development US
Senator Orrin Hatch, Utah
US Senator Mike Lee, Utah
US Senator Ed Markey, Massachusetts
US Senator Mitch McConnell, Kentucky, Senate Majority Leader US
Senator Chuck Schumer, New York, Senate Minority Leader
US Senator Marco Rubio, FL US
Senator Jeff Flake, Arizona
US Chuck Senator Grassley, Iowa
US Senator Patrick Leahy, Vermont
US Senator Chris Coons, Delaware
US Senator Tom Cotton, Arkansas
US Senator Dick Durbin, Illinois US
Senator Mazie Hirono, Hawaii
US Representative Paul Ryan, Wisconsin, Speaker of the House of Representatives
US Representative Mia Love, Utah
US Representative Nancy Pelosi
Governor Gary Herbert, Utah
The Honorable John Roberts, Chief Justice of the Supreme Court of the United States
The Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States
The Honorable Anthony Kennedy, Associate Justice of the Supreme Court of the United States
The Honorable Ruth Bader Ginsberg, Associate Justice of the Supreme Court of the United States
The Honorable Stephen Breyer, Associate Justice of the Supreme Court of the United States
The Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States
The Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States
The Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States
The Honorable Neil Gorsuch, Associate Justice of the Supreme Court of the United States
The Honorable Sharon Prost, Chief Judge, United States Court of Appeal for the
Federal Circuit
Honorable Gloria M. Navarro, Chief Judge, US District Court, District of
Nevada (Voip-Pal.com Inc. v. Apple Inc. Case No. 2:2016cv00260, Voip-Pal.com v. Twitter
Inc., Case No. 2:2016cv02338, Voip-Pal.com Inc. v. Verizon Wireless Services LLC et al.,
case number 2:16-cv-00271)
Honorable Richard F. Boulware II, US District Court, District of Nevada (Voip-Pal.com Inc.
v. Apple Inc. Case No. 2:2016cv00260, Voip-Pal.com Inc. v. Twitter Inc., Case No.
2:2016cv02338, Voip-Pal.com Inc. v. Verizon Wireless Services LLC et al., case
number 2:16-cv-00271)
Office of the Solicitor General of the United States
Sean Reyes, Attorney General of the State of Utah
USPTO Office of Enrollment and Discipline
Patent Office of the Ombudsman
David P. Ruschke Chief Judge for the Patent Trial and Appeal Board
Dr. Colin Tucker, Chairman of the Board, Voip-Pal.com Inc
Multiple Media Outlets

CC's sent via Registered US Mail and email when available

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July 11, 2017

The Honorable David P. Ruschke
Chief Judge for the Patent Trial and Appeal Board
Patent Trial and Appeal Board
P.O. Box 1450
Alexandria, VA 22313-1450

Subject: *Inter Partes* Review Apple v. Voip-Pal.com Inc. Case IPR2016-01198 Patent 9,179,005 B2 and Case IPR2016-01201 Patent 8,542,815 B2

Dear Judge Ruschke,

I am disappointed that I have not received a response concerning my letter of June 21, 2017. I would be very grateful for an explanation for the replacement of all of the members of the panel designated to hear the two IPR's identified above.

In an attempt to try and understand the rationale for the removal of the judges, I have re-read CFR 11.803a – 11.804, USPTO Rules of Professional Conduct for Practitioners; 28 U.S.C. § 455, which deals with the disqualification of judges; and Rule 59 of the Federal Rules of Civil Procedure, which deals with the rationale for retrial in other federal courts and 37 CFR 42.12, that deals more generally with sanctions; to see if they would clarify the picture for me.

USPTO Rules of Professional Conduct

37 CFR 11.803(b) provides:

- (a) A practitioner who knows that another practitioner has committed a violation of the USPTO Rules of Professional Conduct that raises a substantial question as to that practitioner's honesty, trustworthiness or fitness as a practitioner in other respects, shall inform the OED Director and any other appropriate professional authority.
- (b) A practitioner who knows that a judge, hearing officer, administrative law judge, administrative patent judge, or administrative trademark judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the individual's fitness for office shall inform the appropriate authority.
- (c) The provisions of this section do not require disclosure of information otherwise protected by § 11.106 or information gained while participating in an approved lawyers assistance program.

Judicial Misconduct

28 U.S.C. §455 provides:

Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, 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 of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party.

Analogous Processes for Retrial

Federal Code of Civil Procedure Rule 59

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

Sanctions

37 CFR § 42.12

If a violation that involves judicial misconduct has occurred, the applicable sanctions are contained in CFR Title 37 > Chapter I > Subchapter - > Part42 > Subpart A > Section 42.12
 “A practitioner who knows that a judge, hearing officer, administrative law judge,

administrative patent judge, or administrative trademark judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the individual's fitness for office shall inform the appropriate authority.”

(This section appears to contemplate a USPTO definition of judicial misconduct that doesn't appear in the same area of the Code.)

(b) Sanctions include entry of one or more of the following:

- (1) An order holding facts to have been established in the proceeding;
- (2) An order expunging or precluding a party from filing a paper;
- (3) An order precluding a party from presenting or contesting a particular issue;
- (4) An order precluding a party from requesting, obtaining, or opposing discovery;
- (5) An order excluding evidence;
- (6) An order providing for compensatory expenses, including attorney fees;
- (7) An order requiring terminal disclaimer of patent term; or judgment in the trial or dismissal of the petition.

Assumptions and Conclusions

My assumptions, after reviewing the quoted sections, are that:

1. The replacement was made to avoid any perception of bias based on undisclosed prior relationships of any of the panel members and the Petitioner or some other circumstance that might appear to be prejudicial to the administration of justice. If this was indeed the reason, then the solution does not resolve the problem. The replacement of the judges, while leaving the IPR's instated, removes the cause, but not the consequence.
2. It is common practice in other federal judicial settings to set aside the original outcome and try the case again to ensure that decision, which may have been based upon bias, can be tried again in an unbiased setting. Such an outcome would be particularly appropriate in this setting, since the statistics released by the PTAB and others suggest that there is an overwhelming likelihood that a patent that has an IPR instituted will have some or all of its claims found to be un-patentable. Lee and Simpson, in an article called *How Kill Rates are Affecting Patents* conclude, "Once the PTAB institutes a petition, the odds are overwhelmingly in favor of the petitioner. Of the 404 final written decisions analyzed (that had been made at the time of the article), 88 percent (356 of 404) resulted in at least one claim being invalidated. Importantly, this average remained steady between 2014 and 2015, providing petitioners with a reasonably high level of confidence that an IPR can and will weaken a challenged patent." [<https://www.law360.com/articles/699860/ptab-kill-rates-how-iprs-are-affecting-patents> accessed June 18, 2017]

The very high percentage of patents that are invalidated in the IPR system appears to be several times greater than the percentage of invalidation for a similar patent through the federal court system. In *IPR Statistics Revisited, Yep it's a Killing Field*, Samson Vermont does an "apples to apples" comparison of kill rate between section 102 cases filed in the PTAB versus federal court and concluded that the federal courts for section 102 cases have an 18.7% kill rate, while the PTAB/IPR kill rate for similar patents is 41.1%.
[<https://www.patentattorney.com/ipr-statistics-revisited-yep-its-a-patent-killing-field/> accessed June 19, 2017]

Of the available sanctions for bias or misconduct on the part of the previous panel, it appears that only a judgment in the patent owner's favor or a dismissal of the action would make the patent owner whole.

I appreciate your difficult position, but as a former CEO of VoIP-Pal I am concerned that any bias, conflict or other problem with the previous panel may not be addressed in a way that the company is made whole.

Respectfully Yours,



Dr. Thomas E. Sawyer

CC

Donald J. Trump, President of the United States
Wilbur Ross, US Secretary of Commerce
Steven Mnuchin, US Secretary of the Treasury
Dr. Ben Carson, US Secretary Housing and Urban Development
US Senator Orrin Hatch, Utah
US Senator Mike Lee, Utah
US Senator Ed Markey, Massachusetts
US Senator Mitch McConnell, Kentucky, Senate Majority Leader
US Senator Chuck Schumer, New York, Senate Minority Leader
US Senator Marco Rubio, FL US Senator Jeff Flake, Arizona
US Senator Grassley, Iowa
US Senator Patrick Leahy, Vermont
US Senator Chris Coons, Delaware
US Senator Tom Cotton, Arkansas
US Senator Dick Durbin, Illinois
US Senator Mazie Hirono, Hawaii
US Representative Paul Ryan, Wisconsin, Speaker of the House of Representatives
US Representative Mia Love, Utah
US Representative Nancy Pelosi, California, Minority Leader of the House of Representatives

Governor Gary Herbert, Utah

The Honorable John Roberts, Chief Justice of the Supreme Court of the United States

The Honorable Clarence Thomas, Associate Justice of the Supreme Court of the United States

The Honorable Anthony Kennedy, Associate Justice of the Supreme Court of the United States

The Honorable Ruth Bader Ginsberg, Associate Justice of the Supreme Court of the United States

The Honorable Stephen Breyer, Associate Justice of the Supreme Court of the United States

The Honorable Samuel Alito, Associate Justice of the Supreme Court of the United States

The Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States

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The Honorable Sharon Prost, Chief Judge, United States Court of Appeal for the Federal Circuit

The Honorable Gloria M. Navarro, Chief Judge, US District Court, District of

Nevada (Voip-Pal.com Inc. v. Apple Inc. Case No. 2:2016cv00260, Voip-Pal.com v.

Twitter Inc., Case No. 2:2016cv02338, Voip-Pal.com Inc. v. Verizon Wireless Services

LLC et al., case number 2:16-cv-00271)

The Honorable Richard F. Boulware II, US District Court, District of Nevada (Voip-

Pal.com Inc. v. Apple Inc. Case No. 2:2016cv00260, Voip-Pal.com Inc. v. Twitter Inc.,

Case No. 2:2016cv02338, Voip-Pal.com Inc. v. Verizon Wireless Services LLC et al., case number 2:16-cv-00271)

Office of the Solicitor General of the United States

Sean Reyes, Attorney General of the State of Utah

Director Will Covey, USPTO Office of Enrollment and Discipline

Patents Ombudsman

Judge Josiah Cocks, PTAB

Judge Jennifer Chagnon, PTAB

Judge John Hudalla, PTAB

Dr. Colin Tucker, Chairman of the Board, Voip-Pal.com Inc

Multiple Media Outlets

CC's sent via Registered US Mail and email if available

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June 21, 2017

The Honorable David P. Ruschke
Chief Judge for the Patent Trial and Appeal Board
Patent Trial and Appeal Board
P.O. Box 1450
Alexandria, VA 22313-1450

Subject: Inter Partes Review
Apple v Voip-Pal.com Inc
Case IPR2016-01198
Patent 9,179,005 B2
Case IPR2016-01201
Patent 8,542,815 B2

Dear Judge Ruschke,

It has recently come to my attention that the original three judges assigned to hear IPR2016-01198, Patent 9,179,005 B2 and IPR2016-01201, Patent 8,542,815 B2 were removed from hearing these *Inter Partes* Reviews (IPR's). My research suggests that replacement of an entire panel of judges is almost unheard of in past Patent and Trademark Appeals Board (PTAB) practice, since such a change is likely to have impacts on all concerned. Presumably, there is something that all three have done, or have failed to do that is of sufficient warrant that it was necessary to replace all three in the middle of an IPR.

My understanding is that the principal actions that have been taken, to date by the removed panel of judges, are the institution of the two IPR's and the refusal to rehear the institution decisions. There may be things about the hearing that I don't understand, but the statistics released by the PTAB and other suggest that there is an overwhelming likelihood that a patent that has an IPR instituted will have some or all of its claims found to be un-patentable. Lee and Simpson in an article called "How Kill Rates are Affecting Patents" conclude, "Once the PTAB institutes a petition, the odds are overwhelmingly in favor of the petitioner. Of the 404 final

written decisions analyzed, 88 percent (356 of 404) resulted in at least one claim being invalidated. Importantly, this average remained steady between 2014 and 2015, providing petitioners with a reasonably high level of confidence that an IPR can and will weaken a challenged patent.”

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The very high percentage of patents that are invalidated in the IPR system appears to be several times greater than the percentage of invalidation for a similar patent through the federal court system. In “IPR Statistics Revisited, Yep it’s a Killing Field” Samson Vermont does an “apples to apples” comparison of kill rate between sec.102 cases filed in the PTAB versus federal court and concluded that the federal courts for sec. 102 cases have an 18.7% kill rate, while the IPR kill rate for similar patents is 41.1%. <https://www.patentattorney.com/ipr-statistics-revisited-yep-its-a-patent-killing-field/> accessed June 19, 2017

If the problem, with the actions of the previous panel impacted the decision to institute the two IPR’s or reject a rehearing of those decisions, it seems clear that putting a new panel in place will not have the same effect as rehearing the institution decision, since all instituted cases move forward with the strong assumption that some or all of the claims are invalid. If the previous panel acted inappropriately, it seems clear that the only way to make the patent owner even partially “whole” is to allow the new panel to reconsider the institution decision. It is a partial solution, because the new panel comes to the case with knowledge of the previous panel’s decision and may be swayed to a decision that supports their colleagues.

If the problem was not the action of the previous panel, but an implied or actual conflict of interest, by the judges (such as past employment, financial impact of a decision, close personal relationship or some other conflict) such a conflict should have been identified by the judges and/or the petitioner’s counsel:

37 CFR 11.803(b) provides that practitioners commit an ethical violation for failing to report APJs who have violated the applicable “rules of judicial conduct.” § 11.803 reads:

“A practitioner who knows that a judge, hearing officer, administrative law judge, administrative patent judge, or administrative trademark judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the individual’s fitness for office shall inform the appropriate authority.”


If a violation that involves judicial misconduct has occurred, the applicable sanctions are contained in CFR Title 37 › Chapter I › Subchapter - › Part 42 › Subpart A › Section 42.12

(b) Sanctions include entry of one or more of the following:

- (1) An order holding facts to have been established in the proceeding;
- (2) An order expunging or precluding a party from filing a paper;
- (3) An order precluding a party from presenting or contesting a particular issue;
- (4) An order precluding a party from requesting, obtaining, or opposing discovery;
- (5) An order excluding evidence;
- (6) An order providing for compensatory expenses, including attorney fees;
- (7) An order requiring terminal disclaimer of patent term; or
- (8) Judgment in the trial or dismissal of the petition

Of the available sanctions for bias or misconduct on the part of the previous panel, it appears that only a judgment in the patent owner's favor or a dismissal of the action would make the patent owner whole.

I appreciate your difficult position, but as a former CEO of VoIP-Pal I am concerned that any bias, conflict or other problem with the previous panel may not be addressed in a way that the company is made whole.


Dr. Thomas E. Sawyer
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Dr. Thomas E. Sawyer
3626 E. Little Cottonwood Lane
Sandy, Utah 84092

May 1, 2017

Hon. David P. Ruschke
Chief Judge, Patent Trial and Appeal Board
P.O. Box 1450
Alexandria, VA 22313-1450

Re: Inter Partes Review Apple v Voip-Pal.com Inc, Case IPR2016-01198 Patent 9,179,005 B2;
Case IPR2016-01201 Patent 8,542,815 B2

Dear Judge Ruschke,

My professional life has been an integration of government and private sector work. I have had the unique opportunity to serve as senior advisor to four U.S. Presidents, Nixon, Ford, Reagan, and Bush Senior. Past technical and managerial experience included serving as Chairman of the Board of Directors and CEO of Voip-Pal.com Inc., as well as Director of Special Operations (see attached resume).

Although I no longer have a formal role with Voip-Pal, I am a shareholder and as such, have become increasingly concerned about the prospects of Voip-Pal receiving a fair and impartial inter partes review (IPR) by the currently assigned USPTO panel of administrative law judges.

The applicable section of the U.S. Code 28 USC §455 provides, in part:

- (a)** Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
- (b)** He shall also disqualify himself in the following circumstances...
 - (2)** Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it...
 - (4)** He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, 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 of the proceeding;
 - (5)** He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person...
 - (iii)** Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household...

(d) For the purposes of this section the following words or phrases shall have the meaning indicated...

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party.

The focus of the statute is not on whether there is actual bias, but on avoiding the potential for bias when "impartiality might reasonably be questioned." Consistent with that high standard, the "Judicial Conference (of the United States) policy now requires each court to enter judges' financial conflicts into a database that stores case information, including parties and attorneys. Judges, according to the policy, must provide the court with a list of their financial conflicts." (O'Brien, R., Weir, K., & Young, C. (2014, May 1). Revealed: Federal judges guilty of owning stock in corporations they ruled on. *Occupy.com*. Retrieved from <http://www.occupy.com/articles/revealed-federal-judges-guilty-owning-stock-corporations-they-ruled-against/> (idXmJ5Nm4s app))

If there is such a list for the Patent and Trademark Trial and Appeal Board, that information has not been shared. Further, in response to a request for such records in Re: USPTO FOIA Request re Leader Technologies, Inc. v. Facebook, Inc., U.S. Pat No. 7,139,761 and 3rd Reexam No. 951001,261, the United States Patent and Trademark Office of the General Counsel took the following position in an August 7, 2013 letter:

The financial disclosures are withheld in full pursuant to Exemption (b)(6) of the FOIA, which permits the withholding of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). (Retrieved from <https://www.fbi.gov/open-foia/docs/library/2013/08/08/08-07-13-foia-response-RT-DAY-1113-08-08-13-1008-re-exam-lead-technologies-v-facebook-1-1-1308071308-Aug-7-2013.pdf>)

As a consequence, it is impossible to get financial information about the three members of the panel in the current IRB, nor is it possible to request financial information concerning any potential bias in the administration of this judicial system, because Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, Michelle K. Lee, was not required to file any financial information at the time of her appointment, because the U.S. Senate had her answer a "Questionnaire for **Non-Judicial** Nominees."

(Retrieved from <https://www.judiciary.senate.gov/imo/media/doc/1-cer-a20v-gu-stg-mmmx%20of-ma.pdf>)

Based on information that is available, it can be determined that two of the assigned judges either represented Apple (the Petitioner) or worked in a law firm which has represented Apple in patent litigation. Judge Stacy Margolies represented Apple in a 2011 patent litigation case and Judge Barbara Benoit was a principal at Fish & Richardson, a law firm which has represented Apple in patent litigation, including a case before the Patent Trial and Appeal Board (PTAB). The third judge, Lynne Pettigrew, was employed by AT&T for a period of eight years. While AT&T is not directly related to the petitioner, they are a named party in a lawsuit filed by Voip-Pal pertaining to the patents currently being reviewed in the IPR. Thus it appears that each of the judges may

have a potential bias, but there is no way of ascertaining whether the problem is an appearance or a reality.

There is also a potential of bias on the part of the administrator, Under Secretary Lee, who, prior to becoming the Director of the USPTO, was Deputy General Counsel and Head of Patents and Patent Strategy for Google, which is also a defendant in the federal court action that is considering these patents. Given her position as the head of the USPTO, which now includes the judicial arm, the PTAB, I request that she be asked to provide the financial disclosures that are contemplated by 28 USC§455 and that she consider whether “[s]he, individually or as a fiduciary, or [her] spouse or minor child residing in h[er] household, 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 of the proceeding.” For example, it seems likely that her long tenure at Google resulted in her owning a number of Google shares and/or options, which may create a circumstance where she should “disqualify h[er]self (acting as an administrator over a judicial system) in any proceeding in which h[er] impartiality might reasonably be questioned.”

A further and more fundamental bias during her administration is suggested by the fact that the PTAB has invalidated a record number of patents, many of them developed by individuals or small American inventors. Each patent, prior to the PTAB invalidation, had been awarded after a careful review by patent examiners, who come from the same system with the same criteria as the PTAB judges. An indication of the “administrative headwind” that Director Lee’s has created, was her recent statement, “Our stakeholders share my belief, and that of my USPTO colleagues, that there is a cost to society when this agency issues a patent that should not issue...” Are the “colleagues” and “stakeholders” the large Silicon Valley companies that have largely been the beneficiaries of the PTAB’s decisions? Or just the members of the “death squad,” a characterization embraced by former PTAB Chief Judge James Smith in a speech in which he described it as “unfortunate language,” but in some ways it adequately described the mission Congress gave the board under the America Invents Act.

(Davis, R. (2014, August 14). PTAB’s ‘Death Squad’ label not totally off-base, chief says. Retrieved from <https://www.lexipol.com/articles/567850-ptabs-death-squad-label-not-totally-off-base-chief-says/>)

The concerns about the “impartiality” of the process seem quite reasonable when considering the seemingly excessive rate of institution and cancellation by two of these judges, Barbara Benoit and Lynne Pettigrew. Both are among the judges with the highest institution rates at **89%** and **84%** respectively, and Judge Lynne Pettigrew has a cancellation rate of **97%**.

(Graham, S. & Shuchman, L. (2015, Fall). The Brainy Bunch. *Intellectual Property: An ALM Supplement*, 6. Retrieved from https://www.ropergray.com/_media/files/articles/2015_Sepember_20150911_PTAB_Report.aspx)

Those numbers are disconcerting in that each IPR involves one or more patents and raises the question whether any patent owner who has spent years conducting R&D and tens of thousands of dollars, if not millions, bringing their inventions and innovations to fruition will receive fair and impartial consideration: certainly not by a panel of judges who appear eager to cancel claims and patents which have been properly examined and thoroughly vetted and granted by competent USPTO examiners. Voip-Pal and other companies like it are generally funded by thousands of hard working and often small shareholders who deserve fair and impartial treatment. As a shareholder, I seek a fair review on the merits of each patent case. Your attention to this matter is greatly appreciated.

Personal Observation

Further substantiating the concerns are PTAB's own statistics. Since its formation in 2012, **69%** of trials resulted in all instituted claims being rendered un-patentable (an additional **15%** resulted in some instituted claims rendered un-patentable). A total of **84%** of trials resulted in the cancellation of claims.

By PTAB's own published numbers they are disallowing the vast majority of contested patents which had been properly and carefully reviewed by qualified and competent examiners. As the "death squad" nickname embraced by Judge Smith suggests, it seems the primary purpose of the PTAB is to cancel properly issued patents.

(Retrieved from https://www.uspto.gov/sites/default/files/documents/ala_statistics_january2017.pdf)

- It takes a company or an individual approximately 4 to 6 years for a patent to be allowed and issued by the USPTO, which can then be cancelled by the PTAB, an element within the USPTO. Is the USPTO telling the world it does not trust the diligent work of its own experienced, expert examiners?
- America was built upon individual's efforts that were encouraged and rewarded as a result of their scientific and technological achievements. The American economic engine is fueled by innovation which is being stifled by the USPTO's PTAB. In my opinion the USPTO/PTAB is discouraging inventors when they should be doing exactly the opposite.

A Legal and Moral Issue

The USPTO charges fees when an inventor applies for a patent. Years are spent in the process of responding to the examiner and following established Patent Office rules. A patent is allowed and issued only after a rigorous review that determines that it is **valid and non-obvious**, and does not infringe prior art of an issued patent.

(Davis, R. (2017, April 24) Fed. Circ. Reverses PTAB nix of Synopsys Circuit patent. *Law 360*. Retrieved from <https://www.law360.com/articles/916431/fed-circ-reverses-ptab-nix-of-synopsys-circuit-patent>)

Scheller, B.M. & Ferraro, V.M. (2017, April 25). Federal Circuit to PTAB: No short cuts allowed. *The National Law Review*. Retrieved from <http://www.natlawreview.com/article/federal-circuit-to-ptab-no-short-cuts-allowed>)

The same USPTO, through the PTAB process, has set up a different standard that has resulted in 84% of all patent prosecutions through the IPR procedure becoming disallowed and cancelled. Fees have been paid by the inventor to the same office for both the issuance and the cancellation of their patent. One side takes 4 to 6 years to issue a patent while the other side strikes down the same patent in one year or less. Both entities are part of the same government agency and yet each has its own set of rules which are contradictory. The question must be asked, "Does this process reflect the 'fundamental fairness' upon which our laws are based?"

An anticompetitive patent process that favors large politically powerful software and hardware companies, while excluding the small company or individual inventor, brooks the potential not only for a reduction in patent development, but long-term monopolistic practices that will thwart our national creativity and the strength of our economy which has thrived under free market and fair trading principles. The pushback is already gaining steam in the European Union, where several countries have filed or are considering suits against large American software companies. (Couturier, K. (2016, Dec. 20). How Europe is going after Apple, Google, and other U.S. tech giants. *New York Times*. Retrieved from <https://www.nytimes.com/interactive/2015/04/13/technology/how-europe-is-going-after-us>)

tech-giants.html; Manjoo, F. (2017, Jan. 4). Tech giants seem invincible. That worries lawmakers. *New York Times*. Retrieved from <https://www.nytimes.com/2017/01/04/technology/techs-next-battle-the-fight-for-eyes-of-lawmakers.html>

In looking at the emerging practices of the USPTO/PTAB as anti-competitive, reconsider again the current cancellation rates of the PTAB judges that are canceling an average of 84% of issued claims, with some judges reaching as high as 97%. USPTO examiners are amongst the most highly skilled and competent in the entire world. The patents granted by such examiners should be looked at as a resource, not a problem. The PTAB has tarnished the USPTO's reputation for fairness and impartiality. Now, rather than being at the forefront of innovation and patent protection the United States has now fallen behind Australia, Canada, Europe and even China in terms of its patent protection and inventor friendly laws. (Quinn, G. & Brachmann, S. (2017, Feb. 2, 2017). Michelle Lee's views on patent quality out of touch with reality facing patent applicants. Retrieved from http://www.ipwatchdog.com/2017/02/02/michelle-lee-s-patent-quality-reality/id_77158/ ;

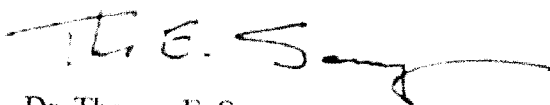
Quinn, G. (2017, April 10). Michelle Lee launches PTAB initiative to 'shape and improve' IPR proceedings. Retrieved from http://www.ipwatchdog.com/2017/04/10/michelle-lee-ptab-initiative-ipr-proceedings/id_81911/)

It appears, based on the extremely high percentage of cancellations since the formation of the PTAB in 2012 that the IPR process was set up primarily to protect large companies which have deep pockets for lobbying. It seems that the IPR system favors two groups: patent infringers from Silicon Valley and the pharmaceutical industry.

The actions of the PTAB are signaling inventors and scientific and technological innovators that their lawfully allowed and issued patents have little or no value since they can so easily be cancelled. The USPTO seems to have forgotten why it was formed in the first place - patent protection for innovations. I can only conclude that the USPTO/PTAB is conducting a biased court process that favors influential infringers, which has no place in our democracy.

(See Attachment 1 for Related Issues of Concern)

Respectfully yours,



Dr. Thomas E. Sawyer

CC The President of the United States
 Wilbur Ross, United States Secretary of Commerce
 John Roberts, Chief Justice of the United States Supreme Court
 Steven Mnuchin, United States Secretary of the Treasury
 Honorable Sharon Prost, Chief Judge, United States Court of Appeal for the Federal Circuit
 Honorable Gloria M. Navarro, Chief Judge, United States District Court, District of Nevada (Voip-Pal.com Inc. v. Apple Inc. Case No. 2:2016cv00260, Voip-Pal.com v. Twitter Inc., Case No. 2:2016cv02338, Voip-Pal.com Inc. v. Verizon Wireless Services LLC et al., case number 2:16-cv-00271)
 Honorable Richard F. Boulware II, United States District Court, District of Nevada (Voip-Pal.com Inc. v. Apple Inc. Case No. 2:2016cv00260, Voip-Pal.com Inc. v.

Twitter Inc., Case No. 2:2016cv02338, Voip-Pal.com Inc. v. Verizon Wireless
Services LLC et al., case number 2:16-cv-00271)
Office of the Solicitor General of the United States
Judge Barbara Benoit, PTAB
Judge Lynne Pettigrew, PTAB
Judge Stacy Margolies, PTAB
Michelle Lee, USPTO
US Senator Orrin Hatch, Utah
US Senator Mike Lee, Utah
US Senator Ed Markey, Massachusetts
US Senator Mitch McConnell, Kentucky, Senate Majority Leader
US Representative Paul Ryan, Wisconsin, Speaker of the House of Representatives
Governor Gary Herbert, Utah
Sean Reyes, Attorney General of the State of Utah
Director Will Covey, USPTO Office of Enrollment and Discipline
Patents Ombudsman
Dr. Colin Tucker, Chairman of the Board, Voip-Pal.com Inc
Multiple Media Outlets