

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

MARTIN DAVID HOYLE and B.E.
TECHNOLOGY, L.L.C.,

Plaintiffs,

v.

MICHELLE K. LEE, in her individual capacity as former Director of the U.S. Patent and Trademark Office; JAMES DONALD SMITH, in his individual capacity as former Chief Administrative Patent Judge of the Patent Trial and Appeal Board; JAMES T. MOORE, in his individual capacity as former Vice-Chief Administrative Patent Judge of the Patent Trial and Appeal Board; SALLY C. MEDLEY, KALYAN K. DESHPANDE, and LYNNE E. PETTIGREW, in their individual capacities as current or former Administrative Patent Judges of the Patent Trial and Appeal Board; and various other UNKNOWN OFFICERS,

Defendants.

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

**PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS'
CONSOLIDATED MOTION TO DISMISS**

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Plaintiffs Martin David Hoyle and B.E. Technology, L.L.C. (“Plaintiffs”) hereby respectfully submit this response in opposition to the consolidated motion to dismiss filed by Defendants Michelle K. Lee, James Donald Smith, James T. Moore, Sally C. Medley, Lynne E. Pettigrew, Kalyan K. Deshpande, and other Unknown Officers of the United States Patent and Trademark Office (“USPTO”) (collectively, “Defendants”), *see* Defs’ Mot. to Dismiss (“MTD”) (filed Nov. 23, 2021) (ECF No. 19), and state as follows:

I. INTRODUCTION

This lawsuit arises from the unconstitutional deprivation of Plaintiffs’ patent rights without due process of law, by and through actions of Defendants in connection with a series of *inter partes* review (“IPR”) proceedings before the USPTO’s Patent Trial and Appeal Board (“PTAB”), between 2013 and 2015.

After having invested substantial time and resources developing novel targeted web-based advertising technologies in the late 1990s—and obtaining patents to secure their intellectual property rights in these inventions—Plaintiffs were blindsided by the PTAB’s decision to cancel their foundational patents in 2015, at the insistence of Google and several other “Big Tech” behemoths that had previously sought, unsuccessfully, to obtain patents covering these same technologies from the USPTO.

Several years later, various media outlets and websites began to expose deeply troubling facts about the USPTO’s inner machinations—such as its implementation of a program to flag patent applications filed by independent inventors that were perceived as potentially threatening to Google and other established tech industry giants for enhanced scrutiny—and a seemingly endless series of revelations about the PTAB’s internal operating procedures, which cast doubt upon the constitutional validity of the IPR proceedings that had resulted in the cancellation of Plaintiffs’ most critical patents.

Having already exhausted all other avenues for relief available to them, Plaintiffs brought the instant *Bivens* action against the individual officers that devised and administered the unconstitutional policies that ultimately led to the deprivation of Plaintiffs’ most valuable patents.

Predictably, Defendants have now moved to dismiss the complaint on various grounds—questioning whether *Bivens* is an appropriate remedy, claiming that they are entitled to qualified immunity if it is, and raising various other unmeritorious affirmative defenses.

As explained herein, Defendants’ motion to dismiss should be denied in its entirety because their proffered defenses lack merit, and are also improper for consideration at the motion to dismiss stage.

II. FACTS

A. Overview of Key Factual Allegations in the Complaint

The factual basis for this *Bivens* action is fully set forth in the complaint filed on August 9, 2021 (“Compl.”) (ECF No. 1), and is only recited in summary form here to provide a broad overview of the central allegations giving rise to a valid cause of action against each of the individual Defendants.

Among other things, the complaint alleges that Defendant Lee—who served as Google’s Head of Patents prior to assuming her role as Director of the USPTO, Compl. ¶¶ 7, 25, 34, 55, 62—conspired with Defendants Smith, Moore, and others, to devise a financial incentive-based compensation program that rewarded Administrative Patent Judges (“APJs”) for instituting IPR proceedings against independent inventors, at the request of tech-industry giants like Google, Compl. ¶¶ 14, 39–78, 94—and that provided substantial bonus payments to APJs for cancelling the challenged patent claims in these proceedings. Compl. ¶¶ 56–59, 72.

And as alleged in the complaint, this very same incentive-based compensation scheme also served to artificially manufacture decisional uniformity among three-member APJ panels, through the implementation of a policy set forth by Defendant Moore, that precluded the issuance of “productivity” credits to APJs for authoring dissents or concurrences, absent a specific pre-authorized exception. Compl. ¶¶ 44, 51–54. Under this system, APJs received bonus payments based on a point system of “decisional units,” Compl. ¶ 44, that did not award points for dissenting or concurring opinions. Compl. ¶¶ 51–54.

As alleged in the complaint, Defendants Medley, Pettigrew, Deshpande (the APJs assigned to preside over Plaintiffs’ IPR proceedings) willingly participated in this scheme for their own personal pecuniary gain, despite knowing—based on their legal training as attorneys—that these improper financial incentives were wholly inconsistent with the most basic and fundamental tenets of procedural due process, which are necessarily premised upon the judicial independence, integrity, and impartiality of those charged with presiding over administrative proceedings. Compl. ¶¶ 36, 56–59, 78.

The complaint also alleges that Defendants Lee, Smith, Moore, and others at the helm of the agency routinely abused their case assignment authority to selectively staff IPR proceedings with APJs based on their perceived propensity for ruling a certain way—and did so for the express purpose of “indirectly influencing” adjudicative outcomes in IPR proceedings. Compl. ¶¶ 36, 40–42, 74–76, 82. And that Defendants Deshpande, Medley, and Pettigrew were specifically chosen to preside over the IPR proceedings involving Plaintiffs’ patents because they were known to have a particularly high propensity towards cancelling patent claims, as compared to other PTAB judges. Compl. ¶¶ 56–58.

As if these allegations weren't shocking enough, the complaint further alleges that at least some (though potentially all) of the individual Defendants were involved in the creation and/or inner workings of a secret extra-judicial review committee within the USPTO, that was charged with reviewing, editing, and modifying the outcome, if necessary, of draft decisions authored by the original three-member APJ panel in any IPR proceeding, to ensure that final written decisions aligned with various unwritten policy objectives and were otherwise consistent with the private interests of industry "stakeholders," like Google, that generate a substantial amount of fee-based revenues for the agency's operating budget. Compl. ¶ 71. While Plaintiffs currently lack definitive evidence that the decisions cancelling their most valuable patents were generated through this black box process, the allegations in the complaint credibly set forth facts from which a reasonable inference can be drawn that this secret extra-judicial committee would have inserted itself and exerted undue influence, as necessary, over the final decision in any IPR proceeding brought by Google and several other Big Tech behemoths concerning foundational patents held by any independent inventor.

Although Plaintiffs need not surmise Defendants' motives for carrying out this blatantly unconstitutional scheme, the complaint also credibly sets forth reasons why Defendants may have acted as they did. For example, the complaint explains that Defendant Lee had a personal axe to grind against Plaintiffs dating back to her time as Head of Patents at Google, when the USPTO rejected several of Google's patent applications on targeted advertising technologies (which accounted for nearly all of Google's revenues at the time), because the technologies described therein were already covered by Plaintiffs' foundational patents in this area. Compl. ¶¶ 22–27, 34, 55, 71, 77.

The complaint also provides an overview of the USPTO’s financial operations as a “fee-funded agency” and the PTAB’s role as a revenue-generating entity within that framework, owing to the exorbitant filing fees that it collects from entities seeking to challenge the validity of existing patents through IPR proceedings. Compl. ¶¶ 33, 45–49, 65, 70.¹ As alleged in the complaint, this dynamic functioned as a strong institutional inducement in favor of instituting IPR proceedings to maximize the fee-based revenues that fund the agency’s operating budget. *Id.* And it is reasonable to infer that Defendants Lee, Smith, Moore, and other unnamed officers responsible for the agency’s budgetary operations were motivated by these factors in crafting and administering policies that consistently tilted the scales of justice to favor the agency’s “best customers” in IPR proceedings (*e.g.*, the implementation of an improper outcome-driven compensation scheme for APJs, purposefully biased case assignments based on the perceived propensity of certain APJs to rule a certain way, and the creation of a secret extra-judicial review committee to exert undue influence over adjudicative outcomes).²

With respect to Defendants Deshpande, Medley, and Pettigrew, it is equally reasonable to infer that the improper financial incentive-based compensation structure for APJs provided

¹ Under the USPTO’s current fee schedule, for example, IPR petitions must be accompanied by “request fee[s]” in the amount of \$19,000 and “post-institution” fees in the amount of \$22,500. 37 C.F.R. § 42.15(a) (Oct. 2, 2020). If the petition is denied, however, then the \$22,500 “post-institution” fee must be returned to the petitioner. 37 C.F.R. § 1.26.

² Another important aspect of this history is the incredible volume of IPR petitions that were filed with the PTAB following the passage of the America Invents Act (“AIA”). Defendants have acknowledged, in public remarks, that they only expected to receive approximately 400 petitions to institute IPR proceedings in 2013, but in fact, received something closer to 1,400 petitions. Rather than imposing reasonable limits on the number of petitions to grant, as originally contemplated by the “graduated implementation” in the AIA, Pub. L. No. 112-29, 125 Stat. 288 (2011), Defendant Smith and others made the decision to grant and adjudicate the vast majority of all these petitions, leading to a significant influx of work that required the hiring of numerous additional APJs to preside over these proceeding—many of whom lacked the requisite experience and training to carry out their intended function as impartial adjudicators.

sufficient motive for those individuals to participate and collude with the other Defendants in this scheme; and, as alleged in the complaint, all three of those Defendants did, in fact, receive substantial bonus payouts for their work as APJs during the relevant time frame. Compl. ¶ 59.

The complaint further sets forth credible factual allegations upon which a reasonable inference can be drawn that all of the individual Defendants were additionally motivated by various factors affecting their own personal and professional pecuniary interests, such as their prospects for career advancement and future employment in the private sector.

Finally, the complaint sets forth credible factual allegations demonstrating that at least some of the individual Defendants harbored some amount of animus towards independent inventors in general, and towards the Plaintiffs in this case in particular—as demonstrated by Defendant Moore’s involvement in the administration of the surreptitious Sensitive Application Warning System (“SAWS”) program that specifically targeted B.E. Technology as an entity whose patents threatened the interests of far more powerful established tech-industry giants, and whose patent applications were flagged for enhanced scrutiny for that reason, under this surreptitious program. Compl. ¶¶ 60–65, 74.

In sum, the allegations in the complaint plainly set forth the reasons why Defendants are each individually liable under *Bivens*, for personally undertaking, contributing to, conspiring in, and/or otherwise being complicit in the violation of Plaintiffs’ constitutional rights, under color of federal law, during their tenure as officers, agents, employees, or representatives of the USPTO.

B. Procedural History

Plaintiffs filed the instant action August 9, 2021, and subsequently began the process of effectuating formal service on each of the individual Defendants.

On or around September 21, 2021, counsel for all the individual Defendants confirmed that they were authorized to accept service, thereby waiving the otherwise applicable requirements of

personal service on those Defendants that had not yet been served. *See* Joint Mot. to Extend Time for Responding to the Complaint (Oct. 6, 2021) (ECF No. 17 at 1) (affirming that “[s]ervice of the summons and complaint is complete on [all] defendants...”). Notably, counsel did so without any reservation of rights to subsequently challenge this Court’s jurisdiction over Defendants.

On November 19, 2021, Defendants collectively filed the consolidated motion to dismiss that is presently before this Court (ECF No. 19), arguing that Plaintiffs have failed to allege facts giving rise to a cognizable cause of action under *Bivens* and its progeny, MTD at 19–24, or that Defendants are otherwise immune from suit, MTD at 26–39, and setting forth various other meritless affirmative defenses. MTD at 14–16.

III. ARGUMENT

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the complaint; thus, the question before this Court is not whether Plaintiffs will ultimately prevail, but rather whether the facts alleged in the complaint give rise to a cognizable cause of action. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009); *accord Left Fork Min. Co., Inc. v. Hooker*, 775 F.3d 768, 773 (6th Cir. 2014). In passing upon the instant motion, this Court must therefore “accept all well-pleaded factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff.” *Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016).

At the outset, it is worth noting that many of Defendants’ arguments are based upon a counternarrative of facts that are neither in the record, nor appropriate for this Court’s consideration at the motion to dismiss stage. Although Plaintiffs vigorously dispute Defendants’ counternarrative, the controversy over what actually happened is ultimately irrelevant at this juncture, since these factual disputes cannot be resolved in their favor on a motion to dismiss.

Having said that, we now turn to the principal legal argument advanced in Defendants’ motion to dismiss.

A. Plaintiffs have adequately alleged facts giving rise to an implied constitutional cause of action under *Bivens* and its progeny.

The gravamen of Defendants’ motion to dismiss is premised upon their view that the complaint fails to state a claim under *Bivens* and its progeny. MTD at 19–24. Contrary to Defendants’ protestations, however, Plaintiffs have adequately alleged facts giving rise to an implied constitutional cause of action under *Bivens* and its progeny.

In order to withstand a motion to dismiss in a *Bivens* action, “plaintiff[s] must initially demonstrate (1) a challenged action attributable to a person acting under color of federal law, and (2) conduct that deprives the party of a constitutionally protected interest.” *Left Fork Min. Co., Inc.*, 775 F.3d at 774 (citing *Schweiker v. Chilicky*, 487 U.S. 412, 418–21 (1988)); accord *Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417 (6th Cir. 2016); see also *Webb v. U.S.*, 789 F.3d 647, 659 (6th Cir. 2015) (citing *Marcilis v. Twp. of Redford*, 693 F.3d 589, 595 (6th Cir. 2012); *Redding v. St. Edward*, 241 F.3d 530, 532 (6th Cir. 2001)).

In addition to the foregoing, courts should not extend *Bivens* where plaintiffs have access to other “alternative processes” or available remedies for redressing the alleged constitutional injury. *Ivy v. U.S. Attorney’s Off.*, 2016 WL 2587289, at *5 (W.D. Tenn. May 4, 2016) (McCalla, J.) (citing *Koubriti v. Convertino*, 593 F.3d 459, 466 (6th Cir. 2010)); see also *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017) (“if there is an alternative remedial structure present in a certain case, that alone may limit the power of the Judiciary to infer a new *Bivens* cause of action.”); accord *Koprowski v. Baker*, 822 F.3d 249, 257 (6th Cir. 2016).

Last but not least, courts must also examine whether the *Bivens* claim “arises in a ‘new context’ or involves a ‘new category of defendants,’” *Hernandez v. Mesa*, 140 S. Ct. 735, 743

(2020) (citing *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 68 (2001) and *Ziglar*, 137 S. Ct. at 1859); accord *Callahan v. Fed. Bureau of Prisons*, 965 F.3d 520 (6th Cir. 2020)—and if so, “whether any ‘special factors counsel hesitation’ against allowing a *Bivens* suit to proceed.” *Koprowski*, 822 F.3d at 255 (citing *Wilkie v. Robbins*, 551 U.S. 537, 550 (2007) and *Bush v. Lucas*, 462 U.S. 367, 378 (1983)).

i. Plaintiffs have stated a valid cause of action for the unconstitutional deprivation of their property rights without due process of law.

Here, there is no real dispute that Defendants acted “under color of federal law.” *Left Fork*, 775 F.3d at 774. Accordingly, the next question is whether Plaintiffs have adequately alleged that Defendants’ conduct deprived them of a constitutionally protected interest.

The Fifth Amendment to the United States Constitution provides that “[n]o person shall be ... deprived of life, liberty, or property without due process of law.” U.S. CONST. amend. V. And the Supreme Court has long recognized that patents are property within the meaning of the Fifth Amendment. *See, e.g., Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (“[O]ur decision [upholding the constitutionality of *inter partes* review under Article III] should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.”) (citing *Florida Prepaid Postsecondary Ed. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 642 (1999); *James v. Campbell*, 104 U.S. 356, 358 (1882)); *see also Consol. Fruit-Jar Co. v. Wright*, 94 U.S. 92, 96 (1877) (“A patent for an invention is as much property as a patent for land.”); *Cammeyer v. Newton*, 94 U.S. 225, 226 (1876) (“the right of the [patent] holder is as much entitled to protection as any other property.”); *Brown v. Duchesne*, 60 U.S. 183, 197 (1857) (“For, by the laws of the United States, the rights of a party under a patent are his private property.”); *see also Celgene Corp. v. Peter*, 931 F.3d 1342,

1358 (Fed. Cir. 2019) (“The PTO does not dispute that a valid patent is private property for the purposes of the Takings Clause.”), *cert. denied*, 141 S. Ct. 132 (2020).

The complaint in this case alleges that Defendants violated Plaintiffs’ rights under the Due Process Clause of the Fifth Amendment, by and through their role in setting forth and/or administering unconstitutional policies that consistently favored Plaintiffs’ adversaries in the IPR proceedings, and that resulted in the cancellation of Plaintiffs’ most valuable patents. In other words, Plaintiffs have quite clearly alleged that Defendants’ conduct deprived them of a “constitutionally protected” property interest without due process of law.

To the extent that Defendants attack the underlying merits of Plaintiffs’ substantive legal claims, the three-factor balancing test prescribed in *Mathews v. Eldridge*, 424 U.S. 319 (1976) is the appropriate framework for assessing the viability of procedural due process claims. Specifically, under *Mathews*, courts must evaluate: (1) “the private interest affected”; (2) “the risk of erroneous deprivation of that interest through the procedures used”; and (3) “the governmental interest at stake.” *Nelson v. Colorado*, 137 S. Ct. 1249 (2017) (citing *Mathews*, 424 U.S. at 335). Although this Court need not engage in a lengthy analysis of those factors to determine that the complaint sets forth a valid cause of action at this stage, it is worth noting that all three factors weigh against the constitutionality of the IPR proceedings that resulted in the cancellation of Plaintiffs’ patents here.

With respect to the first *Mathews* factor (*i.e.*, “the private interest affected by the official action”), it is well-established that patent rights are “property” within the meaning of the Fifth Amendment. *See, e.g., Oil States Energy Servs.*, 138 S. Ct. at 1379.

The second *Mathews* factor (“the risk of [an] erroneous deprivation ... through the procedures used”) is also easily resolved here, since it is well-established that the Due Process

Clause “demands impartiality on the part of those who function in judicial or quasi-judicial capacities.” *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (“the law concerning disqualification because of interest applies with equal force to ... administrative adjudicators.”); *see also Tumey v. Ohio*, 273 U.S. 510, 523 (1927) (explaining that the Due Process Clause prohibits “any officer, judicial or quasi-judicial” from presiding over the subject-matter of any proceeding in which he or she has even “the slightest pecuniary interest.”). The Supreme Court has repeatedly held that the risk of an erroneous deprivation is “unacceptably high” when litigants are not provided with a “neutral decisionmaker.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (applying *Mathews*); *see also, e.g., Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (“It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’”) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *Weiss v. United States*, 510 U.S. 163, 178 (1994) (“A necessary component of a fair trial is an impartial judge.”); *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 617 (1993) (“due process requires a ‘neutral and detached judge in the first instance’”) (quoting *Ward v. Monroeville*, 409 U.S. 57, 61–62 (1972)); *Goldberg v. Kelly*, 397 U.S. (1970) (“[A]n impartial decision maker is essential.”).

These principles necessarily disqualify adjudicators from deciding matters in which they have a “direct, personal, substantial pecuniary interest,” *Tumey*, 273 U.S. at 532; *see also Murchison*, 349 U.S. at 136 (“no man is permitted to try cases where he has an interest in the outcome.”); *accord Ward v. Monroeville*, 409 U.S. 57, or where there is an apparent risk of bias, undue influence, or a conflict-of-interest giving rise to an appearance of impropriety. *See Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986) (“The Due Process Clause ‘may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of

justice equally... But to perform its high function in the best way, ‘justice must satisfy the appearance of justice.’”); *see also Caperton*, 556 U.S. at 884; *Berryhill*, 411 U.S. at 564; *Beer v. United States*, 696 F.3d 1174, 1179 (Fed. Cir. 2012); *Long v. Soc. Sec. Admin.*, 635 F.3d 526, 533 (Fed. Cir. 2011).

The third and final factor under *Mathews* concerns “the governmental interest at stake,” 424 U.S. at 340, and also weighs in Plaintiffs’ favor here. It is readily apparent that the government has a substantial public interest in the proper functioning of our patent system. *See, e.g., Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 203 (2014) (noting the importance of “a well-functioning patent system”); *United States v. Line Material Co.*, 333 U.S. 287, 320 (1948) (“[The Constitution] makes the public interest the primary concern in the patent system”); *Mercoird Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661, 665 (1944) (“It is the public interest which is dominant in the patent system”). And it is equally apparent that Defendants’ conduct, as described in the complaint, failed to advance that interest. Neither the government nor the public stands to benefit from a system that deprives patent owners of their property rights without due process of law.

To the extent that Plaintiffs invoke *Mobility Workx, LLC v. Unified Patents, LLC*, 15 F.4th 1146 (Fed. Cir. Oct. 13, 2021), for the proposition that Plaintiffs’ allegations do not rise to the level of a constitutional violation under the Due Process Clause of the Fifth Amendment, that decision is simply not the silver bullet that Defendants claim it to be. The *Mobility Workx* decision only tangentially relates to a single aspect of the myriad procedural due process violations at issue here, insofar as it passed upon the issue of whether the PTAB’s *current* financial operations create an inherent structural bias in favor of IPR petitioners at the institution stage. *See Mobility Workx*, 15 F.4th at 1156. As Plaintiffs acknowledged in their complaint, the USPTO has undertaken

various remedial measures to improve upon some of the questionable practices described therein—such its discontinuation of the SAWS program in or around 2014, its implementation of a \$10,000 cap on bonus payments to any individual APJ in 2019,³ and its introduction of formal procedural mechanisms to supplant the questionable practices that were previously relied upon by agency leadership to “indirectly influence” adjudicative outcomes in IPR proceedings. *See* Compl. ¶¶ 79–82.

As alleged in the complaint, however, “these corrective measures [have] offer[ed] nothing in the way of relief or remedies to the Plaintiffs—who were deprived of valuable property rights after being forced to adjudicate the validity of their patents in a forum where the deck was improperly stacked against them, without their knowledge,” several years before these critical policy changes were implemented. *See* Compl. ¶ 83. To that end, the *Mobility Workx* decision—which concerned a far narrower due process challenge to the significantly improved operations of the PTAB as of 2021—hardly dictates the analysis of the Plaintiffs’ due process claims based on the very policies that were previously in place, and that prompted these critical reforms.

ii. Plaintiffs’ claims are cognizable under *Bivens* and its progeny.

Setting aside the merits of Plaintiffs’ substantive claims, Defendants contend that the case should be dismissed on the grounds that it “seek[s] an improper extension of *Bivens*,” and because “special factors” counsel hesitation against extending *Bivens* to this purportedly “new context,” MTD at 23—or in the alternative, that *Bivens* is not the appropriate remedy here, because other alternative remedies exist and are allegedly available to redress the unconstitutional deprivation of Plaintiffs’ property rights, MTD at 24. But Defendants’ analysis on these issues is equally flawed.

³ By comparison, the APJ Defendants named here received bonus payments of almost \$26,000 for their work on the PTAB during the time that they presided over Plaintiffs’ IPR proceedings. Compl. ¶ 59.

As an initial matter, Defendants' contention that this case seeks an improper extension of *Bivens* ignores well-established historical precedent, in a long line of cases, recognizing the availability of an implied constitutional cause of action under *Bivens* for claims arising under the Due Process Clause of the Fifth Amendment.

The Supreme Court first extended *Bivens*' reach to cover claims under the Fifth Amendment in *Davis v. Passman*, 442 U.S. 228 (1979). In that case, the former deputy administrative assistant to a congressman alleged that she was fired because she was a woman; the Congressman had actually written a letter to the plaintiff in which he explained that although she was "able, energetic and a very hard worker... it was essential that the understudy to my Administrative Assistant be a man." *Id.* at 231. At the time, Title VII did not apply to federal employees, and so the plaintiff brought her suit as a *Bivens* action instead. Finding that she had no other alternative remedy, the Supreme Court recognized her *Bivens* cause of action under the Fifth Amendment so that she could bring a discrimination suit directly against the Congressman. *Id.* at 247.

The Supreme Court subsequently reaffirmed the availability of *Bivens* as a remedy for Fifth Amendment violations in *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988) (citing *Davis v. Passman*, 442 U.S. 228, for the general proposition that "'*Bivens* actions' for money damages against federal officers... [are] permitted... for violations of the Due Process Clause of the Fifth Amendment."). The plaintiffs in *Schweiker* were disability claimants whose Social Security benefits had been improperly terminated pursuant to a continuing disability review ("CDR") program devised by the Secretary of Health and Human Services and administered, in part, by the Social Security Administration. The plaintiffs brought a *Bivens* action against federal officials with policymaking authority over the administration of the CDR program, alleging that their actions

had resulted in the deprivation of their constitutionally protected interest in the continued receipt of disability benefits, without due process of law. *Schweiker*, 487 U.S. at 418. When presented with the question of whether to foreclose the availability of a *Bivens* remedy for procedural due process violations arising from the unconstitutional acts of federal officials in policymaking roles at administrative agencies, however, the Supreme Court chose not to do so. Instead, the Supreme Court declined to extend *Bivens* on the facts of that particular case, finding that the Social Security Act provided an adequate mechanism for redress by allowing for the reinstatement of benefits when such denial was erroneous. *Id.*

The instant case is, in many respects, factually analogous to *Schweiker*. Here, as in *Schweiker*, the Plaintiffs allege that they were unconstitutionally deprived of a constitutionally protected interest, without due process of law. And here, as in *Schweiker*, Plaintiffs have filed a *Bivens* action against individual federal executive branch officers for their policymaking role in devising and administering the federal agency scheme that resulted in that deprivation.

But the instant case also departs from the facts of *Schweiker* in one critical respect: unlike the plaintiffs in *Schweiker*, the Plaintiffs in this case have no alternative remedy for seeking redress. While the plaintiffs in *Schweiker* had access to an adequate procedural mechanism for seeking the reinstatement of their disability benefits, the Plaintiffs here have no such analogous procedural mechanism to restore their constitutionally protected interest in the subject patents. In that regard, this case is more analogous to *Davis v. Passman*, 442 U.S. at 247, where the Supreme Court decided to extend *Bivens* precisely because the plaintiff lacked any other avenue for relief. Thus, here as in *Passman*, Plaintiffs are entitled to rely on *Bivens*, because it is the only existing post-deprivation remedial scheme available to redress the violation of their constitutionally protected interests under the Due Process Clause of the Fifth Amendment.

This conclusion is consistent with the reasoning in other subsequent cases applying the principles set forth in *Davis v. Passman*, 442 U.S. 228 (1979), and *Schweiker v. Chilicky*, 487 U.S. 412, 421 (1988), to determine whether and when *Bivens* claims arising under the Due Process Clause should be allowed to proceed. *See, e.g., Haines v. Fed. Motor Carrier Safety Admin.*, 814 F.3d 417 (6th Cir. 2016); *Left Fork Min. Co., Inc. v. Hooker*, 775 F.3d 768 (6th Cir. 2014); *Rutherford v. U.S.*, 702 F.2d 580 (5th Cir. 1983); *Maglietti v. Nicholson*, 517 F. Supp. 2d 624, 632 (D. Conn. 2007).

In *Rutherford*, for example, plaintiffs brought a *Bivens* action against an individual tax agent whom they claimed had violated their rights under the Due Process Clause by willfully and maliciously assessing taxes against them which they did not owe, which left them with no choice but to institute and participate in tax refund proceedings before the IRS. Although plaintiffs were able to successfully obtain a refund of the over-assessed tax payments, the court rejected the notion that the availability of tax refund proceedings was an adequate remedy and allowed the *Bivens* action to proceed:

The administrative and judicial refund proceedings available to the Rutherfords are not designed to, and do not, protect the range of interests they fairly may be understood to assert...

The Rutherfords' complaint, viewed in a favorable light, sketches a portrait of a lawless and arbitrary vendetta fueled by the power of the state... intended to abuse by the creation of palpably unfounded claims against their property which they can set to right only by unnecessary litigation... The tax recovery proceedings available to the Rutherfords... [were] limited strictly to a determination of the validity of the Government's demand... [and] provide[d]... no 'opportunity to be heard' on their allegations that [defendant] violated their constitutional rights... Because a refund proceeding is not the process that is due, we reverse the district court's decision that available judicial and administrative proceedings [served as an adequate remedy].

Rutherford, 702 F.2d at 581, 584.

Similarly, in *Left Fork Min. Co., Inc.*, plaintiff mine operators brought a *Bivens* action alleging that federal inspectors with whom they had a history of interpersonal conflict issued a baseless “stop work” order with directives to remove electrical power from the mine, knowing that a shut-down of the electrically-powered water pumps would cause substantial flood damage to plaintiffs’ property. Based on the foregoing, the Sixth Circuit found that plaintiffs had met the threshold requirements of asserting valid *Bivens* claim under the Due Process Clause, as follows:

Left Fork has demonstrated that the challenged action here (the de-energizing of the Straight Creek mine) was attributable to individuals employed by a federal agency (the MSHA) who were acting under color of federal law (the Mine Act). Left Fork has also demonstrated that the de-energizing of the mine resulted in damage to property, ostensibly in violation of the Fifth Amendment, which protects individuals from being “deprived of life, liberty, or property without due process of law.” U.S. Const., Amend. V. Accordingly, Left Fork has met the two threshold considerations for a *Bivens* claim.

Left Fork Min. Co., Inc. v. Hooker, 775 F.3d 768, 774 (6th Cir. 2014). In *Left Fork*, however, as in *Schweiker*, 487 U.S. at 421, the case was ultimately dismissed because plaintiffs had access to other existing procedural mechanisms under the Mine Health and Safety Act which provided an adequate alternative remedial scheme for seeking redress. *See Left Fork*, 775 F.3d at 776.

And in *Haines v. Fed. Motor Carrier Safety Admin.*, the owner of a bus company brought a *Bivens* action alleging that individual officers of the U.S. Department of Transportation had arbitrarily suspended his motor carrier operations without due process of law. Here too, the Sixth Circuit found that these allegations gave rise to a cognizable cause of action under *Bivens*, but ultimately dismissed that claim based on the availability of other alternative avenues for relief:

Accepting these allegations as true... we find that [plaintiff]... sufficiently alleged that the challenged action [was attributable to persons acting under color of federal law]... and that this conduct deprived him of his constitutionally protected [property] interests in [his business operations]...

[But] [a] *Bivens* remedy is available only [where]... there are no ‘alternative, existing process[es]’ for protecting a constitutional interest...

Haines, 814 F.3d at 431.

Contrary to Defendants’ assertion that this case would require an extension of *Bivens* to a “new context,” the aforementioned cases conclusively demonstrate the availability of a *Bivens* cause of action to redress procedural due process violations carried out by individual officers of federal administrative agencies. In any event, even if this case did require the extension of *Bivens* to a “new context,” that would not end the analysis; instead, it would only warrant further consideration into whether Plaintiffs have other adequate alternative means of relief, *see Bush v. Lucas*, 462 U.S. 367, 388 (1983) (*i.e.*, “whether an elaborate remedial system that has been constructed... with careful attention to conflicting policy considerations, should be augmented by the creation of a new judicial remedy for the constitutional violation at issue.”)—and “whether there are any [other] ‘special factors that counsel hesitation’ about granting the extension” in this case. *Hernandez v. Mesa*, 140 S. Ct. 735, 743 (2020) (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017); *Carlson v. Green*, 446 U.S. 14, 18 (1980)); *see also Wilkie v. Robbins*, 551 U.S. 537, 550 (2007); *Canada v. U.S.*, 950 F.3d 299, 307 (5th Cir. 2020) (“The Supreme Court has made clear that claims for violations of Fifth Amendment rights can still be brought in a new context.”) (citing *Ziglar*, 137 S. Ct. at 1860 and *Iqbal*, 556 U.S. at 675).

iii. Plaintiffs have no other alternative means of obtaining relief.

To the extent that Defendants seek to characterize the availability of judicial review in the form of a direct appeal from the PTAB decisions in IPR proceedings to the U.S. Court of Appeals for the Federal Circuit as an “adequate alternative remedy,” MTD at 24, that argument is clearly made in bad faith—or at the very least ignores the well-pleaded allegations in the complaint—and should not be countenanced for that reason. As alleged in the complaint, Plaintiffs did, in fact,

appeal the IPR decisions to the U.S. Court of Appeals for the Federal Circuit, *see* Compl. ¶ 37, but had no reason to question the constitutional integrity of those proceedings at the time. And it was not until years later, well after the appeal had already been brought and decided by the Federal Circuit, that Plaintiffs started learning about the various inner machinations and improprieties that undermined the constitutional validity of those proceedings. Compl. ¶¶ 39–72. Accordingly, since the factual basis for Plaintiffs’ due process claims was not known at the time, Plaintiffs were deprived of any opportunity to raise these issues and their constitutional implications in their appeal to the Federal Circuit. Compl. ¶ 85.

To the extent that Defendants point to the availability of injunctive relief and Federal Tort Claims Act (“FTCA”) damages as other forms of alternative relief, these arguments are also made in bad faith, as Defendants are well-aware that neither of those avenues would offer meaningful or adequate post-deprivation relief on the facts of this case. To the extent that Defendants suggest that an FTCA claim might be viable in this context, however, Plaintiffs would readily amend the complaint to include such a claim.

Plaintiffs are well-aware of the jurisprudential hurdles that restrict the availability of relief under *Bivens* and its progeny when other alternative remedies exist. If there were, in fact, any other adequate alternative means of relief available to them, then Plaintiffs would, of course, have readily availed themselves of those remedies before bringing this action. *See Escobar v. Gaines*, 2014 WL 4384389, at *4 (M.D. Tenn. Sept. 4, 2014) (“[I]f a *Bivens* remedy were precluded, Plaintiffs would have no forum in which to seek a remedy for the Federal Defendants’ alleged Fourth and Fifth Amendment violations.”).

iv. Defendants have failed to identify any other “special factors” counseling hesitation or weighing against authorizing a *Bivens* remedy on these facts.

“[H]aving determined that [no other]... alternative process” or remedial scheme exists to redress the unconstitutional deprivation of Plaintiffs’ constitutionally protected interest in the subject patents, “the final question is whether any ‘special factors counsel[] hesitation’ against allowing a *Bivens* suit to proceed” here. *Koprowski v. Baker*, 822 F.3d 248, 257 (6th Cir. 2016) (citing *Wilkie*, 551 U.S. at 550).

In *Koprowski*, the now-Chief Judge of the U.S. Court of Appeals for the Sixth Circuit explained that the “special factors” analysis “exist[s] to help ... court[s] ‘make the kind of remedial determination that is appropriate for a common law tribunal.... That is, the court must ‘weigh reasons for and against’ allowing a *Bivens* action [to proceed] in this context.” *Koprowski*, 822 F.3d at 257 (Sutton, J.) (quoting *Bush v. Lucas*, 462 U.S. at 378, and *Wilkie*, 551 U.S. at 554).

Defendants’ principal argument with respect to the existence of “special factors counselling hesitation” is that allowing Plaintiffs’ claims to proceed would “intrude into government policy-making” functions. *See* MTD at 21–22 (citing *Ziglar*, 137 S. Ct. at 1860). But they cannot point to a single case in which a so-called “intrusion” on the policymaking decisions of individual officers has been deemed improper, where those policies so clearly violate the most basic requirements of the Due Process Clause. If anything, the facts of this case provide a compelling justification for this Court to “intrude” upon the circumstances surrounding the individual Defendants’ decision-making processes, and to hold them accountable for their unconstitutional acts. *See Koprowski*, 822 F.3d at 255 (observing that “[t]he purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.”) (citing *Malesko*, 534 U.S. at 70).

Defendants further contend that this case would impose “unacceptably burdensome inquiries into sensitive government deliberations about those policies and [their] motives for

creating them.” MTD at 22. But Defendants again fail to provide any authority to support that contention, aside from another passing conclusory reference to *Ziglar*, 137 S. Ct. at 1860—which arose from a constitutional challenge to the conditions of confinement of suspects being held in connection with the September 11, 2001 terrorist attacks on the United States. By comparison, the instant case hardly implicates any such “sensitive” or classified “government deliberations” relating to issues of national security.

Finally, Defendants point to “Congress’s silence on a damages remedy” despite “its intense interest in patent rights and regulation,” as a another proffered “special factor” weighing against the extension of *Bivens* in this context. MTD at 22. But the reality is that Congress has *not* been silent on the availability of damages arising from the unlawful encroachment upon the property rights of patent owners. To the contrary, Congress created a private right of action for patent infringement that specifically authorizes suits for damages, *see* 35 U.S.C. § 281, *et seq.*, which Plaintiffs already sought to rely upon in bringing several patent infringement actions before this very court. Compl. ¶¶ 28–30. Indeed, and as alleged in the complaint, the filing of those previous patent infringement actions is what prompted Google and others to institute the very IPR proceedings in which Plaintiffs’ procedural due process rights were violated.

Simply put, Defendants have failed to identify any “special factors” that persuasively weigh against allowing the instant *Bivens* action to proceed.

B. Defendants are not immune from suit.

Defendants forge an even more extreme path by arguing that they are immune from suit for their unconstitutional acts. This cannot be so.

i. The APJ Defendants are not entitled to absolute judicial immunity.

As an initial matter, Defendants Deshpande, Medley, and Pettigrew are not categorically immune from suit by reason of their position as APJs. While it is true that “[t]he shield of absolute

immunity has been extended to some officials who ‘perform functions closely associated with the judicial process’...

[T]he Supreme Court has also been ‘quite sparing in its recognition of absolute immunity,’ and has declined to extend it any further than its justification would warrant.’ As such, ***officials seeking ‘absolute exemption from personal liability for unconstitutional conduct must bear the burden of showing that public policy requires an exemption of that scope.’***

Boler v. Earley, 865 F.3d 391, 415–16 (6th Cir. 2017) (emphasis added) (citations omitted) (quoting *Butz v. Economou*, 438 U.S. 478, 506 (1978); *Cleavinger v. Saxner*, 474 U.S. 193, 200–01 (1985); *Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm’n*, 597 Fed. App’x 342, 348 (6th Cir. 2015); and *Burns v. Reed*, 500 U.S. 478, 487 (1991)).

The conclusory assertion that the APJ Defendants are categorically immune from suit fails to satisfy this burden. *Id.*

In determining whether executive branch officials should be granted absolute immunity from suit for due process violations in actions arising from their role as adjudicators, courts must consider “whether [the]... procedures governing [the adjudication that led to the alleged deprivation]... share enough of the ‘characteristics of the judicial process,’ and whether the officials themselves were functioning in a manner sufficiently analogous to a judge.” *DiBlasio v. Novello*, 344 F.3d 292, 298 (2d Cir. 2003) (quoting *Butz*, 438 U.S. at 513). And “[i]n evaluating the process itself, ... [courts] assess [those] factors outlined in *Butz*, that are ‘characteristic of the judicial process,’” including, *inter alia*, “the presence of safeguards that reduce the need for private damages actions as a means of controlling unconstitutional conduct”; the adjudicatory officer’s “insulation from political influence”; and “the correctability of error on appeal.” *DiBlasio*, 344 F.3d at 298 (quoting *Cleavinger*, 474 U.S. at 202); *see also Boler*, 865 F.3d at 416; *Flying Dog*, 597 Fed. App’x at 348–49.

Here, the complaint clearly alleges that the IPR proceedings over which Defendants presided were rife with constitutional defects and failed to adequately protect Plaintiffs from the erroneous deprivation of their property rights without due process of law. There were no procedural “safeguards” in place, and certainly no “insulation from political influence,” to ensure that these proceedings would comport with the minimum requirements of due process; nor were these decisions correctab[e]... on appeal,” since Plaintiffs did not know any of the facts that led them to bring this *Bivens* action until several years later. *See DiBlasio*, 344 F.3d at 298; *Boler*, 865 F.3d at 416; *Flying Dog*, 597 Fed. App’x at 348–49; *see also Goldstein v. Moatz*, 364 F.3d 205, 217 (4th Cir. 2004) (finding that USPTO officers involved in disciplinary hearing against patent attorney were not entitled to judicial immunity because the proceeding did not comport with the minimum requirements of procedural due process).

Moreover, the doctrine of judicial immunity cannot be applied where, as here, the challenged actions, though adjudicatory in nature, may have been undertaken without appropriate jurisdiction. *DePiero v. City of Macedonia*, 180 F.3d 770, 784 (6th Cir. 1999) (“a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction.”) (citing *Mireles v. Waco*, 502 U.S. 9, 11–12 (1991) and *Barnes v. Winchell*, 105 F.3d 1111, 1116 (6th Cir. 1997)); *accord Dixon v. Clem*, 492 F.3d 665, 674 (6th Cir. 2007). As is relevant here, the Supreme Court’s recent decision in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021), directed the USPTO to cure constitutional defects in the PTAB’s structure and operations that ran afoul of restrictions on APJs’ authority to function as principal officers within the meaning of the Appointments Clause. And as alleged in the complaint, the USPTO has undertaken various remedial measures in light of *Arthrex*. Compl. ¶¶ 79–83. Although *Arthrex* does not necessarily require a retroactive inquiry into the constitutional validity of all IPR decisions that preceded the

Supreme Court’s intervention, the decision certainly casts sufficient doubt upon the scope of the APJ Defendants’ jurisdiction in the Plaintiffs’ IPR proceedings to preclude the application of absolute immunity for their unconstitutional acts in the instant case.

ii. Defendants are not entitled to dismissal based on their qualified immunity defense at the motion to dismiss stage.

Defendants also argue that the doctrine of qualified immunity shields them from liability for their unconstitutional acts. But their qualified immunity defense is premised upon disputed factual issues that necessarily preclude the dismissal of this action at the motion to dismiss stage.

The doctrine of qualified immunity only functions as a shield against liability insofar as the conduct of government officials “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 897 (6th Cir. 2019) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see also Saucier v. Katz*, 533 U.S. 194, 202 (2001) (the essential question is “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”), *modified on other grounds, Pearson v. Callahan*, 555 U.S. 223 (2009).

Furthermore, where, as here, the complaint raises material issues of fact as to whether the officers’ actions violated Plaintiffs’ clearly established rights, those issues cannot be resolved in Defendants’ favor on a motion to dismiss. *See generally Jacobs v. Alam*, 915 F.3d 1028, 1043 (6th Cir. 2019); *see also Courtright v. City of Battle Creek*, 839 F.3d 513, 518 (6th Cir. 2016) (“[I]t is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity.”); *Wesley v. Campbell*, 779 F.3d 421, 434 (6th Cir. 2015) (“the fact-intensive nature of the applicable tests make it difficult for a defendant to claim qualified immunity on the pleadings *before discovery*.”) (quoting *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Village Sch. Dist.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring)); *see also Osberry v.*

Slusher, 750 F. App'x 385, 391 (6th Cir. 2018) (explaining that qualified immunity arguments are more appropriate for consideration at the summary judgment stage, after discovery has taken place).

As alleged in the complaint, it is well-established that patent rights are “property” within the meaning of the Fifth Amendment, and that any adjudicative forum that passes upon the validity of an existing patent must therefore comport with the minimum procedural requirements of the Due Process Clause. Compl. ¶ 88; *see also, e.g., Oil States Energy Servs.*, 138 S. Ct. at 1379 (“[O]ur decision [upholding the constitutionality of *inter partes* review under Article III] should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause.”) (citing *Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. at 642; *James*, 104 U.S. at 358); *see also Consol. Fruit-Jar Co.*, 94 U.S. at 96 (“A patent for an invention is as much property as a patent for land.”); *Cammeyer*, 94 U.S. at 226 (“the right of the [patent] holder is as much entitled to protection as any other property.”); *Brown*, 60 U.S. at 197 (“For, by the laws of the United States, the rights of a party under a patent are his private property.”).

It is equally well-established that the Due Process Clause encompasses, among other things, the right to a fair adjudication before an impartial decisionmaker, *see* Compl. ¶ 89 (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927); *In re Murchison*, 349 U.S. 133, 136 (1955); *Ward v. Monroeville*, 409 U.S. 57, 61–62 (1972); *Gibson v. Berryhill*, 411 U.S. 564 (1973); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 824 (1986); *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for Southern Cal.*, 508 U.S. 602, 617 (1993); *Weiss v. United States*, 510 U.S. 163,

178 (1994); *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004); *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009))—and the right to know the identity of the ultimate decision-makers in any adjudicative system that issues a final determination concerning a litigant’s constitutionally protected property interests, Compl. ¶ 90 (citing *In re Oliver*, 333 U.S. 257, 268 (1948); *Levine v. U.S.*, 362 U.S. 610, 616 (1960); *Estes v. State of Tex.*, 381 U.S. 532, 539 (1965); *Sheppard v. Maxwell*, 384 U.S. 333, 349 (1966); *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 380–81 (1979); *U.S. v. Ochoa-Vasquez*, 428 F.3d 1015, 1029–30 (11th Cir. 2005); *U.S. v. Index Newspapers LLC*, 766 F.3d 1072, 1084 (9th Cir. 2014)).

Defendants’ qualified immunity defense requires an inquiry into disputed facts that cannot be resolved at the motion to dismiss stage. For example, the apparent factual controversy as to whether Defendant Lee personally intervened in the IPR proceedings for the benefit of Google is one such issue that precludes dismissal on the basis of qualified immunity. Similarly, the factual controversy over whether the APJ Defendants did in fact receive bonus payments, and whether those payments were, in fact, associated with the substance of their decisions in Plaintiffs’ IPR proceedings, is another factual dispute that precludes the availability of a qualified immunity defense at this stage. The complaint also alleges that Defendants Lee, Smith, and Moore purposefully selected Defendants Deshpande, Medley, and Pettigrew to preside over these proceedings, based on their perceived propensity towards cancelling patent claims, as compared to other APJs serving on the PTAB. And this is just a small sampling of the myriad factual disputes that preclude dismissal based on Defendants’ proffered qualified immunity defense.

Accordingly, Plaintiffs respectfully submit that any ruling on issues related to Defendants’ proffered qualified immunity defense would be premature at this juncture.

iii. Defendants' qualified immunity defense also fails on the merits.

Defendants' qualified immunity defense should also be denied because it fails on the merits. Here too, the central inquiry is whether Plaintiffs have plausibly alleged that Defendants' conduct violated their "clearly established rights" under the Due Process Clause of the Fifth Amendment. And as explained above, the allegations in the complaint are premised upon legal precedents concerning the "contours" of applicable due process jurisprudence that were already "clearly established" at the time of Plaintiffs' IPR proceedings, *supra*. See *Baynes v. Cleland*, 799 F.3d 600, 610 (6th Cir. 2015) ("A right is 'clearly established' if '[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.'") (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

While "clearly established law" should not be defined "at a high level of generality" *Godawa v. Byrd*, 798 F.3d 457, 467 (6th Cir. 2015) (quoting *Plumhoff v. Rickard*, 572 U.S. 765, 779 (2014)), this limiting principle does not imply—as Defendants appear to suggest—that there must already be an earlier decision in Plaintiffs' favor that is a nearly exact facsimile of the case at bar. See, e.g., MTD at 44. The qualified immunity doctrine is not such an exercise in parsimonious literalness. Rather, "an official can be on notice that his conduct violates established law even in novel factual situations." *Littlejohn v. Myers*, 684 F. App'x 563, 569 (6th Cir. 2017). "There does not need to be 'a case directly on point, but existing precedent must have placed the... constitutional question beyond debate.'" *Morgan v. Fairfield Cty., Ohio*, 903 F.3d 553, 564 (6th Cir. 2018) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

Here, because the "procedural-due-process right to an impartial adjudicator ... [is] clearly established[.]" it should have been "apparent" to Defendants based on prior precedent, that their conduct violated that clearly established right. *Doe v. Miami Univ.*, 882 F.3d 579, 605 (6th Cir. 2018).

With respect to the incentive-based, outcome-driven compensation structure for APJs, for example, it has long been recognized that the Due Process Clause prohibits “any officer, judicial or quasi-judicial” from presiding over any proceeding in which he or she has even “the slightest pecuniary interest.” *Tumey*, 273 U.S. at 524; *see also, e.g., Schweiker*, 456 U.S. at 195; *Gibson*, 411 U.S. at 579 (“the law concerning disqualification because of interest applies with equal force to ... administrative adjudicators.”); *In re Murchison*, 349 U.S. at 136 (“no man is permitted to try cases where he has an interest in the outcome.”).

And courts have also repeatedly held that an adjudicator’s impartiality is not only implicated when the judge “stands to benefit directly and financially from the outcome[,]” but also “when the outcome stands to provide a substantial financial benefit to the [government].” *Bailey v. City of Broadview Heights*, 674 F.3d 499, 503 (2012) (citing *Ward v. Vill. of Monroeville, Ohio*, 409 U.S. 57, 59 (1972)); *see also DePiero v. City of Macedonia*, 180 F.3d 770, 782 (6th Cir. 1999) (holding mayor violated plaintiff’s due process rights by “tr[ying] his contested traffic and criminal contempt charges” in part because he “retained ultimate responsibility for ... preparation of the city’s budget, and appointed the officer who issued the plaintiff’s parking ticket”); *Rose v. Village of Peninsula*, 875 F. Supp. 442, 452 (N.D. Ohio 1995) (“The amount of [] court fee revenues is just one measure of whether the mayor may reasonably be questioned as being impartial. The more substantial the amount ... of revenue produced ... the more reasonable it is to question the impartiality of a mayor who has any executive authority.”); *see also McNeil v. Comm. Probation Servs., LLC*, 2021 WL 366776, at *18 (M.D. Tenn. Feb. 3, 2021) (denying qualified immunity to private probation services company in suit alleging that improper financial incentives prevented probation officers from acting as neutral public court officers).

This case represents “one of the rare situations where the unconstitutionality [of Defendants’ actions]... [is] plainly obvious.” *United Pet Supply, Inc. v. City of Chattanooga, Tenn.*, 768 F.3d 464, 488 (6th Cir. 2014). Indeed, the complaint sets forth credible allegations from which a reasonable inference can be drawn that Defendants were well-aware that the circumstances surrounding Plaintiffs’ IPR proceedings were inconsistent with the most basic requirements of procedural due process; and that they were at the very least, indifferent, to the unconstitutional deprivation of Plaintiffs’ property rights in the subject patents. For these reasons, Defendants’ proffered qualified immunity defense also fails on the merits.

C. Defendants’ other affirmative defenses also fail.

The well-pleaded allegations in the complaint also easily overcome the remainder of Defendants’ proffered affirmative defenses with respect to standing, personal jurisdiction, and the applicable limitations period.

i. Plaintiff Hoyle has standing to sue as the beneficial owner of B.E. Tech and as someone who was independently injured by defendants’ unconstitutional acts.

As an initial matter, Defendants’ contention that Plaintiff Hoyle lacks standing is inconsequential, because it would not lead to the dismissal of this suit in any event.

Second, this argument also fails on the merits because it fundamentally misconstrues the pre-requisites for Article III standing, which only require plaintiffs to allege: “(1) an injury in fact ...; (2) causation ...; and (3) redressability.” *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 273 (2008); *see also Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 167 (2014).

Plaintiff Hoyle has quite obviously done so here, irrespective of the fact that the patents on his inventions have been assigned to Plaintiff B.E. Technology. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 260–61 (1977) (“The essence of the standing question, in its constitutional dimension, is whether the plaintiff has alleged such a personal stake

in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf.”) (cleaned up). And his allegations must be taken as true. *See Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988) (“[W]hen standing is challenged on the basis of the pleadings, we ‘accept as true all material allegations of the complaint, and... construe the complaint in favor of the complaining party.’”) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

To the extent that Defendants seek to raise a factual dispute concerning the scope of Plaintiff Hoyle’s interest in the patents as the founder and principal shareholder of B.E. Technology, that issue will be squarely addressed in discovery and need not be addressed at the motion to dismiss stage.

ii. This Court does not lack personal jurisdiction over Defendants.

Defendants’ assertion that this Court lacks personal jurisdiction over them is equally flawed. Defendants contend that personal jurisdiction is lacking because “the complaint does not allege that [they] performed any of their challenged actions in Tennessee.” *See* MTD at 15. But it is well-established that personal jurisdiction can be premised upon conduct that occurs outside the forum state, when it is either directed towards or results in an injury within that jurisdiction: “‘if a tortious act is committed outside the state and the resulting injury is sustained within the state, the tortious act and the injury are inseparable, and jurisdiction lies in Tennessee.’” *Neal v. Janssen*, 270 F.3d 328, 331 (6th Cir. 2001) (quoting Tenn. Code Ann. § 20–2–214(a)); *accord Harris v. Lloyds TSB Bank, PLC*, 281 F. App’x 489, 492 n.3 (6th Cir. 2008); *Rice v. Karsch*, 154 F. App’x 454, 459 (6th Cir. 2005).

As alleged in the complaint, Plaintiff B.E. Technology was incorporated in Memphis, Tennessee and continually conducted its business in this jurisdiction, at all times relevant to the

central factual allegations in the complaint. *See* Compl. ¶¶ 5, 20. And Plaintiffs brought patent infringement actions in this jurisdiction, and indeed, in this very Court. Compl. ¶ 29.

But Defendants—by and through the unconstitutional deprivation of Plaintiffs’ procedural due process rights—knowingly and purposefully directed their conduct towards this jurisdiction by instituting the IPR proceedings to interfere with Plaintiffs’ attempts to enforce their patent rights in Tennessee. The IPR proceedings cancelled these patents and the “resulting injury [was] [also] sustained within th[is] state.” *Neal*, 270 F.3d at 332 (“even a single act by defendant directed toward Tennessee that gives rise to a cause of action can support a finding of minimum contacts sufficient to exercise personal jurisdiction.”); *see also Argueta v. U.S. Immigr. & Customs Enf’t*, 2009 WL 1307236, at *21 (D.N.J. May 7, 2009) (finding that personal jurisdiction was established in *Bivens* action arising from the conduct of senior government officials who “facilitated the creation of a culture of lawlessness and lack of accountability within an agency they supervise” that harmed plaintiff in the forum state).

Since Defendants’ intentional conduct directed towards Tennessee caused harm here, jurisdiction is presumptively reasonable. *See, e.g., Gus’s Franchisor, LLC v. Terrapin Rest. Partners, LLC*, 2020 WL 6878358, at *2 (W.D. Tenn. Nov. 23, 2020) (McCalla, J.). Moreover, government counsel for Defendants was authorized to accept service in this jurisdiction and did so without any reservation of rights to challenge personal jurisdiction. (ECF No. 17.) Defendants have not proffered any compelling reasons to suggest that this Court’s exercise of jurisdiction is otherwise unreasonable. *See* MTD at 15–16. Accordingly, the exercise of personal jurisdiction is well within this Court’s authority.

iii. Plaintiffs’ claims are not time barred.

Finally, Defendants’ argument that the complaint should be dismissed on statute of limitations grounds also fails.

In a *Bivens* action, the applicable statute of limitations is governed by state law, but “federal law governs when a *Bivens* claim accrues.” *Gray v. U.S.*, 2021 WL 3727234, at *13 & n.14 (W.D. Tenn. Aug. 23, 2021). In Tennessee, the statute of limitations for injuries to personal property is three years, *see* Tenn. Code Ann. § 28-3-105(1), and the statute of limitations for civil rights violations is one year from when the cause of action accrued, *see* Tenn. Code Ann. § 28-3-104(a)(1)(B).

The limitations period on a *Bivens* action only begins to run when the plaintiff discovers the bases for the injury that forms the claims therein. *See D’Ambrosio v. Marino*, 747 F.3d 378, 384 (6th Cir. 2014) (“The ‘standard rule’ is that a cause of action accrues ‘when the plaintiff has a complete and present cause of action, that is, when the plaintiff can file suit and obtain relief.’”) (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)); *Ruff v. Runyon*, 258 F.3d 498 (6th Cir. 2001) (“[P]laintiffs’ [*Bivens*] claims did not accrue until the charges against plaintiffs were finally dismissed because prior to that point in time, plaintiffs did not ‘know’ of their injury for purposes of the statute of limitations”); *Kronisch v. United States*, 150 F.3d 112, 123 (2d Cir. 1998) (“Under federal law, the limitations period governing plaintiff’s *Bivens* claims ... will be equitably tolled so long as defendants’ concealment of their wrongdoing prevented plaintiff from becoming aware of, or discovering through the exercise of reasonable diligence, his cause of action.”); *see also Doe v. Rausch*, 382 F. Supp. 3d 783, 791 (E.D. Tenn. 2019) (“Under federal law, the limitations period [for a 1983 claim] begins to run when a plaintiff knew or should have known of the injury that forms the basis of the claim.”) (quoting *Fox v. DeSoto*, 489 F.3d 227, 233 (6th Cir. 2007)); *Donahue v. United States*, 634 F.3d 615, 623 (1st Cir. 2011) (“Accrual [of FTCA claim] starts when a plaintiff knows or reasonably should have known the factual basis for his claim; that is, the existence of his injury and its cause.”); *cf. Zundel v. Holder*, 687 F.3d

271, 282 (6th Cir. 2012) (the alleged misconduct, earlier known, was already enough to support a *Bivens* claim without the later-discovered facts). Accordingly, Defendants’ argument that Plaintiffs’ “claims accrued at the conclusion of the IPR trials in April 2015,” MTD at 16, is plainly mistaken.

The complaint in this action includes a detailed timeline of how and when Plaintiffs learned of the misconduct and bad acts that form the factual basis for due process violations alleged therein. Based on that timeline, Plaintiffs’ claims only began to accrue following the publication of the “Katznelson Report,” in or around July 5, 2021. Compl. ¶¶ 69-72, 85. Irrespective of whether the longer three-year statute of limitations for injuries to personal property or the one-year statute of limitations for civil rights violations applies here, Plaintiffs’ complaint, which was filed on August 9, 2021, falls well within the applicable limitations period.

To the extent that Defendants contest this timeline by insinuating that Plaintiffs either could or should have discovered the factual basis giving rise to this *Bivens* cause of action at any earlier point in time, these arguments are premised on yet another proffered factual controversy that Defendants can explore in the course of discovery. Like all the other factual disputes raised by Defendants, issues relating to what Plaintiffs knew and when, or whether those circumstances tolled the running of any proscriptive limitations period, cannot be resolved in their favor at the motion to dismiss stage. Furthermore, Defendants should not be rewarded for their role in keeping the critical facts alleged in the complaint under wraps for so many years, which were only initially revealed in response to a series of FOIA request on the USPTO. Compl. ¶ 44.

IV. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' motion to dismiss outright— or in the alternative, if any of allegations in the complaint are deemed to be insufficient, then grant leave for Plaintiffs to amend as necessary.

Dated: January 21, 2022
New York, NY

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served electronically via the Court's CM/ECF electronic filing and notification system on all counsel of record, on this 21st day of January, 2022.

Dated: January 21, 2022
New York, NY

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