

# Exhibit 12

**AFFIDAVIT OF PETER WONG**

STATE OF VIRGINIA                    )  
  ) ss  
COUNTY OF FAIRFAX                )

Peter Wong being first duly sworn, deposes and states as follows:

1. I presently reside in Centreville, VA.

**My Background.**

2. I worked at the Patent and Trademark Office (“PTO”) from 1977 through my retirement in 2007. In the 1980s and early 1990s, I was a patent examiner in the Electrical Group 210, now Technology Center (TC) 2800.

3. In 1995, my Supervisory Primary Examiner (“SPE”) in TC 2800 retired. I was then promoted to his job as a SPE in TC 2800 in July 1995. In 2000, I was reassigned as a SPE in TC 2100, and in 2002 I was promoted to Director of TC 2100. I served as Director of TC 2100 until I retired in 2007.

**The Sensitive Application Warning System (“SAWS”).**

4. SAWS was established in the mid-1990s by PTO Commissioner Bruce Lehman to identify and, in the case of many, to delay or prevent controversial patents from issuing. The scope of SAWS subject matter, among other things, included patent applications with controversial subject matter, patent applications with claims “of broad or domineering scope”, patent applications which had old effective filing dates (commonly referred to as “submarine applications”), patent applications with claims of “pioneering scope,” and patent application that, if issued, would embarrass the PTO. The SAWS program was often used to target what the senior management staff called “patent trolls” and “submariners.” This was often stated at management staff meetings and by SAWS program coordinators. PTO Commissioner Lehman

1 made submarine applications even more out of favor within the PTO. He often criticized  
2 submariners and submarine applications at management meetings.

3         5. Each TC maintained a list of the SAWS applications that they designated, or  
4 “flagged” as such. During my tenure as the Director of TC 2100, my staff closely monitored all  
5 filed applications in TC 2100, identified any potential SAWS applications, made decisions to  
6 include the identified patent applications into the SAWS list, and reported such findings to the  
7 Office of the Commissioner for Patents on a quarterly basis.

8         6. The SAWS program was implemented PTO-wide and PTO policy required all  
9 patent applications to be screened for SAWS subject matter. PTO upper senior management  
10 staff (the Commissioner for Patents and the Deputy Commissioners for Patents) from the top  
11 down through the ranks to the TC Directors and Supervisory Patent Examiners and down to the  
12 examiners had formal assigned roles in the SAWS program. There were meetings, memos,  
13 training, and much information about reporting patent applications for SAWS evaluation.  
14 SAWS was part of the PTO internal culture and it involved the whole PTO for decades. It was a  
15 PTO-wide program but it was not mentioned in the PTO rules nor in the Manual of Patent  
16 Examining Procedure (“MPEP”) and it was kept secret from the auditors, the patent profession,  
17 the applicants, and the public. The SAWS program main objective was not to issue any  
18 controversial patents that would create embarrassment to the PTO. In some instances, it was  
19 misused as a form of secret “witch hunt.”

20         7. SAWS-flagging of patent applications usually took place very early in the  
21 examination process of a patent application. Examiners and supervisors were trained to be  
22 liberal in criteria identifying SAWS applications and were given broad discretion to cast a “broad  
23 net” (a PTO SAWS-related term) to identify patent applications that had SAWS subject matter. I  
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1 personally believed this to be overly broad program, subject to being abused that might  
2 intentionally or unintentionally delay and taint many legitimate patent applications. Since I  
3 became Director of TC 2100 in 2002, I observed that the scope of SAWS criteria expanded over  
4 time, leaving more room for abuse.

5 8. I observed that many patent applications that were SAWS-flagged were  
6 questionable about meeting the SAWS criteria. However, I did not have the time and desire to  
7 dispute the SAWS-flagging of these patent applications since the SAWS program criteria was  
8 created very broadly, intended to cast a “broad net”.

9 9. Selecting SAWS applications was an *ad hoc* process, sometimes without any  
10 patentability criteria. The SAWS program was at times being abused and used as a political  
11 process that secretly delayed and poisoned-the-well for perceived undesirable patent  
12 applications. It gave the PTO upper senior staff the ability to prevent patentable patent  
13 applications from issuing by adding additional requirements to the existing patent laws laid down  
14 by Congress. It appeared to be arbitrary and at the discretion of the PTO upper senior staff,  
15 usually at the Office of the Commissioner for Patents and the Office of Patent Legal  
16 Administration (OPLA), under the direction of the PTO Commissioner.

17 10. I was never able to remove a SAWS flag as Director of TC 2100, nor did I ever  
18 know of a SAWS-flag being removed for a patent application in my TC. The SAWS-flagged  
19 applications that my TC 2100 examiners worked on and subsequently transferred to a special art  
20 unit, were subjected to repeated examination as a pretext for not issuing them. These  
21 SAWS-flagged applications were repeatedly re-examined. This re-examination caused  
22 significant delays and examiner prejudice. Examiners in the Special Art Unit realized that they  
23 were more closely scrutinized, not for patentability reasons, but for political reasons,  
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1           11.     Thus, examiners in regular art units did not want to examine SAWS-flagged  
2 applications and were prejudiced against SAWS-flagged applications.

3           12.     As a patent examiner in the early 1990s, I saw an examiner with a pile of paper  
4 patent application files from some applicants just sitting idle in his office week after week. I  
5 thought “how is that fair to the applicants?” if the examiner is not prosecuting those applications.  
6 I later realized that the examiner was selected to be a “trouble-shooter,” specializing in handling  
7 only applications from certain “known” applicants. I believed that was the early version of the  
8 SAWS special Art Unit that was created in the late 1990s.

9           13.     As a SPE from 1995 to 2002, I would submit quarterly reports to my TC Director  
10 on how many SAWS applications I had pending and abandoned in my Art Unit. We were  
11 promised by senior management that delay in examining SAWS applications would not affect  
12 our performance ratings. Senior management made it known that we would be allowed liberal  
13 extra time to examine SAWS-flagged patent applications and that delayed examinations of these  
14 SAWS-flagged patent applications would not affect our reviews, raises, or bonuses.

15           14.     In 2002, if an examiner in my TC were to allow a patent application (the term  
16 “allow” and variations thereof were used by the PTO to mean “allow for issuance”) which later  
17 on was flagged as a SAWS application, the patent application would have to pass a SAWS panel  
18 review. As a TC Director, I would then notify the office of Commissioner for Patents that  
19 allowance for issuance of a SAWS-flagged application was imminent but I could not authorize  
20 removal of the SAWS flag and actually issue the SAWS application. It was a political process  
21 that deviated significantly from the allowance of an application that was not SAWS-flagged.

22           15.     From my experience working with the senior management staff and the Special  
23 Art Unit staff on the SAWS-flagged applications in my TC 2100 from 2002 to 2007, I come to  
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1 the conclusion that the PTO's ultimate goal in placing these patent applications on the SAWS list  
2 was to prevent their issuance so that they would not embarrass PTO.

3 **Gilbert Hyatt And His Patent Applications.**

4 16. I was aware of Gilbert Hyatt and many of his patent applications after I became  
5 SPE and subsequently TC 2100 Director in 2000 and 2002, respectively. I had about 50 of Mr.  
6 Hyatt's patent applications assigned to my TC 2100 in mid-2002. It was well known in the PTO  
7 that Mr. Hyatt was disliked by upper senior management staff since he was cast as a  
8 "submariner" by the upper senior management staff. I learned at staff meetings and I was  
9 informed by management such as Steve Kunin, the Deputy Assistant Commissioner for Patent  
10 Policy and Projects, that all of Mr. Hyatt's patent applications were flagged as SAWS  
11 applications and I personally observed that all of Mr. Hyatt's patent applications assigned to my  
12 TC 2100 were SAWS-flagged. All of Mr. Hyatt's patent applications assigned to my TC 2100  
13 were subsequently transferred to the Special Art Unit which I was informed by Mr. Kunin was  
14 handling all of his patent applications.

15 17. The PTO prevented certain patent applicants from receiving patents. These  
16 applicants were named on an applicant Look-Out list that was circulated to Group Directors. Mr.  
17 Hyatt's name was on the applicant Look-Out list. Patent applications of applicants whose names  
18 were on the applicant Look-Out list were taken out of the normal prosecution stream, which  
19 resulted in significant delays and examiner prejudice.

20 18. The PTO treatment of Mr. Hyatt as I observed was contrary to what we teach  
21 examiners -- be diligent, be efficient; do not treat applications based on the applicant's name,  
22 race, or creed; read the patent application, do your prior art searching, and examine the patent  
23 application impartially.

1           19.     During my tenure at TC 2100, Mr. Hyatt's patent applications were located in a  
2 Special Art Unit, resulting in significant delay and examiner prejudice. Examiners in the Special  
3 Art Unit realized that their work was more closely scrutinized, not necessary for patentability  
4 reasons but for political reasons.

5           20.     From 2002, when I became the Director in TC 2100, Mr. Kunin, the Deputy  
6 Assistant Commissioner for Patent Policy and Projects, often meddled in TC 2100 affairs to  
7 assure that SAWS-flagged applications, including Mr. Hyatt's patent applications, would not  
8 issue. This appeared unusual to me because the Commissioner's Office would not normally  
9 meddle with matters of application prosecution within a TC. However, the Commissioner's  
10 Office would not allow "the Hyatt cases" to issue simply because it had an ad hoc rule that -- no  
11 more patents were to issue to Mr. Hyatt. This was contrary to the normal practice at the TC 2100  
12 because issues of allowance and entitlement to patents was decided by the TC Director and those  
13 under him with full signatory authority. The normal practice was that political issues, other than  
14 national security, were not to be considered, and the sole objective was to apply high quality  
15 examination while maintaining low pendency.

16           21.     From my experience working with the Special Art Unit on Mr. Hyatt's patent  
17 applications that were assigned to my TC 2100, I come to the conclusion that the PTO's intent  
18 was to prevent the issuance of Mr. Hyatt's patent applications because they would potentially be  
19 embarrassing to the PTO.

20           22.     I learned that Assistant Commissioner Kunin held up for years Mr. Hyatt's patent  
21 applications that were initially allowed for issuance by TC 2100 but were later stopped from  
22 issuing because they were flagged as SAWS applications. Favorable patentability  
23 determinations were made by the TC 2100 examiners. Mr. Kunin had never requested that I as  
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1 the TC Director resolve any patentability issue. Mr. Hyatt's allowed SAWS-flagged applications  
2 continued to be charged to TC 2100. TC 2100 would have to allocate "other time" and give  
3 other concessions to examiners to cover for Assistant Deputy Commissioner Kunin's hold up on  
4 issuing "the Hyatt case."

5 23. In the early and mid-2000s, most of my TC 2100 SPEs and examiners knew that  
6 the PTO considered Mr. Hyatt an adversary because the PTO had poisoned-the-well for Mr.  
7 Hyatt by labeling him a "submariner."

8 24. In my five years of experience as Director of TC 2100, I observed that none of the  
9 SAWS-flagged applications in TC 2100 was unflagged and I had the opinion that a  
10 SAWS-flagged application could not be unflagged except at the whim of upper senior  
11 management at the Office of the Commissioner for Patents.

12 25. I retired in 2007 as a TC Director because I could not tolerate the politics within  
13 the Commissioner's Office. I was a technical person, I enjoyed the technical aspects of the  
14 patent examination process and I truly believed in the Patent System to promote innovation. I  
15 disliked the politics and the secret processes (e.g., SAWS) imposed by some individuals that  
16 unfairly deprived applicants of their rights and selectively targeted certain applicants (e.g., Mr.  
17 Hyatt).

18 26. I recall that during my tenure as Director of TC 2100 a few examiners were  
19 recruited to handle sensitive patent applications including Mr. Hyatt's patent applications. At the  
20 time, all of Hyatt's patent applications were gathered up and assigned to these examiners. This  
21 seemed to me to be an inefficient management process – selecting examiners, not for their  
22 technological background to handle the subject matter of the applications, but for being  
23 prejudiced against a certain applicant.



1           27.     In 2004, I communicated with Esther Kepplinger, then Deputy Commissioner for  
2 Patent Operations, and her staff. I sent an email to Maria Nuzzolillo, Ms. Kepplinger's assistant,  
3 regarding a meeting with Deputy Commissioner Kepplinger concerning Mr. Hyatt's patent  
4 applications. In 2004, Deputy Commissioner Kepplinger held a meeting at the Commissioner's  
5 Office to discuss "the Hyatt cases" that were located in my TC 2100. From at least 2003 to  
6 2007, Mr. Hyatt's patent applications were assigned to a group of examiners handling "sensitive"  
7 patent applications of Mr. Hyatt. About 50 of these "sensitive" patent applications were  
8 technically assigned to my TC 2100 but TC 2100 examiners were not permitted to examine these  
9 "sensitive" Hyatt patent applications.

10           28.     It was apparent from the statements by Deputy Commissioner Kepplinger that she  
11 did not like "the Hyatt cases" in part because, as she stated in management staff meetings  
12 something to the effect that "the Hyatt cases" were submarine patent applications and that the  
13 inaction on "the Hyatt cases" affected the pendency numbers for Commerce Department  
14 quarterly reporting.

15           29.     I have seen the PTO at other times use "creative accounting" to enhance the  
16 reporting results. During my tenure as Director of TC 2100, the PTO had creative ways of  
17 manipulating numbers to cure problems. I recall a situation where our parent, the Commerce  
18 Department, was upset because the PTO was losing 20% of new-hire examiners each year  
19 through attrition. So, the PTO came up with new way of reporting to make the numbers look  
20 better than they were.

21           30.     New-hire examiners were initially trained in the Patent Academy for three months  
22 before they returned to their assigned TC. Within the TC, these new hires were continuously  
23 trained and evaluated under a Supervisory Patent Examiner (SPE). If the SPE concluded that the  
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1 new hire is not suitable to be an examiner after careful evaluation, the new hire would be  
2 recommended for dismissal within one-year probation period. The PTO changed the initial  
3 training in the Patent Academy from 3 months to one year before they returned to their assigned  
4 TC. Then the SPE evaluation of the new hires would be after the one-year probationary period  
5 and the one-year attrition rate went down from 20% to less than 1% -- magically. Similarly, by  
6 taking Mr. Hyatt's patent applications "off the books," the delays that the PTO was causing his  
7 patent applications did not affect the PTO reported pendency numbers or cause audits or  
8 investigations issues.

9 31. During my tenure as the Director of TC 2100, the PTO treated Mr. Hyatt's patent  
10 applications different from the other patent applications. From my interactions with PTO senior  
11 staff, I had the suspicion that the goal of the PTO senior staff was to prevent Mr. Hyatt's patent  
12 applications from issuing, essentially an *ad hoc* Rule -- no more patents for Mr. Hyatt.

13 32. In 2006, Vincent Trans was the Special Program Examiner ("SPRE") in TC 2100.  
14 He handled the group reports for TC 2100. Mr. Trans monitored and reported on reissues,  
15 petitions, re-examinations, terminal disclaimers, and "the Hyatt cases" for TC 2100. Mr. Trans  
16 grouped "the Hyatt cases" together and transferred them to the examiners in "the Hyatt Unit" in  
17 TC 2600. The "Hyatt Unit" was the name given to the special examiners that were dealing with  
18 "the Hyatt cases" in TC 2600. Although "the Hyatt cases" were technically assigned to  
19 TC 2600, "the Hyatt cases" were not under the control of TC 2100, they were under the control  
20 of special "Hyatt case" coordinators such as SPE Richard Hjerpe and SPE Michael Razavi.

21 33. Mr. Hyatt filed various appeals and appeal briefs regarding some of his  
22 applications that were assigned to TC 2100. Examiners are instructed under 37 CFR § 41.39 to  
23 file an answer (called an "examiner's answer") to an appeal brief. During my tenure as the  
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1 Director of TC 2100, I was concerned because my examiners were not permitted by the special  
2 “Hyatt case” coordinators to file examiner’s answers to “the Hyatt cases” in which Mr. Hyatt had  
3 filed appeal briefs.

4 **Phantom Art Units**

5 34. The Phantom Art Units (also called Shadow Art Units) were used to concentrate  
6 “the Hyatt cases” into an Art Unit within a TC and to park them so that they could be kept out of  
7 the normal examination process and pendency statistics. The Phantom Art Units had special  
8 examiners and procedures to handle “the Hyatt cases.” The main purpose of the Phantom Art  
9 Units was to avoid reporting long pendency and inaction on specific applications that would  
10 negatively affect the reported production metrics of the TCs and the PTO Corps, to avoid the  
11 “8-month reports” (excessive time in the same status reports), and to avoid audits and  
12 investigations by the Commerce Department Inspector General.

13 35. Because activity reporting was based only on (publically known) Art Units  
14 included in the reports, the Phantom Art Units were therefore “off the books” and did not have to  
15 report their production (or lack of production) metrics. Examiners detailed from other Art Units  
16 into the Phantom Art Unit were not concerned with their production because of promises by their  
17 SPEs such as “don’t worry about production, it is not going to affect you.”

18 36. The “8-month status reports” reported to management and auditors about patent  
19 applications held up in a given status too long, or with long pendencies. However, I do not recall  
20 ever seeing any of the about 50 “Hyatt cases” that were located in my TC 2100 reported in an  
21 “8-month status report.” The “Hyatt cases” were “off the books.”

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23   
24 **PETER WONG**

1 State of Virginia

2 County of Fairfax

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4 Subscribed and sworn to (or affirmed) before me on this 26 day of February, 2019,  
5 by Peter Wong, proved to me, on the basis of satisfactory evidence, to be the person who  
6 appeared before me.

7 Signature \_\_\_\_\_

Notary Public

8 My Commission Expires:

9 9/30/20  
10 \_\_\_\_\_

