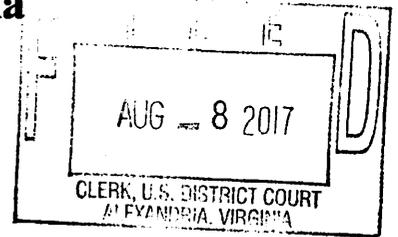


**UNITED STATES DISTRICT COURT  
for the Eastern District of Virginia**



Mitchell R. Swartz,  
Plaintiff

v.

1:17-cv-482-LMB/TCB

Joseph Matal,  
Acting Under Secretary of Commerce  
for Intellectual Property and  
Director of the United States Patent and Trademark Office,  
Defendant

Filed: August 6, 2017

**Plaintiff's Memorandum in Opposition to  
Defendant's "Motion to Dismiss"**

Dr. Mitchell Swartz, *pro se*  
Weston, Massachusetts

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## REMARKS

1. The Defendant's "'Office's"] attorneys have filed a Motion to Dismiss and a MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS ["Memorandum"]. The Defendant's MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS ["Memorandum"] is 32 pages long, and 10,400 words.

2. Of the several of Defendant's Motions on the docket, only *one* was sent to the Plaintiff [Figure 1]. Furthermore, its title is different from all three listed on the on-line Pacer [Figure 2] site. In addition, two copies of the same different-title single-version Motion were sent to the Plaintiff [Figure 1]. What was received by the Plaintiff can be seen in Figure 1, and that shows two identical copies of a different titled Motion. Why were the actual Motions not sent to the Plaintiff?

Pacer lists the Defendant's Motions as "MOTION to Dismiss for Lack of Jurisdiction with Roseboro", and "MOTION to Dismiss for Failure to State a Claim with Roseboro" [with "Memorandum in Support (to Dismiss for Lack of Jurisdiction with Roseboro)"], and "MOTION to Dismiss for Failure to State a Claim with Roseboro" [Figure 2]. That is at least two (2) Motions, possibly three of Defendant's Motions which were not sent to or included in the package sent to the Plaintiff. Why were a different, single Motion sent in duplicate to the Plaintiff?

3. The Defendant's Memorandum of Law does not fully and clearly use averments, as required for each alleged "fact". Astonishingly, appended to the Defendant's Memorandum of Law, the Exhibits sent to the Plaintiff were printed backwards. Were they printed backwards in the court copies, as well?

Some apparently may have been printed over already existing text.

4. Plaintiff reasonably requests that complete, correct, accurate, and readable, records be sent to the litigant. It is customary practice to re-send accurate and correct copies but this Defendant and counsel chose to break with this custom. This egregious behavior by the Defendant's counsel is inexcusable – and given the obstruction of justice and factually false statements already saturating their decision, it has the appearance of impropriety.

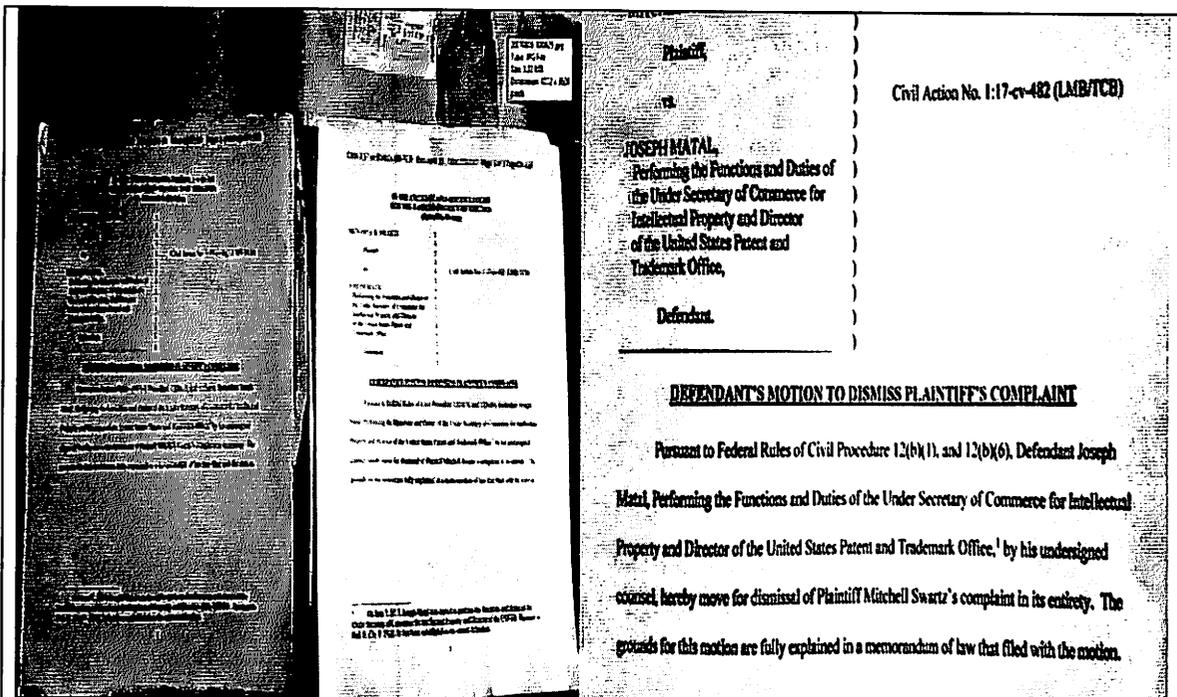


Figure 1 - Of the three Motions on the docket shown on the on-line Pacer, only one was sent to the Plaintiff, and its title is different from all three listed on Pacer [Figure 2]. Two copies of this version were sent (left side of Figure 1). The Title of the duplicate Motions (right side of Figure 1) is different from what is listed in Pacer (Figure 2)

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18 **Memorandum in Support** **Mon 12:04 PM**  
 Memorandum in Support re16 MOTION to Dismiss for Lack of Jurisdiction with Roseboro., 15 MOTION to Dismiss for Failure to State a Claim with Roseboro., filed by Michelle Lee, United States Patent and Trademark Office.

Att: 1 Exhibit Ex. 1 (691 Board Decision),  
 Att: 2 Exhibit Ex. 2 (258 Board Decision),  
 Att: 3 Exhibit Ex. 3 (058 Board Decision),  
 Att: 4 Exhibit Ex. 4 (765 Board Decision),  
 Att: 5 Exhibit Ex. 5 (643 Board Decision),  
 Att: 6 Exhibit Ex. 6 (DIA Report),  
 Att: 7 Exhibit Ex. 7 (DTRA Report),  
 Att: 8 Exhibit Ex. 8 (457 Specification),  
 Att: 9 Exhibit Ex. 9 (970 Specification),  
 Att: 10 Exhibit Ex. 10 (058 Specification),  
 Att: 11 Exhibit Ex. 11 (765 Specification),  
 Att: 12 Exhibit Ex. 12 (Damein Decl.),  
 Att: 13 Exhibit Ex. 13 (Bartlett Decl.),  
 Att: 14 Exhibit Ex. 14 (Unpublished Cases))(Kimball, Kimere)

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17 **Roseboro Notice** **Mon 11:50 AM**  
 Roseboro Notice as to Motion to Dismiss (Dkt Nos. 15, 16) by Michelle Lee, United States Patent and Trademark Office (Kimball, Kimere)

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16 **Dismiss Lack of Jurisdiction** **Mon 11:48 AM**  
 MOTION to Dismiss for Lack of Jurisdiction with Roseboro., by Michelle Lee, United States Patent and Trademark Office. (Kimball, Kimere)

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15 **Dismiss for Failure to State a Claim** **Mon 11:47 AM**  
 MOTION to Dismiss for Failure to State a Claim with Roseboro., by Michelle Lee, United States Patent and Trademark Office. (Kimball, Kimere)

Figure 2 - The docket shown on the on-line Pacer reveals that three Motions are listed on Pacer, with different titles of the single version sent to the Plaintiff [with an identical duplicate version (cf. Figure 1)]. .

5. The Office's attorneys' Memorandum of Law contains many factually false statements, inaccuracies and innuendos, which are disproved by the record. It also contains perjury, which is specified below.

6. The Defendant's Memorandum of Law falsely mischaracterizes the actual patent applications. It misdescribes the Plaintiff's inventions and then attempts to relegate the Plaintiff's inventions to twisted renditions of treatments for baldness and cancer. But the comparison is wrong and ironic.

7. The Defendant's Memorandum used factually false statements as weapons, and have thrown everything at the pro se Plaintiff except the proverbial 'kitchen sink'. The Defendant's Memorandum of Law attempts to obstruct by diverting the court from the actual nature of the complaint, and from what the Defendant has actually perpetrated such as removal of rebutting Evidence.

8. The Office's attorneys cite Roseboro which requires the Plaintiff to respond. Plaintiff does so below, and hereby Opposes their wrongful Motion to Dismiss. Under Roseboro, the Defendants require a sworn Declaration for each proof that they have made a false statement before the court. Therefore, the Office's latest false statements are herein rebutted by sworn Declarations.

9. Plaintiff hereby files this legal brief in opposition to the one(s) filed by the Defendant. Hopefully, the Defendant will on their own, and send a copy of the three Motions with good reasons why this happened OR the honorable Court should Order that reasonable request. Meanwhile, their factually false statements as discussed in detail below.

**UNDISPUTED FACT: NEW EVIDENCE AND SEQUESTERED/IGNORED  
PREVIOUS EVIDENCE DEMONSTRATES DEFENDANT WAS WRONG**

10. Attention is directed to the fact that the Defendant's Memorandum is not sworn under pains and penalties of perjury, as the Defendants demand of the Plaintiff. There should be reciprocity for the Defendants and their counsel. Therefore, the Plaintiff requests reciprocity that the Defendants and their counsel now swear to each fact they dispute (attached), and a sworn copy affirming their statements herein proven inaccurate.

11. What have they disputed under Oath that was in the Complaint? Nothing. In accordance with *Roseboro v. Garrison*, 528 F .2d 309 (4th Cir. 1975), Plaintiff respectfully requests that Defendant identify all facts stated by Plaintiff in this Memorandum in Opposition to Defendant's Motion to Dismiss, with which Defendant disagrees sworn under the pains and penalties of perjury. By reciprocity, Plaintiff has given a Rosenboro Notice to the Defendant, and demands equivalent answers to be provided within twenty-one (21) days of the date the Plaintiff's motion is filed. The Plaintiffs motion is being filed on August 7, 2017.

12. Attention is directed to the fact that there is still no Answer to the Plaintiff's Complaint. The Defendant has failed to Answer the Complaint by using systematic diversions and a cornucopia of false statements to attempt to evade justice to trick the court and usurp Constitutionally-protected rights of a US citizen - the Plaintiff.

13. In the discussion below, reference is made to the Declarations of several individuals of significant probative value to the court, including the Declaration of Dr. Brian Ahern. Dr. Ahern, who is an inventor and who served at USAF Rome Laboratory, is a recognized expert in material science.

In the discussion below, reference is made to the Declaration of Lt. Colonel Robert E. Smith Jr. USAF (retired). Mr. Smith was directly involved with defense of the United States of America, and is an expert on the impact of technology on U.S. security.

In the discussion below, reference is made to the Declaration of Dr. Frank E. Gordon. Dr. Gordon ran the Research and Applied Sciences department at the SPAWAR Systems Center [U.S. Navy Research and Development Laboratory] in San Diego, and is an expert on the impact of technology on U.S. security.

In the discussion below, reference is made to the Declaration of Dr. Jean-Paul Biberian, an expert on scientific publications, and materials, and energy production and conversion. Some of the Declarants have since passed away (Dr. Mallove, Dr. Fox, Dr. Talbot Chubb) and they deserve a voice in this official venue to this very important discussion of Evidence, proving the Defendant is wrong. The probative value is listed in each document.

In the discussion below, reference is made to the Declaration of Dr. Mitchell Swartz, Plaintiff of this case, who asserts that the Defendant and counsel are accurate and failed to honor their duty.

Some of the Declarants have since passed away (Dr. Mallove, Dr. Fox, Dr. Talbot Chubb) and they deserve a voice in this official venue to this very important discussion of Evidence, proving the Defendant is wrong. The probative value is listed in each document.

14. In the discussion below, reference is made to the attached Exhibits. They are in response to the Defendant's Motion and Memorandum to Dismiss. The Exhibits

appended are included to rebut the false statements by the Defendant and counsel. The first 17 Exhibits are some of the submitted Evidence which was not logged and responded to appropriately by the USPTO. These are peer-reviewed.

The next 9 Exhibits demonstrate NEW Evidence which corroborate operability, reproducibility, and utility. They also demonstrate that the Office's opinion was unfounded and absolutely wrong.

The next group of Exhibits are legal briefs, from the cases misdescribed, now and originally, by Defendant and counsel. Application number '258 was originally called '937 involving a vibrator to measure loading [the amount of hydrogen in a metal electrode]. The Office misdescribed it and wrote fraudulent case law about it ["In re Swartz].

Exhibit 53 through 56 demonstrate corrupt actions by the Defendant in this matter for which the Defendants were notified about, but their heavy handed decision has been to continue, and today they are as malicious about this technology as when the Exxon Valdez oil was freshly floating on Alaska's waters in 1989.

Exhibits 57 and 58 are included because although the USPTO says something cannot be done, it often can. Exhibit 57 discusses the first time a medical patient, as described therein, ever left the hospital to survive for a short time with her affliction. Everyone said it could not happen. It did - and the Plaintiff wrote it up.

Exhibit 58 was the first time a mammal with carcinoma was imaged by positron emission tomography. Everyone said it could not happen because it would take capturing 511 keV photons and measuring time of flight. It did happen - and the Plaintiff wrote it up. It is the same for this technology. The USPTO says it does not exist, and yet it does.

15. Application '058 was originally '457 and is a calorimeter used to measure generated heat. The Defendant misdescribed it, too, and also wrote fraudulent case law about it. In both these cases, the Response Briefs, Reply Briefs, and Petitions for Certiorari are appended and included as if attached herein. These additional legal documents demonstrate decades-long factually false statements by the Defendant. Relief by correcting this wrongful and costly situation is due the Plaintiff. Truth in Federal records is a Relief due to All.

In the discussion below, reference is made to the attached Exhibits which are the Affidavits and Amicus Curiae briefs from '937 and '258, and other cases. These Declarations are appended and included as if attached herein.

### **FACTUAL BACKGROUND: GRAVAMEN OF THE CASE**

16. The present, above-entitled, action is about the patentability of a series of inventions whose operability and utility is supported by solid new Evidence overcoming the Office's intense, proven wrongful, unfounded opinions and factually false statements, and other wrongful actions and inactions.

17. The Plaintiff submitted more than ten patent applications to the Defendants involving clean energy which has no carbon emissions and no radioactivity. It is safe. The series of inventions are used to make, monitor, and measure, the generated heat very quietly and efficiently - and can be used to generate electricity. Heat means ordinary thermal energy such as used to heat homes, used to heat water, and used to purify water, such as needed in industrial laboratories and hospitals, worldwide.

18. Some of the Plaintiff's patent applications were made "SPECIAL" by the Board of Patent Appeal because of their importance.

**STATUTORY AND REGULATORY BACKGROUND**  
**UNDISPUTED FACT: Shift of Burden of Proof Required**  
**Defendant to Respond to Evidence**

19. On page four, the Defendant's Memorandum of Law purports that the Examiner reviews claims and makes a determination. In fact, the correct analysis is that the Office has a right to make objections, but then the burden falls upon the applicant (here Plaintiff) who can then submit evidence to overcome those objections. That happened here, but each time in these multiple cases, not once was the submitted Evidence [which was presented to the office to overcome the objections] either logged or discussed. That is obviously improper.

20. On page four, the Defendant's Memorandum of Law purports that the Examiner may reject an application from an applicant, and if the Applicant desires further review he/she may appeal that decision to the patent trial and appeal board ["Board"]. However, the truth is that the applicant is allowed to respond to the Examiner, and the Defendant ["Office" or "PTO" or "USPTO"] must properly log-in the submitted Evidence, and then respond to the timely-submitted evidence. That did not happen in this case. Instead, over and over, there was inaction, which was improper and which was systematically repeated, each time demonstrating an increasing appearance of impropriety.

21. It is a FACT that the Plaintiff had a right to submit Evidence to rebut the Defendant because patentability is determined on the totality of the record, by a preponderance of the Evidence, with due consideration to persuasiveness of argument. After the Defendants first responded against the Plaintiff, there was [In re Brana, 51 F.3d at 1566, 34 USPQ2d at 1441] a

**"burden shift ... to provide rebuttal evidence sufficient to convince such a person of the invention's asserted utility".**

Therefore, over and over, the Plaintiff undertook the full burden of coming forward many times with his rebuttal Evidence [hereinafter "Evidence"] before the requisite time as required [In re Oetiker, 977 F.2d at 1445, 24 USPQ2d at 1444].

### **UNDISPUTED FACT: Defendant Sequestered and Ignored Evidence**

22. The Defendant acted improperly – which is part of the basis of the above-entitled action. It will be shown that in each case the original specification has been ignored, that submitted evidence (before Final) was ignored, that declarations were ignored, and that notification of these issues were ignored.

23. First, the Defendants refused to fully docket and absolutely refused to cite documents that were repeatedly submitted **before FINAL** That is especially relevant because **THIS Evidence substantively and completely disputes all of the rejections by the Defendants.**

24. DTRA disagrees with the USPTO. DARPA disagrees with the USPTO. The US Navy disagrees with the USPTO. NASA disagrees with the USPTO. Thousands of scientists disagree with the USPTO. These references have been published, peer-reviewed, and discussed on the Internet worldwide, and in print, and cited in the original specification.

Yet the opinion of the Office continues unsupported for almost three decades. The Defendants never substantively discussed them in the Memorandum of Law. Not once substantively.

25. Second, instead, there were attempts at exculpatory behavior. As an example, in at least one application, first, the received Evidence and responses were allegedly “not received”. Then, they were allegedly “not legible”. Then, they were allegedly “lost”. Then, the wrong references were listed. The USPTO failed to respond fully and completely and truthfully to submitted Evidence and Affidavits which show its opinion is dead-bolt wrong.

None of this wrongful behavior under color of Law is addressed in the Defendants' Memorandum. Instead, once again the Office attempts to divert and distract from the directives of the US Congress and the President of the United States. By contrast, the *pro se* Plaintiff notes that the U.S. Supreme Court has ruled that any *pro se* litigant is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)].

### **UNDISPUTED FACT: The Plaintiff Complied with the USPTO**

26. The *pro se* Applicant has been compliant, timely, and complete. The Applicant has responded time and time again with detailed, continuous, complete, scientific timely-received Declarations and Exhibits consistent with 1.131 (a)(1) which requires that

**"When ... a patent ... is rejected .... on reference ... to a printed publication, the inventor of the subject matter of the rejected claim ... may submit an appropriate oath or declaration to overcome the patent or publication."**

The Applicant did respond in full supplying sterling and precise Declarations and other Evidence which went into considerable detail. Applicant undertook the full burden of coming forward with his evidence, again before the Final, as required [In re Oetiker, 977 F.2d at 1445, 24 USPQ2d at 1444].

**UNDISPUTED FACT: The Decision from the US Board of Patent Appeals Ordered Petitions to be File**

27 . The Board previously stated to the Plaintiff that corruption reported to it would have to be handled by Peititon to the Commissioner. In the UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES *Ex parte* MITCHELL R. SWARTZ in Appeal 2009-001853, Application 10/646,143, in the DECISION ON REQUEST FOR REHEARING made Feb. 22, 2011, the Board of Patent Appeals said,

**“To the extent that Appellant seeks our review of any denial of entry of documents into the record prior to the appeal, such a matter of discretion is reviewable by petition not by an appeal to this Board (see Manual of Patent Examining Procedure (MPEP) § 1002 and 1201), and therefore is not within our jurisdiction. See *In re Mindick*, 371 F.2d 892, 894 (CCPA 1967). Similarly, we review only the substance of the Examiner’s decision regarding the application currently on appeal, not alleged procedural misconduct by the Examiner in this or any other case”**

**UNDISPUTED FACT: Plaintiff’s Compliance with The Board of Patent Appeals and Interferences**

28. The Plaintiff thereafter did Obey the Decision of Appeal 2009-001853, Application 10/646,143, in the DECISION ON REQUEST FOR REHEARING made Feb. 22, 2011. The Plaintiff repeatedly DID file the appropriate Petitions to the Commissioner [cf. Figure 7 below].

Plaintiff followed the repeated explicit orders of the Board of Patent Appeals and sent seventeen Petitions to the Commissioner of Patents (Defendant) in the period of 2015 to 2016.

Plaintiff presented more than a dozen administrative claims to the USPTO prior to

commencing this suit, and did so, including by Petition pursuant to the Order of the Board. Plaintiff did exactly what that USPTO required prior to commencing this suit.

### **UNDISPUTED FACT: Plaintiff Did Exhaust All Remedies**

29. The Plaintiff absolutely did exhaust all his remedies, including multiple Petitions to the Commissioner, supported as required by multiple declarations, and also supported by timely-submitted Evidence from the DIA, DTRA, DARPA, and NASA. In the previous Declaration of Dr. Swartz, he stated:

**“ I repeatedly did undertake the full burden of coming forward with evidence as required [In re Oetiker, 977 F.2d at 1445, 24 USPQ2d at 1444].”**

It was all ignored by the Defendants. It remains unaddressed. Because it is important (confer *Iqball*), it will be repeated and expanded here.

### **UNDISPUTED FACT: THE OFFICE FAILED ITS DUTY**

30. The Defendant's rejections have been rendered without substantive relevant foundation, and have been made only by ignoring submitted Evidence. This has been an extreme abuse of the Plaintiff over decades. The rejection for putative "lack of operability" or "enablement" under 35 U.S.C. §112, ¶1 and "lack of utility" under 35 U.S.C. §101 has only been made by ignoring the original specification and claims, by ignoring the timely-submitted un rebutted Declarations, by ignoring scores of relevant, unrefutable Exhibits and references, and by ignoring the Office's own rules, and thus by the Office having created an arbitrary two-tier "standard of review" for patentability, where they pick and choose which words to discuss – out of context, ignoring the content

and ignoring the submitted Evidence showing their opinion is wrong.. In the Declaration of Dr. Swartz, he states:

**“The USPTO deprived me of rights explicitly given under the US Constitution, including by failing to properly log or to properly address submitted materials, including Evidence from the Defense Intelligence Agency (DIA), Defense Threat Reduction Agency (DTRA), NASA, and the American Nuclear Society.”**

31. The USPTO profoundly discriminates against this field, in a reaction historically similar to treating baldness or treating cancer – both of which are unarguably treatable. These absurd references are in the Defendant’s Memorandum of Law, and considered by the Office to STILL be inherently unbelievable undertakings. But neither is. Both are treatable, successful in many, and THAT makes their argument nothing but diversion and evasion. The invention is what is written in the original specification and claimed and not what the Defendant imagines in its proven mischaracterizations.

### **FACTUAL BACKGROUND : EVIDENCE**

32. There are three (3) types of Evidence discussed here [Confer Figure 1]. First, there is the previously timely-submitted, but ignored, spoliated, sequestered, Evidence.

Second, there is further new Evidence which demonstrates the Office’s opinion is wrong. This includes the following: the growing peer reviewed scientific literature, the sworn testimony of those skilled in the art, Plaintiff’s open demonstrations [some shown at MIT over months], the fact that other applicants were issued patents that overlap the Plaintiff’s teachings and claims, and the indelible fact finally that other patents, issued in the very same field which the Office purports does not exist, expressly cite the Plaintiff’s denied

applications. These facts herald blatant discrimination and double standards in reviews.

Third, there is also more evidentiary knowledge of the coverup and removal of evidence submitted, of the mischaracterizations used freely by Defendant and counsel, and the misprision of felony that resulted upon Notification.

**UNDISPUTED FACT: DEFENDANT SYSTEMATICALLY FAILED TO ADDRESS PREVIOUS TIMELY-SUBMITTED EVIDENCE (Type 1)**

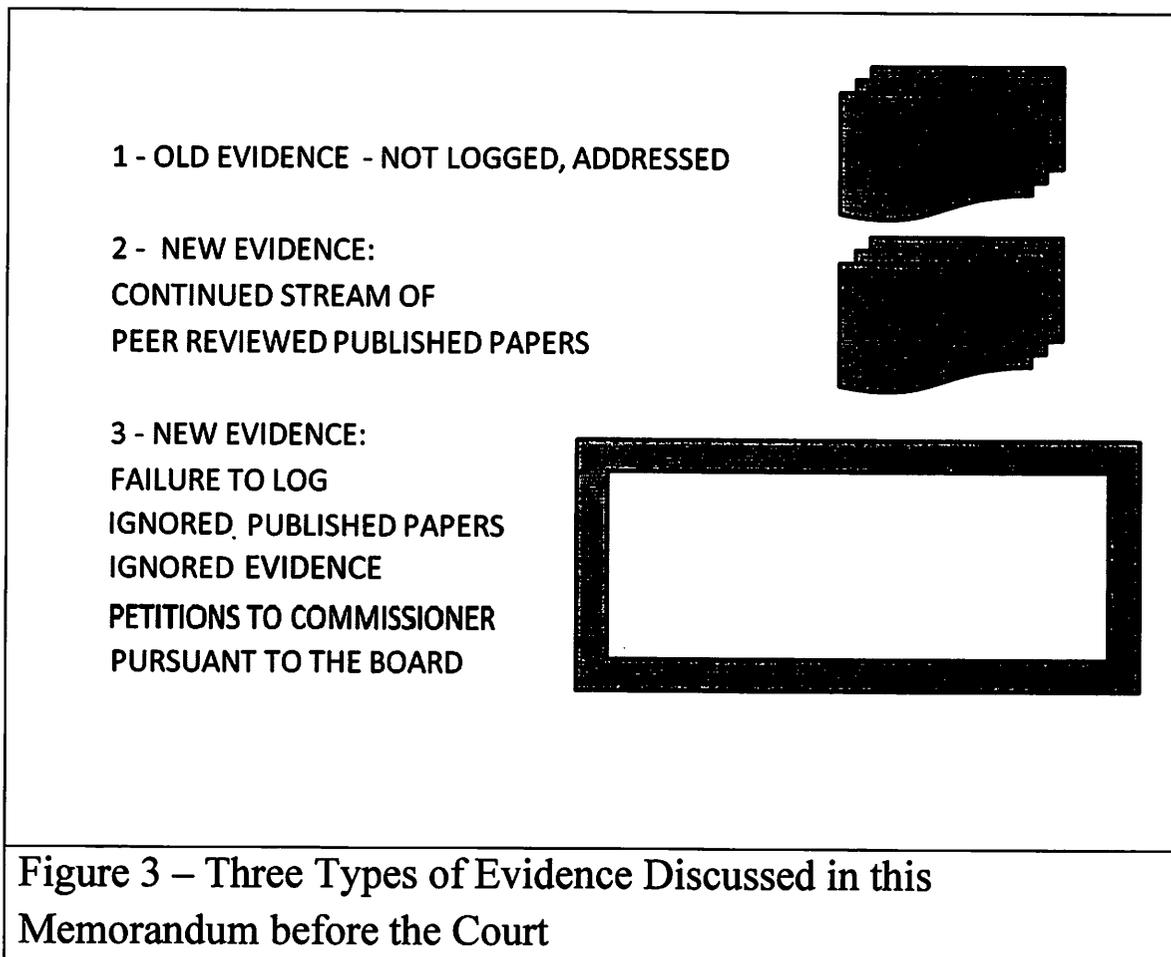
33. At least five (5) types of Evidence have been systematically ignored by the Defendants. Plaintiff's multiply-submitted Evidence included unclassified relevant reports from DIA, DTRA, NASA, and the US Navy.

Examples include the first 17 Exhibits which are some of the submitted Evidence which was not logged and responded to appropriately by the USPTO. These are peer-reviewed.

Also included were sworn Declarations of individuals with high probative value, and several scientific technical papers and peer-reviewed publications written by the Plaintiff published in the American Nuclear Society's *Fusion Technology* and *Current Science*.

These types of Evidence include

- 1) Information from DIA, DTRA, DARPA, the American Nuclear Society, and the U.S. Navy,
- 2) Sworn Declarations,
- 3) Original Specifications with the enclosed graphs,
- 4) Plaintiff's open demonstrations at MIT in 2003 and 2012, and
- 5) Peer-reviewed scientific literature describing Plaintiff's inventions.



**UNDISPUTED FACT: DIA REPORT PROVES  
ENABLEMENT**

34. The DIA (Defense Intelligence Agency) Report is a Defense Analysis Report [DIA-08-09U-003, November, 13 2009] which notes "Technology Forecast: Worldwide Research on Low-Energy Nuclear Reactions Increasing and Gaining Acceptance".] It cites the Appellant's technology which is explicitly mentioned.

## **UNDISPUTED FACT: DTRA REPORT PROVES ENABLEMENT**

35. The DTRA Report is from the Defense Threat Reduction Agency [8725 John J. Kingman Road, MSC 6201 Fort Belvoir, VA 22060-6201] and is the High Energy Science and Technology Assessment [FINAL REPORT, June 29, 2007].

Page 28 of the DTRA Report states in the (now Declassified) conclusion of the DTRA Group in response to Appellant's technology.

**"There is good evidence of excess heat and transmutation "**

This was after Plaintiff presented his technology, and began the USA taking proposal and contracts in this field.

Evidence should never be overlooked. It should not be dismissed out of hand, or hidden by false statements, or otherwise sequestered or "lost", ending only with other exculpatory behavior as the Defendant has exhibited.

## **UNDISPUTED FACT: NEW EVIDENCE (Type 2) SUPPLEMENTS THIS ACTION CONFIRMING ENABLEMENT**

36. On page five, the memorandum falsely purports that there is no new evidence. However, there is now much more new Evidence overcoming the Office's unsupported, invalid opinion [consistent with 35 USC 145]. This is also presented in the Complaint and below. Today, in addition, there also exist newer published peer-reviewed scientific literature, and the newer submitted declarations, each of which is more than sufficient to show that Defendant has demonstrated inactions and wrongful actions which are systematically unlawful.

Exhibits 18 through 26 demonstrate NEW Evidence which corroborate operability, reproducibility, and utility. They also demonstrate that the Office's opinion was unfounded and absolutely wrong.

**UNDISPUTED FACT: NEW EVIDENCE (Type 3) of the  
PREVIOUS SYSTEMATIC REMOVAL OF AND FAILURE  
TO ADDRESS PREVIOUS EVIDENCE, EACH  
DEMONSTRATES DEFENDANT WAS WRONG**

37. In the above entitled action, said Evidence includes three sets of evidence before the court; the first part includes the past evidence which was neither logged-in nor commented upon, and the second part includes additional evidence, as well. Most relevant to 2017-482, the Supreme Court clarified the scope of 35 U.S.C. §145 proceedings in its April 18, 2012, unanimous decision in *Kappos v. Hyatt*, affirming the Federal Circuit's *en banc* decision which held that Evidence not submitted to the Patent and Trademark Office (PTO) during prosecution is admissible in a civil action brought against the Director of the PTO under 35 U.S.C. §145.

38. In the above entitled action there is sterling evidence heralding and revealing a coverup and obstruction of justice by some at the PTO, and also additional Evidence [\*\*\*] which supplements the previous timely-submitted evidence which was neither logged-in nor commented upon – but instead was conveniently and repeatedly “lost” and mischaracterized. This cannot be emphasized enough. In this matter, therefore, the administrative record is compromised by the sequestration and spoliation of Plaintiff's highly relevant timely-submitted rebutting Evidence by some individuals at the USPTO. The next group of Exhibits 27 through 62 are legal briefs, from the cases cited by, but misdescribed, now and originally, by Defendant and counsel. Application number ‘258

was originally called '937 involving a vibrator to measure loading [the amount of hydrogen in a metal electrode]. The Office misdescribed it and wrote fraudulent case law about it ["In re Swartz].

39. Application '058 was originally '457 and is a calorimeter to measure generated heat. The Defendant misdescribed it, too, and also wrote fraudulent case law about it. In both these cases, the Response Briefs, Reply Briefs, and Petitions for Certiorari are appended and included as if attached herein. These additional legal documents demonstrate decades-long factually false statements by the Defendant. Relief is due the Plaintiff.

40. In the discussion below, reference is made to the attached Exhibits which are the Affidavits and Amicus Curiae briefs from '937 and '258, and other cases. These Declarations are appended and included as if attached herein.

41. Some of the Declarants have since passed away (Dr. Mallove, Dr. Fox, Dr. Talbot Chubb) and they deserve a voice in this official venue to this very important discussion of Evidence, proving the Defendant is wrong.

## **TABLE 1 - OLD EVIDENCE REMOVED**

### **TABLE 1 – SOME OF THE OLD EVIDENCE REMOVED/IGNORED/NOT LOGGED**

1. Swartz M. R., Hagelstein P.I., Demonstration of Energy Gain from a Preloaded ZrO<sub>2</sub>-Pd Nanostructured CF/LANR Quantum Electronic Device at MIT, J. Condensed Matter Nucl. Sci. 13, (2014), p 516 [www.iscmns.org/CMNS/JCMNS-Vol13.pdf](http://www.iscmns.org/CMNS/JCMNS-Vol13.pdf)
2. Swartz M. R., Verner G., et al., Energy Gain From Preloaded ZrO<sub>2</sub>-PdNi-D Nanostructured CF/LANR Quantum Electronic Components, J. Condensed Matter Nucl. Sci. 13, (2014), p 528 [www.iscmns.org/CMNS/JCMNS-Vol13.pdf](http://www.iscmns.org/CMNS/JCMNS-Vol13.pdf)
3. Swartz M., Verner G., et al., Non-Thermal Near-IR Emission from High Impedance and Codeposition LANR Devices, Proc. ICCF14 1, (2008), p 343; Ed D.J. Nagel and M.E.Melich, ISBN: 978-0-578-06694-3, 343, (2010);

- [www.iscmns.org/iccf14/ProcICCF14a.pdf](http://www.iscmns.org/iccf14/ProcICCF14a.pdf)
4. Swartz M., Verner G., The Phusor®-type LANR Cathode is a Metamaterial Creating Deuteron Flux for Excess Power Gain, Proc. ICCF14 2, (2008), p 458; Ed D.J. Nagel and M.E.Melich, ISBN: 978-0-578-06694-3, 458, (2010); [www.iscmns.org/iccf14/ProcICCF14b.pdf](http://www.iscmns.org/iccf14/ProcICCF14b.pdf)
  5. Swartz M., Excess Power Gain using High Impedance and Codepositional LANR Devices Monitored by Calorimetry, Heat Flow, and Paired Stirling Engines, Proc. ICCF14 1, (2008), p 123; Ed D.J. Nagel and M.E.Melich, ISBN: 978-0-578-06694-3, 123, (2010); [www.iscmns.org/iccf14/ProcICCF14a.pdf](http://www.iscmns.org/iccf14/ProcICCF14a.pdf)
  6. Swartz M., Optimal Operating Point Manifolds in Active, Loaded Palladium Linked to Three Distinct Physical Regions, Proc. ICCF14 2, (2008), p 639; Ed D.J. Nagel and M.E.Melich, ISBN: 978-0-578-06694-3, 639, (2010); [www.iscmns.org/iccf14/ProcICCF14b.pdf](http://www.iscmns.org/iccf14/ProcICCF14b.pdf)
  7. Swartz, M., Bass, R.W., "Empirical System Identification (ESID) and Optimal Control of Lattice-Assisted Nuclear Reactors," Proceedings of the 14th International Conference on Condensed Matter Nuclear Science and the 14th International Conference on Cold Fusion (ICCF-14), Ed D.J. Nagel and M.E.Melich, ISBN: 978-0-578-06694-3, 497, (2010).
  8. Swartz, M., "Electrical Breakeven from LANR Phusor Device Systems: Relative Limitations of Thermal Loss in Feedback Loop", Proceedings of the 14th International Conference on Condensed Matter Nuclear Science and the 14th International Conference on Cold Fusion (ICCF-14), Ed D.J. Nagel and M.E.Melich, ISBN: 978-0-578-06694-3, 689, (2010).
  9. Swartz, M., G. Verner, "Excess Heat from Low Electrical Conductivity Heavy Water Spiral-Wound Pd/D2O/Pt and Pd/D2O-PdCl2/Pt Devices", Condensed Matter Nuclear Science, Proceedings of ICCF-10, eds. Peter L. Hagelstein, Scott, R. Chubb, World Scientific Publishing, NJ, ISBN 981-256-564-6, 29-44; 45-54 (2006).
  10. Swartz, M., "Can a Pd/D2O/Pt Device be Made Portable to Demonstrate the Optimal Operating Point?", Condensed Matter Nuclear Science, Proceedings of ICCF-10, eds. Peter L. Hagelstein, Scott, R. Chubb, World Scientific Publishing, NJ, ISBN 981-256-564-6, 29-44; 45-54 (2006).
  11. Swartz, M., "Photoinduced Excess Heat from Laser-Irradiated Electrically-Polarized Palladium Cathodes in D2O", Condensed Matter Nuclear Science, Proc. ICCF-10, eds. Peter L. Hagelstein, Scott Chubb, NJ, ISBN 981-256-564-6, 213-226 (2006).
  12. Swartz, M., "The Impact of Heavy Water (D2O) on Nickel-Light Water Cold Fusion Systems", Proceedings of the 9th International Conference on Cold Fusion (Condensed Matter Nuclear Science), Beijing, China, Xing Z. Li, pages 335-342. May (2002).

13. Swartz, M, "Improved Electrolytic Reactor Performance Using p-Notch System Operation and Gold Anodes, Transactions of the American Nuclear Association, Nashville, Tenn. Meeting, (ISSN:0003-018X publisher LaGrange, Ill) 78, 84-85 (1998).
14. Swartz. M., "Consistency of the Biphasic Nature of Excess Enthalpy in Solid State Anomalous Phenomena with the Quasi-1-Dimensional Model of Isotope Loading into a Material", Fusion Technology, 31, 63-74 (1997).
15. Swartz. M., "Codeposition Of Palladium And Deuterium", Fusion Technology, 32, 126-130 (1997).
16. Swartz, M., "Phusons in Nuclear Reactions in Solids", Fusion Technology, 31, 228-236 (March 1997).
17. Swartz M., Isotopic Fuel Loading Coupled to Reactions at an Electrode, Proc. ICCF4 2, (1993), p 429; Fusion Technology, 26, 4T, 74-77 (1994); [www.lenr-canr.org/acrobat/EPRProceedinga.pdf](http://www.lenr-canr.org/acrobat/EPRProceedinga.pdf)
18. Swartz, M., "Quasi-One-Dimensional Model of Electrochemical Loading of Isotopic Fuel into a Metal", Fusion Technology, 22, 2, 296-300 (1992).

## TABLE 2 - NEW EVIDENCE

1. Swartz, M. R, "Oscillating Excess Power Gain and Coerced Magnetic Domains in M-NANOR-type CF/LANR Components", J. Condensed Matter Nucl. Sci. 22, 35-46 (2017)
2. Swartz, M.R. "Optical Detection of Phonon Gain Distinguishes an Active Cold Fusion/LANR Component", JCMNS, 20, 29-53 (2016); [www.iscmns.org/CMNS/JCMNS-Vol20.pdf](http://www.iscmns.org/CMNS/JCMNS-Vol20.pdf)
3. Swartz, M.R. P. Hagelstein, G. Verner, Impact of Electrical Avalanche Through a ZrO<sub>2</sub>-NiD Nanostructured CF/LANR Component on its Incremental Excess Power Gain", ICCF-19, JCMNS, 19, (2016)
4. Swartz, M. G. Verner, J. Tolleson, P. Hagelstein, Dry, preloaded NANOR®-type CF/LANR components, Current Science, 108, 4, 595 (2015); <http://www.currentscience.ac.in/Volumes/108/04/0595.pdf>
5. Swartz M., Verner, G., et al., Imaging of an Active NANOR®-type LANR Component using CR-39, J. Condensed Matter Nucl. Sci. 15, (2015), p 81; [www.iscmns.org/CMNS/JCMNS-Vol15.pdf](http://www.iscmns.org/CMNS/JCMNS-Vol15.pdf)
6. Swartz M., Incremental High Energy Emission from a ZrO<sub>2</sub>-PdD Nanostructured Quantum Electronic Component CF/LANR, J. Condensed Matter Nucl. Sci. 15, (2015), p 92; [www.iscmns.org/CMNS/JCMNS-Vol15.pdf](http://www.iscmns.org/CMNS/JCMNS-Vol15.pdf)
7. Swartz M., Verner, G., et al., Amplification and Restoration of Energy Gain Using Fractionated Magnetic Fields on ZrO<sub>2</sub>-PdD Nanostructured Components, J. Condensed Matter Nucl. Sci. 15, (2015), p 66;

[www.iscmns.org/CMNS/JCMNS-Vol15.pdf](http://www.iscmns.org/CMNS/JCMNS-Vol15.pdf)

### **TABLE 3 - EVIDENCE OF EXISTENCE OF FIELD**

#### **OLDER EVIDENCE NOT LOGGED OR SUBSTANTIVELY ADDRESSED**

1. Swartz, M., with Marwan, J, M. C. H. McKubre, F. L. Tanzella, P. L. Hagelstein, M. H. Miles, Edmund Storms, Y. Iwamura, P. A. Mosier-Boss and L. P. G. Forsley, "A new look at low-energy nuclear reaction (LENR) research: a response to Shanahan", J. Environ. Monit., (2010).
2. Swartz, M., "Survey of the Observed Excess Energy and Emissions In Lattice Assisted Nuclear Reactions", Journal of Scientific Exploration, 23, 4, 419-436 (2009).
3. Swartz M., A Method to Improve Algorithms Used to Detect Steady State Excess Enthalpy, Proc. ICCF4 2, (1993), p 257; Transactions of Fusion Technology, 26, 156-159 (1994); [www.lenr-canr.org/acrobat/EPRiproceedinga.pdf](http://www.lenr-canr.org/acrobat/EPRiproceedinga.pdf)
4. Swartz M., Some Lessons from Optical Examination of the PFC Phase-II Calorimetric Curves, Proc. ICCF4 2, (1993), p 283 [www.lenr-canr.org/acrobat/EPRiproceedinga.pdf](http://www.lenr-canr.org/acrobat/EPRiproceedinga.pdf)
- 5.

#### **NEW EVIDENCE OF FIELD'S DEVELOPMENT**

6. Verner, G., M. Swartz, P. Hagelstein, Development of a Science and Engineering CF Course, J. Condensed Matter Nucl. Sci. 22, 47-52 (2017)
7. Mosier-Boss, P.A, L. P. Forsley, F. E. Gordon, D. Letts, D. Cravens, M. H. Miles, M. Swartz, J. Dash, F. Tanzella, P. Hagelstein, M. McKubre, J. Bao, Condensed matter nuclear reaction products observed in Pd/D codeposition experiments, Current Science, 108, 4, 656 (2015); <http://www.currentscience.ac.in/Volumes/108/04/0656.pdf>
8. Verner, G., M. Swartz, P. Hagelstein, Summary report: 'Introduction to Cold Fusion'—IAP course at the Massachusetts Institute of Technology, Current Science, 108, 4, 653 (2015); <http://www.currentscience.ac.in/Volumes/108/04/0653.pdf>
9. Cravens, D., M. Swartz, B. Ahern, Condensed matter nuclear reactions with metal particles in gases, Current Science, 108, 4, 582 (2015); <http://www.currentscience.ac.in/Volumes/108/04/0582.pdf>

## **35 U.S.C. § 145 CLAIM (Count 1)**

### **UNDISPUTED FACT: Plaintiff's 35 U.S.C. § 145 Claim (Count 1) Is Consistent with the Law**

42. Plaintiff has asked the court in the Eastern District of Virginia to examine the record in a *sui generis* statutory review regime that is distinct from review under other provisions of law because although the Federal Circuit's review in a §141 appeal is expressly limited to the record before the Board, however Section §145 includes no such express limitation. The Supreme Court clarified the scope of 35 U.S.C. §145 proceedings in its April 18, 2012, unanimous decision in *Kappos v. Hyatt*, affirming the Federal Circuit's en banc decision which held that Evidence not submitted to the Patent and Trademark Office (PTO) during prosecution is admissible in a civil action brought against the Director of the PTO under 35 U.S.C. §145 subject only to the limitations imposed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure.

In the above-entitled Complaint, the Plaintiff clearly described his claims for constitutional violations, including that the equal protection clause was clearly shown to be broken several ways. The office has not refuted even one fact in said above-entitled Complaint, which therefore must be taken as true.

### **UNDISPUTED FACT: Venue and Jurisdiction are Appropriate**

43. This court has subject jurisdiction for multiple reasons, including pursuant to 35 U.S.C. § 145 and Article III, and civil rights violations.

**UNDISPUTED FACT: This Court Has Full and Only  
Jurisdiction over Plaintiff's § 145 Claims**

44. Plaintiff's 35 U.S.C. § 145 Claims have distinct and complete legal authority. Several patent applications are discussed here. In each, there have been two rejections and the Plaintiff has filed Appeals and has paid the fees [\*\*\*]. In one other, there was the failure to pass to the Board the received Appeal Brief and other Evidence, after cashing the transfer fee ('381). The Patent Trial and Appeal Board [PTAB] "Decision(s) on Request for Rehearing" were rendered on February 24, 28, and March 14, 2017. The PTAB decisions were final decisions. In one instance Evidence and Appeal Briefs have been withheld from the Board even after a check was received and cashed. These are consistent with the meaning of 37 C.F.R. § 41.2.

**UNDISPUTED FACT: Previous Sequestered/Unaddressed  
Evidence Support U.S.C. § 145**

45. The Plaintiff is dissatisfied with the decisions of the Patent Trial and Appeal Board in said appeals under section 134(a) [35 U.S.C. 145 [Civil action to obtain patent]].

**UNDISPUTED FACT: New Evidence Supports U.S.C. § 145  
Claim with Plausibility (Count 1)**

46. The 35 U.S.C. § 145 Claims have scientific and engineering plausibility. The USPTO has absolutely NO foundation to support their mistaken opinions about the above-entitled technologies. The Office's continuous removal by the Office of submitted Exhibits (peer-reviewed publications and Declarations) by this Group Art has been illegal, immoral, unconstitutional, and outright wrong. It is also unfair and cruel. Instead of Defendant's counsel addressing the "lost", "displaced", and ignored Evidence in detail, counsel diverts attention from the real facts to impugn the Plaintiff and the submitted,

verified, technologies. Attention is directed to the fact that none of the opinion of the Office is supported by sworn Declaration, nor is the Complaint answered.

47. The office is rebutted by the following: the growing peer reviewed scientific literature, the sworn testimony of those skilled in the art, the open demonstrations given at MIT over months, the indelible fact that the same thing which the Plaintiff's patent described and claimed was actually given to others by USPTO at a later date, and finally that other patents, in the very same field, that cite the Plaintiff's applications, were issued to others by the USPTO, proving indelible bias and blatantly cruel discrimination.

48. In this case there has been no substantive response to, or dispute of the Evidence. The Office is obligated by law to assume that all Declarants assertions are true [Lewis v. Bours, 119 Wn.2d 667, 670, 1992]. This demonstrates a pattern of fraud and corrupt behavior. Failing to log them, and spoliating and/or ignoring said Evidence (and its cover-up), by the Office is even more reprehensible.

**UNDISPUTED FACT: Claims re: 35 U.S.C. § 145 are  
Supported by Scientific Articles (Count 1)**

49. The USPTO has ignored timely submitted peer-reviewed documents and Evidence corroborating the Plaintiff; said Evidence including peer-reviewed publications in *Current Science* and *Fusion Technology* (of the American Nuclear Society), peer-reviewed by the foremost authorities in the field. They are also accepted internationally. These conferences have been run by SRI, by EPRI, by the US Navy and other sterling groups that the Office "shugs off" and ignores. The PTO has no basis for impugning them, just because it cannot rebut their additional Evidence. These scientific publications are sufficient to show the salient operability and definiteness of this invention.

These supporting documents also indelibly show that the Plaintiff's facts are correct, and the Office's opinion is incorrect.

50. In an unbiased venue, such peer-reviewed publications (like the timely submitted Declarations) establish facts. Such Evidence consisting of published peer-reviewed scientific articles which prove Plaintiff was correct on the filing date of the application, would have already met the bar of enablement [In re Hogan, 559 F.2d 595, 60S, 194 USPQ 527, 537 (CCPA 1977)]. Therefore, the USPTO has ignored In re Oetiker, 977 F.2d at 1445, 24 USPQ2d at 1444 which requires them to substantively respond with a prima facie case of unpatentability. They have not. They cannot because there is no real basis to substantiate their opinion.

**UNDISPUTED FACT: Claims re: 35 U.S.C. § 145 Supported  
by DIA and DTRA Reports (Count 1)**

51. In fact, DTRA, DIA, and other agencies report utility and operability based on Plaintiff's presentation of his technologies. This satisfies the double prong requisite for "validation" and proves the Defendant has not been honest with respect to this matter. These Reports positively discuss the Plaintiff 's technologies, and the Defendants and Office cannot rebut them. Specifically, in addition to Chinese, Japanese. French. Israeli and Indian scientists, the DIA Report explicitly mentions the Navy SPAWAR group, SRI International, the Plaintiff in Massachusetts, and the China Lake Naval Air Warfare Center in California. On what possible basis could the Defendant or counsel purport this are not good enough?

**UNDISPUTED FACT: Claims re: 35 U.S.C. § 145 are  
Supported by Open Demonstrations (Count 1)**

52. The Office is wrong because the existence of Plaintiff's demonstrations saliently prove that the inventions do operate as indicated and are capable of providing a useful output. It is customary that demonstrations ARE adequate proof of operability; and that has extended from early Italy in the glass industry -- to the Wright brothers -- to this day. And yet, colored glass does exist and flying planes are quite operable.

53. In the Declaration of Dr. Swartz, he states:

**“ My open demonstrations saliently prove that the inventions do operate as indicated and are capable of providing a useful output. THESE open demonstrations extended over several days, and in 2012 over several months, and were witnessed by several hundred witnesses skilled in the art, which were conducted in the Department of Electrical Engineering at MIT.”**

The Office is wrong by ignoring this evidence because these open demonstrations were highly specific and relevant and conducted in the Department of Electrical Engineering at MIT, a reputable institution. These demonstrations at MIT attracted many scientists and those interested in the invention, and that is proof of utility, and consistent with operability.

The Office is wrong because the gold standard in the scientific community has been, and is, an open demonstration followed by a peer-reviewed publication. These demonstrations had “write-ups” which went to peer-review, including Current Science. Such peer-review is standard operating procedure. The USPTO knows that, which is why those submitted papers were also excluded.

54. In summary, the Office is wrong because the above-entitled invention IS operable. Despite the removed/destroyed/ blackenedout/censored/ ignored peer-reviewed articles by the Office and his Group Art, many internet sites describe independent reports of the Appellant's work, both in this field and about the above-entitled invention. Plaintiff's open demonstrations at MIT, and the Plaintiff's submitted peer-reviewed articles and Declarations are MORE than sufficient [In re Brana, 51 F.3d at 1566, 34 USPQ2d at 1441] to meet the

**"burden shift ... to provide rebuttal evidence sufficient to convince such a person of the invention's asserted utility".**

**UNDISPUTED FACT: Claims re: 35 U.S.C. § 145 are  
Supported by those Skilled-in-the-Art (Count 1)**

55. The Office has erred by failing to consider the submitted Declarations of those skilled-in-the-art who counter the rejection under 35 U.S.C. § 112 (and § 101). Only a single affiant is required to prove utility, which is a "fact" issue.

**UNDISPUTED FACT: Collateral Estoppel  
not relevant in this Court**

56. The doctrine of collateral estoppel is not appropriate here.

Invoking it can not accurately be used, and it cannot bar the Plaintiff from seeking Judicial Review, including of the Board Decisions because of the actual facts:

57. There is not a repeat of previous issues because previously there was no real indication of sequestration of Evidence. Furthermore, previously the most recent peer reviewed articles were not part of the record, and previously there was no knowledge of

removal/sequestration and spoliation of the evidence which was timely submitted because it was simply not known. In fact the removal and sequestration of timely submitted evidence was not even known during the previously filings, nor could it have be known at the time of the previous filings.

58. The doctrine of collateral estoppel is not appropriate here because here there are new materials and evidence, including additional new evidence of a cover-up in violation of the Plaintiff's civil rights, and including new evidence. In the Declaration of Dr. Swartz, he states:

**“The doctrine of collateral estoppel is not appropriate here. First, a subset of cases proceeded though 35 USC §146. By contrast, 35 USC §145 has rules and Law [suchas enabling new Evidence] which were never available in 35 USC §146. The doctrine of collateral estoppel is also not appropriate here because here there is new evidence and new knowledge of what was wrongly undertaken by the Office. None of this was in any previous action.”**

None of this was in any previous action. Furthermore, there is now additional evidence including new sworn declarations and new peer-reviewed publications proving operability and utility, in addition to the previous evidence which was submitted and not logged or properly addressed.

59. Another reason is that there is clear-cut evidence that timely submitted evidence was ignored in violation of the Plaintiff's civil rights, and Federal rules.

60. In addition, at least one of the patents was issued to an automotive company [the invention from the '258 application was issued on Jul 8, 2004 to Masaru Okamoto of Nissan Motor Co., Ltd.] even though Plaintiff was first to submit, and submitted data,

clear claims, and a far more definite application at an earlier time and ignored by the Defendant, claiming it did not exist. The Defendant also misdescribed and mischaracterized it as 'cold fusion' when in fact it was a way to measure loading of hydrogen into a metal, and then had no trouble issuing it on less evidence to a foreign automotive company.

61. Furthermore, it is not relevant what the scientific community thinks because a patent application should be considered only on what is submitted and not what people think about it BEFORE THE INVENTION WAS MADE. People thought no one could invent a flying machine, and then develop a rocket, and then could split the atom.

62. Fortunately, the evidence for a patent is based on the record and not on the opinions of the office and others, which in this case have been shown to be improper, including that patents involving cold fusion actually HAVE been issued to others.

63. It is egregious and reprehensible that the counsel of the Defendant in the USPTO Memorandum does not admit that some of the Plaintiff's (and they all do) DO WORK. This includes applications '058 which measures heat output, and '258 which measures the loading of metal by hydrogen. The former has led to more than two dozen peer review publications, and the latter was issued a US patent, which was filed later and then assigned to a foreign automotive company.

64. It is egregious and reprehensible that the counsel of the Defendant in the USPTO Memorandum does not admit that some of the Plaintiff's technologies are widely accepted as scientifically feasible. By contrast, they were mentioned explicitly in the

sequestered/ignored and spoliated timely-submitted evidence including the DTRA and DIA reports which explicitly mentioned some of the plaintiff's technologies.

65. Collateral estoppel is not relevant in '058 and '765 as the Memorandum purports because new material was presented in the most recent application. Said new material was not available at the time of the previous applications (these are continuations) and the added newer material includes new declarations, new evidence of open demonstrations, new scientific results, and new peer-reviewed scientific publications.

66. The court should allow a deposition of the attorneys who wrote this memorandum to compel them to defend their false statements. The factually false statements were submitted by the Defendant and counsel to trick the court, and to deny the plaintiff his civil rights and his rights under the U.S. constitution, and his rights under 35 USC 145.

### **U.S. Patent Application Serial No. 12/932,058 – Misdemeanor by Office, New Evidence – Belongs in this court**

67. In the Declaration of Dr. Swartz, he states:

**“Application '058 was originally '457 and is a calorimeter to measure generated heat. The Defendant misdescribed it, too, and also wrote fraudulent case law about it.”**

The court should allow a deposition of the attorneys who wrote this memorandum to compel them to defend their false statements. To explain this further, since the Defendant has brought this up are Exhibits 27 through 30.

**U.S. Patent Application Serial No. 091750,765 - Misdescribed  
by Office, New Evidence - Belongs in this court**

68. The court should allow a deposition of the attorneys who wrote this memorandum to compel them to defend their false statements. To explain this further, since the Defendant has brought this up are Exhibits 31 through 51 which describe the actual case that was brought to federal court.

**New Material Uncovered and Failure to Log and Address  
Timely-Submitted Material**

69. During said series of US Patent applications for these high-technology inventions, the Defendant has systematically violated due process, including failing to properly log and to properly address submitted materials, including Evidence from the Defense Intelligence Agency (DIA), Defense Threat Reduction Agency (DTRA), NASA, and the American Nuclear Society. The above-entitled Complaint explicitly presents solid, sterling Evidence in photographs, as examples, showing repeated timely-receipt of thereafter ignored/spoiled/sequestered Evidence, including but not limited to the DIA and DTRA Reports. This is new material, and also demonstrates that there can be no collateral estoppel.

**STATUTORY AND REGULATORY BACKGROUND**

**Article III and 28 U.S.C. §1331 are Appropriate**

70. Although there is the existence of new evidence (of two types), there is also the previous Evidence which was timely-submitted but then wrongly sequestered and spoiled and ignored by the Office. This evidence includes the peer-reviewed articles in respected scientific journals, and includes the documented multiple open demonstrations

at MIT demonstrating operability and utility, and it includes the sworn declarations affirming both.

71. The Defendant has acted under color of Federal law [Osborn v. Bank of United States], and so the mere possibility that a question of federal law might arise is sufficient to satisfy the "arising under" jurisdictional authorization of Article III. The relevant statute is found at 28 U.S.C. §1331:

**"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."**

### **Equal Protection Clause - Denial of Impartial Tribunal**

72. By the systematic failure to enter and address timely-submitted Evidence, the Plaintiff has been denied his right to an impartial tribunal [28 U.S. Code Section 144, Mayberry v. Penna.; Duncan v. Louisiana]. The Defendant has acted under color of Federal law [Osborn v. Bank of United States], and therefore as Judge Marshall has indicated, the mere possibility that a question of federal law might arise is sufficient to satisfy the "arising under" jurisdictional authorization of Article III.

The equal protection clause has been broken by the fact that individual applicants in other states have their evidence docketed, addressed, and properly delivered to supervising authorities. That is not the case here.

### **The Administrative Procedure Act [5 U.S.C. § 704]**

73. This venue and jurisdiction regarding the above-entitled Complaint is also supported by the U.S. Administrative Procedures Act which invites Judicial review for abuse of

discretion. It provides for judicial review of final agency action for which there is no other adequate remedy in a court.

The APA's provisions apply to many federal governmental institutions. The APA in 5 U.S.C. 551(1) defines an "agency" as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency", with the exception of several enumerated authorities, including Congress, federal courts, and governments of territories or possessions of the United States. Attention is directed to the fact that the court has held that even the US President is not an agency under the APA [Franklin v. Mass., 505 U.S. 788 (1992)] [underlined for emphasis].

74. The failure of the USPTO to control, to accurately record, and then to abide by, docketing evidence, and its secondary failure to provide true statements on Federal forms is egregious. The failure of the USPTO to render statements consistent with the Evidence submitted, and its failure to obey Remands and Orders brought to the attention of the Defendant, the failure to pass on Evidence to higher administrative Authority during Appeals, are wrongful and egregious actions and inactions – they are nothing but obstruction of justice and Constitutional violations under color of law.

### **The Federal Tort Claims Act ("FTCA")**

75. The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, allows certain kinds of lawsuits to proceed against federal employees who are acting within the scope of their employment [negligence or careless conduct]. And that makes it not relevant to the above-entitled action for a number of reasons because FTCA

is only appropriate for negligent or wrongful conduct done within the scope of the defendant's employment. These abrogations, described in, and related to, the above-entitled Complaint is far beyond.

First, FTCA is only appropriate for negligence -- as opposed to intentional misconduct.

76. Second, FTCA would be irrelevant anyway because the agency has six months to respond, and the Plaintiff has submitted Petitions (pursuant to the Board of Patent Appeals) seventeen times in the last two years alone.

77. Third, in this case, the FTCA is only for federal employees who can be sued under the FTCA, not independent contractors hired by the federal government.

78. Fourth, in this case, foreign governments may be involved (on information and belief through at least Examiner Palabrica).

79. The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680, is irrelevant because it only allows certain kinds of lawsuits against federal employees who are acting within the scope of their employment [negligence or careless conduct], but Defendant's abrogations are systematic intentional misconduct. Also, FTCA is irrelevant because the USPTO had 6 months to respond after the Plaintiff had submitted Notices and Petitions more than a dozen times in the last two years alone.

## **Constitutional Claims Against the USPTO (including Counts 2 and 8)**

80. The Complaint Explicitly described clear-cut Constitutional Claim against the USPTO (including Counts 2 and 8). The USPTO deprived Plaintiff of rights explicitly given under the US Constitution, including by failing to properly log and to properly address submitted materials, including Evidence from the Defense Intelligence Agency (DIA), Defense Threat Reduction Agency (DTRA), NASA, and the American Nuclear Society. More are now presented.

### **Article I**

81. The Defendant has ignored and rejected controlling Authorities including Article I, Section 2 of the Constitution of the United States [Constitutional Convention in August of 1787, adopted in September of 1787] by ignoring that Plaintiff, then Applicant, is entitled to the privileges and immunities of citizens in the other states. Briefly, the Defendants were discriminatory in reaching a Decision without considering submitted Evidence and in the light of allowing similar patent applications to proceed.

82. The Defendant has ignored and rejected the controlling Authorities including Article I, Section 8, by ignoring that Plaintiff, then Applicant, is entitled to the citizen's right to secure for a limited time the exclusive right to his or her writings and discoveries.

### **Article III**

83. The Defendant has acted under color of Federal law [Osborn v. Bank of United States], and so the mere possibility that a question of federal law might arise is sufficient to satisfy the "arising under" jurisdictional authorization of Article III. The relevant

statute is found at 28 U.S.C. §1331:

**"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."**

#### **Article VI**

84. The Defendant has ignored and reject controlling Authorities including Article VI of the Constitution of the United States [Constitutional Convention in August of 1787, adopted in September of 1787] by interfering laws passed by Congress [DIAMOND v. CHAKRABARTY; 447 U.S. 303, 309] including legislation that patentable statutory subject matter spans **"anything under the sun that is made by man"** [S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952); H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952)].

The Supreme Court clarified the scope of 35 U.S.C. §145 proceedings in its April 18, 2012, unanimous decision in *Kappos v. Hyatt*, affirming the Federal Circuit's *en banc* decision which held that Evidence not submitted to the Patent and Trademark Office (PTO) during prosecution is admissible in a civil action brought against the Director of the PTO under 35 U.S.C. §145 subject only to the limitations imposed by the Federal Rules of Evidence and the Federal Rules of Civil Procedure [\*\*\*].

[\*\*\*] The Supreme Court held that the district court hearing a §145 action must make a *de novo* finding "when the new evidence is presented on a disputed question of fact".

#### **Other Claims Against the USPTO**

85. Claims 3, 4 8, and 12, and others, sound in tort. They fall within the "limited waiver of the federal government's sovereign immunity with respect to private causes of action

sounding in tort" provided for in the Federal Tort Claims Act ("FTCA"). *Fothergill v. United States*, 566 F.3d 248,252 (1 st Cir. 2009).

Pursuant the FTCA, the Plaintiff did totally exhaust ALL available administrative remedies [28 U.S.C. § 2675(a); *McNeil v. U.S.*, 508 U.S. 106, 113 (1993)]. As described above and below, the Board was notified repeatedly. Thereafter, Petitions were sent pursuant to the Orders of the Board. Further Notifications were made. [*Gonzalez v. United States*, 284 F.3d 281,288 (1st Cir. 2002) (describing compliance with the statutory requirement of administrative exhaustion as "a jurisdictional prerequisite to suit that cannot be waived")]. Therefore, the Plaintiff's Action is Supported by *Bivens*. A *Bivens* claim [named for *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)] is a judicially created Constitutional claim which is outside the purview of the Federal Tort Claims Act [confer 28 U.S.C. S 2679(b)(2)(A)]. In *Bivens*, the Court created a damage remedy under the Fourth Amendment against individual federal law enforcement officers who had arrested *Bivens* and searched his home without a warrant or probable cause, causing mental suffering and embarrassment. Later, the Court extended the implied cause of action principle to Fifth Amendment claims in *Davis v. Passman*. In *Carlson v. Green*, the Court allowed a *Bivens* action under the Eighth Amendment. In both *Bivens* and *Davis*, the plaintiffs had no other available remedy [\*\*], and in *Bush v. Lucas*, the Court stated:

**"In the absence of such a congressional directive, the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any "special factors counseling hesitation" before authorizing a new kind of federal litigation."**

[\*\*] That is the case here. There is no other way to resolve Plaintiff's express rights.

86. A *Bivens* action is not needed when a statute authorizes the relief sought, such as under the Tucker Act or the Federal Tort Claims Act, because those statutes authorize damages. By contrast, the Administrative Procedure Act does not authorize damages against persons acting under color of federal law, and therefore, *Bivens* actions are necessary to support a damage claim against individual federal actors for constitutional violations. In this case, the plaintiff demonstrated both that the defendant's conduct was wrongful (inconsistent with a duty resting on the defendant) and that the plaintiff is within the category of persons entitled to judicial relief because of the wrongful conduct.

87. The equal protection clause has been broken by the fact that individual applicants in other states have their evidence docketed, addressed, and properly delivered to supervising authorities. That is not the case here.

88. In addition, consistent with the Due Process Clause of the United States Constitution, the Defendants issued Nissan Motor Co., Ltd. the invention from the '258 application [US 8247122 B2 was issued on Jul 8, 2004 to Masaru Okamoto of Nissan] even though Plaintiff was first to submit, and unlike Nissan, Plaintiff actually submitted data, clear claims, and a far more definite application.

## **Counts Consistent with Law and Justice (5-7 9-12, and 14)**

### **New Evidence of Misprision of Felony**

#### **Cashed Checks Imply the Expectation of Fair Evaluation**

89. Proving indelibly the existence of Obligation, a series of checks from the Plaintiff's bank, located in the Commonwealth, were cashed by the USPTO creating an explicit promise of contract with the Defendants, that they would faithfully and honestly evaluate the patent application, as they do for other applicants, in other states. Multiple fees were paid, including tens of thousands of dollars just to file, maintain, and transfer documents to the Appellate court over many years. This proves a contract of trust, paid for by fees, does exist between the parties for this.

### **UNDISPUTED FACT: Defendants Violated Contractual Obligations**

90. The Plaintiff did identify contractual Obligations owed by the defendants, and that includes their obligation for honesty, and for correct docketing, and for properly addressing what was timely- (and repeatedly) submitted. In fact, the Defendants upon cashing the checks entered into a confidential or fiduciary relationship to support a constructive or equitable fraud claim. See *In re Sherwood Inv. Overseas Ltd., Inc.*, No. 6:10-AP-00158-KSJ, 2015 WL 4486470, at \*16 (Bankr. M.D. Fla. July 22, 2015) ("A fiduciary relationship does not arise because one side of a business relationship depends on the other side.

91. Rather, for a fiduciary obligation to arise, the purported fiduciary must accept the more demanding, fiduciary responsibilities requiring it to act in the best interest of the

other party, not itself, which is the virtual opposite of the typical business relationship where parties act in their own best interest."

## **Mail Fraud through the US Postal Service**

### **The Defendant Has Engaged in Fraudulent inducement**

92. The Defendant has fabricated false statements on federal documents which were then sent through the Massachusetts US post office. This includes Defendant's exculpatory statements, data changes, and documents involving the Plaintiff. These make for significant personal and subject jurisdiction.

### **The Defendant Has Engaged in Civil Conspiracy**

93. The elements of civil conspiracy consist of (1) a conspiracy between two or more parties; (2) to do an unlawful act, or to do a lawful act by unlawful means; (3) an overt act in pursuance of the conspiracy, and (4) damage to plaintiff as a result [Microsoft Corp. v. Big Boy Distribution LLC, 589 F. Supp. 2d 1308, 1322 (S.D. Fla. 2008)]. In the above-entitled action for fraud and deceit, the Plaintiff did allege with precise certainty that 1) the Defendants made a representation on which the Plaintiff did act, including paying fees and submitted Evidence; 2) the Defendant knew their representation was false; and 3) the Plaintiff relied on the representation to his detriment, and financial loss to himself and Massachusetts corporations and education. [Carl's Furniture, Inc. v. APJL Consulting, LLC, No. 15-60023- CIV, 2015 WL 1467726, at \*3 (S.D. Fla. Mar. 30, 2015) (alteration in original)].

**UNDISPUTED FACT: The Defendant Has Engaged in  
Fraudulent inducement**

94. Fraudulent inducement occurs where "one party's ability to negotiate and make informed decisions as to the contract is undermined by the other party's pre-contractual fraudulent behavior. [Bradley Factor, Inc. v. United States, 86 F. Supp. 2d 1140, 1145 (M.D. Fla. 2000)], as the Defendant has done.

By sequestering and causing spoliation of Evidence, the Defendant has systematically also used fraudulent inducement to enter into serial contracts and remove serial fees (both for each application, and for each Appeal, and for each transfer fee).

In addition, the Defendants planned to use the fruit of their poisoned tree ("in re Swartz" confer Complaint) which also makes the promise to honestly evaluate a patent application nothing but fraudulent inducement.

**The Defendant Has Engaged in Constructive Fraud**

95. A confidential or fiduciary relationship exists where "confidence is reposed by one party and a trust is accepted by the other, or where confidence has been acquired and abused"[ Am. Honda Motor Co. v. Motorcycle Info. Network, Inc., 390 F. Supp. 2d 1170,1179 (M.D. Fla. 2005) (quoting Doe v. Evans, 814 So. 2d 370, 374 (Fla. 2002))].

Constructive fraud occurs when a duty under a confidential or fiduciary relationship has been abused or where an unconscionable advantage has been taken [Tardif v. People for the Ethical Treatment of Animals, No. 2:09-CV-537, 2010 WL 3860733, at \*6 (M.D. Fla. Sept. 29, 2010) (quoting Levy v. Levy, 862 So.2d 48,53 (Fla. 3d DCA 2003))].

In this case, the Plaintiff has demonstrated breach of a confidential or fiduciary relationship, where "a party must allege some degree of dependency on one side and

some degree of undertaking on the other side to advise, counsel, and protect the weaker party." [Id. (quoting *Watkins v. NCNB Nat. Bank of Fla., N.A.*, 622 So.2d 1063, 1065 (Fla. 3d DCA 1993))]. Also, in this case, the Plaintiff is clearly the weaker party in the transaction.

### **UNDISPUTED FACT: The Defendant Has Engaged in Inequitable Conduct**

96. Plaintiff is being restrained [*Turmenrte v. White Consolidated Indus., Inc.* 266 F. Supp. 35, 37 (D. Mass. 1967); also *Gentron Corp. v. H.C. Johnson Agencies, Inc.*, 79 F.R.D. 415, 419 (E.D. Wis. 1978)]. Simply put, a Petition for Mandamus of records was sought but was not allowed. Instead, six retaliatory actions have followed. These exculpatory actions in themselves are wrong and **"should not be a means to keep relevant information from courts"** [emphasis in original; United States Court of Appeals for the Federal Circuit, MISCELLANEOUS DOCKET NO. 492, IN RE JENOPTIK AG, March 3, 1997].

### **The Defendant has a History of Bad Faith**

#### **UNDISPUTED FACT: Defendant Has Unclean Hands**

97. Defendant has unclean hands-- and their systematic behavior demonstrates that they believe that they are above the Law. It is with impropriety that Exhibits can be "lost" and purported as unreadable, after being received as the USPTO's mail room's stamp indicates. The Defendant did not honor cashed checks, received Briefs, received Evidence, and Priority dates, and the most recent being application '381.

## **UNDISPUTED FACT: Defendant Failed to Respond at SCOTUS**

98. On page six, the Defendant's Memorandum states that the Federal circuit upheld the utility and operability rejections, but fails to admit that the plaintiff (there Appellant) exposed that the timely submitted evidence was not being docketed or commented upon.

99. Corroborating that there was wrongful behavior, it is important for this court to note that when this was taken to the Supreme Court of the United States, when a petition for certiorari was filed, the U.S. patent office did not even respond. The Clerk of SCOTUS stated that this had never happened before in the history of the supreme court. An honest agency, unlike the Defendant, exposed that it failed to log Evidence (but not 'facts' of the case at that time) would not have had to have been evasive.

## **UNDISPUTED FACT: Defendant Created a Factually False "In re Swartz" which in the patent application did not mention "excess heat" but did measured Loading of hydrogen into the metal**

100. The memorandum cites In Re Swartz but fails to admit that In Re Swartz involves a patent application that dealt with a vibration system to measure loading of a metal by hydrogen, and fails to admit that the Patent Office falsely claimed this measurement was "cold fusion", and fails to admit that the application said that the invention could be used in metallurgy and other fields. In the Declaration of Dr. Swartz, he states:

**"Application number '258 was originally called '937 involving a vibrator used to non-invasively measure loading [the amount of hydrogen in a metal electrode]. The Office misdescribed it and wrote fraudulent case law about it ["In re Swartz]. The patent office rejected '258 [then as '937, and**

**misdescribed in In Re Swartz] by falsely asserting what the application involved (claiming it was cold fusion when it measured loading of a metal by hydrogen), and mischaracterizing what was actually submitted in the original specification (not even using the words in the original specification in the Decision), and by making further false statements about operability (even after the patent was finally given to a foreign automotive company).”**

The SAWS Memorandum, which remained secret until this century, continued to be followed – even after the court directed the USPTO to stop.

101. In addition, the Memorandum omits that in In Re Swartz, when the case was taken to the Federal Appellate Court, and subpoena power was obtained, it was finally revealed that there was a scheme used by some at the U.S. patent office not to log any timely-submitted evidence which disputed the opinion of the patent office. This is present in the complaint, corroborated by Exhibit.

102. The patent office rejected In Re Swartz falsely asserting what the application involved (claiming it was cold fusion when it measured loading of a metal by hydrogen), and mischaracterizing what was actually submitted in the original specification (not even using the words in the original specification in the Decision), and by making further false statements about operability (even after the patent was finally given to a foreign automotive company).

### **UNDISPUTED FACT: Defendant Has used Perjury Perjury Count 1**

103. In Rachel B. Damelin’s January 23, 2017 Declaration [Office of the General Counsel, Office of General Law United States Patent and Trademark Office] sworn

Affidavit, Attorney Damelin swore under pains and penalties of perjury, "*I have conducted a review and search of all administrative tort claims filed with the OGC within the last two years, According to my search, no administrative tort claim has been filed by Mitchell Swartz with the USPTO.*"

The alleged "search" is both untruthful and unconvincing. First, the Plaintiff thereafter did Obey the Decision of Appeal 2009-001853, Application 10/646,143, in the DECISION ON REQUEST FOR REHEARING made Feb. 22, 2011. The Plaintiff repeatedly DID file the appropriate Petitions to the Commissioner [Figure 4]. Plaintiff followed the repeated explicit orders of the Board of Patent Appeals and sent seventeen Petitions to the Commissioner of Patents in the period of 2015 to 2016. Plaintiff did exactly what that USPTO required at the USPTO prior to commencing this suit. And yet the Defendant's Memorandum and the Declarations of Damelin purports otherwise. In the Declaration of Dr. Swartz, he states:

**"I did obey the Decision of Appeal 2009-001853, Application 10/646,143, in the DECISION ON REQUEST FOR REHEARING made Feb. 22, 2011. I DID file the appropriate Petitions to the Commissioner. This was exactly what the USPTO ["Board"] required prior to commencing these legal proceedings.**

**Despite what the Defendant's Memorandum falsely purports, I gave multiple warnings ("Notices") of the upcoming tort action to each of the parties involved. This was done BOTH by Petition (17 times in 2015 through 2016 alone) and by Notice (9 times in May 2016 alone)."**

Figure 4 demonstrates seventeen (17) Petitions made just in the period of 2015 to 2016.

These were made to the Commissioner -- and yet none (zero) made it to Ms. Damelin? Why? Where did the 17 Petitions go? Why was there no record of these of the nine Notices made in just May 2016?

### **UNDISPUTED FACT: Notices of Tort and Petitions Were Received**

104. Second, also, before this case was filed, the Plaintiff DID give multiple warnings ("Notices") of a possible upcoming tort action, long before it was filed, to each of the parties involved. Attention of the court is directed to the simple fact that despite the factually false statements, the Defendant received letters and repeated explicit warnings -- and therefore Notice. Figure 5 is a compilation of nine (9) warnings ("Notices") of the possible upcoming tort action to the Defendant in May 2016 alone.

89. Is the court to believe that NONE (zero) of the Notices to the Defendant and Petitions to the Commissioner (as Plaintiff was Ordered by the the Board of Patent Appeals) made it into the records which Attorney Damelin allegedly "search(ed)".

105. The Declaration of Rachel B. Damelin, January 23, 2017 is perjurious. Defendant's Associate Counsel Rachel B. Damelin, Office of the General Counsel, Office of General Law United States Patent and Trademark Office is either totally untruthful in a deceptive Affidavit, or led astray for reasons unclear.

### **Perjury Count 2**

106. In Rachel B. Damelin's June 2017 Declaration [Office of the General Counsel, Office of General Law United States Patent and Trademark Office] sworn Affidavit, Attorney Damelin swore under pains and penalties of perjury,

*“6. I have conducted a review and search of all administrative tort claims filed with the OGC within the last two years. According to my search, no administrative tort claim has been filed by Mitchell Swartz with the USPTO.”*

[Case 1:17-cv-00482-LMB-TCB Document 18-12 Filed 07/17/17 Page 3 of 3 PageID# 598]

The alleged “search” is both again untruthful and further unconvincing. Where was the due diligence. This and last year there should have been some light of awareness from the federal court system and/or Dept. of Justice where further notifications were made, and the wrongful actions specified exactly.

### **UNDISPUTED FACT: Post-Notification of Notices of Tort and Petitions**

107. Despite what the Defendant’s Memorandum falsely purports, the Plaintiff gave multiple warnings (“Notices”) of the upcoming tort action. This happened nine (9) times in May 2016 alone. Where are any of these twenty-six (26) filings in counsel Damelin's records? Why are none of these in counsel Damelin's records?

108. Is the court to believe that NONE (zero) of the Notices to the Defendant and Petitions to the Commissioner made it into the records which Attorney Damelin allegedly “search(ed)”, even after being re-informed by the Plaintiff during case 16-12144? What is clear is that an honest “review and search” did NOT happen either time, but perjury was used both times to trick the court -- a significant error which the court should want to be made aware of, and which it should want to correct.

109. Is the court to believe that NONE (zero) of more than 26 documents, involving Notices and Petitions were logged. Or is the court to believe that the data was logged and then erased to hide them to cover it all up?

=> What is clear is that an honest "review and search" did NOT happen.

110. The Declaration of Rachel B. Damelin, signed on or about June 2017, is clearly reprehensible FRAUD before this court. THIS perjury was fabricated to deny Plaintiff his civil and Constitutional rights. Sanctions are warranted; along with the court striking the Motion to Dismiss.

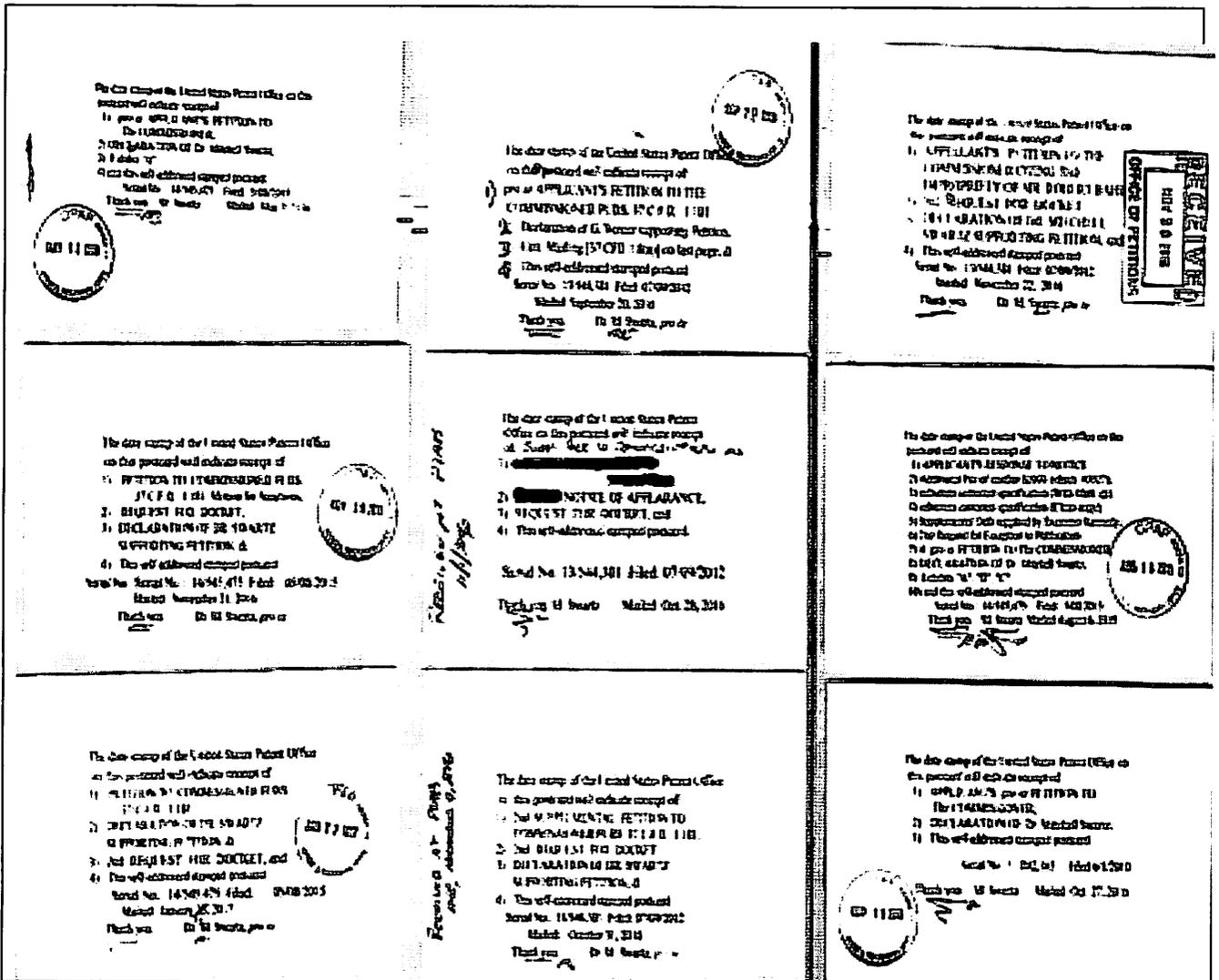


Figure 4 – [Part 1 of 2 parts] Copies of actual post cards, stamped by the Official Postal Office of the USPTO demonstrate Notice by Petition pursuant Order of the Board, and saliently and indelibly.

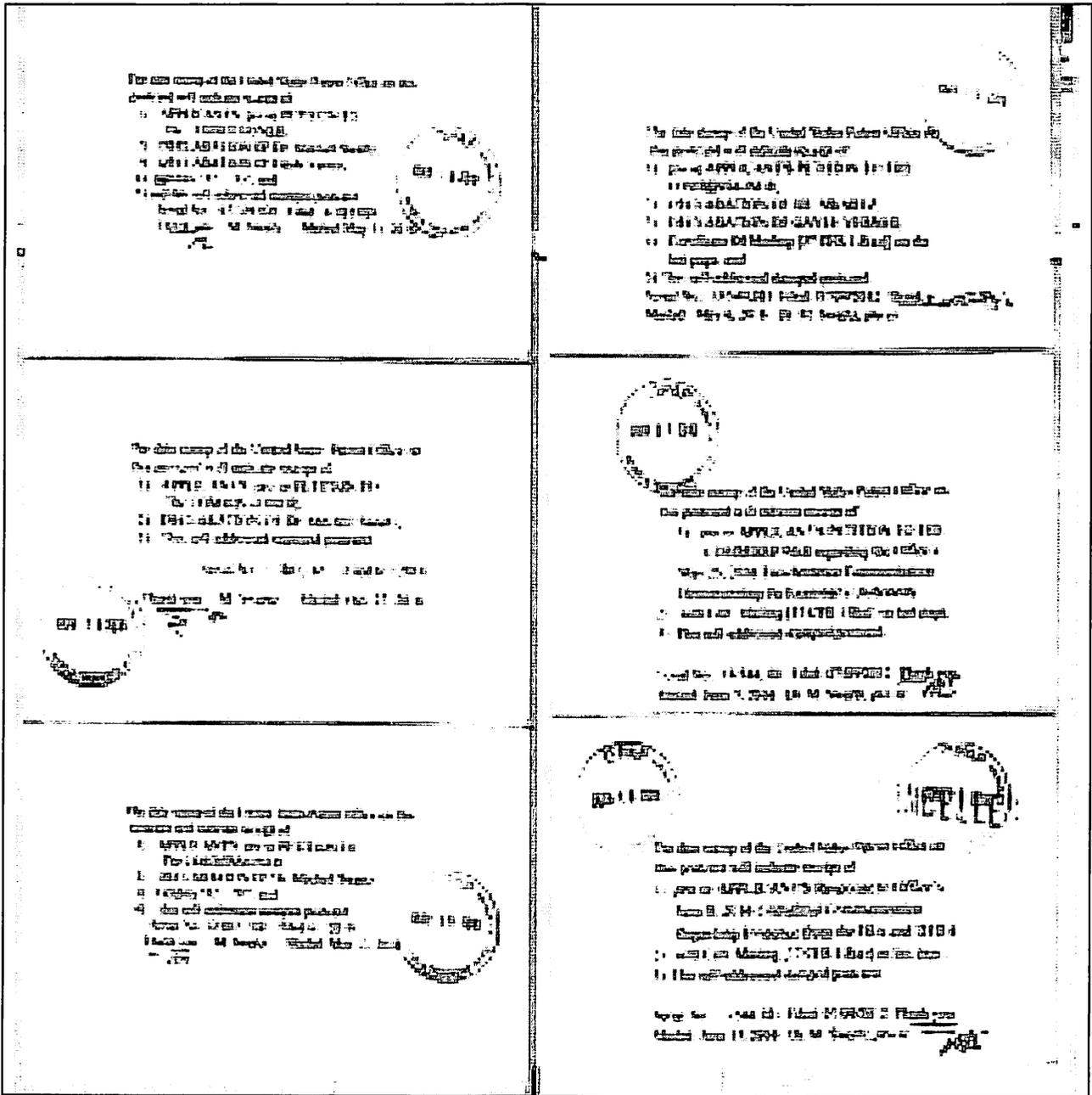


Figure 4 – [Part 2 of 2 parts] Copies of actual post cards, stamped by the Official Postal Office of the USPTO.

111. In summary, the two Declarations of Damelin contain perjury. They are fabricated factually false statements to avoid justice and are barratry, abuse of power, and a betrayal of Trust. Sanctions are warranted, and most importantly, the Plaintiff's ONLY remedy with respect to that matter in this court.

<p>P/O Box 81135 Wellesley Hills, Massachusetts 02148 May 11, 2016</p> <p>Examiner Ricardo Petalucha, as an Agent of the USPTO and as an Individual</p> <p><b>RESPECTFUL TIMELY IMPORTANT NOTICE</b></p> <p>Dear Sir:</p> <p>This letter is a notice, as required by the federal court, that you will be held accountable both as an Official agent of the USPTO and as an individual, if the timely multiple submitted, Group Art-exemplified, First, Second, and 3rd pro or Appart Drafts are not transferred to the Board of Patent Appeals, with full notice in thirty (30) days from receipt of this letter.</p> <p>The Applicant has been more than patient for judicial economy, but given that Evidence has been removed in the past and there has been no accountability, and that it has now continued along with its coverage, the patience is nearly exhausted given the continued improper behavior at the USPTO in forcing that other venues need be sought.</p> <p>The U.S. Supreme Court has ruled that any pro or Appart is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)] but there is now systematic possible violations of 18 U.S.C. § 1001, 18 U.S.C. § 1341, 18 U.S.C. § 241, 18 U.S.C. § 242, 18 U.S.C. § 4, 18 U.S.C. § 242, and 18 U.S.C. § 1513.</p> <p>Thank you for your attention to this serious matter. Respectfully,  Mitchell Swartz, pro se</p>	<p>P/O Box 81135 Wellesley Hills, Massachusetts 02148 May 11, 2016</p> <p>Attorney Robert W. Baber, as an Agent of the USPTO and as an Individual</p> <p><b>RESPECTFUL TIMELY IMPORTANT NOTICE</b></p> <p>Dear Sir:</p> <p>This letter is a notice, as required by the federal court, that you will be held accountable both as an Official agent of the USPTO and as an individual, if the timely multiple submitted, Group Art-exemplified, First, Second, and 3rd pro or Appart Drafts are not transferred to the Board of Patent Appeals, with full notice in thirty (30) days from receipt of this letter.</p> <p>The Applicant has been more than patient for judicial economy, but given that Evidence has been removed in the past and there has been no accountability, and that it has now continued along with its coverage, the patience is nearly exhausted given the continued improper behavior at the USPTO in forcing that other venues need be sought.</p> <p>The U.S. Supreme Court has ruled that any pro or Appart is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)] but there is now systematic possible violations of 18 U.S.C. § 1001, 18 U.S.C. § 1341, 18 U.S.C. § 241, 18 U.S.C. § 242, 18 U.S.C. § 4, 18 U.S.C. § 242, and 18 U.S.C. § 1513.</p> <p>Thank you for your attention to this serious matter. Respectfully,  Mitchell Swartz, pro se</p>	<p>P/O Box 81135 Wellesley Hills, Massachusetts 02148 May 12, 2016</p> <p>Commissioner of Patents Michelle Lee, as Commissioner of Patents at the USPTO and as an Individual</p> <p><b>RESPECTFUL TIMELY IMPORTANT NOTICE</b></p> <p>Dear Honorable Commissioner:</p> <p>This letter is a notice, as required by the federal court, that you will be held accountable both as an Official agent of the USPTO and as an individual, if the timely multiple submitted and received, persuasive objective evidence is not properly declared and addressed, and if there is not an immediate removal of the false statement that "There is no evidence of record" and the like, with full notice in thirty (30) days from receipt of this letter.</p> <p>The Applicant has been more than patient for judicial economy, but given that Evidence has been removed in the past and there has been no accountability, and that it has now continued, the patience is nearly exhausted given the continued improper behavior at the USPTO in forcing that other venues need be sought.</p> <p>The U.S. Supreme Court has ruled that any pro or Appart is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)] but there is now systematic possible violations of 18 U.S.C. § 1001, 18 U.S.C. § 1341, 18 U.S.C. § 241, 18 U.S.C. § 242, 18 U.S.C. § 4, 18 U.S.C. § 242, and 18 U.S.C. § 1513.</p> <p>Thank you for your attention to this serious matter. Respectfully,  Mitchell Swartz, pro se</p>
<p>P/O Box 81135 Wellesley Hills, Massachusetts 02148 May 28, 2016</p> <p>Commissioner of Patents Michelle Lee, as Commissioner of Patents at the USPTO and as an Individual</p> <p><b>RESPECTFUL TIMELY IMPORTANT NOTICE</b></p> <p>Dear Commissioner Lee:</p> <p>This letter is a notice, as required by the federal court, that you will be held accountable both as an Official agent of the USPTO and as an individual, if a correction is, or replacement of, the May 24, 2016 Decision, that Evidence was submitted with the Declarations, including the Official stamps of the USPTO Mail Room, is not made in 21 days with full notice to Petitioner from receipt of this letter.</p> <p>This Applicant has been more than patient for judicial economy, but given that Evidence has been removed in the past and there has been no accountability, and that it has now continued, the patience is nearly exhausted given the continued improper behavior at the USPTO in forcing that other venues need be sought.</p> <p>The U.S. Supreme Court has ruled that any pro or Appart is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)] but there is now systematic possible violations of 18 U.S.C. § 1001, 18 U.S.C. § 1341, 18 U.S.C. § 241, 18 U.S.C. § 242, 18 U.S.C. § 4, 18 U.S.C. § 242, and 18 U.S.C. § 1513.</p> <p>Given that you have ignored every previous Notification, your attention is directed to this serious matter. Respectfully,  Mitchell Swartz, pro se</p>	<p>P/O Box 81135 Wellesley Hills, Massachusetts 02148 May 8, 2016</p> <p>Supervisor Jack Keith, as an Agent of the USPTO and as an Individual</p> <p><b>RESPECTFUL TIMELY IMPORTANT NOTICE</b></p> <p>Dear Sir:</p> <p>This letter is a notice, as required by the federal court, that you will be held accountable both as an Official agent of the USPTO and as an individual, if the timely multiple submitted and received, persuasive objective evidence is not properly declared and addressed with full notice in thirty (30) days from receipt of this letter.</p> <p>This Applicant has been more than patient for judicial economy, but given that Evidence has been removed in the past and there has been no accountability, and that it has now continued, the patience is nearly exhausted given the continued improper behavior at the USPTO in forcing that other venues need be sought.</p> <p>The U.S. Supreme Court has ruled that any pro or Appart is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)] but there is now systematic possible violations of 18 U.S.C. § 1001, 18 U.S.C. § 1341, 18 U.S.C. § 241, 18 U.S.C. § 242, 18 U.S.C. § 4, 18 U.S.C. § 242, and 18 U.S.C. § 1513.</p> <p>Thank you for your attention to this serious matter. Respectfully,  Mitchell Swartz, pro se</p>	<p>P/O Box 81135 Wellesley Hills, Massachusetts 02148 May 11, 2016</p> <p>Commissioner of Patents Michelle Lee, as Commissioner of Patents at the USPTO and as an Individual</p> <p><b>RESPECTFUL TIMELY IMPORTANT NOTICE</b></p> <p>Dear Commissioner:</p> <p>This letter is a notice, as required by the federal court, that you will be held accountable both as an Official agent of the USPTO and as an individual, if the timely multiple submitted, Group Art-exemplified, First, Second, and 3rd pro or Appart Drafts are not transferred to the Board of Patent Appeals, with full notice in thirty (30) days from receipt of this letter.</p> <p>The Applicant has been more than patient for judicial economy, but given that Evidence has been removed in the past and there has been no accountability, and that it has now continued, the patience is nearly exhausted given the continued improper behavior at the USPTO in forcing that other venues need be sought.</p> <p>The U.S. Supreme Court has ruled that any pro or Appart is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)] but there is now systematic possible violations of 18 U.S.C. § 1001, 18 U.S.C. § 1341, 18 U.S.C. § 241, 18 U.S.C. § 242, 18 U.S.C. § 4, 18 U.S.C. § 242, and 18 U.S.C. § 1513.</p> <p>Thank you for your attention to this serious matter. Respectfully,  Mitchell Swartz, pro se</p>
<p>P/O Box 81135 Wellesley Hills, Massachusetts 02148 May 11, 2016</p> <p>Examiner Ricardo Petalucha, as an Agent of the USPTO and as an Individual</p> <p><b>RESPECTFUL TIMELY IMPORTANT NOTICE</b></p> <p>Dear Sir:</p> <p>This letter is a notice, as required by the federal court, that you will be held accountable both as an Official agent of the USPTO and as an individual, if the timely multiple submitted, Group Art-exemplified, First, Second, and 3rd pro or Appart Drafts are not transferred to the Board of Patent Appeals, with full notice in thirty (30) days from receipt of this letter.</p> <p>The Applicant has been more than patient for judicial economy, but given that Evidence has been removed in the past and there has been no accountability, and that it has now continued along with its coverage, the patience is nearly exhausted given the continued improper behavior at the USPTO in forcing that other venues need be sought.</p> <p>The U.S. Supreme Court has ruled that any pro or Appart is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)] but there is now systematic possible violations of 18 U.S.C. § 1001, 18 U.S.C. § 1341, 18 U.S.C. § 241, 18 U.S.C. § 242, 18 U.S.C. § 4, 18 U.S.C. § 242, and 18 U.S.C. § 1513.</p> <p>Thank you for your attention to this serious matter. Respectfully,  Mitchell Swartz, pro se</p>	<p>P/O Box 81135 Wellesley Hills, Massachusetts 02148 May 11, 2016</p> <p>Attorney Robert W. Baber, as an Agent of the USPTO and as an Individual</p> <p><b>RESPECTFUL TIMELY IMPORTANT NOTICE</b></p> <p>Dear Sir:</p> <p>This letter is a notice, as required by the federal court, that you will be held accountable both as an Official agent of the USPTO and as an individual, if the timely multiple submitted, Group Art-exemplified, First, Second, and 3rd pro or Appart Drafts are not transferred to the Board of Patent Appeals, with full notice in thirty (30) days from receipt of this letter.</p> <p>The Applicant has been more than patient for judicial economy, but given that Evidence has been removed in the past and there has been no accountability, and that it has now continued along with its coverage, the patience is nearly exhausted given the continued improper behavior at the USPTO in forcing that other venues need be sought.</p> <p>The U.S. Supreme Court has ruled that any pro or Appart is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)] but there is now systematic possible violations of 18 U.S.C. § 1001, 18 U.S.C. § 1341, 18 U.S.C. § 241, 18 U.S.C. § 242, 18 U.S.C. § 4, 18 U.S.C. § 242, and 18 U.S.C. § 1513.</p> <p>Thank you for your attention to this serious matter. Respectfully,  Mitchell Swartz, pro se</p>	<p>P/O Box 81135 Wellesley Hills, Massachusetts 02148 May 12, 2016</p> <p>Commissioner of Patents Michelle Lee, as Commissioner of Patents at the USPTO and as an Individual</p> <p><b>RESPECTFUL TIMELY IMPORTANT NOTICE</b></p> <p>Dear Honorable Commissioner:</p> <p>This letter is a notice, as required by the federal court, that you will be held accountable both as an Official agent of the USPTO and as an individual, if the timely multiple submitted and received, persuasive objective evidence is not properly declared and addressed, and if there is not an immediate removal of the false statement that "There is no evidence of record" and the like, with full notice in thirty (30) days from receipt of this letter.</p> <p>The Applicant has been more than patient for judicial economy, but given that Evidence has been removed in the past and there has been no accountability, and that it has now continued, the patience is nearly exhausted given the continued improper behavior at the USPTO in forcing that other venues need be sought.</p> <p>The U.S. Supreme Court has ruled that any pro or Appart is entitled to less stringent standards [U.S. Rep volume 404, pages 520-521 (72)] but there is now systematic possible violations of 18 U.S.C. § 1001, 18 U.S.C. § 1341, 18 U.S.C. § 241, 18 U.S.C. § 242, 18 U.S.C. § 4, 18 U.S.C. § 242, and 18 U.S.C. § 1513.</p> <p>Thank you for your attention to this serious matter. Respectfully,  Mitchell Swartz, pro se</p>

Figure 5 – Copies of the actual letters comprising these Notices were delivered to the Defendant.

## **UNDISPUTED FACT: DEFENDANT ATTEMPTED EXCULPATORY BEHAVIOR IN '381**

112. Defendant's Memorandum states,

*"Additionally, Dr. Swartz's complaint identifies U.S. Patent Application Serial No. 13/544,381 ("the' 3 81 application"), but the Board has not yet rendered a decision in that case, thus depriving this Court of jurisdiction to consider this claim. "*

Several patent applications are discussed here. In each, there have been two rejections and the Plaintiff has filed Appeals and has paid the fees [\*\*\*]. In one other, there was the failure to pass to the Board the received Appeal Brief and other Evidence, after cashing the transfer fee ('381). Regarding '381 [Serial No.: 13/544,381, Filed: 07/09/2012], an Appeal Brief, Reply Brief, Declarations, DIA and DTRA Reports WERE submitted and received.

[\*\*\*] The Patent Trial and Appeal Board [PTAB] "Decision(s) on Request for Rehearing" were rendered on February 24, 28, and March 14, 2017. The PTAB decisions were final decisions, as were the refusal to admit Evidence and Briefs and cashed checks were received, within the meaning of 37 C.F.R. § 41.2.

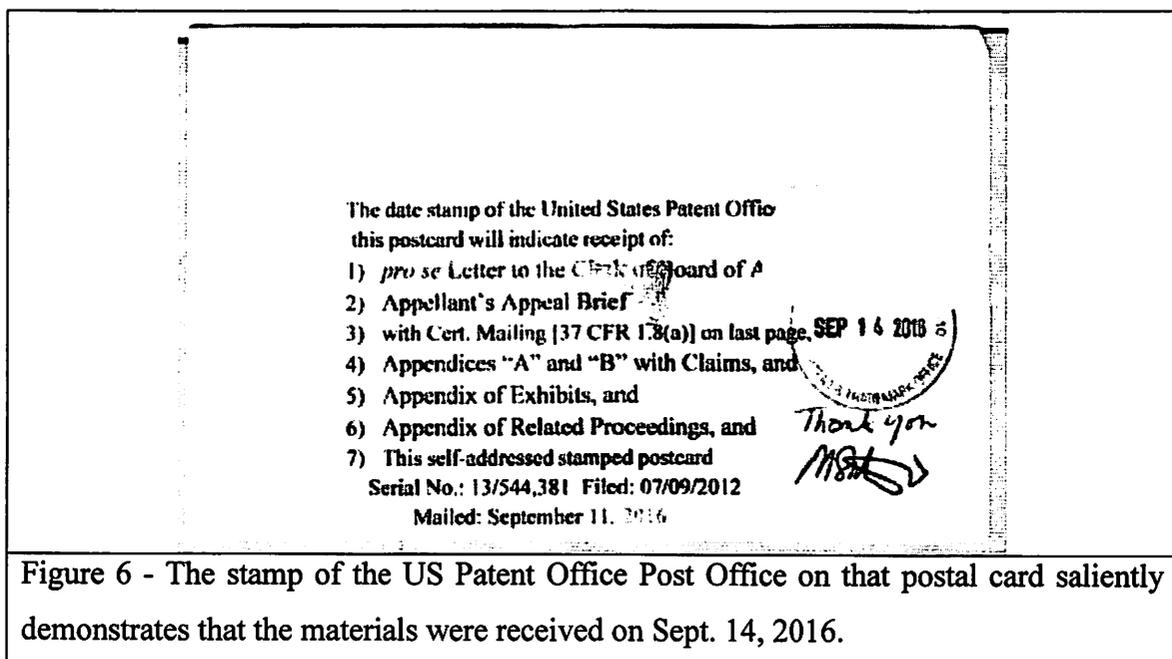
## **UNDISPUTED FACT: Appeal Briefs & DIA and DTRA Reports WERE Submitted and Received**

113. A Communication from the Defendant dated March 10, 2017 falsely purported Plaintiff had not *"timely submit(ted) the (Appeal) brief and requisite fee"* even after the check had been cashed. The factually false Office Communication dated March 10, 2017 stated:

*“The appeal in this application will be dismissed unless corrective action is taken to timely submit the brief and requisite fee. See 37 CFR 41.37(a)(1). Extensions of time may be obtained under 37 CFR 1.136(a). See 37 CFR 41.37(e).”*

This is a factually false statement and innuendo, but shows the standard operating procedure of the USPTO. In fact, on September 11, 2016, the US Patent Office was sent the following: Appellant’s Appeal Brief, with Cert. Mailing [37 CFR 1.8(a)] on last page, Appendices “A” and “B” with Claims, and the Appendix of Exhibits, and the Appendix of Related Proceedings, and a self-addressed stamped postcard. The stamp of the US Patent Office Post Office on that post card saliently demonstrates that the materials were received on September 14, 2016.

114. In addition, on February 15, 2017, the US Patent Office was sent the following: Appellant’s Reply Brief with a Certificate of Mailing on the last page. Also sent were a Check for \$1000 for the Transfer Fee, Decl. Smith, Gordon, Verner, Biberian, Ahern, Exhibit "A" - DIA Report, Exhibit "B" - DTRA Report, Petition to the Commissioner of Patents, Declaration Supporting Petition, and self-addressed stamped white postcard that, curiously, had not been stamped by the mailroom and returned, as is the custom. The US Postal return green card demonstrates that the materials were received on February 21, 2017. The bank statement showed that the USPTO actually did receive, and even cashed the check for the Appeal Brief Transfer fee from the Plaintiff despite having wrongly purported otherwise.



115. In addition, on February 15, 2017, the US Patent Office was sent the following: Appellant's Reply Brief with a Certificate of Mailing on the last page. Also sent were a Check for \$1000 for the Transfer Fee, Decl. Smith, Gordon, Verner, Biberian, Ahern, DIA Report, DTRA Report, Petition to the Commissioner of Patents, Declaration Supporting Petition, and self-addressed stamped white postcard that, curiously, had not been stamped by the mailroom and returned, as is the custom. The US Postal return green card demonstrates that the materials were received on February 21, 2017. The bank statement showed that the USPTO actually did receive, and even cashed the check for the Appeal Brief Transfer fee from the Plaintiff despite having wrongly purported otherwise.

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> <li>● Complete Items 1, 2, and 3. Also complete Item 4 if Restricted Delivery is desired.</li> <li>● Print your name and address on the reverse so that we can return the card to you.</li> <li>● Attach this card to the back of the mailpiece, or on the front if space permits. <i>Exp. 3/1</i></li> </ul>	<p>A. Signature X <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) C. Date of Delivery</p>
<p>1. Article Addressed to:</p> <p>Clerk, Board of Patent Appeal c/o Commissioner of Patents P.O. Box AF / 1450 Alexandria, VA 22313-1450</p>	<p>D. Is delivery address different from sender's? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No If YES, enter delivery address below:</p> <p><b>RECEIVED</b> FEB 21 2017 USPTO MAIL CENTER</p> <p>3. Service Type  <input checked="" type="checkbox"/> Certified Mail® <input type="checkbox"/> Priority Mail Express™  <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise  <input type="checkbox"/> Insured Mail <input type="checkbox"/> Collect on Delivery</p>
<p>2. Article Number (Transfer from) 7016 0910 0000 0650 6443</p>	<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>
<p>PB Form 3811, July 2013 Domestic Return Receipt</p>	

Figure 7, Exhibit "C" - The US Postal return card demonstrates that the materials were received on February 21, 2017.

116. The Communication heralds that the submitted documents and Exhibits have again been removed/sequestered/sent-elsewhere/spoliated/etc. This has the appearance of impropriety.

## UNDISPUTED FACT: The Forwarding Fee WAS Paid and the Check Cashed by EFT

### Factual False Statement #2:

117. Said Communication falsely states:

*" (d) I:81 other: Appeal Forwarding fee not paid, see 37 CFR 41.20(b) (4) and CFR 41.45 (b) Also see 1401 OG184 04/08/14."*

This is a factually false statement and innuendo. The Forwarding Fee WAS paid and the check cashed. As the Swartz Declaration stated

**"I received a Communication dated March 10, 2017. It states the Transfer fee was not paid. This is absolutely not true. My check was received on or about February 21, 2017, and then cashed by electronic funds transfer (EFT) on March 13, 2017."**

The facts, and bank statement show that, in this case, the USPTO has received, and cashed a check from the Appellant. This makes obvious that the Communications’ allegation that “*the fee was not paid*” is a factually false statement.

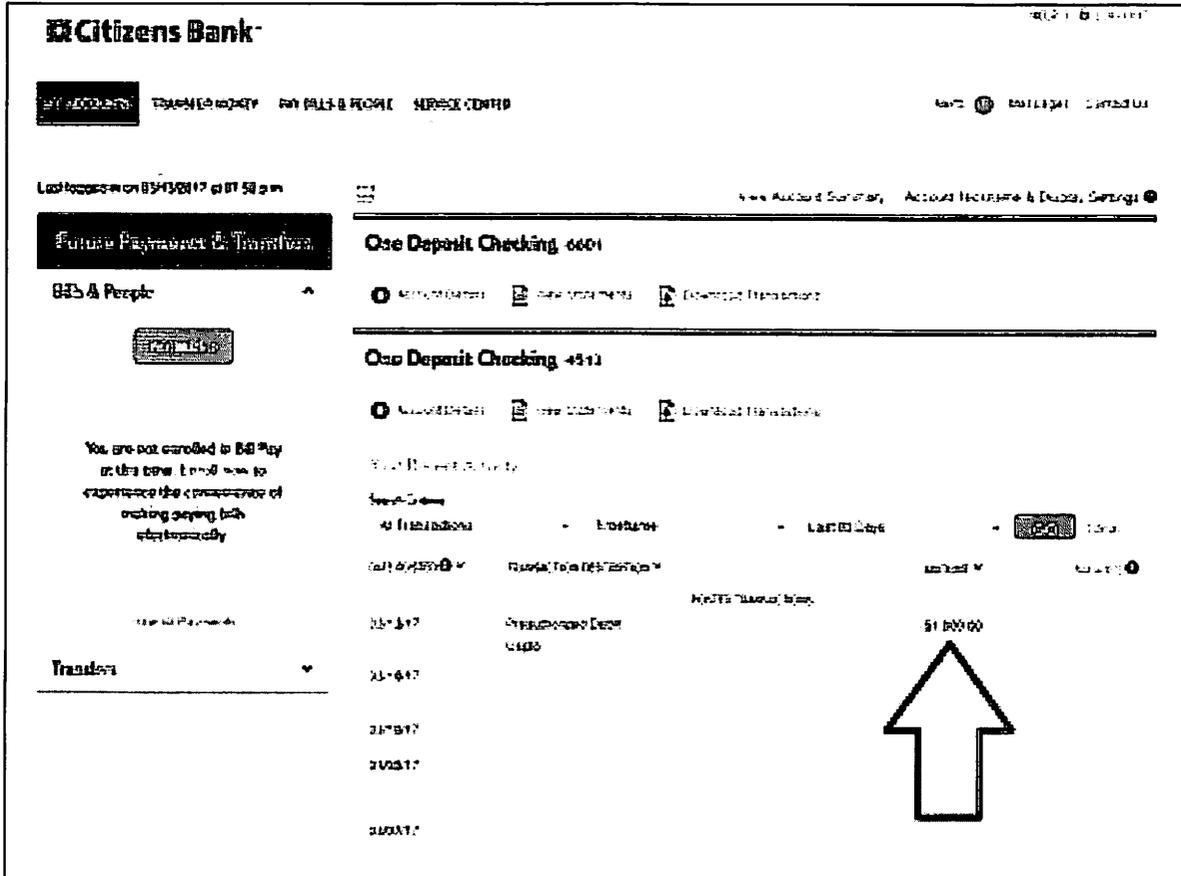


Figure 8 – Bank Statement demonstrating an EFT was made of the received check. Someone in the US Patent Office transferred money from the Appellant after the check was received Feb. 21, 2017 (arrow), and did not give him credit.

118. In summary, the Communication ignored the facts of the case. This has the appearance of impropriety.

The Communication dated March 10, 2017 states the Transfer fee was not paid. This is absolutely not true. Plaintiff’s check was received on or about February 21, 2017, and then cashed by electronic funds transfer (EFT) on March 13, 2017. Falsely claiming that Plaintiff did pay the Transfer fee has the appearance of impropriety.

## **UNDISPUTED FACT: Defendant Has Systematically Ignored the Content of the Plaintiff's Applications**

119. The memorandum states that the present patent applications seek claims directed to cold fusion, but in fact they seek patents based on what was actually laid out in the original specifications. The Office ignored the original specification, the figures, and even the words of the original specifications, lying and claiming they only involved "cold fusion" and therefore had to be ridiculed and ignored. This is an attempt to circumvent the US Constitution and the will of the US Congress [S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952); H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952)].

120. The USPTO ignores the actual inventions and falsely purports that they are all "cold fusion" and F+P (Drs. Fleischman and Pons) invented them 28 years ago and therefore they have been disproven. These inventions are not what was described as "cold fusion" and they art they submit has not refuted any of the Plaintiff's inventions.

In the Declaration of Dr. Swartz, he states:

**“ The Office ignored the original specifications, the figures, and even the words of the original specifications, falsely claiming they only involved “cold fusion” which they then ridiculed and ignored. The USPTO has absolutely NO foundation to support their mistaken opinions about my technologies.”**

The proof includes the following, each of which have been ignored by the Office, and now in the Memorandum to Dismiss.:

In another case, application '258, the Plaintiff's cathode vibrator to measure loading?

The USPTO says it is F+P.

The Plaintiff's generation of electricity? The USPTO ignores the actual invention and says it is "cold fusion" and F+P (Drs. Fleischman and Pons) invented it 28 years ago.

The Plaintiff's system to assemble multiple LANR systems? The USPTO ignores the actual invention and says it is "cold fusion" and F+P (Drs. Fleischman and Pons) invented it 28 years ago.

The Plaintiff's use of increasing temperature to trigger reactions? The USPTO ignores the actual invention and says it is "cold fusion" and F+P (Drs. Fleischman and Pons) invented it 28 years ago.

The Plaintiff's optimal operating points? The USPTO ignores the actual invention and says it is "cold fusion" and F+P (Drs. Fleischman and Pons) invented it 28 years ago.

The Plaintiff's system to increase tardive heat? The USPTO ignores the actual invention and says it is "cold fusion" and F+P (Drs. Fleischman and Pons) invented it 28 years ago.

The Plaintiff's unique multiring calorimeter? The USPTO ignores the actual invention and says it is "cold fusion" and F+P (Drs. Fleischman and Pons) invented it 28 years ago.

The Plaintiff's use of incident microwave radiation? The USPTO ignores the actual invention and says it is "cold fusion" and F+P (Drs. Fleischman and Pons) invented it 28 years ago.

The Plaintiff's use of nickel metamaterials with ultrapure water? The USPTO ignores the actual invention and says it is "cold fusion" and F+P (Drs. Fleischman and Pons) invented it 28 years ago.

121. No matter what the Plaintiff's invention, there is one response from the USPTO. The USPTO ignores the actual invention and says it is "cold fusion" and F+P (Drs. Fleischman and Pons) invented it 28 years ago. Truly, that is cloth cut of other art than the above-entitled application.

122. FACT: Attention is directed to the fact that given that the Plaintiff, unlike F+P, has

demonstrated the above-entitled application at MIT in open demonstrations, and elsewhere, heralds that there should be allowance. If something is successfully demonstrated twice, over months, with hundreds of visiting scientists, students and others followed by positive investigative write-ups in the press both in print and online, then it is both operable and has utility.

123. FACT: The Office's segue to less relevant art is meant to confuse the issue, and end the matter without examination of the above-entitled invention. Such hand waving to other much less relevant art, and in the light of obstruction of justice and destroyed Evidence, is not a fair or proper rebuttal. The Declaration of Dr. Brian Ahern states,

**“I have never experienced such a response from any Examiner before, like I have from Ricardo Palabrica. His response was inappropriate for a Patent Examiner. The comments involve attempting to change an invention by overstepping his directives and acting as a 'protector' of scientific knowledge. ... Dr. Mitchell Swartz appears to be laboring under the same misuse of authority.”**

124. FACT: It is an uncontested fact that ONLY the claimed invention should be the focus of the Office review. Enablement must be judged on this invention's original specification and claims. The Office disingenuously LEADS AWAY from the real issues and matters and structures THIS INVENTION. This has the appearance of impropriety.

125. FACT: The Office's repeated, unsubstantiated claim that the (nay, each) invention lacks operability is full of impropriety. And so, for two decades, no matter which of the Plaintiff's invention's in this field has been "examined", there has been essentially one, and only one, response from the USPTO. They say "It is F+P." And therefore does not exist. And therefore has no utility. Ignored is the obvious discrimination and corrupt

false statements that must be made to continue this under color of Law. At the end of the day, THIS patent application is not about Fleischman and Pons but about the Plaintiff's invention and his discovery(ies).

### **UNDISPUTED FACT: Defendant Has Made False Statements About Utility**

126. It is wrongful that the Defendant has made false statements on federal documents sent through the US mail in yet another egregious violation of 18 U.S.C.§1001. The Defendant has not been truthful about the utility of this technology, despite Evidence to the contrary.

As the Declaration of Dr. Frank Gordon states,

**“Access to sources of energy by the U.S. military at the location where it is needed is both a costly and tactical necessity. It has been widely reported that the U.S. Marines carry more weight in batteries for their equipment than ammunition.”**

The Declaration of Lt. Colonel Robert Smith states,

**“It is my professional as well as personal opinion that this field is real in spite of opinion of the Patent Office (USPTO).”**

### **UNDISPUTED FACT: Defendant Has Falsely Purported there have been No Responses by Plaintiff**

127. It is egregious that the Defendant has made false statements on federal documents sent through the US mail in yet another violation of 18 U.S.C.§1001. The Defendant has not been truthful about receipt of the Evidence. To obstruct justice, the Defendant has demeaned the sworn Affiants, but took no Oaths, themselves. As the Declaration of Gayle Verner states,\

*“The Defendants have a long history of mischaracterizing facts. Their flurry of false allegations are inconsistent and created to make it all difficult to keep track of.*

## **UNDISPUTED FACT: The Defendant Has Made Systematic False Statements About Delivery of the Evidence**

128. It is with impropriety that Exhibits can be "lost" and purported as unreadable, after being received as the USPTO's mail room's stamp indicates.

The Declaration of Gayle Verner states,

**“The behavior of some of these defendants, such as Sharon Davis at the USPTO, cries out for correction by the federal court, especially since the USPTO’s own judicial/administrative system has failed to do its job with respect to this matter.”**

**“One conceivable reason for the Defendants to fabricate and switch the exact documents involved is to avoid any real examination and response to the submitted Evidence. A second possible reason is that to do so would also add credence to Dr. Swartz’s position. It is, therefore, probable that this mischievous behavior by some at the USPTO was created for the sole purpose of harassing him, and thereby, discouraging the continuation of his patent application process.”**

129. It is egregious that the Defendant has made false statements on federal documents sent through the US mail in violation of 18 U.S.C. §1001. The Defendant has not been truthful about the technology or the Evidence received.

## **UNDISPUTED FACT: Defendant Has Falsely Purported there have been No Responses by Plaintiff**

130. In many of the cases before the Board, the Defendant has falsely alleged much is ‘*ex parte*’ despite multiple recorded responses by the Plaintiff. This is consistent with the fact that the Defendant has also sequestered documents and Appeal Briefs.

In at least one of the cases, it has now been determined that documents were removed and a ruling sent from the Board to the Examiner (a copy was never previously sent to the Plaintiff, but a sympathetic person at the USPTO sent it). It Ordered one of the Defendant's agents to stop removing evidence.

### **UNDISPUTED FACT: Defendant Has Systematically Denied this Entire Field**

131. The Office has planned a priori to not grant "the right to exclude others from making, using, or selling the invention throughout the United States," for a period of 17 years [35 U.S.C. 154].

Exhibits 53 through 56 demonstrate corrupt actions by the Defendant.

Attention is directed to the US Patent Office's own records, uncovered by Honorable Judge Moore, confer "IN THE MATTER OF ARBITRATION Between Patent Office Professional Association FMCS Case No. 00-01666, US Department of Commerce, Patent and Trademark Office (2005). Robert T. Moore, Arbitrator, US Department of Commerce, Patent and Trademark Office, stated,

**"Seemingly lost on those with control over slicing the government pie who are persuaded by the relentless drumbeat of the Parks and Zimmermans, is that those questing for "free energy," whether through cold fusion or by way of some other "emerging technology," may be similar to the alchemists of centuries back who never turned base metals into gold, but were the forerunners of modern chemistry, got the Periodic Table of Elements off to a start, and among all things, discovered how to duplicate Asian porcelain which at the time was worth more than its weight in gold. So too, those in pursuit of "free energy" could well spinoff useful advances in knowledge while failing to achieve their "holy grail. ... I was struck by the discomfort of Mr. Godici as he struggled to explain why the blanket exclusion of cold fusion remains in effect when during the intervening 16 years since its adoption, certainly some better understandings and approaches to cold fusion and its related technologies must have occurred which, ordinarily and**

but for the ban, would meet the new and useful criteria for a patent, or constitute what I'll call, a "non-obvious improvement of existing technology." ... "None of Mr. Godici's answers was totally satisfactory, and the urge, not well restrained, to say, if not scream: Hold it a minute! Isn't time to go back to the earlier days of the PTO when inventors had to produce working models of their devices?"

"(There is a) prevailing policy of the PTO. Currently, patent applications for alternative or non-conventional sources of nuclear fusion energy, including cold fusion, are routed to (Examiner's Group Art). This routing has been going on for more than 16 years pursuant to a June 5, 1989 memo to all Group Directors with the subject; Cold Fusion Applications. It reads: 'Although the media attention relating to cold fusion has diminished, we are just now beginning to see a large number of applications relating to this subject. Although we are attempting to identify all of these applications in the pre-examination screening process, there is the possibility that a few applications may slip through without being identified. Please have your examiners be on the look out for any application that may relate to cold fusion.

.... If one of your examiners should receive an application related to cold fusion, he or she should check to make sure the words "COLD FUSION" are stamped on the file wrapper. If not, the application should be referred to Licensing and Review [ ] for marking. Also, any action on one of these applications should be routed through the Group 220 Director's Office and the Office of the Assistant Commissioner for Patents prior to mailing."

"The Agency's witnesses avoided directly answering the question of what explicit instructions were given Mr. Behrend and other examiners in the "fusion" group on how to handle applications for cold fusion patents. However, their testimony and demeanor when questioned were clear enough. Figuratively speaking, (they have) a "rejected" stamp he wields on patent applications which claim to achieve cold fusion. That is, whether well fPounded or not, the PTO has a bias against the concept and theories of cold fusion. .... the PTO considers cold fusion to be "inoperable technology."

[IN THE MATTER OF ARBITRATION Between Patent Office Professional Association FMCS Case No. 00-01666, 2005, Robert T. Moore, Arbitrator, US Department of Commerce, Patent and Trademark Office, Decision AND AWARD ON THE MERITS]

132. Confirming this, the SAWS Memorandum, dated March 27, 2006, confirms the conspiracy against the America Constitution, against the will of the American Congress, and formed secretly by some in the US Patent Office to absolutely positively insure that the American people never maximize their likelihood of energy production and security.

133. The SAWS memo proves that a policy of 'flagging' exists. The discrimination and abuse of the Applicant, now Appellant, is a result of this illegal, sadistic plan which continued after the 911 Attacks against the United States of America, even when energy was in-volved, and even after the Board of Patent Appeal made this US patent application (the above-entitled action) "SPECIAL". The Applicant was never told, and therefore this has the appearance of impropriety.

**UNDISPUTED FACT: Defendant Dismisses ALL of Plaintiff's Patent Applications as 'Cold Fusion'**

134. First, the memorandum purports again that 'cold fusion' is involved but in fact these are energy applications which are different from classic 'cold fusion' and which have great operability and utility and have been openly demonstrated. They have also been published. Therefore, the endless segue made repeatedly to cold fusion is improper, and a segue from the original intent of the Complaint.

135. That said, second, there are four important things for this Court to recognize when the USPTO's attorneys attempt to label ALL of the Plaintiff's patent applications as 'cold fusion'. It is discriminatory, it is inappropriate, it is made to deny civil rights, and it is used to coverup highly improper actions by the USPTO that have already been exposed, at least partially.

First, to the contrary of this innuendo by the Defendant's counsel, the Plaintiff's applications involve the production of, measurement, and monitoring of, heat - which can be used for many purposes, although in the end, it is irrelevant what it is used for. Heating can be used to stimulate many reactions by energy activation (usually an increase ever 10 degrees Centigrade required for a doubling of the rate) and by increasing diffusion or flow rate (the former has an increase of about 30 degrees C required for a doubling).

136. Second, in *In re Swartz*, Plaintiff's patents application involved a means to measure loading (H in a metal) which the USPTO falsely called "cold fusion" to dismiss it, and later another invention involved a means to diagnostically measure the heat produced, and this too the USPTO also falsely called "cold fusion". No matter the spectroscopy, no matter the diagnostic, no matter the metamaterial, and no matter the scientific or engineering advance, the USPTO has done NOTHING -- except remove documents, failure to address, timely submitted as Evidence disputing the opinion of the USPTO. All the evidence has been "deep sixed". Where is the justice of that? Why does the counsel of Defendant not address this abuse of process?

137. Third, as "proof" that it cannot exist, the Defendant's Memorandum and the Defendant's lawyers cite baldness and cancer treatment. This is reprehensible because certain cancers are curable as are some types of baldness. This is another discriminatory and unnecessary twisted ridicule via improper inference, name calling, and innuendo in place for factually determining the truth.

**UNDISPUTED FACT: Cancer is Successfully Treatable**

138. The Plaintiff of this action, Dr. Mitchell R. Swartz, has four degrees in electrical engineering from the Massachusetts Institute of Technology, including an Doctorate in Science (ScD) and an MD from Harvard. His background includes biomedical engineering, the interaction of radiation and materials, and imaging systems such pattern recognition, positron emission scanning and imaging processing. He studied water and ice at MIT with the late Arthur von Hippel from 1968 to 1971, and then studied water in living systems at Massachusetts General Hospital (MGH) in the Departments of Anaesthesia and Nuclear Physics where he conducted the first positron emission tomography (PET) on patients afflicted with cancer. He served a surgical internship at New England Deaconess and at MGH, and followed that with a residency at MGH, becoming Board Certified in Therapeutic Radiology.

139. Many cancers have long been curable, and it began with radium a year after it was discovered, and engineering with 220v power supplies used against Hodgkin's disease and then the use of van de Grafs against deeper tumors (before Co60 became available). Plaintiff used MV electron at MIT, and at MGH used linacs (10 to 25 MeV) and Co60, and at Harvard used the cyclotron (~ca. 100 MeV protons) with its superb Bragg peak to treat cancer. Plaintiff was among the first to treat patients with proton beam, intraoperative radiotherapy, and initiated electrophototherapy.

140. Exhibit 57 discusses the first time a medical patient, as described therein, ever left the hospital to survive for a short time with her affliction. Everyone said it could not happen. It did - and the Plaintiff wrote it up.

Exhibit 58 was the first time a mammal with carcinoma was imaged by positron emission

tomography. Everyone said it could not happen because it would take capturing 511 keV photons and measuring time of flight. It did happen - and the Plaintiff wrote it up. It is the same for this technology. The USPTO says it does not exist, and yet it does.

Therefore, this factually false statement is also a directed smear, reminiscent of racism and more.

**UNDISPUTED FACT: Baldness is also Successfully Treatable**

141. In this case, the subject has drawn a reaction historically similar to treating baldness which was once, many years ago, considered by the Office to also to be an inherently unbelievable undertaking. See *In re Ferens*, 417 F.2d 1072, 1074, 163 USPQ 609, 611 (CCPA 1969); *In re Oberwener*, 115 F.2d 826, 829, 47 USPQ 455, 458 (CCPA 1940). Since then, treatments for baldness have gained acceptance with minoxidil and other materials now recognized as effective in treating baldness. The Office must eventually admit that, as in baldness control, the field discussed by the Office where the present invention can be used, does exist. Furthermore, corroborating that fact, the PTO has granted patents in this field, just as they are granted in a number of countries around the world.

**UNDISPUTED FACT: Reproducibility is another avoidance**

142. The Office ignores the peer reviewed published scientific papers associated with the above-entitled inventions, and the actual original specification's words and figures. By substituting its curse word: 'cold fusion', the USPTO Memorandum impugns the Plaintiff, making an error of logic. The Office purports non-"reproducibility" of

these phenomena, as a "reason" for rejection. However, there are several salient errors with this logic. The Office's arguments are clouded by the two different meanings of the word(s) "(not) reproducible". In the parlance of the Office, when referring to "cold fusion", the word(s) "(not) reproducible" are a euphemism for "wrong". When used more generally, however, these words can even apply to scientific (and medical) fields which actually do engender respect and/or validity, and where "reproducible" only refers to the number of samples in a cohort developing the desired effect. The restriction that the Office creates using the word "reproducible" in the present case would obviously create unreasonable hurdles for inventors in such fields as cancer treatment, meteorology, or the sciences of earthquakes, lightning, sun-spots, or solar storms.

143. Second, despite the erroneous logic of the Office, radiation therapy accounts for the cure of more than 60+% of adults afflicted with solid tumors composed of malignant disease, and obtunds the pain in 80% (or more) of patients treated palliatively, there is almost always a clinical effectiveness. Yet it is not possible to know in advance which patients are going to be cured nor is it necessarily reproducible in any single patient. Thus there is clinical proof and utility, despite the lack of reproducibility in any single individual or cohort of patients. Thus, the claim that "reproducibility" must necessarily be absolute for there to be "utility" is also simply not true.

Would the Office withhold curative treatment of a patient --of their own family member-- because such therapy is not "reproducible"? Of course not.

144. In summary, if the court throws out alleged 'cold fusion' patent applications because there is not 100% reproducibility, then probably all of the pharmaceutical and biomedical device patents should, for similar reasons, also be voided *nunc pro tunc*.

There is reputable evidence of record to support the claim that the present invention works, and that it has resulted in reproducible systems which have led to multiple open demonstrations at MIT.

Furthermore, attention is directed to the fact that the Plaintiff substantially solved the reproducibility issue. The Office has not given a reason why the Plaintiff should be abused and denied a patent solely for being ahead of his time.

145. Therefore no basis exists for a rejection under either section 112, 1 for lack of enablement as a result of "the specification's ... failure to disclose adequately to one ordinarily skilled-in-the-art 'how to use' the invention without undue experimentation," or section 101 for lack of utility "when there is a complete absence of data supporting the statements which set forth the desired results of the claimed invention." [Envirotech Corp. v. Al George, Inc., 730 F.2d 753, 762, 221 USPQ 473, 480 (Fed. Cir. 1984); also In re Brana, 51 F.3d 1560, 1564 n.12, 34 USPQ2d 1436, 1439 n.12 (Fed. Cir. 1995)].

## **REMEDY BY FEDERAL LAW**

146. Rule 11 Penalizes Parties and Counsel Who Advance Factual Contentions That Have No Evidentiary Support Formed Without Reasonable Inquiry. Rule 11 (b) of the Federal Rules of Civil Procedure states, in pertinent part, that:

**By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances.**

Rule 11 sanctions are proper when a party files a pleading that has no reasonable factual basis or a party files a pleading in bad faith for an improper purpose [Worldwide Primates, 87 F.3d at 1254; Pelletier, 921 F.2d at 1514; Universal Communications, 2005 WL 3956648 at \*1]. Both prongs are met here, as the Defendant's assertions have no reasonable factual basis and were clearly filed for an improper purpose as discussed more fully below. to remove the Plaintiff's only remedy and to obstruct justice.

147. Rule 11 requires district courts to sanction attorneys and the parties they represent when they are used to prosecute baseless claims, perjury, and false factual statements [e.g. Pelletier v. Zweifel, 921 F.2d 1465, 1469 (11th Cir. 1991)].

148. On information and belief, it is reasonable to conclude that Defendant's lawyers used factually false statements for improper purpose, to deny Plaintiff his civil rights. In this case the perjury has also caused unnecessary delay, to obstruct justice, and to deny due process and right to an impartial tribunal [28 U.S. Code Section 144, Mayberry v. Penna.; Duncan v. Louisiana]; and has been planned to deliver irreversible harm and loss of civil rights to the Plaintiff under color of law.

149. On information and belief, Defendants's lawyers have deliberately used factually false statements, and evasion to hurt the Plaintiff and to deny civil rights with malice [Mullins v. Brando, 13 Cal. App. 3d 409 (1970)]. Therefore, Plaintiff is entitled to special damages with the sanctions.

150. This perjury by Declaration with a Memorandum with factually false statements is itself a new civil rights violations against the Plaintiff [Gamez v. Toledo, 100 S. Ct. 1920] under color of Law, and comes to the court with strong-arm tactics [\*\*\*] and an indelible violation of 18 U.S.C.§1001.

151. This court has jurisdiction and a legal right and a legal duty to stop Defendant and their lawyers [Cheney v. United States, Dist. Court DC (03-475) 542 US 367 (2004) 334 F.3d 1096)].

## LEGAL STANDARD

### ***pro se* Plaintiff's Complaint Is Consistent with Rule 8**

152. The Defendant's Memorandum states that the Plaintiffs did not state a claim upon which relief may be granted. However, this is not true. Federal Rule of Civil Procedure 8(a) requires a Plaintiff to plead "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). The Plaintiff has done exactly that. The relief can be granted by responding as the Law requires and defines or by Ordering the Office to correctly log, and discuss, the evidence which was in the record and which was neither logged nor commented upon. Therefore, Plaintiff has done enough to satisfy the Rule 8(a) standard.

### ***pro se* Plaintiff's Complaint Is Consistent with Rule 9**

153. Rule 9(b) is satisfied if the complaint sets forth: "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the Defendant obtained as a consequence of the fraud." *Ziamba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (quoting *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, 1371 (11th Cir. 1997)).

154. In this case, the Plaintiff, consistent with Rule 9(b) of the Federal Rules of Civil Procedure, took pains to carefully demonstrate indelibly the omissions and wrongful actions. In this case, the Complaint describes the spoliation and sequestration of Evidence by the Defendant(s) and DOES state the facts with particularity – and now adds new Evidence pursuant to the 35 USC 145.

155. Rule 9(b) is also satisfied given day-to-day interrelationship between multiple agents of the Defendant as related to allegations [Associated Indus. Ins. Co. v. Advanced Mgmt. Servs., Inc., 2014 WL 1237685, at \*7 (S.D. Fla. Mar. 26, 2014)]. Therefore, Plaintiff has done enough to satisfy the Rule 9 standard.

### **Plaintiff's Complaint Is Consistent with Rule 12(b)(6) Plaintiff's Action Exceeds the Standards Under Iqbal**

156. A motion to dismiss under Rule 12(b)(6) [Fed. R. Civ. P. 12(b)(6); Bell Atlantic Corp v. Twombly, 550 U.S. 540, 570 (2007)] tests the legal sufficiency of a complaint, requiring a court to construe the complaint liberally, assume all facts as true, and draw all reasonable inferences in favor of the Plaintiff [Tellabs, Inc. v. Makor Issues and Rights, Ltd, 551 U.S. 308, 322 (2007)].

**"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"**

[Ashcroft v. Iqbal, 556 U.S. 662,678 (2009)  
(quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544,570 (2007)). ]

157. The plaintiff has supported the rule 12B6 standard because there are sufficient facts to make a claim which is more than plausible on its face, and for which there is a remedy. In fact sterling evidence is presented in the exhibits which show the ignored evidence timely-submitted to the record, and it also includes additional evidence.

**158. In this case, the Exhibits show the Evidence WAS RECEIVED but the receipt was falsely denied and/or ignored repeatedly.** In this case, there were detailed factual allegations, and systematic wrongful behavior, followed by (after the Complaint was received by the Defendant) more exculpatory behavior by the Defendant. Attention is directed to the fact that the claims are plausible on their face, made indelible by Exhibits therein, making the Complaint's content having more than sufficient facts for a court to draw an inference that the defendant is liable for the alleged misconduct.

159. The Plaintiff has set forth detailed allegations that fulfill each and every pleading requirement under 9(b) as suggested by the Seventh Circuit, answering the "who, what, when, where, and how" of the fraud [Borsellino v. Goldman Sachs Group, Inc., 477 F.3d 502,507 (7th Cir. 2007)]. The following, below, illustrates how each of these questions are addressed in the Complaint.

**What?** The Defendant has demonstrated breach of duty, civil rights violations against the Plaintiff under color of Law, negligence, strong-arm tactics, fraud, civil conspiracy, and other possible violations. In addition, in fact the plaintiff has thoroughly demonstrated the abrogation of civil rights, repeatedly by the USPTO.

**How?** Defendant failed to properly log in, and then to properly docket, review, and address repeatedly submitted Evidence from the Defense Intelligence Agency (DIA),

Defense Threat Reduction Agency (DTRA), the American Nuclear Society, and Current Science magazine. Instead of correcting their error, the Defendant has continued to violate civil rights and other federal and state law as they have used false statements on federal documents and other exculpatory behavior.

**Who?** the US Patent and Trademark Office Defendant, and agents Robert W. Bahr, Defendant Jack Keith, Ricardo J. Palabrica, Michelle Lee, Johannes P. Mondt, Marshall P. O'Connor, Sharon Davis, And Kathy Matecki.

**When?** Beginning on or about April 1989 to the present time; continuing after the filing of the above-entitled Complaint in a series of retaliatory exculpatory actions.

These allegations establish the essential elements for each count in the Complaint.

The Plaintiff's Complaint Is Consistent with Rule 12 of the Federal Rules of Civil Procedure. The above-entitled Complaint is consistent with the May 2009 Supreme Court decision in *Ashcroft v. Iqbal*, *Bell Atlantic Corp. v. Twombly*, and therefore *Fed R Civ. P.8*.

### **Additional Reasons to Deny Defendant's 'Motion to Dismiss' Absence of a Response to the Complaint**

160. Attention is directed to the fact that the Defendant's Memorandum does not deny, or answer, a single claim or averment from the Complaint under the pains and penalties of perjury. In this case, the Defendant has not denied a single Averment in the original Complaint. The Evidence sequestered from the DIA, DTRA, etc. is not even mentioned, thus essentially assenting that the claims are accurate and correct. Therefore, the Defendant's Memorandum actually supports the Plaintiff's Motion for Default.

**UNDISPUTED FACT: Defendant Ignored Obligation**

161. For the record, attention is again directed to the fact that the Plaintiff repeatedly did undertake the full burden of coming forward with his evidence as required [In re Oetiker, 977 F.2d at 1445, 24 USPQ2d at 1444]. The Applicant has also provided Evidence in the form of publications that rebut the Office. This includes open demonstrations of the technology that were held at the Massachusetts Institute of Technology, and Applicant's oral reports to the US Navy and DTRA and other agencies, whose memoranda and documentation has previously been shared with the Office. They have odiously been ignored by the Defendants.

162. By ignoring Evidence, the Defendants continued the appearance of impropriety [In re Wands, 858 F.2d 731, 737, 8 USPQ2d 1400, 1404 (Fed. Cir. 1988)]. In fact, the open demonstrations of the Plaintiff's technology at MIT, and his submitted peer-reviewed articles and Declarations are MORE than sufficient [In re Brana, 51 F.3d at 1566, 34 USPQ2d at 1441] to meet the

**"burden shift ... to provide rebuttal evidence sufficient to convince such a person of the invention's asserted utility".**

**UNDISPUTED FACT: Defendant Ignored Notification**

163. Despite what the Defendant's Memorandum falsely purports, the Plaintiff gave multiple warnings ("Notices") of the upcoming tort action to each of the parties involved. This was done BOTH by Petition (17 times in 2015 through 2016 alone) and by Notice (9 times in May 2016 alone).

### **UNDISPUTED FACT: Factually False Statements in Defendant's Memorandum**

164. The repeated proven factually false statements and perjury by the Defendant (and counsel) demonstrates the entire Memorandum is frivolous and should be struck down and Sanctions considered. The Defendant's "MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS" is an over-reach using repeated mistaken, not fully truthful, and false statements. Simply put, it is over-reaching and unreasonable because it would obstruct justice [Ares-Serono, Inc. v. Organon Intern. B.V., 151 F.R.D. 215 (D.Mass. 1993)]. The Defendants are not allowed to make conclusory and false allegations as they do in the Memorandum [Garcia v. Peeples, 734 S.W.2d 343, 345 (Tex. 1987); Independent Insulating Glass/Southwest, Inc. v. Street, 722 S.W.2d 798, 802 (Tex. App. Fort Worth 1987); IN THE SUPREME COURT OF TEXAS No. 97-1171; In re Alford Chevrolet-Geo, et al., Relators]. The Memorandum's mischaracterizations of facts over and over are simply a betrayal of Law and Trust.

### **The Court should Consider the Impact on Due Process**

165. In fact, the Court also has substantial interest in pre-trial discovery to facilitate the search for truth and promote justice (Hickman v. Taylor (1947) 329 U.S. 495, 507). Denial of evidence is just another denial of a fair trial by the Defendants. Plaintiff has a right to examine the appropriate relevant requested documents because they are material and will help prove Plaintiff's case.

## **The Court should Consider the Impact on Justice**

166. The court should ask: Who is hurt if this wrongful 'Motion to Dismiss' goes forward and is allowed to perpetuate the continued cover-up and wrongful gouts of exculpatory behavior?

The Plaintiff will suffer immediate, continuous and irreparable injury.

If that is not enough, America's military in the future will lose vital technology requisite to protect stealth submarines and moving Marines, and worldwide people will lose cheaper clear water and energy.

Who is hurt if this wrongful 'Motion to Dismiss' is denied? No one.

Instead, the attempts to deny justice, using unethical, egregious, and unreasonable practices, and to deny civil rights, including Constitutionally protected rights, will cease [Braaten v. Deere & Co., Inc., 1997 ND 202, ¶9, 569 N.W.2d 563; North Dakota Supreme Court Opinions, Nastrom v. Nastrom, 1998 ND 142, 581 N.W.2d 919 Filed July 16, 1998].

## **CONCLUSION**

167. The above-entitled complaint has alleged sufficient facts, and precise specific allegations, so that the Court should not dismiss any claims.

168. Most importantly, this court has jurisdiction over the Defendant because the US Board of Patent Appeals and Interferences did say so when they declared "**procedural misconduct by the Examiner in this or any other case (35 U.S.C. § 6(b) ( is not reviewable)**". The Plaintiff's ONLY avenue for justice with respect to these matters is in THIS court.

169. Nothing in the United States Constitution, or any law or directive from Congress authorizes the destruction, spoliation, sequestration, or destruction of Evidence involving that the DIA, DARPA, NASA, or DTRA.

170. In conclusion, most importantly, there are no grounds for dismissal under Rule 12(b)(6). The above-entitled Complaint particularly states facts that support each element of Plaintiff's claims and thus withstands the Defendants' Motion to Dismiss.

WHEREFORE, for the above reasons, and more, the Defendant's Motion to Dismiss should be denied by the Honorable court.

Respectfully submitted,



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Mitchell Swartz, ScD, MD, *pro se*

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**CERTIFICATE OF SERVICE**

Plaintiff certifies that a copy of the above has been delivered to Defendants this August 6, 2017 by First Class mail or FED-X, sent to United States Attorney, sent to Attorney Dana J. Boenta, US Attorney, U.S. Attorney's Office, 2100 Jamieson Avenue, Alexandria, Virginia 22314. *MS*