

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

MARTIN DAVID HOYLE and B.E.
TECHNOLOGY, LLC,

Plaintiffs,

V.

MICHELLE K. LEE, JAMES DONALD SMITH,
JAMES T. MOORE, SALLY C. MEDLEY,
KALYAN K. DESHPANDE, LYNNE E.
PETTIGREW, and UNKNOWN OFFICERS,

Defendants.

Case No. 2:21-cv-02512-JPM-tmp

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before the Court is Defendants’ Motion to Dismiss the Complaint and Memorandum of Law, filed on November 23, 2021. (ECF No. 19.) For the reasons discussed below, Defendants’ Motion to Dismiss is **GRANTED**.

I. BACKGROUND

a. Procedural Background

Plaintiffs filed their Complaint on August 9, 2021. (ECF No. 1.) Defendants filed this Motion to Dismiss on November 23, 2021. (ECF No. 19.) Plaintiffs filed a Response in Opposition on January 21, 2022. (ECF No. 22.) Defendants filed a Reply on February 11, 2022. (ECF No. 23.) On June 13, 2022, Defendants also filed a Notice of Supplemental Authority. (ECF No. 24.)

b. Factual Background

Plaintiffs allege that the Defendants in this suit violated Plaintiffs' constitutional right to due process under the Fifth Amendment and seek compensatory and punitive damages against them pursuant to Bivens and its progeny. (ECF No. 1 ¶¶ 86–94.) Plaintiffs make the following factual allegations in their Complaint, which they contend amount to a procedural due process violation that can be remedied with a Bivens suit. Plaintiffs' patent portfolio includes two relevant patents to the issues here: U.S. Patent No. 6,628,314 (the "'314 Patent") and U.S. Patent No. 6,771,290 (the "'290 Patent"). (Id. ¶ 21.) In September 2012, "B.E. Technology filed patent infringement actions against several well-known technology companies—including Google, Facebook, Microsoft, Samsung, and others—to enforce its rights in the '314 and the '290 patents." (Id. ¶ 29.) "Google and all other defendants in those actions filed petitions seeking to challenge the validity of the '314 and the '290 patents in IPR proceedings—and then moved to stay the district court proceedings until the PTAB had ruled upon the validity of the underlying patents." (Id. ¶ 35.) "The same three-judge panel—Sally C. Medley, Kalyan K. Deshpande, and Lynne E. Pettigrew" presided over all seven of the IPR proceedings related to these two patents, and this "panel proceeded to rule against B.E. Technology in each of those cases—ultimately invalidating both patents as either 'anticipated by' and/or 'obvious,' in light of prior art." (Id. ¶ 36.)

Following the panel's decisions, B.E. Technology appealed to the Federal Circuit, which "then affirmed [the] PTAB's reasoning in two subsequent unpublished decisions." (Id. ¶ 37.) "Based upon the limited facts known by B.E. Technology and its counsel at that time, B.E. Technology did not file petitions for a writ of certiorari to the Supreme Court in either case." (Id. ¶ 38.)

“Starting in or around late 2017, various news outlets, blogs, and other websites began to publish scandalous revelations about the USPTO’s inner machinations, which raised serious questions about the constitutionality of IPR proceedings before the PTAB.” (*Id.* ¶ 39.) “[T]he USPTO eventually admitted that the Director and Chief Administrative Patent Judge had routinely employed various mechanisms ‘to indirectly influence’ the course of IPR proceedings before the PTAB—such as by ‘designat[ing] [certain] APJs [that were presumably] predisposed to decide a case in his preferred manner.’” (*Id.* ¶ 41.) (quoting *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1972 (2021).)

Additionally, “Plaintiffs learned that while APJs’ base salaries are supposed to be subject to a statutory cap, the USPTO had implemented a scheme of annual bonus payments, premised upon a points-based system of ‘decisional units’ associated with the various types of work assignments that APJs undertake and complete within each calendar year” which “created particularly problematic incentives in the context of IPR proceedings.” (*Id.* ¶¶ 44–45.) Specifically, “the compensation structure that was subsequently implemented by the USPTO provides substantial incentives for APJs to grant institution” and the USPTO implemented “policies that expressly discouraged and penalized the issuance of dissenting opinions.” (*Id.* ¶¶ 47, 51.)

“[T]he Director of the USPTO at all times relevant to the IPR proceedings discussed herein, was . . . Defendant Lee—who had previously served as the Head of Patents and Patent Strategy at Google.” (*Id.* ¶ 55.) Mr. Hoyle also discovered that:

APJ Medley had presided over approximately 64 IPR proceedings and had ruled in favor of the petitioners by cancelling the challenged patents in 100% of those proceedings. APJ Deshpande had likewise cancelled the challenged patents in 100% of the IPR proceedings over which he had presided as of 2015. And APJ Pettigrew also had a solid cancellation rate of 97% in all of the IPR proceedings over which she had presided as of 2015.

Upon information and belief, USPTO leadership was well-aware of these three APJs' particular propensity for ruling against patent owners, and specifically chose them (out of approximately 215 APJs who were employed by the USPTO at the time) to preside over B.E. Technology's IPR proceedings for that reason.

Mr. Hoyle also learned that all three of the APJs assigned to B.E. Technology's IPR proceedings received substantial bonus payments that year. Specifically, APJ Deshpande (who authored the four final written decisions cancelling the '314 patent in 2015) received a bonus payment in the amount of \$25,220 that year; APJ Pettigrew (who authored the three final written decisions invalidating the '290 patent in 2015) received a bonus in the amount of \$18,520 that year; and APJ Medley (who joined in each of those decisions) received a bonus in the amount of \$25,976 that year.

(Id. ¶ 57–59.)

“Thereafter, Mr. Hoyle discovered additional facts tending to suggest that USPTO leadership had specifically targeted B.E. Technology for enhanced scrutiny and adverse actions during this time frame.” (Id. ¶ 60.) “Mr. Hoyle learned that some of B.E. Technology's other patent applications (unrelated to the '314 and the '290 patents discussed herein) had been flagged for enhanced scrutiny pursuant to the USPTO's surreptitious Sensitive Application Warning System ('SAWS') program—which operated in secret from 1994 until approximately 2014.” (Id.) “Although Plaintiffs did not know it at the time, the assistant patent examiner who had been assigned to the patent applications filed by B.E. Technology actually admitted . . . that she had been instructed to flag all patent applications relating to targeted advertising technologies . . . for increased scrutiny under the SAWS program during her tenure at the USPTO.” (Id. ¶ 61.) “[W]hile the SAWS program obviously did not preclude the issuance of the '314 and the '290 patents, these revelations only served to confirm Plaintiffs' suspicions and concerns about the USPTO leadership's pervasive structural bias and secret internal policies favoring large industry players . . . , and its corresponding animus towards independent inventors like Plaintiffs.” (Id. ¶ 65.)

Mr. Hoyle next alleges further facts that he claims he became aware of through Mr. Ron D. Katznelson's paper in draft form, *The Pecuniary Interests of PTAB Judges: Empirical Analysis Relating Bonus Awards to Decisions in AIA Trials*. (*Id.* ¶ 69.) The report "identified a recruitment brochure published by the USPTO . . . which advertised the availability of 'gain-sharing bonuses' as a benefit available to PTAB judges—thereby suggesting that APJs would receive a share in the revenues that they generated for the agency by instituting IPR proceedings." (*Id.* ¶ 70.) "The Katznelson Report also revealed—based upon documents obtained through FOIA requests—the existence of a secret internal review committee within the PTAB called the AIA Review Committee ('ARC'), which was apparently responsible for reviewing certain final written decision drafts prior to their issuance, and providing suggestive guidance and/or edits on such decisions." (*Id.* ¶ 71.) "[S]ince the identity of persons serving on this secret extra-panel review committee was never revealed, Plaintiffs were ultimately deprived of their right to know who else might have contributed, influenced, or made the ultimate decision in B.E. Technology's IPR proceedings—or whether those persons . . . [had] clear conflicts-of-interest." (*Id.*)

Plaintiffs contend that these facts, taken together, "amount to a particularly clear and egregious violation of Plaintiffs' rights and leave no room for debate as to the unconstitutionality of those proceedings." (*Id.* ¶ 74.) Plaintiffs contend that each of the named Defendants "was either individually responsible for, involved in, or otherwise complicit in the actions that resulted in the violation of Plaintiffs' constitutional rights." (*Id.* ¶ 75.)

II. LEGAL STANDARD

Federal Rule of Civil Procedure 12(b)(6) allows dismissal of a complaint that "fail[s] to state a claim upon which relief can be granted." A Rule 12(b)(6) motion permits the "defendant to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged



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