APPENDIX: COMPLAINT FORM

U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

COMPLAINT OF JUDICIAL MISCONDUCT OR DISABILITY

MAIL THIS FORM TO THE CLERK, UNITED STATES COURT OF APPEALS, 717 MADISON PLACE, N.W., WASHINGTON, D.C. 20439. MARK THE ENVELOPE "JUDICIAL MISCONDUCT COMPLAINT" OR "JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE JUDGE ON THE ENVELOPE.

SEE RULE 2(e) FOR THE NUMBER OF COPIES REQUIRED.

1. Complainant's name: Joseph A. Gentiluomo

Address: 1456 Belmont Avenue
Schenectady, N.Y. 12308

Daytime telephone: (518) 346-0895

2. Judge complained about:

Name: Lourie, Plager, and Dyk

Court: U.S. Court of Appeals for the Federal Circuit

3. Does this complaint concern the behavior of the judge in a particular appeal?

[✓] Yes [ ] No

If "yes," give the following information about each appeal (use the reverse side if there is more than one):

Docket number: 01-1364

Are (were) you a party or lawyer in the appeal?

[ ] Party [ ] Lawyer [✓] Neither

If a party, give the name, address, and telephone number of your lawyer:

4. Have you filed any lawsuits against the judge?

[ ] Yes [✓] No

If "yes," give the following information about each lawsuit (use the reverse side if there is more than one):

Court:

Docket number:

Present status of suit:

Name, address, and telephone number of your lawyer:

Court to which any appeal has been taken in the foregoing suit:

Docket number of the appeal:

Present status of appeal:

5. On separate sheets of paper, not larger than the paper this form is printed on, describe the conduct or the evidence of disability that is the subject of this complaint. See rule 2(b) and 2(d). Do not use more than 5 pages (5 sides). Most complaints do not require that much.

6. You should either

(1) check the first box below and sign this form in the presence of a notary public; or

(2) check the second box and sign the form. You do not need a notary public if you check the second box.

[ ] I swear (affirm) that--

[✓] I declare under penalty of perjury that--

(1) I have read rules 1 and 2 of the Rules of the United States Court of Appeals for the Federal Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint are true and correct to the best of my knowledge.

Joseph A. Gentiluomo
(Signature)

Executed on 2/3/03
(Date)

Sworn and subscribed
to before me _____
(Date)

_____
(Notary Public)

My commission expires:

5. Statement of Facts:

In rendering their decision in Gentiluomo v. Brunswick (01-1364), Joseph A. Gentiluomo contends that the judges Lourie, Plager, and Dyk engaged in conduct that does not meet the standard required of federal judges, in that they neglected to abide to established legal precedent and made arbitrary judgments, regarding the above cited appeal.

The credibility of my herein made allegations are supported by my engineering and legal background. I have a Bachelors of Science Degree in Mechanical Engineering from Rensselaer Polytechnic Institute (Troy, N.Y.), an equivalent of a Masters of Science Degree through engineering courses completed while employed as a Development Engineer at the General Electric Co., have about 50 years of engineering experience, have about 42 years experience in patent law, have 25 patents of which I personally prepared and prosecuted 22, prosecuted cases before the former Court of Customs and Patent Appeals and the present Court of Appeals for the Federal Circuit. Based on my background, I consider myself amply qualified to pass judgment on decisions rendered by the Federal Courts.

A review of the Appeals Court decision will reveal that the precedent set forth in Graham v. John Deere for determining patent validity/invalidity based on obviousness/non-obviousness, was never properly utilized. The record will show that the scope and content of the cited prior art taken as a whole, the scope and content of the claims at issue taken as a whole, and the level of ordinary skill in the art at the time of the invention, were never determined.

Therefore, how can the Appeals Court make a legal determination of obviousness when the level of skill in the art was never determined. Also, how can said skilled person (if skill is properly established), determine if a claimed invention taken as a whole is obvious, when it is not known what the scope and content of the prior art is when taken as a whole, nor what the scope and content is of the claims at issue taken as a whole? Yet, the Appeals Court affirmed the District Court's decision.

The Appeals Court introduced new matter regarding claim construction, and made impermissible factual determinations. Gentiluomo presented rebuttal to the Court's arguments in his rehearing petition, but the Court denied the petition. What kind of justice is this, when a person is not allowed to defend himself against the Court's erroneous determinations.

In rendering its decision, the Court considered only a portion of claim limitations 24(b) and 32(b), while neglecting to consider all the claim limitations recited in claims 24 and 32 taken as a whole. The claimed invention must be considered as a whole in deciding the question of obviousness. Litton Indus. Prods., Inc. v. Solid State Sys. Corp., 755 F. 2d 158, 164(Fed. Cir. 1985). The Federal Circuit impermissibly chose to interpret claim construction regarding complex subject matter, without the aid of expert testimony to establish a proper factual foundation for determining obviousness/unobviousnes. As a result, the Court took upon itself to act as both judge and jury, and ignore Gentiluomo's rebuttal regarding claim construction in his rehearing petition. Credibility determinations, weighing evidence, and drawing reasonable inferences are jury functions, and not of a judge deciding a motion for summary judgement. Clay v. Interstate Nat. Corp., affirmed 124 F. 2d 203. Since the Court's newly presented matter regarding claim construction represents a genuine issue of material fact in dispute, the case should have been remanded to District Court to resolve the issue at trial through the use of expert testimony. On appeal of grant of summary judgment, Court of Appeals is not to weigh evidence or determine the truth of the matter, but only determine whether there is genuine issue for trial. Abdul-Jabbar v. General Motors Corp., 85 F. 3d 407 (1996).

In it's decision, the Federal Circuit presented the newly cited case laws of In re Aller, 220 F. 2d 454; In re Hill, 284 F. 2d 955; and Titanium Metals Corp. of Amer. v. Banner, 778 F. 2d 775, to show that criticality must also be proven in situations wherein the claimed value or range of values fall outside the value or range disclosed by prior art. After recently reviewing cited case laws, Gentiluomo determined that the factual scenarios of these cases were not in point with the instant case at issue. Based on the fact that Gentiluomo was never given the opportunity to rebut the disclosure existing in newly cited case laws, the case should have been remanded to District Court to obtain the aid of expert testimony to properly interpret the factual content of said case laws, and their applicability to Gentiluomo's claimed invention. Court in ruling on summary judgment motion, is not to resolve factual issues, but may only determine whether factual issues exist. Bashir v. National R. R. Passenger Corp., affirmed 119 F. 3d 929.

For the first time it was disputed by the Federal Court that the prior art patents of MacDonald (4,268,034 and 4,353,850) and Miller (4,522,397), do not teach away from Gentiluomo's claimed invention. This creates a new genuine issue of material fact in dispute, which should be resolved at trail through expert testimony, so that Gentiluomo could have the opportunity to prove his assertion that cited prior art does in fact teach away from his claimed invention.

Based on presented facts, summary judgment is inappropriate when there are genuine issues of material fact in dispute that require jury trail to resolve. Thomas v. St. Luke's Health Systems Inc., affirmed 61 F. 3d 908.