

2020-1441

United States Court of Appeals
for the Federal Circuit

MOBILITY WORKX, LLC,
Appellant,

v.

UNIFIED PATENTS, LLC,
Appellee,

ANDREI IANCU, UNDERSECRETARY OF COMMERCE FOR
INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE,
Intervenor.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in Inter Partes Review No. IPR2018-01150.

REPLY BRIEF OF APPELLANT MOBILITY WORKX, LLC

David A. Randall
Counsel of Record
HACKLER DAGHIGHIAN
MARTINO & NOVAK P.C.
10900 Wilshire Blvd., Suite 300
Los Angeles, CA 90024
Telephone: (310) 887- 1333
Email: dave@hdmnlaw.com

Michael Machat
MACHAT & ASSOCIATES, PC
8730 W Sunset Blvd Ste 250
West Hollywood, CA 90069-2281
Telephone: (310) 860-1833
Email: michael@machatlaw.com

Counsel for Appellant MOBILITY WORKX, LLC

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iii
INTRODUCTION	1
ARGUMENT	4
I. ONE CANNOT WAIVE A RIGHT OR CLAIM THAT HAS NOT YET COME INTO BEING	4
II. THE DIRECTOR FAILS TO NEGATE THE APPEARANCE OF IMPROPRIETY THAT IS IN AND OF ITSELF SUFFICIENT TO CREATE A SUBSTANTIVE DUE PROCESS VIOLATION	6
A. In an Attempted Sleight Of Hand, The Director Discusses the PTAB Compensation System Pre-AIA As If That Were Relevant To The Issue At Hand With The Post AIA System	8
B. The Director Admits Many of Mobility’s Claims And Fails To Deny Others That Lead To A Finding Of A Substantive Due Process Violation	11
C. Respondents Fail To Even Acknowledge The October Effect Described In The Amicus Brief Of US Inventor, Inc.	12
D. The Director Attempts To Distract From The Issue At Hand By Citing Cases Distinguishable From The Systematic Due Process Violation At Issue..	13
E. The Director Fails To Distinguish Between Various Types of Government Functions and Fails To Acknowledge In Some Instances It Is Appropriate To Charge A Fee Relative To The Government Service And In Some Instances It Is Not.....	14
III. THE APJS IN MOBILITY’S CASE DID HAVE A PECUINARY INTEREST IN THEIR INSTITUTION DECISIONS	15
IV. THE DIRECTOR’S ARGUMENT THAT MOBILITY’S TAKINGS AND IMPROPER DELEGATION CLAIMS ARE FORECLOSED BY <i>CELGENE</i>	

AND *ETHICON* FAILS TO CONSIDER THOSE CLAIMS ANEW IN THE
TOTAL CONTEXT OF THE PTAB AS A BUSINESS MODEL.....21

V. RESPONDENTS FAIL TO ADDRESS THE LOGICAL ABSURDITY OF
THE *ARTHREX* REMEDY22

VI. MOBILITY HAS NOT WAIVED ITS ABILITY TO CHALLENGE
WHETHER THE BOARD’S FINDING WAS SUPPORTED BY
SUBSTANTIAL EVIDENCE22

VII. THE PTAB’S DECISION THAT CLAIMS 1, 2, 4, AND 5 ARE
UNPATENTABLE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE 25

CONCLUSION28

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

<i>ACCO Brands Corp. v. Fellowes, Inc.</i> , 813 F.3d 1361 (Fed. Cir. 2016)	25
<i>Califano v. Sanders</i> , 430 U.S. 99 (1977).....	6
<i>Commonwealth Coatings Corp. v. Continental Casualty Co.</i> , 393 U.S. 145 (1968)	8
<i>Delaware Riverkeeper Network v. FERC</i> , 895 F.3d 102 (D.C. Cir. 2018).....	11
<i>Doolin Security Savings Bank, F.S.B. v. FDIC</i> , 53 F.3d 1395 (4 th Cir. 1995).....	14
<i>Esso Standard Oil Co. v. Lopez-Freytes</i> , 522 F.3d 136 (1 st Cir. 2008)	21
<i>Hammond v. Baldwin</i> , 866 F.2d 172 (6th Cir. 1989)	12, 19
<i>Howmedica Osteonics Corp. v. Zimmer, Inc.</i> , 640 Fed. App'x 951 (Fed. Cir. 2016).....	26
<i>HTC Corp. v. Uniloc 2017 LLC</i> , IPR2018-01631, 2019 WL 343813 (PTAB Jan. 25, 2019)	6
<i>Hulu, LLC v. Sound View Innovations, LLC</i> , 2020 WL 5924197 (P.T.A.B. Oct. 6, 2020).....	20
<i>In re Alonso</i> , 545 F.3d 1015 (Fed. Cir. 2008)	25, 26
<i>In re Thorpe</i> , 777 F.2d 695 (Fed. Cir. 1985)	26

Marshall v. Jerrico, Inc.,
446 U.S. 238 (1980)8

MCM Portfolio LLC v. Hewlett-Packard Co.,
812 F.3d 1284 (Fed. Cir. 2015)26

Offutt v. United States,
348 U.S. 11, 75 S.Ct. 11, 99 L.Ed. 11 (1954)8

Patlex Corp. v. Mossinghoff,
771 F.2d 480 (Fed. Cir. 1985)9

Quest USA Corp. v. PopSockets LLC,
IPR2018-00497, 2019 WL 3799344 (PTAB Aug. 12, 2019)6

Richardson v. Perales,
402 U.S. 38914

Riggin v. Office of Senate Fair Emp’t Practices,
61 F.3d 1563 (Fed. Cir. 1995)6

Rose v. Village of Peninsula,
875 F. Supp. 442 (N.D. Ohio 1995)22

Taylor v. Hayes,
418 U.S. 488 (1974)8

Thryv, Inc. v. Click-to-Call Technologies, LP,
140 S. Ct. 1367 (2020)22

Tumey v. Ohio,
273 U.S. 510 (1927) 16, 21

Unified Patents Inc. v. MOAEC Technologies, LLC,
IPR2018-01758, 2019 WL 1752807 (PTAB Apr. 17, 2019).....6

United States v. Benitez-Villafuerte,
186 F.3d 651 (5th Cir. 1999) 14, 15

Utica Packing Co. v. Block,
781 F.2d 71 (6th Cir. 1986)12

<i>Van Harken v. City of Chicago</i> , 103 F.3d 1346 (7th Cir. 1997)	19
<i>Ward v. Village of Monroeville</i> , 409 U.S. 57 (1972).....	16, 21
<i>Weinberger v. Salfi</i> , 422 U.S. 749 (1975)	5
<i>ZTE (USA) Inc. v. Fundamental Innovation Sys. Int’l LLC</i> , IPR2018-00425, 2019 WL 2866003 (PTAB July 2, 2019)	6
<u>Other Authorities</u>	
5 U.S.C. § 706(2)	25
42 U.S.C. § 7178(f)	11
157 Cong. Rec. H4432 (June 22, 2011).....	10
IPR (35 U.S.C. § 316(d)).....	25

INTRODUCTION

Both Appellee Unified Patents, LLC (“Unified”) and the Director or Intervenor (collectively, “Respondents”) repeatedly argue that Appellant Mobility Workx, LLC (“Mobility”) waived its constitutional arguments. This same issue was first presented in the Director’s Opposition to Mobility’s motion for judicial notice, which Unified joined. That opposition focused more on arguing waiver than opposing the request for judicial notice. Thus, much of the briefing on waiver has already been done in those documents.

Noticeably, the Director has never disputed the authenticity or accuracy of the government documents of which Mobility requests this Court to take judicial notice. Instead, the Director claims those documents only tell part of the story, but the Director, given the opportunity, has failed to present any other documents that tell a different story. By failing to produce any supplemental documents showing what might conceivably be missing, Respondents concede the story is more or less as the documents reveal it to be. Respondents argue instead those documents should be interpreted differently than a straightforward reading would suggest.

The Director does not contest he is running the PTAB as a business unit. The PTAB’s business practice creates, at the very least, an appearance of injustice that leads to a substantive due process violation. Respondents fail to squarely address that an appearance of impropriety is sufficient to create a substantive due process

violation. Instead, Respondents seem to argue because Congress said it is ok, it must be ok. But Acts of Congress can be found unconstitutional, and it is not enough for the Director to point to Congress for refuge. Mobility's critique is directed to the "system" and not to anyone in particular at the USPTO. The system was set up in an unconstitutional manner and the Director's references to how congressional funding may actually work is not at issue. Instead, it is the perception of injustice that is at the heart of the substantive due process argument; and tellingly, Respondents have no answer for the "October effect" described in the amicus brief of US Inventor, Inc..

As the briefing and Appendix indicate, the Director views the IPR proceedings as a self-sustaining business, and not a place of refuge for those seeking justice. Quite the opposite, it is a place where those accused of infringing a patent pay a fee of \$30,000 to \$40,000¹ to have an 80% chance² of having most of the claims of the patent invalidated. While it may be perfectly acceptable for one division of the USPTO to be funded by applications fees (such as in the application process), it is quite different for a judicial division of the USPTO to be funded by petitioners seeking to invalidate a patent.

Nowhere in the Constitution does it mention that access to justice has a monetary price. None of the Articles referencing the Courts or Judges mentions or

¹ At the time of institution of the IPR, the filing fees were \$30,500. They are now \$41,500 for an IPR request for up to 20 claims. <https://www.uspto.gov/about-us/performance-and-planning/fee-setting-and-adjusting#tmfee-info>.

² Appx4611.

even suggests the judiciary should turn a profit or pay for itself. Quite the opposite, it seems if there is any part of government that should not have to be self-funding that would be the judicial system and the police. The Preamble to the Constitution refers to justice as its first goal:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

U.S. Const., Preamble.

Of course, via taxation, Congress can raise funds to promote the general welfare and provide for the common defense. Mobility has no qualm with the notion that some public services should be self-funding. But the notion that a judicial system should be self-funding is contrary to justice. It simply is un-American and leads to the logic of *Alice in Wonderland*. “Sentence first – verdict afterwards.”³

The Director has failed to refute the substantive due process claims. Neither the Director nor Unified can logically refute that the IPR system does constitute a Taking. Nor can Respondents logically refute that the *Arthrex* remedy is no more than hocus pocus and not a true remedy, for it did nothing to change the fact that the IPR APJ’s were unconstitutionally appointed.

³ From chapter 12 “Alice’s Evidence” in Lewis Carrol’s *Alice in Wonderland*, 1865.

The record below also confirms that the Board's conclusion of obviousness with respect to claims 1, 2, 4, and 5 is not supported by substantial evidence, and Mobility did not waive its "trigger" limitation argument.

ARGUMENT

I. ONE CANNOT WAIVE A RIGHT OR CLAIM THAT HAS NOT YET COME INTO BEING

It is almost absurd and Kafkaesque to suggest that the administrative panel tasked with the job of determining whether a patent at issue in an AIA proceeding is invalid would undertake an inquiry as to whether they themselves were properly appointed to perform the task they are asked to do, or whether their superiors had established a process that created such adverse incentives and structural biases as to violate the due process clause of the Constitution. Essentially, the Director's argument is that Mobility should have asked the panel to find itself incapable of rendering a decision because the system in which they function is unconstitutional. But if the system by which the PTAB Judges proceeds is unconstitutional then all of what they would be called upon to decide would be subject to the same challenge, including deciding whether the system they operate in deprives patent holders of their due process rights, leading to a "paradoxical conundrum."

Of course, the PTAB panel would not have undertaken the task of determining its own propriety or the propriety of the internal PTAB procedures under which they are evaluated and compensated and asking the panel that heard the IPR below to do

so would have been futile. Even more importantly, objecting before the PTAB would have been futile, because agencies lack jurisdiction to determine the constitutionality of a statute. *Weinberger v. Salfi*, 422 U.S. 749, 751 (1975).

In general agency tribunals are unsuited to consider constitutional issues. *See Califano v. Sanders*, 430 U.S. 99, 109 (1977); *ZTE (USA) Inc. v. Fundamental Innovation Sys. Int'l LLC*, IPR2018-00425, Paper No. 52, at 29, 2019 WL 2866003, at *12 (PTAB July 2, 2019). Indeed, federal agencies or their internal decisionmakers, not surprisingly, are often not the best adjudicator of substantial constitutional issues and frequently decline to rule on a constitutional challenge.

In fact, the PTAB itself has expressed the view that it generally refrains from deciding constitutional issues. *See Quest USA Corp. v. PopSockets LLC*, IPR2018-00497, Paper No. 59 at 92, 2019 WL 3799344, at *36 (PTAB Aug. 12, 2019) (declining “to consider the merits of . . . constitutional challenges”); *Unified Patents Inc. v. MOAEC Technologies, LLC*, IPR2018-01758, Paper No. 12 at 21, 2019 WL 1752807, at *9 (PTAB Apr. 17, 2019); *HTC Corp. v. Uniloc 2017 LLC*, IPR2018-01631, Paper No. 9 at 5, 2019 WL 343813, at *2 (PTAB Jan. 25, 2019).

As this Court has recognized, one consideration when determining if an agency can decide a constitutional issue is whether the constitutional defense would “disable the board from fulfilling its responsibility to decide the statutory claim presented to it.” *Riggin v. Office of Senate Fair Emp’t Practices*, 61 F.3d 1563, 1569-70 (Fed. Cir. 1995). Of course, Mobility’s due process argument would have done just that if successful,

by disabling the PTAB panel from ruling on the “statutory claim presented to it,” *i.e.*, the requested cancellation of Mobility’s patent. That is a strong reason to think the PTAB would have declined this challenge. If the PTAB had agreed with Mobility, that particular panel would have effectively dismantled the current AIA institution decisionmaking process. That outcome seems extraordinarily unlikely.

II. THE DIRECTOR FAILS TO NEGATE THE APPEARANCE OF IMPROPRIETY THAT IS IN AND OF ITSELF SUFFICIENT TO CREATE A SUBSTANTIVE DUE PROCESS VIOLATION

There can be no denying that after paying \$30,500 to the PTAB to initiate an IPR proceeding against Mobility’s ‘417 Patent, Unified won. Mobility paid no filing fees in connection with the IPR and lost. This is true. Some may naturally read causation into the prior sentences. The Director argues winning or losing has nothing to do with the amount that a repeat customer such as Unified pays on a regular basis. The Director argues Congress appropriates the money based on a formula (that he fails to deny is based on output of IPR decisions) and that this money goes to pay the APJs salaries and bonuses. If the institution and invalidation rate drastically decrease, the IPR division of the PTAB will surely lose customers, which will lead to lower revenues and layoffs.

Is Unified a customer? According to their website, they rank number 6 in the top ten petitioners at the PTAB. Top paying customers at fancy restaurants get impeccable service. Is it unreasonable for the public to assume the same happens at

the PTAB, particularly when filing fees are around \$40,000? Unlike district court where a plaintiff pays a modest filing fee (that can be waived in certain circumstances to allow justice for all), in the IPR you pay for what you get. Why pay a few hundred dollars to litigate in district court at perhaps 50/50 odds when for \$40,000 you can bring the battle to the PTAB's IPR division and have 80% chance of prevailing?⁴ Unfortunately, all of this is sadly true. The Director does not deny it; rather he describes in detail how the allocation mechanism works between his IPR division, the PTAB and Congress. But all those details and descriptions behind the scenes have no bearing on public perception.

Mobility's due process challenge does not depend on an actual explanation or showing of actual bias, just the "possible temptation," and erosion of the "feeling, so important to a popular government, that justice has been done." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). The effect may be subtle and subconscious, but even a small effect violates due process. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 148 (1968) (in reviewing the *Tumey* line of cases, noting that even small temptations violate due process).

"Indeed, 'justice must satisfy the appearance of justice,' *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954), and this "stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very

⁴ Appx4611.

best to weigh the scales of justice equally between contending parties,” *Taylor v. Hayes*, 418 U.S. 488, 501 (1974); *Marshall*, 446 U.S. at 243.

No doubt Congress set out with good intentions when it passed the America Invents Act, and no doubt the APJs are also well intentioned. No one has set out intentionally to do harm. But good intentions are one thing and subconscious systematic bias is another. The appearance of impropriety has been described in the Opening Brief, and the Amicus Brief uses statistical analysis to confirm the bias is real. The statistics in the Amicus Brief, based on public records available on Lexis, have not been controverted. The statistics show actual bias. The system needs to be revamped to avoid that bias.

A. In an Attempted Sleight Of Hand, The Director Discusses the PTAB Compensation System Pre-AIA As If That Were Relevant To The Issue At Hand With The Post AIA System

The Director’s description of the appropriation process does not solve the substantive due process violation. At most it just shifts the blame of the due process violation to Congress, and Congress is capable of enacting laws that violate due process just as much as the PTAB can implement laws in violation of due process. Moreover, most of the discussion concerns pre-AIA Congressional authorization. The current funding scheme of the PTAB is so different from the past that older precedent is not relevant.

Before 1990, PTO user fees went into the general Treasury, and then Congress decided how much to appropriate, with little correlation to the PTO total fees

collected. Appx4390. This former funding scheme was in operation when *Patlex Corp. v. Mossinghoff*, 771 F.2d 480 (Fed. Cir. 1985), was decided. So, the *Patlex* decision is no longer relevant as the funding situation now is so very different. Also, back then, *Patlex* concerned a refund of \$1200 out of a comparatively nominal filing fee of just \$1500. Now the filing fees are \$40,000 and higher.

Interestingly, not once does the Director's brief acknowledge that the PTO "operates like a business." 82 Fed. Reg. 52,780, 52,780 (Nov. 14, 2017). In 2011, with the AIA, the PTO's control over its fee-generation and budget reached its zenith with near-unique budget independence.

Indeed, Congress gave the PTO essentially full control over fee collection and usage. *See* 157 Cong. Rec. H4432 (June 22, 2011) (Rep. Bob Goodlatte) (explaining that the AIA "makes clear the intention . . . to appropriate to the USPTO any fees collected"). The PTO's funding since 2013 has conformed to Congress's intention. Director's Br. 4-5 (noting that, "[i]n the last few years, Congress has appropriated to USPTO all the money it collects").

That last point highlights a major flaw in the Director's response. The Director repeatedly claims that the PTO is at the mercy of Congressional appropriations. *See* Director's Br. 23 ("Where Congress is responsible for budget decisions and appropriations, the necessary direct control is absent."). While true in the past, it no longer is. The Director effectively knows that the PTO can set fees at the level it

wants and retain all the fees it collects this year—including AIA fees.⁵ That is why the Director’s reliance on *Delaware Riverkeeper* is misplaced. See *Delaware Riverkeeper Network v. FERC*, 895 F.3d 102, 112 (D.C. Cir. 2018) (noting that “FERC’s fees and charges are ‘credited to the general fund of the Treasury,’ 42 U.S.C. § 7178(f), not placed into its own coffers”).

Although the Director raises theoretical possibilities about appropriations, Director’s Br. 25-26, 30-31, none has occurred. The current reality is that the PTO gets 100% of the fees its sets—fee levels that are decided by PTO and PTAB leadership without Congressional approval.

In short, the Director invokes an outdated representation of PTO funding, with citations to pre-AIA budgets, reports, and laws. In contrast, the current “pay-to-play” structure for PTAB institution is disturbingly problematic, particularly because the PTAB leadership are involved in running business operations and budgets as well as deciding cases on the merits. Appx4004. The PTAB has some of the highest-paid, non-presidentially-appointed government employees.⁶ To maintain that “fee-for-service” model in a “business-like” agency, the PTAB as a whole and each individual APJ are incentivized—whether intentionally or not—to ensure that enough AIA trials

⁵ The PTO recently increased AIA fees by approximately 25%, noting the agency’s “business-like” operations and “changing market needs.” Setting and Adjusting Patent Fees During Fiscal Year 2020, 85 Fed. Reg. 46,932, 46,945 (Aug. 3, 2020).

⁶ With bonuses, an APJ earns almost the same as Article III district court and appeals court judges.

are instituted to generate enough fees to support the overall PTAB budget and the APJ salaries. Again, the correct focus is the appearance of an overarching structural financial bias. If patent owners or petitioners cannot know with reasonable certainty whether petitions are granted or denied based on merits or finances, there is a due process problem. *See Hammond v. Baldwin*, 866 F.2d 172, 177 (6th Cir. 1989) (“The administrative process ‘requires the appearance of fairness and the absence of a probability of outside influences on the adjudicator; it does not require proof of actual partiality.’” (quoting *Utica Packing Co. v. Block*, 781 F.2d 71, 77 (6th Cir. 1986))).

B. The Director Admits Many of Mobility’s Claims And Fails To Deny Others That Lead To A Finding Of A Substantive Due Process Violation

The Director admits that the APJs may receive a bonus and are subject to performance reviews based upon subjective factors in which they could obtain a \$10,000 bonus. (Director’s Brief pp.9-10) The Director does not dispute that a minimum number of “decisional units” is required for certain ratings and bonus payments. (Director’s Brief 39.) Most tellingly, the Director fails to deny that the PTAB is run like a business with its most profitable item, the IPR proceeding where numerous well-funded companies routinely pay \$40,000 to get patent claims invalidated.

C. Respondents Fail To Even Acknowledge The October Effect Described In The Amicus Brief Of US Inventor, Inc.

Respondents fail to discuss the October effect described in US Inventor, Inc's amicus brief. The brief demonstrates that the perceived bias is actual. Applying the teachings from US Inventor's statistical analysis, if Unified had filed its petition seeking to institute an IPR against Mobility's patent just ten weeks earlier, most probably it would not have been granted.

Unified filed its Petition on June 1, 2018. Appx54. The IPR was instituted approximately 26 weeks later on December 3, 2018. Appx54. According to the October effect, if Unified filed its petition 10 weeks earlier in mid-March, the decision to institute or not would have been made in mid-September and most likely the PTAB would not have instituted proceedings because instituting new proceedings in September would not count toward their yearly requirements which are set anew each October. As explained in more detail and backed up by statistics from information verifiable from LexMachina, the APJ's quota of proceedings to institute gets reset every October. That explains why the institution rate in October 2018 was approximately double what it was in September 2018. Amicus Brief 5. Put differently, there would have been a fifty-percent chance those same APJs would not have instituted the IPR review had they reviewed the same petition in September 2018 as opposed to later that year. Of course, there is no way to be certain this is true; but certainty is not required for substantive due process. Instead, "justice must satisfy the

appearance of justice.” *Offutt*, 348 U.S. at 14. The PTAB should not suffer from the appearance of impropriety. The FWD must be vacated.

D. The Director Attempts To Distract From The Issue At Hand By Citing Cases Distinguishable From The Systematic Due Process Violation At Issue

In trying to justify the current unconstitutional system, the director aggregates different types of cases, not relevant to the issue before this court to try to justify the status quo. One such case, *Richardson v. Perales*, 402 U.S. 389, 410, involving social security case, is readily distinguishable for the fact that rather than dealing with a government taking of property (a patent is an exchange of a secret invention for certain rights to exclude others from practicing that invention for 20 years), the social security case involves a giving—the government giving money. Different situations call for different kinds of relief. The takings in a patent case have no bearings on the government hand-out of cash in a social security case. The patent is not free – but an exchange. The cash handout to a social security recipient is free.

Neither *Doolin Security Savings Bank, F.S.B. v. FDIC*, 53 F.3d 1395 (4th Cir. 1995), a case about funding FDIC insurance premiums, nor *United States v. Benitez-Villafurte*, 186 F.3d 651 (5th Cir. 1999), a case dealing with an allegation that the INS was unconstitutionally biased in favor of deporting illegal immigrants, have anything to do with a judiciary that is admittedly run as a business. The argument in *Benitez-Villafurte* was dismissed in a single paragraph, *id.* at 660, with no analysis to suggest any applicability to the factually distinct PTAB decisionmaking and funding.

E. The Director Fails To Distinguish Between Various Types of Government Functions and Fails To Acknowledge In Some Instances It Is Appropriate To Charge A Fee Relative To The Government Service And In Some Instances It Is Not

Presumably, Respondents would agree that before obtaining police protection, citizens should not have to pay an entry fee to say, lodge a police report or criminal complaint. The judicial system, like the police, is essential to our system of government and are the main reasons for government. So, whereas it may be appropriate to charge various and different rates for a room at a hotel at a national park to help pay for the forest service, it is far different for essential government services. There must not be an appearance of bias. Unlike access to the National Park's hotel reservation system, the judicial functions of government must not be allocated based on business factors, such as supply and demand. All would agree that Justice should be available to all. And, when it comes to potentially taking someone's property away, there should be no application of supply and demand economics. Small inventors need the same judicial protections as the big corporations. To have justice for all, we cannot have an appearance of bias in favor of the PTAB's best customers. It is one thing to take economic factors into account when processing a patent application; it is another to do so when running a mini judiciary charged with distributing justice. Instead of making this type of distinction, the Director lumps all the facets of his agency together and attempts to run it all (even the judiciary part) as a business.

To the uninitiated in the niceties of the law, *i.e.*, the every-day man and woman of this country, who would call what they see as it is, the companies that writes checks of \$40,000 thirty-eight times a year,⁷ year after year, to a business, are golden customers – customers that a business surely would not want to disappoint. Like a law firm that seeks to please its clients and churn out well-reasoned briefs that advance the clients’ interest, the logical perception is the PTAB, which is run as a business, seeks to please its customers too. The current funding system at the PTAB is just too full of perceived bias for the Courts to ignore. It is unconstitutional under *Tumey* and its progeny. *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). The system must be revamped. The Final Written Decision must be reversed due to a systematic bias.

III. THE APJS IN MOBILITY’S CASE DID HAVE A PECUINARY INTEREST IN THEIR INSTITUTION DECISIONS

The Director has no meaningful disagreement with Mobility’s description of APJ compensation. The Director does not dispute that a minimum number of “decisional units” is required for certain ratings and bonus payments. (*See* Director’s Brief 39.) The Director’s agreement confirms the pecuniary interest connecting institution decisions with APJ compensation and the “decisional unit” count system.

⁷ According to Unified’s website <https://portal.unifiedpatents.com/ptab/annual-report?year=2020> (last accessed December 30, 2020), they are the PTAB’s sixth largest customer filing 38 petitions at \$40,000 a pop in 2020 for over \$1.5 million in fees.

The Director tries to rebut this pecuniary interest by reference to *ex parte* appeals. (Director’s Brief 39.) But *ex parte* appeals are not where the money is. They are far less profitable than an IPR proceeding and generate far less money (as little as \$1,140 for an entire *ex parte* appeal). More importantly, the fees for an *ex parte* appeal do not depend on an APJ’s decision to grant or deny the appeal. While actual bias need not be shown, “the October effect” discussed in the Amicus Brief is alarming and cannot be otherwise explained. It also supports an unconstitutional link between institution decisions, “decisional unit” quotas, performance reviews, and bonuses.

In Mobility’s case, at least one of the three panel APJ’s was a Vice Chief APJ at the time of Institution of the IPR and another was an Acting Vice-Chief APJ at the time of Institution.⁸ The Vice Chief APJs had dual duties—administrative and judicial. The Vice Chief APJs in Mobility’s case actually did have conflicting responsibilities. Besides the judicial responsibility of arriving at a just decision, the Vice Chief APJ had additional responsibilities such as supervising the other APJ assisting in the decision making as well Appx4106–4113 (Vice Chief APJ). In addition, as the Director admits “the Vice Chief Judges are responsible for ‘prepar[ing] budget requests’ for the Director and ‘[e]xecut[ing] the operating budget.’” (Director’s Brief 28.) The same judges responsible for the budget decided

⁸ The Institution Decision is signed by William M. Fink, Vice Chief APJ, Melissa A. Haapala, Acting Vice Chief APJ, and Kara L. Szpondowski, APJ. Appx1. On the FWD, only William M. Fink is listed as Vice Chief APJ. Appx185.

to first institute IPR proceedings and eventually decided to invalidate Mobility's patent claims benefiting the PTAB's sixth largest customer, Unified.

Unlike a federal judge, APJs are discouraged from writing a concurrence or dissent (Appx3813) and are graded by the Vice Chief APJs. Thus, in Mobility's case, the independent APJ who was not a Vice-APJ may not have been independent at all. Instead, the third APJ may have simply been incentivized to go along with the thought process of the Vice APJ and Acting Vice APJ who would have a say in her performance review, in which she was eligible to earn a \$10,000 bonus. Appx3881. The non-management APJ would have had to ask permission from her two bosses on the panel to write a concurrence or dissent, contributing to the appearance of impropriety. (Appx3813) The appearance of impropriety in the institution decision and throughout the IPR proceedings, is rampant and calls for a reversal of the FWD.

The Director's reliance on *Hammond v. Baldwin*, 866 F.2d 172, 178 (6th Cir. 1989) is misplaced. In *Hammond*, the Sixth Circuit stated: "[W]e hold to the basic principle that the entire government of a state cannot be disqualified from decisionmaking on grounds of bias when all that is alleged is a general bias in favor of the alleged state interest or policy." 866 F.2d at 177. The Sixth Circuit's holding addressed nothing like what the PTAB does. In fact, the appeals court recognized the very principle Mobility argues here—a violation of due process occurs when "the decisionmaker was engaged in both adjudicative and executive functions." *Id.* at 177 (citing *Ward and Meyes v. Niles Township, Illinois*, 477 F. Supp. 357 (N.D. Ill. 1979)).

Again, there is no harm in the USPTO charging the approximate costs of processing a patent application. There is logic to that, and that aspect of the USPTO could be run as a business unit without running afoul of the 5th Amendment. But running judicial proceedings for profit is otherwise unheard of. None of the cases cited by the Director involve a situation such as exists with the PTO.

The Director also overlooks the significant differences between APJs and the hearing officers in *Van Harken v. City of Chicago*, 103 F.3d 1346 (7th Cir. 1997). Writing for the Seventh Circuit, Judge Posner noted that the hearing officers had “no quota of fines” to impose and were not paid by the number of hearings resolved. *Id.* at 1353. With APJs, however, their pay, bonuses, and ratings depend in part on “decisional unit” quotas. Appx3822-3823; Appx3835. Further, unlike in *Van Harken*, the PTAB’s overall budget essentially equals the fees collected to cover its operating costs as an independent “business unit.” Appx4128. Judge Posner also observed that a stronger case for structural bias could stand “[i]f the Director of Revenue or his subordinates were hearing these parking cases.” *Van Harken*, 103 F.3d at 1353. That is exactly what happened with Mobility’s IPR proceedings. An executive, at least one Vice Chief APJ and an Acting Vice Chief APJ instituted the IPR proceeding knowing that doing so would at least indirectly benefit both the PTAB treasury and themselves.

The recent decision in the PTAB’s *Hulu, LLC v. Sound View Innovations, LLC* case confirms the problematic mixing of responsibilities. IPR2018-01039, Paper 31, 2020 WL 5924197 (P.T.A.B. Oct. 6, 2020) There, Hulu filed a petition for IPR that

was denied. *Hulu v. Innovations*, 2020 WL 5924197 at *2. But following a rehearing request, this well-funded customer was able to persuade a different panel comprising PTAB leadership—the Precedential Opinion Panel—to overrule the original panel, which later granted the petition enabling the PTAB to keep the additional revenue for the trial phrase.⁹

The ultimate problem with instances like *Hulu* is that the PTAB’s structure and funding mechanism make it impossible for the public to know whether the PTAB leadership overruled the original panel solely on the merits or also (or even primarily) because PTAB leadership was concerned that the panel decision would necessarily lead to fewer institutions and lower revenue. For this reason, courts have repeatedly found problems when an agency combines adjudicatory and executive decisionmaking responsibilities in a single position. See *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Esso Standard Oil Co. v. Lopez-Freytes*, 522 F.3d 136, 146-47 (1st Cir. 2008); *Rose v. Village of Peninsula*, 875 F. Supp. 442, 453 (N.D. Ohio 1995). To be clear in district courts, the best funded companies are still just a party—whether plaintiff or defendant. The cost is only a few hundred dollars to file.

⁹ Multiple petitions (at \$30,000 to \$40,000) can also transform repeat petitioners into repeat customers. The wealthy customers would otherwise shop and conduct their litigation before the District Courts if not for the much greater statistical likelihood of prevailing before the PTO than before a district court judge appointed for life who need not worry about keeping a supervisor happy or obtaining a bonus

In the PTAB, these well-funded companies appear to be good paying customers who the PTAB wants to keep happy with high IPR institution rates.

Without being specific, the Director claims that Mobility's structural bias argument "could jeopardize many government programs for which Congress has established a user-fee system." (Director's Brief 35). The Director identifies no specific "user-fee system" that would be adversely affected.

In short, the Director has not identified a single other federal agency that authorizes employees to make fee-generating decisions, adverse to a private party, under a remotely similar funding scheme. The PTO is entirely user-fee funded, with near autonomy over its budget. The PTAB operates as a separate PTO "business unit," with about \$23 million of its budget dependent on fees generated by granting petitions to institute. Finally, neither the PTO nor Unified dispute Mobility's point that *Thryv, Inc. v. Click-to-Call Technologies, LP*, 140 S. Ct. 1367 (2020) makes it all the more important that the institution decision be free from any potential pecuniary bias. With so much at stake for a patent owner or a petitioner—and so much as stake for the PTAB's budget—the agency should be required to structure the decisionmaking process in a manner that removes any appearance of pecuniary bias.

IV. THE DIRECTOR'S ARGUMENT THAT MOBILITY'S TAKINGS AND IMPROPER DELEGATION CLAIMS ARE FORECLOSED BY *CELGENE* AND *ETHICON* FAILS TO CONSIDER THOSE CLAIMS ANEW IN THE TOTAL CONTEXT OF THE PTAB AS A BUSINESS MODEL

While it is accurate to say that the takings claim and improper delegation claim raised in Mobility's Opening Brief have been dealt with by this circuit court in other contexts, it is equally true that those decisions were not made in the context of the overall substantive due process issues presented in this case in which the judicial function of the PTO appears to have been put up for sale. Given this setting it is even more important that the APJ's that make the initial determination to institute proceedings not be the APJ's that make the Final Written Decision. Similarly, the change in procedures brought on by the AIA needs to be re-examined in the context present here where it appears justice has been put up for sale to the repeat customers who pay \$40,000 a shot.

Also, while discussing the Takings issue, Unified acknowledges that *Celgene* did not explicitly address the right to freely amend the claims of a patent is far different in an IPR proceeding than it was in pre-AIA re-examination proceedings. Unified goes on to argue that nevertheless, Mobility did not attempt to amend so therefore this claim is waived. However, Unified does not address the fact that it would have been foolhardy to attempt to amend as it is well-known that successful amendments are rare in IPR proceedings.

So, the inability to have a real shot at amending a claim in the IPR setting is so different from the process that existed before, that applying the IPR proceedings to a pre-AIA issued patent is indeed a Taking.

V. RESPONDENTS FAIL TO ADDRESS THE LOGICAL ABSURDITY OF THE *ARTHREX* REMEDY

Respondents argue there should be no remand under *Arthrex* and cite cases which all ignore the logical fallacy of the *Arthrex* remedy. They do not try to dispute it because the remedy is straight out of Alice and Wonderland. It makes no sense to argue because we fixed the problem going forward there never was a problem going backwards. The fact remains at the time of institution of the IPR proceedings the APJs were unconstitutionally appointed.

To further highlight the ridiculousness of the “supposed remedy” consider our country’s history with slavery. After the Emancipation Proclamation, no one has ever argued because slavery has been outlawed therefore there was no slavery in the past.

VI. MOBILITY HAS NOT WAIVED ITS ABILITY TO CHALLENGE WHETHER THE BOARD’S FINDING WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Under the APA this court reviews the Board’s factual determinations under a substantial evidence standard. *See, e.g., ACCO Brands Corp. v. Fellowes, Inc.*, 813 F.3d 1361, 1365 (Fed. Cir. 2016). Because Unified bore the burden of proving invalidity in the underlying IPR (35 U.S.C. § 316(d)), Mobility was not required to take any action. Indeed, this is evidenced in the current proceedings, where the Board concluded that

Unified failed to prove by a preponderance of the evidence that claims 3 and 6 were unpatentable (Appx2), even though Mobility never argued those claims separately. Although the Board found that Unified met its burden with respect to claims 1, 2, 4, and 5, the Board's factual findings supporting its decision must be supported by substantial evidence, else it is an unlawful agency action. *See* 5 U.S.C. § 706(2).

Unified's argument that Mobility has waived its right to challenge whether substantial evidence exists to support the Board's finding of unpatentability in the present case is without merit. Nor does the case law that Unified has cited support such a sweeping proposition.

This Court in *In re Alonso*, 545 F.3d 1015 (Fed. Cir. 2008), disregarded a "new legal theory" that was not advanced before the board. 545 F.3d at 1022. In *Alonso*, the Board found that the Alonso had not adequately described the claimed invention because the single antibody described did not sufficiently represent the claimed genus of antibodies. *Id.* at 1018. The Court found that the Board's conclusion was supported by substantial evidence. *Id.* at 1020. A genus can be described by disclosing (1) a representative number of species in the genus; or (2) its relevant identifying characteristics. *Id.* at 1019 (citing *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 323 F.3d 956, 970 (Fed. Cir. 2002)). The Board had based its decision on the representative number of species test. *Id.* at 1022. On appeal, Alonso made a "structure-function correlation argument" under the second prong that was not raised below. *Id.* The Court found the new legal theory to be waived. *Id.*

In *Howmedica Osteonics Corp. v. Zimmer, Inc.*, 640 Fed. App'x 951 (Fed. Cir. 2016), Zimmer argued the Board improperly assigned patentable weight to an additional limitation found in certain dependent claims under *In re Thorpe*, 777 F.2d 695 (Fed. Cir. 1985). 640 Fed. App'x at 960. This Court rejected Zimmer's new claim construction theory on appeal, and not a challenge to whether the Board's factual findings were supported by substantial evidence.

In *MCM Portfolio LLC v. Hewlett-Packard Co.*, 812 F.3d 1284 (Fed. Cir. 2015), this Court waived an argument MCM had only raised in a few scattered sentences during oral argument before the Board. 812 F.3d. 1284, 1294 n.3. The waived argument was whether the cited references were properly combinable because "Kobayashi relies on a physical/optical detector to determine whether there is a controller on the flash card and that this form of detection cannot be incorporated into [the claim requirement of] a single chip." *Id.*

By contrast, to the cases cited by United, Mobility simply argues that the evidence presented and to which the Board cites does not provide substantial evidence to support the Board's finding that Liu or Liu and Gwon teach or suggest the last limitation of claim 1.

VII. THE PTAB’S DECISION THAT CLAIMS 1, 2, 4, AND 5 ARE UNPATENTABLE IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

No reasonable fact finder could conclude that the Liu’s M-agent is the entity in the Liu communication network or the Liu communication network as modified by Gwon that “triggers” signaling to allocate resources and initiate mobility.

Accordingly, the Board’s finding that Liu or Liu and Gwon teaches or suggests this limitation is not supported by substantial evidence. *See Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Unified attempts to distort Mobility’s argument. First, Unified argues that Mobility presents a new claim construction. (OB14-15.) Mobility does not. As noted in the FWD, the Board did not construe any terms (Appx10), and Mobility proposed no special construction in its Opening Brief. Nor does Mobility’s argument rely on anything other than the plain meaning of “trigger.”

Second, Unified argues that “Mobility contends that to ‘trigger’ the claimed signaling, Liu’s M-agent ... must directly perform a location prediction function” (Opposition Brief (“OB”) 15-16.) Mobility does not attempt to so limit the ghost mobile node or trigger. The issue is simply whether substantial evidence supports the Conclusion that the Liu M-agent is the entity in Liu that “triggers” the signals required to allocate resources and initiate mobility “based on a predicted physical location of such mobile node or distance with relation to the at least one foreign agent.” The

record below, however, plainly shows that the Liu mobile node is what triggers services and resource pre-arrangement, and not the M-agent, in Liu.

In describing the '417 patent, the Opposition Brief provides:

The ghost mobile node signals the foreign agent before the mobile node arrives in the foreign agent's physical region of coverage, based upon the predicted future state of the mobile node. Appx65, 6:27–38. This predicted future state of the mobile node can be based upon, for example, an estimated location, trajectory, or speed of the mobile node. Appx65, 6:38–46. **The signal can be a registration request to allocate communications resources** in the same way as performed if the mobile node were physically present in the foreign agent's region of coverage. Appx67, 9:7–17.

OB4 (emphasis added). Indeed, the portion of the '417 patent discussing registration signals cited in the Opposition Brief provides as follows:

The signal from the ghost-mobile node 220 can be a registration request. The signal from the ghost-mobile node 220 **can cause an allocation of communications network resources**, the resources being those needed for relaying communications between the communications network and the mobile node.

Appx67, 9:7-12. Moreover, in the embodiment shown in Fig. 2A of the patent, the ghost mobile node is part of the of mobile node and thus sends its registration request to the foreign agent 215, which then forwards that request to foreign agent 230 before the mobile node 215 is within the geographic region covered by 230 and thus can communicate directly with foreign agent 230.

Similarly, in relevant part, the Opposition Brief describes Liu as follows:

Liu’s MF agent protocol commences **when the mobile device sends a request to its M-agent to pre-assign an MF-agent at the location it is traveling to, to ensure the necessary services and data are ready for the mobile terminal when it arrives at its new location.** Appx483, 7:26-38. This new location may have been explicitly provided by the user or may have been predicted through mobility prediction mechanisms. *Id.* at 7:29–31. **M-agent 50 registers the request and forwards it to remote MF-agent manager 62 at the new location.** Appx483, 7:37–38.

OB6 (emphasis added). Indeed, Liu expressly states the “MF-assignment request” (or pre-registration request as referred to by Unified) is “a request to establish (i.e., alternatively create or pre-assign) an MF-agent 52 at the location that the mobile node is traveling to **and thus have any necessary services and data ready for the mobile terminal, when it arrives at the new location.**” Appx483, 7:31-37 (emphasis added).

Thus, Liu plainly teaches it is the pre-registration request from the mobile device that causes the Liu network to initiate the Liu pre-assignment protocol. Accordingly, all of the actions taken by the Liu MF-agent are triggered by the pre-registration request sent by the mobile device.¹⁰

¹⁰ Unified points to the fact that the mobile terminal in Liu never directly communicates with the foreign agent 73 prior to reaching its destination. OB17. But this argument is a red herring. The same is true with the mobile terminal 250 of the ‘417 patent. Nor does the ghost mobile node 220 necessarily communicate directly with the next foreign agent. For example, as reflected in the embodiment shown in Fig. 2A of the ‘417 patent, the ghost mobile node 220 sends its pre-registration request to foreign agent 215, which then forwards it to foreign agent 230. Appx58.

Accordingly, the Board's conclusion that Liu's M-agent is the entity in the Liu communication network or the Liu communication network as modified by Gwon that "triggers" signaling to allocate resources and initiate mobility is not supported by substantial evidence.

CONCLUSION

The FWD should be vacated on the constitutional grounds and reversed as to claims 1, 2, 4, and 5 for lack of substantial evidence.

Respectfully submitted,

Date: December 30, 2020

/s/David A. Randall

David A. Randall
HACKLER DAGHIGHIAN MARTINO &
NOVAK

10900 Wilshire Blvd., Suite 300

Los Angeles, CA 90024

Tel: 310-887-1333

Fax: (310) 887-1334

Email: dave@hdmnlaw.com

Attorney for Appellant

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATIONS**

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rules because the has been prepared using proportionally-spaced typeface and includes 6989 words (exclusive of the corporate disclosure statement, table of contents, table of authorities, addendum, this certification, and certificate of service). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), as the brief has been prepared in a proportionally spaced typeface using Microsoft® Word in 14-point Garamond font.

Date: December 30, 2020

/s/David A. Randall

David A. Randall
HACKLER DAGHIGHIAN MARTINO &
NOVAK
10900 Wilshire Blvd., Suite 300
Los Angeles, CA 90024
Tel: 310-887-1333
Fax: (310) 887-1334
Email: dave@hdmnlaw.com
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing paper entitled

REPLY BRIEF OF APPELLANT MOBILITY WORKX, LLC

was filed with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF SYSTEM. Counsel registered with the CM/ECF system have been served by operation of the Court's CM/ECF SYSTEM per Fed. R. App. P. 25 and Fed. Cir. R. 25(c) on the 30th day of December 2020.

Date: December 30, 2020

/s/David A. Randall

David A. Randall
HACKLER DAGHIGHIAN MARTINO &
NOVAK
10900 Wilshire Blvd., Suite 300
Los Angeles, CA 90024
Tel: 310-887-1333
Fax: (310) 887-1334
Email: dave@hdmnlaw.com
Attorney for Appellant