

2020-1441

United States Court of Appeals
for the Federal Circuit

MOBILITY WORKX, LLC,
Appellant,

v.

UNIFIED PATENTS, LLC,
Appellees.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in Inter Partes Review No. IPR2018-01150.

APPELLANT'S MOTION FOR JUDICIAL NOTICE

FILED ON BEHALF OF MOBILITY WORKX, LLC,
APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUMENT	3
I. Background.....	3
II. The Court Should Take Judicial Notice Of The Limited Set Of Publicly Available Documents.....	5
A. A Court May Take Judicial Notice of Publicly Available Documents	6
B. Documents Published in the Federal Register	7
C. Documents Published on the USPTO's Website	8
D. PTO Documents Produced Through A Freedom of Information Act Request	9
E. A Congressional Research Service Report.....	12
III. Conclusion.....	12

ADDENDUM

Declaration of Randall Landreneau with Attachments

Declaration of Michael Machat with Attachments

CERTIFICATE OF INTEREST

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Acetris Health, LLC v. United States</i> , 949 F.3d 719 (Fed. Cir. 2020).....	8
<i>Al-Aulaqi v. Panetta</i> , 35 F. Supp. 3d 56 (D.D.C. 2014).....	7, 9
<i>Calloway v. Veal</i> , 571 Fed. App'x 626 (9th Cir. 2014)	11
<i>Group One, Ltd. v. Hallmark Cards, Inc.</i> , 407 F.3d 1297 (Fed. Cir. 2005)	6, 7, 11
<i>In re American Apparel, Inc. Shareholder Litigation</i> , 855 F. Supp. 2d 1043 (C.D. Cal. 2012)	10
<i>In re Chippendales USA, Inc.</i> , 622 F.3d 1346 (Fed. Cir. 2010).....	6
<i>In re Santa Fe Natural Tobacco Co. Marketing & Sales Practices & Products Liability Litigation</i> , 288 F. Supp. 3d 1087 (D.N.M. 2017).....	10
<i>Kaempf v. Myers</i> , 367 F.3d 958 (D.C. Cir. 2004)	8
<i>Lising v. INS</i> , 124 F.3d 996 (9th Cir. 1997).....	9
<i>Simpson v. Socialist People's Libyan Arab Jamahiriya</i> , 362 F. Supp. 2d 168 (D.D.C. 2005)	8
<i>Singletary v. Howard University</i> No. 17-cv-01198, 2018 WL 4623569 (D.D.C. Sept. 26, 2018).....	10
<i>Vitek Systems, Inc. v. Abbott Laboratories</i> , 675 F.2d 190 (8th Cir. 1982).....	8

<i>Williams v. Long,</i> 585 F. Supp. 2d 679 (D. Md. 2008).....	8
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Statutes

44 U.S.C. § 1507	7
------------------------	---

Rules

Federal Circuit Rule 27	1
Federal Rule of Appellate Procedure 27	1
Federal Rule of Evidence 201(b)	6
Federal Rule of Evidence 201(d)	6
Federal Rule of Evidence 902	10

Other Authorities

Dani Kass, <i>Fed. Circ. Told PTAB's Fee Model Undercuts Due Process</i> , Law360 (July 2, 2020).....	1
Josh Landau, <i>New Federal Circuit Appeal Claims PTAB Unconstitutional Because Of Fee Funding—But Ignores The Patent Examination Process</i> , Patent Progress (July 10, 2020) .	1

INTRODUCTION

Appellant Mobility Workx, LLC (“Mobility”) is contemporaneously filing an appeal that identifies a constitutional flaw with the Patent Trial and Appeal Board’s (“PTAB”) structure and process for deciding whether to institute post-grant proceedings under the Leahy-Smith America Invents Act (“AIA”). Mobility and its counsel first became aware of this particular flaw only after reading the recently filed appeal in *New Vision Gaming & Development, Inc. v. SG Gaming, Inc., f/k/a Bally Gaming, Inc.*, Case Nos. 2020-1399 and 2020-1400, before this Court. After reading the press, Mobility found New Vision’s Appellant’s Opening Brief compelling and read it with both great fascination and shock. Fascinating for how good it was, and a shock for what it uncovered as a systematic due process violation that if not cured may lead some to compare the esteemed and extremely intelligent PTAB judges to meter maids in black robes who are sometimes improperly subjected to incentives to write parking tickets to finance a municipality’s budget. The decision of whether to institute an inter partes review proceeding needs to be free from any actual or apparent financial incentive.

This issue presents a substantial question about the current AIA post-grant review process. Until the constitutional issue is addressed, many if not all patent owners and patent challengers will harbor doubts about the finality of AIA post-grant review decisions. Pursuant to Federal Rule of Appellate Procedure 27 and Federal Circuit Rule 27, Mobility asks the Court to take judicial notice of precisely the same set of documents presented by New Vision in its similar motion for Judicial Notice.

For the convenience of the Court and all readers, the documents all have the same Bates Stamped numbers as presented by New Vision. Mobility has independently verified each document. They are the same.

On Tuesday, July 28, 2020, counsel reached out to counsel for Appellee Unified Patents, LLC. (“Unified”), via email, and provided each of these documents to Unified so Unified can comment. As of the time of filing, Unified has not provided any comments one way or another and has not indicated if they will oppose Mobility’s request for judicial notice.

Like New Vision’s motion for judicial notice, Mobility’s present motion asks the Court to take judicial notice of a select number of publicly available documents that the PTAB would almost certainly not have considered during the *inter partes* review proceeding, even though the publicly available documents support the due process challenge. The significance of the due process challenge warrants the Court’s consideration of the publicly available documents.

Indeed, in the New Vision case, this Court has already certified New Vision’s same Constitutional challenge to the Attorney General. [Dkt No. 42 of New Vision Case] and instructed the Attorney General to let the Court know if the government intends to intervene and file a brief.

ARGUMENT

I. Background

This appeal ultimately stems from an *inter partes* review of Mobility's '417 patent.

On December 2, 2019, the PTAB issued its Final Written Decision concluding that claims 1, 2, 4, 5, and 7 of the '417 patent are unpatentable. Claims 3 and 6 survived.

Afterwards, Mobility timely appealed the Final Written Decision to this Court, and has just filed its opening brief. In the opening brief, Mobility raises the following issues, amongst other arguments:

1. Whether the unusual structure for instituting and funding AIA post-grant reviews violates the Due Process Clause in view of *Tumey v. Ohio*, 273 U.S. 510 (1927), and its progeny, which establish “structural bias” as a violation of due process.

Because the due process challenge relies on documents that recently became publicly available through a FOIA request, as well as many documents published on the USPTO's own website—Mobility (like New Vision before hand) seeks to include those documents in the joint appendix for the Court's convenience. Mobility informed United on July 28 that it intended to file a motion for judicial notice and provided United with a copy of documents for which it is seeking this Court to take judicial notice. Mobility has not yet received a response.

II. The Court Should Take Judicial Notice Of The Limited Set Of Publicly Available Documents

Mobility's appeal explains how the current structure of the AIA decisionmaking process creates a structural bias in favor of granting institution. While actual bias of a decisionmaker need not be shown in order to prevail, the publicly available documents establish that an administrative patent judge's ("APJ") compensation is affected, at least indirectly, by granting institution. Moreover, the leadership of the PTAB is involved in both judicial and administrative roles. The publicly available documents Mobility seeks to include in the joint appendix illustrate how the institution decisionmaking process is structurally biased, with 40% of the PTAB's budget dependent on fees generated from granting institution.

A. A Court May Take Judicial Notice of Publicly Available Documents

This Court may take judicial notice of documents that are not "subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); *In re Chippendales USA, Inc.*, 622 F.3d 1346, 1356-57 (Fed. Cir. 2010) (taking judicial notice of information in PTO records). Such judicial notice may be taken "at any stage of the proceeding," Fed. R. Evid. 201(d), including on appeal, Fed. R. Evid. 201 (advisory committee's note to the 1972 proposed rules); *accord Group One, Ltd. v. Hallmark Cards, Inc.*, 407 F.3d 1297, 1306 (Fed. Cir. 2005) (affirming district court's judicial notice of a PTO document created after the close of evidence).

For the reasons explained below, each set of documents is appropriate for judicial notice, particularly given the significance of the constitutional issue raised by the appeal. Each document is “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” *Group One*, 407 F.3d at 1306.

B. Documents Published in the Federal Register

Mobility asks the Court to take judicial notice of, and for leave to include in the joint appendix, the following document published in the Federal Register: *Department of Commerce, Patent and Trademark Office, Setting and Adjusting Patent Fees During Fiscal Year 2020*, 84 Fed. Reg. 37,398 (July 31, 2019), attached as Appx4114-4156.

Mobility submits that, as a notice in the Federal Register, there should be no question about whether a court can take judicial notice of the document. Indeed, by statute, the Court may take judicial notice of documents published in the Federal Register. 44 U.S.C. § 1507 (“The contents of the Federal Register shall be judicially noticed and without prejudice to any other mode of citation, may be cited by volume and page number.”); *see also Al-Aulaqi v. Panetta*, 35 F. Supp. 3d 56, 67-68 (D.D.C. 2014) (“[A] court generally may take judicial notice of materials published in the Federal Register.”). This Court routinely cites the Federal Register without seeing the need to note that judicial notice is being taken. *See, e.g., Acetris Health, LLC v. United States*, 949 F.3d 719, 725 (Fed. Cir. 2020).

C. Documents Published on the USPTO's Website

Mobility seeks judicial notice of twelve documents published on the PTO's website. *See Appx4157-4350; Appx4351-4386; Appx4394- 4801.* Each of these documents is prepared by the PTO and made available on its website, and thus amenable to judicial notice.

The Court may take judicial notice of documents the PTO maintains in its ordinary course, including those from the PTO's website. *See Kaempe v. Myers*, 367 F.3d 958, 965 (D.C. Cir. 2004) (holding that documents from the PTO's system of records are "public records subject to judicial notice"); *Vitek Sys., Inc. v. Abbott Labs.*, 675 F.2d 190, 192 n.4 (8th Cir. 1982) (taking "judicial notice of Patent and Trademark Office documents"); *Williams v. Long*, 585 F. Supp. 2d 679, 687-88 (D. Md. 2008) (postings on government websites are inherently authentic); *Simpson v. Socialist People's Libyan Arab Jamahiriya*, 362 F. Supp. 2d 168, 178 n.5 (D.D.C. 2005) (taking judicial notice of State Department's annual publication *Patterns of Global Terrorism* as reflecting the official position of U.S. government), *aff'd*, 470 F.3d 356 (D.C. Cir. 2006).

As explained in the attached declaration of Michael Machat, each of the documents cited at Appx4157-4350, Appx4351-4386, and Appx4394 - 4801 is available on the PTO's website. *See Declaration of Michael Machat ("Machat Decl.") ¶¶ 1-17.* Because all of these documents are available on the PTO's website, Mobility submits that the Court can take judicial notice of the documents and that they can be included in the joint appendix.

D. PTO Documents Produced Through A Freedom of Information Act Request

Mobility also seeks judicial notice of, and to potentially include in the joint appendix, several PTO documents that were produced via a FOIA request. As with the other documents, the FOIA documents are amenable to judicial notice. *See Appx3602-4113.*

A court may take judicial notice of agency FOIA documents. Judicial notice may be taken of public records and government documents available from reliable sources. *Lising v. INS*, 124 F.3d 996, 998 (9th Cir. 1997) (relying on an out-of-record document produced by the agency from its own records); *Al-Aulaqi*, 35 F. Supp. 3d at 67-68. Indeed, agency documents produced through FOIA requests may be considered “self-authenticating” official documents amenable to judicial notice that require no extrinsic evidence of authenticity. *See* Fed. R. Evid. 902; *see also Singletary v. Howard Univ.*, No. 17-cv-01198, 2018 WL 4623569, at *4 n.2 (D.D.C. Sept. 26, 2018), *rev’d on other grounds*, 939 F.3d 287 (D.C. Cir. 2019) (taking judicial notice of an email “which the University obtained through a request filed with the agency’s Freedom of Information Office”); *In re Santa Fe Natural Tobacco Co. Mktg. & Sales Practices & Prods. Liability Litig.*, 288 F. Supp. 3d 1087, 1211-12 (D.N.M. 2017) (“FOIA disclosure makes the document capable of accurate and ready determination by resort to a source whose accuracy cannot reasonably be questioned.” (quotation and alterations omitted)); *In re Am. Apparel, Inc. Shareholder Lit.*, 855 F. Supp. 2d 1043, 1064 (C.D. Cal. 2012) (“Because plaintiffs obtained

the documents by making a FOIA request, the court will take judicial notice of them as matters of public record.”).

Here, the FOIA documents produced by the PTO confirm and support Mobility’s constitutional due process argument. As explained in the attached declaration of Randall Landreneau, the president of US Inventor, the documents at Appx3813-4113 were all produced by the PTO in response to US Inventor’s FOIA request on the PTO.

See Declaration of Randall Landreneau (“Landreneau Decl.”) ¶¶ 1-12.

For example, the documents at Appx3815-3859, Appx3888-3910, Appx3931-3971, Appx3981-4063, Appx4074-4102, and Appx4106-4113 are APJ Performance Appraisal Plans that reflect the various production and financial incentives imposed on the APJs. The document at Appx3813 is a PTO email setting forth APJ guidance that, if “a dissent, concurrence, or remand [is] to be considered towards . . . productivity totals,” the APJ “must submit a request.” These and other FOIA documents are discussed in Mobility’s opening brief, and United will have an opportunity to respond to them in its response brief on the merits. All the PTO documents describe agency policies suitable for judicial notice. *See, e.g., Calloway v. Veal*, 571 Fed. App’x 626, 628 n.2 (9th Cir. 2014) (non-precedential).

Given the importance of the due process argument, the Court should take judicial notice of the FOIA documents. These documents are official agency records, produced in response to valid FOIA requests. The Court can consider the documents knowing that their “accuracy cannot reasonably be questioned.” *Group One*, 407 F.3d at 1306.

E. A Congressional Research Service Report

Lastly, Mobility seeks judicial notice of, and leave to include in the joint appendix, a report from the Congressional Research Service (“CRS”). *See* Appx4387-4393. Like the Federal Register notice, *supra*, the CRS report is the type of document a court routinely cites in its opinion without needing to expressly state that it is taking judicial notice of it. Further, Mobility seeks to include the CRS report in the joint appendix for the Court’s convenience.

III. Conclusion

For the foregoing reasons, Mobility asks that its motion be granted, that the Court take judicial notice of the documents identified in the attached declarations (and identified as Appx3600-4801), and that leave be granted to include such documents in the joint appendix (to the extent relied up by the parties) for the Court’s convenience.

Date: July 30, 2020

Respectfully submitted,

/s/ Michael Machat

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ADDENDUM TABLE OF CONTENTS

1. Declaration of Randall Landreneau (3 pp.)

Attachments: Appx3600-4113

2. Declaration of Michael Machat (6 pp.)

Attachments: Appx4114-4801

CERTIFICATE OF INTEREST

Counsel for Appellant, MOBILITY WORKX, LLC certifies the following:

1. The full name of the party represented by me is: MOBILITY WORKX, LLC.
2. The name of the real party in interest is: MOBILITY WORKX, LLC.
3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are: None.
4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the agency or are expected to appear in this Court (and who have not or will not enter an appearance in this case) are:

Tarek N. Fahmi, Ascenda Law Group, LLC

Michael Machat, Machat & Associates

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal:

Mobility Workx, LLC v. Celco Partnership d/b/a/ Verizon Wireless, 4:17-cv-

00872-ALM (EDTX).

Date: July 30, 2020

/s/ Michael Machat
Michael Machat
Counsel for Appellant

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE
STYLE REQUIREMENTS**

Pursuant to Federal Rule of Appellate Procedure 27(d) and 32(g), I certify the following:

1. The attached motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A). The motion contains 2,043 words (according to the Microsoft Word for Microsoft 365 MSO word count function), excluding the accompanying documents authorized by Federal Rule of Appellate Procedure 27(a)(2)(B) and items excluded by Federal Rules of Appellate Procedure 27(d)(2) and 32(f).
2. The attached motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point proportional Garamond type style.

Date: July 30, 2020

/s/ Michael Machat
Michael Machat Counsel
for Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copies of the foregoing:

1. APPELLANTS'S MOTION FOR JUDICIAL NOTICE
2. DECLARATION OF RANDALL LANDRENEAU IN SUPPORT OF APPELLANT'S MOTION FOR JUDICIAL NOTICE
3. DECLARATION OF MICHAEL MACHAT IN SUPPORT OF APPELLANT'S MOTION FOR JUDICIAL NOTICE

was filed with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF SYSTEM. Counsel registered with the CM/ECF system have been served by operation of the Court's CM/ECF SYSTEM per Fed. R. App. P. 25 and Fed. Cir. R. 25(c) on the 31st day of July 2020.

Date: July 31, 2020

/s/Michael Machat

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