

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

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
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 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
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 US Senator Chuck Schumer, New York, Senate Minority Leader
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 US Senator Patrick Leahy, Vermont
 US Senator Chris Coons, Delaware
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 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

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

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

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