

**United States Court of Appeals
for the Federal Circuit**

NANTKWEST, INC.,
Plaintiff-Appellee

v.

**JOSEPH MATAL, PERFORMING THE FUNCTIONS
AND DUTIES OF THE UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY
AND DIRECTOR, U.S. PATENT AND TRADEMARK
OFFICE,**
Defendant-Appellant

2016-1794

Appeal from the United States District Court for the
Eastern District of Virginia in No. 1:13-cv-01566-GBL-
TCB, Judge Gerald Bruce Lee.

SUA SPONTE REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK,
MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, HUGHES,
and STOLL, *Circuit Judges*.*

PER CURIAM.

* Circuit Judge Chen did not participate.

ORDER

This case was argued before a panel of three judges on February 9, 2017. A sua sponte request for a poll on whether to reconsider this case was made. A poll was conducted and a majority of the judges who are in regular active service voted for sua sponte en banc consideration.

Accordingly,

IT IS ORDERED THAT:

(1) The panel opinion of June 23, 2017 is vacated, and the appeal is reinstated.

(2) This case will be heard en banc sua sponte under 28 U.S.C. § 46 and Federal Rule of Appellate Procedure 35(a). The court en banc shall consist of all circuit judges in regular active service who are not recused or disqualified.

(3) The parties are requested to file new briefs. The briefs should address the following issue:

Did the panel in *NantKwest, Inc. v. Matal*, 860 F.3d 1352 (Fed. Cir. 2017) correctly determine that 35 U.S.C. § 145's "[a]ll the expenses of the proceedings" provision authorizes an award of the United States Patent and Trademark Office's attorneys' fees?

(4) An original and thirty copies of the new en banc briefs shall be filed, and two copies of each en banc brief shall be served on opposing counsel. Appellant's en banc brief is due 45 days from the date of this order. Appellee's en banc response brief is due within 30 days of service of appellant's en banc brief, and the reply brief within 15 days of service of the response brief. Briefs shall adhere to the type-volume limitations set forth in Federal Rule of Appellate Procedure 32 and Federal Circuit Rule 32.

(5) Briefing should be strictly limited to the issue set forth above.

(6) In addition, the parties are directed to file with the court thirty paper copies of their original briefs and any appendix within 17 days from the date of this Order.

(7) Briefs of amici curiae will be entertained, and any such amicus briefs may be filed without consent and leave of court but otherwise must comply with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29.

(8) This appeal will be heard en banc on the basis of the original briefs, the supplemental briefs ordered herein, and oral argument.

(9) Oral argument will be held at a time and date to be announced later.

FOR THE COURT

August 31, 2017
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court