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August 31, 2017

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

Dear Secretary Ross,

Having served four past U.S. presidents, I have great respect for the challenges entrusted to your office. I am writing to express my concern over the current patent process, which has been reflected in the news coverage recently showing inventors burning their patents in the street. (Brachmann, S. & Quinn, G. (2017, Aug 11). US Inventor sets patents on fire as part of PTAB protest at USPTO. *IPWatchdog*. Retrieved from <http://www.ipwatchdog.com/2017/08/11/us-inventor-patents-on-fire-ptab-protest-uspto/id=86757/>, and BBC.com (Producer). (2017, Aug 12). Why America's inventors are burning patents [Video file]. Retrieved from <http://www.bbc.com/news/av/world-us-canada-40907634/america-s-inventors-vent-over-patent-infringement>)

As a shareholder and former Chief Executive Officer of Voip-Pal.com, which has had eight *Inter Partes* Reviews filed against the same two patents (all concerning the same basic issues), I find such “gang tackling” (which by law the director of the USPTO can correct) is one of many things that currently undermine the confidence of the American people and the rest of the world in the U.S. patent system.

Recently, some very disturbing revelations have come to light during oral arguments before a panel of appellate court judges in the case of *Yissum Research Development Co. v. Sony Corp.* (Fed. Cir. 2015). By its own admission, the USPTO has revealed that its Director at the time, Michelle Lee, was apparently able to assign panels to IPRs based upon her bias. The Director and her inner circle would predetermine the outcomes of IPR cases before they were decided by a three-judge panel. While the issue in this particular case dealt specifically with joinder, the fact remains the Director used her power to manipulate panels in order to achieve her desired outcome. During Michelle Lee's tenure at the USPTO, she seemed never willing to assist the patent owner, not wanting to “place her finger on the scale.” However, it seems she had no problem placing her “finger on the scale” by changing the judges when it was seemingly benefiting a patent infringer.

It is obvious from the testimony depicted below, that no matter how strong the patent owner's case may have been, judges were apparently put in place to carry out the Director's policies of cancelling patent claims to satisfy her wishes. Webster's dictionary defines a “kangaroo court” as “a mock court in which the principles of law and justice are disregarded or perverted” or “a court

characterized by irresponsible, unauthorized, or irregular status or procedures.” Both definitions appear to apply here.

It is difficult for me to believe this type of procedural manipulation exists in a U.S. court. I am baffled that such an apparent blatant abuse of our legal system is permitted within the USPTO. While arguing on behalf of the USPTO, attorney Scott Weidenfeller acknowledged that the Director, a non-judicial officer, would assert her administrative authority to replace judges, even after panels had been selected, to ensure her desired outcome. As Mr. Weidenfeller stated, this is viewed by the USPTO as a completely acceptable practice in order to enforce a clear bias against individual patent owners and inventors. Mr. Weidenfeller further confirmed the USPTO’s belief that the circuit court has no authority over the PTAB’s decision, when he said, “Our position is that this court lacks jurisdiction to review this decision at all.”

I had to read the transcript multiple times to comprehend its significance. Even the judges asking the questions seemed perplexed by Mr. Weidenfeller’s answers. This amazing revelation confirms that the PTAB, which operates as a non-Article III court, nonetheless makes decisions about property, is nothing more than a kangaroo court that operates at the whim of the Director.

Partial Transcript of Oral Arguments

Judge Taranto: And, anytime there has been a seeming other-outlier you’ve engaged the power to reconfigure the panel so as to get the result you want?

USPTO: Yes, your Honor.

Judge Taranto: And, you don’t see a problem with that?

USPTO: Your Honor, the Director is trying to ensure that her policy position is being enforced by the panels.

Judge Taranto: The Director is not given adjudicatory authority, right, under § 6 of the statute that gives it to the Board?

USPTO: Right. To clarify, the Director is a member of the Board. But, your Honor is correct –

Judge Taranto: But after the panel is chosen, I’m not sure I see the authority there to engage in case specific re-adjudication from the Director after the panel has been selected.

USPTO: That’s correct, once the panel has been set, it has the adjudicatory authority and the –

Judge Taranto: Until, in your view, it’s reset by adding a few members who will come out the other way?

USPTO: That’s correct, your Honor. We believe that’s what *Alappat* holds.

(717 Madison Place: Oral Arguments and the Federal Circuit (n.d.). Selection process for assigning judges to expanded PTAB panels. Retrieved from <http://www.717madisonplace.com/?p=9143>)

In an August 27-28, 2017 updated entry from 717 Madison Place, *Selection process for assigning judges to expanded PTAB panels*, the Federal Circuit (*WI-FI One v. Broadcom*, Fed Cir. 2017) noted another occasion of “panel-stacking.”

During that oral argument, Judge Wallach noted that on the list of “shenanigans” — see the Supreme Court’s Cuozzo decision for more context on the “shenanigans” reference — was the Director appointing judges to come out the way that the Director wanted a case to be decided on re-hearing.

Judge Wallach: No, no, no . . . according to the Government, it’s not individual panels —it’s the Director. Because, on the list of shenanigans, the Director, if the Director doesn’t like a decision, and someone seeks an expanded panel, can appoint judges who take a different position which is more in line with what the Director wants. So, in the long run, what you’re really saying is, it’s the Director who decides it, as opposed to this court.

Later in the oral argument, Judge Wallach would ask the attorney for the opposing side similar questions:

Judge Wallach: The situation I described to your esteemed colleague where in effect the Director puts his or her thumb on the outcome . . . shenanigan or not? It’s within the written procedures.

Attorney: So, your hypothetical is the Director stacks the Board?

Judge Wallach: Yeah, more than a hypothetical, it happens all the time. It’s a request for reconsideration with a larger panel.

Attorney: That’s within the Director’s authority. The make-up of the Board to review the petition is within the Director’s authority. Whether that rises to the level of shenanigans or not . . .

Judge Wallach: Aren’t there fundamental rule of law questions there . . . basic things like predictability and uniformity and transparency of judgments and neutrality of decision makers? And don’t we review that kind of thing?

The testimonies above appear to be clear admissions or recognition of a “rigged system” practice by the USPTO. Unfortunately, Michelle Lee’s abrupt departure as Director has not yet resulted in any meaningful changes. In the case of my former company, Voip-Pal, three judges were suddenly removed and replaced with no explanations ever given. This action becomes quite troublesome in light of the testimonies given in the previously referenced cases.

If Director Lee and her inner circle have made this change to protect high-profile petitioners and to affect Voip-Pal’s pending litigation vs. Apple, Verizon, AT&T and Twitter, then they are involved in anti-competitive practices that in the private sector might have constituted organized crime. Legal decisions must be totally impartial and nonbiased. Any hint of manipulation and or subjectivism within the system should result in the cancellation of all pending IPR petitions against Voip-Pal.

In practice, the PTAB/IPR process does not provide a trial on the merits or a fair procedure to determine the validity of a patent. Instead, this is a structure that appears to have been deliberately set up to satisfy the agenda of the Director of the USPTO, who, prior to her appointment, was the former Deputy General Counsel of Google, and their chief patent litigator.

Sadly, the PTAB/IPR, under its prior leadership, worked diligently to discredit issued patents approved by the USPTO's own examiners, who are among the most competent and qualified in the world. In doing so, Director Lee achieved her apparent goal of making issued patents worthless.

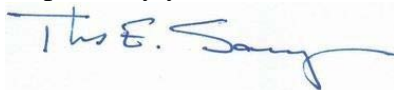
Since the PTAB conflict of interest rules are governed by the Department of Commerce's standards, rather than those employed in an Article III court, or those suggested by the Model Rule of Professional Conduct adopted by most states, it was impossible to determine how stock and/or stock options acquired during her tenure at Google might have influenced the "policy position" that she worked so hard to enforce. Given the potential for conflicts of interest or, at the very least, an appearance of impropriety, Director Lee should have been compelled to provide full financial disclosure of her personal and immediate family's stock and options holdings.

Given the continued effect of the "policy position" of Director Lee that favored the interests of large Silicon Valley technology companies at the expense of small intellectual property development firms, Voip-Pal and other inventors seem to have been "set up" in a system that cannot deliver fair and impartial decisions based on technical merits.

For example, in Voip-Pal's seven pending IPR's, since the petitioners are all large technology firms and Director Lee replaced the judges hearing the cases (presumably to further her "policy positions"), there appears to be little or no chance that the merits of their inventions will have any impact on the decision of the carefully selected and tutored panel.

The USPTO's own admissions about the manipulations of the IPR process have fundamentally damaged the credibility and integrity of this agency and its procedures. In light of these seemingly unfair/illegal acts, the only equitable and acceptable resolution would be an immediate dismissal of the seven pending IPR petitions against Voip-Pal, enabling them to enforce their issued patents.

Respectfully yours,



Dr. Thomas E. Sawyer

Enclosure

CC: The President of the United States
Honorable David P. Ruschke, Chief Judge for the Patent Trial and Appeal Board
Joseph Matal, Acting Director of the USPTO

Honorable Jeff Sessions, Attorney General of the United States
Christopher Wray, Director of the FBI
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 Timothy B. Dyk, United States Court of Appeal for the Federal Circuit
Honorable Richard G. Taranto, United States Court of Appeals 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)
Andrei Iancu, Nominee, Director of the USPTO
Judge Josiah Cocks, Patent Trial and Appeal Board
Judge Jennifer Meyer Chagnon, Patent Trial and Appeal Board
Judge John Hudalla, Patent Trial and Appeal Board
Office of the Solicitor General of the United States
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US Senator Mike Lee, Utah
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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
Director Will Covey, USPTO Office of Enrollment and Discipline
Patents Ombudsman
Dr. Colin Tucker, Chairman of the Board, Voip-Pal.com Inc
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