

**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]

**REPLY BRIEF OF
PRO SE APPELLANT**

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

March 15, 2018

pro se APPELLANT's REMARKS IN REPLY

1 The Appellee's Brief Ignores the Issues of the Complaint, the Complaint's Detailed New Evidence, and Defendant's Systematic Wrongdoing Against the Orders of the PTAB

1. There are so many errors in the Appellee's Brief, that only the most significant can be addressed here. Briefly, the Appellee's Brief is a rehash of past mischaracterizations and past factually false statements and new disingenuous statements without a single admission or substantive correction or discussion of the new evidence.

There is nothing new in it. The multitude of problems within the Appellees Brief now includes impugning the *pro se* Plaintiff (now Appellant) and his several unique, novel and non-obvious inventions producing clean energy.

Other errors include factually false statements, repeated mischaracterizations, systematic misdescriptions of past evidence and pleadings, and outright misdescription of the inventions submitted and the Evidence accompanying them, and a reliance on i) the proverbial "fruit" obtained from the poisonous tree -- which was fabricated by the Defendant to cover up an entire clean energy field using systematic discrimination and an odious series of factually false statements. It is unfortunate that Atty. Michael Forman misrepresents factual information to this court. His false

statements will be corrected in this Reply Brief. Most egregiously, as this Reply Brief and the record demonstrates, the Defendant's said reprehensible actions were made during, and followed by systematic repeated attempts at exculpatory actions.

2 The Appellee's Brief Ignores That 35 U.S.C. § 145 Claims are Supported by New Evidence

2. The Appellee's Brief represents a lengthy but wholly unpersuasive attempt to distract from the actual issue to which the Plaintiff filed. This is unfair, unjust and absolutely unconstitutional.

THIS case was filed because new Evidence became available. Plaintiff 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 *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 deceived, thereby denying Constitutional and due process and civil rights.

3. The expected process was clear, and obviously evaded. 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"**.

That did not occur here. There has been no substantive accurate, and honest, discussion regarding the actual Issue and facts, or the actual Complaint, or the actual new Evidence. All remain ignored and in their stead is the continuing factually false statements that led to the "rubberstamped" court Order that is being appealed.

However, the ignored new evidence speaks for itself and is the basis for Claim 1 under 35 U.S.C. §145 [***].

[***] 35 U.S.C. §145 requires the court to address the new Evidence. That has not happened, and as a result both the old unlogged and/or unaddressed evidence and the New evidentiary proof remain ignored by the court (although known to be obvious by the People) thereby continuing the wrongful practice of the Defendant misleading the court to deny justice and usurp Constitutionally protected rights.

4. There are several types of new evidence, and they have probative value and a substantive salient content which is a tsunami overcoming the Defendant's unsupported, invalid opinion [thus consistent with 35 USC§145]. Appellant submitted at least eleven (11) types of Evidence refuting the Defendant's outdated, biased and unfounded opinion. Much of the Plaintiff's evidence is 'new' although some of the evidence overlaps 'old(er)' timely-submitted evidence which was not logged in and/or ignored. 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).

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, prove BOTH operability and utility, and the Defendants and Office cannot rebut them – so the Defendant demeans the Declarants and the open demonstrations at MIT and the peer-reviewed scientific publications, and misdescribes the DTRA and DIA implications.

The timely-submitted peer-reviewed documents corroborating the Plaintiff; include peer-reviewed publications in *Current Science* and *Fusion Technology* (of the American Nuclear Society), and are peer-reviewed by the foremost authorities in the field. They are also accepted nationally and 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 this additional Evidence. These scientific publications are also sufficient to show the salient operability and definiteness of Appellant's inventions.

The reports, the science papers, and engineering devices are important to the larger issue of US energy requirements that the USPTO's mistaken “belief” continued for unclear reasons – even after the USPTO was rebuked by the court. This is discussed further in the Denied Field Appendix (Appx79).

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 concocted only by ignoring the Evidence. The Defendant, and now the court, has never --so far-- given a full and substantive response to, and dispute of, the new Evidence, and to the trail of the Defendant's failure to log and address timely-received rebutting evidence against its unfounded "opinion".

5. Where is the Defendant's honest acknowledgement of this fact? The record indelibly demonstrates that it is not there. Similarly, the Appellee's Brief will not discuss the Declarations of Robert Smith or Frank Gordon, or Brian Ahern, or Larry Forsley, or David Nagel. The Defendant cannot refute them, and they prove that there is no real basis to substantiate the Defendant's unsupported opinion. Instead of addressing the new Evidence, there is the appearance of the court merely overlooking Defendant's copious false statements rather than its duty of "**making a *de novo* finding when the new evidence is presented on a disputed question of fact**".

3 The Appellee's Brief Ignores Complaint's Detailed, Factual Averments

6. The Appellee's Brief does not address the Complaint but egregiously, and unlawfully, attempts to mischaracterize it, as was done for the Patent Applications. Rather, the Complaint, and the Plaintiff's clearly explicitly

discussed Issue, like the Evidence submitted, is conveniently mischaracterized and ignored regarding its substance by the Defendants.

However, the Complaint and pleadings were specific, substantive and precise with sufficient facts, and precise specific allegations. The Defendant has not refuted even one substantive fact in said above-entitled Complaint, which therefore should have been taken as true [Lewis v. Bours, 119 Wn.2d 667, 670, 1992]. That has not happened.

7. As one example, 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. 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].

8. Ignored by the Defendant's copious missive is the FACT that 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.

9. 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 both for Constitutional issues, National security and the American economy.

4 The Appellee's Brief Ignores Precise Orders to Plaintiff from the Patent Trademark Appeal Board [PTAB]

10. The Appellee's Brief ignores the fact that the Board of Patent Appeal (now called the Patent Trial and Appeal Board [PTAB]) Ordered the Plaintiff (then Applicant) to make Petitions to the Commissioner about the issues of failing to log materials, “missing” evidence (repeatedly), corruption, and the other wrongful behavior.

“(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.]

11. The Plaintiff did Obey the Decision of Appeal 2009-001853, Application 10/646,143, in the DECISION ON REQUEST FOR REHEARING made

Feb. 22, 2011. The Plaintiff repeatedly DID file the appropriate Petitions to the Commissioner and thereafter did send more than seventeen Petitions to the Commissioner of Patents (Defendant) as the USPTO PTAB directed, just during the period of 2015 to 2016. They are discussed further in the Notice Appendix.

Plaintiff did exactly what that the PTAB (Authority overseeing the Defendant) required prior to commencing the legal action. Every attempt at remedy was attempted. As discussed in its Appellee's Brief's Averment 3, the statement that an administrative court claim was not filed as required is utterly fabricated and knowingly false, knowingly irrelevant, and knowingly exactly opposite what was directed by the Board of Patent Appeals. Thus, the Appellee's Brief continues the confabulation as it doubles down on their previous already-exposed two counts of perjury and subornation of perjury. The Plaintiff did exactly what that the PTAB required - exhausting all his remedies.

5 The Appellee's Brief Ignores Defendant has Systematically Failed to File and/or Address Submitted Documents

12. It is extremely troubling that the USPTO failed, and failed systematically, to log and then substantively address Plaintiff's repeated timely-submitted information which would have proven their Opinion to be

wrong, opposite the evidence, and therefore invalid. This is wrongful because 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.

13. An 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, the Defendant's systematic improper inaction has been itemized to more than a dozen specific cases, as cited in the Complaint.

14. Therefore the Plaintiff had a right to, and did, submit Evidence to strongly rebut the Defendant's mistaken, unsubstantiated opinion. This large body of Evidence demonstrates the Defendant's unsubstantiated, unfounded opinion is absolutely positively wrong. In this case, 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]. 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. In its stead, the opinion of the Office continues its unsupported opinion (for almost three decades) leaving a trail of discrimination and pain. As shown in the photographs with the Complaint, each time Evidence was received, it was systematically and odiously ignored, and/or misdescribed.

15. In each case the evidence was ignored, lost, and in some cases, later misdescribed. In every one of the 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. 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. Furthermore, they have not been logged (confer Complaint) and have never been substantively addressed.

16. This is wrong because 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 mishandled and inappropriately and

egregiously ignored. 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.

6 The Appellee's Brief Ignores Defendant's Systematic Mischaracterizations of the Inventions

6-1 The Appellee's Brief Ignores the actual Inventions

17. The Defendant's Brief and Memoranda falsely mischaracterize the actual patent applications. This begins by avoiding the actual words used in the original specifications and claims and instead just grouping them all together and then calling all of them [despite them being all different and something else]: "cold fusion". Yet there is, in fact, almost no overlap with what is called cold fusion [here, aka "F+P" for Drs. Fleischman and Pons; confer Figure 1]. This is a wrongful attempt to demean, ridicule, and eliminate them, despite that it is an uncontested fact that ONLY the claimed invention should be the focus of the Office review. Refer to the SAW Memorandum, directed to Examiners to TARGET patent applications using "palladium"

and “D2O” and giving advice how to screen them out, now using the fruit from the poison tree “In re Swartz”; as discussed in the Complaint. No wonder this is ignored in the Appellee’s Brief.

The Appellees Brief does not use any of the words which the Plaintiff originally used to describe his inventions in the original specifications and claims.

Case 1: Not one time does the Appellees Brief mention the "vibrator" or "vibration" which the Plaintiff used to measure loading in invention '937. In Defendant's responses to '937, even the words in the patent application were not even used. The proof is in the Reply Brief previously submitted to this Court and which was submitted as Evidence in the lower court.

Case 2: Similarly, the Appellees Brief does not use the word "loading" once even though it was the basis of Plaintiffs patent applications, and was a key in each and every one of the Plaintiff's patent applications that distinguished them for all others, and enabled the success.

Double Bubble Map to Compare and Contrast Plaintiff's Inventions with "F+P"

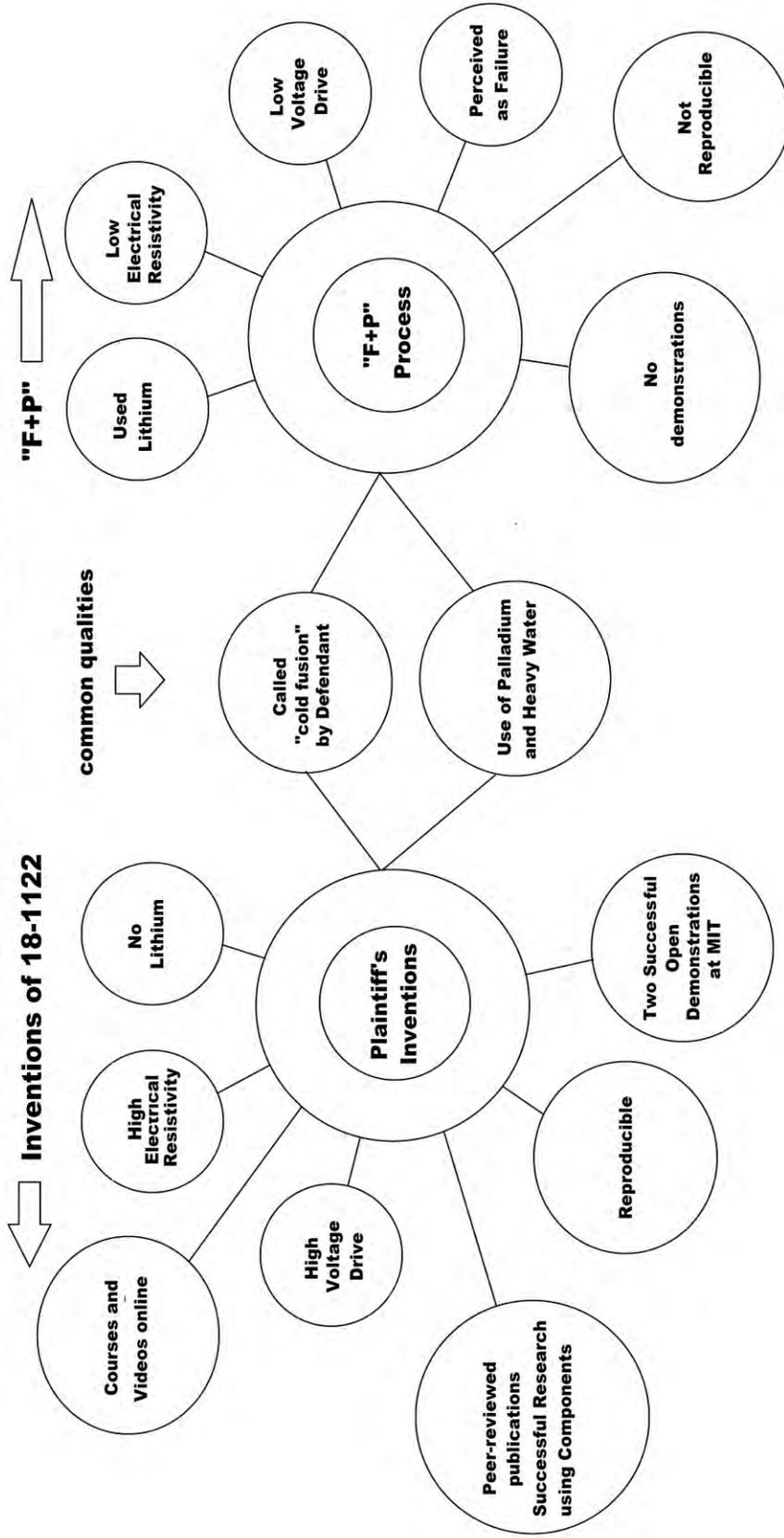


FIGURE 1 - Double Bubble Map Comparing and Contrasting the Inventions of the Above-entitled Appeal and those of "F+P"
 There is very little overlap of common qualities between the inventions of the above-entitled Appeal involving energy, monitoring it, measuring loading, and the other of Plaintiff's allied clean energy technologies versus those of "F+P" (belittled as 'cold fusion').

Case 3: Similarly, the Appellees Brief does not use the word "calorimeter" once even though it was the basis of '058 which is cited in the Appellees Brief as another fruit from the poisonous tree planted by the Defendant. In Defendant's responses to '058, even the words in the patent application were not even used. The proof is in the Reply Brief previously submitted to this Court and which is in Evidence in the lower court.

This is a wrongful behavior, misdirection, and essentially lying to the court. Instead of using the words actually in the patent applications and the claims, the Defendant and now his corrupt tax-paid lawyers ignore the original specifications and claims, and like a racial epithet they whiplash the words "cold fusion" over and over, using the Defendant's and counsel's factually false statements.

18. Despite what the Office purports, THESE inventions are what is written in the original specifications and not what the Defendant imagines in its proven mischaracterizations. 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, as discussed in the Complaint, including on page 13.

It did not matter that '058 is a measurement system of heat production

which is applicable to obstetrics, to space travel, and laboratory use. It did not matter that '765 involved the measurement of hydrogen loading into a metal which is applicable to metallurgy, medicine, and automobiles' energy production. This is long standing. As examples, Exhibits 27 through 62 are legal briefs, from the cases cited by, but misdescribed, now and originally by Defendant and counsel.

6-2 The Appellee's Brief is Factually Wrong about Each Invention

19. The Plaintiff submitted more than a dozen patent applications to the Defendant involving clean energy production which is safe, with no carbon emissions, toxicity, or radioactivity. These inventions are the subject matter of the above-entitled Complaint, and they are discussed in more detail in the Patent Appendix.

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.

20. THESE inventions also 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. The Complaint (and Exhibits) saliently shows that in each case the original specification was ignored, along with submitted evidence (before Final).

6-3 The Appellee's Brief Ignores that These Inventions are Not "F+P"

21. These patent applications, discussed in the above-entitled Appeal and action, are not about what Fleischmann and Pons reported in 1989 ["F+P" or "cold fusion"; confer Figure 1]. Here, "cold fusion" is the proverbial brick which Defendant throws at the Plaintiff to obstruct justice, and to evade evidence, and to evade the Defendant's sequestration of timely-submitted

evidence. The words are a deliberate discriminatory diversion, used as the equivalent of an epithet, used here to deny the Plaintiff's --and other Americans' -- Constitutional rights. The words are used under the guise of ignoring the applications --with a usual 'hand-wave', demeaning them, and ridiculing them. They say "It is F+P" which they deem "does not exist". And therefore they presume it can be ignored [even though they have exculpatory evidence demonstrating the opposite]. Therefore, even though they know better, they make the factually false statement (never under Oath) that it has "no utility".

22. 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.

By contrast, these are different inventions and different claims. What is described in THESE applications was never filed by F+P, was never described by them, AND never described, discussed, or mentioned by the USPTO's cited art and critics. Not once.

23. Furthermore, the many different applications, NOT all the same, could not all be the same. And, not one of them is "F+P". How could ALL of the patent applications be the same as F+P? Any fifth grader can recognize that

each of the inventions cannot all be the same, cannot all be 'F+P'[***].

[***] This would not stand if a deposition, or sworn statements by Reciprocal Roseboro, were allowed. Confer the Wrong Description Appendix for more details.

6-4 The Appellee's Brief Mischaracterizes and Ignores Other Uses for These Technologies

24. The Appellee's Brief paints an incomplete picture and purports everything Plaintiff has done was only cold fusion, as opposed to the fact that part of it was relevant to 'cold fusion' and other fields, but much of it had nothing to do with 'cold fusion' processes. Instead, calorimeters and methods for measuring loading and activity and optical spectra were involved (and misdescribed). Furthermore, the Defendant has falsely purported that Appellant has not stated that these technologies are useful beyond "cold fusion" (also called the lattice assisted, or enabled, nuclear reactions; LANR or LENR). However, this is untrue. IT WAS IN THE ORIGINAL SPECIFICATIONS. Exhibits 63 and 64 did demonstrate that the plaintiff DID substantially say so explicitly before Final.

7 The Appellee's Brief is Factually Wrong about Operability

25. Claim 1, submitted under 35 USC 145, is supported by proven operability corroborated by solid new Evidence which overcomes the

Office's proven wrongful, unfounded opinions. The 35 U.S.C. § 145 Claims have scientific and engineering plausibility. Five (5) types of new Evidence have been submitted, including unclassified relevant reports from DIA, DTRA, NASA, and the US Navy.

The DIA and DTRA Reports, the open demonstrations of the Plaintiff's inventions at MIT, the 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".

26. The USPTO has absolutely NO foundation to support their mistaken opinion. In an unbiased venue, such peer-reviewed publications and Declarations establish facts. Such Evidence proves that the Plaintiff was correct on the filing date of the application, would have already met the bar of enablement [In re Hogan, 559 F.2d 595, 60S, 194 USPQ 527, 537 (CCPA 1977)].

8.DTRA and DIA Reports Proves §145 Enablement of These Inventions and Failure of Defendant to Honor Exculpatory Evidence

27. The DTRA and DIA reports were submitted because they actually,

explicitly, discuss the plaintiff's technology. **In fact, DTRA, DIA, and other agencies report utility and operability based on Plaintiff's presentation of his technologies.** These Reports positively discuss the Plaintiff's technologies, and the Defendants and Office cannot rebut them so they are mischaracterized.

First, the Appellee's brief on page five minimizes with DIA and DTRA reports. Second, reprehensibly, on page seven of the Appellee's brief, Mr. Foreman falsely states that the district court noted that government reports cited by Dr. Swartz made clear that LENR technology is "not operable". The government reports indicate that the Plaintiff's technology worked well enough for the US to begin funding proposals in the field (with the first being to the US Navy using Plaintiff's PHUSOR®-type technology). Defendant and Mr. Forman have elected to attempt to deceive the court – which is an obstruction of justice and another direct assault on the National Security and health of the United States.

9. DIA Report Proves \$145 Enablement of These Inventions

28. The DIA (Defense Intelligence Agency) Report [DIA-08-09U-003, November, 13 2009] 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 defies credulity because this report obviously satisfies the double prong requisite for "validation", which includes operability and obvious, salient utility.

10.DTRA Report Proves §145 Enablement of These Inventions

29. The DTRA Report is from the Defense Threat Reduction Agency 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 "

30. 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.

This obviously satisfies the double prong requisite for "validation".

31. This is corroborated in the Declaration of Lawrence Forsley, which states: "While operating under a US Navy NCRADA at the US Navy SPAWAR-Pacific, I was instrumental in setting up a meeting at SPAWAR to better acquaint the Defense Intelligence Agency with the field. Dr. Swartz was one of the participants of over 20 whom we invited to assess the state of

the Cold Fusion/Low Energy Nuclear Reaction/Lattice Assisted Nuclear Reaction field. Subsequent to this meeting, the DIA published a report in 2009 [#DIA-08-0911-003 13 November 2009]."

This is also corroborated by the Declaration of Dr. David J. Nagel states, "I went with Dr. Swartz, when he presented about this new field to the Defense Threat Reduction Agency in 2006. That meeting led to the DTRA report, which is now in evidence in this case.

11. The Appellee's Brief Ignores that Open Demos at MIT Proves §145 Enablement of These Inventions

32. The gold standard in the scientific community of technology has been, and is, an open demonstration followed by a peer-reviewed publication. Therefore, 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 highly 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. Said open demonstrations saliently prove that the inventions do operate as indicated and are capable of providing a useful output.

33.Plaintiff's open demonstrations at MIT, and the Plaintiff's submitted peer-reviewed articles and Declarations [confer, for example, Figure 2] 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".

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.

Despite the factually false statements of the Defendant and counsel, working successful components and systems based on these inventions have enabled many working CF/LANR systems, and secondary generated scientific papers, and even courses, as shown in the diagram.

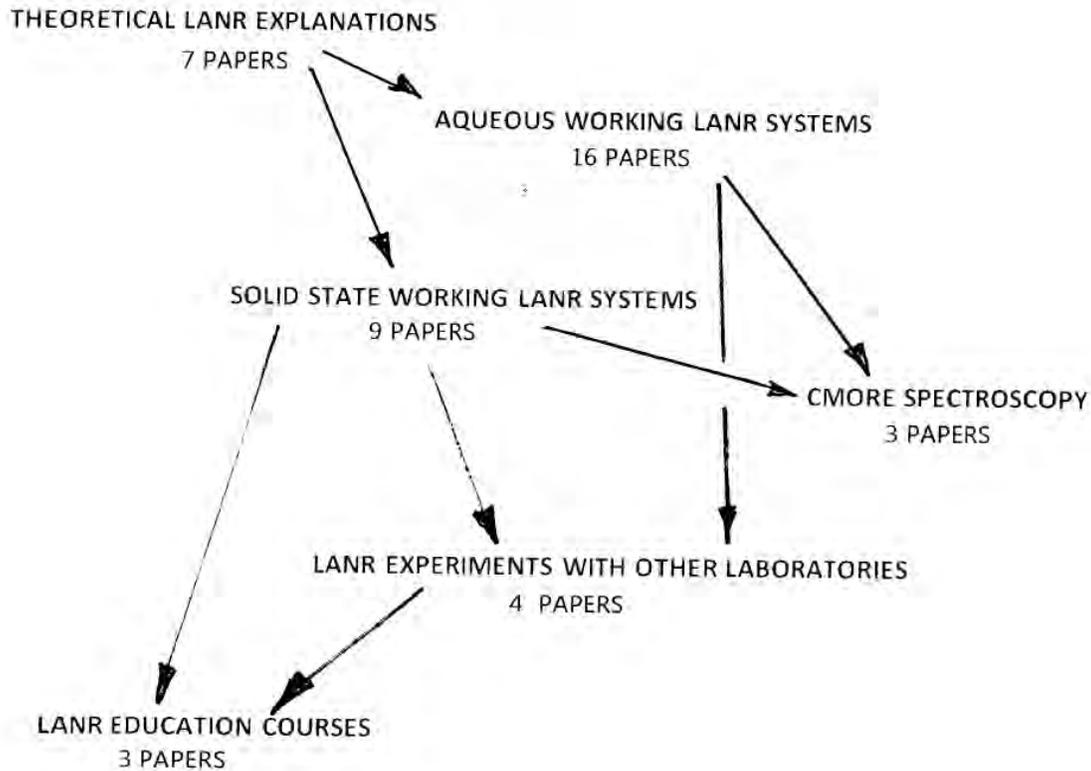


FIGURE 2 – Courses, Affiliated Work, Discoveries, Scientific Papers, and new Products have Resulted from These Inventions

12.The Appellee’s Brief is Factually Wrong about the number of Declarations supporting Operability

34.On page 10, the memorandum discusses declarations that explain "allegedly successful experiments and demonstrations that he has done" (e.g. Robert Smith). In fact there have been many more declarations and Amicus Briefs (consistent with the videos online) submitted which have all probative value and were submitted here as exhibits including Dr. Gordon, and Dr. Ahern, and they are supplemented by the declaration of Lawrence Forsley.

Several others were discussed in the Complaint.

13 The Appellee's Brief is Factually Wrong about the Existence of the Field

35. The field by whatever name is real [confer the Affidavits of Forsley, Nagel, Mallove, Fox, Bass, Swartz, Biberian, Hagelstein]. As the Declaration of Lawrence Forsley states:

"In my opinion, the field of cold fusion whether called low energy nuclear reactions (LENR) or lattice assisted nuclear reactions (LANR) is real, scientifically significant, militarily important and possibly commercially useful."

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

"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."

14 The Appellee's Brief is Factually Wrong about What Plaintiff Purported Alleged about Operability

36. The Appellee's Brief purports that *the PTAB found (Plaintiff's inventions) were inoperable.*

This statement and allegation is not true for several reasons. 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. This was discussed in the Complaint [averments 90-93, pages 45-47]. The Exhibits demonstrate that the USPTO was informed about this, but continues to misdirect the court - which is highly improper.

These inventions have repeated proven operability, and there has been manufacturing and development. By contrast, the Defendant has NEVER offered any counter proof except pointing to someone else's work from 30 years ago.

Second, why else would the Declarants and Appellant bring them up with specificity, under Oath?

37. Third, this is unfair. How could the PTAB have resolved this when the Evidence was not logged and/or removed, and not even addressed? Corroborating this, the PTAB never even discussed Appellant's inventions but was only fixated on "cold fusion" -- while the technologies were thereafter sent to Japan, and on information and belief other countries.

Despite the false statement rubber-stamped in the court's Opinion as the Complaint was ignored, the Plaintiff DID allege the facts. The Plaintiff demonstrated with new evidence, and with old sequestered evidence which was submitted, that pursuant to §145 the court should make a *de novo* finding consistent with the actual "new evidence presented". The court denied this based upon many now proven-factually false statements by the

Defendant and Defendants counsel. Roseboro reciprocity is warranted, as is this Appeal.

OTHER CLAIMS

15 The Appellee's Brief Ignores Usurpation of Civil Rights and Constitutional Rights

38. The Appellee's Brief ignores the Defendant's dual-tiered system. For example, Averment 2 ignores that precise and repeated claims involving salient constitutional violations WERE given. The Appellant did describe clear-cut violations of both his Constitutional and Equal Protection Clause rights including those that protect his right to his inventions, including those upon which he has worked on for 29 years. There is no question that the Plaintiff has demonstrated to this court a dual-tiered system.

First, as 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."

39. Second, as Plaintiff demonstrated, the USPTO systematically failed to docket submitted Evidence, and then even granting '258 [originally '937] claims of the identical invention, to an automobile company, at a later date [***] even though Plaintiff was first to submit, and unlike Nissan, Plaintiff actually submitted data, clear claims, and a far more definite application.

[***] The Defendants issued Nissan Motor Co., Ltd. the invention from the '258 application [US 8247122 B2 was issued on Jul 8, 2004 to Masaru Okamoto of Nissan] even though Plaintiff was first to submit, and unlike Nissan, Plaintiff actually submitted data, clear claims, and a far more definite application (averment 38, corr. Complaint).

The court ought simply remove a growing indelible stain of impropriety by removing the dual-tiered system – which is salient to anyone who reads the entire Complaint. In addition, simply put, the court has denied Article I, Section 8 rights – to wit: 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].

16 The Appellee's Brief is Disingenuous about Claims 5-7 9-12, and 14

40. These Claims sound in tort. In *Bivens*, the Court created a damage remedy under the Fourth Amendment. 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)].

LAW

Defendant's systematic, unfounded, discriminatory behavior has been wrought to prevent the Executive Orders and Requirements of POTUS, and 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 has denied the Plaintiff his right to an impartial tribunal [28 U.S. Code Section 144, *Mayberry v. Penna.*; *Duncan v. Louisiana*].

17 The Appellee's Brief Ignores Negligence Including Cashing Checks for Thirty Years

41. The Appellee's Brief, including Averment 3, ignores that there has been systematic negligence and wrongful behavior by the Defendant [confer Figure 3]. The Complaint and supporting Evidence demonstrate that the Defendant's conduct was wrongful and absolutely inconsistent with the duty resting on the Defendant.

42. The Appellee's Brief confirms that the Plaintiff did indeed trust the USPTO, and that they would abide by their Rules and the US Constitution, as he did make a wide variety of patent applications over many years. It is also salient from the Complaint that the Plaintiff, as he did trust the USPTO and filed continuously, did increasing fill the files with more and more evidence -- which was all ignored - and not addressed because it opposed the "opinion". During said time of Trust, the Defendant had no trouble serially cashing the checks of Plaintiff over decades. Several times the Defendant did not give credit and it took the intervention of the US Attorney General's Office to give that partial justice to another attempted exculpatory action by the Defendant (vide infra). By these actions of cashing fees, over and over, the Defendant in fact 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)]. The Defendants cashed the checks of the plaintiff on the implied and explicit promises that the Federal law would be applied, and that the U.S. constitution would be obeyed.

18 The Appellee's Brief Ignores a the Defendant' Systematic Threat to National Security and Public Safety

43. The Appellee's Brief ignores the implications of the Defendant's systematic removing the patentability of inventions involving clean energy and possible nuclear mitigation from the US Armamentarium while themselves-sheparding said inventions to other governments, individuals and/or entities. Each of the Defendants actions in this matter, continued for decades using factually false statements on federal documents and to courts and using sequestration of submitted evidence to divert, defer, and/or eliminate clean energy production and its measurement and the measurement of loading. These are threats to National Security and Public Safety committed by the Defendant(s), and now their counsel. These threats should require this court to ask itself:

Why are so many lawyers attempting to change the record – to coverup sequestration of evidence and diverting American technologies to other countries? Was there a *quid pro quo*?

Multi-Flow Map showing Cause and Effect

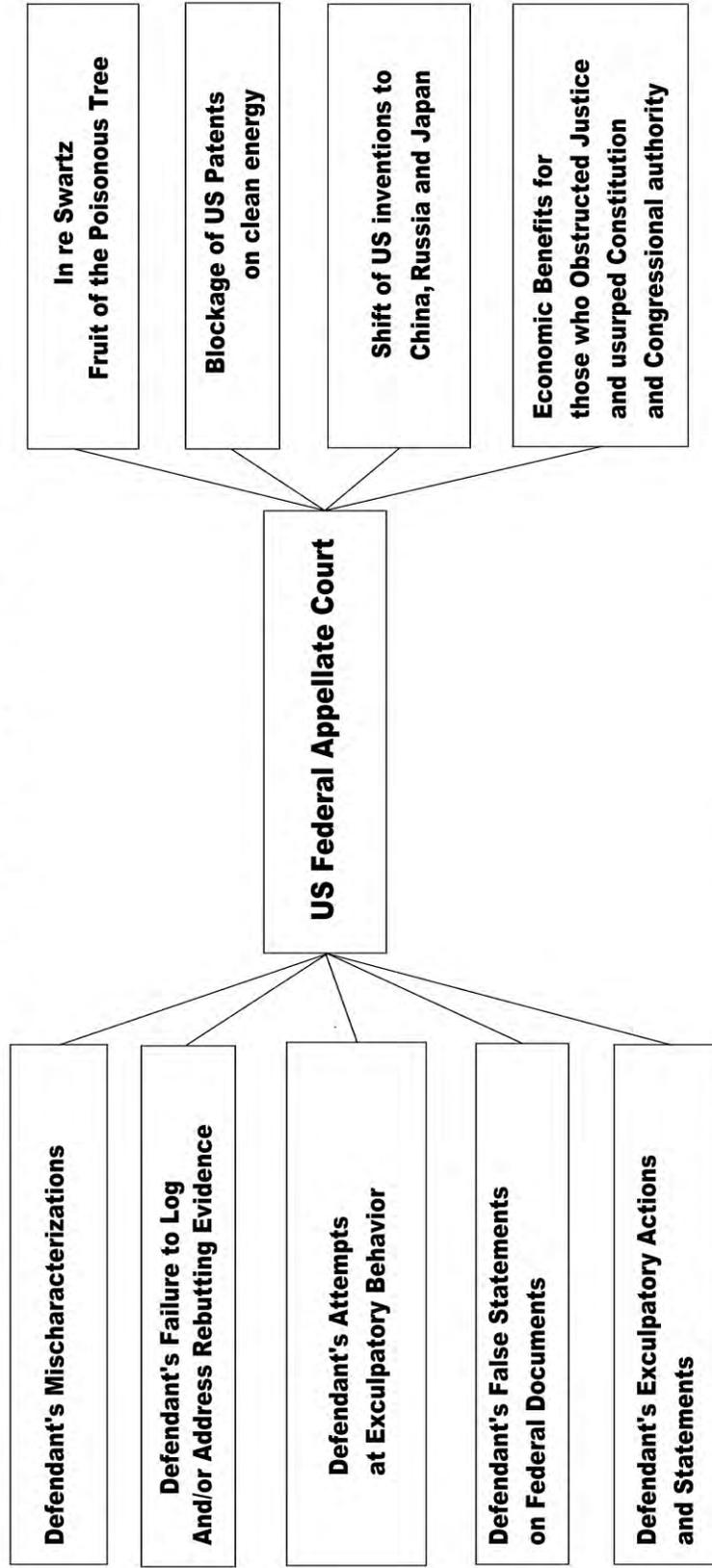


Figure 3 - Multi-Flow Map showing the cause and effect

The Impact of the Defendant's systematic mischaracterizations, failure to supply exculpatory information held by the Defendant, sequestration of timely-submitted rebutting evidence from the Plaintiff, and factually false statements on the PTAB and Federal court system are shown.

44. What is the implication to future American inventors who know that their applications will get more respect and protections in Russia, or in China, and in other countries than in the USA.

Is this behavior consistent with other recent findings? The many lawyers out to destroy the Plaintiff's work product and his credibility, despite that these efforts are for clean energy with demonstrations and presentations made at MIT, DIA, DTRA, and NRL is wrongful and sadly consistent with a very recent report from America's intelligence agencies. They reported that US agencies, including the CIA and the NSA, routinely in the past failed to correct accuracy and methods pertaining to "waste, fraud, abuse, or criminality".

"The investigators looked into 190 cases of alleged reprisal in six agencies, and uncovered a shocking pattern, In only one case out of the 190 did the agencies find in favor of the whistleblower-and that case took 742 days to complete, Other cases remained open longer. One complaint from 2010 was still waiting for a ruling. But the framework was remarkably consistent: Over and over and over again, intelligence inspectors ruled that the agency was in the right, and the whistleblowers were almost always wrong."

The President of the United States has also made a comment on this issue just this week [Figure 4].



Figure 4 – Tweet from President Trump about this issue such as the transfer of technology filed by Plaintiff to other countries (such as the vibrational technology to measure loading in ‘937)

LAW

45. The court has ignored violations of Title 18 U.S.C. §1341, Mail Fraud, 18 U.S.C.§1001. The court has ignored violations of 18 U.S.C. §241 (Conspiracies Against Civil Rights) .

The court has ignored violations of 18 U.S.C. §1962(c) because Defendant has used an enterprise engaged in undermining public safety and adversely affected interstate commerce through a “pattern” (5) of racketeering activity while funded by taxpayers.

The court has ignored violations of Title 18 U.S.C. §241 – Conspiracy Against Constitutional Rights – which prohibits in relevant part, “two or more persons (from conspiring) to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in

the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . .” See, 18 U.S.C. §241.

If these sequestration of, and failure to address, evidence from the DIA, DTRA, and other agencies is not reversed immediately, there may also be a possible relevance to Patriot Act, Title 10, Title 35, and United States v. Reynolds, 345 U.S. 1 (1953) requiring measures to expose, engage, and bring to justice those in government who have engaged in corruption.

FACTUALLY FALSE STATEMENTS

19 The Appellee’s Brief Ignores Systematic Use of Factually False Statements on Federal Documents

46.The Defendant has made systematic false statements on federal documents sent through the US mail in egregious violation of 18 U.S.C.§1001. These involve false statements about receipt of checks, Evidence, communications, transfer fees.

Most importantly, 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).”

47. Furthermore, additionally, egregiously, the Defendant has made several attempts at exculpatory behavior. As discussed in the Complaint, in a typical example, in at least one application, the proven-received Evidence and responses were allegedly, first, “not received”, then allegedly “not legible”, finally allegedly “lost”.

How long shall the Court allow such factually false statements to continue?

How long shall the Court continue to accept factually false statements on Federal documents by the Defendant(s)' lawyers, who are supposed to represent the USA, through the Office of the Solicitor.

20 The Appellee’s Brief Ignores Reliance on the Fruit from the Poisonous Tree

48. Attention is directed to the 'poison tree' [In re Swartz] which was created by the Defendant to impugn the Plaintiff without any limit, and without any basis, and to impugn a whole scientific field of clean energy forever, and to ignore the Defendant's odious sequestration of submitted data ["evidence rebutting the Defendant"] over and over. The timely-submitted

evidence was destroyed, or removed, and ignored, and never addressed because the Evidence shows the Defendant was not truthful to the court when it planted the poisonous tree.

This is utterly unfair for several reasons . First, this is using fruit of the poisoned tree which is why, in part, this case was brought to the court in the first place [*vide infra*]. 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.

49. 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.

50. The Defendant disingenuously fails to point out that the court upheld the denial in federal court (and to the PTAB) ONLY by the PTO making a series of factually false statements on Federal documents, and by a systematic mischaracterization of the patent application [***]. In fact, egregiously, that is in the light that submitted evidence was not docketed, and/or was not addressed.

[**] Previously, the original specifications were not even described accurately, the words of the original specifications were not used but others imposed by the USPTO. The responses involved, and fixated on words, which were not even in the application or mentioned once in passing. Egregiously, the submitted data and evidence were ignored including any and all Evidence that rebutted the opinion of the U.S. patent office. For this court to ignore this, and rubber-stamp the USPTO has the appearance of impropriety.

51. 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.

52. It is extremely troubling is that the Appellee's Brief ignores this matter even now, refusing to admit that Defendant fabricated a Poisonous tree of false statements and innuendos. The district court could not have possibly correctly, or lawfully, dismissed the claims because they were not described correctly, nor was the case described correctly.

How long shall the court permit this poisonous tree to continue to bear fruit used by the Defendants with the gout of factually false statements to deprive America of clean energy? If this matter is not corrected now, this court will leave a neon sign to American inventors to go to other countries.

The subject of clean energy production inventions, already made SPECIAL by the PTAB's precursor, and the right to a US Patent should not be "judged" with a wink and nod and more rubberstamping of an incredibly long list of factually false statements, and misdescriptions of the inventions, made by the Defendant.

21. The Appellee is Factually Wrong about the previous case
'937 - the Invention to Measure Loading by Vibration

53. As an example, Application number '258 was originally called '937 and involves a vibration of an electrode to measure the hydrogen loading [the amount of hydrogen in a metal electrode]. The Office misdescribed it and wrote fraudulent case law about it ["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).”

.[***] Confirming this are 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.

Also confirming this, 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.

54. These action by the Defendant is wrong 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."

22. The Appellee is Factually Wrong about the previous case '058

55. As another example, Application '058 was originally '457 and is a calorimeter used to measure generated heat. The Defendant misdescribed it, 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.

Furthermore, consistent with that, 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.

Despite the facts, on page six of the Appellee's brief, Mr. Foreman disingenuously states that the district court dismissed '058 and '765 because they were excluded by collateral estoppel, but leaves out the fact that these cases were changed with new evidence - despite Mr. Foreman's false statement, and that is what this entire case was about! These lawyers are not truthful -- and need to be sworn under pains and penalties of perjury.

Their false statements will add to the destruction of ongoing research in the United States. Here, Atty. Foreman falsely infers that all cases had been to the Federal Appellate Court before, and he falsely states that all '058 and

'765 (and their continuations with evidence augmentation) were identical when, in fact, new submitted evidence included reports and Declarations of open demonstrations, sales and development of products, actual classes demonstrating the product at MIT, and many, many scientific papers resulting from working technology (Figure 2).

23. The Appellee is Factually Wrong about the previous case '765

56. As another 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.

24 The Appellee's Brief Ignores there have been Factually False Statements Both to the PTAB and This Court to Coverup Past Wrongful Behavior

57. The Appellee's Brief is misleading and dysingenuous with factually wrong statements about the Administrative Notices purportedly not given. Such are not relevant. Furthermore, the plaintiff DID dispute and explicitly did point out how and why the late-purported administrative claim with the USPTO is not, and was not, relevant.

25 The Appellee is Factually Wrong about Submission of DIA and DTRA Reports to THIS COURT

58. On the bottom of page 10, the Memorandum Opinion purports that, regarding the DIA and DTRA reports, that "neither report was filed with the court". This is an incredulous statement., because as the Declaration of Gayle Verner states:

"The Court has stated that the Plaintiff did not include the DIA and DTRA reports with the Complaint, but that they did receive it, only from the Defendant or Defendant's counsel. That could not possibly be accurate because I, indeed, saw the Plaintiff include these documents with the Complaint; and I helped put the package together for the court.

I have first-hand knowledge of these matters and am a probative witness to the fact that I saw these reports being included into the package along with the entire Complaint that was mailed to the court. They were packaged appropriately as I helped compile them, check them, then insert them into the mailing box, and then hand delivered it to the clerk at the US Post Office."

59. The DTRA and DIA reports were cited in the above-entitled Complaint, and pages of the relevant portions citing the Plaintiff's technology were shown. They were also appended to the Complaint and also sent to the US Attorney General [Attachment 1 to pleading 1]. Both the DIA Report and the DTRA Report were both sent, and they were both received by the court.

Whoever removed these exhibits did not want the court to realize that they discuss substantively and explicitly the plaintiff's technology.

26 The Appellee's Brief is Factually Wrong about Plaintiff's Response

60. The plaintiff DID substantially and timely respond, and did also conclusively show fraud at the USPTO. 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' corruption 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.

For this court to simply go along with these falsehoods when disputing Proof is in the Evidence of THIS court, is a miscarriage of justice.

27 The Appellee's Brief Is Factually Wrong about the Proposed Remedy

61. 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,

astonishingly, simply ignored. Plaintiff was denied his day in Court, his jury, his ability to correct the record and assert his Constitutional rights.

28 The Appellee's Brief Ignores a Continuing Series of Attempted Exculpatory Actions to coverup Past Wrongful Behavior

62. The Appellee's Brief ignores the continuing USPTO attempts at exculpatory behavior. First, exculpatory information has been withheld by the Office showing that the "Opinion" of the Office is not truthful. This information includes patents granted on these very subjects to other individuals, and to other agencies, and to people in other countries. These are ignored in Appellee's Brief, but should be important to the court. For example, in *Brady v. Maryland*, the Supreme Court held that the government has a continuing obligation to produce all evidence required under the Federal Rules of Criminal Procedure. "This government responsibility includes producing, during plea negotiations, any exculpatory evidence in the government's possession. The government is further directed to produce all discoverable evidence in a readily usable form," J. Sullivan this month upholding this issue in this circuit.

63. How long shall Americans endure attempted exculpatory actions by the USPTO? For the court to continue to ignore these wrongful actions by the

Office is injustice to Plaintiff AND to others AND to US security AND to the concept of Truth and Justice. 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)].

29 The Appellee's Brief Ignores that Speedy Judgment has Denied Plaintiff's Right to Respond to Defendant's Factually False Statements

64. 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 were rubber-stamped by the lower court, despite the request for a jury trial. The Defendant's statements have been shown to be inaccurate and they demonstrate attempt at evasion.

30. The Appellee's Brief is Factually Wrong about '381

65. The Appellee's brief is factually incorrect about the patent applications by number, by description, and by the provenance on their way to this court. On page six of the Appellee's brief, Mr. Foreman falsely states that the district court dismissed the claims pertaining to '381 because the PTAB had not issued a Decision. In fact, as will be shown below, and has been shown by Petition to the Commissioner, with copy to the Honorable US Attorney General, the Defendant held up the Appeal Brief in '381 by purporting it

was “not received”, and that the “fee was not paid” [even though evidence existed that both allegations of the Defendant were false making this further attempted exculpatory behavior]. After the Decision was made, the District court was correctly notified for ‘381 and ‘342 (confer Figure 5), and the Defendant and Mr. Foreman are revealed making further disingenuous statements to the court.

AC 120 (Rev. 08/10)		
TO: Mail Stop 8 Director of the U.S. Patent and Trademark Office P.O. Box 1450 Alexandria, VA 22313-1450		REPORT ON THE FILING OR DETERMINATION OF AN ACTION REGARDING A PATENT OR TRADEMARK
In Compliance with 35 U.S.C. § 290 and/or 15 U.S.C. § 1116 you are hereby advised that a court action has been filed in the U.S. District Court on the following		
<input type="checkbox"/> Trademarks or <input type="checkbox"/> Patents. (<input type="checkbox"/> the patent action involves 35 U.S.C. § 292.)		
DOCKET NO.	DATE FILED 4/19/2017	U.S. DISTRICT COURT East. District of Virginia No. 1:17cv-482
PLAINTIFF MITCHELL R. SWARTZ	DEFENDANT US COURT OF APPEALS FOR THE FEDERAL CIRCUIT 18-1122 JOSEPH MATAL, Defendant	
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 S.N. 12/589,258	filed: 10/20/2009	Mitchell R. Swartz; Appeal 2013-004667
2 S.N. 13/544,381	filed: 07/09/2012	Mitchell R. Swartz; Appeal 2017-006193
3 S.N. 12/932,058	filed: 7/05/2003	Mitchell R. Swartz; Appeal 2012-012622
4 S.N. 09/750,765	filed: 12/28/2000	Mitchell R. Swartz; Appeal 2012-011287
5 S.N. 09/748,691	filed: 12/26/2000	Mitchell R. Swartz; Appeal 2012-000333
In the above—entitled case, the following patent(s)/ trademark(s) have been included:		
DATE INCLUDED	INCLUDED BY <input type="checkbox"/> Amendment <input type="checkbox"/> Answer <input type="checkbox"/> Cross Bill <input type="checkbox"/> Other Pleading	
PATENT OR TRADEMARK NO.	DATE OF PATENT OR TRADEMARK	HOLDER OF PATENT OR TRADEMARK
1 S.N. 12/316,643	filed: 12/15/2008	Mitchell R. Swartz; Appeal 2013-002922
2 S.N. 13/066,342	filed: 04/11/2011	Mitchell R. Swartz; Appeal 2015-006052
3		
4		
5		
In the above—entitled case, the following decision has been rendered or judgment issued:		
DECISION/JUDGEMENT presently before the US COURT OF APPEALS FOR THE FEDERAL CIRCUIT 18-1122 Appeal from the US District Court for the Eastern District of Virginia (Alexandria Division No. 1:17cv-482)		
CLERK	(BY) DEPUTY CLERK	DATE

Copy 1—1 upon initiation of action, mail this copy to Director Copy 3—1 upon termination of action, mail this copy to Director
Copy 2—1 upon filing document adding patent(s), mail this copy to Director Copy 4—Case file copy

Figure 5 – Proof of Inclusion of ‘381 Despite the exculpatory actions of the Defendant(s) and the Defendant’s factually false statements. After the Decisions were made, the District court was correctly notified for ‘381 and ‘342.

Figure 5 demonstrates that Plaintiff did file with the court and with USPTO as again every effort was made by Plaintiff to follow the rules – unlike the Defendant who has used systematic exculpatory behavior and factually false statements to deceive the court. Therefore, these latest factually false statements by Defendant’s counsel are a spider’s web of exculpatory behavior – purporting that there was no Appeal Brief, then purporting the fee was not paid, and now purporting there was not a Decision when there was one in the case of '381, and the court and USPTO were notified..

31. The Appellee’s Brief is Factually Wrong about Post-Notification of Notices of Tort and Petitions

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

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

“6. I have conducted a review and search of all administrative tort claims filed with the OGC within the last two years. According to my

search, no administrative tort claim has been filed by Mitchell Swartz with the USPTO.”

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

The alleged “search” is both again untruthful and further unconvincing. Where was the due diligence. Both in 2016 and 2017 and 2018, with two federal cases, there should have been a dim glimmer of awareness. The Dept. of Justice had no trouble logging and responding.

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

69. Is the court to believe that NONE (zero) of more than 26 documents, involving Notices and Petitions (Figures 6 and 7) were logged. Or is the court to believe that the data was logged and then erased to hide them to cover it all up? => **What is clear is that an honest “review and search” did NOT happen.**

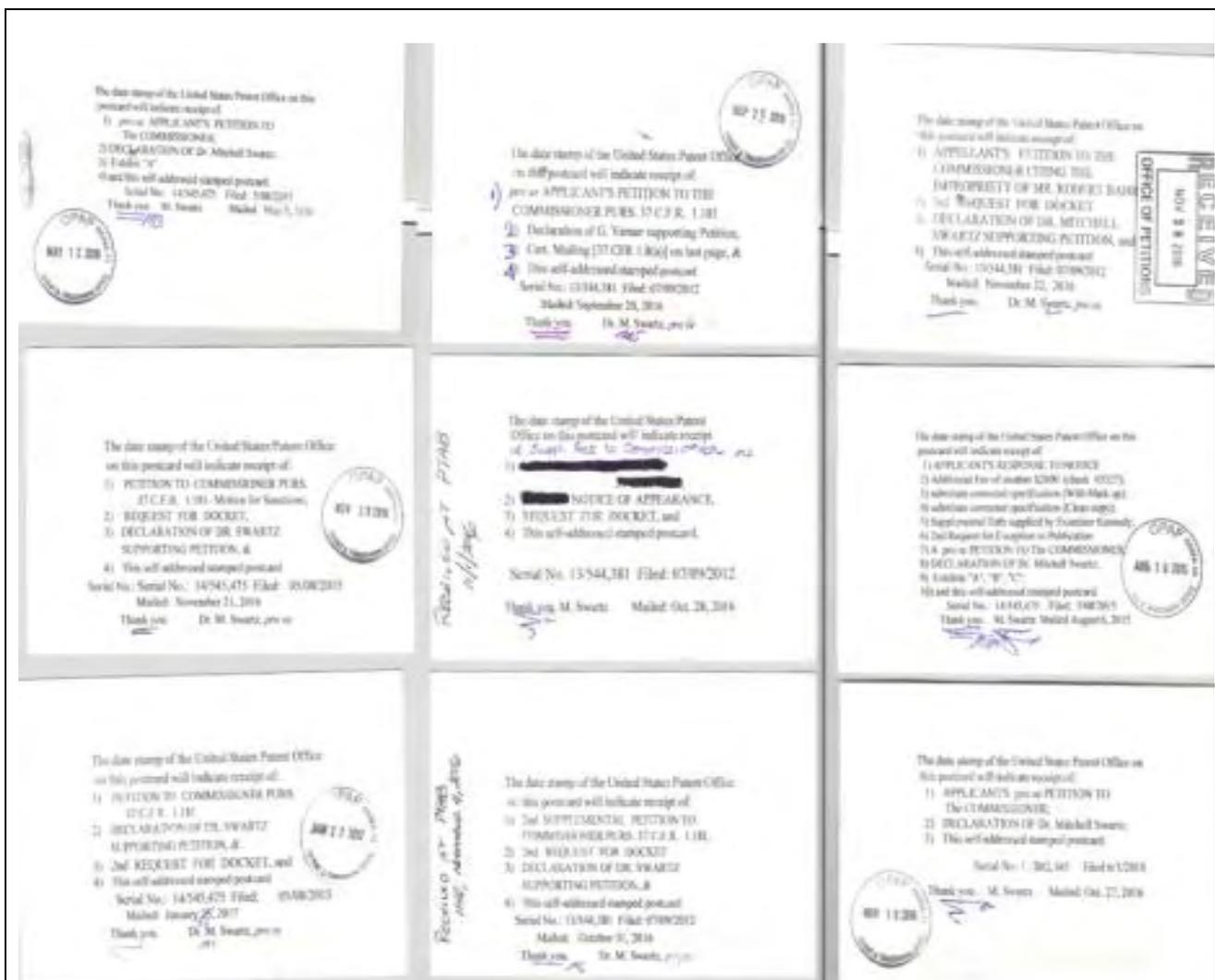


Figure 6 – [Part 1 of 2 parts] Copies of actual post cards, stamped by the Official Postal Office of the USPTO demonstrate Notice by Petition pursuant Order of the Board, and saliently and indelibly.

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



Figure 7 – Photocopies of the actual letters comprising these Notices were delivered to the Defendant.

32. The Appellee's Brief is Factually Wrong about Case 16-12144

72. This case involves some of these issues and includes the attempt of the Commissioner directing her company to publish Plaintiff's (supposedly secret) application '475, and using two agents in Alpha Google to attempt to steal Plaintiff's inventions from MIT while they were being tested. That case was dismissed because of the Defendant's factually false statement that the Defendants were not served (when they in fact were correctly). At the moment, these matters are not before this court unless the court requests it, or the Defendant issues another factually false statement in this matter.

73. Other examples of exculpatory behavior have been discussed in several pleadings in this court, and above and below, and elsewhere [3799666, 3796190, 3808826 before the USAG].

74. Such repeated wrongful attempts at exculpatory behavior and deceit using systematic factually false statements is egregious, and worthy of a serious official (MI?) investigation into why factually false statements and attempted exculpatory behavior have been used as 'standard operating procedure' and to obstruct justice – to shift denied American IP to foreign interests and countries.

33 Plaintiff's Motion For Reciprocity Re: Roseboro

75. The court unfairly asked only one side to swear under the pains and penalties of perjury. Therefore, the Defendant's Memoranda were not sworn under pains and penalties of perjury, as the Defendants demanded of the Plaintiff, who did. 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. 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. This matter is being Appealed so that fairness and justice can be applied in the light of a gout of Defendant's factually false statements and attempted exculpatory behavior -- of which only a handful of examples have been discussed here for brevity.

OTHER LEGAL ISSUES

34. The Appellee's Brief is Factually Wrong about this case re: Collateral estoppel

76. The Appellee's Brief is factually wrong about this case re: Collateral estoppel. This is outrageously unfair for any of the following reasons,

below: First, the use of collateral estoppel is wrong, not relevant and repugnant since it is used with fruit from the poisonous tree in an odious attempt to stop all relevant –and useful-- research into effective clean energy production going forward into the future.

Second, 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. This is not a repeat of previous court issues because previously there is real indication of sequestration of Evidence. And there is new Evidence.

77. Third, most egregious, USC 145 enables the entry of new evidence; evidence making this a completely different case, and one that the US Supreme court said is appropriate for this court. 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.

78. Finally, and most importantly, if collateral estoppel is wrongly applied, it should only effect two to three of the patent applications. The remaining applications involve a different group of the issues, a different group of claims, and clearly a different and larger group evidence, from those

previously submitted. It is factually false that the Defendant purport otherwise. **It is inhumane for the court to have made this case “Dismissed with Prejudice” on this matter, since those other applications are not even relevant here – and because the wrongful Judgment effects patent applications not even before it with such a extensive Order** [emboldened and underlined for emphasis].

35. The Appellee’s Brief is Factually Wrong about FTCA (Relevance and Timing)

79. The Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-2680 is not relevant for any of the following reasons. First, 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.

80. Second, 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.

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

81. Third, 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.

82 Fourth, 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's Executive Actions and Requirements ordering the release of free energy technologies.

SUMMARY and CONCLUSION

83. The Plaintiff clearly described his claims including §145 issues and constitutional violations, including that there was new material, including that the inventions were misdescribed by the Defendant, including that the timely-filed Evidence was not addressed, and including that the federal court

and PTAB had been systematically deceived by some at the Office and counsel using factually false statements. More than a dozen examples of failure to log and/or address Evidence submitted were in the Complaint.

84. The Plaintiff has clearly described his complete (and more) compliance with the PTAB, over and over; yet, so far, the USPTO has not been held accountable.

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

Furthermore, buttressed by impeccable photographs of receipt (virtually all denied at the time by the Defendant) and copious attempts at exculpatory behavior by the Defendants, the *pro se* Plaintiff demonstrated significant Evidence and justifiable reasons for not dismissing this case under Rule 12(b)(6). The above-entitled Complaint particularly states facts that support each element of Plaintiff's claims and thus withstands the Defendants' Motion to Dismiss.

86. Denial of evidence is just another denial of a fair trial. Denial of evidence for decades is a crime against science, Nature, and every anticipation of decency in Law.

87. Defendants' actions may have National Security issues as well.

88. The equal protection clause was clearly shown to be broken by the Defendant, and in several ways. The Defendant has conducted, or allowed by inaction, a systematic departure of procedure, process, and integrity which at least has usurped the Plaintiff's Constitutional rights.

89. Where is Justice for the Appellant? Although non-existent, despite a gout of evidence, old and new. The Appellant is entitled to justice. This Court, having integrity, should have substantial interest in pre-trial discovery to facilitate the search for truth and promote justice (Hickman v. Taylor (1947) 329 U.S. 495, 507) and why, and by whom exactly, this court was deceived in the past to plant the poisonous tree.

90. Where is the enforcement of Constitutional rights in even one of the 14 patent applications over 29 years? It is not there. Ignoring this has the indelible appearance of impropriety.

91. Why are so many lawyers absolutely committed to stopping this clean energy technology if it supposedly "does not even exist"? What is their link to lobbyists with competing interests. What is their link to foreign interests

– given that technology has moved forward in China, Russia, Japan, and other countries.

92. Why are so many lawyers trying to defend sequestration of Evidence which was repeatedly timely-submitted and then destroyed and/or ignored over and over?

93. There is reasonable inference from the actual evidence to justify this Appeal. In light of Defendant's systematic mischaracterizations and factually false statements that the order is more a result of misunderstanding and/or prejudice, than substantial justice. This court has wrongly accepted the Defendants' counsels' statements as accurate and truthful while overlooking facts discussed in several of the pro se Plaintiff's pleadings cited herein.

The Plaintiff's, and in fact this scientific field's, ONLY avenue for justice with respect to these matters is in THIS court.

94. Who is hurt if this wrongful 'Motion to Dismiss' goes forward and is allowed to perpetuate the continued cover-up and wrongful acts of exculpatory behavior and sequestration of evidence demonstrating the Defendant is wrong? The Plaintiff will suffer immediate, continuous and irreparable injury and because this action cited the Lincoln Law, civil rights of many others will also be lost (Complaint, page 120).

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 the opportunities for cheaper clear water (and therefore health) and energy. Most importantly, who is hurt if the wrongful 'Motion to Dismiss' is reversed? No one.

95. Finally, in a world poisoned by the *Exxon Valdez* spill and the still toxic eruption from the Fukushima reactor, attention should be directed to this and every other source of clean energy. Why has it been targeted and obstructed so vociferously and relentlessly? Why are millions of dollars being spent to stop it, rather than to explore and expand it?

Rather than being complicit in rubber-stamping Defendant's egregious allegations, this court should have interest in ending the Defendant's factually false statements, the perjury and the subornation of perjury, the sequestration of evidence, and finally in protecting Americans by making certain that such a deceitful obstruction will never happen again.

WHEREFORE, for the above reasons, the Appellant requests help of this honorable court to enforce the clear Constitutional and Congressional directives, the unanimous decision of SCOTUS, and the Executive Orders specific to this energy technology issued from President Trump.

Appellant begs this court to reverse the Order and Judgment and consider applying reciprocity on the lopsided Roseboro Order.

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” and enforce reciprocal Roseboro. That would restore due process, remove discrimination, and will enable the court to better understand why the Evidence -including from US government agencies- was systematically not logged and/or addressed. Correcting these errors and restoring integrity would also serve the interests of judicial economy and justice for all.

Respectfully submitted,



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

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

Appellant hereby certifies that he has mailed a copy of the REPLY BRIEF OF *pro se* APPELLANT [yellow cover], to all counsel:

Attorney Nathan K. Kelley Solicitor, Mail Stop and P.O. Box 1450
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22314, and

Honorable Attorney General Jefferson B. Sessions, U.S. Department
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 (~12,600 words) using proportional font in the Appeal Brief. *MS*

(15) Certificate of Mailing

March 15, 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.

March 15, 2018

MS

M.R. Swartz

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