

2007-1066

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**United States Court of Appeals  
FOR THE FEDERAL CIRCUIT**

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GILBERT P. HYATT,

*Plaintiff-Appellant,*

v.

David Kappos, DIRECTOR, PATENT AND TRADEMARK OFFICE,

*Defendant-Appellee.*

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*On Appeal from the United States District Court for the District of Columbia  
in Case No. 03-CV-901, Judge Henry H. Kennedy, Jr.*

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**BRIEF OF *AMICUS CURIAE* INTELLECTUAL PROPERTY OWNERS  
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April 6, 2010

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

*Gilbert P. Hyatt v. David Kappos, Director, U.S. Patent and Trademark Office*

2007-1066

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**CERTIFICATE OF INTEREST**

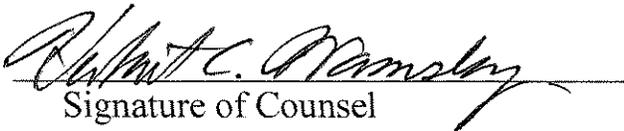
Counsel for the *Amicus Curiae* Intellectual Property Owners Association certifies the following:

1. The full names of every party or amicus represented by me is:  
**Intellectual Property Owners Association**
2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is: **NONE**
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of *amicus curiae* represented by me are: **NONE**
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Pursuant to Fed. R. App. P. 29(a) and Rule 29(a) of this Circuit, Intellectual Property Owners Association (“IPO”) files this brief *amicus curiae* to address certain errors in the panel majority decision in this case, and to urge the Court to hold that section 145 provides for a de novo proceeding in district court. This brief is filed pursuant to this Court's February 17, 2010 Order at 2, Paragraph (6), permitting that briefs *amicus curiae* be filed without leave of court.

## **I. INTEREST OF AMICUS CURIAE**

*Amicus curiae* IPO is a trade association representing companies and individuals in all industries and fields of technology who own or are interested in U.S. intellectual property rights. IPO’s membership includes more than 200 companies and more than 11,000 individuals who are involved in the association either through their companies or as inventor, author, executive, law firm, or attorney members. Founded in 1972, IPO represents the interests of all owners of intellectual property. IPO members receive about thirty percent of the patents issued by the Patent and Trademark Office to U.S. nationals. IPO regularly represents the interests of its members before Congress and the United States Patent and Trademark Office (“PTO”) and has filed *amicus curiae* briefs in this Court and other courts on significant issues of intellectual property law. The members of IPO’s Board of Directors, which approved the filing of this brief, are listed in the Appendix.

## **II. INTRODUCTION**

IPO submits this brief *amicus curiae* to address the issues raised in Paragraph (4)(a) of the Court's February 17, 2010 Order, at 2, requesting briefing for *en banc* review. IPO urges the Court to hold as follows:

Paragraph (4)(a)(i): The Administrative Procedure Act does not require review on the agency record in proceedings pursuant to section 145;

Paragraph (4)(a)(ii): Section 145 does indeed provide for a *de novo* proceeding in district court, and therefore the panel's unwarranted limitation on the introduction of new evidence should be rejected; and

Paragraph (4)(a)(iii): The limitations on the presentation of new evidence before the district court are those provided by the Federal Rules of Evidence.

Because IPO takes no position and submits no response to the Court's inquiry as to whether the district court properly excluded Mr. Hyatt's declaration in this case, Order Paragraph (4)(b), this brief is submitted in support of neither party.

## **III. SUMMARY OF ARGUMENT**

IPO advocates in support of intellectual property laws that provide, strong, cost-effective, and reliable intellectual property protection. IPO believes that the panel opinion will render prosecution before the PTO unreliable and costly, unduly limit statutorily guaranteed rights to seek factual review of adverse patentability

determinations, and further burden the PTO with factual submissions aimed at a hypothetical, and quite unlikely, eventual challenge in district court.

First, we argue that the panel's novel rule excluding evidence from district court proceedings under section 145 threatens to encompass a great deal of properly admissible material. The practicalities of prosecution demonstrate that applicants do not lightly choose to bear the significant costs of a district court proceeding. Thus, evidence they seek to introduce in such an action meets a high standard, and will likely be persuasive, if not dispositive, to the district court. In the face of compelling evidence not presented to the PTO, the Director will often be able to argue that such evidence was withheld from the PTO in breach of a duty. In this way, the panel opinion's exclusion sweeps far wider than it might initially appear.

Second, we argue that the panel misinterprets the Administrative Procedure Act ("APA") by reading it to limit the introduction of new evidence instead of merely governing the standard of review that courts apply to agency findings of fact or law.

Third, we argue that the Court should align the admissibility of evidence under section 145 with that under the parallel provision of trademark law, 15 U.S.C. § 1071(b) ("section 1071(b)"). Cases interpreting that provision routinely admit evidence that could have been submitted to the Trademark Trial and Appeal

Board (“TTAB”). This Court should hold that the same is permitted under section 145.

Finally, we point out that the panel opinion disposes of the approaches for admissibility applied in some district and circuit courts and adopts an ambiguous, unworkable standard. District courts will now face the challenge of applying an unclear rule and clarification by this Court will be immediately necessary. Furthermore, the rule’s ambiguity will disturb practice before the PTO, because applicants concerned about being foreclosed from supplementing the record in district court will burden themselves and the PTO with potentially unnecessary factual and evidentiary submissions. The Federal Rules of Evidence govern the admissibility of evidence in district courts. Without explicit Congressional direction to the contrary, the same rules should govern admissibility in civil actions brought under section 145.

#### **IV. ARGUMENT**

##### **A. The Panel’s Limitation On Introduction Of New Evidence Is Contrary To The Statute’s Text And Undermines Its Purpose.**

The practical effect of the panel's ruling will be a substantial harm to applicants seeking to exercise their right under section 145 to supplement factual submissions to the PTO. Understanding the interests of applicants proceeding before the PTO and district court reveals that the panel’s concern that patentees will “game the system” by withholding evidence from the PTO is without basis.

Furthermore, the realities of prosecution practice demonstrate that the imposition of additional barriers to introduction of new evidence in district court threatens to undermine Congress's primary purpose in providing a civil action challenge before a fact-finding body – allowing the introduction of evidence not submitted to the PTO.

**1. The Main Purpose Of Civil Action Remedies Under Sections 145 And 146 Is To Allow Consideration Of Evidence Not Submitted To The PTO.**

A person dissatisfied with a ruling of the Board of Patent Appeals and Interferences (“the Board”) has two avenues for relief: an appeal to the Federal Circuit, or a civil action in district court in the District of Columbia. *See* 35 U.S.C. §§ 141, 145. The Federal Circuit’s review under section 141 is limited to the proceedings before the PTO, and determines only whether the Board’s conclusions are supported by substantial evidence. *Dickinson v. Zurko*, 527 U.S. 150, 165 (1999). In civil actions brought under sections 145 and 146, on the other hand, evidence not submitted to the PTO is admissible. *Winner International Royalty Corp. v. Wang*, 202 F.3d 1340, 1345-46 (Fed. Cir. 2000). When new evidence is introduced on a particular issue of fact considered by the PTO, the district court’s review of the PTO’s conclusion on that issue is *de novo*. *Id.*

A patent applicant selects a district court challenge to an adverse Board decision, as opposed to a Federal Circuit appeal, solely in order to supplement the

record with evidence and testimony not submitted to the PTO; there is no other purpose under the statute. *See* 35 U.S.C. § 141, 145; *Mazzari v. Rogan*, 323 F.3d 1000 (“A section 145 review is distinct from a section 141 appeal in that it affords the applicant an opportunity to present additional evidence . . . .”); *Zurko*, 527 U.S. at 164 (contrasting district court with Federal Circuit review on the basis that applicants in section 145 district court actions can “present to the court evidence that the applicant did not present to the PTO.”). A prosecution practice guide confirms this, recommending that applicants seek district court review when they wish to “gather additional facts outside the prosecution history” but noting that an appeal to the Federal Circuit “is proper when the applicant is satisfied with [the prosecution history] record.” IRAH H. DONNER, *PATENT PROSECUTION: LAW, PRACTICE, AND PROCEDURE*, 430-31 (2009).

Indeed, this Court has acknowledged the critical importance of district court review of new evidence, emphasizing that a district court's reversal of the PTO's conclusion based on new evidence “is not contrary to the legislative purpose of section 145 de novo review. Indeed, it is a fulfillment of that purpose.” *Burlington Indus., Inc. v. Quigg*, 822 F.2d 1581, 1584 (Fed. Cir. 1987). Review of new evidence, the Court wrote, is a “powerful advantage over the patent examiner” that is “characteristic of section 145 appeals.” *Id.* at 1584.

## **2. The Panel's Exception Threatens to Swallow The Rule.**

As enacted by Congress, the statute ensures that the opportunity to supplement the record before the PTO in district court comes at a significant cost, and carries no assurance of success. First, section 145 requires that the applicant pay “all the expenses of the proceedings.” 35 U.S.C. § 145. Second, as to those issues of fact on which new evidence is not submitted, the district court assesses only whether the PTO’s factual findings are supported by substantial evidence. *Dickinson v. Zurko*, 527 U.S. 150, 164-165 (1999). Finally, generally, no new legal issues can be raised that were not presented to the PTO. *In re Watts*, 354 F.3d 1362, 1367 (Fed. Cir. 2004).

The practical result of these limits is that an applicant’s assessment whether to bear the significant additional cost of a district court challenge depends largely on the likelihood that his contemplated new evidence will result in a reversal of the PTO’s determination of unpatentability. The applicant must, then, have significant confidence that evidence offered for the first time will be persuasive if not dispositive for the district court. That so few district court actions are filed under section 145, and that many applicants instead seek direct Federal Circuit review under section 141, confirms that applicants carefully consider and then select the case-appropriate avenue for relief.

But these same considerations raise the possibility that the panel’s novel evidentiary exception will swallow the rule. This is because the Director will

almost always be able to argue that an applicant's new evidence, proffered as likely dispositive of an issue but not submitted to the PTO, was improperly withheld in breach of some "obligation." This is a particularly serious concern in light of the uncertain nature and scope of the panel's evidentiary "obligations" to the PTO. *See infra*, section IV.D. Once the Director has advanced such an argument, the applicant must rebut it or face exclusion of critical new evidence – the reason for pursuing a district court action in the first instance – from his case. Cases applying a variety of evidentiary standards to the admission of evidence in section 145 actions bear this concern out by placing the *burden on the applicant* to show that new evidence was not negligently withheld from the PTO. *See, e.g.*, Panel Op. at 50; *McKay v. Quigg*, 641 F. Supp. 567, 570 (D.D.C. 1986) (holding that plaintiffs failed to "meet their burden of showing" why certain new evidence should be admitted but finding that burden satisfied for other new evidence.); *Takeda Pharmaceutical Co., Ltd. v. Dudas*, 511 F. Supp. 2d 81, 86 (requiring explanation from applicant based on an allegation of negligence by the director); *Hyatt v. Dudas*, 2005 WL 5569663, \*7 (D.D.C. 2005) (requiring that Hyatt explain, in the first instance, why his failure to offer the evidence to the PTO was not negligent). *See also Barrett Co., v. Koppers Co.*, 22 F.2d 395 (characterizing the introduction of evidence for the first time in a statutory action, i.e., introducing new evidence, as "com[ing] very close to trifling with the court's processes.").

Far from fulfilling the purpose of de novo review under section 145, the panel opinion threatens to expand an exception nearly to the bounds of the rule. And for that new evidence that remains narrowly admissible, the applicant, practically, will bear the burden of proving that he breached no evidentiary duty to the PTO during prosecution. As the Court wrote in *Koki v. Dudas*, 556 F. Supp. 2d 41, 47 (D.D.C. 2008), the panel’s standard “would render an appeal under section 145 nearly indistinguishable from a direct appeal to the Federal Circuit, and would render the purpose of the statute duplicative and meaningless.”

Finally, the panel focuses on supporting the “general policy of encouraging full disclosure to administrative tribunals.” Panel Op. at 32 (quoting *Cal. Research Corp. v. Ladd* 356 F.2d 813, 820 n.18 (D.C. Cir. 1966)). But the policy of encouraging disclosure needs no further intrusion from the courts. Preliminarily, the PTO has adopted, and the courts have enforced, Rule 56, 37 C.F.R. § 1.56, which ably incents applicants to make a full disclosure to the PTO in seeking patent protection. More fundamentally, Congress understood the importance of applicants presenting their full case to the PTO, and preserved the incentive to do so by shifting the burden of paying expenses under section 145 to the applicant while permitting the PTO to submit new evidence on patentability. Respectfully, the panel now substitutes its judgment for Congress’ as to the proper policy balance between encouraging disclosure to the PTO and allowing supplementation of the PTO record on which the district court may find facts and reach conclusions

of law. By placing its thumb on the scales, the panel opinion will unnecessarily disturb practice before both the district court, as argued above, and before the PTO. *See infra*, section IV.D.

**B. The Administrative Procedure Act Governs The Standard Of Review, Not The Admissibility Of New Evidence Under Section 145.**

The APA requires that district courts reviewing factual findings of the PTO in the absence of new evidence affirm those findings when they are supported by substantial evidence. *Zurko*, 527 U.S. at 164. When new evidence is submitted on a particular issue of fact, however, review of the PTO’s factual findings on that issue is *de novo*. *Winner International Royalty Corp.*, 202 F.3d at 1345-46 (“even though section 146 uses neither the term ‘*de novo*’ nor ‘appeal’”). These well-established rules provide for the *standard of review* that a court affords an agency determination, but they do not govern the *admissibility of evidence* in the course of that review. In this action, both non-deferential review of agency findings, and a lack of restrictions on the introduction of new evidence, have been referred to as a “*de novo*” proceeding, but the two inquiries are quite different. The panel opinion elides this important distinction, and thereby misapplies the APA.

The panel relies on a number of cases in support of the proposition that review under the APA should be limited to the agency record. *See* Panel Op. at 36-38 (citing *Tagg Bros. & Moorhead v. United States*, 280 U.S. 420, 444-45 &

n.4 (1930), *Nat'l Broadcasting Co. v. United States*, 319 U.S. 190, 227 (1943), and *United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 714-15 (1963)). The panel's reliance on these cases is misplaced. First, these cases do not interpret the APA. See *Tagg Bros. & Moorhead* 280 U.S. at 444-45 (1930) (pre-APA); *Nat'l Broadcasting Co.* 319 U.S. at 227 (pre-APA); *Carlo Bianchi & Co.*, 373 U.S. at 714-15 (interpreting the Wunderlich Act). Second, as even the panel concedes, review under section 145 is *not limited to the agency record*. Panel Op. at 39 ("Of course, in § 145 actions, review is not strictly confined to the administrative record."). To the extent *Tagg Bros.*, *Nat'l Broadcasting Co.*, and *Carlo Bianchi* reflect an "accepted legal principle of general applicability"<sup>1</sup> that review of agency determinations should be limited to the agency record, this Court and the Supreme Court have concluded that section 145 departs from that principle.

The panel's concern appears to be that without restrictions on the admissibility of new evidence in section 145 proceedings, applicants will be able to "unnecessarily convert deferential review into effectively de novo review." Panel Op. at 40 (citing *Axiom Resource Mgmt. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009)). This concern is unjustified. First, if Congress had intended only a deferential review of PTO determinations, it would not have provided applicants with an option to seek a remedy by civil action with the full implication of a

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<sup>1</sup> See Panel Op. at 40 n. 22 (quoting *eBay v. MercExchange L.L.C.*, 547 U.S. 388, 390-94 (2006)).

district court to hear live testimony, make findings of fact, and reach conclusions of law on patentability. Second, if an applicant seeks to introduce new evidence that is merely duplicative of that presented to the PTO in order to manipulate the standard of review, the Federal Rules of Evidence readily permit the district court to exclude the evidence. FED. R. EVID. 403 (“[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or *needless presentation of cumulative evidence.*”) (emphasis added).

Finally, the panel’s apparent adoption of the rule in *Citizens to Preserve Overton Park, Inc. v. Volpe* that de novo review is authorized when “agency fact-finding procedures are inadequate” is an incorrect reading of *Overton Park* and would, if applied as the panel suggests, impose even greater barriers to introduction of new evidence. See Panel Op. at 41 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971)). Initially, it is not clear whether the panel intends *Overton Park* to apply or not. The panel first states that the APA (citing *Axiom Resource Mgmt. v. United States*, 564 F.3d 1374, 1380 (Fed. Cir. 2009)). This concern is unjustified. First, if Congress had intended only a deferential review of PTO determinations the panel then offers the *Overton Park* exception as basis for introducing oral testimony when credibility determinations are necessary

to resolve the case. *Compare* Panel Op. at 36 (“[The *Overton Park*] exceptions do not apply to [section 145] cases; the patent application process is not adjudicatory . . .”) *with* Panel Op. at 41 (applying *Overton Park* exception to section 145 cases).

*Overton Park*'s standard has no place here. Patent prosecution is not adjudicatory in nature, and section 145's purpose is to allow the introduction of new evidence, which is inconsistent with, and should take precedence over, the APA's limitations in *Overton Park*. As the panel suggests, applying *Overton Park* would effectively bar the introduction in district court of any evidence of the type the PTO is capable of accepting. Some oral testimony, as the panel points out, would be admissible because the PTO does not take oral testimony in support of a patent application. But the PTO's procedures do provide for the submission and consideration of documentary and written testimonial evidence. *See, e.g.*, 37 C.F.R. §§ 1.131 (allowing affidavit or declaration for purpose of traversing prior art rejection), 1.132 (requiring that any evidence submitted to traverse rejection or objection of any claim on a basis not otherwise provided be by way of affidavit or declaration); MPEP §§ 715-715.10, 716-716.10. Under the panel's reading of *Overton Park*, no such written testimonial evidence could be introduced in district court, and an applicant could never introduce evidence beyond the PTO record to rebut the Director's early motion for summary judgment based on the PTO record. The cases of this Court and the Supreme Court contain no hint of such a rule. *See*

*Winner International Royalty Corp.*, 202 F.3d at 1345-46. Nor does any cogent public policy support such a rule.

**C. The Panel’s Ruling Unnecessarily Creates Divergent Admissibility Standards In Patent And Trademark Civil Actions.**

Applicants in trademark proceedings before the PTO “dissatisfied with the decision of the Commissioner or Trademark Trial and Appeal Board” also have an option between a Circuit Court appeal and “a remedy by a civil action” in a district court. 15 U.S.C. §1071(b) (2006). Just as in civil actions under sections 145 and 146, the parties to a section 1071(b) action may present new evidence, and though the court “must afford deference to the fact findings of the TTAB,” the “district court’s review of the TTAB’s decision is considered de novo when the parties present new evidence.” *CAE, Inc. v. Clean Air Eng’g, Inc.*, 267 F.3d 660, 674 (7th Cir. 2001). Significantly, since the 1962 amendment of section 1071 that deleted reference to sections 145 and 146, *see* 15 U.S.C. §1071(b) (1952) (to provide the “conditions, rules, and procedure as are prescribed in the case of patent appeals or proceedings so far as they are applicable”), resulting in parallel language in sections 1071(b) and 145, the courts have consistently continued to permit new evidence in “remed[ies] by civil action” in district courts.

Because section 1071(b) has never imposed limitations on the evidence admissible in a civil action, prior or subsequent to the 1962 amendment, the common practice among district courts has been to admit all newly presented

evidence subject only to the Federal Rules of Evidence. *See, e.g., CAE*, 267 F.3d at 670 n. 6 (7th Cir. 2001) (affirming district court decision regarding registration and infringement after trial which included a “substantial amount” of new evidence, including additional affidavits, interrogatories, materials from parties’ web sites, and brochures that could have been presented before the TTAB); *Wells Fargo & Co. v. Stagecoach Props., Inc.*, 685 F.2d 302 (9th Cir. 1982) (similar); *Durox Co. v. Duron Paint Mfg. Co., Inc.*, 320 F.2d 882, 883 (4th Cir. 1963) (similar). Thus, section 1071(b) actions have been described as “virtually *de novo*, since additional cross-examination and presentation of additional testimony is permitted.” *Goya Foods, Inc. v. Tropicana Prods., Inc.*, 846 F.2d 848 (2d Cir. 1988) (distinguishing 1071(b) actions “from the traditional arena of primary jurisdiction”).

The shared history, purpose, and statutory language of sections 145, 146, and 1071(b) strongly suggests that Congress, in promoting strong intellectual property rights and providing a check on a PTO final determination, did not intend that different standards of evidentiary admissibility would govern these civil actions. Any perceived need by U.S. District Court for the District of Columbia or the prior panel of this Court for admissibility rules beyond the Federal Rules of

Evidence in section 145 actions is belied by the fact that such rules have not generally existed in section 1071(b) actions.<sup>2</sup>

**D. A Clear De Novo Standard Will Render Prosecution More Efficient And Avoid Burdening The PTO With Unnecessary Evidentiary Submissions.**

If allowed to stand, the panel's ruling will disturb the settled expectations of applicants before the PTO and introduce much uncertainty into PTO patentability proceedings. The panel disavowed the District of Columbia's negligence-based approaches (Panel Op. at 48) and disturbed many of this Court's opinions where the district court admitted new evidence that could have been presented to the PTO. *See, e.g., Mazzari v. Rogan*, 323 F.3d 1000, 1003 (Fed. Cir. 2003) (considering new prior art references and expert declarations offered by the PTO and applicants); *Genentech, Inc. v. Chiron Corp.*, 220 F.3d 1345 (Fed. Cir. 2000) (considering testimony of four new experts despite fact that none had offered testimony in PTO proceedings); *Fregeau v. Mossinghoff*, 776 F.2d 1034, 1036

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<sup>2</sup> The cases interpreting section 146 are also equally consistent with a de novo proceeding under section 145 and section 1071(b). There are cases under 146 holding that *legal issues* not presented to the PTO may not be raised for the first time in district court. *See Conservolite, Inc. v. Widmayer*, 21 F.3d 1098, 1102 (Fed. Cir. 1994). But, like under section 145, there is no Federal Circuit precedent regarding the circumstances in which a district court may properly restrict the admission of *evidence* on previously raised issues that was not presented to the Board. *Case v. CPC International, Inc.*, 730 F.2d 745 (Fed. Cir. 1984) (“Whether under some circumstances a district court may properly restrict the admission of testimony on an issue raised before the [B]oard is not before us.”); *See also Adhesives Research, Inc. v. Minnesota Mining and Mfg. Co.*, 2003 WL 25548427, \*2-3 (D.D.C. 2003) (reiterating same and collecting cases).

(Fed. Cir. 1985) (considering applicant’s new expert declaration setting forth additional data and new theory). This Court has consistently recognized that the only obligation imposed on applicants is Rule 56. *See e.g., Digital Control, Inc. v. Charles Machine Works*, 437 F.3d 1309, 1314-16 (Fed. Cir. 2006) (discussing standard of materiality in “new” Rule 56).

By holding “[o]n these facts” that Hyatt failed to meet an “obligation” to respond to the examiner’s written description rejection by which the exclusion of Hyatt’s evidence must be affirmed, the panel provided scant guidance as to what other failures – neither in kind nor degree – actions, or non-actions before the PTO might create an obligation that would render evidence inadmissible in a following district court challenge. Panel Op. at 49-50.

Without clear guidance, applicants, justifiably concerned about the potential exclusion of evidence from a later civil action challenge, could threaten to overwhelm the PTO with extraneous facts and evidentiary submissions. This threat is made all the more likely given the exponential increase in appeals to the Board in recent years. Presently, applicants proceeding before the PTO strike a strategic balance, submitting evidence likely sufficient to obtain a patent while avoiding overburdening the PTO because, should it be necessary and important enough, applicants can present additional evidence to the district court under section 145. And if no further evidence is needed, review may instead be had under section 141. The panel opinion upends this balance, and creates a strong

incentive for applicants to make unnecessarily extensive evidentiary submissions to the PTO.

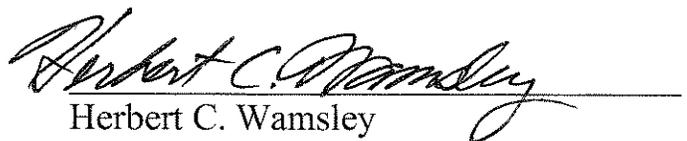
Moreover, applicants and the PTO will likely be forced to engage in much additional litigation in order to clarify the panel's vague evidentiary standard.

The panel's ambiguous rule, and the burden on applicants, the PTO, and the courts that will follow from it, are entirely unnecessary. This Court should reject that rule and hold that evidence in section 145 challenges is admissible according to the same clear, established standards that apply in other civil actions: the Federal Rules of Evidence.

## **V. CONCLUSION**

For the reasons stated above, the IPO urges the Court to reject the panel decision's restriction on the admissibility of new evidence and hold that section 145 provides for a de novo proceeding in district court, subject to the Federal Rules of Evidence.

Respectfully Submitted,



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## APPENDIX<sup>1</sup>

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*Hyatt v. Kappos*, 2007-1066

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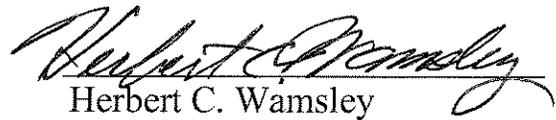
April 6, 2010

A handwritten signature in black ink, appearing to read "John C. Kruesi, Jr.", written over a horizontal line. The signature is cursive and includes a large loop on the left side.

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