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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.

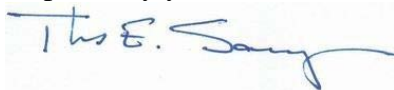
Since the PTAB conflict of interest rules are governed by the Department of Commerce's standards, rather than those employed in an Article III court, or those suggested by the Model Rule of Professional Conduct adopted by most states, it was impossible to determine how stock and/or stock options acquired 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  
US Senator Orrin Hatch, Utah  
US Senator Mike Lee, Utah  
US Senator Ed Markey, Massachusetts  
US Senator Mitch McConnell, Kentucky, Senate Majority Leader  
US Senator Chuck Schumer, New York, Senate Minority Leader  
US Senator Chuck Grassley, Iowa  
US Senator Marco Rubio, Florida  
US Senator Maria Cantwell, Washington  
US Senator Mike Crapo, Idaho  
US Senator James Risch, Idaho  
US Senator Jeff Flake, Arizona  
US Senator John McCain, Arizona  
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  
Multiple Media Outlets

## Supplemental Issues Regarding Patents and the PTAB

### Legal Concerns Regarding PTAB/IPR Procedures

- In theory, the IPR involves the same standard as the patent process; in practice, the IPR process invalidates more than 80% of the patents which were awarded after skilled examiners considered the claims unique and valid following multiple years of careful review.
- In Federal District court, an Article III court, a plaintiff may only sue once on any particular issue. By contrast, in the PTAB, a petitioner is permitted to sue as many times as they wish against a single patent. For example, Voip-Pal has had the same two patents challenged by IPR's, eight times. In the Federal District court, such behavior would constitute vexatious litigation and would result in dismissal of any complaints filed after the initial action.
- Infringers use the "broadest reasonable interpretation" standard, together with combinations of multiple patents and testimony of highly paid consultants to kill patents. Determining the "obviousness" of combinations of existing patents to disallow the claim in question is disingenuous.
- Extinguishing property rights by canceling the claims of a patent without an Article III jury trial would seem unconstitutional. The Supreme Court ruled as far back as 1898 that once granted, a patent is a private property right.

### Recent Industry Commentary

In a recent article, Scott Eden observed, "Starting in the early 2000s, the rights and protections conferred by a U.S. patent have eroded to the point that they are weaker today than at any time since the Great Depression. A series of Supreme Court decisions and the [America Invents Act], the most important patent-reform legislation in sixty years, signed into law in 2011, have made it so. The stated purpose of the reform was to exterminate so-called patent trolls—those entities that own patents (sometimes many thousands of them) and engage in no business other than suing companies for patent infringement. The reforms have had their desired effect. It has become harder for trolls to sue. But they've made it harder for people with legitimate cases ... to sue, too."<sup>1</sup>

Greg Raleigh, a Stanford-educated engineer who came up with some of the key standards that make 4G networks possible, stated "It has become questionable whether a small company or startup can protect an invention, especially if the invention turns out to be important." Some call it collateral damage. Others maintain it was the express purpose of the large corporations to harm

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<sup>1</sup> Eden, Scott, "How the U.S. Patent Office got so Screwed Up" Popular Mechanics, Jun 21, 2016.

inventors. But, in the end, the result is the same. The Davids have been handicapped in favor of the Goliaths.<sup>2</sup>

The IPR process deprives patent owners of property rights without the substantive and procedural protections of an Article III Court. The United States Supreme Court recently granted certiorari in *the Oil States vs. Greene's Energy Group, et al.* on the following question: Whether *inter partes* review – an adversarial process used by the Patent and Trademark Office (PTO) to analyze the validity of existing patents – violates the Constitution by extinguishing private property rights through a non-Article III forum without a jury.<sup>3</sup>

### **Supreme Court Decisions Intentionally, or Unintentionally, Favor the Patent Infringer**

In a unanimous decision of the Court delivered by Justice Thomas the Supreme Court, *TC Heartland LLC v. Kraft Food Group Brands LLC*, reversed the Federal Circuit and ruled that [28 U.S.C. 1400\(b\)](#) remains the only applicable patent venue statute for domestic patents. For the most part, this decision will require patent owners to sue those infringing their patents in a district court in the state where the infringer is incorporated.<sup>4</sup>

*Cuozzo Speed Technologies, LLC v. Lee*, the United States Supreme Court upheld the United States Patent Office's regulation requiring the Patent Trial and Appeal Board to apply the broadest reasonable interpretation (BRI) standard in IPR proceedings rather than the Plain and Ordinary Meaning standard used in Article III courts.<sup>5</sup>

Other differences between the two systems include:

1. Issued patents receive fundamentally different levels of deference in district court and PTAB proceedings. In district court, patents enjoy a statutory presumption of validity and challengers must prove each patent claim invalid by clear and convincing evidence—the highest burden of proof in U.S. civil litigation. But no such presumption of validity applies in PTAB proceedings. Petitioners need only establish unpatentability by a preponderance of the evidence—i.e., that the claims are more likely than not unpatentable. This is a significantly reduced burden of proof compared to litigation.
2. A subtle but important distinction also exists in standing requirements. As a jurisdictional prerequisite to initiating a civil action in federal district court, a party must have sufficient Article III standing. On the other hand, standing is not required for those who file IPR petitions with the board. In fact, any member of the public, other than the patent owner, may file a petition with the PTO to initiate an IPR.

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<sup>2</sup> Quoted in *Supra*

<sup>3</sup> Gene Quinn, IP Watchdog, Jun. 6, 2017 “Supreme Court to decide if Inter Partes Review is Unconstitutional” <http://www.ipwatchdog.com/2017/06/12/supreme-court-inter-partes-review-unconstitutional/id=84430/>

<sup>4</sup> Gene Quinn, IP Watchdog, May 22, 2017 “Industry reaction to SCOTUS patent venue decision in *TC Heartland v. Kraft Food Group*” <http://www.ipwatchdog.com/2017/05/22/industry-reaction-scotus-patent-venue-decision-tc-heartland-v-kraft-food-group/id=83518/>

<sup>5</sup> *Cuozzo Speed Technologies, LLC v. Lee* [https://www.supremecourt.gov/opinions/15pdf/15-446\\_ihdk.pdf](https://www.supremecourt.gov/opinions/15pdf/15-446_ihdk.pdf)

The IPR petition, however, must identify the real party in interest, which is not required for district court plaintiffs. In addition, though anyone can initiate an IPR, a party must have standing to appeal an adverse decision to the U.S. Court of Appeals for the Federal Circuit. For public interest groups and others who may have difficulty establishing a potential injury from the decision on patentability, they may be able to institute an IPR but not appeal any loss.

3. District court litigants deal with a set of patent claims that cannot change, as no procedure exists to modify claims. They also have procedures for Summary Judgment, broad discovery and extended hearings, compared to the typical two hour IPR trial.
4. Both PTAB decisions and district court judgments may be appealed directly to the U.S. Court of Appeals for the Federal Circuit, but the standards of review are somewhat different. A district court's factual findings are reviewed for clear error whereas the Federal Circuit reviews the Board's factual findings for substantial evidence. Legal issues are reviewed under the same de novo standard. Litigants should keep in mind that, historically, the affirmance rate of Board decisions by the Federal Court of Appeals is quite high (about 80%), perhaps owing in part to the more deferential 'substantial evidence' standard of review.<sup>6</sup>

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<sup>6</sup> Adapted from: Flibbert, Michael J., Queler, Maureen D 5 Distinctions Between IPRs and District Court Patent Litigation, Corporate Counsel. December 16, 2015. Accessed 8/14/17, <http://www.finnegan.com/resources/articles/articlesdetail.aspx?news=64c22ef3-9abe-4637-a445-c75c56892eb1>