

**UNITED STATES DISTRICT COURT FOR  
THE EASTERN DISTRICT OF VIRGINIA  
(Alexandria Division)**

**TRIANAFYLLOS TAFAS,**

**Plaintiff,**

v.

**JON W. DUDAS, in his official capacity as Under-Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, and the UNITED STATES PATENT AND TRADEMARK OFFICE,**

**Defendants.**

**CIVIL ACTION: 1:07cv846 (JCC/TRJ)  
and Consolidated Case (below)**

**SMITHKLINE BEECHAM CORPORATION,**

**Plaintiff,**

v.

**JON W. DUDAS, in his official capacity as Under-Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, and the UNITED STATES PATENT AND TRADEMARK OFFICE,**

**Defendants.**

**PLAINTIFF TRIANAFYLLOS TAFAS'  
MOTION FOR SUMMARY JUDGMENT**

The Plaintiff, Dr. Triantafyllos Tafas (“Tafas”), by and through his undersigned attorneys, KELLEY DRYE & WARREN LLP, and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56, hereby moves for summary judgment on all claims in his First Amended Complaint dated September 7, 2007 (the “Amended Complaint”).

As set forth more particularly in Tafas’ supporting memorandum of law, Tafas’ supporting Declaration and the Declarations of Robert Fenili, Ph.D and Michael Rueda, Esq.,

being filed along herewith, and based on the administrative record<sup>1</sup> proffered by Defendant United States Patent and Trademark Office (“USPTO”), there are no genuine issues as to any material fact and Tafas is entitled to judgment as a matter of law.

More particularly, this action is brought for declaratory judgment pursuant to 28 U.S.C. § 2201 *et seq.*, and for judicial review under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706, and the Regulatory Flexibility Act (“RFA”), 5 U.S.C. § 611. Tafas seeks the entry of summary judgment, *inter alia*, to: (1) permanently enjoin Defendants from implementing sections 1.75, 1.78, 1.104, 1.105, 1.110, 1.114, 1.142, 1.265 and 1.704 of certain new federal regulations promulgated by the USPTO, with an effective date of November 1, 2007, which were published at 72 Fed. Reg. 46716, 46835-43 (Aug. 21, 2007) and are to be codified at 37 C.F.R. Part 1 (the “Revised Rules”); (2) declaring the Revised Rules, *in toto*, null, void and without legal effect, *inter alia*, as being beyond the rule making power of the USPTO and as inconsistent with various federal statutes and the United States Constitution, including Article I, Section 8, Cl. 8 and the Fifth Amendment; and, (3) vacating and remanding the Revised Rules, including requiring Defendants to comply with the requirements of the APA, 5 U.S.C. § 553, and the RFA, 5 U.S.C. § 601 *et seq.*, in promulgating any regulations in the future concerning the subject matter of the Revised Rules.

As set forth more specifically in Tafas’ memorandum of law, the Revised Rules should be permanently enjoined and declared null and void, among other reasons, because they: (1) violate and conflict, in whole or in part, with Sections 2, 41, 101, 102, 111, 112, 120, 121, 122, 131, 132, and 151 of the Patent Act (35 U.S.C. § 1 *et seq.*) and Sections 200-203 of the

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<sup>1</sup> Tafas has challenged the sufficiency and completeness of the USPTO’s administrative record and Tafas’ Objection to Magistrate Thomas Rawles Jones, Jr. Order denying discovery is still *sub-judice* with the Court. In the event that the Court should subsequently overrule Magistrate Jones and permit discovery, Tafas reserves the right to move to supplement his present summary judgment motion.

Bayh-Dole Act (35 U.S.C. § 200 *et seq.*), and exceed the USPTO's rule making authority delegated by Congress and under the U.S. Constitution; (2) violate and conflict with Sections 553(b)-(c) and 706(2) of the APA (5 U.S.C. §§ 553(b)-(c) and 706(2)), among other ways, because the USPTO purported to enact rules with retroactive effect; denied the public of its right to be informed of and meaningfully comment on "the terms or substance of the proposed rule"; by promulgating rules that are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, contrary to Plaintiff's constitutional rights and in excess of the USPTO's statutory jurisdiction and authority; and (3) violate and conflict with the RFA, 5 U.S.C. §§ 601-612, because the USPTO erroneously certified under RFA Section 605(b) that the Revised Rules would not have a significant impact on a substantial number of small businesses and, as such, failed to prepare a Final Regulatory Flexibility Analysis in contravention of RFA Section 604.

**CONCLUSION**

WHEREFORE, for all the foregoing reasons, as well as those set forth in Tafas' supporting memorandum of law and Declaration, and the Declarations of Robert Fenili, Ph.D and Michael Rueda, Esq., Plaintiff Tafas respectfully moves the Court to grant Tafas summary judgment in his favor, and to enter the proposed form of Order being submitted along herewith as follows, along with such other, further and different relief as the Court deems just, equitable and proper:

Respectfully submitted,

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Dated: December 20, 2007

**CERTIFICATE OF SERVICE**

I hereby certify that on December 20, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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