Appeal Nos. 2020-1399, -1400

In the United States Court of Appeals for the Federal Circuit

NEW VISION GAMING & DEVELOPMENT, INC.,

Appellant,

v.

SG GAMING, INC. f/k/a BALLY GAMING, INC.,

Appellee.

Appeals from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in Nos. CBM2018-00005 and CBM2018-00006.

CORRECTED BRIEF OF *AMICUS CURIAE* US INVENTOR, INC. IN SUPPORT OF APPELLANT'S DUE PROCESS ARGUMENT

ROBERT P. GREENSPOON
FLACHSBART & GREENSPOON, LLC
333 NORTH Michigan Avenue
27th Floor
Chicago, Illinois 60601
(312) 551-9500
rpg@fg-law.com

Counsel for Amicus Curiae
US Inventor, Inc.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-1399, -1400

Short Case Caption New Vision Gaming & Development, Inc. v. SG Gaming, Inc. f/k/a Bally Gaming, Inc.

Filing Party/Entity US Inventor, Inc.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 08/03/2020

Signature: Robert P. Greenspoon

Name: Robert P. Greenspoon

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
☐ None/Not Applicable	☐ None/Not Applicable	☑ None/Not Applicable
US Inventor, Inc.	US Inventor, Inc.	

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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Robert P. Greenspoon	Flachsbart & Greenspoon, LLC	

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF AUTHORSHIP AND FUNDING

Under Federal Rule of Appellate Procedure 29(a)(4)(E), Amicus US Inventor, Inc. states that no party or its counsel authored this brief in whole or part; no party or its counsel contributed money intended to fund preparing or submitting the brief; and, no person other than Amicus, its members or counsel contributed money intended to fund preparing or submitting this brief.

IDENTITY AND INTEREST OF AMICUS

US Inventor, Inc. is a non-profit association of inventors devoted to protecting the intellectual property of individuals and small companies. It represents its 13,000 inventor and small business members by promoting strong intellectual property rights and a predictable U.S. patent system through education, advocacy and reform. US Inventor was founded to support the innovation efforts of the "little guy" inventors, to ensure that strong patent rights are available to support their efforts and promote continued innovation.

US Inventor has an interest in this proceeding because its membership has long believed that the Patent Trial and Appeal Board ("PTAB") has not lived up to its promise (and Congressional purpose) of being an unbiased and less costly alternative to federal court validity litigation. Appellant New Vision Gaming consented, but Appellee SG Gaming, Inc. declined to consent, to the filing of this brief, thus US Inventor's motion for leave accompanies its filing.

ARGUMENT

Amicus US Inventor confirms Appellant's argument that the PTAB trial system violates due process. The PTAB is not neutral like it should be. First, data proves that there is an "October Effect:" APJs change their judging standards at the end and beginning of each performance evaluation period. Second, APJ performance evaluations are, by design, subjective. A reasonable person would question whether the PTAB invalidates patents so frequently because its constituent APJs try to please their budget-minded bosses through revenue-enhancing decision making.

I. THE "OCTOBER EFFECT" DEMONSTRATES THAT THE COMPENSATION AND PERFORMANCE RATING SYSTEM AFFECTS APJ DECISION MAKING

A relevant statistic of PTAB institution decisions varies by nearly a factor of two, depending on whether institution is decided in September versus October. That is, the last month of the evaluation year has APJs behaving differently from the first. This statistic validates the contention in Appellant's Principal Brief, that "[e]very time an APJ decides to institute, that patent judge understands that his or her production scores will likely improve," such that when "an APJ votes to grant institution, that APJ is voting to grant himself or herself work on that post-grant proceeding over the next 12 months." (Blue Br. 40). This statistic also confirms Appellant's argument that there is a "perceived temptation . . . to earn decisional units or satisfy the APJ's supervisor . . . [and] concerns over reduced employment

due to decreased PTAB revenues." (Blue Br. 45-46). Unfortunately, bias is not just a logical inference. It actually appears in PTAB decisional data.

With 97% confidence, the current performance rating system influences APJ decisions at the institution stage. The character of institution decisions is remarkably different in September, at the end of APJs' evaluation period, compared with October, at the beginning of the next. This "October Effect" is not random.

The Rating Period for APJs starts on October 1 of each year, and goes to the next September 30 (*i.e.*, the federal government's fiscal year). *E.g.*, Appx3818. APJ performance ratings require that they earn at least 84 "decisional units" per year, and that year ends September 30. Appx3818, Appx3823. Obviously, APJs issue institution decisions throughout the year. This includes in September (the end of the fiscal year when APJs have already earned most of their decisional units) and October (the beginning, when the counter resets to zero).

Standard statistical methods can be used to test whether, in the aggregate, APJs change how they judge institution based on when in the performance evaluation calendar they institute a trial. We can test this hypothesis: after final outcomes are known, we can go back to test the quality of institution decisions. If institutions during some time periods tend to result in proportionally more final decisions favorable to the patentee, and institutions during other time periods result in proportionally more final decisions favorable to petitioners, and those time periods correlate with APJs' annual salary reviews, a reasonable person would question whether the compensation cycle influences APJ likelihood to institute. The

relevant statistic, for a given time slice of institution decisions, is the ratio of institutions that result in affirming at least some claims, versus institutions that result in all claims cancelled or amended.

To give it a label, let's coin that statistic the "Questionable Institution Ratio." For example, imagine a given month that had 20 decisions granting institution, where 5 (over the next 12 months) resulted in an adjudicated final decision that vindicated the patentee, but 15 resulted in adjudicated invalidation or amendment of all claims. The Questionable Institution Ratio for such a month would be 0.333 (5 divided by 15). That ratio should be relatively constant over time, with any variance caused by randomness.

This is useful not because there is an optimal ratio (there is not), but rather because it allows comparison of the judging behavior of the same decision makers in consecutive periods.[1]

[1] The Questionable Institution Ratio controls for everything except judging trends. One assumes that when the month changes from September (end of year) to October (beginning of year), the pool of APJs does not change. One also assumes that, on average, filed petitions have equal merit whether they get decided for institution in September versus October. And since the data point is a ratio, this controls against any suggestion that any observed effect arises from a collective APJ shift of absolute quantities of institution decisions from one month to the next ("end-loading"), or from the next month to the previous one ("front-loading").

Amicus gathered data to compare the Questionable Institution Ratio for the month of September to the month of October for the six consecutive years for which data are available, 2013-2018.[2] The results are, in a word, shocking:

Year	September Institutions: Some patentee success (all claims patentable or mixed)	September Institutions: Petitioner success (all claims unpatentable or amended)	September Ratio	October Institutions: Some patentee success (all claims patentable or mixed)	October Institutions: Petitioner success (all claims unpatentable or amended)	October Ratio
2013	2	15	0.133	5	10	0.500
2014	10	47	0.213	13	48	0.271
2015	13	35	0.371	24	34	0.706
2016	16	41	0.390	12	24	0.500
2017	9	22	0.409	19	34	0.559
2018	8	29	0.276	12	24	0.500

The result: in every observed year for which there are data, the Questionable Institution Ratio is higher in October than in September—*nearly twice as high* (0.506/0.299).

This means that, since the inception of PTAB trials, standards for institution are systematically and significantly more favorable to petitioners in October than in September. Relatively more Questionable Institutions happen in October. Relatively

[2] The undersigned used Lex Machina to collect the raw data.

more patentees have to deal with trials that should never have been instituted in the first place.

This effect is statistically significant. A standard statistical confidence interval test shows that, with 97% confidence, the higher Questionable Institution Ratio in October is not caused by random chance.[3] This is an irrefutable "October Effect." Statistics show that APJ judging changes (with 97% confidence) in correlation with the annual reset of their decisional unit counter to zero.

What is the explanation for such a large and significant disparity between September and October institution rates? Appellant'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). Appellant's principal brief showed the temptation; these statistics show the existence of an actual effect: a skew in decisional outcomes. That skew is sufficient to show a

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[3] The undersigned performed statistical testing using Microsoft Excel formulas. This application permitted calculation of the mean and standard deviation of each month's column for the Questionable Institution Ratio. The standard deviation then became one of three inputs into a confidence interval calculation, along with N=6 and alpha (or p-value) set to 0.03. Respective ranges resulted from calculation of the mean plus or minus this confidence interval. These ranges did not overlap when alpha was set as low as 0.03. Hence there is 97% confidence that the observed differences from September to October do not arise from random chance. It is generally accepted that nonoverlapping ranges, even at only 95% confidence, indicates statistical significance. Calculating 97% confidence shows even more significance than that.

due process violation. While there is no need to attribute a reason for the skew, one cannot rule out that APJs are more likely to grant less meritorious petitions at certain times in the year to "stuff the pipeline" as a guarantee of future work. Regardless, the mere existence of the effect, and its statistical clarity, are troubling.

The October Effect reveals the merit of Appellant's due process argument. If the PTAB system were truly just and free of perceptible bias, judging statistics at the PTAB would not systematically and significantly change based on timing within a performance evaluation year. If concern among APJs for refilling their decisional unit pipeline is not the reason for this effect, the Patent Office should come forward to explain what that reason is.

II. THREE OF THE FOUR APJ PERFORMANCE ELEMENTS ARE SUSPICIOUSLY SUBJECTIVE

A second fact supports Appellant's due process argument. The appendix documents show that APJ salary "can be increased, up to five percent, depending on the APJ's numerical rating and final Performance Rating, Appx3881, which necessarily turns on the APJ's production of 'decisional units.'" Appx3822-3824; Blue Br. 21. Appellant has focused on the "Production" "performance element." Those same appendix APJ "Performance Appraisal Plans" and "Classification and Performance Management Record" documents, *e.g.*, Appx3814-3838 (APJ performance evaluation forms for 2018) show that additional suspicious factors should lead the Court to conclude that APJ decision making is perceptibly biased in a way that violates due process.

Annual performance evaluations of APJs are highly subjective, and subject to the eye of a beholder who happens to be a Leadership APJ with budget responsibility. When there is a combination of one class of adjudication outcomes more budget-friendly than another, subjective evaluation criteria over adjudicator performance, and evaluation by superiors who simultaneously care about meeting the budget, the system violates due process. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

Only 35% of an APJ's performance rating turns on Production. Three other "performance elements" make up 65%. These are "Quality," "Supporting the Mission of the Board / Leadership" and "Internal/External Stakeholder Interactions," constituting, respectively, 35%, 10% and 20%. On their face, these "performance elements" are subjective. The subjectivity becomes more apparent when considering their official description.

The "Quality" performance element (35%) requires supervisory personnel to evaluate whether written decisions "are logically presented, soundly reasoned, have accurate analysis and are concise," all with "[p]roper judicial tone." Appx3819. They also evaluate whether the APJ provides "sound and helpful input" during deliberations. *Id.* They also evaluate whether APJ oral arguments are "conducted skillfully with proper judicial tone." Appx3820. An APJ is supposed to review draft opinions of other panelists to offer "frank, accurate and timely feedback on the quality of the decisions." *Id.* An APJ should avoid "undue delay" when doing so,

and be "prompt and timely." *Id.* All of these aspects of the "Quality" performance element are subjective.

The "Supporting the Mission of the Board / Leadership" performance element (10%) requires supervisory personnel to evaluate whether an APJ "[s]ets a professional example for others to emulate." Appx3826. They must evaluate whether APJs "seek constructive solutions . . . to achieve higher levels of performance." *Id.* Supervisory personnel must also evaluate whether an APJ "[i]nspires and empowers other internal stakeholders by example and by encouragement to think positively." Appx3827. All of these aspects of the "Supporting the Mission of the Board / Leadership" performance standard are subjective. As indicated by Appellant (Blue Br. 44-46), APJs are expressly rewarded for a "support management" approach to judging.

The "Internal/External Stakeholder Interactions" performance element (20%) requires supervisory personnel to evaluate whether APJs address inquiries "courteously." Appx3831. APJs are judged whether their stakeholder interactions are "highly professional and appropriate to the nature of the Judge's position, and to preserve the dignity of the Board." Appx3832. Decisions need to be processed and forwarded "promptly." *Id.* All of these aspects of the "Internal/External Stakeholder Interactions" performance element are subjective.

This intrinsic subjectivity raises concerns that amplify those Appellant raised within its due process arguments. As Appellant ably describes, the same Leadership APJs who make line APJ performance evaluations simultaneously have budget

responsibilities. A typical APJ who enters a performance evaluation with a track record of pro-patentee decision making is taking a grave risk. A record of pro-patentee decisions threatens the popularity of PTAB trials among its paying customers: petitioners / accused infringers. Pro-patentee decision making, beyond the norm, would stand out to budget-minded Leadership APJs as a threat to annual receipts. This, in combination with the rank subjectivity of performance evaluation criteria, and their admitted emphasis on supporting the mission of the Board and its Leadership, incentivizes APJs in only one direction—please the bosses.

In substance, this means a typical APJ will have an incentive to steer his or her decisions in a petitioner-friendly direction. 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). A reasonable APJ would know that avoiding a negative job evaluation and boosting bonus chances depends on discrete scores, subjectively bestowed by Leadership APJs charged with guaranteeing agency funding. In turn, reasonable stakeholders in the process (such as patentees dragged into PTAB trials involuntarily) would question whether budget needs drive adjudicative outcomes in a systematically unfair way. That very uncertainty is sufficient to violate due process, even without attribution of actual bias to any individual.

In short, a combination of four factors dooms due process review of PTAB trials: (a) APJ performance criteria are subjective, (b) those evaluating that

performance bear budget responsibility, (c) the performance evaluation scores determine win or loss of significant financial rewards by those same APJs, and (d) one class of adjudication outcomes (*i.e.*, invalidating claims) is more budget-friendly than another (*i.e.*, upholding claims). Under camouflage of subjective notions of "quality," "support" and "courtesy," "professionalism" and "dignity," an evaluator may bestow or withhold whatever number of performance scoring points makes the difference between an APJ bonus or no APJ bonus. Any adjudication system with those four factors will be systematically biased in favor of invalidation of patents. That is anathema to a judicial process that our Constitution guarantees to be free of bias, or even the perception of bias.

CONCLUSION

The PTAB trial system violates due process. Data proves that there is an "October Effect:" APJs change their judging standards at the end and beginning of each performance evaluation period. In addition, APJ performance evaluations are subjective. A reasonable person would question whether APJs try to please their budget-minded bosses through revenue-enhancing decision making that incentivizes invalidating patents.

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Dated: August 3, 2020

Respectfully submitted,

/s/ Robert P. Greenspoon
Robert P. Greenspoon
FLACHSBART & GREENSPOON, LLC
333 N. Michigan Ave.
Chicago, IL 60601
(312) 551-9500
rpg@fg-law.com

Counsel for Amicus Curiae

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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