No. 18-1367

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

INTELLECTUAL VENTURES I LLC,
INTELLECTUAL VENTURES II LLC,

Plaintiffs – Appellees

INVENTION INVESTMENT FUND II, LLC,
INTELLECTUAL VENTURES MANAGEMENT, LLC,
INVENTION INVESTMENT FUND I, L.P.

Third Party Defendants – Appellees

v.

CAPITAL ONE FINANCIAL CORPORATION, CAPITAL ONE BANK (USA), NATIONAL ASSOCIATION, CAPITAL ONE, NATIONAL ASSOCIATION

Defendants/Third Party Plaintiffs – Appellants

Appeal from the United States District Court
District of Maryland, No. 8:14-cv-111-PWG, Judge Paul W. Grimm

---

APPELLEES' RESPONSE TO COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

ROBERT E. FREITAS
DANIEL J. WEINBERG
JESSICA N. LEAL
FREITAS & WEINBERG LLP
350 Marine Parkway, Suite 200
Redwood Shores, California 94065

Telephone: (650) 593-6300
Facsimile: (650) 593-6301

Attorneys for
Intellectual Ventures I LLC
Intellectual Ventures II LLC
Invention Investment Fund II, LLC,
Intellectual Ventures Management, LLC,
Invention Investment Fund I, L.P.

CERTIFICATE OF INTEREST

Counsel for Appellees certifies the following:

1. Full Name of Party represented by me:
   Intellectual Ventures I LLC
   Intellectual Ventures II LLC
   Intellectual Ventures Management, LLC
   Invention Investment Fund I, L.P.
   Invention Investment Fund II, LLC

2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:
   Intellectual Ventures I LLC
   Intellectual Ventures II LLC
   Intellectual Ventures Management, LLC
   Invention Investment Fund I, L.P.
   Invention Investment Fund II, LLC

3. Parent corporations and publicly held companies that own 10 percent or more of stock in the party:
   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 agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

FREITAS ANGELL & WEINBERG LLP

Robert E. Freitas
Daniel J. Weinberg
Jessica N. Leal
Rachel B. Kinney
350 Marine Parkway, Suite 200
Redwood Shores, CA 94065
Telephone: (650) 593-6301
Facsimile: (650) 593-6301

FUNK & BOLTON, P.A.

Bryan D. Bolton
100 Light Street,
Suite 1400
Baltimore, MD 21202
Telephone: (410) 659-7700
Facsimile: (410) 659-7773

FEINBERG DAY ALBERTI &
THOMPSON LLP

Ian N. Feinberg
Margaret Elizabeth Day
David L. Alberti
Clayton Thompson
Marc Belloli
Yakov Zolotorev
Sal Lim
Jeremiah A. Armstrong
Nickolas Bohl
Vinay Malik
1600 El Camino Real, Suite 280
Menlo Park, California 94025
Telephone: (650) 618-4360
Facsimile: (650) 618-4368

Terminated

Michael Edward McCabe, Jr.
McCabe Law LLC
9233 Fall River Lane
Potomac, MD 20854
Telephone: (301) 968-0546
Facsimile: (888) 522-6855

Terminated

David Taylor Rudolph
Eric B. Fastiff
Patricia Ann Dyck
LIEFF CABRASER HEIMANN
AND BERNSTEIN LLP
275 Battery St, 29th Floor
San Francisco, CA 94111
Telephone: (415) 956-1000
Facsimile: (415) 956-1008

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. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b).

   None.

Date: November 21, 2019

/s/Robert E. Freitas
Robert E. Freitas

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Other Authorities

"[A] fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive." *Arizona v. California*, 460 U.S. 605, 619 (1983) (citing *Montana v. United States*, 440 U.S. 147, 153 (1979), *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981), and *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877)). Since at least *Cromwell*, the Supreme Court has made it clear that "a losing litigant deserves no rematch after a defeat fairly suffered, in adversarial proceedings, on an issue identical in substance to the one he subsequently seeks to raise." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U. S. 104, 107 (1991). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Arizona*, 460 U.S. at 619 (quoting *Montana*, 440 U.S. at 153-54). "To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution."

Astoria, 501 U.S. at 107-08 (citing *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 (1979)).

The Court's opinion recognizes that the "policy against duplicative litigation is at its strongest where the losing plaintiff in the first case is in a position to make a conscious choice whether to pursue an appeal in the first case or begin anew by bringing a second action." Opinion ("Op.") at 29-30. "For the reasons given by the Second Circuit in *Williams v. Ward* and *Winters v. Lavine*," the Court determined that "this case is a particularly strong candidate for applying collateral estoppel, because of the co-pendency of the Virginia and Maryland lawsuits." *Id.* at 37. "Capital One . . . withdrew its cross-appeal in the Virginia case in favor of litigating its antitrust claims in the Maryland case despite the known risk—pointed out by IV—that abandoning its appeal from the adverse decision in the Virginia case could result in a collateral estoppel bar to its claims in the Maryland case." *Id.* Capital One took this action "with full awareness of the risk of preclusion based on the adverse rulings in the Virginia case." *Id.* Now that the risk has come to fruition, Capital One seeks to avoid the fate that would befall any other litigant by complaining that the Court's opinion does not specifically account for all of the bases on which it failed in Virginia. There is no relief for Capital One in this detail.

Capital One also argues that the Court's decision is wrong because the Fourth Circuit has supposedly adopted a radical version of the Restatement (Second) rule that denies preclusion in absolutely all cases of "alternative determinations." No court has taken such an extreme position, and the Fourth Circuit has never suggested that it would. The *dicta* in the principal case cited by Capital One does not call this Court's opinion into question in any way. Capital One's apparent contention that Illustration 16 cannot be a part of the law without a specific case proclaiming it to be is amply answered by the Court's analysis.

The dubious policy arguments advanced in support of the Restatement (Second) rule, *see Herrera v. Wyoming*, 139 S. Ct. 1686, 1710 (2019) (Alito, J., dissenting), are understood not to apply when the first case "necessarily adjudicated [an] issue," "even though there were alternative bases for that determination." *See* Restatement (Second) of Judgments § 27, comment *i*, Illustration 16. If, as here, "any one of the alternative grounds that were independently sufficient to dispose of the first action would also be independently sufficient to decide the second," those policy rationales "are significantly diluted." Op. at 27. Judge Trenga's dismissal of Capital One's first set of counterclaims "necessarily adjudicated" Capital One's Section 2 claims. As this Court has determined, the Fourth Circuit would not adopt a version of the Restatement (Second) rule that omitted an essential component of the Restatement (Second) approach.

Capital One's plea for relief on the basis that it "relied" on Judge Grimm's initial erroneous failure to apply issue preclusion has no substance. The allegation of new facts is never sufficient to avoid issue preclusion. "It is just this type of argument," Justice Breyer has observed, "that issue preclusion bars." *Pignons S.A. de Mecanique v. Polaroid Corp.*, 701 F.2d 1, 2 (1st Cir. 1983). Any "reliance" would not have been reasonable.

The failure of Capital One's attempt to relitigate claims it lost and was not willing to test on appeal does not end with the inadequacy of its rehearing arguments. As the Appellees explained in their brief, there are various other reasons why the pursuit of these claims must finally be brought to an end.

Capital One's Section 7 claim is barred by claim preclusion. None of the Appellees acquired any patents after the rejection of the first Section 7 counterclaim in Virginia. The Section 7 claim made in this case is a duplicate of the first, and it is clearly barred. Appellees' Br. at 67-68. *See* Op. at 32 n.7. Because the Section 7 claim was not rejected on the basis of "alternative determinations," Capital One presents no argument sufficient to avoid issue preclusion.

The *Noerr-Pennington* doctrine and the First Amendment bar the Section 2 claims. Appellees' Br. at 34-38. Capital One's claims were based on litigation conduct that is protected by the First Amendment. Because Capital One did not overcome the *Noerr-Pennington* protection that attaches to protected conduct, summary judgment was granted on this ground as well.

Affirmance is required independent of the issue preclusion bar because the history of these cases makes clear that Capital One's claims are not proper antitrust claims. As this Court explained, Judge Trenga recognized that "Capital One did not allege that the proposed market in the Virginia case 'contains all, even any, of the available substitutes for the technologies included within that proposed market or that the included technologies all pertain to the same aspects of the commercial banking operations, or even to those at issue in this case.'" Op. at 33. In the District of Maryland, despite lengthy and overwhelmingly expensive discovery, Capital One did not prove that the purported market included any substitutes, and the undisputed evidence showed that substitutes for patents alleged to be a part of the "market" were owned by others. Appellees' Br. at 51. "The requirement that a relevant market must be limited to substitutes is so clear that few courts fail to see it." Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 565a (2017). "Grouping complementary goods into the same market" is "economic nonsense," and would "undermin[e] the rationale for the policy against monopolization or collusion in the first place." *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2295-96 (2018) (Breyer, J., dissenting) (quoting Areeda & Hovenkamp ¶ 565a). But the "economic nonsense" of grouping unidentified, unrelated, and (possibly) complementary patents into a single market is the basis for Capital One's claims.

I. THE COURT'S RELIANCE ON ISSUE PRECLUSION WAS PROPER.

The Court concluded that the Fourth Circuit would adopt the "alternative determinations" rule of the Restatement (Second) of Judgments, rather than the First Restatement rule recently described by four members of the Supreme Court as "the more compelling position." *See Herrera*, 139 S. Ct. at 1710 (Alito, J., dissenting). The debate about the wisdom of the Restatement and Restatement (Second) rules is not important now. As this Court correctly held, any adoption of the Restatement (Second) rule would include the Illustration 16 concept. Op. at 29. Where, as here, the first case "necessarily adjudicated" the matters in issue in the second, there is no reason why issue preclusion would not apply.[1]

[1] Capital One claims that the rule of Illustration 16 creates "uncertainty," and is inconsistent with a need for "crisp rules with sharp corners." Pet. at 23. Capital One cites *Taylor v. Sturgell*, 553 U.S. 880 (2008), a case addressing a "diffuse balancing approach" used to assess claims of "nonparty preclusion." *Id*. at 901. The Court's preference in that area for "crisp rules with sharp corners" over "a round-about doctrine of opaque standards," *id*. (quoting *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 881 (6th Cir. 1997)), poses no difficulty for the clear principle of Illustration 16.

Capital One asserts that, even when Illustration 16 applies, a losing party would not know which issues might be raised in a future case, and argues that the incentive of a party losing on multiple grounds to appeal could therefore be affected. Justice Alito described the class of cases in which a losing party's incentive to appeal might be affected as a "small subset." *Herrera*, 139 S. Ct. at 1711. And the range of adjudications that might be relevant in a future dispute is not unlimited. In antitrust cases, it is typically obvious which issues might be relevant in a future case. When the prospective future case is a clone of the first case, little time need be spent doubting that all issues are likely to be relevant.

As this Court pointed out, the Virginia and Maryland cases were co-pending when Capital One abandoned its appeal, Op. at 29, and there is no suggestion that Capital One abandoned its appeal because of the "strength" of any single ground. Capital One decided to abandon its appeal because it was afraid to test its claims on appeal, and mistakenly believed it had found a judge who might allow the claims to go to a jury. This is not a tactic deserving of special legal protection.

When Capital One made the fateful decision to abandon its appeal, it was able to identify all of the problems that might be presented by its failure in Virginia, and it was explicitly warned of the risk of preclusion by the Appellees. *Id.* at 37. Whatever might be speculated about other cases in which an appeal might be deterred is not relevant here. *Id.* at 29 ("As noted, the Fourth Circuit in *Microsoft* did not adopt an inflexible rule that collateral estoppel is unavailable as to alternative and independent determinations, no matter what the circumstances.").

The Court pointed out that this case falls within Illustration 16, Op. 21-22, and indeed it does. The issues decided by Judge Trenga show that Capital One's Sherman Act Section 2 claims were "necessarily adjudicated" in the Eastern District of Virginia, and Capital One does not cast doubt on that proposition. The claims were conclusively resolved by virtue of Judge Trenga's conclusion that Capital One did not allege a proper antitrust market, and his determination that Capital One failed to allege the possession of monopoly power in that market. *Intellectual Ventures I, LLC v. Capital One Financial Corp.*, 2013 U.S. Dist. LEXIS 177836, at *17-18 (E.D. Va. Dec. 18, 2013). These are the issues identified by the Court, and the outcome is not changed if the additional bases for Judge Trenga's order are considered. In addition to pointing to the lack of a proper market and the absence of monopoly power, Judge Trenga also concluded that Capital One did not allege the willful acquisition or maintenance of monopoly power, part and parcel of the determination that the Appellees lacked monopoly power, *id.* at *21-22, and that Capital One's Section 2 claims were barred by the *Noerr-Pennington* doctrine. *Id.* at *24-25. Completing the picture on the lack of monopoly power and adding the *Noerr-Pennington* bar do not disrupt the application of the Illustration 16 principle.

In Illustration 15 to section 27, the adjudication of the interest claim in the first case did not necessarily resolve the question of liability for the payment of principal. B prevailed on two grounds, but only one could have disposed of the principal issue. In Illustration 16, where a later interest claim is made, there is no escaping the fact that B's liability for interest was resolved in the first case. Both of the "alternatives" were sufficient to bar the recovery of interest. Interest is not due, either because the right to interest was waived, or because execution of the note was fraudulently induced. There is no reason why the plaintiff should be allowed to escape preclusion. The same is true of Capital One's Section 2 claims in this case.

The Court's opinion overlooked Judge Trenga's reliance on Capital One's failure to allege the willful acquisition or maintenance of monopoly power, and its failure to overcome *Noerr-Pennington*, but that does not change the outcome. With consideration of these issues, either of which was sufficient to dispose of the Section 2 claims, it is still the case that the question of liability under Section 2 was necessarily adjudicated. Adding additional grounds, both sufficient to dispose of the claims, does not provide an escape for Capital One.

II. *TUTTLE* DOES NOT ALTER THE OUTCOME REQUIRED BY THE COURT'S ANALYSIS.

Recognizing that the Court's acknowledgement of the Illustration 16 caveat, a part of the Restatement (Second) rule, is fatal, Capital One attempts to establish that the Fourth Circuit has previously adopted a version of the Restatement (Second) rule that precludes the application of Illustration 16. Capital One principally relies on the brief *per curiam* opinion in *Tuttle by Tuttle v. Arlington County Sch. Bd.*, 195 F.3d 698 (4th Cir. 1999), for this proposition.

Tuttle did not address Illustration 16 or cite any authority in its short discussion of issue preclusion. Illustration 16 could not have applied to *Tuttle* because *Tuttle* involved an admission policy that was different from a policy found not to be "narrowly tailored" to achieve a compelling governmental interest in the first case. *Id*. at 701. (The conclusion that the prior policy was not narrowly tailored would not "necessarily adjudicate" whether a different policy was narrowly tailored.) *Tuttle* is not a holding that Illustration 16 does not apply in the circumstances in which it might.

Tuttle decided that a school board was not barred by issue preclusion from asserting that diversity is a compelling governmental interest, despite losing that legal point in a prior case. The decision in the first case "was hardly 'final and valid,'" however, and there was therefore no predicate for the application of issue preclusion. *Id.* at 704. *See In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004) (the judgment in the prior proceeding must be "final and valid"). In addition, the issues decided in the prior case "were hardly 'identical' to the issues" before the *Tuttle* court, another reason why issue preclusion was not a possibility. *Tuttle*, 195 F.3d at 704. *See Microsoft*, 355 F.3d at 326 (the issue must be "identical to the one previously litigated").

In the first case, the court also determined that the admission policy in issue was not "narrowly tailored" to fulfill an interest in diversity. The *Tuttle* court said the legal conclusion that diversity could not be a compelling governmental interest was therefore not "necessary." But this was *dicta*, given the court's determinations that the prior decision was not final, and the issues not identical. *Tuttle* cannot be taken as a contradiction of this Court's conclusion that the adoption of the Restatement (Second) rule for defensive issue preclusion would include the Illustration 16 caveat.

III. ADDITIONAL GROUNDS NOT CONSIDERED BY THE COURT REQUIRE AFFIRMANCE.

A. The Section 7 Claim Is Barred By Claim And Issue Preclusion.

Capital One asserted identical Section 7 claims in the Eastern District of Virginia and in this case. The Court's opinion notes Judge Grimm's determination that none of the Appellees acquired additional patents after the filing of the Virginia counterclaims, and the absence of any reason why "any marginal increase" in the number of owned patents might be material. Op. at 32 n.7. The Section 7 claim made here is the same as the Section 7 claim made in Virginia and it is barred by claim preclusion. *See* Appellees' Br. at 67-68.

Judge Trenga dismissed Capital One's original Section 7 claim because Capital One did not allege a sufficient impact on competition resulting from the acquisition of the unidentified patents on which the Section 7 claim was based. *Intellectual Ventures I*, 2013 U.S. Dist. LEXIS 177836, at *30. There were no alternative determinations. Because the patents are the same, the competitive effect issue is identical, and the Section 7 claim is also barred by issue preclusion, under the Restatement rule and the Restatement (Second) rule. *See* Appellees' Br. at 21.

B. Capital One's Section 2 Claims Are Barred By The *Noerr-Pennington* Doctrine.

Capital One was unable credibly to claim that any conduct by the Appellees had an adverse impact on competition. In an attempt to remedy this deficiency, Capital One offered a model based on the idea that protected litigation, and equally protected purported "threats" of litigation, supplied the necessary adverse effect on competition. Appellees' Br. at 48-60. The idea, belied by the fact that no banks agreed to license any patents, was that litigation or the threat of litigation would induce the payment of "supracompetitive" royalties.

Judge Grimm understood that the claims made by Capital One depended on protected conduct. Appx63; Appx80. Specifically, Capital One's theory of competitive impact was based on protected conduct. Appx63. Judge Grimm therefore determined that the claims were barred by *Noerr-Pennington*. *See* Appellees' Br. at 34-38. Judge Grimm did not, as Capital One asserted in an attempt to overcome its reliance on protected conduct, hold that *Noerr-Pennington* applies to the acquisition of patents, or to other conduct that does not involve litigation or threats of litigation.

Capital One eventually attempted to establish that the Section 2 claims could survive on the basis of non-litigation conduct, but this assertion made no sense. *See* Appellees' Br. 52-55. Capital One pointed to the acquisition of unidentified patents it labeled "IV's Financial Services Portfolio." A violation of Section 2 cannot be proved by pointing to the acquisition of unidentified patents not proved to be substitutes. The evidence showed that neither the acquisition, nor the assertion, of the patents produced any anticompetitive effect. *See id.*

Capital One also whimsically spoke of "concealment" of patents. It is not possible that the "concealment" of one's ownership of unidentified patents not proven to be substitutes could have an adverse effect on competition. *Id.* at 55-57.

C. Capital One Presented No Evidence That Would Justify An Antitrust Trial.

None of the failings identified by Judge Trenga was corrected, despite the massive discovery Capital One was allowed to pursue. Capital One presented no cognizable antitrust theory, and it did not present any evidence sufficient to suggest even a possibility that the antitrust laws were violated. Capital One claimed that every one of the patents alleged to comprise "IV's Financial Services Portfolio" was invalid and not infringed. *See* Appellees' Br. at 9. What is the theory by which invalid patents that are not infringed confer a monopoly? Capital One alleged that the ownership of a group of unidentified patents, the assertion of some of the patents, and the alleged threat to assert others would result in supracompetitive royalties, but no banks agreed to license the patents. There were no "supracompetitive" royalties.

Capital One argued that patents it did not identify and did not prove to be substitutes for each other comprised a market, but a relevant market consists only of goods that are reasonably close substitutes for one another. Areeda & Hovenkamp ¶ 565a. Only "substitutes," i.e., "goods that can replace one another and thus 'compete' for the user's purchase," *id.*, ¶ 565a, can be a part of the same market, and there was no proof that the unidentified patents on which Capital One's claims are based include substitutes, or that no substitutes for the patents alleged to comprise a market are owned by others.

IV. THERE IS NO NEED FOR *EN BANC* REVIEW, OR FOR CONCERN ABOUT THE COURSE OF THE LAW.

Capital One's last gasp is a suggestion that there is something dangerous associated with Judge Grimm's rejection of its counterclaims. There is nothing remarkable about the routine application of issue preclusion to a litigant's attempt at a second bite at the apple, no contradiction of Supreme Court or Federal Circuit precedent on any issue, and nothing requiring answers to any questions of exceptional importance presented by the rejection of claims that admittedly fall far outside of the established boundaries of antitrust analysis. There is nothing difficult or the least bit controversial about any of the rulings made by Judge Trenga or Judge Grimm.

The Court did not address Judge Grimm's *Noerr-Pennington* ruling, but Capital One cites the *Noerr-Pennington* issue as presenting an occasion for *en banc* rehearing. Pet. at 8. Capital One's suggestion that there is something alarming about Judge Grimm's conclusion that *Noerr-Pennington* requires the rejection of claims that are explicitly based on the exercise of First Amendment rights has no substance. The government expressed concern about a single sentence in Judge Grimm's order, *see* Appellees' Br. 59-61, but Deputy Assistant Attorney General Murray acknowledged at oral argument that the sentence is "ambiguous." The government's worry that the sentence might be read as the government brief suggested it could be has not been realized.

Capital One also relies on Professor Hovenkamp's surprising misstatements about this case. Professor Hovenkamp's understanding of the facts is wildly inaccurate. *See* Appellees' Br. at 58 n.9. Professor Hovenkamp claimed that the Intellectual Ventures companies acquired "substantially all of the patents covering certain types of transactions in financial services industries," Appx200951, but even Capital One never suggested any such thing. The evidence showed that the patents owned by the Intellectual Ventures companies are a small fraction of the patents in their class codes. *See* Appx103586. Professor Hovenkamp suggests that Judge Grimm's *Noerr-Pennington* ruling would prevent the application of Section 7 to patent acquisitions, but there is no basis for that statement. Judge Grimm did not apply *Noerr-Pennington* to patent acquisitions, and he was not asked to do so. The government brief did not attribute a decision to that effect to Judge Grimm.

The Appellees did not claim that subsequent petitioning "immunized" unlawful acquisitions. Just the opposite happened. Capital One claimed lawful acquisitions were made unlawful by subsequent protected conduct. *See* Appellees' Br. at 54. As far as the Appellees are aware, no one has ever argued that the subsequent assertion of patents retroactively immunizes unlawful acquisitions, and the Appellees cannot imagine that anyone ever will.

V. CONCLUSION

Capital One made a conscious decision to abandon its Virginia appeal in the face of an explicit warning about the consequences of doing so. The petition offers no basis on which Capital One might be relieved of those consequences.

Date: November 21, 2019

ROBERT E. FREITAS
DANIEL J. WEINBERG
JESSICA N. LEAL
FREITAS & WEINBERG LLP

/s/Robert E. Freitas
Robert E. Freitas
Attorneys for Appellees
Intellectual Ventures I LLC
Intellectual Ventures II LLC
Intellectual Ventures Management, LLC
Invention Investment Fund I, L.P.
Invention Investment Fund II, LLC

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. Cir. R. 35(e)(4). This brief contains 3,781 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 35(c)(2).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook.

Date: November 21, 2019

/s/Robert E. Freitas
Robert E. Freitas

CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2019, the foregoing was electronically filed with the United States Court of Appeals for the Federal Circuit through the Court's CM/ECF system. All parties and registered CM/ECF users and will be served by the CM/ECF system.

Date: November 21, 2019

/s/Robert E. Freitas
Robert E. Freitas