

Attachment 1

FILED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

GILBERT P. HYATT,)
)
Plaintiff,)
)
v.)
)
UNITED STATES PATENT AND)
TRADEMARK OFFICE and MICHELLE K.)
LEE, Deputy Under Secretary of Commerce for)
Intellectual Property, and Deputy Director of)
the United States Patent and Trademark Office,)
)
Defendants.)
)
)
)

Case No.: 1:14cv1300 (TSE/TCB)



MEMORANDUM IN SUPPORT OF
DEFENDANTS' RENEWED MOTION TO DISMISS

Defendants Michelle K. Lee and the United States Patent and Trademark Office (collectively "USPTO" or "Office"), through undersigned counsel, respectfully submit this memorandum in support of their renewed motion to dismiss Plaintiff Gilbert Hyatt's ("Mr. Hyatt's") Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). As explained in the USPTO's motion, upon transferring this case for lack of jurisdiction in Nevada, the United States District Court for the District of Nevada expressly declined to rule on the USPTO's remaining arguments for dismissal.

INTRODUCTION

Mr. Hyatt contends in this lawsuit that the USPTO has "unreasonably delayed," under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(1), taking final agency action on 80 patent applications pending before the Office. What Mr. Hyatt's Complaint fails to acknowledge

is that the 80 pending applications at issue represent roughly *one-fifth* of 399 applications he has pending before the USPTO, which contain an estimated total of 115,000 claims; that the size, volume, and interconnectedness of these 399 applications have created extraordinary challenges for the USPTO in examining his applications; that, faced with these challenges, the USPTO, last year, commenced a renewed effort to bring order and finality to Mr. Hyatt's applications by requiring Mr. Hyatt to take certain steps to help organize and streamline his applications; and that, in response to that effort, prosecution is now actively ongoing in Mr. Hyatt's applications, with Mr. Hyatt amending many of his claims and engaging in an iterative process with the 14 patent examiners who the USPTO has dedicated to working full-time on his applications.

In view of these essential facts, the Court lacks jurisdiction to issue the declaratory and injunctive relief Mr. Hyatt seeks. The Court lacks jurisdiction to issue any relief under 5 U.S.C. § 706(1) when a final agency action by the Patent Trial and Appeal Board ("Board") is not "legally *required*" at this time. *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62 (2004) (emphasis original). Because active prosecution is ongoing at the examiner level, there is no discrete, mandatory action that the Board has jurisdiction to take, much less one that the Board is legally required to take in any established time-frame. To the extent that Mr. Hyatt is simply dissatisfied with the types of actions the USPTO has been taking in his applications, any such complaints are not remediable through a lawsuit under § 706(1) that alleges a failure to act.

The Court also lacks jurisdiction over this case because it is unripe for judicial review. The issues in this case are not fit for judicial resolution at this time for many of the same reasons that the Court lacks jurisdiction directly under § 706(1). The matter is also unripe because the next steps in examining Mr. Hyatt's numerous applications are contingent on future actions that he will take and do not rest solely in the hands of the USPTO.

Finally, Mr. Hyatt cannot pursue his claim for declaratory relief by invoking the Declaratory Judgment Act, 28 U.S.C. § 2201, when that statute only provides a procedural mechanism to obtain a declaratory judgment where jurisdiction otherwise exists. Because there is no present case or controversy for this Court to review, and there is no jurisdiction under 5 U.S.C. § 706(1), all of Mr. Hyatt's claims should be dismissed.

BACKGROUND

1. Statutory and Regulatory Background

The USPTO is responsible for “the granting and issuing of patents” after conducting a thorough examination of applications to determine whether they meet the statutory criteria for patentability and comply with USPTO rules governing patent examination. 35 U.S.C. § 2(a)(1); *see id.* § 131; *Blacklight Power, Inc. v. Rogan*, 295 F.3d 1269, 1274 (Fed. Cir. 2002) (“The PTO’s responsibility for issuing sound and reliable patents is critical to the nation.”); *In re Alappat*, 33 F.3d 1526, 1535 (Fed. Cir. 1994) (en banc) (“The [Director] has an obligation to refuse to grant a patent if he believes that doing so would be contrary to law.”). To facilitate the USPTO’s undertaking such examinations, Congress has conferred on the agency the authority to establish regulations that “govern the conduct of proceedings in the Office.” 35 U.S.C. § 2(b)(2)(A); *see also In re Bogese*, 303 F.3d 1362, 1368 (Fed. Cir. 2002) (“The PTO has inherent authority to govern procedure before the PTO, and that authority allows it to set reasonable deadlines and requirements for the prosecution of applications.”). The USPTO has exercised the discretion afforded by Congress by issuing a series of regulations governing the examination of patent applications and the appeals of adverse patentability determinations. *See, generally*, 37 C.F.R. Ch. 1, Subch. A, Pts. 1 & 41.

A patent examiner, who has the relevant scientific or technical competence, is responsible for examining each application. *See In re Berg*, 320 F.3d 1310, 1315 (Fed. Cir. 2003). A patent

application consists of a “written description of the invention,” 35 U.S.C. § 112, and “one or more claims,” which “provide[] the metes and bounds of the right which the patent confers on the patentee to exclude others,” *Corning Glass Works v. Sumitomo Elec. U.S.A., Inc.*, 868 F.2d 1251, 1257 (Fed. Cir. 1989). Because the applicant’s rights will be determined by the scope of the claims, much of the examination process focuses on the claims.

Patent examination (also known as “prosecution”) generally consists of a back-and-forth between the patent examiner and the applicant. The examiner initially looks at each proposed claim and reviews it for novelty, support in the written description, and compliance with the rest of the patent statute and the USPTO’s rules. *See, e.g.*, 35 U.S.C §§ 101, 102, 103, 112. In some cases, where the novelty of the claims is self-evident and the claims well-described in the application, very little back-and-forth may be required. In other cases, examination may take a long time, with many iterations back and forth.

After initial examination, the examiner sends the applicant an “office action,” which may allow or reject the claims. If the claims are rejected, the applicant may respond with amendments, evidence of patentability, arguments in favor of patentability, or some combination thereof. 37 C.F.R. § 1.111. The goal of this back-and-forth communication is either to reach an agreement on allowable claims, or have the examiner and the applicant set forth their positions in the administrative record for appeal to the Board. 35 U.S.C. § 134 (“An applicant . . . any of whose claims has been twice rejected, may appeal from the decision of the primary examiner.”). Beyond the statutory mandate that an applicant be allowed to appeal, Congress did not specify a procedure for how appeals are taken; instead, the USPTO has exercised its rulemaking authority to establish appeal procedures. *See* 35 U.S.C. § 2(b)(2)(A).

Under the USPTO's regulations, before an application may reach the Board's jurisdiction, the applicant must file a notice of appeal and an appeal brief, the examiner may file an "examiner's answer," and the applicant may file a reply brief. 37 C.F.R. §§ 41.37(a), 41.39(a), 41.41(a). There is no deadline by which an examiner's answer must be filed. Only after the reply brief is filed or the time for filing a reply brief expires does jurisdiction over the application pass from the examiner to the Board. 37 C.F.R. § 41.35(a).

The filing of an appeal brief does not obligate (or even allow) the Board to issue a decision. For example, even after the applicant has filed an appeal brief, and before jurisdiction passes to the Board, prosecution may be reopened either by the applicant or the examiner. *See, e.g.*, 37 C.F.R. § 41.40(b); Manual of Patent Examination Procedure ("MPEP") § 1207.04.¹ Moreover, USPTO regulations state that "[q]uestions relating to matters not affecting the merits of the invention may be required to be settled before an appeal can be considered." 37 C.F.R. § 41.31(c).

A set of appeal briefs generally addresses the claims as previously presented to the examiner. *See* 37 C.F.R. § 1.116(b). Thus, the applicant generally may not amend the claims once an appeal brief is filed, except for very limited purposes. *See* 37 C.F.R. § 41.33(b), (c); MPEP § 1206. Once claims are amended, the examiner must reconsider his previous rejections in light of the new claim language, with the very strong possibility that the previous rejections will no longer apply in the same manner.

¹ The MPEP lays out the procedures that guide examination by the USPTO. The MPEP is publicly available at <http://www.uspto.gov/web/offices/pac/mpep/>, including current and archived versions. Unless noted otherwise, the USPTO's cites refer to the current version.

2. Mr. Hyatt's Applications

Mr. Hyatt's applications present an unprecedented situation for the USPTO. Mr. Hyatt currently has 399 applications pending with the USPTO that were filed before June 8, 1995, of which the 80 applications at issue in this case are but a part. *See* Defendants' Exhibit ("DEX") A (Declaration of Robert A. Clarke), ¶ 4; DEX B (sample Requirement in one of the 80 applications at issue) at 3; *see also Hyatt v. U.S. Patent & Trademark Office*, No. 1:13-cv-1535, 2014 WL 2446176, at *1 (E.D. Va. May 29, 2014) (Hilton, J.). By both historical and contemporary standards, each of Mr. Hyatt's 399 pending applications contains an immense number of claims—on average, 299 total claims. DEX B at 3, 9. Thus, almost every one of Mr. Hyatt's pending applications has one of the largest claim sets that the USPTO has ever encountered in any application. *Id.* at 3. By comparison, the patents issued by the USPTO in FY 2012 averaged between 16 and 17 claims per patent. *Id.* at 10. For example, application serial number 08/458,143 ("the '143 application"), which Mr. Hyatt refers to as "Docket No. [REDACTED],"² contains a total of [REDACTED] claims. *Id.* at 10. The family of the [REDACTED] application collectively contains a total of [REDACTED] claims.³ *Id.* at 12. All told, the USPTO estimates that Mr. Hyatt has approximately 115,000 claims pending across all 399 applications. *Id.* at 10; *see Hyatt*, 2014 WL 2446176, at *1.

² Every application filed with the USPTO that proceeds to examination receives a serial number, which is the official number used to identify that application and to access the file by the applicant and the public. *See* 37 C.F.R. §1.5(a) (explaining that patent applicants must use serial numbers when transacting business with the USPTO). In his Complaint, Mr. Hyatt instead uses his own personal docket numbers to refer to his applications. Consistent with Office practice, the USPTO will refer to the applications by official serial number and, for the Court's convenience, also identify Mr. Hyatt's corresponding personal docket number, when referring to one of the 80 applications referenced in Exhibit 1 of the Complaint.

³ Patents may be part of a "family," or may be considered "related," when they substantially share a common written description, or specification.

Moreover, Mr. Hyatt's specifications are hundreds of pages long. For example, the specifications filed in the [REDACTED] applications that are subject to the Requirement attached as Exhibit B are approximately [REDACTED] pages long. DEX B at 7. As a point of reference, the USPTO deems any specification (the written description plus drawings plus original claims) longer than 20 pages to be a "Jumbo Application" subject to special rules and fees. *See id.*; MPEP § 608.01 [¶6.31].

Mr. Hyatt's applications are not only unprecedented in their size and volume, but also in their interconnectedness. *Hyatt*, 2014 WL 2446176, at *1. All of Mr. Hyatt's pending applications are "related" to – that is, share written descriptions with – other applications. "Each of the 399 pending applications purportedly incorporates by reference and claims the benefit of priority to numerous earlier-filed applications often dating back into the early 1970s." *Id.* Moreover, "[m]any of the pending applications not only claim priority to a web of overlapping, earlier-filed applications, but are also themselves 'parents' for the overlapping priority claims of numerous other later-filed applications." *Id.*

To avoid repetition and maintain consistency, examination of any application requires ongoing knowledge of the claims in the other related applications. *See, e.g.*, MPEP § 706.07(h)(XI)(A) (explaining that a Board decision is controlling in related applications). The examiner must also have an intimate knowledge of the written description and drawings in the application. *See* 35 U.S.C. § 112; MPEP §§ 2161-86 (many sections explaining ways in which examiner must compare claims to written description).

As another member of this Court recently held in ruling on one of Mr. Hyatt's cases, "[t]he size, volume, and interconnectedness of Plaintiff's applications [has] complicated their

examination by the USPTO and contributed to examination delays.” *Hyatt*, 2014 WL 2446176, at *1.⁴

Faced with an extraordinary situation, the USPTO determined last year that [REDACTED]
[REDACTED]
[REDACTED] DEX B at 31; *see also Hyatt*, 2014 WL 2446176, at *6 (concluding that “[t]he Requirements arose to compel Plaintiff’s cooperation in organizing the claims among his applications”). Thus, [REDACTED]
[REDACTED] Mr. Hyatt’s applications, *id.* at 4, the USPTO grouped the applications into 12 families, each corresponding to a common specification, and, beginning in August 2013, began issuing a series of formal Requirements to the applications in 11 of the 12 families. *See Hyatt*, 2014 WL 2446176, at *1; *see, e.g.*, DEX B at 6-26; *id.* at 4-5. The USPTO issued Requirements in 385 of Mr. Hyatt’s pending applications. DEX A ¶ 5; *see also* DEX B at 29-31 (setting forth legal basis for the Requirements).

The Requirements generally made three demands of Mr. Hyatt: (1) that he select no more than 600 total claims per family for examination (still an immense number of claims to keep track of), while also allowing Mr. Hyatt to justify why additional claims should be examined; (2) that for each claim he selects, he identify the earliest applicable priority date and supporting

⁴ Mr. Hyatt’s prior case in this Court challenged the extent to which the USPTO was required to keep the Requirements confidential under 35 U.S.C. § 122. The Court granted the USPTO’s motion to dismiss, or in the alternative for summary judgment, finding that § 122’s determinations of special circumstances warranting disclosure were “committed to agency discretion by law” and thus judicially unreviewable under the APA, 5 U.S.C. § 701(a)(2). *See Hyatt*, 2014 WL 2446176, at *3-5. The Court found that even if jurisdiction existed, the USPTO had properly determined that two exceptions to § 122’s confidentiality requirements applied. *See id.* at *5-7. The case is on appeal to the Federal Circuit. *See Hyatt v. U.S. Patent & Trademark Office*, No. 2014-1596 (Fed. Cir.) (docketed July 7, 2014).

disclosure; and (3) that he present a copy of the pending claims in accordance with current practice. DEX B at 26-29. Without the Requirements, the USPTO explained, the agency [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 31.

Given the need for consistency across applications in the same family, Requirements were issued in applications that were still in the midst of prosecution, as well as in applications that Mr. Hyatt had appealed to the Board. DEX A ¶ 6.

3. Applications that Are the Subject of Mr. Hyatt's Judicial Complaint

Mr. Hyatt's Complaint alleges delay in the adjudication of 80 applications for which he at one time filed appeals at the Board.⁵ In all but four of those cases, his appeal brief was allegedly filed between 2003 and 2012. Compl. Ex. 1 (only docket nos. 379 and 547 allege appeal briefs filed in 2002, and docket nos. 856 and 865 allege appeal briefs filed in 1999).

From approximately 2003 until 2012, the examination of many or most of Mr. Hyatt's applications was stayed during the pendency of multiple proceedings before the Board, as well as civil lawsuits brought by Mr. Hyatt against the USPTO, the outcome of which affected examination of all or many of his pending applications. *See Hyatt*, 2014 WL 2446176, at *1; *see, e.g., Kappos v. Hyatt*, --- U.S. ---, 132 S.Ct. 1690 (2012); *Hyatt v. Dudas*, 551 F.3d 1307 (Fed. Cir. 2008); *Hyatt v. Dudas*, 492 F.3d 1365 (Fed. Cir. 2007). Hence, between 2003 and 2012, in many of Mr. Hyatt's applications, the USPTO issued suspensions of action, explaining

⁵ Mr. Hyatt filed a related case in the District of Nevada, case no. 2:14-cv-00011-JCM-NJK, on January 3, 2014, and filed an amended complaint on April 25, 2014. In that case, Mr. Hyatt alleges agency inaction on two of his patent applications, much like he alleges agency inaction on 80 of his patent applications here. Although the USPTO moved to dismiss the related case on similar grounds as it moved to dismiss this case in Nevada, the court has not yet ruled on that motion, even to determine whether transfer is appropriate.

that a “court [or Board] decision relevant to the examination of this application will be rendered soon.” Compl. ¶ 61; *see id.* Ex. 1 (other than applications labeled Dkt 337 and 560, showing vast majority of USPTO suspensions issued in time period between 2003 and 2012).

Soon after the Supreme Court issued its decision in *Kappos v. Hyatt*, --- U.S. ---, 132 S.Ct. 1690 (2012), the USPTO resumed examination of Mr. Hyatt’s pending applications, including taking the unprecedented action of dedicating 12 (now 14) primary examiners to prepare actions on his 399 applications. *See* DEX B at 24; DEX A ¶ 3. In September or October 2013, four or five months before he filed this suit, the USPTO issued Requirements in each of the 80 applications at issue, among hundreds of Mr. Hyatt’s other applications. *See* Compl. ¶ 60; DEX A ¶¶ 5, 8. Thus, prosecution has now been reopened in each of the 80 applications that was on appeal at the Board when the Requirements issued.⁶

The examiners have since taken significant actions in Mr. Hyatt’s applications, not only with respect to the 80 applications at issue in this case, which are described in more detail below,

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Id. Regardless, the USPTO’s intent to reopen prosecution in all 80 applications by issuing the Requirement was clear from its course of action and from the nature of the Requirement itself. Given that Mr. Hyatt has now responded to the Requirements in all 80 applications, the USPTO has issued non-final office actions in many of them, and Mr. Hyatt has responded to some of those non-final office actions by amending his claims, there can be no dispute that prosecution has, as a practical matter, been reopened and is actively underway in all 80 applications. Moreover, given the altered state of Mr. Hyatt’s applications since issuance of the Requirements, the appeal briefs Mr. Hyatt previously filed in these applications would undoubtedly raise arguments that are now moot. *See, e.g.*, DEX A ¶ 14 (describing Mr. Hyatt’s amendment of claims in response to the Requirement in one of the eight applications that did not contain language expressly reopening prosecution); *see also* 37 C.F.R. § 41.33 (claim amendments generally not allowed after filing appeal brief unless prosecution is reopened).

and the other 305 applications subject to the Requirement, but also as to other applications that were not subject to Requirements. *See, e.g.*, DEX C (excerpt of 1218-page office action on the merits from USPTO in application no. 05/849,812, dated April 25, 2013); DEX D (excerpt of 579-page office action on the merits from USPTO in application no. 07/493,061, dated May 24, 2013); DEX E (excerpt of 514-page examiner’s answer on the merits from USPTO in application no. 05/302,771, dated April 7, 2014).

Mr. Hyatt has responded to the Requirements in each of the 80 applications [REDACTED] [REDACTED]⁷ DEX A ¶ 15. In [REDACTED] of those applications, he amended his claims in responding to the Requirement. *Id.* In [REDACTED] of the 80 applications, the examiner has taken the claims selected by Mr. Hyatt in response to the Requirement and issued a non-final office action. *Id.* ¶ 16; *see, e.g.*, DEX F (sample Office Action in application no. [REDACTED] which Mr. Hyatt refers to as “Docket No [REDACTED] In [REDACTED] of those [REDACTED] applications, Mr. Hyatt responded to the non-final office action [REDACTED] DEX A ¶ 17; *see, e.g.*, DEX G [REDACTED]

As a result, the examiner will now need to consider Mr. Hyatt’s proposed amendments to the claims and issue a responsive paper accordingly. DEX A ¶ 17; 37 C.F.R. §§ 1.111, 1.113. In the other 21 applications out of the 24 subject to non-final office actions, Mr. Hyatt’s response is due in the next zero to six months. DEX A ¶ 19. It remains to be seen whether Mr. Hyatt will amend those applications [REDACTED]

⁷ He has also filed petitions with the agency challenging the Requirements themselves. *See* DEX A ¶ 21.

LEGAL STANDARDS

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges a court's jurisdiction over the subject matter of the suit. *See* Fed. R. Civ. P. 12(b)(1). One way to attack subject matter jurisdiction through a Rule 12(b)(1) motion is by asserting that a complaint simply fails to allege facts upon which subject-matter jurisdiction can be based. *See Adams v. Bain*, 697 F. 2d 1213, 1219 (4th Cir. 1982). Alternatively, a Rule 12(b)(1) motion may attack subject matter jurisdiction by asserting that, as a factual matter, the plaintiff cannot meet his burden of establishing a jurisdictional basis for the suit. *See id.* at 1215. Under this approach, in order to determine whether jurisdiction exists, a trial court may consider evidence extrinsic to the complaint. *Id.* (citing *Mims v. Kemp*, 516 F.2d 21 (4th Cir. 1975)). The USPTO raises this second type of challenge and thus relies on the attached exhibits in support of its jurisdictional arguments. Because Mr. Hyatt is the party invoking the Court's jurisdiction, he bears the burden of establishing the existence of subject matter jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994).

ARGUMENT

I. THE COURT LACKS JURISDICTION UNDER 5 U.S.C. § 706(1) BECAUSE PROSECUTION IS ACTIVELY UNDERWAY, AND THE BOARD IS NOT LEGALLY REQUIRED TO RENDER A DECISION ON THE MERITS OF MR. HYATT'S APPLICATIONS AT THIS TIME.

Section 706(1) provides that a reviewing court shall "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). As the Supreme Court cautioned in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (hereinafter "*SUWA*"), however, "[f]ailures to act are sometimes remediable under the APA, but not always." *Id.* at 61. Most importantly, "the only agency action that can be compelled under the APA is action legally required." *Id.* at 62 (emphasis original). Where a court is asked to compel action that is not

legally required, it must dismiss the claim for lack of jurisdiction. *See Village of Bald Head Island v. U.S. Army Corps of Engineers*, 714 F.3d 186 (4th Cir. 2103) (affirming dismissal on basis of lack of jurisdiction where plaintiff agency was not legally required to take action that plaintiff alleged was unreasonably delayed or unlawfully withheld under 5 U.S.C. § 706(1)); *Hamandi v. Chertoff*, 550 F. Supp. 2d 46, 49-50 (D.D.C. 2008) (describing jurisdictional limitations on courts adjudicating claims under 5 U.S.C. § 706(1)).

Such is the case here, where Plaintiff seeks to compel issuance of decisions by the Board that are not legally required in view of the active state of prosecution. Moreover, to the extent that Plaintiff is attempting to use this lawsuit to avoid the Requirements the USPTO issued in his 80 pending applications, any such challenge to agency action is improper in a suit alleging a purported *failure to act* under 5 U.S.C. § 706(1).

A. The Action Plaintiff Seeks to Compel Is Not Legally Required

The action Mr. Hyatt seeks to compel – a final Board decision – must be “legally required” for Mr. Hyatt’s suit to be justiciable because, at the time the APA was enacted, § 706(1) was intended to carry forward the traditional writ of mandamus. *See SUWA*, 542 U.S. at 63. The traditional remedy of mandamus was limited to enforcing “a specific, unequivocal command . . . about which [an official] had no discretion whatsoever.” *SUWA*, 542 U.S. at 63 (internal quotation marks and citations omitted). The Court in *SUWA* thus endorsed the view that “§ 706(1) empowers a court only to compel an agency ‘to perform a ministerial or non-discretionary act’ or ‘to take action upon a matter, without directing *how* it shall act.’” *Id.* at 64 (quoting Attorney General’s Manual on the Administrative Procedure Act 108 (1947) (emphasis added by Supreme Court)). By way of example, the Court posited a situation where an agency is compelled by law to act within a certain time period, but the manner of acting is left to the

agency's discretion. *See id.* at 65. In such a situation, "a court can compel the agency to act, but has no power to specify what the action must be." *Id.*

The limitations on judicial review under § 706(1) serve an important purpose: They prevent courts from becoming entangled in affairs that lie within an agency's lawful discretion.

As the Court explained in *SUWA*:

The principal purpose of the APA limitations we have discussed – and of the traditional limitations upon mandamus from which they were derived – is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and information to resolve. If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved - which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management. . . . The prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA.

Id. at 66-67.

Mr. Hyatt's claims for declaratory and injunctive relief under 5 U.S.C. § 706(1) run afoul of these principles because they would require the Court to entangle itself in the adjudication of 80 patent applications that are in active prosecution, when a final Board decision is not required or even permissible at this stage of patent prosecution. Mr. Hyatt's applications are in the midst of an iterative examination process that depends on future actions to be taken by both the USPTO and Mr. Hyatt.

All 80 of the patent applications at issue are subject to Requirements, which the USPTO issued in September or October 2013, in an effort to place Mr. Hyatt's applications in a condition that would allow the USPTO to examine them, and hopefully identify patentable subject matter, in an efficient and effective manner. *See* DEX A ¶ 8; DEX B at 31. Mr. Hyatt responded to the

Requirements with respect to all 80 applications at issue in this suit by choosing claims for continued prosecution and, in some cases, amending his claims. See DEX A ¶ 15. In [REDACTED] of these applications, the USPTO is still assessing Mr. Hyatt's response to the Requirements and working on its next action. *Id.* ¶ 20.

In the remaining [REDACTED] applications, the examiner has taken the claims selected by Mr. Hyatt in response to the Requirement and issued a non-final office action. *Id.* ¶ 16; see, e.g., DEX F. In [REDACTED] of those [REDACTED] applications, Mr. Hyatt [REDACTED] [REDACTED]. DEX A ¶ 17. As a result, the examiner will now need to [REDACTED] [REDACTED] *Id.*

The landscape of the applications subject to Mr. Hyatt's Complaint has changed markedly even since he filed his Complaint and the USPTO filed its original motion to dismiss in Nevada. Application No. [REDACTED] which Mr. Hyatt refers to as "Docket No. [REDACTED]" is illustrative of [REDACTED] [REDACTED]

[REDACTED] Mr. Hyatt responded to the Requirements in that application by [REDACTED] [REDACTED] *Id.* ¶ 18. [REDACTED]

[REDACTED] *Id.* & DEX F. [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

DEX A ¶ 18 & DEX G. One of the 14 examiners working full-time on Mr. Hyatt's claims, see

DEX A ¶ 3, will now need to [REDACTED]

In the other [REDACTED] applications out of the [REDACTED] subject to non-final office actions, Mr. Hyatt's response is due in the next zero to six months. *Id.* ¶ 19. It remains to be seen how Mr. Hyatt will respond to those office actions – including whether he will [REDACTED] [REDACTED] – and what action that response will necessitate from the USPTO. But, specifics aside, it cannot be denied that further prosecution will occur before the Board would assume jurisdiction over any appeal.

Despite the iterative process that continues between Mr. Hyatt and the examiners with respect to the examination of all 80 of the applications at issue, Mr. Hyatt asks this Court to issue a declaratory judgment finding that USPTO has unreasonably delayed under § 706(1) and to “direct[] Defendants to issue a final decision from the Appeal Board in each of the 80 patent applications . . . on a schedule of one per month starting within three months.” Compl., Prayer for Relief, ¶¶ A, B. But given that examination is actively ongoing in all 80 of his applications, the Board does not even have jurisdiction to take the action that Mr. Hyatt asks this Court to compel. Unless or until Mr. Hyatt's patent applications are again in a position to be appealed to the Board, he appeals those rejections to the Board, the examiner files his “examiner's answer,” and Mr. Hyatt files a reply brief (or the time for him to do so lapses), the Board cannot act. *See* 37 C.F.R. §§ 41.35(a), 41.37(a), 41.39(a), 41.41(a). Thus, far from asking this Court to “perform a ministerial or non-discretionary act” that is “legally required” at this time, *SUWA*, 542 U.S. at 64, Mr. Hyatt asks the Court to order the Board to take an action that is entirely inappropriate given the present state of examination.

If granted, Mr. Hyatt's requested relief would put this Court in exactly the position that the Supreme Court cautioned against in *SUWA*: “[i]t would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate [to grant and issue patents], injecting the judge into day-to-day agency management. . . .” *Id.* at 66-67; *see* Compl., Prayer for Relief, ¶ C (requesting an Order “[d]irecting the parties to confer on the status monthly and to appear before this Court for a status check monthly”). Moreover, while Mr. Hyatt asks the Court to “[d]irect Defendants to issue a final decision from the Appeal Board in each of the 80 patent applications . . . on a schedule of one per month starting within three months,” Compl., Prayer for Relief, ¶ B, “[t]he prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with such congressional directives is not contemplated by the APA,” *SUWA*, 542 U.S. at 66. This is particularly so where, unlike the example the Supreme Court gave in *SUWA*, there is no indication that Congress intended the USPTO to complete adjudication of patent applications “within a certain time period.” *SUWA*, 542 U.S. at 67; *cf. Safadi v. Howard*, 466 F. Supp. 2d 696, 699 (E.D. Va. 2006) (Ellis, J.) (finding that this Court lacked jurisdiction to compel United States Citizenship and Immigration Services (“USCIS”) to adjudicate adjustment of status application more quickly, where “[n]owhere in the statute is there any reference to time limits for the processing of adjustment of status applications or the need for expedition in doing so”).

Moreover, Congress expressly conferred on the agency the authority and discretion “to establish regulations governing the conduct of proceedings in the Office,” 35 U.S.C. § 2(b)(2)(A), and the USPTO is actively carrying out those proceedings at this time. Given this ongoing activity, where the USPTO has 14 primary examiners dedicated to processing Mr. Hyatt's application, an order compelling agency action is plainly unwarranted. *See In re Am.*

Fed. of Gov't Employees, AFL-CIO, 790 F.2d 116 (D.C. Cir. 1986) (declining to issue a court order compelling agency action unreasonably delayed where, although past delays were “intolerable,” agency was diligently making progress in reducing a backlog of administrative appeals); *cf. Safadi*, 466 F. Supp. 2d at 701 (“[W]hile the application processing time that has elapsed in this case has been substantial, the evidence that USCIS is actively processing plaintiff’s application makes clear that this is not a case where USCIS has refused to adjudicate or process an application. Instead, it is a case in which USCIS is and has been processing plaintiff’s adjustment of status application, but has done so at a pace plaintiff finds unsatisfactory.”).

The role Mr. Hyatt is asking this Court to assume is especially ill-advised under the circumstances of this case, where Mr. Hyatt’s 399 pending applications are unprecedented in their “size, volume, and interconnectedness.” *Hyatt*, 2014 WL 2446176, at *1. Mr. Hyatt’s applications raise complicated technical and legal issues. If Mr. Hyatt is to receive a patent – either because an examiner issues a notice of allowance or because the Board ultimately determines that the examiner’s rejections lack merit – it should be because the Office had the time to thoroughly consider the merits of his arguments for why he is entitled to a patent, not because a clock is ticking. Conversely, any Board decision needs to be as comprehensive as possible to withstand the inevitable judicial scrutiny that will follow should it affirm some or all of the rejections. *See United Steelworkers of Am. v. Rubber Manufacturers Ass’n*, 783 F.2d 1117, 1120 (D.C. Cir. 1986) (imposition of compressed time frame on the agency to take future action would ill-serve public interest where agency action must be “careful[] and thorough[] if the agency’s action is to pass judicial scrutiny”).

When the USPTO issues a patent, it is imparting substantial rights to the patent owner, which can be enforced broadly against the public. *See, e.g., Callaway Golf Co. v. Kappos*, 802 F. Supp. 2d 678, 686 (E.D. Va. 2011) (Brinkema, J.) (“Patents are government-granted monopolies that provide the patent holders with tremendous power to suppress competition. Accordingly, there is a strong public interest in ensuring that patents are valid.”) (internal citation omitted). The public interest thus strongly disfavors imposing arbitrary deadlines that may prevent USPTO from sufficiently examining patent claims, especially where Congress has imposed no such deadlines.

B. Mr. Hyatt Cannot Use a Suit Alleging a Failure to Act to Challenge Action It Has Received But Does Not Like

Furthermore, to the extent that Mr. Hyatt’s real dissatisfaction lies with the fact that the 80 applications at issue were made subject to Requirements after he had filed an appeal with the Board, any such complaint is not properly before the Court in this action under 5 U.S.C. § 706(1). Mr. Hyatt’s prayer that the Court “order the PTO not to reopen prosecution on the appeals or otherwise delay final resolution on the merits of the appeals as presented to the Appeal Board in each of these 80 appealed applications” strongly suggests that he is attempting to use this suit to influence the manner in which the USPTO conducts proceedings – a plainly inappropriate use of § 706(1).⁸ Compl., Prayer for Relief, ¶ B. It is well-established that Mr.

⁸ The position Mr. Hyatt took on the transfer of this case also raises questions about the goal of this suit. When the USPTO moved to dismiss Mr. Hyatt’s suit in the District of Nevada, it explained that, in addition to the reasons presented in this memorandum, any jurisdiction would lie exclusively in this Court or in the Federal Circuit in the first instance. Mr. Hyatt responded that, if the Nevada court found that exclusive jurisdiction lay outside Nevada, it should transfer the case to this Court. The USPTO argued that transfer to the Federal Circuit would be more appropriate because, as Mr. Hyatt “has brought this suit seeking to hasten the agency action, a transfer to the Federal Circuit presents the avenue of least delay.” Order, Dkt. 29 at 4. Although the Nevada court found the USPTO’s position more persuasive, it pointed out that, as plaintiff,

Hyatt cannot seek review of the USPTO's decision to issue the Requirements under the guise of an alleged *failure to act*. See *Sierra Club v. Peterson*, 228 F.3d 559, 568 (5th Cir. 2000) (en banc) (rejecting plaintiffs' claim under 5 U.S.C. § 706(1) where the agency "has been acting, but the [plaintiffs] simply do not believe its actions have complied" with the relevant statute); *Ecology Center, Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 926 (9th Cir. 1999) ("This court has refused to allow plaintiffs to evade the finality requirement with complaints about the sufficiency of an agency action 'dressed up as an agency's failure to act.'").

If Mr. Hyatt ultimately wishes to challenge the Requirements, he must first finish exhausting administrative remedies, as he has already begun to do by filing petitions that challenge the propriety of the Requirements themselves and then seeking reconsideration of any denials. See DEX A ¶ 21; see 5 U.S.C. § 704 (provision of the APA requiring "final agency action" before any judicial review may be obtained). This APA suit to "compel agency action" under 5 U.S.C. § 706(1) is not the proper mechanism to reach those questions.⁹

Yet to compel immediate Board decisions in the 80 subject applications would effectively nullify the Requirements, as Mr. Hyatt is presumably asking for the Board to take action on appeal briefs that he filed before the Requirements, which bear little resemblance to the current state of Mr. Hyatt's applications. See, e.g., DEX A ¶¶ 15 & 18 (describing amendments filed in response to the Requirements themselves, and in response to subsequent non-final office actions) & DEX G. Mr. Hyatt should not be permitted to hijack the administrative process by compelling

Mr. Hyatt could have filed in any appropriate forum "even if that might result in greater delay in obtaining the relief Hyatt *ostensibly* seeks." *Id.* (emphasis added).

⁹ Mr. Hyatt's Complaint does not ask for judicial review under any provision of the APA other than 5 U.S.C. § 706(1), and thus cannot be read to challenge the propriety of the Requirements or any subsequent action of the USPTO.

an agency action that is not presently required. The Court should dismiss his § 706(1) claims for lack of subject matter jurisdiction.

II. MR. HYATT'S REQUEST FOR INJUNCTIVE AND DECLARATORY RELIEF UNDER 5 U.S.C. § 706(1) IS NOT RIPE FOR JUDICIAL REVIEW.

This Court also lacks jurisdiction over Mr. Hyatt's claims for injunctive and declaratory relief under 5 U.S.C. § 706(1) because they are unripe for judicial review. A lack of ripeness deprives a court of subject matter jurisdiction. *See Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013) ("Ripeness is a question of subject matter jurisdiction.") (internal quotation marks omitted).¹⁰ If the Court determines that it lacks subject matter jurisdiction, it must dismiss the action. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

"The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148 (1967). The rationale of the ripeness doctrine is similar to the rationale for the limitations on judicial review under § 706(1): The doctrine exists "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision had been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148-49.

¹⁰ Although any appeal of this action would be to the United States Court of Appeals for the Federal Circuit, *see* Order, Dkt. No. 29 at 2-4, when reviewing a district court's conclusion that the causes of action in a case are not ripe for adjudication, and therefore are beyond the Article III jurisdiction of the federal courts, the Federal Circuit applies the law of the regional circuit in which the district court sits. *See Cedars-Sinai Medical Center v. Watkins*, 11 F.3d 1573, 1580 (Fed. Cir. 1993).

The Supreme Court has set forth a two-part test to assess whether a claim is ripe for review: A court must first evaluate the fitness of the issues for judicial decision, and, second, the hardship to the parties of withholding court consideration. *Id.* at 149. Furthermore, “[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas v. United States*, 523 U.S. 296, 300 (1998) (internal quotation marks omitted).

With regard to the first prong of the *Abbott Laboratories* analysis, Mr. Hyatt’s claims are not fit for judicial resolution for many of the same reasons that the Court lacks jurisdiction under 5 U.S.C. § 706(1). *See supra* Pt. I.A. As discussed above, Mr. Hyatt is seeking to compel a Board decision that is not even within the Board’s jurisdiction to take at this time. *See* 37 C.F.R. § 41.35(a). With prosecution actively underway at the examiner level, Mr. Hyatt is still substantially amending his claims in response to USPTO actions, and the USPTO is responding. Consequently, the Court could not simply review a closed administrative record and determine that the Board has taken too long to act on a matter that is ripe for its decision. To the contrary, any administrative record is growing and changing each time the USPTO or Mr. Hyatt takes another action on his applications.

With regard to the second prong of the *Abbott Laboratories* test, any hardship from the Court finding that his § 706(1) claims were unripe for judicial review would be minimal. Ultimately, Mr. Hyatt’s interest in his pending applications lies in his ability to capitalize on his full patent term for any applications that issue as patents. Because Mr. Hyatt filed his applications before June 8, 1995, he would be entitled to a patent term of 17 years *from whatever date any patent ultimately issued*. *See* 35 U.S.C. § 154 (1988). Thus, the later any patent issues, the later his patent term extends.

Under the *Abbott Laboratories* test, “if the interests of the court and agency in postponing review outweigh the interests of those seeking relief, settled principles of ripeness squarely call for adjudication to be postponed.” *Action on Smoking & Health v. Dep’t of Labor*, 28 F.3d 162, 164 (D.C. Cir. 1994) (internal quotation marks omitted). Here, the balance of interests in this case clearly favors allowing the USPTO to continue its active processing of Mr. Hyatt’s applications without judicial intervention.

Finally, *when* the USPTO can take future actions and *what types* of actions it will take depends on the choices Mr. Hyatt makes in prosecuting his applications. Accordingly, the path forward “rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *Texas*, 523 U.S. at 300. For this reason, too, the Court should dismiss this action as unripe for judicial review.

III. MR. HYATT’S CLAIM UNDER THE DECLARATORY JUDGMENT ACT SHOULD LIKEWISE BE DISMISSED FOR LACK OF JURISDICTION.

For the reasons discussed above, this Court lacks jurisdiction over this action in its entirety, as both counts of the Complaint turn on asking the Court to find that the USPTO has unreasonably delayed taking action on the 80 patent applications under 5 U.S.C. § 706(1). *See* Compl. ¶¶ 66, 72. That Mr. Hyatt has framed his claim for declaratory relief as one arising under the Declaratory Judgment Act, 28 U.S.C. § 2201, does not save his cause, as that statute is not itself a jurisdictional grant. *See Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-72 (1950). Rather, it is a procedural vehicle that provides a remedy only if the court has jurisdiction from some other source. *Aetna Life Ins. Co. of Hartford, Conn. v. Haworth*, 300 U.S. 227, 240 (1937); *see also StoneEagle Servs., Inc. v. Gillman*, 746 F.3d 1059, 1062 (Fed. Cir. 2014); *Mut. Life Ins. Co. of New York v. Moyle*, 116 F.2d 434, 437 (4th Cir. 1940).

Thus, for courts to issue a declaratory judgment under 28 U.S.C. § 2201, a case must “(i) meet the constitutional ‘case or controversy’ requirement and also (ii) present a valid basis for subject matter jurisdiction, *i.e.* diversity or federal question jurisdiction.” *Dunn Computer Corp. v. Loudcloud, Inc.*, 133 F. Supp. 2d 823, 826 (E.D. Va. 2001) (Ellis, J.). As explained above, this case satisfies neither requirement: It fails to meet the “case or controversy” requirement because the claims are unripe for judicial review, *see supra* Pt. II, and it also fails to present a valid basis for subject matter jurisdiction since Mr. Hyatt cannot show that final agency action is legally required under 5 U.S.C. § 706(1). Thus, Mr. Hyatt’s claim under the Declaratory Judgment Act plainly requires dismissal.

Moreover, even if Mr. Hyatt’s request for a declaratory judgment did meet these requirements (in fact, it meets neither), the “exercise of [declaratory judgment] jurisdiction rests within the sound discretion of the district court.” *Dunn Computer Corp.*, 133 F. Supp. 2d at 826 (alteration original). The Fourth Circuit has articulated certain factors courts should consider when deciding whether to exercise such discretion. Ordinarily, “a federal district court should . . . entertain a declaratory judgment within its jurisdiction when it finds that the declaratory relief sought (i) ‘will serve a useful purpose in clarifying and settling the legal relations in issues’ and (ii) ‘will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.’” *Nautilus Ins. Co. v. Winchester Homes, Inc.*, 15 F.3d 371, 375 (4th Cir. 1994) (quoting *Aetna Cas. & Sur. Co. v. Quarles*, 92 F.3d 321, 325 (4th Cir. 1937)).

Neither factor applies here. A declaratory judgment to the effect that the USPTO unreasonably delayed final action on the 80 pending applications would not “terminate and afford relief from the uncertainty, insecurity, and [purported] controversy giving rise to the

proceeding” because patent prosecution would necessarily continue in the 80 pending applications absent accompanying injunctive relief. Moreover, far from serving a useful purpose in settling the legal relations at issue, an advisory opinion about USPTO delay could have unintended consequences well beyond this litigation.

For example, if Mr. Hyatt were to obtain a patent and sue a third party for infringement, that party may assert that the patent is unenforceable for “prosecution laches,” meaning the patentee unreasonably delayed in prosecuting his patent. *Symbol Techs., Inc. v. Lemelson Medical, Edu. & Research Foundation*, 422 F.3d 1378, 1384-85 (Fed. Cir. 2005). Any litigation over prosecution laches would necessitate an examination of Mr. Hyatt’s delays, which he has wholly failed to recognize in his Complaint. “In particular, multiple examples of repetitive refilings that demonstrate a pattern of unjustifiably delayed prosecution may be held to constitute laches.” *Symbol Techs.*, 422 F.3d at 1385. Here, as explained above, Mr. Hyatt has 399 applications pending that were filed before June 8, 1995. All 399 of these applications are part of the same “extended family” since their claims for benefit of priority and their incorporation of previous applications by reference are inextricably linked. DEX B at 3. According to the Federal Circuit, “refiling an application solely containing previously-allowed claims for the business purpose of delaying their issuance can be considered an abuse of the patent system.” *Symbol Techs.*, 422 F.3d at 1385. Many of Mr. Hyatt’s applications claim priority to applications filed as early as 1970, meaning he alleges the subject matter was invented in 1970, but they were not actually filed until 1995.

For instance, in application serial no. 08/419,585 (“the ’585 application,” which Mr. Hyatt refers to as “Docket No. [REDACTED]” Mr. Hyatt first filed claims in April 1995, but he alleged that they were supported by a written description [REDACTED]

[REDACTED]
[REDACTED] DEX H at 2. By the time Mr. Hyatt [REDACTED]
[REDACTED]

[REDACTED] DEX I at 17. Thus, not only did Mr. Hyatt [REDACTED]
[REDACTED]
[REDACTED]

Any advisory opinion declaring that the USPTO “has unreasonably delayed in processing Mr. Hyatt’s patent applications” runs the risk of being used by Mr. Hyatt to attempt to insulate himself against a charge of prosecution laches involving a hypothetical future patent. Resolving this issue should be left to any future patent infringement litigation on any patent that actually issues. This Court should not mire itself in the decades-long prosecution history of 80 voluminous applications, including assessing the relative culpability for delay of both the USPTO and Mr. Hyatt in each individual application, to issue a declaratory judgment that could have serious collateral consequences for private litigants.

In sum, this Court lacks jurisdiction over Mr. Hyatt’s claim under the Declaratory Judgment Act, but even if the Court had jurisdiction, it should decline to exercise its discretion to issue a declaratory judgment.

CONCLUSION

For the foregoing reasons, this Court lacks subject matter jurisdiction over this action in its entirety and should dismiss the Complaint.

Respectfully submitted,

DANA J. BOENTE
United States Attorney



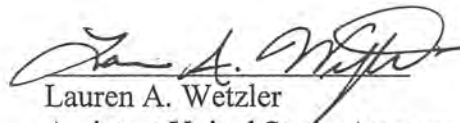
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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2014, I mailed the foregoing UNDER SEAL document and accompanying exhibits, via first class mail, to the following counsel of record:

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DEX A



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

GILBERT P. HYATT,

Plaintiff,

v.

UNITED STATES PATENT AND
TRADEMARK OFFICE and MICHELLE K.
LEE, Deputy Under Secretary of Commerce for
Intellectual Property, and Deputy Director of the
United States Patent and Trademark Office,

Defendants.

Civil Action No. 1:14-cv-1300-TSE-TCB



DECLARATION OF ROBERT A. CLARKE

I, ROBERT A. CLARKE, pursuant to the provisions of 28 U.S.C. § 1746, declare as follows:

1. I have been an employee of the United States Patent and Trademark Office (USPTO) for more than 24 years. I am currently a senior patent attorney in the Office of the Deputy Commissioner for Patent Examination Policy at the USPTO and have held this position for more than two years.

2. I have reviewed the Complaint filed by Mr. Gilbert Hyatt in *Hyatt v. Lee*, Civil Action No. 14-cv-1300 (E.D.Va.) (transferred from the District of Nevada) and am familiar with the prosecution history of Mr. Hyatt's pending patent applications.

3. The USPTO presently has 14 primary patent examiners assigned to work full-time on processing Mr. Hyatt's pending patent applications.

4. Mr. Hyatt has 399 patent applications filed before June 8, 1995 that are pending with the USPTO. Across these applications, the USPTO has identified 12 distinct families of applications and has issued a set of Requirements in 11 of the 12 families (“Requirements”). Because all of the applications in a family share substantially the same specification, a similar Requirement has been issued in most of the applications located in a particular family.

5. By the USPTO’s estimation, 385 of Mr. Hyatt’s pending applications (including [REDACTED] of Mr. Hyatt’s applications filed before June 8, 1995) are subject to a Requirement.

6. Requirements were issued in applications that were still in the midst of prosecution, as well as in applications that Mr. Hyatt had appealed to the Board of Patent Appeals and Interferences (now renamed Patent Trial and Appeal Board, both referred to as “Board”).

7. An example of a Requirement is provided as Defendants’ Exhibit (DEX) B to the Memorandum in Support of the USPTO’s Renewed Motion to Dismiss. It is the Requirement in application no. [REDACTED] which Mr. Hyatt refers to as “Docket No. [REDACTED] mailed on October 28, 2013.

8. Mr. Hyatt’s Complaint encompasses 80 of his 399 patent applications that were filed before June 8, 1995. In all 80 applications, Mr. Hyatt filed an appeal brief to the Board between [REDACTED]. In each of the 80 applications, the USPTO later issued a Requirement, in September or October 2013, as discussed below.

9. I have personally reviewed the file histories of the 80 applications from issuance of the Requirements up to October 20, 2014.

Before the Board Could Obtain Jurisdiction, Prosecution Was Reopened in Each Case

10. Under USPTO procedure, the examiner can file an examiner's answer to respond to an applicant's appeal brief. *See* 37 C.F.R. § 41.39. There is no deadline by which an examiner's answer must be filed. The applicant can then file a reply brief if desired. *See* 37 C.F.R. § 41.41. The Board does not take jurisdiction over the appeal until after the time for filing a reply brief passes. 37 C.F.R. § 41.35(a).

11. In all 80 applications covered by Mr. Hyatt's complaint, before the examiner had filed an examiner's answer, and therefore before the Board had jurisdiction over the appeals, the examiner issued a Requirement, and prosecution was reopened, to the extent that it had not been reopened by earlier actions of the examiner and/or Mr. Hyatt.

12. In the vast majority of the Requirements relating to the 80 applications at issue—
█ of them—the examiner explained in the Requirement itself that prosecution was being reopened. *See, e.g.*, DEX B at 32 (explaining that █
█
█
█

13. The USPTO did not include this or similar language in the Requirements of the █ remaining applications. In each of those █ applications, the USPTO █
█
█

14. In one of those █ applications, application no █ which Mr. Hyatt refers to as "Docket No. 607," Mr. Hyatt █
█
█

[REDACTED]

[REDACTED]

In Response to the Requirements, Mr. Hyatt Has Petitioned and Amended His Claims

15. In response to the Requirements in each of the 80 applications, Mr. Hyatt has taken a multi-pronged approach. He has (1) responded to the Requirement and continued substantive prosecution, including amending his claims; and (2) filed various petitions at the USPTO challenging the Requirement and its contents. In each of the 80 applications subject to Mr. Hyatt's complaint, Mr. Hyatt has responded to the Requirement, [REDACTED]

[REDACTED]

16. In [REDACTED] of the 80 applications subject to Mr. Hyatt's complaint, the examiner has taken up the claims selected by Mr. Hyatt in response to the Requirement and issued a non-final office action. In each of those [REDACTED] applications, the examiner has [REDACTED]

[REDACTED]

17. In [REDACTED] of those [REDACTED] applications, Mr. Hyatt has responded to the non-final office action. In those [REDACTED] responses, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

18. For example, in application no. [REDACTED] which Mr. Hyatt refers to as "Docket No. [REDACTED] the Requirement was issued on [REDACTED]. Substantively, Mr. Hyatt [REDACTED]

[REDACTED] The examiner issued a non-final office action [REDACTED]

[REDACTED] DEX F. [REDACTED]

[REDACTED] DEX G. [REDACTED]

[REDACTED]

[REDACTED] *Id.* at

Attachment 1, 1-239 [REDACTED]

[REDACTED] For example, [REDACTED]

[REDACTED]

[REDACTED] *Id.* at Attachment 1, 1-2.

19. In the other [REDACTED] of the [REDACTED] applications subject to non-final office actions, Mr. Hyatt's response is due in the next 0-6 months. In response, he may permissibly respond to the office action without amendment, amend his claims, or file a notice of appeal.

20. In the remaining [REDACTED] of the 80 applications, the USPTO is in the process of assessing Mr. Hyatt's response and preparing another action.

21. Additionally, in each of the 80 applications subject to Mr. Hyatt's complaint, he petitioned the USPTO challenging the Requirement. The USPTO denied each of those petitions. In each application, Mr. Hyatt has requested reconsideration of the USPTO denials of those petitions. The USPTO is still assessing the merits of Mr. Hyatt's requests for reconsideration.

Exhibits

22. Attached as DEX B is a true and correct copy of the Requirement in application no. [REDACTED] mailed on October 28, 2013.

23. Attached as DEX C is a true and correct copy of an excerpt, including the table of contents, from a 1218-page office action in application no. 05/849,812, mailed on April 25, 2013.

24. Attached as DEX D is a true and correct copy of an excerpt, including the table of contents, from a 579-page office action in application no. 07/493,061, mailed on May 24, 2013.

25. Attached as DEX E is a true and correct copy of an excerpt, including the table of contents, from a 514-page examiner's answer in application no. 05/302,771, mailed on April 7, 2014.

26. Attached as DEX F is a true and correct copy of an office action in application no. [REDACTED] mailed on March 5, 2014.


27. Attached as DEX G is a true and correct copy of Mr. Hyatt's response to the office action in DEX F in application no. [REDACTED], received on September 5, 2014.

28. Attached as DEX H is a true and correct copy of an office action in application no. [REDACTED], mailed on August 8, 1995

29. Attached as DEX I is a true and correct copy of an excerpt from an appeal brief filed by Mr. Hyatt in application no. [REDACTED], received on December 1, 2008.

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on October 22, 2014 at Alexandria, Virginia.


Robert A. Clarke

DEX C



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
05/849,812	11/09/1977	GILBERT P. HYATT	NONE	3455
7590 GILBERT P. HYATT P. O. BOX 81230 LAS VEGAS, NV 89180		04/25/2013	EXAMINER BRINEY III, WALTER F	
			ART UNIT	PAPER NUMBER
			2615	
			MAIL DATE	DELIVERY MODE
			04/25/2013	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary

Application No.
05/849,812

Applicant(s)
HYATT, GILBERT P.

Examiner
Walter F. Briney III

Art Unit
2615

**AIA (First Inventor to File)
Status**
No

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 16 April 2007.
 A declaration(s)/affidavit(s) under **37 CFR 1.130(b)** was/were filed on _____.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) An election was made by the applicant in response to a restriction requirement set forth during the interview on _____; the restriction requirement and election have been incorporated into this action.
- 4) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 5) Claim(s) See Continuation Sheet is/are pending in the application.
5a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 6) Claim(s) _____ is/are allowed.
- 7) Claim(s) 6,45,58,60,84-88,92,96,108,109,111-361,363-369,371-376 and 379-416 is/are rejected.
- 8) Claim(s) _____ is/are objected to.
- 9) Claim(s) _____ are subject to restriction and/or election requirement.

* If any claims have been determined allowable, you may be eligible to benefit from the **Patent Prosecution Highway** program at a participating intellectual property office for the corresponding application. For more information, please see http://www.uspto.gov/patents/init_events/pph/index.jsp or send an inquiry to PPHfeedback@uspto.gov.

Application Papers

- 10) The specification is objected to by the Examiner.
- 11) The drawing(s) filed on _____ is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

Certified copies:

- a) All b) Some * c) None of the:
 - 1. Certified copies of the priority documents have been received.
 - 2. Certified copies of the priority documents have been received in Application No. _____.
 - 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Interim copies:

- a) All b) Some c) None of the: Interim copies of the priority documents have been received.

Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 3) Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 4) Other: _____

Continuation of Disposition of Claims: Claims pending in the application are 6,45,58,60,84-88,92,96,108,109,111-361,363-369,371-376 and 379-416.

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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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GILBERT P. HYATT
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EXAMINER

ATALA, JAMIE JO

ART UNIT	PAPER NUMBER
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2615

MAIL DATE	DELIVERY MODE
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05/24/2013

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 07/493,061	Applicant(s) HYATT, GILBERT P.	
	Examiner JAMIE ATALA	Art Unit 2615	AIA (First Inventor to File) Status No

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) Responsive to communication(s) filed on 19 July 2004.
 A declaration(s)/affidavit(s) under **37 CFR 1.130(b)** was/were filed on _____.
- 2a) This action is **FINAL**. 2b) This action is non-final.
- 3) An election was made by the applicant in response to a restriction requirement set forth during the interview on _____; the restriction requirement and election have been incorporated into this action.
- 4) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 5) Claim(s) See Continuation Sheet is/are pending in the application.
5a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 6) Claim(s) _____ is/are allowed.
- 7) Claim(s) 3-6,8-10,12,13,15-20,22,24-34,38-41,43-45,47-57,59-64,66-69 and 71-361 is/are rejected.
- 8) Claim(s) _____ is/are objected to.
- 9) Claim(s) _____ are subject to restriction and/or election requirement.

* If any claims have been determined allowable, you may be eligible to benefit from the **Patent Prosecution Highway** program at a participating intellectual property office for the corresponding application. For more information, please see http://www.uspto.gov/patents/init_events/pph/index.jsp or send an inquiry to FPHfeedback@uspto.gov.

Application Papers

- 10) The specification is objected to by the Examiner.
- 11) The drawing(s) filed on 13 March 1990 is/are: a) accepted or b) objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

Certified copies:

- a) All b) Some * c) None of the:
1. Certified copies of the priority documents have been received.
 2. Certified copies of the priority documents have been received in Application No. _____.
 3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Interim copies:

- a) All b) Some c) None of the: Interim copies of the priority documents have been received.

Attachment(s)

- | | |
|---|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 3) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____ | 4) <input type="checkbox"/> Other: _____ |

Continuation of Disposition of Claims: Claims pending in the application are 3-6,8-10,12,13,15-20,22,24-34,38-41,43-45,47-57,59-64,66-69 and 71-361.

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DETAILED ACTION

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Status of Claims

Claims 3-6,8-10,12-13,15-20,22,24-34,38-41,43-45,47-57,59-64,66-69,71-361 are currently pending.

Claims 1, 2, 7, 11, 14, 21, 23, 35, 36, 37, 42, 46, 58, 65, and 70 have been cancelled.

This case has one parent cases:

DEX E



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BEFORE THE PATENT TRIAL AND APPEAL BOARD

Application Number: 05/302,771
Filing Date: 01 November 1972
Appellant(s): Gilbert Hyatt

Gilbert Hyatt, *pro se*¹,
For Appellant

EXAMINER'S ANSWER

This Examiner Answer is responsive to an appeal (Notice of Appeal (10 September 2008); Appeal Brief (08 December 2008)) challenging the Non-Final Rejection filed 11 March 2008. This Answer includes new grounds of rejection.

¹ Mr. Hyatt is also a registered practitioner with Reg. No. 27,647.

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