

Exhibit A

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

JOSH MALONE,

Plaintiff,

v.

UNITED STATES PATENT AND
TRADEMARK OFFICE,

Defendants.

No. 1:23-cv-1075 (CMH/LRV)

SUPPLEMENTAL DECLARATION OF CAITLIN TRUJILLO

I, Caitlin Trujillo, declare the following to be a true and correct statement of facts:

1. I am an Associate Counsel for the Office of General Law (“OGL”) within the Office of General Counsel at the United States Patent and Trademark Office (“USPTO”), headquartered at 600 Dulany Street, Alexandria, VA 22314. I am also a Freedom of Information Act (“FOIA”) Officer for the USPTO. *See* 37 C.F.R. § 102.1(a). I have worked on FOIA matters at the request stage, appeal stage, and in litigation for over ten years. As a FOIA Officer for the USPTO from April 2022 to the present, my responsibilities include: (1) reviewing requests for access to USPTO records filed under the FOIA, 5 U.S.C. § 552; (2) assigning FOIA requests to FOIA Specialists for processing; (3) identifying offices within the USPTO (often referred to as “business units”) likely to possess responsive records; (4) liaising with business units to help identify specific custodians of records and collect responsive records; (5) reviewing responsive records and determining applicable FOIA exemptions in accordance with the provisions of the FOIA and the USPTO regulations (37 C.F.R. §§ 102.1–102.11); (6) reviewing correspondence related to requests; and (7) preparing responses to FOIA requests.

2. As a USPTO FOIA Officer, I have authority to release and/or withhold records requested under the FOIA and to explain the rationale for USPTO's disclosure determinations. The statements I make in this declaration are based on my review of the official files and records of the USPTO, my own personal knowledge, and/or information acquired by me through the performance of my official duties.

3. Due to the nature of my official duties, I am personally familiar with the procedures that were followed by the USPTO in responding to Plaintiff Josh Malone's FOIA request number F-23-00149, which is at issue in the above-captioned action. I am the FOIA Officer that responded to this request.

4. The Patent Trial and Appeal Board ("PTAB") studied expanded panels and provided information about that study in a Chat with the Chief webinar, which the public could attend, on March 13, 2018 with the then Chief Administrative Patent Judge ("APJ") David Ruschke.¹ The presentation slides for that webinar were posted to the USPTO's website and are available to the public.² These slides contain a discussion of an Expanded Panel Study, which Plaintiff references numerous times in his Opposition to Defendant's Summary Judgment Motion and Cross-Motion for Summary Judgment, *see* Dkt. 19. The agenda for this Chat with the Chief webinar states that Lead Administrative Patent Judge ("APJ") Michelle Ankenbrand participated with Chief APJ Ruschke in discussing the Expanded Panel Study, which provided some information about how common expanded panels were, when and why panels were expanded, and what was the result of a panel expansion.³

¹ The details of this webinar are available at <https://www.uspto.gov/patents/ptab/chat-chief-judge> and <https://www.uspto.gov/patents/ptab/new-ptab-studies-aia-proceedings-expanded>.

² The slides for this presentation are available at https://www.uspto.gov/sites/default/files/documents/chat_with_the_chief_march_2018.pdf.

³ *Id.* at slide 2.

5. My prior declaration discusses a spreadsheet that had been prepared by a PTAB Administrative Patent Judge (“APJ”) in approximately January 2018; describes how this spreadsheet contains a nonauthoritative list of cases where a panel had been expanded up until approximately January 2018 (which is less than half the time that America Invents Act (“AIA”) proceedings have existed); and explains that this spreadsheet does not contain any information as to whether panels were expanded with or without notice to the parties. *See* Trujillo Decl. ¶ 13, Dkt. 15-1 at 1–10. This spreadsheet is the document prepared by Lead APJ Ankenbrand that underlies the Expanded Panel Study. Mr. Malone did not submit a FOIA request for this spreadsheet or anything related to the Expanded Panel Study or the Chat with the Chief at any time.

6. The USPTO FOIA Office has been aware of this spreadsheet since approximately April 22, 2021. The spreadsheet was collected at that time from PTAB in response to FOIA request F-21-00071. A redacted copy of the spreadsheet was provided to the requester in that case on May 10, 2021. This FOIA request, which also involved documents other than the spreadsheet, later ended in litigation in the U.S. District Court for the District of Columbia in *Smartflash, LLC v. USPTO*, Civil Action No. 2-1123.

7. The Circulation Judge Pool (“CJP”) review process began in May 2022.⁴ As part of the workflow process when draft decisions in AIA proceedings are reviewed by the CJP, a folder is used on the S drive (a PTAB shared network drive) with the current network address and name of S:\Circulation Judge Pool\2 Returned to Panel (“the Returned to Panel folder”). That folder has

⁴ See the explanation of the interim process for PTAB Decision Circulation and Internal PTAB review at 87 FR 43249, *available at* <https://www.federalregister.gov/documents/2022/07/20/2022-15475/request-for-comments-on-director-review-precedential-opinion-panel-review-and-internal-circulation> (July 20, 2022).

been in use since May 2022. Typically, after the CJP reviews a draft decision, the CJP places the draft in the Returned to Panel folder with any comments or suggestions imputed into the draft in redline. The CJP then sends an email to the panel members for the AIA proceeding in question to inform them that the draft has been reviewed and placed in the Returned to Panel folder. The normal practice is for the panel to then remove the draft from the Returned to Panel folder, so that this folder generally only has recent draft decisions reviewed by the CJP—although some older draft decisions dating back to May 2022 remain in the folder.

8. While the general practice is to place draft decisions in the Returned to Panel folder *only* when the CJP made suggestions or comments on a draft, this workflow was not consistently followed from approximately May through September of 2023, because the workflow was still being standardized. As such, there is a reasonable possibility that draft decisions without any comments or suggestions from the CJP were placed in the Returned to Panel folder during that time. In addition, even when the procedures have been clear, it is possible that a draft decision without changes could have been placed in the folder. The Returned to Panel folder does not serve, and is not intended to serve, as a list or database identifying the decisions in connection with which a panel received recommendations or instructions from the CJP. Although a small number of the draft decisions in the folder indicate in the file name that they have edits or comments, the only way to know with certainty whether most draft decisions in the Returned to Panel folder have comments or suggestions from the CJP would be to review each draft to verify whether comments or suggestions are present.

9. My prior declaration discussed the current CJP process as set forth in Standard Operating Procedure 4 (“SOP 4”), *Procedure for Pre-Issuance Optional Decision Review and Post-Issuance Decision Review*, which went into effect on October 5, 2023. See Trujillo Decl. ¶¶

17. Under SOP 4, panel members have the sole discretion to circulate to circulate draft decisions with the CJP. Before SOP 4 went into effect, however, there were certain categories of decisions that panel members were required to circulate to the CJP, such as decisions on institution and final written decisions. However, the CJP was not required to review all the draft decisions circulated to it and could decide not to review a particular draft decision. While the CJP would commonly provide suggestions or comments to draft decisions they reviewed, the CJP did not necessarily provide comments or suggestions on every draft decision it reviewed.

10. PTAB's use of the Patent Trial and Appeal Case Tracking System ("P-TACTS") was also discussed in my prior declaration, as well as the fact that P-TACTS does not track when panels have expanded or APJs who may have previously been assigned to a panel. *See* Trujillo Decl. ¶ 15. P-TACTS offers basic search functionality. Members of the public can search for AIA proceedings by AIA Review Number (i.e., the case number assigned to a particular AIA proceeding), patent or patent application number, a party's name, the AIA case type, and the USPTO Technology Center where the patent in question would have been examined. Internal USPTO users of PTACTS have similar search capabilities but can also search by an APJ's name. P-TACTS does not use Boolean searches; when conducting a search, all or part of a name or number is entered into one of the search fields and AIA proceedings that are responsive to the search will then be listed. A search of P-TACTS cannot be performed that will identify orders expanding panels in AIA proceedings.

11. In addition to consulting with Lead APJ Scott Moore, PTAB's FOIA Liaison about this FOIA request, I also consulted with Chief APJ Scott Boalick and Deputy Chief APJ Jacqueline Wright Bonilla. Chief APJ Boalick has been on the Board since 2007 and Deputy Chief APJ Bonilla has been on the Board since 2012 and both have extensive knowledge about how AIA

proceedings are conducted and tracked, as well as the PTAB's record systems and search capabilities. After consulting with all three Judges, I determined that PTAB did not actively maintain the information Plaintiff sought and did not have a filing system with search capabilities that could uncover it.

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

Executed on the 1st day of March, 2024, at Alexandria, Virginia.

Users, Trujillo,
Caitlin

Digitally signed by Users,
Trujillo, Caitlin
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Caitlin Trujillo
Associate Counsel
United States Patent and Trademark Office