

**APPENDIX A – Decision of the U.S. Court of Appeals for the
Tenth Circuit**

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

June 17, 2020

Christopher M. Wolpert
Clerk of Court

DONALD L. BAKER,

Plaintiff - Appellant,

v.

ANDREI IANCU, Director USPTO;
DREW HIRSHFELD, Comm for Patents,
USPTO; ROBIN O. EVANS, Dir, Tech
Center 2800, USPTO; ELVIN G. ENAD,
Supervisory Patent Examiner, Art Unit
2837, USPTO; MARLON T. FLETCHER,
Primary Patent Examiner, Art Unit 2837,
USPTO,

Defendants - Appellees,

and

DANIEL SWERDLOW,

Defendant.

No. 19-5100
(D.C. No. 4:19-CV-00289-CVE-FHM)
(N.D. Okla.)

ORDER AND JUDGMENT*

Before BRISCOE, MATHESON, and EID, Circuit Judges.

* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Donald L. Baker, pro se, appeals the district court’s order dismissing his complaint for lack of subject matter jurisdiction. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm. We remand for the court to amend the judgment to reflect a dismissal without prejudice.

I. BACKGROUND

Mr. Baker filed suit in the United States District Court for the Northern District of Oklahoma against five employees of the United States Patent and Trademark Office (“USPTO”) for their alleged fraud and harassment in connection with the denial of his patent application. The district court dismissed the case for lack of subject matter jurisdiction

The court first explained that an applicant who wishes to challenge the denial of a patent claim must first do so through an appeal to the Patent Trial and Appeal Board (“PTAB”). *See* 35 U.S.C. § 134(a) (“An applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the [PTAB] . . .”). An applicant who is dissatisfied with the PTAB’s decision may then appeal to the United States Court of Appeals for the Federal Circuit. *See id.* § 141(a) (“An applicant who is dissatisfied with the final decision in an appeal to the [PTAB] . . . may appeal the . . . decision to the United States Court of Appeals for the Federal Circuit.”). An applicant who has not taken an appeal to the Federal Circuit may alternatively bring a “civil action against the Director [of the USPTO] in the United States District Court for the Eastern District of Virginia.” *Id.* § 145.

The court further explained that it lacked subject matter jurisdiction over Mr. Baker's alleged tort claims because he failed to give the USPTO the required notice under the Federal Tort Claims Act prior to filing suit. *See* 28 U.S.C. § 2675(a) (A party cannot file suit on "a claim against the United States for money damages for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government . . . unless the claimant . . . first present[s] the claim to the appropriate Federal agency . . .").

II. DISCUSSION

In his briefs to this court, Mr. Baker has not addressed any of the grounds for the district court's dismissal as required under Federal Rule of Appellate Procedure 28(a)(8)(A). "Although a pro se litigant's pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers, this court has repeatedly insisted that pro se parties follow the same rules of procedure that govern other litigants." *Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836, 840 (10th Cir. 2005) (brackets, citation, and quotations omitted). Where, as here, issues "are not adequately briefed," they "will be deemed waived." *Id.* (brackets and quotations omitted).

III. CONCLUSION

We affirm the judgment of the district court and remand only for the court to amend its judgment to reflect that the dismissal is without prejudice. "A longstanding line of cases from this circuit holds that where the district court dismisses an action for lack of jurisdiction, as it did here, the dismissal must be

without prejudice.” *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1216 (10th Cir. 2006).

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge

19-5100

Donald L. Baker
4203 South 109th East Avenue, Unit 237
Tulsa, OK 74146

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
OFFICE OF THE CLERK

Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303)844-3157

Christopher M. Wolpert
Clerk of Court

June 17, 2020

Jane K. Castro
Chief Deputy Clerk

Donald L. Baker
4203 South 109th East Avenue, Unit 237
Tulsa, OK 74146

RE: **19-5100, Baker v. Iancu, et al**
Dist/Ag docket: 4:19-CV-00289-CVE-FHM

Dear Appellant:

Enclosed is a copy of the order and judgment issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Please contact this office if you have questions.

Sincerely,



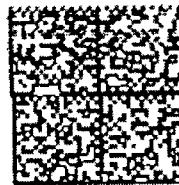
Christopher M. Wolpert
Clerk of the Court

cc: Jeffrey Andrew Gallant

CMW/mlb

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
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**APPENDIX B – Decision of the U.S. District Court for the
Northern District of Oklahoma**

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

DONALD L. BAKER,)
Plaintiff,)
v.) Case No. 19-CV-0289-CVE-FHM
ANDREI IANCU, Director USPTO,)
DREW HIRSHFELD, Comm for Patents,)
USPTO, ROBIN O. EVANS, Dir, Tech Center)
2800, USPTO, ELVIN G. ENAD, Supervisory)
Patent Examiner, Art Unit 2837, USPTO, and)
MARLON T. FLETCHER, Primary Patent)
Examiner, Art Unit 2837, USPTO,)
Defendants.)

RCVD 25 Oct 2019
DLB Evening

OPINION AND ORDER

Now before the Court is Defendant the United States of America's (USA) Motion to Dismiss (Dkt. # 14). Plaintiff alleges that five employees of the United States Patent and Trademark Office (USPTO) committed fraud and harassed him in connection with his application for a patent. He argues that the USPTO relies on junk science and "magical thinking" when making decisions on patent applications, and he states that "[i]t has become so blatant for so long that clearly neither the USPTO, nor the Patent Trial and Appeal Board (PTAB), nor the Department of Commerce Office of Inspector General can be trusted to ensure professional scientific, engineering and mathematical standards, ethics and behavior." Dkt. # 1, at 11. Defendant USA has filed a motion to dismiss (Dkt. # 14) asserting that the Court lacks subject matter jurisdiction over this case and that plaintiff has failed to properly serve defendants. Plaintiff is proceeding pro se and, consistent with Supreme

Court and Tenth Circuit precedent, the Court will construe his pro se pleadings liberally. Haines v. Kerner, 404 U.S. 519, 520 (1972); Gaines v. Stenseng, 292 F.3d 1222, 1224 (10th Cir. 2002).

I.

On May 28, 2019, plaintiff filed a complaint (Dkt. # 1) alleging that five employees of the USPTO violated numerous civil and criminal laws in connection with the denial of his application for a patent. Plaintiff states that he filed a patent application and paid the filing fee, but certain documents were missing from his application. Dkt. # 1, at 6. Plaintiff supplied the missing forms or documents, and it appears that he disagreed with the advice given to him by employees of the USPTO. Id. at 7. Plaintiff states that his patent application was denied, in part, “on the basis of false interpretation of prior art.” Id. at 9. Plaintiff asked to have the patent examiner assigned to his application removed, but his request was denied and he was advised to appeal the denial of his patent application to the PTAB. Id. at 9-10. Plaintiff believed that any appeal to the PTAB would have been untimely and he threatened to file a civil lawsuit if he was not treated fairly by the USPTO. Id. at 10.

Plaintiff filed this lawsuit alleging claims against the patent examiner, Marlon T. Fletcher, and other employees of the USPTO who allegedly failed to properly supervise Fletcher. Plaintiff claims that defendants committed mail and wire fraud, engaged in a racketeering conspiracy, made false statements and falsified records, and violated his rights under the Equal Protection Clause. Id. at 4. He asks the Court to exercise “original jurisdiction over executive branch agencies,” and he asserts that the Court has federal question jurisdiction over a “Bivens negligence suit.” Id. Plaintiff seeks injunctive relief, inter alia, preventing the USPTO from relying on “junk science” and asking that the USPTO cease and desist from requiring patent applicants to submit unnecessary paperwork.

Id. at 20. He is also asking the Court to compel the USPTO to adopt new procedures for the review of patent applications and to issue an opinion recommending that Congress open an investigation into the practices of the USPTO. Id. at 21.

II.

Defendant USA argues that the Court lacks subject matter jurisdiction over plaintiff's claim, because he has filed his claims in the wrong court and defendants have sovereign immunity from suit from any tort claims asserted by plaintiff. In considering a motion to dismiss under Fed. R. Civ. P. 12(b)(1), the Court must determine whether the defendant is facially attacking the complaint or challenging the jurisdictional facts alleged by the plaintiff. In Holt v. United States, 46 F.3d 1000 (10th Cir. 1995), the Tenth Circuit stated:

Generally, Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms. First, a facial attack on the complaint's allegations as to subject matter jurisdiction questions the sufficiency of the complaint. In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true.

Second, a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends. When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations. . . . In such instances, a court's reference to evidence outside the pleadings does not convert the motion to a Rule 56 motion.

In this case, defendant does not present evidence outside of the pleadings and the Court must accept the well-pleaded allegations of the complaint as true. Paper, Allied-Industrial, Chemical and Energy Workers Int'l Union v. Continental Carbon Co., 428 F.3d 1285, 1292 (10th Cir. 2005); Stuart v. Colorado Interstate Gas Co., 271 F.3d 1221, 1225 (10th Cir. 2001).

III.

Defendant USA argues that the Court lacks subject matter jurisdiction over this case, because federal district courts do not generally have jurisdiction over claims concerning the denial of a patent application. Defendant USA argues that plaintiff was obligated to appeal the denial of his patent application to the PTAB and, if he was dissatisfied with the PTAB's decision, he could seek judicial review in the United States Court of Appeals for the Federal Circuit or the United States District Court for the Eastern District of Virginia. Dkt. # 14, at 6. To the extent that plaintiff could be alleging fraud or other tort claims, defendant argues that plaintiff did not present notice of his claims to the appropriate federal agency before filing suit and, even if he had, many of his tort claims would still be barred. Id. at 8-9. Finally, defendant claims that all defendants were not properly served under Fed. R. Civ. P. 4(i). Id. at 10-11.

Defendant USA argues that plaintiff uses language such as "fraud," "fraudulent," or "false statements" to describe his claims, but this case essentially concerns a dispute over the USPTO's rejection of plaintiff's application of a patent. Dkt. # 14, at 5. Under 35 U.S.C. § 134, "[a]n applicant for a patent, any of whose claims has been twice rejected, may appeal from the decision of the primary examiner to the [PTAB]" The final decision of the PTAB may be appealed to the United States Court of Appeals for the Federal Circuit, or the applicant may file a civil action in the United States District Court for the Eastern District of Virginia. 35 U.S.C. § 141; 35 U.S.C. § 145. A patent applicant must exhaust all administrative remedies, including appeals to the PTAB, before seeking judicial review of the denial of a patent application, and the exhaustion requirement also applies to constitutional claims arising out of the patent application process. Cooper v. Lee, 86 F. Supp. 3d 480, 484 (E.D. Va. 2015). Plaintiff has styled his claims as "fraud" or negligence, but

all his potential claims derive from the alleged mishandling and improper denial of his patent application. Plaintiff admits that he did not file an appeal to the PTAB and, even if he had, this is not the proper court to seek judicial review of the denial of a patent application. Plaintiff's claims are subject to dismissal for failure to exhaust administrative remedies and for being filed in a court without jurisdiction over his claims.

To the extent that plaintiff may be alleging tort claims, defendant USA argues that plaintiff did not present notice of his tort claims to the appropriate federal agency before filing suit. The United States generally has sovereign immunity from suit, but the Federal Tort Claims Act, 28 U.S.C. 1346(b)(1) (FTCA), provides a waiver of sovereign immunity for certain claims against the United States and its employees. Federal courts have jurisdiction over "claims against the United States, for money damages . . . , for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his officer or employment . . ." 28 U.S.C. §1346(b)(1). However, there are certain procedural requirements that must be satisfied before a tort claim can be brought against the United States and its employees. Before filing suit, a plaintiff must "first present[] the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail," and a claim will be deemed denied if the agency does not respond to the claim within six months. 28 U.S.C. § 2675(a). To proceed with tort claims against the USPTO, an aggrieved patent claimant must present notice of his tort claims to the Office of General Counsel for the USPTO, and it is not sufficient to mention such claims in communications with the USPTO. Swartz v. Matal, 2017 WL 3611715 (E.D. Va. Aug. 22, 2017) (unpublished). Defendant argues that plaintiff did not present a tort claim to the Office of General Counsel of the

USPTO before filing this case, and plaintiff has failed to respond to this argument. The Court has reviewed the complaint and plaintiff could be asserting fraud and negligence claims against defendants. These would be tort claims that could be filed against employees of the United States only if plaintiff can show that sovereign immunity has been waived. Dkt. # 1, at 4. Plaintiff does not offer any argument suggesting that he presented a notice of tort claim before filing suit, and defendants have sovereign immunity from any tort claims due to plaintiff's failure to comply with the procedural requirements of the FTCA.

Broadly construing plaintiff's complaint, it is also possible that he intends to allege constitutional claims under the Fifth Amendment for violations of his right to due process or equal protection.¹ It appears that plaintiff's equal protection claim is based on an alleged disparity in the treatment of patent applicants with and without an attorney, and he claims that the "USPTO has attempted to deny the Plaintiff the same right to file multiple independent claims that it allows to those with patent attorneys." Dkt. # 1, at 18-19. However, pro se litigants are not a protected class for the purpose of an equal protection claim. Svatovic v. United States Patent and Trademark Office, 2013 WL 4792837, *3 (S.D.N.Y. Sep. 9, 2019) (unpublished); Chapman v. Barcus, 2009 WL 57092, *6 (N.D. Okla. Jan. 7, 2009) (unpublished). Broadly construing plaintiff's complaint, he could also be alleging that his right to procedural due process was violated by the patent application process. See Dkt. # 1, at 20. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Lawrence v. Reed, 406 F.3d 1224, 1233 (10th Cir. 2005). Plaintiff has provided a list of his interactions with the USPTO during the patent application

¹ The Fifth Amendment does not contain an equal protection clause, but the Equal Protection Clause of the Fourteenth Amendment has been incorporated against the federal government. Bolling v. Sharpe, 347 U.S. 497 (1954).

process, and it is apparent that he had numerous opportunities to communicate with the patent examiner and advocate for the issuance of a patent. Dkt. # 1, at 6-10. Plaintiff could be arguing that the patent application process is too complex and that too much procedure is required in order to obtain a patent, but he has cited no authority suggesting that a person's right to procedural due process could be violated by too much procedure. Plaintiff had an opportunity to be heard and he failed to take advantage of the opportunity to have his patent application reviewed by the PTAB, and there is no possibility that plaintiff could succeed on a claim for procedural due process.

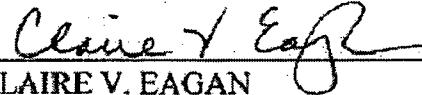
Defendant USA also argues that plaintiff has failed to properly serve all defendants in compliance with Fed. R. Civ. P. 4(i). Each defendant is an employee of the USPTO and plaintiff has sued them for actions taken on behalf of the USPTO. Rule 4(i)(3) states that, “[t]o serve a United States Officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States's behalf, . . . a party must serve the United States and also serve the officer or employee under Rule 4(e), (f), or (g).” Further, “[t]o serve the United States, a party must: (A)(i) deliver a copy of the summons and of the complaint to the United States attorney for the district where the action is brought . . . or (ii) send a copy of each by registered or certified mail to the civil-process clerk at the United States attorney's office; [and] (B) send a copy of each by registered or certified mail to the Attorney General of the United States at Washington, D.C. . . .” Fed. R. Civ. P. 4(i)(1). Serving the United States and its employees can be complex and the Court must grant an extension of time to cure improper service if such an extension is requested. Fed. R. Civ. P. 4(i)(4); Ennis v. Donahoe, 2014 WL 69877 (N.D. Okla. Jan. 9, 2014) (unpublished). However, plaintiff has filed numerous documents since the motion to dismiss was filed, and none of these documents contains any statement that could be construed as a request for

additional time to properly serve defendants. Dkt. ## 16, 17, 18, 19, 20. Defendant USA states that plaintiff sent a copy of the complaint to the USPTO and the Solicitor General by certified mail, but plaintiff has not served a copy of the complaint on the United States Attorney or the Attorney General. Dkt. # 14, at 11. In addition, plaintiff has not served a summons on any of the named defendants. Defendants have not been properly served under Rule 4(i) and plaintiff has not requested additional time to cure his failure to serve defendants. Plaintiff's failure to properly serve defendants is an additional reason for the dismissal of his claims.

IT IS THEREFORE ORDERED that Defendant the United States of America's Motion to Dismiss (Dkt. # 14) is **granted**, and plaintiff's claims are **dismissed for lack of jurisdiction**. A separate judgment of dismissal is entered herewith.

IT IS FURTHER ORDERED that plaintiff's motion for preliminary injunction (Dkt. # 3), motion to withdraw documents (Dkt. # 10), and motion for order to show cause (Dkt. # 17) are **moot**.

DATED this 22nd day of October, 2019.



CLAIRES V. EAGAN
UNITED STATES DISTRICT JUDGE

CLERK, UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
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74146-391262

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

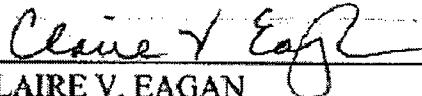
DONALD L. BAKER,)
Plaintiff,)
v.) Case No. 19-CV-0289-CVE-FHM
ANDREI IANCU, Director USPTO,)
DREW HIRSHFELD, Comm for Patents,)
USPTO, ROBIN O. EVANS, Dir, Tech Center)
2800, USPTO, ELVIN G. ENAD, Supervisory)
Patent Examiner, Art Unit 2837, USPTO, and)
MARLON T. FLETCHER, Primary Patent)
Examiner, Art Unit 2837, USPTO,)
Defendants.)

Received Oct 25 2019
DLS

JUDGMENT OF DISMISSAL

This matter has come before the Court for consideration and an Opinion and Order (Dkt. # 21) dismissing plaintiff's case for lack of subject matter jurisdiction has been entered. A judgment of dismissal of plaintiff's claims is hereby entered.

IT IS SO ORDERED this 22nd day of October, 2019.



CLAIRES V. EAGAN
UNITED STATES DISTRICT JUDGE

CLERK, UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA
333 WEST FOURTH STREET, ROOM 411
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--Case Participants: Jeffrey Andrew Gallant (caseview.ecf@usdoj.gov, jeff.gallant@usdoj.gov, michelle.hammock@usdoj.gov, michelle.schrader@usdoj.gov, sarah.m.coffey@usdoj.gov), Magistrate Judge Frank H McCarthy (fhmintake_oknd@oknd.uscourts.gov), Judge Claire V Eagan (cveintake_oknd@oknd.uscourts.gov)
--Non Case Participants:
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U.S. District Court

U.S. District Court for the Northern District of Oklahoma

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Case Name: Baker v. Iancu et al

Case Number: 4:19-cv-00289-CVE-FHM

Filer:

Document Number: 24(No document attached)

Docket Text:

MINUTE ORDER by Judge Claire V Eagan – Defendant's exhibits [23] are stricken as they were filed after termination of this action (see [21, 22]), striking/withdrawing document(s). (Re: [23] Exhibit(s) in Support of Document(s), [22] Judgment,, Dismissing/Terminating Case,,, [21] Opinion and Order,,,,,, Ruling on Motion for Permanent Injunction,,, Ruling on Motion to Withdraw Documents(s),,, Ruling on Motion to Dismiss for Lack of Jurisdiction,,, Ruling on Motion for Miscellaneous Relief,,,) (Documents Terminated: [23] Exhibit(s) in Support of Document(s)) (This entry is the Official Order of the Court. No document is attached.) (RGG, Chambers)

4:19-cv-00289-CVE-FHM Notice has been electronically mailed to:

Jeffrey Andrew Gallant Jeff.Gallant@usdoj.gov, CaseView.ECF@usdoj.gov, michelle.hammock@usdoj.gov, michelle.schrader@usdoj.gov, sarah.m.coffey@usdoj.gov

4:19-cv-00289-CVE-FHM Notice has not been electronically mailed to:

Donald L Baker

4203 S 109TH E AVE

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NORTHERN DISTRICT OF OKLAHOMA
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APPENDIX C – E-mail from Davis S. Warren, USPTO

Subject: RE: 15/616,396 - ownership
From: "Warren, David" <David.Warren@USPTO.GOV>
Date: 1/23/2018 8:31 PM
To: "business1@android-originals.com" <business1@android-originals.com>

Mr. Baker,

At the moment I don't have time to respond to all your comments below. I'll just say this: I'll never reject or "pass on" or "throw out" an application just because it's a burden. It's true that I think you've generated unnecessary work (for both you and me). But once I determine you have something patentable, I'll do my best to get you the best patent possible. I don't think I'm there yet.

Yes, I think it's best that I write the claims (with your final approval). In fact, please don't submit anymore papers without first getting my opinion (again, I think I can save you time and possibly money).

A note on obviousness: It's not whether something is merely obvious...but obvious to "one of ordinary skill in the art." Your math is not obvious to one of ordinary skill, but math is not patentable.

For me, this is the problem: Your invention has two main components, 1) combining any number of pickups in any possible topology and 2) excluding duplicates. First, there is prior art that seeks to combine multiple pickups in all possible configurations (series, parallel, in-phase, out-of-phase). Second, your math merely describes those prior art combinations, again math is not patentable (there's a nuance here that I can't go into now, but I will if you request it). Third, your "exclude duplicates" feature lacks enablement. Let's say your claimed "M" is, say, 4358...an algorithm would be well beyond one of ordinary skill (thus, an "undergrad" would not be able to do it), you have not provided one (or "enabled" one). You mentioned this would be easily doable by an undergrad using a table-lookup system. I disagree. I cannot conceive of any way to generate an "infinite" (your word) table that would accommodate the breadth of claim 28. You mentioned going through this and "visually" deleting duplicates. How do you do that with infinite pickups? How do you do it with 500,000 pickups? 10,000? 500? You mention FFT, claim 28 is silent as to any FFT. Or, how do you create a table-lookup system to delete duplicates of, say, 500,000,000 pickups? 10,000? 500? Even 25? And finally, to me, removing duplicates is pretty obvious, e.g., to optimize user experience, to reduce CPU load, minimize memory/storage, etc. I just did a quick search of "eliminate duplicates" and returned about 14,000 hits.

I'm sorry, it's been a long day for me here, I'll send you the electronic correspondence info later (although it appears you've already agreed).

David S. Warren
Primary Patent Examiner
GAU 2837
571-272-2076

-----Original Message-----

From: Don Baker [mailto:business1@android-originals.com]
Sent: Tuesday, January 23, 2018 3:00 PM
To: Warren, David <David.Warren@USPTO.GOV>
Subject: 15/616,396 - ownership

**APPENDIX D – 181 Complaint on Non-Final Rejection of NPPA
15/917,389**

Accidentally duplicated in Appendix F
Please look there D&B

**APPENDIX E – Response of TC2800 Director R.O. Evans to 181
Complaint**



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
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P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/917,389	07/14/2018	Donald L. Baker		7425
116309	7590	05/13/2019		EXAMINER
Donald L Baker dba android originals LC 4203 S 109th E Ave #237 Tulsa, OK 74146				FLETCHER, MARLON T
			ART UNIT	PAPER NUMBER
				2837
			MAIL DATE	DELIVERY MODE
			05/13/2019	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.



UNITED STATES PATENT AND TRADEMARK OFFICE

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United States Patent and Trademark Office
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Alexandria, VA 22313-1450
www.uspto.gov

Donald L. Baker
4203 S 109th E Avenue #237
Tulsa, OK 74146

MAY 13 2019

In re Application of:
Donald L. Baker
Serial No.: 15/917,389
Filed: July 14, 2018
Title of the Invention: Single-Coil Pickup with
Reversible Magnet and Pole Sensor

**DECISION ON PETITION
UNDER 37 CFR § 1.181**

This is a decision on a petition under 37 CFR 1.181, filed on February 18, 2019 and resented on February 21, 2019 and March 25, 2019, requesting that the above-identified application be assigned to a different examiner. The petition is before the director of Technology Center 2800 for a decision.

The petition is DENIED.

Petitioner requests appointment of a new examiner. To support the request, petitioner asserts the following reasons: that the examiner has discriminated applicant's status as Pro Se inventor; that the examiner has fabricated and misrepresented prior arts to reject his claims. Petitioner further asserts that examiner provided irrelevant patents and citations thus demonstrating lack of full understanding of the facets of his invention. As such, Petitioner citing misconduct and examiner lacking the skill of "one of ordinary" in the art, requests examiner be terminated and replaced on the above application.

A review of the file record reveals that claims 1, 11-13 and 15-17 were rejected, while dependent claims 2-10 and 14 were being objected to as being dependent upon a rejected base claim but would be allowable if rewritten in independent form including all the limitations of the base claim and any intervening claims. Petitioner asserted that the examiner's position on the rejected claims over the prior art to Beller, US patent No. 7,166,793, was incorrect because examiner misstated that Beller teaches using a "solid-state preamplifier" which Petitioner alleged does not exist in Beller's pickup device.

Before addressing the points raised in the petition, the following USPTO practice is noted:

1. Issues that are petitionable v. appealable: Ordinarily, an objection is petitionable, and a rejection is appealable, but when the objection is "determinative of the rejection" the matter may be addressed by the Patent Trial and Appeal Board. See *In re Hengehold*, 440 F.2d 1395, 1403, 169 USPQ 473, 479 (CCPA 1971) and *Ex parte Frye*, 94 USPQ2d 1072, 1078 (Bd. Pat. App. & Int. 2010) (precedential). Some matters which have been determined to be petitionable and not appealable include: a requirement for restriction or election of species, finality, non-entry of amendments, and holdings of abandonment. MPEP 1201.

2. All business regarding a patent application must be transacted in writing. 37 CFR 1.2. Accordingly, a rejection and/or objection that are raised in an Office action must be addressed in writing by filing a reply.

3. Reassignment of an application during prosecution occurs when the review of the application file record reveals that the examiner has abused his authority and discretion.

This application is being prosecuted *pro se* and the file record has been carefully reviewed.

Under current US Patent and Trademark Office policy of compact prosecution, examiners are encouraged to contact and work with the patent applicants to promptly bring prosecution to a close and pass the application to issue where appropriate. This includes conducting interviews and assisting in drafting claims where appropriate. While extra efforts are given when an application is being prosecuted *pro se*, examiners are allotted limited time to review an application. However, not all patent application prosecution results in the application being allowed. Disagreement between an examiner and the applicant on allowable subject matter is not uncommon. When such disagreement occurs, an applicant may appeal any rejections of any claim twice rejected to the Patent Trial and Appeal Board and then to the appropriate courts of law, where necessary and applicable. Disagreement appeared to have arisen from the fact that petitioner believed that his claims are patentable and that the examiner had failed to appreciate his invention due to examiner's failure to understand his invention. Petitioner asserts that, due to examiner's failure to understand and appreciate the claimed invention, examiner has fabricated and misrepresented prior arts to reject his claims.

Reassignment of an application during prosecution occurs when the review of the application file record reveals that the examiner has abused his authority and discretion. The record reveals that the examiner has attempted to understand what petitioner considers as his invention and examiner explained his position as to what would be considered allowable. The record does not indicate that the examiner has abused his authority or acted improperly in attempting to bring prosecution to a successful conclusion and a prompt issuance of a patent. Contrary to petitioner's assertions, disagreements between the petitioner and the examiner about the merits of a prior art reference or of a rejection are inherently not a violation of the USPTO practice that rises

to a conduct level of abuse of authority and discretion. Disagreement on the merits of the claims and their rejections may be resolved by appealing to the Patent Trial and Appeal Board. Since there is disagreement between petitioner and the examiner regarding the patentability of the claimed invention, an appropriate action by the petitioner would be to appeal the rejections to the PTAB or to file a reply, in writing, to argue and point out where the rejections are flawed.

For the above stated reasons, the request to replace the examiner is hereby denied.
The application will remain assigned to the same examiner.

When disagreement on the merits of the claimed invention occurs, an applicant may appeal any rejections made by the examiner to the Patent Trial and Appeal Board and then to the appropriate courts of law, where necessary. This option is currently available to the applicant but must be exercised before the maximum extendable statutory period expires and the application becomes abandoned.

The file of record reveals that the examiner has indicated allowable subject matter if the dependent claims were rewritten in independent form including all of the limitations of the base claim and any intervening claims. Petitioner is encouraged to contact the examiner or his Supervisory Patent Examiner to bring prosecution to a successful conclusion. However, the substance discussed during any future communications should be summarized and made of record by both the applicant and the examiner.

The shortened statutory period for reply to the Office action of February 4, 2019 continues to run three (3) months from its mailed date. Extensions of this time period are governed by 37 CFR 1.136 but under no circumstances this time period may be extended past six (6) months. A reply to the Office action must be filed on or before August 4, 2019, along with any applicable request for extension of time and appropriate extension of time fee, to avoid the application from becoming abandoned by operation of law.

Telephone inquiries should be directed to Elvin Enad, Supervisory Patent Examiner, at (571) 272-1990.



Robin Evans, Director
Technology Center 2800
Semiconductors, Electrical and Optical
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APPENDIX F – Final Rejection of NPPA 15/917,389



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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
15/917,389	07/14/2018	Donald L. Baker		7425
116309	7590	12/05/2019	EXAMINER	
Donald L Baker dba android originals LC 4203 S 109th E Ave #237 Tulsa, OK 74146				FLETCHER, MARLON T
ART UNIT		PAPER NUMBER		
		2837		
MAIL DATE		DELIVERY MODE		
12/05/2019		PAPER		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

** See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) Notice of References Cited (PTO-892) 3) Interview Summary (PTO-413)
2) Information Disclosure Statement(s) (PTO/SB/08a and/or PTO/SB/08b) Paper No(s)/Mail Date ____.
Paper No(s)/Mail Date _____

4) Other: _____

U.S. Patent and Trademark Office

Notice of Pre-AIA or AIA Status

1. The present application, filed on or after March 16, 2013, is being examined under the first inventor to file provisions of the AIA.

DETAILED ACTION

Notice of Pre-AIA or AIA Status

2. The present application, filed on or after March 16, 2013, is being examined under the first inventor to file provisions of the AIA.

Claim Objections

3. Claims 2-17 are objected to because of the following informalities:

The preamble of the claims recite "An embodiment as recited ..." All of the claims depend from independent claim 1. In referring back to independent claim 1, the preamble should recite "The electromagnetic coil vibration pickup, as recited ..." The claims should not refer to an embodiment. Appropriate correction is required. (refer to some of the prior art patents to help write proper dependency claims or refer to the MPEP).

Claim Rejections - 35 USC § 112

4. The following is a quotation of 35 U.S.C. 112(b):
(b) CONCLUSION.—The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the inventor or a joint inventor regards as the invention.
5. The following is a quotation of 35 U.S.C. 112 (pre-AIA), second paragraph:
The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

6. Claim 16 recites the limitation "said pole-sensing device" in lines 1-2. There is insufficient antecedent basis for this limitation in the claim. There is no mentioning of "a pole-sensing device" in claim 1. Correction is required.

Claim Rejections - 35 USC § 102

7. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(a)(1) the claimed invention was patented, described in a printed publication, or in public use, on sale or otherwise available to the public before the effective filing date of the claimed invention.

8. Claim(s) 1, 11-13, is/are rejected under 35 U.S.C. 102(a)(1) as being anticipated by Beller (7,166,793).

Beller discloses an electromagnetic coil vibration pickup, generally mounted in the body of another device, comprised of: a coil (26) of insulated electrical wire to detect variations in a magnetic field, said variations caused by one or more vibrating magnetically permeable objects (figure 3); a magnetic core (ALNICO ROD MAGNET) to shape and provide said magnetic field, preferably with its magnetic field oriented along the axis of said coil, said core and field easily reversible by hand with respect to said coil and said vibrating objects (figure 3), and a device which provides an electrical signal when a preferred pole of said magnetic core is oriented in a preferred direction with respect to said one or more vibrating ferrous objects (column 8, line 60 – column 9, line 19; and figure 4); and a support structure for said coil, said magnetic core and said signal device, such the physical orientation of the field of said magnetic core, with respect to said vibrating objects, can be easily reversed by hand (figures 3 and 5).

Beller discloses an embodiment, wherein said magnetic core varies in magnetic properties and physical dimensions in 3 dimensions, so as to shape the resulting field in the region of said vibrating objects (figure 5; and column 10, line 64 – column 11, line 19).

Beller discloses an embodiment as recited in Claim 1, wherein an active and powered solid-state preamplifier, preferably fully differential, is incorporated into said support structure, taking as input the output of said wire coil, and the output of said preamp is presented elsewhere as the output of said pickup (column 10, line 58 – column 11, line 35).

Beller discloses an embodiment, wherein said pickup contains a ferro-magnetic plate on the side opposite said vibrating objects, so as to impede the extent of said magnetic field of said magnetic core in that direction (column 7, lines 44-60).

Claim Rejections - 35 USC § 103

9. The following is a quotation of 35 U.S.C. 103 which forms the basis for all obviousness rejections set forth in this Office action:

A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. Patentability shall not be negated by the manner in which the invention was made.

10. Claim 15 is/are rejected under 35 U.S.C. 103 as being unpatentable over Beller.

Beller is discussed above. Beller does not disclose magnetic cores varying in shape and dimension. However, Official Notice is taken with respect to it being well known in the art that shape and dimension of the magnetic core will change values of the strength and gradient of the magnetic field.

It would have been obvious to one of ordinary skill in the art at the time the invention was filed to utilize the well known teachings in the art with Beller, because the teachings provide the ability to vary the magnetic field generated by each core.

11. Claim 16 and 17 is/are rejected under 35 U.S.C. 103 as being unpatentable over Beller in view of Wallace (8,269,095).

Beller is discussed above. Beller does not disclose a pole sensing device.

However, Wallace discloses an electromagnetic pickup, wherein a pole sensing device is a solid state magnetic field and direction detector (column 15, lines 56-62).

It would have been obvious to one of ordinary skill in the art at the time the invention was filed to utilize the teachings of Wallace with Beller, because the teachings provide the detection of poles and their orientation.

Allowable Subject Matter

12. Claims 2-10 and 14 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Arguments

13. Applicant's arguments filed 2/18/2019 have been fully considered but they are not persuasive.

The applicant makes several arguments. With regards to the "question of racial and class discrimination, I will not address these arguments in that they do not pertain to the merits of this case. The applicant makes arguments stating "Mr. Fletcher cites irrelevant prior art ..."

The applicant argues that “Mr. Fletcher blatantly fabricates prior art ...” The applicant clearly does not understand the process of examining patent applications. While I will not address the applicant’s demeaning and disrespectful comments, the examiner has no reason to fabricate nor treat the applicant in any particular way. Based on the broadly written claims, there are many references that could be used to meet the claim limitations of the present invention. Looking at claim 1 of the present invention, the prior art merely needs to provide an electromagnetic pickup that provides (a) a coil of insulated electrical wire to detect variations in a magnetic field ..; (b) a magnetic core .. to provide said magnetic field; (c) a device which provides an electrical signal ... and (d) a support structure for said coil, said magnetic core and said signal device, ... Claim 1 discloses language such as “preferably with its magnetic field oriented ...” and “when a preferred pole of said magnetic core is oriented in a preferred direction”. The terms “preferably” and “preferred” are that are optional rather than distinct terms. Therefore, “preferably” provides an ideal way of doing something; however, not the only way of doing something. This optional language broadens the claim. Therefore, the limitations as provided in the present claims are met.

The applicant states that “Beller’s invention is demonstrably different ...” The applicant goes on to explain the difference in Beller’s pickups and applicant’s present invention. While the inventions may not be the same, examination is based on what the applicant claims as his invention. The applicant makes arguments that do not pertain to what has been claimed. The applicant’s claims are written broadly and are examined in a broad manner.

The applicant argues “Mr. Fletcher misrepresent prior art.” Mr. Fletcher disagrees. Again, the applicant does not appear to understand the examination process. The claims to an invention are read and view in light of its broadest interpretation. The rejection of the claims are based on the broadest reasonable interpretation of the claims. The claims should be written in a clear, concise, and distinct manner in a way to define the invention being claimed. When a claim is written so broadly that prior art

can be read on the claim language, the rejection should be made based on the claim language.

Applicant argues points that are not provided in the claim language.

Applicant argues that "Mr. Fletcher has little ordinary skill in the art." Again, as stated above, the claim limitations are met by the prior art. Not all of the claims are rejected by the prior art. The applicant argues points that are not recited in the rejected claims. The applicant may want to seek legal help from the patent office help desk or seek help from a patent attorney. Understanding the Manual of Patent Examining Procedures would help the applicant understand the rejection provided in the non-final office action (2/4/19).

The applicant argues "Mr. Fletcher discriminates, and denies patent protection ..." Mr. Fletcher disagrees and has pointed out allowable subject matter which provides "patent protection." However, the applicant has chosen not to address nor amend these allowable claims. Applicant makes arguments that pertain to references not used in the rejection provided in the non-final office action. These argues will not be address, since they are irrelevant to the non-final office action.

As stated by the applicant in the "conclusion", "No doubt I could have written some claims better". The writing of the claims are crucial and is the basis for patentability. The claims are what is provided patent protection. While the specification and specifically, the detailed description provides the written description of the invention for patent, the claims are what the applicant provides to define what the applicant believes to be their invention. The claims should distinguish the present invention over the prior art. The rejected claims in the present invention, do not distinguish over the prior art. Therefore, the previous rejection is maintained and stands.

Conclusion

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MARLON T FLETCHER whose telephone number is (571)272-2063. The examiner can normally be reached on M-F 6:30am-4:30pm.

Examiner interviews are available via telephone, in-person, and video conferencing using a USPTO supplied web-based collaboration tool. To schedule an interview, applicant is encouraged to use the USPTO Automated Interview Request (AIR) at <http://www.uspto.gov/interviewpractice>.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Elvin Enad can be reached on 571-272-1990. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained

from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

MTF

12/4/19

/MARLON T FLETCHER/
Primary Examiner, Art Unit 2837

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