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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 if 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/article/revealed-federal-judges-guilty-owning-stock-corporations-they-ruled#sthash.dUEdfXt6.iJ5Nrn4s.dpbs)

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.fbcoverup.com/docs/library/2013-08-07-Patent-Office-FOIA-Response-REDACTED-CONFLICTS-LOGS-re-Leader-v-Facebook-F-13-00218-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/Lee%20Questionnaire%20Final.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.law360.com/articles/567550/ptab-s-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.ropesgray.com/~/media/Files/articles/2015/September/20150911_PTAB_Reprint.ashx)

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/aia_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-frightful-five-vs-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-lees-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=81932/)

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.

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