

**UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE USPTO DIRECTOR**

In the Matter of	)	
	)	
Allen D. Brufsky,	)	
	)	
Respondent	)	Proceeding No. D09-09
_____	)	

**Final Order**

Office of Enrollment and Discipline Director Harry I. Moatz (“OED Director”) and Allen D. Brufsky (“Respondent”) have submitted a Proposed Settlement Agreement to the Acting Under Secretary of Commerce for Intellectual Property and Acting Director of the United States Patent and Trademark Office (“USPTO Director”) or his designate for approval.

The OED Director and Respondent’s Proposed Settlement Agreement sets forth certain stipulated facts, legal conclusions, and sanctions to which the OED Director and Respondent have agreed in order to resolve voluntarily a disciplinary complaint against Respondent. The Proposed Settlement Agreement, which satisfies the requirements of 37 C.F.R. § 11.26, resolves all disciplinary action by the United States Patent and Trademark Office (“USPTO” or “Office”) arising from the stipulated facts set forth below.

Pursuant to such Proposed Settlement Agreement, this Final Order sets forth the parties’ stipulated facts, legal conclusions, and agreed upon discipline.

**Jurisdiction**

1. At all times relevant hereto, Respondent of Miami, Florida, has been an attorney registered to practice before the United States Patent and Trademark Office (“USPTO” or “Office”) and is subject to the Disciplinary Rules of the USPTO Code of Professional Responsibility set forth at 37 C.F.R. § 10.20 *et seq.*
2. The USPTO Committee on Discipline met at the request of the OED Director and, on December 10, 2008, found probable cause to bring charges against Respondent.
3. The USPTO Director has jurisdiction over this matter pursuant to 35 U.S.C. § 2(b)(2)(D) and 37 CFR §§ 11.20(a)(3) and 11.26.

**Stipulated Facts**

4. At all times relevant hereto, Respondent of Miami, Florida, has been an attorney registered to practice patent law before the Office (Registration Number 21,056) and is

subject to the USPTO Code of Professional Responsibility set forth at 37 C.F.R. § 10.20 *et seq.*

5. On June 22, 2006, Respondent filed a complaint on behalf of a client in the United States District Court for the Southern District of Florida alleging that Dynapoint (Taiwan), Inc. (“Dynapoint Taiwan”) infringed on the client’s patent by distributing and selling within the United States its various lines of scrolling wheel computer mice and/or importing into the United States such items for sale.

6. On February 20, 2007 Dynapoint Taiwan filed a motion to dismiss the complaint based on a lack of personal jurisdiction. Dynapoint Taiwan contended that it was a Taiwanese corporation headquartered in Taipei, Taiwan, and that its sole business function was to serve as the Asia and Europe sales division for Dynapoint (Dong Guan) Inc. (“Dynapoint China”), which was a discrete corporation organized under the laws of China and located in Mainland China. Dynapoint Taiwan also contended that it had no office in the State of Florida; had never operated, conducted, engaged in, or carried on any business venture anywhere in the United States; had not sold or solicited customers for Dynapoint China anywhere in the United States; had not attended any trade shows in the United States; had no corporate officers who were residents of the United States; maintained no financial accounts in the United States; did not manufacture computer mice; and had only a passive website, which did not enable visitors to order products.

7. Respondent opposed Dynapoint Taiwan’s motion to dismiss and submitted a personal declaration to the district court in support thereof. Respondent’s declaration linked the distribution of computer mice allegedly infringing on the client’s patent to Dynapoint China, not Dynapoint Taiwan. Respondent’s declaration did not mention Dynapoint Taiwan.

8. On March 26, 2007, Respondent also moved the district court to join Dynapoint China as a defendant.

9. On April 11, 2007, the district court granted Respondent’s motion to join Dynapoint China noting that Dynapoint Taiwan had failed to submit a memorandum in opposition to Respondent’s motion to join a party.

10. On April 12, 2007, Dynapoint Taiwan filed a motion asking the district court to reconsider its April 11, 2007, order explaining that, under the local district court rules, Dynapoint Taiwan’s time for responding to Respondent motion to join had not yet expired prior to the district court’s April 11 ruling. Dynapoint Taiwan also filed an opposition to Respondent’s motion to join Dynapoint China.

11. On April 13, 2007, the district court granted Dynapoint Taiwan’s motion for reconsideration and, accordingly, set aside its April 11, 2007, order.<sup>1</sup> The district court also granted Dynapoint Taiwan’s motion to dismiss the complaint for lack of personal

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<sup>1</sup> Respondent represents that he did not have the chance to reply to Dynapoint Taiwan’s motion for reconsideration prior to the district court granting the motion.

jurisdiction. See *F&G Research, Inc. v. Dynapoint (Taiwan), Inc.*, 2007 WL 5175171 (S.D. Fla. 2007)

12. On or about May 3, 2007, Respondent filed a notice of appeal of the district court's dismissal of the complaint.

13. On or about May 16, 2007, the appeal was docketed in the United States Court of Appeal for the Federal Circuit ("CAFC").

14. On December 19, 2007, the CAFC issued an order to Respondent and his client directing them to show cause as to why the appellate case should not be deemed frivolous as filed and frivolous as argued and why sanctions should not be imposed upon them. In part, the CAFC predicated its December 19 order on that part of Respondent's submission to the CAFC wherein Respondent represented that Dynapoint China was a co-defendant in the underlying district court case even though the district court's April 11, 2007, order had been set aside.

15. On January 4, 2008, Respondent filed a response to the show cause order.

16. Respondent also separately filed a motion offering to dismiss the appeal or, in the alternative, seeking an order directing the district court to take certain actions.<sup>2</sup> The CAFC denied Respondent's motion.

17. On January 31, 2008, the CAFC held that the appeal was both frivolous as filed and frivolous as argued under Rule 38 of the Federal Rules of Appellate Procedure because: (a) Respondent and his client had failed to point to any legal errors by the district court or any evidentiary support for its position on appeal, (b) Respondent had misstated the record with respect to Dynapoint China's status as a co-defendant, and (c) Respondent and his client had failed to respond meaningfully to the show cause order.

18. On January 31, 2008, the CAFC awarded sanctions against Respondent and his client, jointly and severally, in the amount of Dynapoint Taiwan's reasonable attorney fees and costs in defending the appeal. See *F&G Research, Inc. v. Dynapoint (Taiwan), Inc.*, 262 Fed. Appx. 277 (Fed. Cir. 2008).

19. The district court case was subsequently re-filed against the correct defendant and resolved in a matter favorable to Respondent's client.

### Mitigating Factors

20. Respondent, who has been registered as a patent agent since June 14, 1963, and registered as a patent attorney since January 30, 1964, represents that he has been actively involved in the practice of patent law for over 45 years and has no prior history of discipline.

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<sup>2</sup> Respondent represents that he sought dismissal of the appeal so that he could add Dynapoint China as a defendant either through filing a new motion in the district court or by filing a new complaint.

21. Respondent represents that he did not intend to mislead the CAFC. He represents that his failure to alert the CAFC to the setting aside of the April 11, 2007, order was due to the mistake of his docket clerk and paralegal who did not timely apprise him of that court action.

22. Respondent represents that, pursuant to the January 31, 2008, order, he timely paid to Dynapoint Taiwan over \$30,000 in reasonable attorney fees and costs in defending the appeal.

### **Legal Conclusion**

23. Based on the stipulated facts, Respondent acknowledges that his conduct violated Disciplinary Rules 10.23(b)(4) and 10.23(b)(5) of the USPTO Code of Professional Responsibility by filing and arguing a frivolous appeal and submitting a document to a court containing a misstatement of fact.

### **Sanctions**

24. Respondent agreed, and it is ORDERED that:
- a. Respondent be, and hereby is, publicly reprimanded;
  - b. The OED Director shall publish this Final Order;
  - c. The OED Director shall publish the following Notice in the Official Gazette:

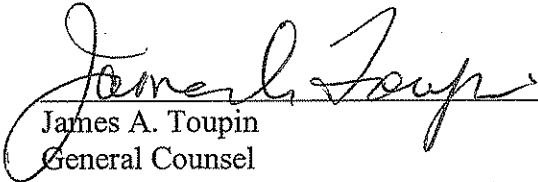
#### Notice of Reprimand

Allen D. Brufsky of Miami, Florida, an attorney whose registration number is Registration Number 21,056, has been publicly reprimanded by the United States Patent and Trademark Office for violating 37 C.F.R. §§ 10.23(b)(4) (misrepresentation) and 10.23(b)(5) (conduct prejudicial to the administration of justice). The violations are based on Respondent having been sanctioned by the U.S. Circuit Court of Appeals for the Federal Circuit for filing and arguing a frivolous appeal and for misstating the district court record about the non-joinder of a purported co-defendant. This action is taken pursuant to the provisions of 35 U.S.C. § 2(b)(2)(D) and 37 C.F.R. §§ 11.20(a)(3), 11.26 and 11.59. Disciplinary decisions regarding practitioners are posted at the Office of Enrollment and Discipline's Reading Room located at: <http://des.uspto.gov/Foia/OEDReadingRoom.jsp>.

- d. The OED Director shall give notice of public discipline and the reasons for the discipline to disciplinary enforcement agencies in the State where the practitioner is admitted to practice, to courts where the practitioner is known to be admitted, and the public; and
- e. The OED Director and Respondent shall each bear their own costs incurred to date and in carrying out the terms of this agreement.

MAY 6 2009

Date

  
James A. Toupin  
General Counsel  
United States Patent and Trademark Office

on behalf of

John J. Doll  
Acting Under Secretary of Commerce for  
Intellectual Property and Acting Director of the  
United States Patent and Trademark Office

cc:

Harry I. Moatz  
Director Office of Enrollment and Discipline  
U.S. Patent and Trademark Office  
Mail Stop OED  
P.O. Box 1450  
Alexandria, Virginia 22313-1450

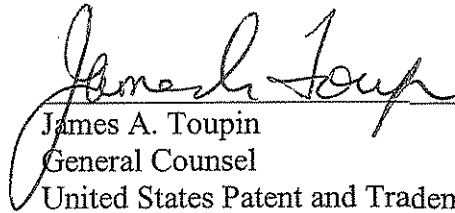
Allen D. Brufsky  
475 Galleon Drive  
Naples, FL 34102

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MAY 6 2009

Date



James A. Toupin  
General Counsel  
United States Patent and Trademark Office

on behalf of

John J. Doll  
Acting Under Secretary of Commerce for  
Intellectual Property and Acting Director of  
the United States Patent and Trademark  
Office