

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

**18-1122
Swartz v. PATO**

MITCHELL R. SWARTZ,
Plaintiff - Appellant

v.

UNITED STATES PATENT AND TRADEMARK OFFICE,
JOSEPH MATAL, Performing the Functions & Duties of Director of the US
Patent & Trademark Ofc,
Defendants – Appellees

[Appeal from the US District Court
for the Eastern District of Virginia
Alexandria Division No. 1:17-cv-482]

**OPENING BRIEF OF
PRO SE APPELLANT
(CORRECTED)**

Appellant Mitchell R. Swartz, ScD, MD, EE *pro se*



December 28, 2017
(corrected January 16, 2018)

(1) Certificate of Interest [Pursuant Rule 47.4]

Appellant, *pro se*, certifies the following:

1. The full name of every party or amicus represented by me is:

Mitchell R. Swartz, ScD, MD, EE, pro se

2. The name of the real party in interest represented by me is:

Mitchell R. Swartz, ScD, MD, EE, pro se

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are: NONE

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are: NONE

(2) Table of contents

(1) Certificate of Interest [Pursuant Rule 47.4]	i	
(2) Table of contents	ii	
(3) Table of authorities	iii	
(4) Statement of Related Cases (Fed Circuit Rule 47.5)	iv	
(5) Jurisdictional statement	1	
(6) Statement of the issues	1	
(7) Statement of the case	3	
(8) Statement of facts with references (Rule 28(e))	4	
(9) Summary of Pthe arguments - arguments under 35U.S.C. §112	17	
(10) Arguments by Issue	18	
(10) Arguments - 35 U.S.C. § 145 Claim (Count 1)	18	
35 U.S.C. § 145 Claims are Supported by The New Evidence	18	
35 U.S.C. § 145 are Supported by DIA, DTRA	19	
35 U.S.C. § 145 Claims are Supported by Scientific Articles	21	
35 U.S.C. § 145 Claims are Supported by Unaddressed Evidence	21	
(10) Arguments - Constitutional Claims (Counts 2 and 8)	22	
(10) Arguments –Other Claims	25	
(10) Arguments – Matters about which the Court is Mistaken	26	
The Court is Factually Wrong about the Inventions	26	
The Court is Mistaken about the Existence of a Scientific Field	30	
The Court Misapprehends Appellant's Response as Applicant	31	
The Court is Wrong about What Plaintiff Alleged re:Operability	32	
The Court is Factually Wrong about the Content of Previous cases	33	
Has the Court Erred by Ignoring that '058 and '765 Were Misdescribed?	34	
The Court is Factually Wrong about '258 to Measure Loading	34	
The Court is Partially Wrong about this case re: Collateral estoppel	36	
The Court Leaves Factually False Statements in Legal Record	37	
The Court is Factually Wrong about Administrative Notices Given	40	
The Court Misapplies the Federal Tort Claims Act ("FTCA")	41	
Has the Court Erred by Ignoring the Plaintiff's Compliance with the PTAB?	41	
Has the Court Erred by Ignoring the Defendant's Exculpatory Behavior?	42	
(11) Short conclusion stating the precise relief sought	43	

(12) Addendum -	44	
01-482-Judgment_unsigned	44	
02-482-Order Aug22	45	
03-482_Order-Sept7_2017	46	
04-482-Order Aug17	49	
05-Memorandum - Aug 22	52	
(13) Certificate of Service (Rule 25 (d))	68	
(14) Certificate of compliance (Rule 32 (a) 7)	68	
(15) Certificate of Mailing	68	
(16) Contents of Appendix	69-70	

(3) Table of authorities

	Page(s)
28 U.S.C. §144	6, 14
28 U.S.C. § 2675(a)	25
28 U.S.C. S 2679(b)(2)(A).	25
35 U.S.C. §145 Civil action to obtain patent	1,2,4,10,11,19-21
35 U.S.C. §146, §183and §306.	2, 33
Article I	2, 22
Article III	2
Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)	25, 26
Braaten v. Deere & Co., Inc., 1997 ND 202, ¶9, 569 N.W.2d 563	45, 46
Cheney v. United States, Dist. Court DC (03-475) 542 US 367 (2004) 334 F.3d 1096).	26
Defense Analysis Report DIA-08-09U-003, November, 13 2009	10, 20
Diamond v. Chakrabarty; 447 U.S. 303, 309.	22
Duncan v. Louisiana	6, 14, 22
Ex parte Mitchell R. Swartz; Appeal 2009-001853, App. 10/646,143	14
Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680	41
Gonzalez v. United States, 284 F.3d 281,288 (1st Cir. 2002)	25
Hickman v. Taylor (1947) 329 U.S. 495, 507	44
In re Brana, 51 F.3d at 1566, 34 USPQ2d at 1441	12, 17
In re Hogan, 559 F.2d 595, 60S, 194 USPQ 527, 537 (CCPA 1977).	21
In re Oetiker, 977 F.2d at 1445, 24 USPQ2d at 1444.	8, 13, 18
In re Sherwood Inv. Overseas Ltd., Inc.	26
In re Swartz, 232 F.3d 862, 864 (2000)	28,30,35,39
Kappos v. Hyatt,	4, 17
Lewis v. Bours, 119 Wn.2d 667, 670, 1992.	13, 33
Mayberry v. Penna.	6, 14, 22
McNeil v. U.S., 508 U.S. 106, 113 (1993)	25
North Dakota Sup.Court Opinions, Nastrom v. Nastrom, 1998	45, 46
Roseboro v. Garrison, 528 F .2d 309 (4th Cir. 1975),	24
S. Rep. No. 1979, 82d Cong., 2d Sess., 5 (1952)	22, 30
H. R. Rep. No. 1923, 82d Cong., 2d Sess., 6 (1952)	22, 30

(4) Statement of Related Cases (Fed Circuit Rule 47.5)

There is not another appeal in or from the same proceeding in the lower court or body.

(5) Jurisdictional statement

This Appeal is from the Decision and Judgment of Swartz vs Matal [No. 1:17-cv-482] in the US District Court for the Eastern District of Virginia, Alexandria Division. On April 19, 2017, Plaintiff filed a civil action against the Director in the Eastern District of Virginia, in accordance with 35 U.S.C. §145 [Civil action to obtain patent] with an explicit demand for a jury Trial.

This followed two rejections from the Trial and Appeal Board [PTAB] for a series of inventions. The court was asked 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. This would also enable the entry of material which the Defendant did not log. This would also correct the previous corruption, and discrimination, and usurpation of civil rights. Several types of new Evidence were submitted [cf DIA/DTRA and Scientific Publication Appendices].

As an alternative remedy, the Plaintiff asked the court that the Defendant be Ordered to log the Evidence and to respond substantively to all the Evidence, both new and previously sequestered. There are several reasons that "materially" affect Appellant's "substantial rights". First, several relevant factual statements in the Opinion Order and Judgment are not accurate. Second, the court has misperceived evidence. Third, the court has applied the wrong standard.

This court has subject jurisdiction including pursuant to 35 U.S.C. § 145, 35 U.S.C. §146, §183, Articles I, III, and civil rights violations. Defendants have acted under color of Federal law [Osborn v. Bank of United States], satisfying the "arising under" jurisdictional authorization of Article III.

Venue is appropriate under of 35 U.S.C. §145, §146, §183and §306.

(6) Statement of the issues
Arguments Under U.S.C. § 145

Has the Court Erred by Ignoring The Requirement of 35 U.S.C. §145 Claims (Count 1) to Address the New Evidence?

Has the Court Erred by Ignoring the new Evidence [three types] Supporting Plaintiff's 35 U.S.C. §145 Claim (Count 1)?

Has the Court Erred by Ignoring, and not Substantively Discussing, Plaintiff's New Evidence of DIA and DTRA Reports Supporting Plaintiff's 35 U.S.C. §145 Claim (Count 1)?

Has the Court Erred by Ignoring Plaintiff's New Evidence of Scientific Articles Supporting Plaintiff's 35 U.S.C. §145 Claim (Count 1)?

Has the Court Erred by Ignoring Constitutional Claims?

Has the Court Erred by Ignoring Discrimination?

Has the Court Erred by Failing to Act *Sui Sponsis* Consistent with Law and Justice (5-7 9-12, and 14)?

Has the Court Erred by Ignoring that under U.S.C. §146, Pat. Appl. 12/932,058 and 09/1750,765 Were Misdescribed by Office and Evidence was not Logged)?

Has the Court Erred by Ignoring the Plaintiff's Compliance with the PTAB?

Has the Court Erred by Ignoring the Defendant's attempted Exculpatory Behavior?

(7) Statement (Gravamen) of the case

1. 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" [Justice Thomas, with Justices Sotomayor and Breyer concurring]. In this case, several types of solid new evidence were presented on the disputed question of fact.

2. The Plaintiff submitted more than ten patent applications to the Defendant involving clean energy production which is safe, with no carbon emissions, toxicity, or radioactivity. These inventions make, monitor, and measure, the generated heat quietly and efficiently, and to generate electricity [shown schematically in Figure 1 in the Patent Appendix (Appx53)]. Heat means ordinary thermal energy -- used to heat homes and purify water in industrial labs and hospitals, worldwide. The heat is made locally in a water tank, or using the dry variant on a circuit board, for use on a satellite, submarine, or

distributed homes and neighborhoods with no need for a central controlled distribution. Some of the Plaintiff's patent applications were made "SPECIAL" by the Board of Patent Appeal because of their importance.

3. The Examiner may reject an application, and if the Applicant responds the Defendant [USPTO] must properly log in and then address and substantively respond to, any such timely-submitted rebutting evidence. That did not happen in this case. Instead, there has been systematic improper inaction, and more than a dozen specific cases are cited in the Complaint.

4. There are several types of new evidence, and it has probative content which is a tsunami overcoming the Defendant's unsupported, invalid opinion [consistent with 35 USC§145]. At least eleven (11) types of Evidence were submitted which refute the Defendant's outdated biased and unfounded opinion; some evidence is 'old' and was not logged/ignored, some evidence is 'new', and some types have elements of both.

5. The evidence (old and new) includes peer-reviewed scientific articles, now unclassified reports from the Defense Intelligence Agency (DIA), the Defense Threat Reduction Agency (DTRA), US Navy, sworn Declarations of individuals with probative value, and scientific peer-reviewed publications written by the Plaintiff and other scientists, published in the American Nuclear Society's *Fusion Technology*, *Current Science*, and the

Journal of Condensed Matter Nuclear Science (JCMNS).

6. The Evidence indelibly shows that Plaintiff's facts were correct at the time of the filing and are correct now, whereas the Defendant's unsupported, non-factually-relevant opinion is not accurate -- and has been made only by ignoring the Evidence. The Defendant, and now the court, has never given a substantive response to, and dispute of, the Evidence.

7. Patentability is supposed to be determined on the totality of the record, by a preponderance of the Evidence with due consideration to persuasiveness of argument, and therefore the Appellant had a right to, and did, submit Evidence to strongly rebut the Defendant's mistaken, unsubstantiated opinion. In each case it was ignored, lost, and in some cases, later misdescribed.

8. The Defendant's systematic failure to enter and address timely-submitted Evidence, and Defendant's subsequent false statements have impacted negatively on the patentability of this, and other, series of inventions which have great importance for the energy production needs and security of the United States of America, and have denied the Plaintiff his right to an impartial tribunal [28 U.S. Code Section 144, *Mayberry v. Penna.*; *Duncan v. Louisiana*] for almost three decades.

9. Claim 1 under 35 USC§145 is supported, on operability and utility, by solid new Evidence overcoming the Office's continual, proven wrongful, unfounded opinions built upon factually false statements and mischaracterizations. This Appeal results because although 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" that did NOT happen. Instead, on 8/22/2017, the court dismissed the above action without even a single in-person Hearing, without permitting the Plaintiff to respond to the Defendant's Reply [Pleading 29] which was received by mail the very same day, and using 'rubber-stamping' of the Defendant's false statements made on federal documents.

(8) Statement of facts with references (Rule 28(e))

10. The Plaintiff is a US citizen, resident of Massachusetts, a physician, electrical engineer, inventor, and a former honorary Deputy Sheriff in Middlesex County, MA. As a successful inventor, he has been issued other Letters Patents [US 4,407,282, 4,402,318, 4,346,172, 4,305,390, 4,243,751, 4,181,128, and 4,139,348; UK 1,564,520 Canada 1,085,723, France 76-3576]. The Defendant is Director of the USPTO, designated specifically under 35 U.S.C. §145 and 35 U.S.C. §154.

11. Eight patent applications are the subject matter of the above-entitled Complaint, and they are discussed in more detail in the Patent Appendix. The Complaint (and Exhibits) does saliently show that in each case the original specification was ignored, along with submitted evidence (before Final).

12. The Plaintiff (then Applicant) responded in full supplying sterling and precise Evidence, including scientific publications, sworn Declarations 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].

13. Instead of an appropriate response, in every one of the present patent applications discussed here, the Defendants have used tactics such as non-docketing, late-docketing, mislabeling, sequestration or ignoring of Evidence, claiming fees were not paid, and the like.

14. The Defendant's three-decade old, long-rebutted opinion is demonstrated wrong by any, and all, of the following: i) the growing peer-reviewed scientific literature, ii) the sworn testimony of those skilled-in-the-art, iii) the open demonstrations given at MIT over months, iv) the indelible fact that the same thing which the Plaintiff's patent described and claimed was actually given to other applicants by USPTO at a later date, and v) that other patents,

in the very same field, that actually cite the Plaintiff's applications, were issued to others by the Defendant. These prove the Defendant's indelible bias and blatantly cruel discrimination.

15. This large body of Evidence demonstrates the Defendant's unsubstantiated, unfounded opinion is wrong. This is discussed in detail in the Complaint, the supporting pleadings, and in the attached Scientific Publication, DIA/DTRA, and Denial of Field Appendices [Appx71, Appx62, Appx79]. The submitted reports from DTRA, DARPA, US Navy, NASA all disagree with the Defendant. They have not been logged (confer Complaint) and have never been substantively addressed.

16. The submitted reports from DTRA, DIA, and other agencies report utility and operability of Appellant's technologies. These Reports positively discuss the Plaintiff's technologies, and the Defendants and Office cannot rebut them.

17. Scores of scientists and thousands of published papers [peer-reviewed and discussed on the Internet worldwide] disagree with the Defendant.

18. Such a cornucopia of rebutting evidence should never be overlooked, dismissed out of hand, hidden by false statements, or otherwise sequestered or "lost", as the Defendant has exhibited. Nor should evidence be misdescribed as it has been in the court's opinion which has 'rubberstamped'

the factually false statements of the Defendant's counsel.

19. One hypothesis is that the Evidence has been ignored and sequestered to rob the USA of clean energy and more efficient equipment to measure heat release and hydrogen loading, and systematically deny the Appellant his obvious Constitutional rights.

DIA REPORT PROVES §145 ENABLEMENT

20. The DIA (Defense Intelligence Agency) Report is a Defense Analysis Report [DIA-08-09U-003, November, 13 2009] which opposes the Defendant's outdated opinion as it headlines: "Technology Forecast: Worldwide Research on Low-Energy Nuclear Reactions Increasing and Gaining Acceptance". It cites the Plaintiff's technology which is explicitly mentioned, along with the Navy SPAWAR group, SRI International, and the China Lake Naval Air Warfare Center in California. On what possible basis could the Defendant purport this is not good enough? This obviously satisfies the double prong requisite for "validation".

21. As importantly, attention of the court is directed to the fact that unlike the Defendant's constantly-irrelevant cited art, THESE reports explicitly cite the Appellant and/or this invention.

DTRA REPORT PROVES §145 ENABLEMENT

22. 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 "

23. This report was issued after Appellant presenting his technology at a classified meeting. The next day, after that meeting, DTRA began taking proposals and contracts in this field – which the Defendant falsely says does not exist. The US Navy was one of the first to its proposal accepted.

Open Demonstrations at MIT PROVE 145 ENABLEMENT

24. The gold standard in the scientific community of technology has been, and is, an open demonstration followed by a peer-reviewed publication. The court is mistaken to ignore the Evidence of the two open demonstrations by the Appellant because they were highly specific and relevant and conducted in the Department of Electrical Engineering at the Massachusetts Institute of Technology [MIT, Cambridge, MA], a reputable institution. Both demonstrations each had “write-ups” and after peer-review were published. The publications were submitted to the Defendant – and the content were

ignored and/or not addressed, inconsistent with the Rules, and normal expectations.

25. These demonstrations at MIT attracted many scientists and those interested in the invention, and that is proof of utility. As the Declaration of Lawrence Forsley states:

"I observed videos of the technology described by Dr. Swartz during his open demonstration of his high-impedance aqueous Pd/D2O/Pt Phusor-type CF/LENR component in 2003 at MIT in Cambridge MA during the 10th International Conference of this field [ICCF-10].—.... In my opinion there is utility to inventions in this field. ... Dr. Swartz' NANOR and PHUSOR type devices exhibit positive thermal gain and by scaling up would be militarily and commercially useful."

As the Declaration of Dr. David J. Nagel states,

"I have observed the technology Dr. Swartz is one of the leaders in the field of LENR, having published many papers on the topic, invented two major approaches to generating energy by LENR, and developed several techniques for confidently measuring energy from LENR."

26. Plaintiff's two open demonstrations, and his submitted peer-reviewed articles and Declarations, saliently prove that the inventions operate as indicated and are capable of providing a useful output, and thus 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".

27. The Examiner [Defendant, "Office", "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, each time they have not been logged. As shown in the photographs with the Complaint, each time Evidence was received, it was systematically and odiously ignored, and/or misdescribed. The Defendant's serial rejections have been rendered without substantive relevant foundation, and have been made only by ignoring the submitted inventions and the submitted Evidence.

28. This is wrongful because *In re Oetiker* requires the Defendant to substantively respond with the Examiner's *prima facie* case of unpatentability which rebuts the submitted Evidence. It has not happened, and in its stead, the opinion of the Office continues unsupported for almost three decades, leaving a trail of discrimination and pain. This extreme abuse has existed for more than two decades. It is against the Constitution, it violates civil rights, and it has hurt the Plaintiff and the security of the USA.

29. The Defendant, and court, are legally obligated to assume that all Declarants assertions are true [Lewis v. Bours, 119 Wn.2d 667, 670, 1992]. That has not happened. The Dismissal and rejections for putative "lack of operability" or "enablement" under 35 U.S.C. §112, ¶1 and "lack of utility" under 35 U.S.C. §101 have only been made by ignoring the growing papers

and conferences, and the large number of researchers, and the open demonstrations, and the courses teaching the technology, and the developing products [hindered ONLY by the Defendant], and the timely-submitted un rebutted Declarations, as well as ignoring the Office's own rules. This has created an indelible arbitrary two-tier "standard of review" for patentability that has the appearance of impropriety – and which this court must fix.

30. These are systematic violations of due process, and have denied the Plaintiff his right to an impartial tribunal [28 U.S. Code Section 144, *Mayberry v. Penna.*; *Duncan v. Louisiana*] and his Constitutional right to a US patent. They have also enabled continuation of Defendant's false statements which have impacted negatively on the patentability of this series of inventions, and others' inventions, and on the energy needs and security of the United States of America.

31. The Patent Trial and Appeal Board [PTAB] previously directed the Appellant (then Applicant) to report the failure to log materials and other corruption to the Commissioner through a Petition to the Commissioner.

“(S)uch 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.”.

[*Ex parte* MITCHELL R. SWARTZ in Appeal 2009-001853, Application 10/646,143, DECISION ON REQUEST FOR REHEARING, Feb. 22, 2011]. Details are in the Compliance Appendix (Appx89) and record.]

32. The Plaintiff, then Applicant, thereafter, did obey the PTAB, including following its Decision of Appeal 2009-001853, Application 10/646,143, in the DECISION ON REQUEST FOR REHEARING made Feb. 22, 2011.

The Plaintiff repeatedly filed the appropriate Petitions to the Commissioner and thereafter sent more than seventeen Petitions to the Commissioner of Patents (Defendant) as the USPTO PTAB directed, just during the period of 2015 to 2016 alone [Confer Compliance Appendix]. Plaintiff did exactly what that the PTAB required.

33. 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).”

34. The Defendant has made several attempts at exculpatory behavior. As an example, in at least one application, first, the received Evidence and responses were allegedly “not received”, then allegedly “not legible”, finally allegedly “lost”. As other examples, the Defendant(s) failed to respond fully and completely and truthfully to submitted Evidence and Affidavits which show his opinion is dead-bolt wrong, also. This wrongful behavior under color of Law has decimated Appellant’s civil and Constitutional rights – and is essentially telling him and other inventors to go to other countries for protection of their inventions.

35. Appellant 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 court has sole jurisdiction for Plaintiff’s 35 U.S.C. § 145 claims.

(9) Summary of the arguments

36. Claim 1 under 35 USC 145 is supported by the proven operability and wide utility of the invention as corroborated by solid new Evidence which overcomes the Office's proven wrongful, unfounded opinions.

37. The DIA and DTRA Reports, the open demonstrations of the Plaintiff's inventions at MIT, his peer-reviewed articles, and the probative 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".

38. In that light, the Supreme Court, in *Kappos v. Hyatt*, affirming the Federal Circuit's *en banc* decision, 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". That did not occur here.

39. As a result, Claims 2 and 8 are obvious Constitutional violations. The other claims should be of interest to the court because of Defendant's record-proven factually false statements, and other wrongful actions.

(10) Arguments by Issue

35 U.S.C. § 145 Claim (Count 1)

Has the Court Erred by Ignoring The Requirement of 35 U.S.C. §145 Claims (Count 1) to Address the New Evidence?

40. The 35 U.S.C. § 145 Claims have scientific and engineering plausibility, supported by substantive Evidence. Despite the misunderstanding of the court, there IS operability; and there has been manufacturing of small units; and there has been both R&D and publications [as discussed in the, apparently unread, Complaint; averments 90-93, pages 45-47].

41. 35 U.S.C. § 145 requires the court to address the new Evidence. That has not happened, and as a result both the old evidence (not logged) and the New evidentiary proof are both ignored denying justice and Constitutionally protected rights.

42. Egregiously, the Defendant has absolutely NO foundation to support the mistaken opinions. As the federal court can see from the record [confer Wrong Description Appendix] not even the words of the inventions are used in the Decisions by the Defendant. Not even the words.

43. Thus, the Defendant has ignored *In re Oetiker*, 977 F.2d at 1445, 24 USPQ2d at 1444 requiring a substantive response with a *prima facie* case of unpatentability. The Defendant has not – and cannot because there is no real basis to substantiate the Office’s opinion.

44. This has the appearance of impropriety. In the light of transferred overseas technologies, obstructed SPECIAL-technologies, and false statements, bypassing Evidence.

45. Where is the Defendant's --or the court's-- honest acknowledgement of this fact? The record indelibly demonstrates that it is not there. They cannot because there is no real basis to substantiate their opinion. Instead of addressing the new Evidence, there is the appearance of the court merely "rubberstamping" false statements rather than its duty of "**making a *de novo* finding when the new evidence is presented on a disputed question of fact**".

35 U.S.C. § 145 Claims are Supported by The New Evidence

35 U.S.C. § 145 are Supported by DIA, DTRA

Has the Court Erred by Ignoring, and not Substantively Discussing, Plaintiff's New Evidence of DIA and DTRA Reports Supporting Plaintiff's 35 U.S.C. §145 Claim (Count 1)?

46. The court falsely purports: "*Although these reports may help plaintiff plausibly allege the scientific possibility of future LENR technology, they do not help him plausibly allege the current operability necessary to show patentability.*"

This is not true. These reports cited by DTRA and the DIA were submitted, first to the USPTO, then to the PTAB, and now to the court, NOT because

they allege "scientific possibility" but because they actually, explicitly, discuss the plaintiff's technology [Confer DIA/DTRA Appendix (Appx62)]. These Reports positively discuss the Plaintiff's technologies, and the Defendants and Defendant cannot rebut them, so they trick the court to misdescribe them. **In fact, DTRA, DIA, and other agencies report utility and operability based on Plaintiff's presentation of his technologies.** [#DIA-08-0911-003 13 November 2009]."

47. 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. This satisfies the double prong requisite for "validation" and proves the Defendant has not been honest with respect to this matter. On what possible basis could the court purport this are not good enough? It is unfair, cruel, discriminatory, and morally reprehensible for the court to continue to misdescribe them this way, in its stead.

35 U.S.C. § 145 Claims are Supported by the Skilled-in-the-Art

48. The court has erred by failing to consider the submitted Declarations from the skilled-in-the-art who counter the rejection under 35 U.S.C. § 101. Only a single affiant is required to prove utility, which is a "fact" issue.

35 U.S.C. § 145 Claims are Supported by Scientific Articles

Has the Court Erred by Ignoring Plaintiff's New Evidence of Scientific Articles Supporting Plaintiff's 35 U.S.C. §145 Claim (Count 1)?

49. The timely-submitted peer-reviewed documents corroborating the Plaintiff; 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.

35 U.S.C. § 145 Claims are Supported by Previously Sequestered/Unaddressed Evidence

Has the Court Erred by Ignoring the new Evidence [three types] Supporting Plaintiff's 35 U.S.C. §145 Claim (Count 1)?

50. In an unbiased venue, 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, and has met the bar of enablement [In re Hogan, 559 F.2d 595, 60S, 194 USPQ 527, 537 (CCPA 1977)].

(10) Arguments - Constitutional Claims (Counts 2 and 8)

Has the Court Erred by Ignoring Constitutional Claims?

51. The court purports:

"In both Count 2 and Count 8, plaintiff alleges only vague violations of his constitutional rights."

On the contrary, the Appellant did describe clear-cut violations of his Constitutional and Equal Protection Clause rights. The court has ignored Article I, Section 8. The 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 [Constitutional Convention in August of 1787, adopted in September of 1787]. Congress has stated 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); *DIAMOND v. CHAKRABARTY*; 447 U.S. 303, 309].

Has the Court Erred by Ignoring Salient Systematic Discrimination?

52. Furthermore, the court has denied the Plaintiff his right to an impartial tribunal [28 U.S. Code Section 144, *Mayberry v. Penna.*; *Duncan v. Louisiana*]. The equal protection clause has been broken by any of the following: i) the fact that applicants in other states have had THEIR

submitted evidence docketed, addressed. That is not the case here.

ii) The Plaintiff has been subjected to special BIAS. Other Applicants have been issued patents in this field from other (not corrupt) Group Arts. The Declaration of Lawrence Forsley states:

"I have a patent issued in this field USPTO 8,419,919 that cites multiple patent applications by Dr. Swartz."

iii) This is also confirmed in Exhibit 59. In that Sept. 27, 2012 letter from Anthony Caputa, Office of the Commissioner for Patents to David J. French, Second Counsel Services, Ottawa, Canada, it states,

"We also thank you for your suggestion to have a message that "The USPTO is open for business in the field of Cold Fusion for properly prepared patent filings" before the Cold Fusion revolution arrives. This is already the case."

iv) Furthermore, in the Complaint, Plaintiff demonstrated that one of his inventions, allegedly which "does not work" was awarded to a Japanese automobile company, at a later date [Nissan Motor Co., Ltd., US 8247122 B2, 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.

Where is the court's honest acknowledgement of any of these facts. The record indelibly demonstrates that it is not there.

(10) Arguments - Plaintiff's Motion For Reciprocity Re: Roseboro

53. The Defendant filed a Motion to Dismiss Re: Roseboro. The accompanying Memorandum of Law contains many factually false statements, which are disproved by the record. Attention is directed to the fact that the Defendant's Memorandum was not sworn under pains and penalties of perjury, as the Defendants demanded of the Plaintiff, who did. Meanwhile, this did occur during the same time that the Defendant failed to Answer the Complaint. Plaintiff asked the court for Roseboro reciprocity to include the Defendants and their counsel - Nathan K. Kelley, Solicitor, Thomas W. Krause, Deputy Solicitor, Dana J. Boenta, US Attorney, and Kimere J. Kimball, Assistance US Attorney. Plaintiff requested reciprocity, and that the Defendant and each counsel now swear to each fact they dispute. Specifically, in accordance with *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975), Plaintiff respectfully requested that Defendant identify all facts stated by Plaintiff in his Opposition to Defendant's Motion to Dismiss, with which Defendant disagrees sworn under the pains and penalties of perjury, as the Plaintiff did. The court unfairly asked only one side to swear under the pains and penalties of perjury. This is additional discrimination and has led to the "rubberstamping" of false statements by the court (*vide infra*) which could have been avoided. This has the appearance

of impropriety, and possible violations of the Patriot Act by those who wrote the court's papers.

10) Arguments –Other Claims

Has the Court Erred by Failing to Act *Sui Sponsis* Consistent with Law and Justice (5-7 9-12, and 14)?

54. These other Claims sound in tort. 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)]. 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 *Biven*. [*Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971)] 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. 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. Here there is no such coverage [vide infra, vide supra]. For example, 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, and supporting Evidence, demonstrate that the Defendant's conduct was wrongful (inconsistent with a duty resting on the defendant).

Furthermore, the Defendants upon serially cashing the checks of Plaintiff over decades entered into a confidential or fiduciary relationship to support a constructive or equitable fraud claim [*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)].

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)].

10) Arguments – Matters about which the Court is Mistaken

The Court is Factually Wrong about the Inventions

55. 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. Therefore, these patent applications should be judged upon what they actually say in the original specification and on

the timely submitted evidence. In this case that did not happen. Although discussed in the Complaint, including on page 13, this is ignored by the court.

56. The court miscomprehends: “*“[Plaintiff’s] claimed invention is drawn to methods for controlling a cold fusion reaction or cold fusion product output.”*”).

This is untrue. These inventions are what is written in the original specifications and not what the Defendant imagines in its proven mischaracterizations. These patent applications are not about what Fleischmann’s and Pons’ reported MSM/Mockingbird-reported disaster in 1989 known as "cold fusion" ["F+P"]. Rather, these are different inventions and different claims. What is described in THESE applications was never filed by F+P, was never described by them, OR described, discussed, or mentioned by the USPTO's cited art and critics. Not even one over 28 years. How could ALL of the patent applications be the same as F+P? The different applications are NOT all the same, and not one of them is F+P. Confer the Wrong Description Appendix for more details.

THESE inventions include an improved calorimeter, an improvement to optimize output of a heat producing system, new improved diagnostic techniques, a new method to measure loading (which the USPTO gave to

another applicant who filed later), and a new way to propel cars and heat homes, and new methods to benefit the United States by making quieter heating (which helps submarines remain stealthy), by making energy production cheaper, by making water cleanliness through boiling cheaper and making it more available, and possibly even by mitigating some nuclear materials.

57. It should matter that '058 is a heat measurement system which is applicable to obstetrics, space travel, and laboratory use. It has not. It should matter that '765 is a measurement of hydrogen loading into a metal which is applicable to metallurgy, medicine, and automobiles' energy production. It has not. Each case has been misdescribed. Specific examples are in the Wrong Description Appendix.

58. And this is long standing. 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].

[***] The Exhibits are the Affidavits and Amicus Curiae briefs from '937 and '258, previously before the federal appellate court, and other cases. Some of the Declarants have since passed away (Dr. Mallove,

Dr. Fox, Dr. Bass, Dr. Talbot Chubb) and they deserve a voice in this official venue to this very important discussion of Evidence, proving the Defendant is wrong.

59. 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.

60. In fact, that the Office disingenuously LEADS AWAY from the real issues and matters and structures THIS INVENTION has the appearance of impropriety. In that light, the Office's repeated, unsubstantiated claim that the (nay, each) invention lacks operability is full of oceans 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.

61. Any fifth grader can recognize that each of the inventions cannot all be the same, cannot all be 'F+P' as the Defendant reports like a parrot.

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, THESE patent applications are NOT about Fleischman and Pons but about the

Plaintiff's invention and his discovery(ies). Defendant's behavior is systematic, unfounded, discrimination to prevent the Requirement of the POTUS, and 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)], and to deny the energy needs and security of the United States of America.

The Court is Mistaken about the Existence of a Scientific Field

62. The court falsely purports: "*Both the USPTO and the Federal Circuit have long believed that LENR technology is presently inoperable. See, e.g., In re Swartz, 232 F.3d at 864...*"

First, this is using fruit of the poisoned tree which is why this case was brought to the court in the first place [*vide infra*].

Second, existence and science papers and engineering devices are more important than the USPTO "belief". The field is real [cf. Affidavits of Forsley, Nagel, Mallove, Fox, Bass, Swartz, Biberian, or Hagelstein].

Declarant Lawrence Forsley has spent

"27 years primarily researching and harnessing the energetic particles that give rise to the excess heat attributed to the phenomena and am engaged in scaling development for deep space power using the phenomena."

Declarant Dr. David J. Nagel states,

"I am very familiar with the subject of Low Energy Nuclear Reactions (LENR), having worked in the field since 1989 and chaired the international convention of the subject as its 14th meeting (ICCF-14) in Washington DC in 2008. LENR (initially called "cold fusion"), which is operable and has great utility, was invented in the U.S. It is expected to be the basis for a new global industry. The U.S., given the proper basis of intellectual property, can be the global leader in the new industry."

This is discussed further in the Denied Field Appendix (Appx79).

The Court Misapprehends Plaintiff's Response as Applicant

63. The court has falsely purported Appellant has not stated that these technologies are useful beyond LANR. This is untrue for several reasons:

IT WAS IN THE ORIGINAL SPECIFICATIONS. Exhibits 63 and 64 did demonstrate that the plaintiff DID substantially say so explicitly before Final. Furthermore, this is corroborated:

In Exhibit 63, the Appeal Brief of '058 shows the misdescription of the invention and failure to consider Evidence submitted are discussed, including on pages 108, and 86,104, 117 & 212 respectively. Defendants' misbehavior is discussed, including on pages 225, 237, 240, and 244.

In Exhibit 64, the Appeal Brief of '258 the misdescription of the invention and failure to consider Evidence submitted are discussed, including on pages

51-53 & 212, and 42-44, respectively.

64. This court has ignored the Exhibits and Figures in the Complaint, has ignored the Declarations, and instead has shamefully rubberstamped falsehoods -- proven false in the record. This charade has the appearance of impropriety, and is a palpable miscarriage of justice which affects the energy needs and security of the United States of America and Appellant's Constitutionally-protected rights.

The Court is Wrong about What Plaintiff Alleged re:Operability

65. The court disingenuously purports:

“he has not plausibly alleged that the inventions claimed in his patent applications were involved in those experiments or that those inventions have any current operability” and “ the PTAB found that all three inventions were inoperable (and) not useful and could not be made.”

This is not true for several reasons. First, the plaintiff DID allege over and over that the inventions in the patent applications WERE involved in those experiments AND in those open demonstrations at MIT. Why else would the Declarants and Appellant bring them up with specificity, under Oath?

Second, how can the PTAB have found this when the Evidence was removed, and not even addressed? Corroborating this, the PTAB never even

discusses Appellant's inventions but is fixated on "cold fusion" -- while the technologies have been sent to Japan, and on information and belief, other countries. Despite the false statement in the court's Opinion, the Plaintiff DID allege the facts.

Third, the Office was, and the court is, Obligated by law to assume that all Declarants assertions are true [Lewis v. Bours, 119 Wn.2d 667, 670, 1992]. Neither has, but instead uses unnamed sources, unsworn individuals discussing other things and other people's art.

The Court is Factually Wrong about the Content of Previous cases

Has the Court Erred by Ignoring that under U.S.C. §146, Pat. Appl. 12/932,058 and 09/1750,765 Were Misdescribed by Office and Evidence was not Logged)?

66. The court states:

".. the Federal Circuit expressly decided the §§ 101 and 112 issues as the basis for affirming the USPTO's decision; and (4) plaintiff, as a party in the earlier litigation, had a full and fair opportunity to litigate those issues. As such, plaintiff is collaterally estopped from relitigating the patentability of the '058 and '765 patent applications and Count 1 will be dismissed with respect to those two applications."

This is utterly unfair for several reasons, addressed immediately below.

The Plaintiff never had an opportunity in earlier litigation for a full and fair opportunity to litigate because the materials were not docketed, and because

the materials were sequestered, and because they were never responded to, and most importantly because the inventions were misdescribed.

. As the first example, Application '058 was originally '457 and is a calorimeter used to measure generated heat. 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.”

To explain this further are Exhibits 27 through 30 which describe the actual case that was brought to federal court.

68. As the second example, U.S. Patent Application Serial No. No. 091750,765 – was similarly misdescribed by Office. To explain this further, are Exhibits 31 through 51 which describe the actual case that was brought to federal court. Ignoring this has the indelible appearance of impropriety.

The Court is Factually Wrong about '258 to Measure Loading

69. The court states, denying justice with a handwave:

“Because plaintiff has failed to plausibly allege that his patent applications describe operable inventions, he has failed to plausibly allege his entitlement to a patent and his § 145 claims must be dismissed with respect to the remaining-'258, '643, and '691-applications.”

This is demonstrably not true for so many reasons. First, the invention in '258 was then granted to an automobile company as discussed above and in the Complaint.

Second, the Office has misdescribed the invention with great consequences.

As one example, the Declaration of Lawrence Forsley states:

"I have read the above-entitled Complaint and am surprised that In re Swartz, used by the USPTO to stifle cold fusion, is actually about a vibrating sensor whose frequency is used to measure loading, and not about cold fusion, but relevant to it as to other things such as metallurgy."

70. The fraudulent behavior of the USPTO with respect to In re Swartz is further discussed in Exhibit 63, including on pages 158 and 161. Although discussed in the Complaint, including on page 97, this is ignored by the court. If this matter is not corrected by the Appeal court, this will make future generations of Americans understand that this important matter, which is not *de minimus* just because it involves hydrogen, was possibly "judged" with a wink and nod to coverup those who attacked the US Constitution for other countries using false statements ["boiler plate"] and endless unsworn, disproven, allegations.

The Court is Partially Wrong about this case re: Collateral estoppel

71. The court purports:

“The application of collateral estoppel does not depend on whether new evidence has been uncovered or whether the plaintiff has identified a different cause of action; instead, collateral estoppel depends on “the identity of the issues that were litigated” in the earlier suit. “

This is outrageously unfair because these are different issues in the docket for the two cases for any of several reasons, below:

i) USC 145 enables the entry of new evidence, such as here, making this a completely different case, and one that the US Supreme court said IS appropriate for this court.

ii) 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. None of this was in any previous action.

iii) Also, there is not a repeat of previous court issues because previously there is real indication of sequestration of Evidence. And NOW there is also new Evidence. 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.[underlined and emboldened for emphasis]. This is a serious matter that was discovered AFTER the Appellate court, and is discussed in the Complaint, including on page 100 where a docket with '1/2' numbers are shown, but substantively ignored by the court. It is also discussed in more detail when it was first serendipitously observed [Plaintiff's Exhibit 65 - Petition for Panel Rehearing [00-1107]]. None of this was in any previous action. For any court to say otherwise is factually false – disproven by the record.

The Court Leaves Factually False Statements in Legal Record

72. The court unfairly purports:

“Plaintiff appealed the rejection of both applications to the Federal Circuit and, in both cases, the Federal Circuit affirmed the Board's determination that the patent applications failed to satisfy §§ 101 and 112. See id.; In re Swartz, 50 F. App'x 422, 424-25 (2002) (per curiam); In re Swartz, 232 F.3d 862, 864 (2000) (per curiam).”

This statement is unfair, inaccurate, and improper for any of the following several reasons: i) It is made using the fruit of a poisoned tree – even after the court was notified. 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.

ii) These were NOT the same cases. They were continuations, but there was new Evidence of operability and utility attached to each refiling. They were not the same, although they were treated the same wrongful way using misdescription and non-addressing submitted Evidence.

iii) In addition, the court omits that in *In re Swartz*, the applications was, as now, misdescribed. Said patent application dealt with a vibration system to measure loading of a metal by hydrogen. The court fails to admit 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).”

iv) In addition, the court 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. After a subpoena, it was observed that the Defendant had a systematic 'failure to docket' along with the well-known 'failure to substantively discuss' or to have truthful statements. This has the appearance of impropriety, and is presented solidly in the Complaint, corroborated by Exhibits.

v) Furthermore, it only effects two of the patent applications. It is inhumane for the court to make this case Dismissed with Prejudice on this matter, since those other applications are not even relevant here. [emboldened and underlined for emphasis]

The Court is Factually Wrong about the Proposed Remedy

73. As an alternative remedy, the Appellant (then plaintiff) also submitted in the Complaint [page 119] that an Order could be made by the Court that the patent applications be re-considered based this time on their actual content and, this time, based on the evidence that was actually previously

submitted, based upon the new Evidence, and based upon the Declarations and Evidence previously submitted which was not docketed, and still, corruptly, simply ignored. Plaintiff was denied his day in Court, his jury, his ability to correct the record and assert his Constitutional rights.

The Court is Factually Wrong about Administrative Notices Given

74. The court falsely purports:

“Plaintiff does not dispute that he failed to appropriately file an administrative claim with the USPTO ...,”

The plaintiff DID dispute and explicitly did point out how and why it was not relevant. The Plaintiff followed the Orders of the PTAB and DID file the absolutely correct administrative notice and claims with the USPTO -- and copies and notices were given to this court and apparently just ignored.

The Petitions and Notices were given to the Office explicitly cited by the PTAB, and cited the PTAB. They are discussed further in the Notice Appendix.

**The Court Misapplies the Federal Tort Claims Act
("FTCA") (Relevance and Timing)**

Has the Court Erred by Ignoring the Plaintiff's Compliance with the PTAB?

75. The court misunderstands when it rubberstamps the Defendants pleadings it misreads the actual law and the previous Directives of the PTAB, as it states:

"To satisfy the FTCA's administrative exhaustion requirement, claims against the USPTO must be filed with the USPTO Office of General Counsel, not merely discussed in a petition submitted to the PTAB."

This is disingenuous. First, the Petitions and Notices were given to the Office explicitly as Directed by the PTAB and not to the PTAB as the court falsely purports. Second, the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680 is not relevant for the following reasons:

- i) It 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, the above-entitled Complaint is far beyond.
- ii) FTCA is only appropriate for negligence -- as opposed to intentional misconduct.

iii) 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.

iv) FTCA is only for federal employees who can be sued under the FTCA, not independent contractors hired by the federal government. FTCA is not applicable for the Defendant's apparent use of (on information and belief, including upon findings of Senator Charles Grassley's Committee) independent contractors.

v) In this case, foreign governments may be involved (on information and belief through at least one Examiner). This is relevant given the role of a certain group in the USPTO and the lengths to which they will go to cover up these actions – against the US Constitution, Congress, and now Presidential Requirement and Orders, including President Donald Trump Executive Memorandum ordering the release of free energy technologies.

Has the Court Erred by Ignoring the Defendant's attempted Exculpatory Behavior?

This has been discussed in several pleadings in this court, and elsewhere [3799666, 3796190, 3808826] and so will not be re-discussed here, although Appellant reserves the right to do so if the Defendant makes any further factually false statements, or attempted further exculpatory behavior going forward.

(11) Short conclusion stating the precise relief sought

76. The *pro se* Plaintiff demonstrated significant new Evidence and new justifiable reasons for a *sui generis* statutory review regime and pursuant to §145 must make a *de novo* finding consistent with the actual “new evidence presented”. The Plaintiff clearly described his claims including for constitutional violations, including that there was new material, including that the inventions were systematically misdescribed, including the reprehensible fact that the federal court had been previously "tricked", denying Constitutional and due process and civil rights.

77. The Complaint and pleadings were specific, substantive and precise with sufficient facts, and precise specific allegations. The Defendant has not refuted even one fact in said above-entitled Complaint, which therefore should have been taken as true.

78. 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.

78. The court has considerable misunderstandings without substantive relevant foundation. The court appearly to have either misunderstood or wrongly accepted, and ‘rubber-stamped’, the Defendant’s counsels’ statements as accurate and truthful while overlooking facts discussed

explicitly in the *pro se* Plaintiff's pleadings and Complaint. This could have been remedied by a hearing, or a jury, but was not. Instead, the "rubberstamp" of now proven falsehoods (over decades by US agencies, and more) was made to obstruct justice, continue discrimination, and hurt the energy needs and security of the USA.

79. The court has misperceived evidence, and its speedy Judgment has denied Plaintiff his right to respond to factually false statements and confront his accuser. The Opinion mischaracterizes the actual patent applications, calling them all the same, and calling all six (6) as "cold fusion" which is a euphemism to deny Constitutional rights to Plaintiff under the guise of –with a usual 'hand-wave' demeaning, and ridiculing, a major part of his life's work on energy production. It is unfair the Plaintiff was not allowed to respond to the Reply by the Defendant and counsel, just as it is unfair that certain false statements by the Defendant's counsel are essentially rubber-stamped by the court, despite the explicit request for a jury trial.

80. In fact, the Court should consider the impact on due process and the appearance of justice. 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. Plaintiff has a right to examine the appropriate relevant

requested documents because they are material and will help prove Plaintiff's case – and will help others persecuted by the same (criminal) behavior of failing to log and/or address Evidence which overcomes the Defendant's proven-wrong monopolistic imperial Opinion.

81. The Court should consider the impact on Justice. 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].

82. Therefore, this court should reverse the Order and Judgment for any one of the following several reasons:

- i) There was compliance repeatedly with the PTAB.
- ii) The Plaintiff's, and in fact this scientific field's, ONLY avenue for justice with respect to these matters is in THIS court.
- iii) This court should protect Plaintiff because the wrongful judgment denies justice, using unethical, egregious, and unreasonable practices, and denies civil and Constitutionally previously-protected rights [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]. If the wrongful judgment stands, the Plaintiff and other Americans will suffer immediate, continuous and irreparable injury, civil rights will be lost, inventions will be shifted overseas, and egregiously America's military in the future will lose vital technology requisite to protect stealth submarines and moving Marines, and worldwide people will lose the means to obtain cheaper clear water and energy.

WHEREFORE, for the above reasons, the Appellant requests help of the honorable court to enforce the clear Constitutional and Congressional directives, the unanimous decision of SCOTUS, and the Executive Orders of President Trump. The *pro se* litigant requests at least a remand to the lower court so that it can do what the Supreme court unanimously Ordered them to do: Examine the record in a *sui generis* statutory review regime and pursuant to §145 must make a *de novo* finding consistent with the actual “new evidence presented”. That would permit normal due process, normal discovery, a normalization of discrimination, and it might even enable the court to better understand why the Evidence -including from US government agencies- was systematically not logged and/or addressed.

Respectfully submitted,



Mitchell Swartz, ScD, MD, *pro se*
Appellant

(corrected January 16, 2018)

(12) Addendum

[pursuant Order of January 5 2018]

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA**

Alexandria Division

Mitchell R. Swartz)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 1:17-cv-482-LMB/TCB
)	
Joseph Matal, et al.,)	
)	
Defendants.)	

JUDGMENT

Pursuant to the order of this Court entered on August 22, 2017 and in accordance with Federal Rules of Civil Procedure 58, JUDGMENT is hereby entered in favor of Joseph Matal and United States Patent and Trademark Office and against Michael R. Swartz.

FERNANDO GALINDO, CLERK OF COURT

By: _____ /s/
Deisy Estevez
Deputy Clerk

Dated: 8/22/2017
Alexandria, Virginia

Appx 1

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

MITCHELL R. SWARTZ,

Plaintiff,

v.

JOSEPH MATAL, Performing the Functions and
Duties of the Under Secretary of Commerce for
Intellectual Property and Director of the United
States Patent and Trademark Office.

Defendant.

No. 1:17-cv-482 (LMB/TCB)

ORDER

Before the Court are two motions from plaintiff, proceeding pro se: a Motion for Reconsideration [Dkt. No. 34] and a Motion for Leave to File a Memorandum in Support of his Motion for Reconsideration [Dkt. No. 35]. In this action, plaintiff challenges the denials of six patent applications and also attempts to bring a variety of other statutory and constitutional claims against defendant. By a Memorandum Opinion and Order dated August 22, 2017, the Court dismissed plaintiff's Complaint with prejudice (except for Count 3, which was dismissed without prejudice) for a variety of substantive and procedural reasons, including failure to state a claim, failure to properly exhaust, collateral estoppel, lack of a private right of action, and sovereign immunity. [Dkt. Nos. 31 & 32]. In the motions now before the Court, plaintiff argues that the Court should reconsider that decision and should allow him to file a long brief in support of his motion for reconsideration.

To begin with plaintiff's Motion for Leave to File a Memorandum in Support, although plaintiff asks for leave to file a "longer than usual Memorandum," Pl. Mot. [Dkt. No. 35], his attached proposed brief is only 22 pages, id. Ex. 1, which is below the 30-page limit set by the local rules, see Local R. Civ. P. 7(F)(3). Accordingly, the Court will consider plaintiff's proposed brief and his motion is moot.

Appx 3

Moving to plaintiff's Motion for Reconsideration, plaintiff argues principally that (1) he was never given a chance to respond to defendant's reply brief, see Pl. Mem. [Dkt. No. 35-1] ¶ 2; and (2) the opinion contains various inaccuracies, see id. ¶ 4. Neither of these arguments is persuasive. Under Fed. R. Civ. P. 60(b),¹ relief from a final judgment is only available for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . , misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief.

Fed. R. Civ. P. 60(b). Neither of plaintiff's arguments demonstrates entitlement to relief under any of the above categories.

First, plaintiff was not entitled to file a sur-reply because under this court's local rules, parties are entitled to file only opening, response, and reply briefs; any further briefs may not be filed "without first obtaining leave of Court," which is not granted as a matter of right. Local R. Civ. P. 7(F)(1). Moreover, inability to file a sur-reply is, as discussed above, not one of the justifications for granting relief under Rule 60(b).

Second, although plaintiff does not specifically fit his claim of inaccuracies in the opinion into the Rule 60(b) framework, the Court construes his argument as claiming "mistake" under Rule 60(b)(1). Plaintiff identifies many statements in the Memorandum Opinion, mostly related to the patentability of his claims, with which he disagrees; however, he has not persuasively demonstrated that any of those statements are incorrect, and, indeed, in many places, plaintiff simply asserts

¹ Plaintiff styles his motion as a "Motion to Reconsider Pursuant to CR 59(a)." Rule 59(a) does not authorize the filing of a motion to reconsider an order granting a motion to dismiss—it only governs motions for new trials. See Fed. R. Civ. P. 59(a). Because the Court must construe plaintiff's Motion liberally in deference to his pro se status, the Court has construed his Motion as a proper motion for relief under Rule 60(b). See id. 60(b).

his patent applications is properly resolved by evaluating his complaint, the defendant's Motion to Dismiss that complaint, and plaintiff's opposition to that motion, not by striking the motion. Plaintiff's second allegation about not receiving all of the defendant's pleadings stems from his misunderstanding of how pleadings are docketed by the Clerk's office. If one document appears to constitute two separate recognized motions, that document will be given two different docket numbers. That is what happened in this case. The defendant's Motion to Dismiss raised jurisdictional issues under Federal Rule of Civil Procedure 12(b)(1) as well as arguments as to the sufficiency of the complaint under Rule 12(b)(6). As a result, it was docketed as two motions, although there is just one physical motion. Plaintiff's extensive response to the Motion to Dismiss demonstrates that he, in fact, did receive the defendant's motion. Lastly, nothing in this record supports plaintiff's call for an investigation by a Special Counsel. Accordingly, it is hereby

ORDERED that plaintiff's Motion to Strike [Dkt. No. 21] be and is DENIED.

Plaintiff has also filed a Motion for Reciprocity re: Roseboro ("Motion for Reciprocity") [Dkt. No. 22] in which he argues that defense counsel should be required to swear to the veracity of the representations in their pleadings just as pro se litigants are. This request is meritless. The reason pro se litigants are required to affirm the truth of their representations, is to provide the Court with some assurance of veracity which enables the Court to sanction a party who knowingly files false information with the Court. Because attorneys are governed by codes of professionalism and could lose their privilege to practice law if they violate their duty of candor to the Court, there is no need to request an affirmation from counsel.

Plaintiff's Motion for Reciprocity also argues that defendant has failed to file an answer to the complaint, which the Court construes as a motion for default. But, a motion to dismiss prevents default by a defendant, therefore plaintiff's argument is baseless. Boyd v. Jordan, 60 F.R.D. 203,

Appx 7

205 (E.D.N.C. 1973); see also Hill v. Didio, 191 F. App'x 13, 14 (2d Cir. 2006) (explaining that the defendant "filed a motion to dismiss in lieu of an answer, as he was permitted to do" under Fed. R. Civ. P. 12(b)). Accordingly, it is hereby

ORDERED that plaintiff's Motion for Reciprocity [Dkt. No. 22] be and is DENIED.

The Clerk is directed to forward copies of this Order to counsel of record and plaintiff, pro se.

Entered this 17th day of August, 2017.

Alexandria, Virginia

Is/ LMB
Leonie M. Brinkema
United States District Judge

Appx B

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

MITCHELL R. SWARTZ,)
)
 Plaintiff,)
)
 v.) No. 1:17-cv-482 (LMB/TCB)
)
 JOSEPH MATAL, Performing the Functions and)
 Duties of the Under Secretary of Commerce)
 for Intellectual Property and Director of the)
 United States Patent and Trademark Office,)
)
 Defendant.)

MEMORANDUM OPINION

Before the Court is defendant Joseph Matal’s Motion to Dismiss [Dkt. Nos. 15 and 16], which has been fully briefed. For the reasons that follow, defendant’s motion will be granted.

I. BACKGROUND

Plaintiff Mitchell Swartz (“plaintiff” or “Swartz”), proceeding pro se, is a medical doctor, electrical engineer, and inventor who holds several patents both in the United States and abroad. Compl. [Dkt. No. 1] ¶¶ 7, 9. At issue in this civil action are six patent applications—U.S. Patent Serial Nos. 12/932,058 (“the ’058 application”), 12/589,258 (“the ’258 application”), 13/544,381 (“the ’381 application”), 12/316,643 (“the ’643 application”), 09/748,691 (“the ’691 application”), and 09/750,765 (“the ’765 application”)— all of which plaintiff describes as relating to inventions that allegedly generate heat and electricity quietly and efficiently. Compl. [Dkt. No. 1] ¶¶ 10, 18.

Each application went through the internal two-stage review process at the United States Patent and Trademark Office (“USPTO”). At the first stage, each application was assigned to a patent examiner, who reviewed its claims to determine patentability. See 35 U.S.C. § 131. For

each application, the examiner determined on both an initial review and after reconsideration that the claims failed to meet the legal requirements for patentability. Cf. id. § 132. After the examiner twice rejected each application, plaintiff filed appeals with the Patent Trial and Appeal Board (“PTAB” or “Board”), an administrative appellate tribunal inside the USPTO. See id. § 134(a). The PTAB affirmed the rejection of five of his applications; however, the appeal of the sixth, the ’381 application, is still pending.¹ See Mem. in Supp. of Mot. to Dismiss (“Def. Mem.”) [Dkt. No. 18] 6. Dissatisfied with the decisions of the PTAB, plaintiff has exercised his right under 35 U.S.C. § 145 to bring the present civil action against the Director of the USPTO, in which he requests in Count 1 that the Court find that he is entitled to a patent on each application. See Compl. [Dkt. No. 1] ¶¶ 315-19. Plaintiff also alleges that the USPTO and its officers have engaged in a variety of misconduct while evaluating his applications. The Complaint includes thirteen additional counts based on these allegations: two counts alleging violations of constitutional rights, one negligence-based tort count, one access-to-records count, eight counts alleging violations of various criminal laws, and one count alleging civil violations of the Racketeer Influenced and Corrupt Organizations Act (“RICO”). See id. ¶¶ 320-60.

Defendant has moved to dismiss each of the fourteen counts for a variety of substantive and procedural reasons, see Def. Mem. [Dkt. No. 18], plaintiff has responded, see Mem. in Opp’n to Mot. to Dismiss (“Pl. Opp.”) [Dkt. No. 25], and defendant has replied, see Reply in Supp. of Mot. to Dismiss (“Reply”) [Dkt. No. 29]. Finding that the briefs are comprehensive and

¹ Paragraphs 19 through 277 of plaintiff’s 120-page Complaint relate the substance of each of the six relevant patent applications as well as plaintiff’s interactions with the USPTO with respect to each application. Because many of the facts alleged are immaterial to the present Motion to Dismiss, the Court will discuss only the relevant details rather than the entire factual background as related in the Complaint.

that oral argument would not aid the decisional process, the Court will resolve defendant's motion on the materials submitted.

II. DISCUSSION

Defendant bases his Motion to Dismiss on Fed. R. Civ. P. 12(b)(1) and 12(b)(6). First, he argues that Count 1 should be dismissed under Rule 12(b)(6) for failure to state a claim because plaintiff does not plausibly allege entitlement to a patent for his various applications, all of which relate to "cold fusion," a "hypothetical technology that has not been shown to be technically feasible."² Def. Mem. [Dkt. No. 18] 1, 14-22. Second, he argues that under Rule 12(b)(1), the Court lacks subject matter jurisdiction to consider some of the patent claims and all of the non-patent claims for a variety of reasons, including sovereign immunity, collateral estoppel, failure to administratively exhaust, and failure to establish a private right of action. See id. at 8-13, 22-28.

A. Standard of Review

Under Rule 12(b)(1), a civil action must be dismissed whenever the court lacks subject matter jurisdiction. Although the plaintiff has the burden of establishing subject matter jurisdiction, Demetres v. East West Const., Inc., 776 F.3d 271, 272 (4th Cir. 2015), a court should accept "as true the jurisdictionally significant facts claimed by the" plaintiff, Motley v. Va. State Bar, 403 F. Supp. 2d 468, 471 (E.D. Va. 2005). After accepting those facts as true, the

² As defendant explains, "[c]old fusion is generally understood to refer to a nuclear reaction that occurs at, or near, room temperature and generates excess heat and transmutation products when hydrogen is introduced to a small piece of nickel or palladium." Def. Mem. [Dkt. No. 18] 5 (quoting id. Ex. 1 at 9 n.6). Plaintiff argues that his applications relate to devices "which are different from classic 'cold fusion'" and believes it is "inappropriate" to label his applications as "cold fusion" devices. Pl. Opp. [Dkt. No. 25] ¶¶ 134-36. In deference to plaintiff's belief that "cold fusion" is a loaded term, the Court will refer to these room temperature nuclear reactions as "low energy nuclear reactions" or "LENRs." Cf. Def. Mem. [Dkt. No. 18] Ex. 6 (using the term "LENR" to describe these reactions).

court must determine “whether those facts are sufficient as a matter of law to establish subject matter jurisdiction.” Id.

Under Rule 12(b)(6), a civil action must be dismissed if the complaint does not “contain sufficient facts to state a claim that is ‘plausible on its face.’” E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc., 637 F.3d 435,440 (4th Cir. 2011) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Although the court must assume for the purposes of deciding the motion that all “well-pleaded allegations” are true and must “view the complaint in the light most favorable to the plaintiff,” Philips v. Pitt Cnty. Mem’l Hosp., 572 F.3d 176, 180 (4th Cir. 2009), allegations that are merely conclusory need not be credited, see Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009).

B. Analysis

1. Count 1 (35 U.S.C. § 145 Claims)

Count 1 alleges under 35 U.S.C. § 145 that plaintiff’s six patent applications—the ’058, ’258, ’381, ’643, ’691, and ’765 applications—should be granted. Defendant argues that three of these applications are ineligible for this Court’s review because the PTAB has not yet rendered a final decision on the ’381 application and plaintiff is collaterally estopped from arguing for the patentability of the ’058 and ’765 applications. Defendant further contends that plaintiff’s allegations as to the remaining three applications should be rejected because he has failed to plausibly allege that they involve patentable claims.

a. ’381 Application

It is uncontested that plaintiff’s appeal of the examiner’s denial of the ’381 application was still pending at the PTAB when he filed this action. See Def. Mem. [Dkt. No. 18] Ex. 13 (“As of [July 17, 2017], the PTAB has not issued any decision in Appeal No. 2017-006193.”). A

patent applicant may only bring a suit under 35 U.S.C. § 145 if he is “dissatisfied with the decision of the Patent Trial and Appeal Board in an appeal under” 35 U.S.C. § 134(a). Section 145 waives the federal government’s sovereign immunity only when the PTAB has issued a final decision on the patent application at issue. See Fleming v. Coward, 534 F. App’x 947, 950 (Fed. Cir. 2013). Therefore, because the PTAB has not issued a final decision on the ’381 patent application, defendant retains its sovereign immunity and plaintiff’s suit must be dismissed with respect to that application. See id.

In response to this argument, plaintiff does not claim that the PTAB has issued a final decision on his application; instead, he appears to claim that the PTAB’s “refusal to admit Evidence and Briefs” into the record during the appeal “were final decisions.” Pl. Opp. [Dkt. No. 25] ¶ 112. To the contrary, these decisions are the antitheses of final decisions; they are, indeed, only intermediate decisions preceding a future final decision on the patentability of the claims in the ’381 application. As such, Count 1 will be dismissed as to the ’381 application.³

b. ’058 and ’765 Applications

Under the doctrine of collateral estoppel, a party may not relitigate an issue that is (1) identical to an issue (2) actually litigated in an earlier proceeding if (3) resolution of the issue was necessary to the judgment in the earlier proceeding and (4) the party had a full and fair opportunity to litigate the issue in the earlier proceeding. Jet, Inc. v. Sewage Aeration Sys., 223 F.3d 1360, 1366 (Fed. Cir. 2000). Defendant argues that two of plaintiff’s patent applications (the ’058 application and the ’765 application) are “substantively identical” to two earlier applications (Application Nos. 08/406,457 and 07/760,970) that plaintiff submitted to the

³ A dismissal for failure to exhaust would typically be without prejudice; however, the reasons the Complaint fails to plausibly allege patentability with respect to plaintiff’s ’258, ’643, and ’691 applications, see infra, apply with equal force to his ’381 application. As such, this dismissal will be with prejudice.

USPTO. Def. Mem. [Dkt. No. 18] 9-13. The USPTO rejected both of the earlier applications for lack of utility under 35 U.S.C. § 101 and for lack of enablement under 35 U.S.C. § 112. See id. Plaintiff appealed the rejection of both applications to the Federal Circuit and, in both cases, the Federal Circuit affirmed the Board's determination that the patent applications failed to satisfy §§ 101 and 112. See id.; In re Swartz, 50 F. App'x 422, 424-25 (2002) (per curiam); In re Swartz, 232 F.3d 862, 864 (2000) (per curiam).

In response, plaintiff does not contend that the claims at issue in the current applications are distinct from the claims at issue in the earlier applications; instead, he argues that "collateral estoppel is not appropriate here because here there are new materials and evidence." Pl. Opp. [Dkt. No. 25] ¶ 58. He also appears to believe that because the earlier cases proceeded under 35 U.S.C. § 141, rather than § 145, collateral estoppel should not apply. See id. Neither of these arguments is persuasive. The application of collateral estoppel does not depend on whether new evidence has been uncovered or whether the plaintiff has identified a different cause of action; instead, collateral estoppel depends on "the identity of the issues that were litigated" in the earlier suit. Ohio Willow Wood Co. v. Alps S., LLC, 735 F.3d 1333, 1342 (Fed. Cir. 2013); see also Black v. Office of Pers. Mgmt., 641 F. App'x 1007, 1009 (Fed. Cir. 2016) ("[C]ollateral estoppel appl[ies] even if new evidence exists . . ."). Here, (1) plaintiff implicitly concedes that the '058 and '765 applications are substantively identical to earlier applications; (2) the issues whether those earlier applications were patentable under §§ 101 and 112 were previously litigated in the Federal Circuit; (3) the Federal Circuit expressly decided the §§ 101 and 112 issues as the basis for affirming the USPTO's decision; and (4) plaintiff, as a party in the earlier litigation, had a full and fair opportunity to litigate those issues. As such, plaintiff is collaterally

estopped from relitigating the patentability of the '058 and '765 patent applications and Count 1 will be dismissed with respect to those two applications.

c. '258, '643, and '691 Applications

Under § 145, an applicant who is dissatisfied with the PTAB's decision affirming the rejection of his patent application may file a civil action against the Director of the USPTO in district court. Section 145 instructs the court to determine whether the applicant is "entitled to receive a patent for his invention" and, if the court determines the applicant is so entitled, to "authorize the Director to issue such patent." See *id.* Furthermore, the district court's review is not limited to the record before the PTAB; instead, the applicant may present additional evidence to the court and, when new evidence is introduced, review is *de novo*. *Kappos v. Hyatt*, 132 S. Ct. 1690, 1693-94 (2012).

To establish entitlement to a patent, an applicant must show (among other things) that his claimed invention is "useful," 35 U.S.C. § 101, and that the specification is "full, clear, concise, and exact" enough to "enable any person skilled in the art to which it pertains" to "make and use" it, *id.* § 112(a). In this case, the PTAB rejected all three applications for lack of utility and lack of enablement. See Def. Mem. [Dkt. No. 18] Ex. 1 at 28; Ex. 2 at 27; Ex. 3 at 25-26.⁴ In all three appeals, the PTAB resolved both issues on the "single question of operability of the claimed invention." See, e.g., *id.* Ex. 2 at 13. Because the PTAB found that all three inventions were inoperable, it also found that they were not useful and could not be made and used by

⁴ The Court may refer to documents referenced in or integral to the complaint without converting defendant's motion to dismiss into a motion for summary judgment. See *Davis v. George Mason Univ.*, 395 F. Supp. 2d 331, 335 (E.D. Va. 2005), *aff'd*, 193 F. App'x 248 (4th Cir. 2006). In this case, the Complaint explicitly incorporates the full record of each patent application at issue and refers to a variety of academic literature relating to LENR technology. See Compl. [Dkt. No. 1] ¶¶ 18, 61-69. These items have been incorporated by reference and may be properly considered in evaluating defendant's Motion to Dismiss and plaintiff's objections to that motion.

persons skilled in the relevant art. See id. Ex. 1 at 28; Ex. 2 at 27; Ex. 3 at 25-26; see also Process Control Corp. v. HydReclaim Corp., 190 F.3d 1350, 1358 (Fed. Cir. 1999) (“If a patent claim fails to meet the utility requirement because it is not . . . operative, then it also fails to meet the how-to-use aspect of the enablement requirement.”). In this litigation, defendant claims that the § 145 claims should be dismissed on the same basis. See Def. Mem. [Dkt. No. 18] 14 (“Specifically, [plaintiff] fails to plausibly allege that his cold fusion inventions are operable.”).

In addition, because plaintiff has included evidence on the issue of operability that allegedly goes beyond the evidence submitted to the PTAB, see, e.g., Pl. Opp. [Dkt. No. 25] Ex. 24 (“Oscillating Excess Power Gain and Magnetic Domains in NANOR-type CF/LANR Components”), plaintiff is entitled to de novo review on the issue of operability. As such, to survive defendant’s Motion to Dismiss, plaintiff must allege facts sufficient to make out a plausible claim that his inventions are operable.

Both the USPTO and the Federal Circuit have long believed that LENR technology is presently inoperable. See, e.g., In re Swartz, 232 F.3d at 864 (discussing the “substantial evidence” that claimed LENR results are “irreproducible” and that “those skilled in the art would ‘reasonably doubt’ the asserted utility and operability” of LENR technology); see also Eli Lilly & Co. v. Actavis Elizabeth LLC, 435 F. App’x 917, 924 (Fed. Cir. 2011) (referencing LENR technology as an example of something “so incredible” as to warrant “special procedures” at the USPTO); Def. Mem. [Dkt. No. 18] Ex. 1 at 18 (“[V]irtually none of the scientific community consider[s] the alleged positive results of cold fusion experiments as being confirmed” (internal quotation marks omitted) (second alteration in original)).

In response, plaintiff argues: (1) that his patent applications are not directed to LENR technology, see, e.g., Compl. [Dkt. No. 1] ¶¶ 24-25, 109-11, 203-04;⁵ and (2) that he has submitted evidence showing both that LENR technology is becoming more widely accepted and also that he has produced positive experimental results, see, e.g., id. ¶¶ 61-69; Pl. Opp. [Dkt. No. 25] Ex. 24 (“Oscillating Excess Power Gain and Magnetic Domains in NANOR-type CF/LANR Components”).

Setting aside the apparent incompatibility of these two responses, neither is persuasive. First, as the PTAB decisions in this case explain, all of plaintiff’s applications relate to the room-temperature nuclear reactions that are the hallmark of LENR technology. See Def. Mem. [Dkt. No. 18] Ex. 1 at 20 (“[T]he claims, including, in particular, representative claim 1, are directed to a process for controlling the production of a cold fusion product.”); Ex. 2 at 11 (establishing “on the record before us that representative independent claim 12 is drawn to a cold fusion process, and more particularly a machine for monitoring electrochemically-induced nuclear fusion reactions in a cold fusion reactor”); Ex. 5 at 15 (“[Plaintiff’s] claimed invention is drawn to methods for controlling a cold fusion reaction or cold fusion product output.”). Moreover, although plaintiff asserts in his Complaint that his technology is not directed to LENR, nowhere does he substantively respond to the PTAB’s characterization of his applications as directed to these low-energy nuclear processes.

Second, neither the evidence plaintiff submits relating to LENR in general nor his evidence of experiments and demonstrations he has run establishes the operability of LENR or of

⁵ It is not entirely clear from plaintiff’s Complaint whether his argument is that his patent applications are not at all directed to LENR technology or that the patent examiner and the PTAB inappropriately referred to his LENR technology as “cold fusion.” For the purposes of the present motion, the Court will construe plaintiff’s argument as the former, more forceful, argument.

the claims in plaintiff's applications. Plaintiff's general LENR evidence consists of various government reports discussing LENR technology. Unhelpfully to plaintiff, these reports make clear that LENR technology is not currently operable. See, e.g., id. Ex. 6 at 1, 6 (explaining that "much skepticism remains" about LENR and describing "real and controllable" LENR experiments in only hypothetical terms); Ex. 7 at 26 (explaining that LENR experiments "remain only thinly reproducible" and that "it seems unlikely that deployable/usable devices could be expected within a five to ten year horizon").⁶ Although these reports may help plaintiff plausibly allege the scientific possibility of future LENR technology, they do not help him plausibly allege the current operability necessary to show patentability. Cf. In re Fisher, 421 F.3d 1365, 1371 (Fed. Cir. 2005) ("[A]n application must show that an invention is useful to the public as disclosed in its current form, not that it may prove useful at some future date after further research."). Moreover, nowhere does plaintiff explain how his specific patent applications relate to the processes described in these reports.

In support of his opposition to defendant's Motion to Dismiss, plaintiff has submitted a variety of academic papers and declarations explaining (allegedly successful) experiments and demonstrations that he has done. See, e.g., Smith Decl. [Dkt. No. 3] ¶¶ 3-5; Pl. Opp. [Dkt. No. 25] Ex. 24 ("Oscillating Excess Power Gain and Magnetic Domains in NANOR-type CF/LANR Components"). Again, plaintiff fails to draw any clear connection between his patent

⁶ Plaintiff discusses both of these reports—one from the Defense Intelligence Agency ("DIA") and one from the Defense Threat Reduction Agency ("DTRA")—in his Complaint. See Compl. [Dkt. No. 1] ¶¶ 61-69. Although plaintiff appears to claim that he attached both reports to his Complaint, see id. ¶ 61 ("Exhibit 11 is from the DIA Report . . ."); id. ¶ 65 ("A closeup of the DTRA report is shown in Exhibit 12."), neither report was filed with the court. Defendant included copies of both reports with his Motion to Dismiss. See Def. Mem. [Dkt. No. 18] Ex. 6; Ex. 7. Because both documents were extensively discussed in the Complaint, they have been incorporated by reference and may be properly considered in evaluating defendant's Motion to Dismiss and plaintiff's objections to that motion. See Davis, 395 F. Supp. 2d 331.

applications and the evidence presented—nowhere, for example, does he explain how an invention described in any of the relevant patent applications was used in the course of any of the referenced demonstrations or experiments. Therefore, although plaintiff may plausibly allege both the theoretic potential of LENR technology and also that he has achieved some positive experimental results (presumably related to the LENR field), he has not plausibly alleged that the inventions claimed in his patent applications were involved in those experiments or that those inventions have any current operability.

Because plaintiff has failed to plausibly allege that his patent applications describe operable inventions, he has failed to plausibly allege his entitlement to a patent and his § 145 claims must be dismissed with respect to the remaining—'258, '643, and '691—applications.

2. Counts 2 and 8 (Constitutional Claims)

In Counts 2 and 8, the Complaint alleges violations of plaintiff's constitutional due process and equal protection rights.⁷ In both counts, plaintiff appears to be requesting damages rather than injunctive relief, see Compl. [Dkt. No. 1] ¶ 322 (“Defendants . . . are hereby sued for monetary damages.”); id. ¶ 341 (citing 42 U.S.C. § 1983 and Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971)); however, plaintiff has only sued Joseph Matal, the acting Director of the USPTO, in his official capacity. Further, neither § 1983

⁷ In both Counts, plaintiff appears to rest his constitutional arguments on the Fourteenth Amendment. See Compl. [Dkt. No. 1] ¶ 322 (“The Defendants have ignored and rejected controlling Authorities including the 14th Amendment of the Constitution of the United States”); id. ¶ 341 (“The Defendants have ignored and reject controlling Authorities including the 14th Amendment’s ‘equal protection’ clause”). The Fourteenth Amendment is not binding on the federal government. See U.S. Const. amend. XIV (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” (emphasis added)). Because the Court must construe plaintiff’s pro se Complaint liberally, see, e.g., Haines v. Kerner, 404 U.S. 519, 520-21 (1972), both Counts will be considered to assert claims under the Fifth Amendment, which does apply to the federal government, see U.S. Const. amend. V; Bolling v. Sharpe, 347 U.S. 497 (1954).

nor Bivens allows a plaintiff to bring such a suit because § 1983 only applies to state officials, see 42 U.S.C. § 1983, and Bivens actions may not be brought against federal agencies or officials in their official capacity, see Doe v. Chao, 306 F.3d 170, 184 (4th Cir. 2002).⁸ Moreover, in his brief [Dkt. No. 25], plaintiff does not clarify the relief he is seeking for the constitutional violations nor does he develop an argument for this Court's jurisdiction. Instead, plaintiff merely argues that his "Action is Supported by Bivens." Id. ¶ 85. Therefore, the Court lacks jurisdiction over Counts 2 and 8, which must be dismissed.

Even if plaintiff were suing the defendant in his personal capacity or were requesting only injunctive relief on his constitutional claims, his Complaint would have to be dismissed for failing to state a claim upon which relief could be granted. In both Count 2 and Count 8, plaintiff alleges only vague violations of his constitutional rights. See Compl. [Dkt. No. 1] ¶ 321 (claiming that the evidence plaintiff submitted to the PTO was "all ignored by Defendants"); id. ¶¶ 342-43 (claiming that "[d]efendants' unlawful dual-tiered system, rather than a single uniform approach, rejecting the reasoning of the Supreme Court's decision in United States v. Nixon (1974) [sic] that all are 'equal under the law'" and that 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"). Without additional factual allegations explaining, for example, what plaintiff means by "[d]efendant's unlawful dual-tiered system"; how plaintiff was treated unequally from others; or what liberty or property interest plaintiff has been denied, his Complaint does not state a plausible claim for relief. Therefore, Counts 2 and 8 will be dismissed.

⁸ Although defendant only explicitly argues this point with respect to Count 8 (plaintiff's equal protection claim), see Def. Mem. [Dkt. No. 18] 22-23, it applies equally forcefully to Count 2 (plaintiff's due process claim).

3. Count 3 (Negligence Claim)

In Count 3, plaintiff contends that defendant was “negligent” in “maintain[ing] the [e]videntiary record.” Under the Federal Tort Claims Act (“FTCA”), which operates as a “limited congressional waiver of sovereign immunity for injury or loss caused by the negligent or wrongful act of a Government employee acting within the scope of his or her employment,” Medina v. United States, 259 F.3d 220, 223 (4th Cir. 2001), negligence actions cannot be brought in federal court “unless the claimant shall have first presented the claim to the appropriate Federal agency,” 28 U.S.C. § 2675(a); see also McNeil v. United States, 508 U.S. 106, 113 (1993) (“The FTCA bars claimants from bringing suit in federal court until they have exhausted their administrative remedies.”).⁹

Plaintiff does not dispute that he failed to appropriately file an administrative claim with the USPTO, see Def. Mem. [Dkt. No. 18] Ex. 12, instead arguing that (1) he “has submitted Petitions (pursuant to the Board of Patent Appeals) seventeen times in the last two years”; (2) “the FTCA is only for federal employees” and does not apply to “independent contractors”; and (3) “in this case, foreign governments may be involved,” Pl. Opp. [Dkt. No. 25] ¶¶ 76-79, 103-11. None of these responses is compelling. To satisfy the FTCA’s administrative exhaustion requirement, claims against the USPTO must be filed with the USPTO Office of General Counsel, not merely discussed in a petition submitted to the PTAB. See 37 C.F.R. § 104.41. Moreover, plaintiff’s claims about independent contractors and foreign governments are nonsensical, as he has sued only the Director of the USPTO. Because he failed to exhaust the

⁹ In his brief [Dkt. No. 25], plaintiff appears to claim that his third count is “Supported by Bivens . . . which is outside the purview of the Federal Tort Claims Act,” id. ¶ 85. To the extent Count 3 is grounded on constitutional rather than tort law, it must be dismissed because, as explained above, Bivens actions cannot be brought against federal agencies or federal officials in their official capacity.

required administrative procedures, Count 3 will be dismissed without prejudice to plaintiff's ability to refile this claim if he properly exhausts the administrative requirements. See Henderson v. United States, 785 F.2d 121, 123 (4th Cir. 1986) ("It is well-settled that the requirement of filing an administrative claim is jurisdictional . . .").

4. Count 4 (Denial of Records Claim)

In Count 4, the Complaint alleges that defendant violated 37 C.F.R. § 41.109, which provides a right to access certain USPTO records in some proceedings before the PTAB. See 37 C.F.R. § 41.109(a) ("Any request from a party for access to or copies of Office records directly related to a contested case must be filed with the Board."). On its face, this provision provides no private right of action and does not grant jurisdiction to this Court to hear an action arising from violations of the regulation. Moreover, plaintiff provides no analysis in either his Complaint [Dkt. No. 1] or his brief [Dkt. No. 25] explaining the source of any right to sue under the regulation. Therefore, Count 4 will be dismissed for lack of jurisdiction.¹⁰

5. Counts 5-7, 9-12, and 14 (Criminal Claims)

Counts 5-7, 9-12, and 14 allege that the defendant has committed a variety of crimes, including obstruction of justice, Compl. [Dkt. No. 1] ¶¶ 327-28 (Count 5) (claiming violations of 18 U.S.C. §§ 1503, 1519); making false statements, id. ¶¶ 329-30 (Count 6) (claiming violations of 18 U.S.C. § 1001); conspiracy to commit an offense against or to defraud the United States,

¹⁰ Even if the Court did have jurisdiction over this Count, plaintiff has failed to plead sufficiently specific allegations to withstand dismissal under Rule 12(b)(6). He claims only that "[t]he PTO, and the Board, have ignored specific requests which would have clarified this for the Honorable court." Compl. [Dkt. No. 1] ¶ 326. He does not explain when he filed those requests, which records he was requesting, how his requests fell under § 41.109, or what those requests would have "clarified." In addition, § 41.109 applies only to a "contested case," 37 C.F.R. § 41.109; however, appeals like plaintiff's proceed under 35 U.S.C. § 134 and are not "contested cases," see 37 C.F.R. § 41.2 ("Contested case means a Board proceeding other than an appeal under 35 U.S.C. 134 or a petition under § 41.3"). Therefore, even on the merits of the claim, plaintiff has failed to plausibly allege any entitlement to relief.

id. ¶¶ 331-40 (Count 7) and 359-60 (Count 14) (claiming violations of 18 U.S.C. § 371); mail fraud, id. ¶¶ 344-46 (Count 9) (claiming violations of 18 U.S.C. § 1341); witness tampering, id. ¶¶ 347-54 (Counts 10 and 11) (claiming violations of 18 U.S.C. § 1512);¹¹ and misprision of a felony, id. ¶¶ 355-56 (Count 12) (claiming violations of 18 U.S.C. § 4). None of the specified criminal statutes contains a waiver of sovereign immunity and plaintiff does not claim that the federal government has in fact waived its immunity with respect to these criminal claims. As such, because plaintiff has only sued the Director of the USPTO in his official capacity, sovereign immunity bars plaintiff from bringing these counts, see Fed. Deposit Ins. Co. v. Meyer, 510 U.S. 471, 475 (1994) (“Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit.”). For these reasons, Counts 5-7, 9-12, and 14 will be dismissed.

6. Count 13 (Civil RICO Claim)

Count 13 alleges that defendant has violated RICO. As with the criminal statutes identified in plaintiff’s other counts, RICO does not contain a waiver of sovereign immunity. See Bloch v. Exec. Office of the President, 164 F. Supp. 3d 841, 856 (E.D. Va. 2016). In addition, plaintiff does not allege—in either his Complaint [Dkt. No. 1] or his brief [Dkt. No. 25]—that the federal government has waived sovereign immunity with respect to being sued under RICO. As such, plaintiff cannot bring a RICO claim against the Director of the USPTO in his official capacity and Count 13 must be dismissed.

¹¹ In Count 11, plaintiff claims defendant has violated 18 U.S.C. § 1512 (a witness tampering statute) through violations of the Administrative Procedure Act (“APA”). To the extent plaintiff is alleging criminal law violations, his claim must be dismissed. To the extent plaintiff is alleging (non-criminal) violations of the APA, his claim must also be dismissed because the APA only provides a cause of action to review agency decisions when “there is no other adequate remedy in a court.” 5 U.S.C. § 704. As the present action demonstrates, 35 U.S.C. § 145 provides a cause of action to review the denial of a patent application; therefore, plaintiff cannot bring suit against the agency under the APA.

III. CONCLUSION

For the reasons stated above, defendant's Motion to Dismiss [Dkt. Nos. 15 and 16] will be granted by an appropriate Order to be issued with this Memorandum Opinion.

Entered this 22nd day of August, 2017.

Alexandria, Virginia

ls/ JMB

Leonie M. Brinkema
United States District Judge

(13) CERTIFICATE OF SERVICE (Rule 25 (d))

Appellant hereby certifies that he has complied with the Order of January 5 2018, and has mailed a copy of the OPENING BRIEF OF *pro se* APPELLANT (corrected) [Blue cover], and Appellant's Appendix (corrected) [White cover], to all counsel:

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of Justice, 950 Pennsylvania Avenue, NW, Washington, DC 20530-
0001

(14) CERTIFICATE OF COMPLIANCE (Rule 32 (a) 7)

Appellant hereby certifies that he has complied with Rule 32 (a) 7, and that there are less than 13,000 words (~9,500 words) using proportional font in the Appeal Brief.

(15) Certificate of Mailing

January 16, 2018

To Whom it Does Concern:

I hereby certify that this correspondence will be deposited with the United States Postal Service by First Class Mail, postage prepaid, in an envelope addressed to **Peter R. Marksteiner, Clerk of Court** US Court of Appeals for the Federal Circuit, 717 Madison Place, NW Washington, DC 20439 on the date below.

Thank you.

January 16, 2018


M.R. Swartz

(16) Contents of Appendix18-1122 (corrected)

	Page	# pages
01-482-Judgment_unsigned	1	1
02-482-Order Aug22	2	1
03-482_Order-Sept7_2017	3	3
04-482-Order Aug17	6	3
05-Memorandum - Aug 22	9	16
06-Docket sheet from proceedings below	25	9
07_482_Plaintiff's Memo.Resp2Decision-Aug302017	34	25
08_Patent_Appendix	59	3
09_DIA_DTRA_Appendix	62	9
10_ScientificPublication_Appendix	71	4
11_WrongDescription_Appendix	75	4
12_DeniedField_Appendix	79	10
13_Compliance_Appendix	89	8
14-143-DecisionBoard	97	16
15-DIAreport	113	8
16-DTRAreport(Excerpt)	121	11
17-NRLonSwartz-2006	132	1
18-Declaration Smith	133	2
19-Declaration Gordon	135	3
20-Declaration Forsley	138	4
21-Declaration Nagel	142	2
22-Declaration Ahern	144	3
23-Declaration Verner	147	2
24-Declaration-976-Bass	149	4
25-Declaration-258-Hagelstein	153	5
26-Swartz-NANOR®_Demo_ICCF17	158	13
27-Verner_DevCFSciEngCourseJCMNS	171	6
28-VernerSwartzHagelsteincourseMITCurrentSci	177	2
29-Swartz_OpDetPhononGainExcerpt_JCMNS	179	9
30-Swartz_IncrPdDantiStokes21	188	16
31-SwartzNANOR®-CurrentScience	204	6
32-Swartz_ImpactElectricalAvalanche	210	11
33-937-FedAppCourt-Excerpt-ReplyBrief	221	20
34-457-1240-FedAppCourt-Excerpt-ReplyBrief	241	11
35-PTOcfCOVERUP-Decision-MooreVsPTOexcerpt	252	11
36-Let2DavidFrench	263	2

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

**18-1122
Swartz v. PATO**

MITCHELL R. SWARTZ,
Plaintiff - Appellant

v.

UNITED STATES PATENT AND TRADEMARK OFFICE,
JOSEPH MATAL, Performing the Functions & Duties of Director of the US
Patent & Trademark Ofc,
Defendants – Appellees

[Appeal from the US District Court
for the Eastern District of Virginia
Alexandria Division No. 1:17-cv-482]

Filed: January 16, 2018

APPELLANT'S NOTICE OF APPEARANCE *pro se*

1. Plaintiff requests to inform the Honorable Court of his appearance *pro se*.

Respectfully submitted,



Dr. Mitchell Swartz, Plaintiff, *pro se*