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Ignoring Administrative Decisions Through Settlement: A Holistic Approach

Vincent Escoto

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Ignoring Administrative Decisions Through Settlement: A Holistic Approach

By Vincent Escoto*

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I. INTRODUCTION

Las Vegas, Nevada—a place of flashing lights, extravagant buildings, and of course, gambling. Anyone who has ever put his or her money on the table in Vegas knows the bitter aftertaste of a bad bet. Unfortunately, there are no take-backs when playing against the house. Yet, what if there were? Imagine you are walking along the Las Vegas Strip, and you decide to pop into the nearest casino to let your money ride. You sit down at a roulette table, cash in your money for some chips, and get the sudden urge to bet it all on black. Somehow your gut convinces you that it is a great idea—close to a 50% chance, right? You slide your stack of chips over the square indicating black for the next round. After a few moments, the dealer closes the table for bets, spins the wheel, and drops the ball. You watch the ball visibly lose momentum as it circles around the circumference of the wheel, and it suddenly stops at double-zero (not a black pocket; therefore, not a winning round). The dealer calls out “double-zero” and clears the table of all losing bets—including yours.

Not a big deal, you just lie passively on the floor of the casino next to the roulette table—taking up valuable space the casino could be using to make money from other gamblers—and advise the pit boss that you are a repeat gambler and this loss will overshadow your future gambling experience forever. Although the pit boss is upset that you *obviously* outplayed him, he walks over to the chip plate, takes your stack of chips out from the deposit box, squats down next to where you are lying down, and hands you your chips back. Now you are on your merry way. You have lived to fight the chump casino another day.

Although this scenario is fictional, it resembles the scenario in *Board of Trustees of the University of Alabama v. Houndstooth Mafia Enterprises LLC*¹, which is explained in more detail below. In the *Houndstooth Mafia* case, the Board of Trustees of the University

* Vincent Escoto is currently completing his legal education at Pepperdine University School of Law. He graduated cum laude from California Polytechnic State University of San Luis Obispo with a degree in applied mathematics and a minor in computer science. He has a passion for intellectual property law, technology, and business.

¹ 163 F. Supp. 3d 1150 (N.D. Ala. 2016).

of Alabama and Paul Bryant, Jr. (collectively, The University) refused to settle out of an appeal unless they could recoup the losses of their gamble with the Trademark Trial and Appeals Board (TTAB).² The University filed an opposition to the Houndstooth Mafia Mark with the TTAB.³ After the TTAB upheld the mark's registration in a precedential decision, the parties settled their dispute during a review proceeding in an Alabama district court.⁴ One of the most interesting aspects of the *Houndstooth Mafia* case is that the district court metaphorically gave The University its money back. The court vacated the TTAB's precedential decision, which damaged The University, because The University was a repeat player, and Houndstooth Mafia Enterprises had to settle because it could not afford further litigation.⁵

The facts and circumstances surrounding the *Houndstooth Mafia* case, which will be discussed in more detail below, pose some interesting questions: (1) Considering that an administrative decision and a judgment by an Article III court⁶ are fundamentally different,⁷ on what rationale did the district court in *Houndstooth Mafia* rely to claim the authority to vacate the TTAB's precedential decision? (2) Is this rationale sound? (3) What could this power shift mean for the dynamic between federal courts and the TTAB in the future? (4) Does this change the strategy for future litigants in proceedings with the TTAB? (5) Although not binding authority, would other jurisdictions adopt the district court's holding in the future? (6) Could the district court's holding apply to other administrative proceedings?

This Note attempts to answer these questions through a four-part discussion. Part II reviews the background and historical information necessary to provide an understanding of the statutes and legal principles involved in the dynamic between administrative bodies (i.e., the TTAB) and district courts.⁸ Part III explains the circumstances surround, the facts of, and the court's reasoning in

² *Id.* at 1154.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ A court of the judicial branch established by Article III of the U.S. Constitution.

⁷ See *infra* Part IV(B) and accompanying notes.

⁸ See *infra* Part I and accompanying notes.

Houndstooth Mafia.⁹ Part IV analyzes such reasoning in *Houndstooth Mafia*, pointing out various inconsistencies in the court's rationale but ultimately agreeing with the outcome.¹⁰ Lastly, Part V analyzes the possible effects of the *Houndstooth Mafia* holding on the future dynamic between district courts and administrative bodies, specifically the TTAB. Additionally, Part V addresses the holding's effect on strategies employed by future litigants in administrative proceedings.¹¹

II. BACKGROUND

A. Congress's Delegation Power and the Controversy Surrounding its Delegates

Our nation's framers wrote the United States Constitution, which established Congress and vested it with the power "to make all Laws which shall be necessary and proper for carrying into Execution" the enumerated powers listed in that Constitution.¹² Courts have long held that this power includes Congress's ability to employ administrative agencies to carry out some of its duties with the caveat that there be clear guidelines describing such delegated duties.¹³ The reality of certain issues within the realm of Congress's power require that Congress delegate its enumerated powers to administrative bodies acting in an adjudicative capacity.¹⁴ In such cases, Congress

⁹ See *infra* Part III and accompanying notes.

¹⁰ See *infra* Part IV and accompanying notes.

¹¹ See *infra* Part V and accompanying notes.

¹² U.S. CONST. Art. I, § 8, cl. 18.

¹³ *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194, 215–216 (1912).

¹⁴ For example, the realities of trademark registration involve fact-finding and matters of law which naturally require a judicial capacity. Congress successfully passed the Trademark (Lanham) Act pursuant to its Commerce Clause powers after the Supreme Court previously struck down the Trademark Act under Congress's Copyright Clause power. Congress subsequently passed the Lanham Act, 15 U.S.C. §§ 1051–1127, (1946), which grants the TTAB, through the United States Patent and Trademark Office, administrative authority over trademark registration disputes. 15 U.S.C. § 1051 (2016). The pervasiveness of administrative agencies has prompted legal scholars to refer to this multitude of agencies and their accompanying regulations as the administrative state. Daniel Manry, *Agency*

will promulgate federal statutes that define the scope of the administrative agency's powers and may also establish a procedure for an Article III court to review an administrative adjudication.¹⁵

Since the inception of the administrative state,¹⁶ there has been widespread debate among scholars, especially between judges and practitioners in Article I and Article III courts, about the powers inherent in its proceedings and the role of its judges.¹⁷ Even after the Administrative Procedure Act of 1946 standardized the rules, procedures, and bounds of Article I courts,¹⁸ there was still considerable contention about the relative roles of the administrative law judge (ALJ) and a judge presiding over an Article III court,¹⁹ the relative roles of administrative proceedings versus an Article III court proceeding,²⁰ and even about the Article I court's duty to follow certain orders from Article III courts.²¹

Exercise of Legislative Authority and ALJ Veto Authority, 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 421, 421–22 (2008).

¹⁵ The Lanham Act also defines the process of review for TTAB trademark registration decisions. 15 U.S.C. § 1071 (2016). If an appellant meets all the prerequisites for review, they can apply for review with the United States Court of Appeals for the Federal Circuit or they can file a civil action in a federal district court. *Id.* at § 1071(a), (b).

¹⁶ Manry, *supra* note 14 at 421–22.

¹⁷ See *infra* notes 21–29 and accompanying text.

¹⁸ 5 U.S.C. § 500 (1946).

¹⁹ See *Butz vs. Economou*, 438 U.S. 478, 511–14 (1978) (comparing an administrative proceeding to an Article III court proceeding and an ALJ to a judge presiding over an Article III court as a test for whether an ALJ should enjoy qualified immunity through its decision-making authority). See generally James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV. 1191 (2006).

²⁰ See *Federal Maritime Com'n v. South Carolina State Ports Authority*, 535 U.S. 743 (2002) (comparing the Federal Maritime Commission's proceedings with an Article III court's proceedings and finding that subjecting a state to an administrative proceeding violates that state's right to Eleventh Amendment sovereign immunity just as in an Article III court proceeding).

²¹ In the 1980's, some administrative agencies developed a non-acquiescence policy in which they followed their own internal policies and regulations during administrative proceedings instead of the relevant case law in the jurisdiction under certain circumstances. Daniel F. Solomon, *Fundamental Fairness, Judicial Efficiency and Uniformity: Revisiting the Administrative Procedure Act*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 52, 65–66 (2013). Around the same time, other

B. The TTAB

The Lanham Act established the TTAB as a part of the United States Patent and Trademark Office (USPTO),²² and gave it the general authority to deal with opposition, cancellation, and various types of inter partes proceedings.²³ Like most administrative agencies, the TTAB publishes important opinions for future use and calls them precedential decisions.²⁴

Appeals from TTAB decisions are governed by rules promulgated by the TTAB and the Lanham Act.²⁵ The Lanham Act provides for very liberal requirements for appealing a TTAB decision. If a litigant is dissatisfied with the outcome of a TTAB proceeding, he or she has the right to appeal to a district court or to the federal circuit court of appeals.²⁶ On the other hand, there is a dearth of regulation governing TTAB proceedings in electronic form on the TTAB's website, which closely mirror the Federal Rules of Civil Procedure.²⁷

agencies were “held in contempt for missing judicially imposed deadlines or failing to follow orders of United States Circuit Courts of Appeal.” *Id.* at 65.

²² 15 U.S.C. § 1067 (2016).

²³ Trademark Trial and Appeal Board, *Trademark Trial and Appeal Board*, USPTO (Jan. 30, 2017 10:24 PM), <https://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab>.

²⁴ Administrative Law and Practice, *The Internal Processes*, § 5:67 (2016). Administrative agencies do not adhere to a strict system of stare decisis, but in order to promote consistency and predictability, a court must articulate a strong reasoning for deciding not to follow a precedential decision. *Id.*

²⁵ USPTO, *supra* note 23.

²⁶ 15 U.S.C. § 1071 (2016). “An applicant for registration of a mark, party to an interference proceeding, party to an opposition proceeding, party to an application to register as a lawful concurrent user, party to a cancellation proceeding, a registrant who has filed an affidavit as provided in section 1058 or section 1141k of this title, or an applicant for renewal, who is dissatisfied with the decision of the Director or Trademark Trial and Appeal Board, may appeal to the United States Court of Appeals for the Federal Circuit.” *Id.* § 1071(a)(1). “Whenever a person authorized by subsection (a) of this section to appeal to the United States Court of Appeals for the Federal Circuit is dissatisfied with the decision of the Director or Trademark Trial and Appeal Board, said person may, unless appeal has been taken to said United States Court of Appeals for the Federal Circuit, have remedy by a civil action.” *Id.* § 1071(b)(1).

²⁷ TRADEMARK TRIAL and APPEAL BOARD MANUAL of PROCEDURE, <https://tbmp.uspto.gov/RDMS/TBMP/current> (last updated Jun. 2017).

C. Equitable Vacatur

In *U.S. Bancorp Mortgage v. Bonner Mall Partnership*,²⁸ the U.S. Supreme Court considered whether settlement alone could require an appellate court to vacate the decision of a lower court through the remedy of equitable vacatur. The Court first noted that, as a court sitting in appellate jurisdiction, 28 U.S.C. § 2106 conferred upon it the power to:

[M]odify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.²⁹

The Court conceded that a settlement between the parties would moot the case prior to a judgment, and a court would therefore be constitutionally prohibited from deciding the case on the merits.³⁰ Fortunately for the parties involved, the Court found that mootness does not necessarily preclude a court's ability to craft a remedy.³¹ It held that although a court could not decide a case on the merits where there is no case or controversy per Article III of the U.S. Constitution, a court could still issue a disposition of the case "as justice may require."³² The Court further held that although settlement means the parties involved forgo any opportunity to contest a lower court's decision, deciding to settle did not warrant vacating the lower court's decision; for instance, in the case before it, settlement was fully within the parties' control.³³ Instead, the Court reserved the power to vacate a lower court's decision of equitable vacatur for "[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of the circumstance, [and]

²⁸ 513 U.S. 18 (1994).

²⁹ 28 U.S.C. § 2106 (2016).

³⁰ *US Bancorp*, 513 U.S. at 21–22.

³¹ *Id.*

³² *Id.* at 21.

³³ *Id.* at 25.

ought not in fairness be forced to acquiesce in the judgment.”³⁴ Finally, the Court stressed that other courts must consider the public interest when establishing and applying equitable remedies such as equitable vacatur.³⁵ In the case of equitable vacatur, courts must consider how the remedy facilitates settlement and the need for judicial precedent.³⁶

Although courts have been consistent in the level of review entitled to an administrative adjudication,³⁷ few decisions have discussed the possibility of an Article III court applying equitable vacatur to an administrative decision.³⁸ However, this Note will focus on this issue because those are the exact circumstances surrounding *Board of Trustees of the University of Alabama v. Houndstooth Mafia Enterprises LLC*.³⁹

III. TIPPING THE SCALES: RATIONALE FOR EXPANDING THE COURT’S VACATUR POWER

A. Procedural History

The *Houndstooth Mafia* case began when Houndstooth Mafia Enterprises, LLC filed an application to register its Houndstooth Mafia mark with the USPTO.⁴⁰ However, The University believed that the Houndstooth Mafia mark posed a likelihood of confusion with its Crimson-and-White Color Mark.⁴¹ According to The University, legendary coach Paul Bryant Sr.’s stylish and unique black and white hounds-tooth fedora, which he wore on national television, made its Crimson-and-White Color Mark an identifier of

³⁴ *Id.* Implicit in this principle is the idea that the settling party who lost on the merits below forfeits its legal remedy for vacatur. *Id.*

³⁵ *Id.* at 26 (citing *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp.*, 510 U.S. 27 (1993)).

³⁶ *Id.* at 27–28.

³⁷ See, e.g., *Board of Regents of Univ. of Wis. System v. Phx. Intern. Software, Inc.*, 653 F.3d 448 (7th Cir. 2011).

³⁸ Although, Congress lists laches, estoppel, and acquiescence as equitable remedies courts can apply when reviewing an administrative adjudication. 15 U.S.C. § 1069 (2015).

³⁹ 163 F. Supp. 3d 1150 (N.D. Ala. 2016).

⁴⁰ *Board of Trustees of the University of Alabama Compl.* ¶ 3.

⁴¹ *Id.*

The University.⁴² Accordingly, the University filed an opposition with the TTAB.⁴³ However, the TTAB did not share The University's belief that the Houndstooth Mafia mark bore a likelihood of confusion to its Crimson-and-White Color Mark, and on July 23, 2013, the TTAB issued a decision to that effect and labeled the decision precedential.⁴⁴ The University then filed a civil action with the District Court for the Northern District of Alabama pursuant to 15 U.S.C. § 1071(b).⁴⁵

However, before the district court could review the TTAB's decision, the parties reached a settlement and prepared a final consent judgment for the district court judge to sign.⁴⁶ The final consent judgment, signed by Judge David Proctor on May 27, 2014, ordered that: (1) the clerk enter final judgment in favor of The University; (2) the TTAB's order be vacated; and (3) the Houndstooth Mafia mark could only be registered after all rights were assigned to The University.⁴⁷ The astute reader may wonder why Houndstooth Mafia would settle for such unfavorable terms when Houndstooth Mafia seemed to have the upper hand on The University. The main reason the parties settled was because Houndstooth Mafia's attorneys "could not afford to do free work on appeal as they had on a hearing before the TTAB," and Houndstooth Mafia could not afford to pay them anymore.⁴⁸

The University then submitted a copy of the final consent judgment to the TTAB to enforce the provision requiring the TTAB to vacate its precedential decision, but the TTAB refused to be controlled by the district court.⁴⁹ The TTAB took over a year to push The University's request through the appropriate channels, and on June 23, 2015, the TTAB took the final consent judgment as simply a "piece of paper," and chose not to comply with the district court's

⁴² *Id.* ¶ 1.

⁴³ Brendan J. O'Rourke, Lee M. Popkin, Celia V. Cohen, *THE DYNAMIC BETWEEN FEDERAL COURTS AND THE TTAB: A Post-B&B Hardware Analysis*, 8 No. 4 LANDSLIDE 6, 9 (2016).

⁴⁴ *Id.*

⁴⁵ *Houndstooth Mafia*, 163 F. Supp. 3d at 1153.

⁴⁶ *Id.*

⁴⁷ ROARKE ET AL., *supra* note 25, at 9.

⁴⁸ *Houndstooth Mafia*, 163 F. Supp. 3d at 1160.

⁴⁹ *Id.* at 1153.

order, and retained its precedential decision regarding Houndstooth Mafia's mark.⁵⁰

The University returned to the District Court for the Northern District of Alabama and filed a motion to enforce the consent judgment issued against the TTAB.⁵¹ The district court in *Houndstooth Mafia* held a hearing on the final consent judgment, and the USPTO appeared through its counsel.⁵² Thereafter, on September 17, 2015, Michelle K. Lee, the Undersecretary for Intellectual Property and Director of the USPTO, sought to intervene in the matter.⁵³

B. Judge Proctor's Decree

On February 23, 2016, Judge Proctor issued a forceful decision in which the District Court for the Northern District of Alabama held that the TTAB could not intervene, as a matter of right, due to untimeliness,⁵⁴ and must follow orders to vacate its decisions.⁵⁵

1. Shutting Out the TTAB

In denying the TTAB's motion to intervene, the district court relied on Federal Rule of Civil Procedure 24(a)(2).⁵⁶ That rule states that a party can intervene as a matter of right when, on timely motion, the party claims an interest in the matter that is not adequately represented by the existing parties, and disposing of the matter will impede the movant's ability to protect its interest.⁵⁷ Judge Proctor did not question the TTAB's interest in the final consent judgment, whether failure to intervene would impede that interest, or whether the USPTO had adequately represented its interests during the hearing.⁵⁸ However, Judge Proctor chastised the

⁵⁰ *Id.* at 1162.

⁵¹ *Id.* at 1155.

⁵² *Id.* at 1153.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 1162–1163.

⁵⁶ *Id.* at 1155–56.

⁵⁷ Fed. R. Civ. P. 24(a)(2) (2015).

⁵⁸ *Houndstooth Mafia*, 163 F.Supp.3d at 1163–65.

TTAB for being untimely and denied the TTAB's motion to intervene.⁵⁹

Judge Proctor concluded that the totality of the circumstances revealed that the TTAB should not be able to intervene in the hearing.⁶⁰ The TTAB argued that it "had no way of knowing its 'interests' were affected by [the district court's] final consent judgment until the court explained its views during the hearing on August 20, 2015."⁶¹ Judge Proctor not only found this argument unpersuasive, but also believed the argument was made in bad faith.⁶² Instead, Judge Proctor chastised the TTAB for missing its opportunities to assert its rights in the enforcement matter even before The University first filed the final consent judgment with the TTAB.⁶³ As such, Judge Proctor denied the TTAB's motion to intervene, holding that it was untimely and stating that the TTAB "slumbered on its right to intervene for purposes of either asking [the district court] to change its decision or asking the Eleventh Circuit to review the final judgment."⁶⁴

2. Claiming Jurisdiction Over the TTAB

Throughout his opinion, Judge Proctor notes the TTAB's lack of respect for the district court's mandate, and his decision in *Houndstooth Mafia* seems to claim the district court's authority to vacate an administrative decision at the request of the parties to the underlying lawsuit. The claim of authority in *Houndstooth Mafia* flows from two basic premises: (1) the TTAB did not have the

⁵⁹ *Id.*

⁶⁰ *Id.* at 1165.

⁶¹ *Id.* at 1163.

⁶² *Id.*

⁶³ *Id.* First, Judge Proctor noted that the USPTO and the TTAB normally monitor matters on appeal, which could have given the TTAB notice once settlement negotiations ended and again once the final consent judgment issued. *Id.* at 1163 n. 11. Second, Judge Proctor believed that the TTAB had notice once the TTAB received the final consent judgment from The University, again when The University filed another request with the TTAB three months later as a reminder, and especially when the district court held a hearing (which the USPTO attended). *Id.* at 1163–64. Judge Proctor chastised the TTAB for not intervening or seeking review of the court's decision at any of these junctions in litigation. *Id.*

⁶⁴ *Id.* at 1165.

authority to ignore a valid district court mandate;⁶⁵ and (2) equitable vacatur in *Houndstooth Mafia* was a valid mandate.⁶⁶

In claiming that the TTAB did not have the authority to ignore a district court mandate and in applying equitable vacatur, Judge Proctor equates the TTAB to a lesser equivalent of a district court, which must follow such an order.⁶⁷ In order to circumvent the issue of mootness by way of settlement, Judge Proctor cited § 1071(b) which gives a court reviewing a TTAB decision the authority to adjudge “such other matters as the issues in the proceeding require.”⁶⁸ He also attempts to analogize the review in *Houndstooth Mafia* to an appellate court proceeding.⁶⁹ Section 2106 grants any court of appellate jurisdiction the power to vacate any order lawfully brought before it for review.⁷⁰ According to Judge Proctor, these statutory powers endowed upon an appellate court are equally applicable to a district court reviewing an administrative decision.⁷¹ To bolster his position, Judge Proctor points to the case doctrine law adopted by the Sixth, Seventh, and Eleventh Circuits, which requires an administrative agency to follow an order in “strict compliance.”⁷² He also notes that these circuits believe the doctrine to apply to administrative agency decisions—requiring administrative agencies to follow court mandates in strict compliance.⁷³ Judge Proctor concluded that since an Article III district court must follow an appellate court mandate in strict compliance, so too must an administrative agency, meaning that the TTAB must follow mandates issued by a district court.⁷⁴

⁶⁵ *Id.* at 1156–57.

⁶⁶ *Id.* at 1158.

⁶⁷ *Id.* at 1156–58

⁶⁸ *Id.* at 1157 (citing 15 U.S.C. § 1071(b) (2015)).

⁶⁹ *Id.* at 1157–58 (citing 28 U.S.C. § 2106 (2015)).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* (citing *Youghioghney & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 950 (6th Cir. 1999); *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998, *Norelus v. Denny’s, Inc.* 628 F.3d 1270, 1288 (11th Cir. 2010)).

⁷⁴ *Id.* at 1158. In fact, Judge Proctor seemed to consider the TTAB’s authority to be much narrower than an Article III court. He sarcastically dismissed the TTAB’s “precedential decision,” *Id.* at 1160, and pointed out, rather extensively, that the TTAB is not a court at all. *Id.* at 1156 n. 4.

3. Extending Equitable Vacatur to Administrative Decision

Judge Proctor considered and dismissed the TTAB's arguments against applying vacatur and concluded that the circumstances surrounding settlement in the case constituted exceptional circumstances justifying equitable vacatur.⁷⁵ The TTAB argued that *U.S. Bancorp Mortgage v. Bonner Mall Partnership*⁷⁶ was binding authority on this case, and that *Major League Baseball Properties, Inc. v. Pacific Trading Cards, Inc.*⁷⁷ was not controlling legal authority, and therefore distinguishable.⁷⁸ Judge Proctor reasoned that *MLB Properties* was applicable and *U.S. Bancorp* was not because in *U.S. Bancorp*, one of the parties, Bonner Mall Partnership, opposed vacatur, while in *MLB Properties*, both parties consented to vacatur for the purpose of reaching a settlement.⁷⁹ Judge Proctor believed that the Court's decision in *U.S. Bancorp* boiled down to whether "mere settlement of a case on appeal (or certiorari review) grounds, in and of itself, [is] enough for a reviewing court to vacate the civil judgment of a subordinate court."⁸⁰

The TTAB tried to point out many other distinguishing factors in the *MLB Properties* case, two of which pose formidable arguments. The TTAB argued that *MLB Properties* was inapplicable because in *MLB Properties*, the Second Circuit was deciding the case as a court of appellate jurisdiction through 28 U.S.C. § 2106, and in *Houndstooth Mafia*, the court was reviewing the TTAB's decision based on 15 U.S.C. § 1071(b).⁸¹ The TTAB also argued that the district court did not present any legal authority for its ability to vacate its precedential decision merely because the parties agreed to vacate the judgment.⁸² Judge Proctor dismissed both of these arguments and claimed that § 2106 and *MLB Properties* were at least

⁷⁵ *Id.* at 1161.

⁷⁶ 513 U.S. 18 (1994).

⁷⁷ 150 F.3d 149 (2d Cir. 1998).

⁷⁸ *Houndstooth Mafia*, 163 F.Supp.3d at 1158–63.

⁷⁹ *Id.* at 1158–59.

⁸⁰ *Id.* at 1158.

⁸¹ *Id.* at 1159.

⁸² *Id.* at 1162.

instructive in deciding the court's reviewing power and how to apply equitable vacatur respectively.⁸³

IV. DID THE COURT GET IT RIGHT?

In using the power of equitable vacatur on the TTAB's decision, the court in *Houndstooth Mafia* relied on the Federal Rules of Civil Procedure to oust the TTAB from the proceedings, and relied on § 2106 and § 1071 to transplant a remedy crafted for appellate procedure review of administrative decisions. The following sections analyze whether the decision properly applied the Federal Rules of Civil Procedure in determining that the TTAB untimely intervened, whether the district court properly characterized the dynamic between it and the TTAB, if such a characterization was even necessary for the court to reach its ultimate conclusion, the scope of § 1071's grant of power, and finally, the applicability of equitable vacatur to other administrative agencies in light of the aforementioned analyses.

A. *The TTAB's Right to Intervene*

Judge Proctor made a convincing argument that under the totality of the circumstances, the TTAB's intervention was untimely per Federal Rules of Civil Procedure Rule 24(a)(2). But in this author's opinion, Judge Proctor may have applied the wrong rule. Even if Judge Proctor did not apply the incorrect rule, he was still partly unsympathetic to the reality of the TTAB's caseload in determining untimeliness. Under Federal Rules of Civil Procedure 24(a)(1), a party can intervene as a matter of right when it is "given an unconditional right to intervene by a federal statute."⁸⁴ Furthermore, under 15 U.S.C. § 1071(b)(2), the "[d]irector shall not be made a party to an inter partes proceeding under this subsection, but he shall be notified of the filing of the complaint by the clerk of the court in which it is filed and *shall have the right to intervene in the action.*"⁸⁵ It would seem that Congress intended § 1071(b)(2) to be an unconditional right for the TTAB to intervene, and therefore, the

⁸³ *Id.* at 1158–59.

⁸⁴ Fed. R. Civ. P. 24(a)(1).

⁸⁵ 15 U.S.C. § 1071(b)(2) (2015) (emphasis added).

TTAB should have been given the right to intervene under Federal Rules of Civil Procedure Rule 24(a)(1). At the very least, the interplay between Rule 24(a)(1) and §1071(b)(2) deserved some discussion.

However, even if Federal Rules of Civil Procedure Rule 24(a)(2) was the correct rule, Judge Proctor may have been too quick to conclude that the TTAB's intervention was untimely. As a practical matter, the TTAB may not have had the proper infrastructure to alert itself of a district court's consideration to vacate its decisions. Judge Proctor claimed that the TTAB could have had notice of the district court's decision as early as when the court initially made its decision.⁸⁶ However, considering the high-volume nature of the TTAB's case load and lack of an effective reporting mechanism for litigants to report negotiations and settlement,⁸⁷ the TTAB may not have been on alert that the district court was entertaining the possibility of a consent judgment to vacate the TTAB's decision. Furthermore, Judge Proctor claimed the TTAB had notice as soon as it received the final consent judgment notice and request to vacate the TTAB judgment.⁸⁸ However, as Judge Proctor notes, the TTAB is not a court.⁸⁹ The TTAB is a decentralized hierarchy of workers with a high volume of cases.⁹⁰ As such, there is an unspecified period of time in which a novel issue must find the proper channels to a supervisor who can act on the matter.⁹¹ Therefore, Judge Proctor should have accounted for some sort of a grace period after The University first filed its request to vacate the decision on June 3,

⁸⁶ *Houndstooth Mafia*, 163 F. Supp. 3d at 1163 n. 11.

⁸⁷ The TTAB has recently passed a proposed change to the rules of TTAB proceedings in order to alert the TTAB of settlement negotiations in inter partes proceedings. Miscellaneous Changes to Trademark Trial and Appeal Board (Oct. 7, 2016), <https://www.uspto.gov/sites/default/files/documents/Chart%20Summarizing%20Rule%20Changes%2010-7-16.pdf>. (referring to rule 2.117(c)). In the same set of ratified rules, the TTAB reserved the right to cancel TTAB proceedings, especially when settlement negotiations are involved. *Id.* (referring to rule 2.145).

⁸⁸ *Houndstooth Mafia*, 163 F. Supp. 3d at 1163–64.

⁸⁹ *Id.*

⁹⁰ Trademark Trial and Appeal Board (TTAB), USPTO, <https://www.uspto.gov/trademarks-application-process/trademark-trial-and-appeal-board-ttab> (last visited Oct. 20, 2016).

⁹¹ *Id.*

2014. However, even if Judge Proctor were to give the TTAB the benefit of the doubt during these two windows of opportunity, the TTAB still waited an entire year to voice their opinions on the matter.⁹² Therefore, Judge Proctor's opinion that that the TTAB's intervention was untimely is most likely proper.⁹³

B. Judge Proctor's Circular Logic

The *Houndstooth Mafia* decision presents a diverse set of legal issues involving equity, administrative law, and justiciability, all within the greater backdrop of a contentious rivalry between Article I and Article III courts. At the heart of the *Houndstooth Mafia* case is the issue of whether a reviewing court can vacate one of the TTAB's precedential decisions when the case before that court was moot by way of settlement.⁹⁴ Judge Proctor's characterization of the TTAB as a lesser equivalent of an Article III court⁹⁵ is not only unhelpful and unpersuasive for the purpose of proving that an Article III court has power to vacate a TTAB decision, but it also severely undermines the power of administrative agencies in general. On the other hand, relying on the language of § 1071 as a basis for applying equitable vacatur⁹⁶ instead of comparing these two institutions properly shifts the analysis to the issue of whether equitable vacatur is an appropriate and valid remedy under the specific circumstances surrounding the *Houndstooth Mafia* case.

This note will next examine several cases and other sources which call for a comparison between administrative agencies and Article III courts to determine when it is appropriate to treat an administrative agency the same as an Article III court. The cases and other sources which follow reveal a workable framework for deciding whether to transplant longstanding Article III court

⁹² *Houndstooth Mafia*, 163 F. Supp. 3d at 1163.

⁹³ However, as a practical matter, the TTAB's formal intervention may not have been of much significance because the court gave due consideration to the TTAB's arguments in its decision anyways. *Id.*

⁹⁴ *Houndstooth Mafia*, 163 F.Supp.3d at 1156–57.

⁹⁵ See *supra* Part III and accompanying notes 47–62.

⁹⁶ Judge Proctor's second jurisdictional basis for vacating the TTAB's precedential decision in the *Houndstooth Mafia* case. See *supra* Part III and accompanying notes 47–54.

principles to an Article II court by comparing and contrasting objective aspects of the two.

*Federal Maritime Commission v. South Carolina State Ports Authority*⁹⁷ is one case that draws a useful comparison between Article III courts and administrative agencies. In that case, the U.S. Supreme Court compared the Federal Maritime Commission's (FMC) proceedings to that of an Article III court's proceedings to determine whether subjecting a state to FMC proceedings would violate that state's Eleventh Amendment right to sovereign immunity.⁹⁸ The Court "examine[d] FMC adjudications to determine whether they are the type of proceedings from which the Framers would have thought the States possessed immunity when they agreed to enter the Union", and concluded that such adjudications were overwhelmingly similar to those of an Article III court.⁹⁹ In comparing the two proceedings, the Court noted similarities such as the roles of the presiding judges, the procedural safeguards provided by the courts, rules of procedure, and means of conducting discovery.¹⁰⁰ The Court found that the role of an ALJ is comparable to that of an Article III judge because an ALJ's powers are:

[C]omparable to those of a trial judge: [h]e may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him, free from pressures by the parties or other officials within the agency.¹⁰¹

The Court also noted the fact that "[f]ederal administrative law requires that agency adjudication contain many of the same safeguards as are available in the judicial process."¹⁰² In comparing

⁹⁷535 U.S. 743 (2002).

⁹⁸*Id.* at 743.

⁹⁹*Id.* at 753–61.

¹⁰⁰*Id.*

¹⁰¹*Id.* at 756–57 (quoting *Butz v. Economou*, 438 U.S. 478, 513 (1978)).

¹⁰²*Id.*

the FMC adjudication to that of an Article III court's proceedings, the Court noted a striking similarity between the FMC's rules of practice and procedure and the Federal Rules of Civil Procedure, including the procedure for commencing suit, intervention, entering judgments, default judgments, and discovery procedures.¹⁰³ The Court also noted that the FMC's rules even incorporated the Federal Rules of Civil Procedure as a default in the event that the FMC's rules were silent on a given matter.¹⁰⁴ Since the Court also found that the point of Eleventh Amendment sovereign immunity was to protect the independence of the states, it held that administrative adjudications should be treated the same as a proceeding by an Article III court for the purpose of sovereign immunity.¹⁰⁵

Although the U.S. Supreme Court has recognized that the role of an ALJ requires qualified immunity, some legal scholars believe that the ALJ lacks the true independence which an Article III court judge enjoys, and therefore, lacks the status of a true judge. In *Butz v. Economou*,¹⁰⁶ the Supreme Court of the United States granted qualified immunity to an ALJ to insulate him from liability for damages resulting from an adverse judgment to the plaintiff.¹⁰⁷ The Court believed an ALJ's freedom to exercise discretion would be hampered by the threat of liability and therefore, qualified immunity was necessary to an ALJ's discretion.¹⁰⁸ However, even though the law insulates ALJs from the consequences of their rulings, these judges are still affected by other factors, which can compromise their independence, such as congressional pressure, regulation, and even the rules promulgated by their own agency.¹⁰⁹ Unlike the judicial process where a judge's decision is final until overruled by a higher court, an ALJ's decision can be ignored by the agency for policy reasons.¹¹⁰ This creates an interesting dynamic between an ALJ and its employing agency because such oversight threatens the

¹⁰³ *Id.* at 757–58.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 760.

¹⁰⁶ 438 U.S. 478 (1978).

¹⁰⁷ *Id.* at 497.

¹⁰⁸ *Id.*

¹⁰⁹ James E. Moliterno, *The Administrative Judiciary's Independence Myth*, 41 WAKE FOREST L. REV 1191, 1209–20 (2006).

¹¹⁰ *Id.*

independence of the ALJ at the behest of its employer.¹¹¹ The U.S. Supreme Court has been clear that:

[A]dministrative judges are fundamentally different from Article III judges. It even enumerated the differences precisely: The position of hearing examiners is not a constitutionally protected position. It is a creature of congressional enactment. The respondents have no vested right to positions as examiners. They hold their posts by such tenure as Congress sees fit to give them. Their positions may be regulated completely by Congress, or Congress may delegate the exercise of its regulatory power, under proper standards, to the Civil Service Commission . . .

¹¹²

Another aspect of the administrative process that compromises the ALJ's independence is the fact that its agency can review and reverse an ALJ's decision merely because of internal rules and policy.¹¹³

However, some legal scholars argue that a lack of independence is not fatal to the administrative state because true independence could be hazardous and should be viewed as a means to an end anyways.¹¹⁴ These scholars believe that independence should be granted only to the extent necessary to ensure impartiality in the administrative process, and that any more would run contrary to our legal system.¹¹⁵ The fact that the ALJ enjoys salary protection, tenure, and removal for cause by a constitutionally protected procedure is the essential characteristic that assists the administrative state's impartiality in its decision-making authority.¹¹⁶ According to

¹¹¹ *Id.*

¹¹² *Id.* at 1210 (quoting *Ramspeck v. Federal Trial Examiners*, 345 U.S. 128, 133 (1953)).

¹¹³ *Id.* at 1211.

¹¹⁴ *Id.* at 1214–15.

¹¹⁵ *Id.* at 1214. Complete independence of the judiciary would destroy the system of checks and balances our framers embodied in our Constitution. *Id.* at 1215.

¹¹⁶ *Id.* at 1215.

some scholars, this impartiality is the only trait that an ALJ possesses that raises them to the status of an actual judge. Otherwise, the two are fundamentally different.¹¹⁷

In *B&B Hardware, Inc. v. Hargis Industries, Inc.*,¹¹⁸ the U.S. Supreme Court agreed with the Eighth Circuit's determination that TTAB proceedings have an issue preclusive effect in subsequent proceedings.¹¹⁹ In that case, B&B Hardware, owner of the SEALTIGHT mark, filed an opposition against Hargis's registration of its SEALTITE mark.¹²⁰ While the TTAB proceeding was pending, B&B Hardware also filed a civil lawsuit alleging trademark infringement.¹²¹ After the TTAB found a likelihood of confusion for the purpose of registration and the Eighth Circuit found no likelihood of confusion for the purpose of infringement, B&B Hardware appealed to the U.S. Supreme Court claiming that the district court should have applied issue preclusion.¹²²

The Court in *B&B Hardware* analyzed the policy goals behind issue preclusion and Congress's intent to determine whether TTAB proceedings should have issue preclusive effect.¹²³ First, the Court stated that the TTAB's status as an administrative agency and not an Article III court does not automatically foreclose the applicability of issue preclusion to its proceedings.¹²⁴ Instead, the Court emphasized that the reason the judiciary constructed issue preclusion was to “protect[] against ‘the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] reliance on judicial action by minimizing the possibility of inconsistent verdicts’” – a function that is equally important in TTAB proceedings.¹²⁵ Finally, the Court illustrated the general principal that courts must assume that Congress passes laws with the expectation that common law rules will apply with equal force to its decrees

¹¹⁷ *Id.* at 1217.

¹¹⁸ 135 S. Ct. 1293 (2015).

¹¹⁹ *Id.* at 1302.

¹²⁰ *Id.* at 1298–99.

¹²¹ *Id.* at 1299.

¹²² *Id.*

¹²³ *Id.* at 1302–05.

¹²⁴ *Id.* at 1302.

¹²⁵ *Id.* at 1302–03.

unless suggested otherwise.¹²⁶ Since issue preclusion had been a well-established principle of the common law since its inception, and Congress had not disclaimed issue preclusion in the Lanham Act, Congress must have intended issue preclusive effect for TTAB proceedings.¹²⁷ Since affording issue preclusive effect to TTAB proceedings promotes the policies underlying issue preclusion's inception, and the Court found Congress anticipated issue preclusive effect in administrative proceedings, it gave issue preclusive effect to TTAB decisions.¹²⁸

Judge Proctor offered § 2106 of Title 28 of the United States Code, which gives the district court its options when remedying a case properly brought before it for review¹²⁹ as proof that equitable vacatur should apply with equal force to administrative agencies because administrative agencies are essentially the lesser equivalent of an Article III court.¹³⁰ However, the fact that the respective proceedings are so similar¹³¹ and the fact that the U.S. Supreme Court established issue preclusive effect for that administrative agency¹³² shows that the U.S. Supreme Court and Congress associate

¹²⁶ *Id.* at 1303.

¹²⁷ *Id.* at 1304–05.

¹²⁸ *Id.*

¹²⁹ 28 U.S.C. § 2106 (2016) (“modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.”).

¹³⁰ *Houndstooth Mafia*, 163 F. Supp. 3d at 1157.

¹³¹ *See* *Federal Maritime Commission v. State Ports Authority*, 535 U.S. 743 (2002). The TTAB's rules of procedure for oppositions are listed in Part 2 of Chapter 37 of the Code of Federal Regulations, and its initiation and proceedings are very similar to that of an Article III court. Section 2.101 through Section 2.107 of the rules require that a party seeking to oppose the registration of a trademark must file an opposition with notice upon all parties involved, at which point the other party must file a timely answer. 37 C.F.R. §§ 2.101–07 (2016). Section 2.116 through 2.136 lists the rules of procedure for opposition proceedings including: rules of propounding discovery, conducting depositions, and means of conducting oral argument. 37 C.F.R. §§ 2.116–36 (2016). Both code sections parallel the Federal Rules of Civil Procedure, and the TTAB's rules even expressly state that the Federal Rules of Civil Procedure should govern in the event that the Code of Federal Regulations is silent on an issue of procedure in the proceeding. *See* 37 C.F.R. § 2.116 (2016).

¹³² *See* O'Rourke, *supra* note 43.

administrative agencies as the lesser equivalent of an Article III court for all purposes.

In each of the *Federal Maritime Commission*, *Butz*, and *B&B Hardware* cases, the Court flatly rejected the proposition that certain common law principles and constitutional rights are inapplicable to administrative agencies solely because administrative agencies are not Article III courts.¹³³ Instead, the Court looked to the rationale underlying the respective principles, rights, and statutory constructions to decide whether a principle should apply with equal force to administrative agencies.¹³⁴ This framework provides proper structure for analyzing whether an administrative agency should be treated the same as an Article III court in certain circumstances.

Since the goals prompting the creation of equitable vacatur are wholly present in administrative proceedings just as they are in Article III courts, and there is no indication that Congress has intended otherwise, equitable vacatur should also be applicable to administrative agencies. The U.S. Supreme Court in *United States v. Munsingwear* emphasized the need to preserve precedent.¹³⁵ Despite this countervailing concern, the Court stated that a party should not be forced to acquiesce in a judgment when the circumstances are such that review is precluded through happenstance.¹³⁶ Since the Supreme Court established the idea of equitable vacatur, many courts have applied the remedy in the interests of justice despite the need to preserve precedent.¹³⁷

The fact that litigants are a party to a proceeding in the TTAB instead of a party to a proceeding in an Article III court does not change the fact that an adverse judgment stands against them. In fact, the decision in *B&B Hardware*, which gives issue preclusive effect to administrative agency decisions, makes an adverse judgment even more harmful to litigants in administrative proceedings.¹³⁸ As such, a party that suffers an adverse judgment from the TTAB suffers a very similar plight as a party that suffers an adverse judgment in an Article

¹³³ *Federal Maritime Commission*, 535 U.S. at 743; *Butz*, 438 U.S. at 511; *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015).

¹³⁴ *Id.*

¹³⁵ 340 U.S. 36, 106. (1950).

¹³⁶ *Id.* at 107.

¹³⁷ *See supra* Part II(C).

¹³⁸ *See supra* note 102.

III court proceeding. Therefore, since equitable vacatur was created to alleviate the effects of an adverse judgment upon a party who, through happenstance, can no longer litigate, applying equitable vacatur to TTAB proceedings advances the equitable considerations underlying the remedy's inception. Under the proposed framework, we must also consider whether there is clear congressional intent to the contrary. However, since the Lanham Act does not indicate whether or not Congress was opposed to applying equitable principles to the TTAB, it seems to hold that equitable vacatur should be applicable to the TTAB.¹³⁹

In the absence of express statutory language or guiding principles, Judge Proctor's comparison of the TTAB to an Article III court does little to justify applying the remedy of equitable vacatur to an administrative agency. Although the Administrative Procedure Act attempts to draw some guidelines for the interactions between the courts and administrative agencies, the only expressly granted power courts have over the TTAB is laid out in the Lanham Act¹⁴⁰ and Title 5 of the United States Code.¹⁴¹ Although these provisions of the United States Code and list the powers of administrative agencies and the scope of review of an administrative adjudication, the provisions seem to be silent in the event a case becomes moot by way of settlement.¹⁴² Furthermore, the TTAB is part of an administrative agency. Legal scholars in general have referred to the administrative state as the fourth branch of government,¹⁴³ which seems to imply it is independent in its own right. As such, because the two institutions are fundamentally different, attempting to draw a general comparison between the TTAB and an Article III court makes little sense when determining whether the court has the power to apply the remedy of equitable vacatur.

¹³⁹ See *infra* note 120. This is especially the case because Congress has had at least 50 years since the inception of equitable vacatur to state any intent to the contrary. *Munsingwear*, 340 U.S. 39–41.

¹⁴⁰ 15 U.S.C. § 1051 (2016).

¹⁴¹ Administrative Procedure Act of 1946, 5 U.S.C. §§ 500–04 (2016). Title 5 of the United States Code lists administrative procedure, powers of administrative agencies, and the scope of review of a district court reviewing an administrative decision. *Id.*

¹⁴² *Id.*

¹⁴³ Manry, *supra* note 14, at 421–22.

Instead, § 1071(b)(1) gives the most weight to the applicability of equitable vacatur to the TTAB since it provides that “[t]he court may adjudge that an applicant is entitled to a registration upon the application involved, that a registration involved should be canceled, or such other matter as the issues in the proceeding require, as the facts in the case may appear.”¹⁴⁴ The court in *Houndstooth Mafia* claimed that upholding vacatur of the TTAB’s judgment as a term of the settlement between The University and Houndstooth Mafia Enterprises constituted “such other matter[s] as the issue[s] in the proceeding require[d].”¹⁴⁵ This approach establishes jurisdiction over the TTAB better than attempting to draw a general comparison between the TTAB and a trial court because § 1071(b)(2) acts as a catchall provision which would most appropriately encompass the power to craft a remedy in the event of settlement.

The circumstances surrounding the *Houndstooth Mafia* case represent the ideal situation for which the U.S. Supreme Court established the remedy of equitable vacatur. The U.S. Supreme Court established the remedy to provide relief for “[a] party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of the circumstance, [and] ought not in fairness be forced to acquiesce in the judgment.”¹⁴⁶ In the *Houndstooth Mafia* case, Houndstooth Mafia Enterprises could no longer afford to litigate the matter further and therefore required a settlement or a default judgment.¹⁴⁷ The U.S. Supreme Court has recognized that in such a case, the remedy of equitable vacatur facilitates orderly procedure at the cost of losing potentially good law and the risk of encouraging litigious parties to appeal.¹⁴⁸ In recognizing the remedy at the cost of

¹⁴⁴ 15 U.S.C. § 1071(b)(1) (2016).

¹⁴⁵ *Houndstooth Mafia*, 163 F. Supp. 3d at 1162.

¹⁴⁶ See *U.S. Bancorp Mortgage v. Bonner Mall Partnership*, 513 U.S. 18, 25 (1994).

¹⁴⁷ *Houndstooth Mafia*, 163 F. Supp. 3d at 1157.

¹⁴⁸ *U.S. Bancorp Mortgage*, 513 U.S. at 25. The U.S. Supreme Court engaged in a thorough discussion of public policy considerations involved in granting equitable vacatur. *Id.* at 26–29. The Court believed the public interest in preserving precedent is outweighed by considerations of fairness. *Id.* at 26–27. In other words, when a party’s right to appeal to a higher court is frustrated by the circumstances, public interest must yield to equity. *Id.* The Court was reluctant to conclude that equitable vacatur in such situations would encourage settlement because there is

losing valuable precedent and in the face of uncertainties of its effects on settlement, the U.S. Supreme Court showed a great interest in protecting a party's right to appeal an adverse judgment and challenge the merits regardless of whether the case is moot by way of settlement.¹⁴⁹ Therefore, it is not only likely that the U.S. Supreme Court would recognize the importance of respecting The University's right to an appeal, but it would also most likely interpret that right as within the scope of § 1071. Furthermore, relying on § 1071(b)(1) focuses on remedying the real problem in the *Houndstooth Mafia* case, whether The University's right to appeal would be wrongfully taken from them, instead of encouraging a contentious and irrelevant debate about the relative positions of the ALJ and the Article III court judge.

V. EFFECTS

Although the *Houndstooth Mafia* case is not binding case law, Judge Proctor's unprecedented decision may ring loudly throughout the country and result in other courts following suit. If other courts were to follow Judge Proctor's decision, their precedent would have profound effects on TTAB litigants and possibly litigants to proceedings in other administrative agencies.

A. *The Practical Consequences for TTAB Litigants*

It is unclear what effects the advent of equitable vacatur as a remedy in appealing TTAB proceedings could have on settlement and litigation, but considering the factors which may affect a litigant's decision sheds some light on the value of the remedy. To identify these factors, it is useful to parse the classes of cases in which equitable vacatur may apply

In order for equitable vacatur to apply, there must be exceptional circumstances such that "[a] party who seeks review of the merits of an adverse ruling . . . is frustrated by the vagaries of the circumstance, [and] ought not in fairness be forced to acquiesce in

also a possibility that litigants will choose to roll the dice and pursue litigation in hopes that any adverse judgment could be vacated on appeal. *Id.* at 28.

¹⁴⁹ *Id.*

the judgment.”¹⁵⁰ To date, situations which rise to the level of exceptional circumstances include depletion of a non-appealing party’s legal and financial resources, the bankruptcy category¹⁵¹ when vacating a prior decision is a necessary condition of settlement, the conditional settlement category,¹⁵² and when the appealing party has acquiesced in settlement at the request of the court instead of on their own accord, the requested settlement category.¹⁵³ However, the U.S. Supreme Court has only recognized the bankruptcy category as an example of exceptional circumstances.¹⁵⁴

Widespread recognition of the bankruptcy and conditional equitable vacatur categories may create useful but dangerous tools for TTAB litigants. First off, since equitable vacatur in the requested settlement category is ultimately a tool for judicial intervention where a judge may dangle a carrot in front of the losing party in order to expedite a result, judicial impartiality seems to remove the potential for abuse from the equation.¹⁵⁵ On the other hand, since equitable vacatur in the conditional and bankruptcy categories may be initiated by the parties, equitable vacatur in those classes of cases may affect determinations to initiate settlement and/or litigation at any time from the instance of a cause of action up until a final judgment is reached.

In deciding to initiate a TTAB proceeding or appeal an adverse judgement, a TTAB litigant will most likely consider the merits of their own case, the resources available to the opposing party, the

¹⁵⁰ *U.S. Bancorp*, 513 U.S. at 25 (citing *Munsingwear*, 340 U.S. at 39).

¹⁵¹ *U.S. Bancorp*, 513 U.S. at 18 (denying request for equitable vacatur in the absence of exceptional circumstances); *Pacific Trading Cards*, 150 F.3d 149 (2d Cir. 1998) (granting request for equitable vacatur because Pacific Trading Cards, Inc. would have difficulty raising the funds to post a bond funding further litigation).

¹⁵² *Microsoft Corp. v. Bristol Technology, Inc.* 250 F.3d 152 (1st Cir. 2001) (granting request for equitable vacatur because the judgment below involved integral findings and equitable vacatur was a necessary condition of settlement between the parties).

¹⁵³ *Motta v. Director of I.N.S.*, 61 F.3d 117 (1st Cir. 1995) (granting request for equitable vacatur because the I.N.S. only considered settlement at the request of the court and therefore did not acquiesce in settlement and forfeit its right to appeal).

¹⁵⁴ *U.S. Bancorp*, 513 U.S. at 18.

¹⁵⁵ *Id.*

economic costs of litigation, and the direct harms or benefits of any possible TTAB decisions. A putative litigant would likely be slightly more inclined to initiate a TTAB proceeding and/or appeal an adverse judgement as long as the merits of their claims are sufficient enough to avoid sanctions or malicious prosecution. The reason the availability of equitable vacatur as a remedy should only make a litigant only slightly more inclined to initiate a TTAB proceeding or appeal is because whether the remedy will be well-received also depends on the likelihood that the opposing party would be interested in a settlement and the value a court would place on the judgement.¹⁵⁶ Of course, a settlement may be more likely when the opposing party has very little financial resources to fund litigation; and, as in *Houndstooth Mafia*, settlement may be inevitable if a party's financial resources are completely depleted.¹⁵⁷ The prospect of settlement would also likely depend on the relative merits of each party's claims or defenses. However, the decision to enter a TTAB proceeding or appeal an adverse judgement may ultimately come down to whether the economic costs of litigation outweigh the direct benefits or harms of an adverse judgement on the value or strength of a mark.

Since there seems to be an inherent uncertainty in relying on equitable vacatur as a remedy, widespread recognition of the remedy would probably not prompt a large change in the overall amount of future settlements or litigation. As alluded to before, the likelihood of settlement and the value a judge places on any precedent from the TTAB, by definition, directly affects the value and effectiveness of equitable vacatur as a tool for TTAB litigants in the bankruptcy and conditional settlement categories.¹⁵⁸ The prospects of settlement and the value of any TTAB precedent, then, directly affect the value and effectiveness of equitable vacatur in the bankruptcy and conditional settlement categories. This inherent uncertainty renders a generalization about the effects of equitable vacatur on settlement and litigation virtually unrealizable without empirical data. However, on a case-by-case basis, whether the availability of equitable vacatur

¹⁵⁶ *Id.* at 27–28 (requiring that courts consider how the remedy facilitates settlement and the need for judicial precedent).

¹⁵⁷ *Houndstooth Mafia*, 163 F. Supp. 3d at 1160.

¹⁵⁸ *US Bancorp*, 518 U.S. at 27–28 (requiring that courts consider how the remedy facilitates settlement and the need for judicial precedent).

in any given jurisdiction would prompt a party to settle or initiate a TTAB proceeding or appeal seems to ultimately come down to whether the decision strikes the proper balance when considering the merits of their own case, the resources available to the opposing party, the economic costs of litigation, and the direct harms or benefits of various judgments. For example, when the major point of disagreement about settlement conditions between the parties is vacating the TTAB proceedings, a putative appellant may only decide to appeal when the adverse precedent is harmful enough to the value or strength of their mark to warrant the cost and hassle of litigation and the TTAB decision has minimal value.

The U.S. Supreme Court in *U.S. Bancorp* was reluctant to conclude what effect establishing equitable vacatur as a remedy would have on litigants.¹⁵⁹ The Court believed that equitable vacatur could facilitate settlement, in that it would give parties an alternative to appellate proceedings in the event that one party is struggling to continue with litigation.¹⁶⁰ However, the Court also believed “[s]ome litigants, at least, may think it worthwhile to roll the dice rather than settle in the district court, or in the court of appeals, if, but only if, an unfavorable outcome can be washed away by a settlement-related vacatur.”¹⁶¹ In fact, some practice guides¹⁶² and journal articles¹⁶³ advise that parties appeal TTAB judgments whenever possible to avoid an adverse TTAB precedent, but it would seem that this advice is only founded in those classes of cases where the decision to initiate a TTAB proceeding or appeal strikes the proper balance as mentioned above.

¹⁵⁹ *Id.* at 28.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Malla Pollack, § 7:19 *Protecting Marks*, in CORPORATE COUNSEL’S GUIDE TO TRADEMARK LAW (July 2016).

¹⁶³ Steve Wieland, *Don’t Let the TTAB Decide Your Next Infringement Dispute*, 59 ADVOCATE 38 (2016).

B. Adopting the Houndstooth Mafia Decision: A Jurisdictional Epidemic?

Although the circumstances surrounding litigation in the *Houndstooth Mafia* case were unusual, the issue of equitable vacatur and the TTAB is bound to present itself again,¹⁶⁴ but would the outcome be different in another court? Judge Proctor's opinion is laden with indignation, which suggests that his views and emotions may have played a big part in his ruling to compel the TTAB to vacate its decision.¹⁶⁵ In the absence of any on-point precedent, a future court's decision may depend on the ruling judge's perceptions.

Legal scholars have long studied the effects of judicial ideologies and precedent in our judicial system. Ronald Dworkin is well known in this field for his chain novel theory.¹⁶⁶ The chain novel theory is centered on a useful analogy for understanding how a judge's ideologies influence the outcome of a case in our system of stare decisis.¹⁶⁷ Dworkin compares judicial opinion writing to a series of novelists writing each chapter in succession, each constrained by the plot in the chapter preceding their own.¹⁶⁸ Although the first author has more freedom than the authors which follow him, he does not possess completely free reign to set the tone for the rest of the novel because he must conform to the basic elements of the novel's form.¹⁶⁹ Similarly, in cases of first impression, a judge must first analyze any statutory text and any related cases in an attempt to apply the statute to the circumstances of the case.¹⁷⁰ Stefanie Lindquist and Frank Cross confirmed this theory empirically in cases of first impression and found that judicial ideologies are most prominent in

¹⁶⁴ Especially considering that some corporate counsel guides list the *Houndstooth Mafia* case as a sort of play book for vacating unfavorable decisions. Corporate Counsel's Guide to Trademark Law, *supra* note 106.

¹⁶⁵ See generally *Houndstooth Mafia*, 163 F. Supp. 3d 1150.

¹⁶⁶ Stefanie A. Lindquist & Frank B. Cross, *Empirically Testing Dworkin's Chain Novel Theory: Studying The Path of Precedent*, 80 N.Y.U. L. REV. 1156, 1168 (2005).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1179.

¹⁷⁰ *Id.* at 1168–69.

cases of first impression.¹⁷¹ The *Houndstooth Mafia* case is no exception.

Although the U.S. Supreme Court has firmly established equitable vacatur as a remedy under exceptional circumstances,¹⁷² applying it to an administrative agency was unprecedented, and very little authority constrained Judge Proctor's decision. Section 1071(b) of title 15 of the United States Code was the only cited authority which directly addressed the applicability of equitable vacatur to the TTAB.¹⁷³ Thus Judge Proctor's interpretation of "such other matters," as used in § 1071(b),¹⁷⁴ comprised the bulk of the authority binding his judgment.¹⁷⁵ However, reasonable minds could differ on whether voluntary settlement falls within the gambit of such other matters as envisioned by Congress when drafting § 1071(b).¹⁷⁶ As such, Judge Proctor, and any other judge deciding this issue for that matter, would be required to either speculate as to whether Congress intended the court to enjoy the same freedom to craft a remedy which an appellate court would enjoy under appellate jurisdiction¹⁷⁷ or attempt to extrapolate other judicial opinions characterizing administrative agencies to analogize similar treatment of administrative agencies in other cases¹⁷⁸.

Under either approach, a judge's own characterization of an administrative agency, relative to an Article III court, is bound to factor into the equation—as was the case in *Houndstooth Mafia*.¹⁷⁹

¹⁷¹ *Id.* at 1184.

¹⁷² See *supra* Part II(C) and accompanying notes.

¹⁷³ See *supra* Part IV(B) and accompanying notes.

¹⁷⁴ See 15 U.S.C. § 1071(b) (2015).

¹⁷⁵ *Id.*

¹⁷⁶ The legislative history on this clause is extremely sparse, as it has remained unchanged in the seventy-one years since the Lanham Act's inception in 1946. Lanham Act of 1946 Pub. L. No. 79-489, § 1071(b), 60 Stat. 435 (1946) ("[S]uch other matter as the issues in the proceeding require, as the facts in the case may appear").

¹⁷⁷ Which is what Judge Proctor did. See *supra* Part III(B)(ii) and accompany notes.

¹⁷⁸ Such as the framework envisioned in this article.

¹⁷⁹ *Houndstooth Mafia*, 163 F. Supp. 3d at 1156 n. 4 (citing *About the Trademark Trial and Appeal Board*, USPTO (Mar. 23, 2015), <https://www.uspto.gov/trademark/laws-regulations/trademark-trial-and-appeal-board>).

Judge Proctor reasoned that because the TTAB is “not a court at all” but instead “functions like a court,” Congress’s grant of remedial power must have included the powers endowed upon a court of appellate jurisdiction under § 2106.¹⁸⁰ Viewing an administrative agency not as a court, but as its functional equivalent can have one of two implications: (1) the administrative agency can be treated the same as an Article III court for the purpose of equitable vacatur because it is functionally equivalent to an Article III court; or (2) the TTAB is a distinct entity which enjoys a certain degree of independence to regulate its own internal policies and procedures because it is not a court, but an extension of the legislative branch’s power.¹⁸¹ Throughout Judge Proctor’s opinion, he repeatedly draws attention to the fact that the TTAB ignored the district court’s mandate—making it “crystal clear [that] the court’s Final Consent Judgment is not merely ‘a piece of paper’; [but] an order of a court sitting in appellate review.”¹⁸² Judge Proctor’s charged diction elucidates his indignation—it is almost as if Judge Proctor feels personally disrespected by the TTAB’s actions. Such a state of mind could easily sway a judge’s decision to respect the TTAB’s independence and allow it to uphold its precedential decision. So much so, that it makes one wonder how a timely intervention by the TTAB could have affected the outcome in the *Houndstooth Mafia* case. If the TTAB had, it not only would have enjoyed certain procedural options it did not otherwise have, but the TTAB’s timely intervention would have exhibited a show of respect that may have prompted Judge Proctor to reciprocate by affording more weight to the TTAB’s views.

Judge Proctor’s characterization of the TTAB’s precedential decision also elucidates his indignation.

In addition to not having the authority to ignore this court's final judgment, the TTAB's reason for refusing

¹⁸⁰ *Id.*

¹⁸¹ See *supra* Part IV(B) and accompanying notes.

¹⁸² *Houndstooth Mafia*, 163 F. Supp. 3d at 1162. Other examples include: (1) “the mandate rule requires the TTAB to follow, rather than reexamine (or worse, ignore), this court’s final consent judgment.” *Id.* at 1157; (2) “the TTAB said (in essence), ‘we don’t have to follow your decision—we don’t have to vacate our decision.’” *Id.* at 1163; and (3) “[the TTAB] rested on its laurels.” *Id.* at 1164.

to vacate its decision is also erroneous. The principle argument offered by the TTAB is that, under *U.S. Bancorp*, its “precedential” decision does not become moot based on the parties' settlement of the action. But the TTAB misapplies the Supreme Court's decision in *U.S. Bancorp*. It also flatly mischaracterizes the facts of that case.¹⁸³

One can almost imagine Judge Proctor applying air quotes to the word precedential as he is discussing the importance of the TTAB's decision. His punctuation displays a lack of respect for the importance the TTAB places on its precedential decisions. His tone shows the TTAB's refusal to follow the district court's decision may have also played a part in Judge Proctor's lack of respect for the TTAB's precedential decision.

When the circumstances surrounding the *Houndstooth Mafia* case reappear in another court, a judge's perceptions and ideologies may also play a big part in the outcome. As in the *Houndstooth Mafia* case, how a judge perceives the nature of an administrative agency and the importance of that administrative agency's decisions may affect that judge's propensity to apply equitable vacatur in the case. Furthermore, since administrative agency adjudicators and Article III courts have a contentious history,¹⁸⁴ it is likely that ideologies such as a judge's characterization of the administrative agency's actions and expressions would be a factor in future cases as well.

¹⁸³ *Id.* at 1158 (original quotations and underlining).

¹⁸⁴ See *supra* note 23.

C. Adopting the Houndstooth Mafia Decision: A Legislative Epidemic?

The Association of Administrative Law Judges¹⁸⁵ reports over thirty-four federal agencies that employ ALJs.¹⁸⁶ Certain factors may limit the possibility that these judge's decisions may be vacated as a result of equitable vacatur. Such factors include the fact that some agencies possess a prosecutorial aspect, others employ rules to limit the probability of vacatur, and applicable law may limit the availability of judicial review. On the other hand, a decision by an ALJ overseeing a proceeding that is adversarial in nature and lacks the aforementioned factors may be susceptible to equitable vacatur.

Some administrative decisions are invulnerable to equitable vacatur because their proceedings are prosecutorial in nature. In the *Houndstooth Mafia* case, The University raised the issue of equitable vacatur because it was a repeat player in the TTAB and refused to settle unless equitable vacatur remained a term of settlement.¹⁸⁷ In general, since equitable vacatur requires that a party, through happenstance, can no longer seek review of an initial decision,¹⁸⁸ equitable vacatur necessarily requires an interested party (one who is a repeat player and fears the decision will affect them in the future). However, the identities and relationships of the usual parties involved in administrative adjudications to certain agencies foreclose the possibility that an interested party will push for equitable vacatur. For example, consider the average judicial review of a decision by the Departmental Appeals Board (DAB) of the Department of Health and Human Services.¹⁸⁹ Imagine that the Center for Medicare and

¹⁸⁵ The Association of Administrative Law Judges was founded in 1971, and its membership consists of ALJs from a diverse set of administrative agencies. AALJ, *Mission and History*, AALJ (Feb. 4, 2017, 5:10 PM), <https://www.aalj.org/mission-history>. The association's goal is to "defend judicial independence and due process during administrative hearings, and advance professionalism of Administrative Law Judges." *Id.*

¹⁸⁶ AALJ, *Agencies Employing Administrative Law Judges*, AALJ.ORG (Feb. 4, 2017, 5:10 PM), <https://www.aalj.org/agencies-employing-administrative-law-judges>.

¹⁸⁷ *Houndstooth Mafia*, 163 F. Supp. 3d at 1154.

¹⁸⁸ *Munsingwear*, 340 U.S. at 39.

¹⁸⁹ The Department Appeals Board of the Department of Health and Human Services handles "appeals from civil monetary penalties and other enforcement

Medicaid (CMS) services finds that a health care provider is engaging in fraudulent activity, and when the center imposes penalties, the health care provider appeals to the DAB. Assuming the DAB takes no other type of administrative action, one of the parties is going to win the appeal. First, assume that the CMS wins the appeal with the DAB, and the health care provider subsequently appeals to a federal court. In such a case, neither party would be in a position to request equitable vacatur from the appellate court. The CMS would not want to vacate a favorable decision and the health care provider would not be able to establish any amount of unfairness in its ability to litigate, which would justify avoiding penalties through equitable vacatur. On the other hand, if the health care provider won the appeal under the DAB, still neither party would be in a position to request equitable vacatur from a federal court. This time the health care provider would not want to vacate the favorable judgment and the CMS would not have the right to seek judicial review.¹⁹⁰ Therefore, no matter what the outcome of the appeal to the DAB, equitable vacatur would not be an option. In general, an agency that is prosecutorial in nature, who is a party to an administrative proceeding, may not have the option to appeal an adverse decision to a federal court due to statutory barriers, and thus unable to seek equitable vacatur. Furthermore, the other party to an administrative proceeding which is prosecutorial in nature would also be unable to seek equitable vacatur because its punishment cannot be avoided. Thus, decisions by ALJs who are reviewing agency action that is prosecutorial in nature are safe from the effects of equitable vacatur.

In what seems like an effort to limit the likelihood that judicial resources will be wasted on decisions that will only be later vacated

actions taken by the Centers Medicare & Medicaid Services (CMS) against nursing home providers, clinical laboratories, home health care agencies and other health care providers.” Department of Health and Human Services, *Appeals to DAB Administrative Law Judges (ALJs)*, HHS (Feb. 4, 2017, 6:01 PM), <https://www.hhs.gov/about/agencies/dab/different-appeals-at-dab/appeals-to-alj/index.html#>. Other enforcement actions include fraud, abuse, and non-compliance determinations; provider or supplier Medicare enrollment and revocation proceedings; and civil monetary penalty determinations by the Social Security Administration (SSA) by interagency agreement. *Id.*

¹⁹⁰ 42 C.F.R. § 498.80 (2016). Only the provider is allowed to seek judicial review of the Departmental Appeals Board. *Id.*

by a district court, at least one agency essentially eliminated the availability of equitable vacatur from a litigant's toolbox from the get-go by imposing internal regulation.¹⁹¹ On October 17, 2016, the TTAB published new changes to the TTAB's Rules of Practice, which included additions and amendments that indirectly affect the viability of equitable vacatur for TTAB litigants.¹⁹² The TTAB amended 37 C.F.R. § 2.117(c) to clarify that the TTAB retains the discretion to suspend proceedings sua sponte and further retains the discretion to condition approval of suspension on the parties supplying necessary information about the status of settlement talks or trial activities.¹⁹³ Furthermore, the TTAB added several amendments to section 2.145, which provide the TTAB with greater transparency in actions of the parties to TTAB proceedings.¹⁹⁴ In particular, the TTAB amended section 2.145 to require litigants to file notice of appeals and notice of elections with the Electronic System for Trademark Trial and Appeals (ESTTA) and a copy with the Office of the General Counsel (Office) in order to "enhance the Office's ability to properly handle applications, registrations, and proceedings while on review in federal court."¹⁹⁵ Together, these two changes effectively reduce the likelihood that TTAB decisions will be vacated through equitable vacatur—effectively saving judicial resources—through first improving notice to the TTAB of settlement talks and appeals to federal courts under section 2.145 and then by clearly reserving the right to suspend proceedings sua sponte under section 2.117(c). In doing so, the TTAB effectively limits the availability of equitable vacatur to TTAB litigants. This approach can also be employed by other administrative agencies to reach the same result.

¹⁹¹ See, e.g., Miscellaneous Changes to Trademark Trial and Appeal Board Rules of Practice, 81 Fed. Reg. 69950 (proposed Oct. 7, 2016) (codified at 37 C.F.R. § 2.145 (2016)).

¹⁹² Perhaps coincidentally, these rule changes came to fruition a mere eight months after Judge Proctor ruled that equitable vacatur applied to the TTAB.

¹⁹³ See 37 C.F.R. § 2.117(c) (2017).

¹⁹⁴ *Id.* § 2.145 (2017).

¹⁹⁵ Miscellaneous Changes to Trademark Trial and Appeal Board Rules of Practice, 81 Fed. Reg. 69950 (proposed Oct. 7, 2016) (codified at 37 C.F.R. § 2.145 (2016)).

It should be clear that a litigant must first appeal to a federal court before equitable vacatur can apply. Therefore, an agency decision that is not reviewable by a federal court cannot be vacated on equitable grounds. An agency decision may not be reviewable for various reasons, but in general, agency action is reviewable under the Administrative Procedure Act¹⁹⁶ unless there is evidence of legislative intent to the contrary, and unless the language or structure of a particular statute precludes judicial review.¹⁹⁷

Since there are many considerations affecting the availability of equitable vacatur in administrative proceedings, an attorney practicing administrative law should not be too quick to celebrate the *Houndstooth Mafia* decision. Firstly, litigators practicing administrative law under agencies that are prosecutorial in nature may not be able to bank on equitable vacatur because the agency may erect barriers to the use of the remedy. Secondly, litigators hoping to capitalize on using equitable vacatur in the event of an adverse judgment must also be wary of the rules of practice in that proceeding because the agency may require notice of settlement talks and appeals. Thirdly, a litigator hoping to use equitable vacatur as a safety net must always consider the reviewability of the issuing judge's decision before counting their chickens. However, if these considerations do not raise any red flags, litigants may be able to consider equitable vacatur a valuable addition to their bags of tricks when deciding whether to file an appeal with an administrative agency.

VI. CONCLUSION

The *Houndstooth Mafia* decision was unprecedented in the world of administrative law. As a result of the tension between the parties involved, the decision veered off into an unconvincing debate about the relative powers of an Article III court and administrative agencies. Nonetheless, the outcome may have a significant impact for

¹⁹⁶ 5 U.S.C. § 704 (2016).

¹⁹⁷ *Id.* For example, a statute requiring a comprehensive city demonstration program to have widespread citizen participation in order to receive federal aid bars judicial review. *North City Area-Wide Council, Inc. v. Romney*, 428 F.2d 754 (3d Cir. 1970).

agencies where certain limiting circumstances are not present, but most agencies will not be impacted at all.

Considering the high rate of cases that settle in court, it may seem odd that no federal court has vacated an ALJ's decision as a term of settlement. It is possible that the TTAB's refusal to follow the district court's mandate may have provoked Judge Proctor to enforce the parties' consent judgment.¹⁹⁸ The TTAB's perceptibly disrespectful actions caused Judge Proctor to add to an already contentious debate between Article III courts and administrative agencies by essentially calling the administrative venue the lesser equivalent.¹⁹⁹ In any event, the outcome has practical consequences for TTAB litigants and possibly other administrative agencies.²⁰⁰ Lastly, applying equitable vacatur to administrative agencies such as the TTAB in the future may have adverse consequences for litigants in those arenas.²⁰¹

¹⁹⁸ See *supra* Part V(B) and accompanying notes.

¹⁹⁹ See *supra* Part IV(B) and accompanying notes.

²⁰⁰ See *supra* Part V(C) and accompanying notes.

²⁰¹ See *supra* Part V(A) and accompanying notes.