November 11, 2019

Patent Public Advisory Committee (PPAC)

Marylee Jenkins, Chair; Steven Caltrider, Jennifer A. Camacho, Barney Cassidy, Mark E. Goodson, Bernard J. Knight, Jr., Dan H. Lang, Jeffrey M. Sears, Julie Mar-Spinola, Members; Pamela R. Schwartz, Catherine Faint, Vernon Ako Towler, Union Representatives

Via email to: ppac@uspto.gov

Subject: Appointments Clause

Dear Committee:

On October 31, 2019 the Court of Appeals for the Federal Circuit ruled that Administrative Patent Judges (APJs) that oversee patent invalidation proceedings at the Patent Trial and Appeal Board (PTAB) were illegally operating as Officers of the United States in violation of the Appointments Clause of the Constitution. Arthrex v. Smith & Nephew (Fed. Cir. 2019).

This is exactly the problem that inventors have been facing for the past 7 years:

1. APJs are not technically capable of understanding the subject matter of the inventions claimed by the patents for which they have been adjudicating validity.
2. APJs lack legal expertise to apply the law on patentability.
3. APJs have demonstrated an alarming bias against inventors, instituting review on over 75% of patents which have been challenged and invalidating 84% of the 2,400 patents in which they have issued final written decisions.

The Arthrex decision provided a proposed remedy, which is likely to be further refined by the courts and Congress. The panel effectively severed APJs from Title 5 of the United States Code to allow the USPTO Director to remove APJs without cause, which the panel determined would reclassify them as inferior officers and compliant with the Constitution.

These approximately 270 APJs need to be fully vetted, some of them must be removed, and inventors must be granted a fair trial before competent and unbiased judges. Over 3,000 inventors have been stripped of our patent rights in unconstitutional AIA trials since 2011. The Arthrex decision proves that these APJs were not properly vetted for the authority they have exercised and validates the serious concerns that have been raised about their competency and objectivity. A sampling of such evidence is:

attached to this letter.

We ask the PPAC to monitor and hold the USPTO accountable in response to this catastrophe.

1. We demand that the USPTO refrain from advising Congress on a legislative solution that would rubber stamp the past decisions rendered by illegal judges and precluding inventors from obtaining a rehearing before a neutral and competent panel. Inventors that lost their rights in this “Kangaroo Court” from 2012 to 2109 must be allowed a rehearing with a neutral and competent panel of adjudicators.

2. We demand the USPTO Solicitor cease advocating for the PTAB in its present form and for the minor “fixes” that leave the current APJs in office. Rather the USPTO must begin doing its job of advocating for due process and fair trials for inventors. The entire corps of APJs must be reviewed and vetted for technical and legal qualifications, objectivity, and fidelity to the Constitutional charter of “securing to inventors the exclusive right to their discoveries”. Those who fail should be removed. The time has come to restore the integrity of the patent system.

3. We demand that the USPTO stop spending our user fees to lobby Congress and advocate in the courts in favor of the PTAB status quo. The Director of Governmental Affairs, Congressional Detailees, and every representative of the USPTO must immediately cease advising Congress on how to shore up and fix the PTAB. This is blatant corruption. USPTO is tricking inventors into paying for patents and then using application fees to undermine the very same patents by lobbying Congress and the courts to uphold the PTAB. We insist that the USPTO stop attacking inventors and supporting status quo at the PTAB.

Please publish this letter and relay our views and demands to the USPTO at the November 14, 2019 meeting.

Sincerely,

[Signature]

Randy Landreneau
President
APPENDIX

NOVEMBER 11, 2019 LETTER TO PPAC RE: APPOINTMENTS CLAUSE

Sample Evidence Questioning PTAB APJ Competency and Objectivity


Sample Evidence Questioning PTAB APJ Competency and Objectivity


Sawyer, T. (2017, May 1). Dr. Sawyer Letter to Judge David Ruschke (May 1, 2017). Retrieved November 11, 2019, from https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e_91dcf172e0d5494b945f81a89f842faa.pdf


Sample Evidence Questioning PTAB APJ Competency and Objectivity


Sawyer, T. (2017, August 31). Dr. Sawyer Letter to Wilbur Ross (August 31, 2017). Retrieved November 11, 2019, from https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e_bfafe6e02b24efc868d221ab12209af.pdf


Sawyer, T. (2017, October 23). Dr. Sawyer Letter to Judge Ruschke & Matal (October 23, 2017). Retrieved November 11, 2019, from https://9d533f37-6fa3-475a-bd7f-0c559f08ae49.filesusr.com/ugd/768c4e_9d7b3339112748b8e0ae3fa2d9c9e7.pdf

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