No. 2021-2301

United States Court of Appeals for the Federal Circuit

CHARLES BERTINI,
Appellant,

v.

APPLE INC.,
Appellee

Appeal from the United States Patent and Trademark Office, Trademark Trial and Appeal Board in Case No. 91229891

APPELLANT CHARLES BERTINI'S REPLY TO APPLE INC.'S OPPOSITION TO BERTINI'S REQUEST TO SUPPLEMENT THE RECORD

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel of record for Charles Bertini certifies as follows:

1. Represented Entities. Fed. Cir. R. 47.4(a)(1). Provide the full names of all entities represented by undersigned counsel in this case. CHARLES BERTINI

2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2). Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. NONE

3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3). Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. NONE

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4). NONE

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal.

Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b)

Charles Bertini v. Apple Inc.
Cancellation No. 92068213
Trademark Trial and Appeal Board,
US Patent and Trademark Office

A panel of three Administrative Law Judges ("ALJ") decided Bertini's Motion for Summary Judgment in this cancellation case for nonuse, Peter W. Cataldo, Frances S. Wolfson and Christen English. The case was submitted for final decision on February 23, 2021. It is unknown whether these ALJs have also been replaced by Management as were two of the ALJs in this Opposition under appeal, however, the docket shows that the interlocutory attorney was replaced. Despite an FAQ and statistics published online by the USPTO - and presumably given in reports to Congress - indicating that the average time to decide such cases is between eight to ten weeks, *the Board has not decided this case in more than eight months.*

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6): NONE

October 27, 2021 /s/ James Bertini
JAMES BERTINI

In its Amended Answer, Apple Inc. listed Apple Reg. No. 4088195 as an affirmative defense to this Opposition. Registration No. 4088195 has been the subject of a Petition to Cancel for nonuse by Bertini since March 19, 2018. However, Counsel for Apple Inc. Joseph Petersen indicated in his answer to #5 of his Certificate of Interest: None. This is not surprising considering the fact that the Board has inexplicably failed to decide this related case for eight months, another TTAB (in)action that presents the appearance of bias in favor of Apple Inc.

Mr. Petersen complains that I didn't include the documents I seek to add to the record with the Motion; the obvious reason is that the Court hasn't given me permission to do so. I did, however, send them to Mr. Petersen at the time I called him to discuss the Motion. He doesn't deny the relationships among Administrative Law Judge ("ALJ") Jonathan Hudis and Mr. Petersen's law partners assigned to this case, Theodore Davis and William Bryner, but characterizes these relationships as "routine and fleeting." This position is undercut by the documents which he now has in his possession. In any event, it is up to the Court to determine the intensity of these relationships and how they may present the appearance of bias, should it be interested in doing so.

Mr. Petersen states that I had an opportunity to present the documents with my Motion for Reconsideration. He states that I was in a position to do this because I already knew the composition of the Board and the identities of the lawyers for Apple Inc. He ignores the fact that parties may not file new documents with the TTAB after trial, which means that I could not present the documents with my Motion for Reconsideration.

Mr. Petersen criticizes me for not finding the documents earlier which show connections between ALJ Jonathan Hudis and Mr. Petersen's partners Messrs. Davis and Bryner, as if suggesting that this should be a new Best Practice for attorneys representing clients at the USPTO: to assume all judges are biased and therefore it is necessary to scour the internet for connections between them (five in this case) and attorneys on the other side (nearly a dozen for Apple Inc.).

When the Board issued its Final Decision, I naturally assumed that its errors were inadvertent and that I could convince the Board to correct these errors with a Motion for Reconsideration. I had no reason to think that there was a possibility of bias until the Board denied my Motion for Reconsideration and dashed all hopes that it would follow the law and their own precedential cases in deciding this case. Mr. Petersen complains that I gave no excuse for not filing the documents earlier but I became aware of

the documents I seek to supplement after I filed this appeal (which I ascertained by the download dates on my files).

Mr. Petersen cited *Abu-Joudeh v. Schneider*, 954 F.3d 842, 848 (6th Cir. 2020) to support his position, but that case is not applicable to this case because it was impossible to make the documents part of the trial record.

I never suggested there are different panels (my reference to the "Original Board" and "New Board" were done for convenience in discussing the change of two ALJs), and the Board was not reconstituted. Moreover, the New Board didn't reject the positions of the Original Board, it just *inter alia* ignored a key position which *by itself* would have vitiated Apple Inc.'s tacking defense and resulted in a decision canceling the application to register the Apple Music mark.

Despite Mr. Petersen's statement otherwise, I never stated that the interlocutory attorney is subject to 28 U.S.C. § 455.

Counsel admits that ALJs are subject to ethical guidelines of the Department of Commerce set forth in 5 C.F.R. Part 2635. One of them requires recusal in a matter where one of the parties is (or is represented by) (i) someone with whom the TTAB judge has or seeks a financial or business relationship; (vii) an organization in which the TTAB judge is an active participant.

First, the position of this Motion is not to demand that ALJ Jonathan Hudis disqualify himself, but to show that his failure to do so demonstrates the appearance of bias when considered with the documents showing the relationships among the parties.[1] Second, ALJ Hudis has and apparently continues to have a business and/or financial relationship with at least one of the partners at Kilpatrick Townsend assigned to this case, and unlike me or my client he knew about it. The book he edited, *A Legal Strategist's Guide to Trademark Trial and Appeal Board Practice*, which includes Mr. Bryner as a chapter author, is currently for sale through Amazon.com at $163.94, new. Third, ALJ Hudis remained in a leadership position on the ABA's IP Section - which for a period of time had Mr. Davis as president - and participated in lobbying Congress on trademark matters even after he was appointed to his position at the TTAB, suggesting that his connection with Mr. Davis could fit into vii above if Mr. Davis remained on the IP Section.

Despite the fact that Mr. Petersen now has documents in his possession demonstrating relationships among ALJ Hudis and Messrs. Davis and Bryner stretching back a decade, he continues to insist that these are

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[1] Mr. Petersen claims that the Director may change panel compositions. Bertini is not challenging that. He is asking the Court to consider the documents which show the relationship among the parties and which, together with the changed positions of the Board, demonstrate the appearance of bias.

"routine and fleeting," and for that reason he doesn't want the Court to see them.

October 28, 2021 /s/ James Bertini_____

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DECLARATION PURSUANT TO FEDERAL CIRCUIT RULE 27(a)(4)

Facts in this Reply are the subject of dispute between the parties.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

October 28, 2021 /s/ James Bertini_____

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITS

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

The filing has been prepared using a proportionally-spaced typeface and includes 961 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

October 28, 2021 /s/ James Bertini_____

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of **APPELLANT CHARLES BERTINI'S REPLY TO APPLE INC.'S OPPOSITION FOR PERMISSION TO SUPPLEMENT THE RECORD** has been served on the following attorneys by email on October 28, 2021 by James Bertini.

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/s/ James Bertini_____
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