

**HUTCHISON & STEFFEN**

A PROFESSIONAL LLC  
PECCOLE PROFESSIONAL PARK  
10080 WEST ALTA DRIVE, SUITE 200  
LAS VEGAS, NV 89145

1 MARK A. HUTCHISON (4639)  
2 ROBERT T. STEWART (13770)  
3 HUTCHISON & STEFFEN, LLC  
4 10080 W. Alta Drive, Suite 200  
5 Las Vegas, NV 89145  
6 (702) 385-2500  
7 Fax: (702) 385-2086  
8 mhutchison@hutchlegal.com  
9 rstewart@hutchlegal.com

7 ANDREW M. GROSSMAN (*pro hac vice application* forthcoming)  
8 MARK W. DELAQUIL (*pro hac vice application* forthcoming)  
9 BAKER & HOSTETLER LLP  
10 1050 Connecticut Avenue, N.W., Suite 1100  
11 Washington, D.C. 20036  
12 (202) 861-1697  
13 Fax: (202) 861-1783  
14 agrossman@bakerlaw.com

*Attorneys for Plaintiffs Gilbert P. Hyatt and  
American Association for Equitable Treatment*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEVADA**

**GILBERT P. HYATT and  
AMERICAN ASSOCIATION FOR  
EQUITABLE TREATMENT, INC.,**

**Plaintiffs,**

**v.**

**UNITED STATES PATENT AND  
TRADEMARK OFFICE and  
MICHELLE K. LEE, in her  
official capacity as Under Secretary  
of Commerce for Intellectual Property  
and Director of the United States  
Patent and Trademark Office,**

**Defendants.**

Civil Case No. \_\_\_\_\_

**Complaint for Declaratory  
and Injunctive Relief**

1 Plaintiffs Gilbert P. Hyatt and American Association for Equitable Treatment, Inc.  
2 (“AAET”), by and through the undersigned counsel, allege for their complaint against the  
3 United States Patent and Trademark Office (“PTO”) and Director Michelle K. Lee, in her  
4 official capacity, as follows:

5 **Jurisdiction and Venue**

6 1. This is an action seeking relief under the Administrative Procedure Act  
7 (“APA”), 5 U.S.C. §§ 701 – 706. The Court has subject matter jurisdiction over this action  
8 under 28 U.S.C. § 1331 (federal question jurisdiction) and 28 U.S.C. § 1338(a) (jurisdiction  
9 for “any civil action arising under any Act of Congress relating to patents”), because it arises  
10 under the laws of the United States, specifically under an Act of Congress relating to patents.

11 2. This Court has authority to grant Plaintiff’s requested relief pursuant to 28  
12 U.S.C. §§ 2201–2202 and 5 U.S.C. §§ 701–706.

13 3. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1391(e)(1)(C)  
14 because Plaintiff Hyatt resides in Nevada and Plaintiff AAET’s principal place of business is  
15 in Nevada.

16 **Nature of the Action**

17 4. Gilbert P. Hyatt, an inventor and holder of more than 70 issued patents and of  
18 nearly 400 pending patent applications, and AAET, a nonprofit organization founded to  
19 promote the fair, efficient, and effective administration of laws related to technology,  
20 innovation and intellectual property, bring this action under the Administrative Procedure  
21 Act. It challenges the legality of a final action of the PTO, *Manual of Patent Examining*  
22 *Procedure* (“MPEP”) § 1207.04, that enables the PTO to shield patent application rejections  
23 from appellate review by administrative law judges of the PTO’s Patent Trial and Appeal  
24 Board (“Appeal Board”) and, ultimately, Article III courts. Specifically, MPEP § 1207.04  
25 permits the examiner to “reopen prosecution” after an applicant files an appeal. Reopening  
26 the prosecution blocks the appeal, preventing jurisdiction from vesting in the Appeal Board  
27 and returning the case to the examiner. To exercise this extraordinary power under the  
28 MPEP, the PTO does not need the consent of the applicant or an administrative law judge.

1 And there is no limit to the number of times the PTO may use the procedure to frustrate  
2 review.

3 5. The PTO, through its examiners, can and does manipulate this procedure to  
4 cause years-long delays in the review of patent applications. For example, the PTO has  
5 wielded this provision to defeat appeals of approximately 80 denials of patent applications  
6 filed by inventor Mr. Hyatt.

7 6. Pursuant to the APA and his right to petition under the First Amendment, Mr.  
8 Hyatt petitioned the PTO to repeal MPEP § 1207.04 or declare it unenforceable. Att. A. The  
9 petition argued that MPEP § 1207.04: (1) was unlawfully adopted because the United States  
10 Patent Act, 35 U.S.C. § 2(b)(2)(B) requires that the PTO adopt procedural rules through  
11 notice-and-comment rulemaking; (2) unlawfully conflicts with the requirement of 35 U.S.C.  
12 § 6(b)(1) that the Patent Trial and Appeal Board “shall on written appeal of a[ patent]  
13 applicant, review adverse decisions of examiners upon applications for patents”; and  
14 (3) unlawfully conflicts with the duly promulgated Examiner’s Answer Rule, 37 C.F.R.  
15 § 41.39, which does not permit an examiner to reopen prosecution after an applicant files an  
16 appeal.

17 7. The Chief Administrative Patent Judge (“APJ”) of the Appeal Board denied  
18 Mr. Hyatt’s petition. Att. B. The PTO also denied Mr. Hyatt’s subsequent petition to the  
19 Acting Director seeking review of the Chief APJ’s denial and repeal or invalidation of MPEP  
20 § 1207.04. Att. D.

21 8. Mr. Hyatt and AAET now ask this Court to find MPEP § 1207.04, as well as  
22 the PTO’s denial of Mr. Hyatt’s petition, arbitrary and capricious and contrary to law within  
23 the meaning of the APA.

24 **Parties**

25 9. Plaintiff Gilbert P. Hyatt is an engineer, scientist, and inventor who has more  
26 than 70 issued patents. Mr. Hyatt is currently awaiting approval on another nearly 400 patent  
27 applications, many of which have been pending for decades and many of which have been  
28

1 subject to delays based on the MPEP provision challenged in this action. He resides in Clark  
2 County, Nevada.

3 10. American Association for Equitable Treatment, Inc., is a non-profit  
4 corporation that operates as a social-welfare organization pursuant to Section 501(c)(4) of the  
5 Internal Revenue Code. AAET was founded in 2016 to promote and advocate for the fair,  
6 efficient, and effective administration of laws related to technology, innovation, and  
7 intellectual property, including the Patent Act and related statutes. Mr. Hyatt is a member of  
8 AAET, as well as a member of AAET’s Board of Directors. AAET’s principal office is  
9 located in Clark County, Nevada.

10 11. Defendant PTO is the federal agency responsible for examining patent  
11 applications and for granting U.S. patents. The PTO’s headquarters is located in Alexandria,  
12 Virginia. The PTO is an “agency” under the APA. 5 U.S.C. § 551(1).

13 12. Defendant Michelle K. Lee is the Under Secretary of Commerce for  
14 Intellectual Property and Director of the United States Patent and Trademark Office. In  
15 performing those duties, Director Lee has overall responsibility for the administration and  
16 operation of the PTO, including the patent examination and appeals processes. She is sued in  
17 her official capacity only.

18 **Facts**

19 13. AAET member Gilbert P. Hyatt has experienced first-hand the PTO’s use and  
20 abuse of the *Manual of Patent Examining Procedure* (“MPEP”) § 1207.04 to evade review  
21 by the Appeal Board and Article III courts of actions that effectively reject patent  
22 applications.

23 14. Mr. Hyatt is an accomplished inventor, with more than 70 issued patents to his  
24 credit. Some of his patents and applications cover microcomputer structure, computer  
25 memory architecture, illumination devices, display devices, graphics systems, image  
26 processing, and sound and speech processing.

27 15. Mr. Hyatt currently has nearly 400 patent applications pending before the  
28 PTO.

1           16.     Most of Mr. Hyatt’s applications have been pending for over 20 years, with  
2 more than a dozen applications for over 35 years, of which three applications have been  
3 pending for over 40 years.

4           17.     With respect to approximately 80 of his applications, Mr. Hyatt has timely  
5 appealed final rejections to the Appeal Board, but those appeals were defeated when, instead  
6 of filing examiner answers, examiners instead acted to reopen prosecution pursuant to MPEP  
7 § 1207.04. In most instances, this occurred five or more years after the appeals were filed.

8           18.     On July 16, 2014, Mr. Hyatt filed a “Petition for Rulemaking Pursuant to 5  
9 U.S.C. § 553(e) or for Other Relief Pursuant to 37 C.F.R. § 1.182 to Repeal Parts of MPEP  
10 §§ 1204 and 1207” (“Petition”), Att. A.

11           19.     Mr. Hyatt’s petition demanded that the PTO either promulgate a rule repealing  
12 MPEP § 1207.04, “Reopening of Prosecution After Appeal,” or declare that the provision is  
13 unenforceable. Petition at 1. Mr. Hyatt also sought conforming changes to MPEP §§ 1204,  
14 1207, 1211. As grounds, Mr. Hyatt argued: (1) that MPEP § 1207.04 is a procedural rule that  
15 was not adopted “in accordance with section 553 of title 5”—that is, through notice-and-  
16 comment rulemaking—as 35 U.S.C. § 2(b)(2)(B) requires; (2) that MPEP § 1207.04 conflicts  
17 with the requirement of 35 U.S.C. § 6(b)(1) that the Patent Trial and Appeal Board “shall on  
18 written appeal of a [patent] applicant, review adverse decisions of examiners upon  
19 applications for patents”; and (3) that MPEP § 1207.04 conflicts with the Examiner’s Answer  
20 Rule, 37 C.F.R. § 41.39, which does not permit an examiner to reopen prosecution after  
21 appeal but only to “furnish a written answer” in response to an applicant’s brief.

22           20.     In a five-page decision received on September 9, 2014, the Chief APJ denied  
23 Mr. Hyatt’s petition, finding that MPEP § 1207.04 is “not inconsistent” with governing  
24 statutory and regulatory authority and that the PTO procedural rules need not be adopted  
25 through notice-and-comment rulemaking. Att. B at 2–3.

26           21.     On September 22, 2014, Mr. Hyatt petitioned the Acting Director of the PTO  
27 to review the petition denial by the Chief APJ and to undertake a rulemaking pursuant to 5  
28

1 U.S.C. § 553(e) to repeal MPEP § 1207.04 or to declare it invalid or unenforceable. Att. C  
2 (“Director Petition”).

3 22. On December 7, 2015, PTO Deputy Director Russell Slifer, acting on behalf  
4 of the Director, denied the Director Petition, finding that MPEP § 1207.04 does not conflict  
5 with governing statutory or regulatory authority and that PTO procedural rules need not be  
6 adopted through notice-and-comment rulemaking. Att. D. The denial concludes by stating:  
7 “No additional filings from Mr. Hyatt on this matter will be entertained.” *Id.* at 26.

8 23. The PTO’s denial of the Director Petition is final agency action subject to  
9 judicial review. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007).

10 **Statutory Framework for Patent Examination, Appeal, and Issuance**

11 24. The United States Patent Act has its origin in Article I, Section 8, of the  
12 Constitution of the United States, which grants Congress the power “[t]o promote the  
13 Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors  
14 the exclusive Right to their respective Writings and Discoveries.” The Framers of the  
15 Constitution included this provision “to motivate the creative activity of authors and  
16 inventors by the provision of a special reward, and to allow the public access to the products  
17 of their genius after the limited period of exclusive control has expired.” *Sony Corp. of Am. v.*  
18 *Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984).

19 25. Pursuant to this constitutional authority, Congress adopted the United States  
20 Patent Act, 35 U.S.C. §§ 1–376.

21 26. The Patent Act establishes the United States Patent and Trademark Office  
22 (“PTO”), 35 U.S.C. § 1, which is responsible for, among other things, “the granting and  
23 issuing of patents” and “disseminating to the public information with respect to patents and  
24 trademarks.” 35 U.S.C. § 2(a).

25 27. The Patent Act instructs the PTO that “[w]hoever invents or discovers any  
26 new and useful process, machine, manufacture, or composition of matter, or any new and  
27 useful improvement thereof, may obtain a patent therefor, subject to the conditions and  
28 requirements of [Title 35 of the United States Code].” 35 U.S.C. § 101.

1           28.     The Patent Act further provides that “[a] person *shall be entitled* to a patent  
2 unless” the applicant fails to meet certain patent-eligibility and patentability conditions. 35  
3 U.S.C. § 102 (emphasis added).

4           29.     To provide appropriate incentives to inventors, ensure that all who are entitled  
5 to a patent receive one, and ensure that only patent-eligible and patentable inventions receive  
6 a patent and that the public is not burdened by exclusive rights to which the patentee is not  
7 entitled, the Patent Act contains a robust system of patent examination with multiple levels of  
8 review.

9           30.     The process begins when an inventor applies for a patent by submitting a  
10 written patent application to the PTO, containing a written description of the invention,  
11 drawings, and one or more numbered claims that define the invention for which a patent is  
12 sought. *See* 35 U.S.C. § 111.

13           31.     The Patent Act requires that the PTO “*shall* cause an examination to be made”  
14 of the application for an “alleged new invention.” 35 U.S.C. § 131 (emphasis added). This is  
15 the first level of review. If the examination reveals “that the application is entitled to a patent  
16 under the law, the [PTO] *shall* issue a patent therefor.” *Id.* (emphasis added).

17           32.     If a patent examiner rejects a patent application, that rejection does not end the  
18 patent prosecution. Instead, the Patent Act requires that the examiner notify the applicant of  
19 the grounds for rejection and provide the applicant with “such information and references as  
20 may be useful in judging the propriety of continuing the prosecution of his application.” 35  
21 U.S.C. § 132(a).

22           33.     The first rejection is non-final. The applicant may reply to rejections by  
23 amendment, argument, and/or evidence, and the examiner must give reconsideration to  
24 applicant’s reply before making a final rejection. 37 C.F.R. §§ 1.111, 1.112.

25  
26  
27  
28





1 **The Manual of Patent Examining Procedure**

2 48. In addition to regulations promulgated through notice-and-comment  
3 rulemaking, 35 U.S.C. § 2(b)(2), the PTO publishes the *Manual of Patent Examining*  
4 *Procedure* (“MPEP”). The MPEP serves as “a reference work on the practices and  
5 procedures relative to the prosecution of patent applications before the USPTO.” MPEP,  
6 Forward.

7 49. The MPEP “does not have the force of law or the force of the rules in Title 37  
8 of the Code of Federal Regulations.” MPEP, Foreword. Indeed, the MPEP explicitly states  
9 that examiners are “governed by the applicable statutes, rules, decisions, and orders and  
10 instructions issued by the Director of the USPTO and other officials authorized by the  
11 Director of the USPTO,” not the MPEP. *Id.*

12 50. The PTO frequently revises the MPEP. Since it was first published in 1948,  
13 the MPEP has been revised well over 100 times.

14 51. The PTO does not engage in notice-and-comment rulemaking when it revises  
15 the MPEP. Nor does the PTO publish notices in the *Federal Register* to inform the public  
16 that a new revision of the MPEP is available.

17 **MPEP § 1207.04 Unlawfully Conflicts with the Examiner’s Answer Rule**

18 52. MPEP § 1207, titled “Examiner’s Answer,” provides guidelines on how the  
19 examiner is to respond to an applicant’s appeal to the Patent Trial and Appeal Board. The  
20 provision was added to the MPEP in August 2005, one year after the PTO promulgated the  
21 Examiner’s Answer Rule in the *Rules of Practice*.

22 53. Unlike the Examiner’s Answer Rule, which only authorizes the examiner to  
23 respond to the applicant’s brief by filing an answer, MPEP § 1207 provides the examiner  
24 with *two* options for responding to the brief.

25 54. Specifically, MPEP § 1207 permits the examiner to: (1) submit an answer as  
26 prescribed by the Examiner’s Answer Rule; *or* (2) “reopen prosecution to enter a new ground  
27 of rejection in response to appellant’s brief.” MPEP § 1207.04.  
28

1           55. To reopen prosecution under MPEP § 1207.04, the examiner does not need  
2 the consent of the applicant or the Appeal Board. Instead, all an examiner need do to prevent  
3 the appeal from reaching the Appeal Board is obtain “approval from the supervisory patent  
4 examiner” and “enter a new ground of rejection in response to appellant’s brief.” MPEP  
5 § 1207.04.

6           56. MPEP § 1207.04 was amended in March 2014 to allow the examiner to  
7 reopen prosecution to enter a new ground of rejection “that would be proper...as described in  
8 [the Examiner’s Answer Rule].” *Compare* MPEP § 1207.04 (ed. 8, rev. 9, Aug. 2012) *with*  
9 MPEP § 1207.04 (ed. 9, rev. 1, Mar. 2014). Prior to March 2014, MPEP § 1207.04 did not  
10 permit the examiner to reopen prosecution if it was proper to enter a new ground of rejection  
11 in the answer.

12           57. MPEP § 1207.04 purports to permit the examiner to reopen prosecution,  
13 including with respect to grounds of rejection that the Examiner’s Answer Rule provides may  
14 be entered in the examiner’s answer. MPEP § 1207.04 therefore unlawfully contravenes and  
15 conflicts with the duly promulgated Examiner’s Answer Rule, 37 C.F.R. § 41.39.

16           **MPEP § 1207.04 Unlawfully Conflicts with the United States Patent Act**

17           58. By authorizing the PTO to reopen prosecution and thereby defeat review by  
18 the Appeal Board, MPEP § 1207.04 unlawfully contravenes and conflicts with the statutory  
19 right of appeal, 35 U.S.C. § 134(a), and the statutory mandate that the Appeal Board “shall  
20 on written appeal of a [patent] applicant, review adverse decisions of examiners upon  
21 applications for patents.” 35 U.S.C. § 6(b)(1).

22           59. The Patent Act authorizes the PTO to adopt procedural rules but not  
23 substantive rules. *See Tafas v. Dudas*, 511 F. Supp. 2d 652, 663 (E.D. Va. 2007), *citing*  
24 *Merck & Co. v. Kessler*, 80 F.3d 1543, 1550 (Fed. Cir. 1996) (“Section 2(b)(2) does not,  
25 however, vest the PTO with any general substantive rulemaking power.”).

26           60. When an examiner reopens prosecution pursuant to MPEP § 1207.04, the  
27 PTO is freed from the duly promulgated rules of evidence for appeals before the Appeal  
28 Board. *See* 69 Fed. Reg. 49960, 50006 (2004), *codified at* 37 C.F.R. § 41.33.

1           61.     When an examiner reopens prosecution, the PTO prevents the Appeal Board  
2 from obtaining jurisdiction over the appeal, because “[j]urisdiction over the proceeding  
3 passes to the Board upon the filing of a reply brief.” 37 C.F.R. § 41.35(a).

4           62.     When an examiner reopens prosecution, the PTO deprives an applicant of his  
5 right, under the Examiner’s Answer Rule, to “maintain the appeal.” Yet agencies may not  
6 issue guidance to impose additional limits on rights granted to the public by statute. *See*  
7 *Southern Rehab. Grp. P.L.L.C. v. Sec’y of Health and Human Servs.*, 732 F.3d 670, 686 (6th  
8 Cir. 2013).

9           63.     When an examiner reopens prosecution, the PTO deprives an applicant, “any  
10 of whose claims has been twice rejected,” of the statutory right to “appeal from the decision  
11 of the primary examiner to the Patent Trial and Appeal Board...” 35 U.S.C. § 134(a).

12           64.     When an examiner reopens prosecution, the examiner enters “a new ground of  
13 rejection in response to appellant’s brief,” MPEP § 1207.04, thereby increasing the count of  
14 rejections to at least three. By requiring an applicant to have his or her claims rejected more  
15 than two times to appeal the rejection decision, MPEP § 1207.04 conflicts with 35 U.S.C.  
16 § 134(a).

17           65.     By abridging the procedural and substantive rights of applicants, MPEP  
18 § 1207.04 unlawfully contravenes, conflicts with, and exceeds the PTO’s authority under the  
19 Patent Act.

20                   **MPEP § 1207.04 Was Unlawfully Adopted in Violation of the Patent Act and**  
21                   **Administrative Procedure Act**

22           66.     The Patent Act requires that PTO procedural rules “*shall* be made in  
23 accordance with section 553 of title 5.” 35 U.S.C. § 2(b)(2)(B) (emphasis added).

24           67.     Section 553 of Title 5, which is part of the Administrative Procedure Act,  
25 prescribes notice-and-comment rulemaking.

26           68.     Section 553 requires that an agency provide “[g]eneral notice of proposed rule  
27 making” in the Federal Register, including a statement of the nature of the rulemaking  
28 proceedings, a reference to the legal authority under which the rule is proposed, and the

1 substance of the proposed rule. 5 U.S.C. § 553(b). The agency must then “give interested  
2 persons an opportunity to participate in the rule making through submission of written data,  
3 views, or arguments....” 5 U.S.C. § 553(c). Section 553 further instructs the agency to give  
4 “consideration [to] the relevant matter presented” by the public, and “incorporate in the rules  
5 adopted a concise general statement of their basis and purpose.” 5 U.S.C. § 553(c).

6 69. Congress added the requirement that PTO procedural rules be promulgated “in  
7 accordance with section 553 of title 5” when it overhauled Title 35 in 1999. *See* American  
8 Inventors Protection Act of 1999, *adopted as part of* An Act Making Consolidated  
9 Appropriations for the Fiscal Year Ending September 30, 2000, and for Other Purposes, Pub.  
10 L. No. 106-113, 113 Stat. 1501A-573.

11 70. Prior to 1999, the Patent Act did not specify how the PTO was to adopt  
12 procedural rules. *Compare* 35 U.S.C. § 6(a) (1994) (authorizing Commissioner to “establish  
13 regulations...for the conduct of proceedings,” but making no reference to 5 U.S.C. § 553)  
14 *with* 35 U.S.C. § 2(b)(2)(B) (2012) (requiring “Office” to make such regulations “in  
15 accordance with section 553 of title 5”).

16 71. By adding the requirement that PTO procedural rules be promulgated “in  
17 accordance with section 553 of title 5,” 35 U.S.C. § 2(b)(2)(B), Congress intended that the  
18 PTO follow notice-and-comment rulemaking.

19 72. The Patent Act requires that the PTO follow notice-and-comment rulemaking  
20 to ensure that all interested parties have an opportunity to participate in the rulemaking  
21 process.

22 73. The Patent Act requires that the PTO procedural rules “*shall* be made in  
23 accordance with section 553 of title 5,” which prescribes notice-and-comment rulemaking.  
24 35 U.S.C. § 2(b)(2)(B) (emphasis added). MPEP § 1207.04 is a procedural rule, but it never  
25 went through notice-and-comment rulemaking. The PTO therefore unlawfully adopted  
26 MPEP § 1207.04.

27  
28

**Allegations Supporting Declaratory Relief**

1  
2 74. Plaintiffs repeat and re-allege the averments of paragraphs 1–73 as if fully set  
3 forth herein.

4 75. Actual and substantial controversies exist between Plaintiff and Defendants  
5 regarding the Defendants’ denial of the Director Petition and Defendants’ promulgation and  
6 reliance upon MPEP § 1207.04.

7 76. Declaratory relief will clarify the rights and obligations of the parties and is,  
8 therefore, appropriate to resolve these controversies.

9  
10 **Count I:**  
11 **Violation of the APA, 5 U.S.C. §§ 553, 706**

12 77. Plaintiffs repeat and re-allege the averments of paragraphs 1–76 as if fully set  
13 forth herein.

14 78. The APA requires this Court to hold unlawful and set aside any agency action  
15 that is “(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with  
16 law;... (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory  
17 right; [or] (D) without observance of procedure required by law.” 5 U.S.C. § 706(2).

18 79. 35 U.S.C. § 2(b)(2) states, “regulations...govern[ing] the conduct of  
19 proceedings in the [PTO]...shall be made in accordance with section 553 of title 5.”

20 80. 5 U.S.C § 553 requires that an agency engage in notice-and-comment  
21 rulemaking.

22 81. Although MPEP § 1207.04 is nominally agency guidance, it constitutes an  
23 agency “rule” under the APA because it is “an agency statement of general or particular  
24 applicability and future effect designed to implement, interpret, or prescribe law or policy or  
25 describing the organization, procedure, or practice requirements of an agency.” 5 U.S.C. §  
26 551(4).

27 82. MPEP § 1207.04 “governs the conduct of proceedings in the PTO,” but was  
28 not subject to notice-and-comment rulemaking.









**HUTCHISON & STEFFEN**

A PROFESSIONAL LLC  
PECCOLE PROFESSIONAL PARK  
10080 WEST ALTA DRIVE, SUITE 200  
LAS VEGAS, NV 89145

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

- (F) An order enjoining the PTO and Director Lee from enforcing MPEP § 1207.04 and compelling the PTO and Director Lee to withdraw MPEP § 1207.04;
- (G) An award of costs and reasonable fees and expenses of attorneys pursuant to the Equal Access To Justice Act, 28 U.S.C. § 2412; and
- (H) All other relief to which the Plaintiffs may show themselves to be entitled.

Dated: June 22, 2016

Respectfully submitted,

/s/ Robert T. Stewart  
 MARK A. HUTCHISON (4639)  
 ROBERT T. STEWART (13770)  
 HUTCHISON & STEFFEN, LLC  
 10080 W. Alta Drive, Suite 200  
 Las Vegas, NV 89145  
 (702) 385-2500  
 Fax: (702) 385-2086  
 mhutchison@hutchlegal.com  
 rstewart@hutchlegal.com

ANDREW M. GROSSMAN (*pro hac vice application* forthcoming)  
 MARK W. DELAQUIL (*pro hac vice application* forthcoming)  
 BAKER & HOSTETLER LLP  
 1050 Connecticut Avenue, N.W., Suite 1100  
 Washington, D.C. 20036  
 (202) 861-1697  
 Fax: (202) 861-1783  
 agrossman@bakerlaw.com

*Attorneys for Plaintiffs Gilbert P. Hyatt and American Association for Equitable Treatment*

JS 44 (Rev. 11/15)

**CIVIL COVER SHEET**

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

<p><b>I. (a) PLAINTIFFS</b>                  GILBERT P. HYATT and AMERICAN ASSOCIATION FOR EQUITABLE TREATMENT, INC.</p> <p><b>(b)</b> County of Residence of First Listed Plaintiff <u>CLARK COUNTY</u>                  (EXCEPT IN U.S. PLAINTIFF CASES)</p> <p><b>(c)</b> Attorneys (Firm Name, Address, and Telephone Number)                  Mark A. Hutchison; Robert T. Stewart, HUTCHISON &amp; STEFFEN, LLC,                  10080 W ALTA DR., #200, LAS VEGAS, NV 89145 (702) 385-2500</p>	<p><b>DEFENDANTS</b>                  United States Patent and Trademark Office and Michelle K. Lee, et al.</p> <p>County of Residence of First Listed Defendant _____                  (IN U.S. PLAINTIFF CASES ONLY)</p> <p>NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.</p> <p>Attorneys (If Known) _____</p>
--	---

<p><b>II. BASIS OF JURISDICTION</b> (Place an "X" in One Box Only)</p> <p><input type="checkbox"/> 1 U.S. Government Plaintiff</p> <p><input checked="" type="checkbox"/> 2 U.S. Government Defendant</p> <p><input type="checkbox"/> 3 Federal Question (U.S. Government Not a Party)</p> <p><input type="checkbox"/> 4 Diversity (Indicate Citizenship of Parties in Item III)</p>	<p><b>III. CITIZENSHIP OF PRINCIPAL PARTIES</b> (Place an "X" in One Box for Plaintiff and One Box for Defendant)</p> <table style="width:100%;"> <tr> <td style="width:33%;"></td> <td style="width:10%;"><b>PTF</b></td> <td style="width:10%;"><b>DEF</b></td> <td style="width:33%;"></td> <td style="width:10%;"><b>PTF</b></td> <td style="width:10%;"><b>DEF</b></td> </tr> <tr> <td>Citizen of This State</td> <td><input type="checkbox"/> 1</td> <td><input type="checkbox"/> 1</td> <td>Incorporated or Principal Place of Business In This State</td> <td><input type="checkbox"/> 4</td> <td><input type="checkbox"/> 4</td> </tr> <tr> <td>Citizen of Another State</td> <td><input type="checkbox"/> 2</td> <td><input type="checkbox"/> 2</td> <td>Incorporated and Principal Place of Business In Another State</td> <td><input type="checkbox"/> 5</td> <td><input type="checkbox"/> 5</td> </tr> <tr> <td>Citizen or Subject of a Foreign Country</td> <td><input type="checkbox"/> 3</td> <td><input type="checkbox"/> 3</td> <td>Foreign Nation</td> <td><input type="checkbox"/> 6</td> <td><input type="checkbox"/> 6</td> </tr> </table>		<b>PTF</b>	<b>DEF</b>		<b>PTF</b>	<b>DEF</b>	Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4	Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5	Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6
	<b>PTF</b>	<b>DEF</b>		<b>PTF</b>	<b>DEF</b>																				
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4																				
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5																				
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6																				

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<p><b>PERSONAL INJURY</b></p> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<p><b>PERSONAL INJURY</b></p> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <p><b>PERSONAL PROPERTY</b></p> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157
			<p><b>LABOR</b></p> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act	<p><b>PROPERTY RIGHTS</b></p> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark
			<p><b>SOCIAL SECURITY</b></p> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 376 Qui Tam (31 USC 3729(a)) <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input checked="" type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<p><b>REAL PROPERTY</b></p> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<p><b>CIVIL RIGHTS</b></p> <input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<p><b>PRISONER PETITIONS</b></p> <p><b>Habeas Corpus:</b></p> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <p><b>Other:</b></p> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement	<p><b>FEDERAL TAX SUITS</b></p> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	
			<p><b>IMMIGRATION</b></p> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	

**V. ORIGIN** (Place an "X" in One Box Only)

1 Original Proceeding     2 Removed from State Court     3 Remanded from Appellate Court     4 Reinstated or Reopened     5 Transferred from Another District (specify)     6 Multidistrict Litigation

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
5 U.S.C §§ 702 AND 706

Brief description of cause:  
Declaratory and Injunctive Relief Against US Patent and Trademark Office

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.    DEMAND \$ \_\_\_\_\_    CHECK YES only if demanded in complaint:  
 JURY DEMAND:     Yes     No

**VIII. RELATED CASE(S) IF ANY** (See instructions):

JUDGE \_\_\_\_\_    DOCKET NUMBER \_\_\_\_\_

DATE: 06/22/2016    SIGNATURE OF ATTORNEY OF RECORD: /s/ ROBERT T. STEWART

**FOR OFFICE USE ONLY**

RECEIPT # \_\_\_\_\_    AMOUNT \_\_\_\_\_    APPLYING IFP \_\_\_\_\_    JUDGE \_\_\_\_\_    MAG. JUDGE \_\_\_\_\_



Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the summons unexecuted because \_\_\_\_\_; or

Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc:



Civil Action No. \_\_\_\_\_

**PROOF OF SERVICE**

*(This section should not be filed with the court unless required by Fed. R. Civ. P. 4 (l))*

This summons for *(name of individual and title, if any)* \_\_\_\_\_  
was received by me on *(date)* \_\_\_\_\_.

I personally served the summons on the individual at *(place)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I left the summons at the individual's residence or usual place of abode with *(name)* \_\_\_\_\_  
\_\_\_\_\_, a person of suitable age and discretion who resides there,  
on *(date)* \_\_\_\_\_, and mailed a copy to the individual's last known address; or

I served the summons on *(name of individual)* \_\_\_\_\_, who is  
designated by law to accept service of process on behalf of *(name of organization)* \_\_\_\_\_  
\_\_\_\_\_ on *(date)* \_\_\_\_\_; or

I returned the summons unexecuted because \_\_\_\_\_; or

Other *(specify)*: \_\_\_\_\_.

My fees are \$ \_\_\_\_\_ for travel and \$ \_\_\_\_\_ for services, for a total of \$ \_\_\_\_\_.

I declare under penalty of perjury that this information is true.

Date: \_\_\_\_\_

\_\_\_\_\_  
*Server's signature*

\_\_\_\_\_  
*Printed name and title*

\_\_\_\_\_  
*Server's address*

Additional information regarding attempted service, etc: