UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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APPLE INC.
Petitioner

v.

VOIP-PAL.COM, INC.
Patent Owner

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Case No. IPR2016-01201
Patent 8,542,815

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**PETITIONER'S REPLY IN SUPPORT OF ITS MOTION FOR ENTRY OF JUDGMENT IN FAVOR OF PETITIONER AS A SANCTION FOR IMPROPER *EX PARTE* COMMUNICATIONS BY PATENT OWNER, OR, ALTERNATIVELY, FOR NEW AND CONSTITUTIONALLY CORRECT PROCEEDINGS**

## I. Voip-Pal Engaged In A Systematic Scheme To Hide Its Involvement

After representing to the Board, Apple, and the public at large that Dr. Sawyer acted "independently" of Voip-Pal, Voip-Pal now admits that it "participat[ed] in the preparation of the Sawyer letters." Opp. at 2, n.1. Voip-Pal would never have come clean had Apple not filed this motion for sanctions. Yet Voip-Pal persists in maintaining that it should suffer no consequence for its extended course of misconduct. Apple, in contrast, respectfully submits that when a party to a Board proceeding participates in the creation of *ex parte* submissions that demand specific results in a particular proceeding, sanctions are not just warranted but required.[1]

Here, the Board is confronted with a nearly unimaginable situation—a party admits to covertly sending threatening *ex parte* letters to the panel (and the Chief Judge) under cover of a purportedly independent third party. Voip-Pal's September 18 press release proclaimed, "The letters were written by Dr. Sawyer **independent of Voip-Pal management** between May and August of this year. . . ." Ex. 1019 (emphasis added). By contrast, after Apple moved for sanctions, Voip-Pal "corrected" its position on January 12, stating, "The letters

[1] The variety of ethical concerns implicated may explain the abrupt attempted departure of Voip-Pal's original counsel, Knobbe, and attempted substitution of new counsel who has no independent historical knowledge of events. Ex. 1022 at 3:6–16. Dr. Sawyer admits he worked with Voip-Pal attorneys. Ex. 3008 at 1.

were written by Dr. Sawyer **in consultation with Voip-Pal management** between May and August of this year…." Ex. 1023 (emphasis added).

In other words, Voip-Pal now admits that its September press release was false. It repeatedly emphasized in the letters that Dr. Sawyer was a *former* executive of Voip-Pal and omitted any mention of its involvement. Exs. 3003–3007. Voip-Pal, both actively and by omission, hid from the Board that it was ghost-writing Dr. Sawyer's letters. This conduct threatens the Board's foundational integrity and is alone sufficient to warrant sanctions against Voip-Pal.

## II. Voip-Pal Cannot Blame Apple For Believing Voip-Pal's Deception

Voip-Pal's deception fooled everyone into believing that Dr. Sawyer acted on his own. Yet Voip-Pal attempts to avoid the consequences of its own misconduct by suggesting that Apple waived objection to the *ex parte* campaign by not taking action as soon as it learned of the May 1 and October 23 letters. Apple was in good company—the Board also did not recognize the letters were from Voip-Pal and took no subsequent action, even though Voip-Pal sending *ex parte* letters was a clear violation of the Board's own rules. 37 C.F.R. § 42.5(d). Nobody took action earlier than now because Voip-Pal successfully hid its involvement.

In the May 1 letter—which Apple received on May 8 only because a District of Nevada clerk decided to file it on that court's docket—Voip-Pal intentionally implied that Sawyer acted alone. Ex. 3003 at 1 (Dr. Sawyer claimed to "no longer

have a formal role with Voip-Pal"). The letter provided no suggestion of Voip-Pal's involvement, as evidenced by the District of Nevada attributing the letter to an "interested party," rather than to Voip-Pal, and by the Board taking no action. Ex. 2057, at Ex. A, p. 5 (doc. 28). Apple did not receive a copy of the October 23 letter until November 1—again, only via a clerk who, on their own accord, filed it in the District of Nevada. While the October 23 letter suggested that Voip-Pal might be involved, it was far from clear, as again evidenced by neither the district court nor the Board attributing the letter to Voip-Pal. *Id.* (doc. 32). In fact, Voip-Pal's substitute attorney, Mr. Malek, argued the October 23 letter was not evidence of Voip-Pal's role: "Dr. Sawyer does meet with the principals of the company as a shareholder. But that is not – that is not evidence that the company was [complicit] in this campaign or this kind of advocacy." Ex. 1021 at 12:16-20.

As Apple explained in its sanctions motion, it investigated Voip-Pal's letters after receiving a Final Written Decision based on grounds that were expressly rejected twice earlier in the proceeding by the original panel. Motion at 7. Apple then discovered that Voip-Pal published six letters (four of which Apple had not previously known about), boasting about their content and their potential impact. After seeing all of this, Apple became convinced that Voip-Pal was behind the letter campaign. Apple diligently investigated the issues raised in its motion and promptly brought Voip-Pal's actions and the associated impacts to the Board's

attention. There is neither waiver nor bar where the key fact (Voip-Pal's involvement) was actively hidden by the party seeking to invoke waiver. Voip-Pal hid the truth, and it cannot pass the blame for its deception to Apple.

## III. Voip-Pal's Letters Are Prohibited *Ex Parte* Communications That Deprive Apple of Due Process

Having now admitted it orchestrated an *ex parte* campaign, Voip-Pal advances three arguments attempting to excuse its actions. First, Voip-Pal argues its letters were permissible because they avoided the merits of the proceeding. Opp. at 2–7. Second, it argues that its letters did not contain "new and material" information. *Id*. at 14–15. Finally, Voip-Pal suggests that its letters were harmless absent evidence that the Board acted on its letters. *Id*. at 8–9. Each of these three arguments fails.

### A. Voip-Pal's Letters Are *Ex Parte* Communications That Violate 37 C.F.R. § 42.5(d)

The Board's rules are clear: "Communication regarding a specific proceeding with a Board member defined in 35 U.S.C. 6(a) is not permitted unless both parties have an opportunity to be involved in the communication." 37 C.F.R. § 42.5(d). Voip-Pal seeks to avoid liability by arguing that the Board's Rules of Practice permit "reference to a pending case in support of a general proposition (for instance, citing a published opinion from a pending case or referring to a pending case to illustrate a systemic concern)." Opp. at 2. This comment clearly

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