Mandamus Petition Seeks Federal Circuit's Intervention to Stop PTAB's Unconstitutional "Kafkaesque Nightmare" in Due Process Challenge to IPR Proceedings

WASHINGTON, D.C. – November 15, 2021 – On November 15, 2021, a mandamus petition was filed in the U.S. Court of Appeals for the Federal Circuit on behalf of B.E. Technology L.L.C., seeking to terminate four separate IPR proceedings before the Patent Trial and Appeal Board (PTAB) as unconstitutional. The petition asserts that allowing the proceedings to continue would violate B.E. Technology's property rights in the challenged patents, without due process of law.

"The USPTO's inner machinations have rendered adjudications before the PTAB so profoundly unfair and biased against independent inventors," that they don't even "stand a chance at a fair trial" against their "Big Tech" adversaries in IPR proceedings, states the petition.

"Although other litigants have raised various constitutional concerns about the legitimacy of adjudications before the PTAB, none of those other cases to date has fully considered or addressed the myriad violations of patent owners' constitutional due process rights that are presently occurring at all stages of IPR proceedings," said former partner Agatha Cole of Pollock Cohen LLP in New York, who represents B.E. Technology.

In Mobility Workx, for example—which was decided by the Federal Circuit last month—the Court rejected another due process challenge based on the claim that the PTAB's institution decisions are biased due to a fee-structure that only allows the agency to retain the full amount of IPR filing fees when it grants the petition to institute proceedings. "We looked at that decision and thought 'Wow, that's really only part of the story here,'" said Ms. Cole. "There's a lot more going on here than just the improper financial incentives that have been put in place for APJs to institute proceedings." "What we're seeing is a host of other issues that ultimately tilt the scales in favor of large and well-established 'Big Tech' industry players and against the independent inventors whose patents are being attacked in these proceedings."

B.E. Technology contends that the impartiality of APJs who preside over IPR proceedings "is mired by improper financial incentives" that affect not only the institution stage, but all other substantive aspects of IPR proceedings thereafter as well. Among other things, the petition cites evidence that APJs receive outcome-driven bonus payments that amount to more than $300 per decision for the cancellation of a patent,

as compared to only $2 per decision for upholding the challenged patent in IPR proceedings. “Whether intentional or not, [these] ‘performance-based’ bonuses have consistently been implemented in a manner that rewards the cancellation of patents, while discouraging APJs from upholding the patent rights of independent inventors,” states the petition. In addition, “USPTO leadership has utilized these bonus incentives as an indirect means of exerting undue influence over adjudicative outcomes, by refusing to allow ‘productivity’ credits for dissenting or concurring opinions,” thereby “artificially manufacturing decisional uniformity among three-member panels” and resulting in an especially high percentage (approximately 98%) of unanimous opinions in IPR proceedings.

The petition also cites evidence that the USPTO’s leadership “abuses its case-assignment authority to selectively staff APJs to specific cases based on their perceived propensity for ruling a certain way, and to ‘stack’ APJ panels for the purpose of achieving specific adjudicative outcomes.” And if their objectives still aren’t met, then “the decision can essentially be re-written by a secret extra-judicial review panel” called the AIA Review Committee, which has been improperly authorized to “review, edit, and change adjudicative outcomes—irrespective of the merits of the case presented before the original three-member APJ panel,” the petition contends.

These “shenanigans” have “rendered IPR proceedings into meaningless ‘show trials,’ that only serve to provide cover for the political decisions of those in power,” said Ms. Cole. “The status quo is completely untenable for the independent inventors who are being dragged into these proceedings by ‘Big Tech’ companies and their allies—not to mention, unconstitutional,” she added. “It’s so abundantly clear that the system is being manipulated in a way that benefits these large and politically powerful industry giants in seeking to further their monopolistic interests by eliminating competition from independent inventors. And that ultimately harms the public because it stifles innovation and hurts our economy.”

“We are hopeful that the Federal Circuit will put an end to these offensive practices, and allow our client to proceed with the patent litigation before a federal district court, rather than having to proceed through this Kafkaesque nightmare that the PTAB has implemented,” said Ms. Cole. The related patent infringement case that is pending before the U.S. District Court for the District of Delaware was stayed several months ago, pending the outcome of the IPR proceedings. If the Federal Circuit terminates those proceedings, then B.E. Technology would go back to adjudicating the validity of its patents before the district court, where it will at least have a “fair shake,” said its attorney.

To read the mandamus petition, click on the link to the right.