

2018-2069

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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**IN RE FCA US LLC,**

*Appellant*

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Appeal from the United States Patent and Trademark Office,  
Trademark Trial and Appeal Board in No. 85650654

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**BRIEF OF AMICUS CURIAE MOAB INDUSTRIES, LLC  
IN SUPPORT OF APPELLEE DIRECTOR OF THE  
UNITED STATES PATENT AND TRADEMARK OFFICE**

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March 25, 2019

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re: FCA US LLC  
Case No. 2018-2069

**CERTIFICATE OF INTEREST**

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for Amicus Curiae

Moab Industries, LLC certifies that:

- 1. The full name of every party of amicus represented in the case:**

Moab Industries, LLC

- 2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:**

N/A

- 3. All parent corporation and any publicly held companies that own 10 percent or more ownership interest in the amicus curiae represented by me are:**

None.

- 4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or are expected to appear in this Court are:**

Jaburg & Wilk, P.C., Maria Crimi Speth, Aaron K. Haar, Phoenix, Arizona

- 5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal.**

None.

March 25, 2019

/s/ Aaron K. Haar  
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**STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE<sup>1</sup>**

Amicus Curiae Moab Industries, LLC (“Moab”) is the current owner of the federally registered service mark MOAB INDUSTRIES (U.S. Reg. No. 3,912,705), the mark cited by the United States Patent and Trademark Office (the “USPTO”) as grounds for denying Appellant FCA US LLC’s application for the mark MOAB. Moab believes the Trademark Trial and Appeal Board (the “Board”) correctly affirmed denial of Appellant FCA US LLC’s application and urges this Court to uphold the Board’s decision.

Moab is interested in this case because it will suffer direct and proximate harm if this Court reverses the decision of the Board and/or otherwise authorizes registration of the applied-for mark. Moab previously filed a lawsuit against Chrysler Group LLC, predecessor of Appellant FCA US LLC (“FCA”), alleging trademark infringement and related claims in the United States District Court, District of Arizona (the “District Court”), captioned as *Moab Industries, LLC v. Chrysler Group LLC*, Case No. 3:12-cv-8247-HRH. At the time of the District Court’s decision, FCA had ceased its use of the MOAB mark and indicated it had no intention of resuming such use. The District Court, noting that FCA had ceased use of the mark, found no likelihood of confusion based on the unique circumstances surrounding FCA’s previous use of the mark.

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<sup>1</sup> No person other than Amicus or its counsel authored this brief or contributed money intended to fund its preparation or filing.

Thereafter, approximately two years after FCA had discontinued its previous use of the mark, FCA sought to register and begin using the mark as part of a relaunched special-edition brand. The FCA's new use of the mark constitutes separate and distinct acts from those previously addressed by the District Court. Moreover, both the USPTO examining attorney and, subsequently, the Board concluded the issues before them were separate and distinct from the issues before the District Court. FCA seeks to blindly impose the District Court decision on the Board in an effort to obtain registration of the mark. Moab would be injured if this Court were to allow registration of the mark based on the distinct circumstances of the previous use.

## STATEMENT OF FACTS

Moab Industries, LLC (“Moab”) is the owner of the federally registered service mark MOAB INDUSTRIES in connection with “[a]utomotive conversion services, namely, installing specialty automotive equipment.” (U.S. Reg. No. 3,912,705). Moab, through its predecessor-in-interest, began using the mark MOAB INDUSTRIES in commerce no later than March 4, 2005. The mark achieved registration on February 1, 2011, with an effective date of registration on October 9, 2008. The mark was deemed incontestable on March 16, 2017.

The record of *Moab Industries, LLC v. Chrysler Group LLC*, 3:12-cv-08247-HRH (D. Ariz.), the infringement lawsuit at issue between Moab and Appellant FCA US, LLC would demonstrate as follows: Moab is in the business of customizing motor vehicles for off-road use. Moab customizes various types of vehicles for its customers. Customers most frequently request customization of JEEP-branded vehicles. Moab also regularly purchases, customizes, and sells spec vehicles. Moab markets its services through in-person sales, partnerships with automotive dealerships, online marketing, automotive industry trade shows, and other traditional channels of commerce.

Moab developed significant relationships with various Jeep dealerships over the years. Moab was a regular customer of Jeep and referred countless others to purchase Jeep products. Various representatives of Jeep’s corporate office and



dealerships had ongoing communications with Moab, visited Moab's Arizona premises, and viewed Moab's product/services both at Moab's premises and at industry trade shows. In early 2011, Moab had numerous conversations with a Jeep regional manager about Moab's services and potential joint business ventures.

On September 12, 2012, at an automotive trade show in Las Vegas, Moab observed Chrysler Group, LLC, then-owner of the Jeep brand and predecessor of Appellant FCA US LLC, ("FCA") unveil a MOAB edition of its Jeep Wrangler. Unbeknownst to Moab, FCA had—several months earlier—filed an intent-to-use application with the USPTO for the mark MOAB in connection with “[m]otor vehicles, namely, passenger automobiles, their structural parts, trim and badges.” (U.S. Serial No. 85,650,654). At the time of the trade show, the application had already been initially refused on grounds of likelihood of confusion with Moab's mark.<sup>2</sup> When Moab addressed concerns to Jeep's regional manager, the regional manager acknowledged the similarities between Jeep's “Moab edition” and the product of Moab's services. Shortly thereafter, Jeep's regional manager stopped responding to Moab's communications.

In December 2012, Moab filed a lawsuit against FCA for trademark infringement and related claims in the U.S. District Court for the District of Arizona (the “District Court”). FCA responded by filing various trademark-related

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<sup>2</sup> On April 2, 2013, the USPTO issued a final refusal of FCA's application for the same reason.

counterclaims<sup>3</sup> in addition to a petition to cancel Moab's registered mark with the USPTO. FCA further retaliated by placing Moab on a do-not-sell list under the pretense that Moab was illegally exporting its vehicles. In fact, Moab had never caused any of FCA's vehicles to cross international boundaries.

In the course of litigation, FCA emphasized it used the mark as JEEP WRANGLER MOAB and argued such use was not confusingly similar to MOAB INDUSTRIES. *See* Def.'s Mot. Summ. J. at 23, ECF No. 101, *Moab Industries, LLC v. Chrysler Group LLC*, 3:12-cv-08247-HRH (D. Ariz. June 6, 2014). At some point, FCA discontinued sales of the Moab edition, which it only sold in 2012 and 2013. *Id.* at p. 21. Through the remainder of the litigation, FCA made much of the fact it no longer used the mark, mooted Moab's claim for prospective injunctive relief and portraying Moab's damages calculations as opportunistic.

On October 6, 2016, following a trial to the court, the District Court issued its decision, concluding there had been no likelihood of confusion and denying both parties' claims for relief. As had been advocated by FCA, the District Court found FCA "has not infringed on [Moab]'s registered trademark (MOAB INDUSTRIES) by selling [FCA]'s JEEP WRANGLER MOAB Special Edition." Decision ¶ 69, ECF 265, *Moab Industries, LLC v. Chrysler Group LLC*, 3:12-cv-

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<sup>3</sup> FCA counterclaimed for (1) declaratory judgment it was not infringing the mark, (2) cancellation of the MOAB INDUSTRIES mark, (3) federal trademark dilution, (4) trademark infringement, and (5) state trademark dilution.

08247-HRH (D. Ariz. Oct. 6, 2016). The District Court further dismissed Moab’s claim for unfair competition because FCA “has not created the false or misleading impression that defendant’s JEEP WRANGLER MOAB Special Edition vehicles are those of [Moab].” *Id.* ¶ 70. The District Court noted FCA “manufactured and sold approximately 3,375 JEEP WRANGLER MOAB Special Edition vehicles,” *id.* ¶ 29, and that “defendant no longer uses the MOAB mark on its vehicles.” *Id.* ¶ 33. The District Court also found none of FCA’s counterclaims—including its claim for cancellation—were supported by the evidence and dismissed them all with prejudice. *See id.* p. 24. The District Court declined to take up FCA’s counterclaim for declaratory relief because the relief sought was “adequately addressed by the court’s finding and conclusions with respect to plaintiff’s claim and defendant’s other counterclaims.” *Id.* p. 17–18.

Moab timely appealed the decision to the Ninth Circuit, but ultimately dismissed the appeal on December 9, 2016.

Exactly two weeks later, on December 23, 2016, despite having repeatedly represented to the District Court that it ceased using the MOAB mark and had no intention to resume such use, FCA filed a request with the USPTO, seeking to lift the suspension of its application and to allow the mark to proceed to registration. FCA then recommenced its use of the mark—and, indeed, in a manner strikingly similar to the manner in which Moab uses its mark.



The top photograph reflects the manner in which FCA currently uses the mark; the bottom reflects Moab's use of its mark in the marketplace.

The USPTO examining attorney and, subsequently, the Trademark Trial and Appeal Board (the “Board”) properly evaluated the District Court’s decision, determined the issues before them were distinct, rejected FCA’s demand to deem the District Court’s decision preclusive, and concluded FCA’s application for the mark must be denied on grounds of likelihood of confusion with Moab’s mark. Both the examining attorney and the Board carefully reviewed the District Court’s opinion and wrote well-reasoned decisions, identifying the distinctions between the issues before them and those decided by the District Court.

## ARGUMENT

### **I. STANDARD OF REVIEW**

The Federal Circuit reviews legal conclusions of the Trademark Trial and Appeal Board de novo and its factual findings for substantial evidence. *M2 Software, Inc. v. M2 Comm’ns, Inc.*, 450 F.3d 1378, 1382 (Fed. Cir. 2006) (citing *Shen Mfg. Co. v. Ritz Hotel Ltd.*, 393 F.3d 1238, 1240 (Fed. Cir. 2004)). “Likelihood of confusion is a legal determination based on underlying facts.” *Coach Svcs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1365 (Fed. Cir. 2012) (citing *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 945 (Fed. Cir. 2000)). “The Board’s legal conclusion receives plenary review, while the factors relevant to likelihood of confusion are reviewed for support by substantial evidence.” *In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010)); *see*

also *In re Viterra Inc.*, 671 F.3d 1358, 1361, 101 U.S.P.Q.2d 1905 (Fed. Cir. 2012) (“For example, the question of similarity between two marks and the relatedness of goods are factual determinations. . . . We will not disturb such factual findings if they are supported by substantial evidence in the record.”).

The substantial evidence standard inquires whether a reasonable fact finder might have reached the Board’s decision. *In re Gartside*, 203 F.3d 1305, 1315 (Fed. Cir. 2000). In such case, the Board’s factual findings should be affirmed even if other evidence exists that would support a contrary factual finding. *In re Stereotaxis*, 429 F.3d 1039, 1042 (Fed. Cir. 2005). “Credibility determinations and weighting of evidence are the province of the PTO and the Board as finders of fact.” *In re Save Venice New York, Inc.*, 259 F.3d 1346, 1354 (Fed. Cir. 2001) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 575, 105 S.Ct. 1504 (1985)).

“Whether preclusion applies to a particular action is an issue of law.” *Jet, Inc. v. Sewage Aeration Sys.*, 223 F.3d 1360, 1362 (Fed. Cir. 2000) (citing *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 475 (Fed. Cir. 1991)).

## **II. THE BOARD’S DECISION SHOULD BE AFFIRMED.**

FCA advances two primary arguments in support of its claim that the Board erred in refusing registration: First, FCA argues the Board’s factual determinations concerning three of the 13 *DuPont* factors (degree of consumer care/sophistication, strength of the mark, and trade channels) were not supported by substantial

evidence. Second, FCA argues the Board may not inquire into the District Court's prior decision. Neither of these arguments is persuasive. This brief will address these issues in reverse order.

**A. The Board's Ruling Properly Addressed the District Court's Opinion and Determined the Issues Were Distinct.**

**1. The Board was not bound by the District Court's decision.**

FCA argues the Board is precluded from questioning the District Court's decision. FCA's argument hinges on whether the Board owes absolute deference to the District Court on the issue of "likelihood of confusion." FCA relies entirely on the fact the District Court found no likelihood of confusion between the two conflicting marks. It does not address the similarity of the case before the District Court. FCA simply argues that because the District Court found no likelihood of confusion in the infringement lawsuit, the Board must blindly apply the determination to register FCA's trademark. But the Board is under no such obligation to blindly apply a prior district-court determination, and issue preclusion is not properly at issue in this matter.

Initially, as addressed by the USPTO, issue preclusion does not apply in the *ex parte* context as no relevant parties exist against whom such preclusion might apply. See Brief for Appellee at 38 (citing *In re Trans Texas Holdings Corp.*, 498 F.3d 1290, 1297 (Fed. Cir. 2007)), ECF No. 38. Issue preclusion is not properly applied to the Board, as a separate and distinct tribunal. FCA's substantial reliance

on questionable policy arguments is indicative of the lack of support for its arguments in the law. *Cf. Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2146 (2016) (finding that a matter concerning reasonable USPTO regulation/policy “is a question that Congress left to the particular expertise of the Patent Office.”); *Janssen v. Sec’y of Health & Human Svcs.*, 07-0401V, 2008 WL 312787, at \*2 (Fed. Cl. Jan. 11, 2008) (“Regarding petitioner’s policy arguments, as my colleague noted in a similar case ‘while petitioners may have a *policy* argument of some appeal, they have failed to offer any meritorious *legal* reason why I should do anything except enforce the statute.’”) (citation omitted). Indeed, FCA does not identify, nor could undersigned counsel find, a single case wherein issue preclusion was applied against the USPTO or in the *ex parte* context.

But, even if the Board should have considered issue preclusion in the *ex parte* context, a review of the case law cited by FCA—all of which concerns preclusion against parties to *inter partes* proceedings—demonstrates the law does not support FCA’s proffered blind deference.

FCA relies in large part on *Jet, Inc. v. Sewage Aeration Systems*, 223 F.3d 1360, 1365 (Fed. Cir. 2000). The case does not help its cause. Contrary to FCA’s representation, the *Jet* Court did not “vacate the Board’s refusal to give preclusive effect to the district court’s decision.” In fact, the Board’s decision was vacated because it had given preclusive effect to the district court’s decision. Moreover, the



Board in *Jet* had dismissed the *inter partes* matter on the basis of claim preclusion—not issue preclusion. The Board had not considered issue preclusion.

The Federal Circuit found “likelihood of confusion” was the only common ground between the two proceedings and emphasized this was only a “superficial similarity.” 223 F.3d at 1364. The court evaluated various ways in which the likelihood of confusion analysis, although applying similar factors, may be distinct based on the underlying facts in the context of an infringement lawsuit versus a cancellation proceeding. *Id.* at 1365. The court ultimately held a prior infringement action can never later bar, under the doctrine of claim preclusion, an *inter partes* proceeding. *Id.* Thus, the Federal Circuit vacated the Board’s application of claim preclusion and reinstated the cancellation proceeding. *Id.*

The *Jet* Court noted that “the particular facts of certain cases may allow for the use of issue preclusion to bar relitigation of the ‘likelihood of confusion’ question.” *Id.* at 1364. The court stated the Board “may consider” issue preclusion on remand since it had not done so previously. *Id.* 1366. The court identified the requirements of issue preclusion –

- (1) identity of the issues in a prior proceeding;
- (2) the issues were actually litigated;
- (3) the determination of the issues was necessary to the resulting judgment; and,
- (4) the party defending against preclusion had a full and fair opportunity to litigate the issues.

*Id.* (string citations omitted). The court explained that “the ‘identity of issues’ analysis requires inquiry into the actual facts found and presented in the earlier litigation.” *Id.* The court stated “the Board will be free to consider whether the issue decided in the infringement litigation is sufficiently the same as that involved in the cancelation proceeding to determine that [the petitioner] should not now be allowed to relitigate the ‘likelihood of confusion’ between [the marks].” *Id.* So, the *Jet* decision suggests the Board has significant latitude in evaluating the factual underpinnings of the prior district-court decision to determine whether the doctrine should apply. Thus, even in *inter partes* proceedings where issue preclusion may properly apply, blind deference is not appropriate. The Board must conduct an in-depth analysis, as it properly did in the present case.

Various Federal Circuit cases have considered and rejected the doctrine of issue preclusion where the factual basis of the prior proceeding was distinct. *See, e.g., Empresa Cubana Del Tabaco v. Gen. Cigar Co., Inc.*, 753 F.3d 1270, 1276–77 (Fed. Cir. 2014) (rejecting issue preclusion based on disparate allegations in the two proceedings); *Levi Strauss & Co. v. Abercrombie & Fitch Trading Co.*, 719 F.3d 1367, 1374 (Fed. Cir. 2013) (reversing Board’s application of issue preclusion because prior infringement case did not challenge the full range of uses the applicant sought to register); *Mayer/Berkshire Corp. v. Berkshire Fashions, Inc.*, 424 F.3d 1229, 1232 (Fed. Cir. 2005) (reversing Board’s application of issue

preclusion because the application embraced an arguably broader category of goods than was at issue in the previous infringement case; and, it appeared the applicant's marketing practices had changed since the infringement case); *Old Grantian Co. v. William Grant & Sons Ltd.*, 361 F.2d 1018, 1022–23 (C.C.P.A. 1966) (reversing Board's application of issue preclusion: "Here appellant has alleged facts ... which have occurred since the prior opposition. ... The scope of protection to which a mark is entitled is not fixed by time; rather the owner's past conduct is always relevant as the mark may become strong or weak with the passage of time."); *see also Stephen Slesinger, Inc. v. Disney Enters., Inc.*, 702 F.3d 640, 646 (Fed. Cir. 2012) (affirming Board's application of issue preclusion where the prior lawsuit had finally determined trademark-ownership rights).

Thus, even if issue preclusion were properly considered in the *ex parte* context, the Board must evaluate the underlying transactional facts to determine whether the issues are identical. But, as indicated above, issue preclusion in the *ex parte* context is not appropriate and the Court should discard FCA's efforts to impose the doctrine herein.

Ultimately, whether the Board should defer to a prior district-court decision depends on an analysis of the underlying facts and a determination of whether the issues are the same. *Mendenhall v. Cedarapids, Inc.*, 5 F.3d 1557, 1570 (Fed. Cir. 1993) (referencing "the familiar principle that deference should be given by one

court to prior decisions of other tribunals on the same legal issue”). The Board’s decision closely analyzed the transactional facts involved in the infringement case as well as considering the District Court’s evaluation of the evidence. The Board properly determined that the issues before the District Court were distinct from those it was tasked with deciding. Therefore, the Board had no obligation to defer to the District Court when considering FCA’s application.

**2. The issues before the District Court were distinct.**

The USPTO has sufficiently addressed the distinctions in the District Court’s opinion that served as the basis for the Board’s decision. This section will briefly provide some additional color.

Throughout the District Court proceedings, FCA purposely and regularly sought to differentiate its use of the mark by referencing the mark as “JEEP WRANGLER MOAB Special Edition.” *See, e.g.*, Def.’s Mot. Summ. J. at 6, ECF No. 101, *Moab Industries, LLC v. Chrysler Group LLC*, 3:12-cv-08247-HRH (D. Ariz. June 6, 2014). FCA ultimately persuaded the District Court to compare Moab’s mark with FCA’s use of JEEP WRANGLER MOAB Special Edition. *See* Decision ¶¶ 69–70, ECF 265, *Moab Industries, LLC v. Chrysler Group LLC*, 3:12-cv-08247-HRH (D. Ariz. Oct. 6, 2016). In that sense, FCA is a victim of its own success. The District Court did not evaluate the likelihood of confusion between

MOAB and MOAB INDUSTRIES. Yet, FCA now seeks the benefit of the District Court's determination in its plight to register the mark MOAB alone.

The Board recognized the District Court conducted its analysis based on disparate marks, and the Board determined the underlying facts were distinct.

FCA also repeatedly represented to the District Court it had ceased using the MOAB mark and had no intention of resuming such use. *See, e.g.,* Def.'s Mot. Summ. J. at 2, ECF No. 101, *Moab Indus., LLC v. Chrysler Grp. LLC*, 3:12-cv-08247-HRH (D. Ariz. June 6, 2014). By this representation, FCA effectively narrowed the scope of the District Court's analysis, limiting its review to retrospective claims for damages. Accordingly, the District Court found FCA had ceased using the mark. *See* Decision ¶ 33, ECF 265, *Moab Indus., LLC v. Chrysler Grp. LLC*, 3:12-cv-08247-HRH (D. Ariz. Oct. 6, 2016). In contrast, the Board was asked to consider FCA's efforts to protect its mark for prospective use. Thus, the transactional facts addressed by the District Court were distinct in this way as well.

Market forces and consumer preferences change over time, and FCA's brand relaunch did not return to the time when the District Court issued its decision. *Cf.* Rich, J., *Trademark Problems As I See Them—Judiciary*, 52 Trademark Rep. 1183, 1185 (1962) ("Rights in this field do not stay put. They are like ocean beaches; they shift around. Public behavior may affect them."). Approximately two years passed between when FCA ceased its initial use of the mark and the date FCA

relaunched its brand under the mark. There is no record evidence that FCA continued the same marketing of the brand as its predecessor Chrysler Group, LLC. There is no record evidence that the same market conditions existed when the District Court issued its decision.

Moreover, in that time, despite the setback to its brand from FCA's use of the mark, Moab enjoyed an additional two years of exclusive use in the market, acquiring further goodwill in the mark before FCA recommenced its use. Moab's mark had become stronger at the time the Board considered FCA's application than it was at the time the District Court's issued its decision. In fact, Moab's mark was deemed incontestable on March 16, 2017—approximately six months after the District Court issued its decision. Moab has now continuously used the mark for more than 14 years, with an effective date of registration more than 10 years ago, October 9, 2008. This additional distinction between the marks further evinces the disparate facts considered by the Board and the District Court.

For these reasons, as well as those identified by the USPTO, the Board properly found the issues were distinct and conducted its own independent analysis, while considering the persuasive nature of the District Court's decision.

**B. The Board's Challenged Factual Determinations Were Supported by Substantial Evidence.**

FCA barely addresses the Board's independent factual determinations. FCA dedicates a mere 2.5 pages of its 27-page Opening Brief to the Board's factual

findings—asserting only conclusory arguments that the Board’s factual findings for three of the *DuPont* factors are not supported by substantial evidence. *See* Brief for Appellant at 18–20, ECF No. 26. Seeking to further constrain the Board’s adjudicating function, FCA ascribes each instance of the Board’s reasoning and factual determination as an impermissible “mental exercise.” *Id.* FCA apparently suggests it should be relieved of the burden of persuasion as a result of “post-trial finding from the District Court.” *Id.* p. 20. But, as more comprehensively addressed by the USPTO, the Board evaluated all record evidence and reached well-reasoned factual determinations therefrom.

Importantly, FCA does not challenge the Board’s factual determinations concerning the two key *DuPont* factors—similarity of the marks and relatedness of the goods. *In re I.AM.Symbolic, LLC*, 866 F.3d 1315, 1322 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 1164–65 (Fed. Cir. 2002)); *In re SL&E Training Stable, Inc.*, 88 U.S.P.Q.2d 1216 (TTAB 2008) (“In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods.”) (citing *Fed. Foods, Inc. v. Ft. Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)); *see also Hewlett-Packard v. Packard*

*Press*, 281 F.3d 1261, 1265 (Fed. Cir. 2002) (“[T]he ‘similarity or dissimilarity of the marks in their entireties’ is a predominant inquiry.”). Both the District Court and the Board found these two vital factors weighed in favor of a likelihood of confusion. See Decision ¶¶ 34–35, 69, ECF 265, *Moab Industries, LLC v. Chrysler Group LLC*, 3:12-cv-08247-HRH (D. Ariz. Oct. 6, 2016); Bd. Decision at 13–17, 23–24, *In re FCA US LLC*, Serial No. 85650654 (TTAB Apr. 10, 2018).

For these reasons, and those identified by the USPTO, the Board’s factual determinations are supported by substantial evidence. The Board properly found FCA’s mark would pose a likelihood of confusion with Moab’s registered mark and denied registration. Therefore, the Board’s decision should be affirmed.

### **CONCLUSION**

For the foregoing reasons, the Court should affirm the Trademark Trial and Appeal Board’s decision and hold that Appellant FCA US LLC is not entitled to registration of the mark MOAB (Serial No. 85650654) on grounds of likelihood of confusion with Amicus Curiae Moab Industries, LLC’s mark MOAB INDUSTRIES (U.S. Reg. No. 3,912,705).

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Respectfully submitted,

/s/ Aaron K. Haar

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March 25, 2019

**CERTIFICATE OF COMPLIANCE**

This Brief complies with the type-volume limitation of Federal Circuit Rule 28.1(b) and Federal Rule of Appellate Procedure 29(a)(5). The brief contains 4,130 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

This Brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) and the type styles requirements of Federal Rule of Appellate Procedure 32(a)(6). The Brief has been prepared in a proportionally spaced typeface using the Microsoft Word in Times New Roman 14-point type.

/s/ Aaron K. Haar \_\_\_\_\_

Aaron K. Haar

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing on March 25, 2019. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Aaron K. Haar

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