2018-2170

In The
United States Court of Appeals
For The Federal Circuit

BEDGEAR, LLC,

***Appellant*,**

v.

FREDMAN BROS. FURNITURE COMPANY, INC.,

***Appellee*.**

APPEAL FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE, PATENT TRIAL AND APPEAL BOARD IN NO. IPR2017-00524.

APPELLEE'S RESPONSE TO APPELLANT'S COMBINED PETITION FOR REHEARING AND REHEARING EN BANC

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January 10, 2020

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CERTIFICATE OF INTEREST

Counsel for Fredman Bros. Furniture Company, Inc. certifies the following:

1. The full name of every party represented in this case by me is: **Fredman Bros. Furniture Company, Inc**.

2. The name of the real party in interest represented by me is: **Fredman Bros. Furniture Company, Inc**.

3. All parent corporations and any publicly held companies that own 10% or more of the stock of the party I represent are as follows: **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: **None**.

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: ***Bedgear, LLC v. Fredman Bros. Furniture Co., Inc. d/b/a Glideaway Sleep Products***, **No. 2:15-cv-06759-KAM-AKT (E.D.N.Y.)**.

Dated: January 10, 2020 *<u>/s/ Jason R. Mudd</u>*

Counsel for Appellee Fredman Bros. Furniture Company, Inc.

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INTRODUCTION

Bedgear suggests in its rehearing petition that the panel "may have inadvertently overlooked Bedgear's Appointments Clause challenge" in Bedgear's opening brief when the panel issued its Rule 36 affirmance on October 14, 2019, prior to the decision in *Arthrex v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. October 31, 2019) ("*Arthrex*"). *Pet.* (Dkt. 56), 2. But the panel could not have inadvertently overlooked an argument that was not properly raised. As Fredman argued in its appellee brief and during oral argument and as the Government noted while a party to this appeal, Bedgear's perfunctory three-sentence attempt in its opening brief to reserve the right to later raise an Appointments Clause challenge did not properly preserve such an argument under this Court's precedent. Bedgear failed to respond to Fredman's argument in either Bedgear's reply brief or at oral argument, and indeed, was silent as to the Appointments Clause entirely at oral argument. Further, an additional, recent precedential opinion of this Court that is squarely on point with regard to constitutional challenges to PTAB decisions, *Trading Technologies International, Inc. v. IBG LLC*, 921 F.3d 1378, 1385 (Fed. Cir. 2019), firmly forecloses any argument from Bedgear that it properly preserved the issue in its opening brief. The panel's non-precedential order in *Bedgear II* does not support a different result. That order is not binding on the panel here, contains no express analysis or explanation on the preservation issue, cannot be applied

consistent with *Trading Technologies*, and is subject to a pending petition for rehearing. Because Bedgear did not properly preserve any Appointments Clause challenge in its opening brief under this Court's precedent, *Arthrex* is inapplicable and affords Bedgear no relief. The Court, therefore, was correct in issuing its Rule 36 affirmance and should deny Bedgear's combined petition for rehearing.

Alternatively, in the event the Court decides to entertain Bedgear's non-preserved Appointments Clause challenge, then Fredman believes that, at a minimum, this case should be stayed until any rehearing or rehearing en banc can be decided by this Court in *Arthrex* and/or in *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 2018-1768 ("*Polaris*"); and, alternatively, if the Court entertains Bedgear's Appointments Clause argument and does not stay this case, then Fredman respectfully requests that en banc rehearing be granted to correct errors in the *Arthrex* panel decision, including, *inter alia*, its holding excusing any and all parties who failed to first raise the challenge before the PTAB (as Bedgear failed to do here) from the standard rule of forfeiture. As discussed below, that overbroad holding was contrary to both Supreme Court precedent and this Court's precedent.

ARGUMENT

I. Bedgear Waived its Appointments Clause Challenge by Failing to Properly Raise It in its Opening Brief in the Manner Required by this Court's Precedent.

As this Court has recently re-confirmed, Appointments Clause challenges to PTAB decisions are waived where a party has not properly raised it at least, at a minimum, by the time of the party's opening appeal brief. *Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1173, 1174 (Fed. Cir. Nov. 1, 2019) (precedential) (holding Appointments Clause challenge to PTAB final written decision waived where not raised in opening brief); *see also Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1339-40 (Fed. Cir. October 31, 2019) ("Appointments Clause challenges are 'nonjurisdictional structural constitutional objections' that can be waived when not presented" and such challenges must be "properly and timely raised."). The Court in *Arthrex* did not have occasion to consider the question of what was required for an appellant to sufficiently raise the Appointments Clause challenge in its opening brief because the appellant there had presented numerous pages of substantive argument in its opening brief, and the issue was discussed by the appellant during oral argument (unlike here). *See Arthrex Opening Brief*, No. 18-2140, Dkt. 16 at 59-66; *see also*, *e.g.*, *Oral Argument*, No. 18-2140, at 6:53-12:20, *available at http://www.cafc.uscourts.gov/oral-argument-recordings*. And in *Customedia*, the appellant "did not raise any semblance of an Appointments Clause

challenge in its opening briefs or raise this challenge in a motion filed prior to its opening briefs," obviating the need to consider the question of the minimum required to properly raise the issue in an opening brief. *Customedia*, 941 F.3d at 1174. But this Court's prior precedent, which is controlling here, holds that issues adverted to in a party's opening brief in a perfunctory manner, including, specifically, perfunctory constitutional challenges to PTAB decisions that are unaccompanied by some effort at developed argumentation or analysis, are deemed waived. *Trading Techs.*, 921 F.3d at 1385 ("In a total of four sentences in its opening brief, TT raises challenges based on a right to a jury under the Seventh Amendment, separation of powers under Article III, the Due Process Clause, and the Taking Clause. Such a conclusory assertion with no analysis is insufficient to preserve the issue for appeal."); *United States v. Great Am. Ins. Co. of New York*, 738 F.3d 1320, 1328 (Fed. Cir. 2013) ("It is well established that arguments that are not appropriately developed in a party's briefing may be deemed waived."); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) (collecting cases); *see also id*. ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.") (quoting *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001)).

Here, in its opening brief, Bedgear merely purported to "reserve[] the right to raise this ground" in the event the Appointments Clause issue was decided in other

cases—and Bedgear did so with three conclusory sentences, unsupported by any analysis or argumentation—the entirety of which are repeated here for convenience:

> An independent ground on which this Court has been asked to set aside the Board's final written decisions in a number of other pending appeals is that the decisions exceeded the powers permitted to the Board under the Constitution's Appointments Clause, Art. I, §2, cl. 2. *See, e.g., Polaris Innovations Ltd. v. Kingston Tech. Co., Inc.*, Appeal No. 2018-1768, DI 21 (Fed. Cir., July 10, 2018); *see also Lucia v. SEC*, 2018 U.S. LEXIS 3836, 585 U.S. __ (June 21, 2018). Although yet to be decided, this issue equally applies to the Board's three decisions at-issue in this appeal. Thus, Bedgear reserves the right to raise this ground in the event the issue is decided during the pendency of this appeal.

Br. (Dkt. 18) at 63-64. Thus, by its own words, Bedgear had not yet even raised this ground at the time of its opening brief but instead reserved the right to raise it later. The Government, as Intervenor, informed the Court in a March 21, 2019, letter that Bedgear had not yet raised any Appointments Clause challenge, that this Court's precedent did not allow Bedgear to purport to reserve its right to raise the challenge later without any developed argumentation. Dkt. 34. In response, the Court removed the Government as a party from this appeal, without further comment. Dkt. 36. In any event, even if Bedgear's opening brief were generously construed as raising such a challenge at that time, this Court's controlling precedent holds that such perfunctory constitutional challenges to PTAB decisions that are unaccompanied by some effort at developed argumentation, are nonetheless deemed waived. *Trading Techs.*, 921 F.3d at 1385 (rejecting a conclusory four-sentence constitutional challenge to a PTAB decision because "[s]uch a conclusory assertion with no

analysis is insufficient to preserve the issue for appeal"); *Great Am. Ins. Co.*, 738 F.3d at 1328; *SmithKline Beecham*, 439 F.3d at 1319-20.

Bedgear's three-sentence attempt to reserve the right to raise this constitutional challenge is even more sparse than the appellant's four-sentence attempt rejected by the Court in *Trading Technologies*—the appellant's attempt rejected in that case is repeated in its entirety here:

> Moreover, the decision should be vacated because CBM review is unconstitutional. TT was entitled to a jury or bench trial on the issues of patent eligibility and invalidity before an Article III court. U.S. CONST. art. III, amend. VII; *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 169 U.S. 606, 612 (1898); *see also In re Trading Techs. Int'l, Inc.*, No. 2016-120 (Fed. Cir. 2016), *petition for cert. filed*, No. 15-1516 (U.S. June 16, 2016); *Oil States*, 137 S. Ct. at 2239. The AIA's CBM review violates separation of powers principles under Article III, due process, and the takings clause because it permits an executive agency to adjudicate a private property interest, without TT's prior consent. Indeed, that the AIA applied retroactively to TT's patent further supports the unconstitutionality of the CBM Review proceeding.

Trading Techs. Int.'l, Inc. v. IBG LLC, No. 17-2323, Dkt. 50 at 64. In that case, the appellant had at least included a very terse statement as to why it contended the PTAB decision was unconstitutional under certain constitutional provisions, in addition to citing to a petition for certiorari. Here, Bedgear failed to provide any analysis or argument at all and left Fredman, the Government, and the Court to guess as to any of the bases that Bedgear purported to rely on, including which of any bases other parties had advanced in which of any of the other various pending appeals, to

support any challenge under the Appointments Clause. Further obscuring any supporting analysis or developed argumentation on which it intended to rely, Bedgear also failed to even mention the Appointments Clause issue during oral argument. *See Oral Argument*, 1:10-13:44, 29:35-32:12, available at *http://www.cafc.uscourts.gov/oral-argument-recordings/* at *2018-2170.mp3*.

During the briefing, Fredman argued in its appellee brief that Bedgear's perfunctory effort in its opening brief failed to properly preserve the issue under this Court's precedent, and Bedgear did not address that argument in its reply brief.[1] *Appellee Br.* (Dkt. 35), 50-51; *Reply* (Dkt. 39), 35. Similarly, during oral argument, Bedgear failed to respond in rebuttal even after Fredman had raised the issue and argued that Bedgear had failed to properly preserve the issue in its opening brief. *See id*. at 28:33-28:56 (Fredman), 29:35-32:12 (Bedgear).

Despite this Court's clear standards, Bedgear ignores those standards and suggests in its petition, for the first time in this appeal, that Bedgear "timely raised [an] Appointments Clause violation in its opening brief." *See Pet.* (Dkt. 56) at 2. As discussed above, even this timeliness argument was itself not timely raised and waived, because Bedgear failed to respond to Fredman's argument both in the

[1] Bedgear did respond to Fredman's argument that Bedgear had also forfeited the Appointments Clause challenge by not raising it below before the PTAB—but, importantly, Bedgear did not respond to the argument that its perfunctory three sentences in its opening brief had failed to properly raise the issue in this appeal. *Reply* (Dkt. 39), 35.

briefing and at oral argument. Nonetheless, Bedgear contends its opening brief sufficiently raised the issue based on *Bedgear II*, a non-precedential ruling by a separate panel of this Court in a co-pending appeal involving the same parties where the Court, after oral argument but before rendering a judgment on the merits, ordered a vacatur and remand in light of *Arthrex*. *See Bedgear, LLC v. Fredman Bros. Furniture Co.*, No. 2018-2082, slip. Op. (Dkt. 68) (Nov. 7, 2019), at *2 ("*Bedgear II*"). Bedgear argues that, in that case, its opening brief set forth "a substantially identical Appointments Clause challenge" to its opening brief here, and that the panel there must have found that Bedgear sufficiently raised the argument. *Pet*. (Dkt. 56), 6. The *Bedgear II* order, however, contains no analysis or explanation of how Bedgear's similar, perfunctory three sentences in its opening brief there properly preserved the issue under this Court's precedent. *Bedgear II*, at *2. And the panel here is not bound by and should not follow that non-precedential order, which is contrary to this Court's precedent and subject to Fredman's pending petition for rehearing, to which the Court has invited a response from Bedgear. No. 2018-2082, Dkt. 73 (Jan. 8, 2020), Dkt. 74 (Jan. 9, 2020).

Therefore, Bedgear failed to properly raise an Appointments Clause challenge on appeal by the time of its opening brief in the manner required under this Court's precedent, including *Trading Technologies*, and, therefore, waived it. The panel,

therefore, properly granted its Rule 36 affirmance and Bedgear's petition should be denied.

II. If The Court Decides To Entertain Bedgear's Petition, Then This Case Should Be Stayed So That This Case Can Track The Outcome In *Arthrex* And Any En Banc Consideration In *Polaris*.

Alternatively, in the event the Court decides to entertain Bedgear's belated argument that its opening brief sufficiently raised the issue and also decides Bedgear's opening brief indeed complied with this Court's precedent, then Fredman respectfully requests that the Court stay this case because any revision to the panel decision in *Arthrex* would be directly applicable here and any remand order could result in wasted resources and unnecessary delay.

The Government and the private parties in *Arthrex* have filed petitions for rehearing en banc on the Appointments Clause issue, and the Court has recently invited responses by no later than January 17, 2020. *See Arthrex*, No. 18-2140, Dkt. Nos. 77, 78, 79, 102. Amicus briefs, all supporting en banc review, have also been filed. *See id*., Dkt. Nos. 92, 99. Further, two judges have called into doubt the remedy adopted in *Arthrex* in a concurring opinion in *Bedgear II*. *Bedgear II*, at **3-10. And shortly after *Arthrex*, a separate panel of this Court in *Polaris* ordered supplemental briefing on many of the same questions addressed in *Arthrex*. *See Polaris*, No. 2018-1768, Dkt. No. 90 (Fed. Cir. Nov. 8, 2019).

Those pending en banc petitions seek rehearing, *inter alia*, on the issue of whether the Appointments Clause was violated, the appropriate remedy, and the issue of whether all appellants who raise the Appointments Clause issue for the first time on appeal without having raised it before the PTAB (as Bedgear also failed to do here) should all be excused from the standard rule of forfeiture under this Court's precedent and Supreme Court precedent. The Government, in its petition for rehearing en banc in *Arthrex* has also asked the Court to order *Polaris* to be heard initially en banc in tandem with rehearing en banc in *Arthrex*, because in *Polaris* the appellant had first raised the challenge before the PTAB, unlike in *Arthrex*. *See Government's En Banc Pet.*, No. 18-2140, Dkt. 77 at 3, 14.

Arthrex, therefore, may not be the final word of this Court and may be revised in a way that would impact this case. Because of these uncertainties, any remand of this case to a new PTAB panel for a new hearing and final written decision, as requested by Bedgear, poses the risk of substantial waste of party, judicial, and administrative resources. The Court, therefore, should, at a minimum, stay this case at least until after the petitions in *Arthrex* are decided, as well as any potential en banc consideration in *Polaris*. Fredman is aware of at least one other case where the Appointments Clause issue had been raised and the Court recently stayed the case. *See Rovi Guides, Inc. v. Comcast Cable Communications, LLC*, No. 19-1293, Dkt. 68 (Jan. 2, 2020).

III. If The Court Entertains Bedgear's Petition And Does Not Stay This Case, Then Bedgear Forfeited Any Appointments Clause Challenge By Not Raising It Before The Board And En Banc Rehearing Should Be Granted To Correct *Arthrex*'s Overbroad Apparent Holding To The Contrary.

As Fredman argued in its appellee brief in this case, Bedgear forfeited any challenge under the Appointments Clause by not first raising it before the Board and by not providing any argument as to why this should be deemed an "exceptional case" that should be excused from forfeiture. *See* Dkt. 35 at 50 (citing *In re DBC*, 545 F.3d 1373, 1378 (Fed. Cir. 2008) (holding that an Appointments Clause challenge regarding APJs of the Board of Patent Appeals and Interferences had been waived by not raising it before the Board because "[it] is well-established that a party generally may not challenge an agency decision on a basis that was not presented to the agency.")). Although this Court will in "exceptional cases" consider issues not previously presented before the Board, such as was done by the Supreme Court for the Appointments Clause challenge in *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868, 878-79 (1991), Bedgear did not provide any reason for why this case was exceptional. *See* Dkt. 35 at 50 (citing *In re DBC*, 545 F.3d at 1379).

The Court in *Arthrex* exercised its discretion in declaring *Arthrex* to be one of those rare, exceptional cases where it should excuse the appellant's forfeiture, but the Court did so in view of the need to obtain a vehicle to timely decide the important constitutional issue. *Arthrex*, 941 F.3d at 1327 ("Because . . . APJs continue to decide patentability in *inter partes* review, we conclude that it is appropriate for this court

to exercise its discretion to decide the Appointments Clause challenge here."). And the Court found it important to "incentivize[]" such challenges at the appellate level. *Id*. at 1340. But now that the Court has chosen *Arthrex* as its vehicle and because *Polaris* provides an adequate vehicle for en banc review in a case where the appellant raised the Appointments Clause challenge before the Board, the instant case is not the kind of exceptional case where Bedgear's forfeiture needs to be or should be excused. Indeed, there is no need to incentivize the type of bare-bones effort to purport to reserve the right to later raise such a challenge for the first time on appeal that Bedgear attempted here, because Bedgear's three sentences, which lacked any analysis, afforded no vehicle for meaningful appellate review.

Nonetheless, *Arthrex* appears to foreclose such arguments by suggesting that, beyond *Arthex* itself, all litigants in all cases who present an Appointments Clause challenge to PTAB final written decisions for the first time on appeal should be excused from forfeiture. *Arthrex*, 941 F.3d at 1340 ("[W]e see the impact of this case as limited to those cases where final written decisions were issued and where litigants present an Appointments Clause challenge on appeal."). This holding appears to be contrary to both this Court's opinion in *In re DBC* and the Supreme Court's opinion in *Freytag*, which provide that the Court's excusal of forfeiture should be applied in a discretionary manner on a case-by-case basis, contrary to the sweeping manner in which *Arthrex* appears to excuse forfeiture in all such cases

where the issue was not raised before the Board. *In re DBC*, 545 F.3d at 1380 ("The Supreme Court has never indicated that such challenges must be heard regardless of waiver. Rather, the Court has proceeded on a case-by-case basis, determining whether the circumstances of the particular case warrant excusing the failure to timely object.") (citing *Freytag*, 501 U.S. at 893 and citing *id*. at 879 ("We conclude that this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge.")). The Court, therefore, should either distinguish *Arthrex* from the instant unexceptional case where Bedgear failed to provide any meaningful vehicle for review to be incentivized and deny Bedgear's petition, or, alternatively, Fredman respectfully requests the Court grant rehearing en banc to reconsider the important question in *Arthrex* of whether all forfeitures in all cases where parties failed to raise this challenge before the PTAB should be summarily excused without discretionary consideration of the particular equities in those cases. This reconsideration is particularly necessary here given the unwarranted substantial administrative disruption that would be caused in light of the hundreds of Board decisions still on appeal or available for appeal where parties failed to timely raise Appointments Clause challenges before the Board and seek unwarranted windfalls, as the Government and an *amicus curiae* have noted. *See Government's En Banc Pet*., No. 18-2140, Dkt. 77 at 12-13; *AAM's Amicus Br.*, No. 18-2140, Dkt. 99 at 9-11.

Further, as the Government has noted in its en banc petition in *Arthrex*, the Supreme Court has only provided the remedy of vacating and remanding for a new hearing before a new administrative judge or panel to remedy an Appointments Clause violation where the petitioner had first raised such a challenge before the agency. *Government's En Banc Pet*., No. 18-2140, Dkt. 77 at 14-15; *see Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055 (2018) (holding Lucia made a "timely challenge" under *Ryder v. United States*, 515 U.S. 177, 182-183 (1995) by raising the challenge before the agency below, entitling Lucia to a "new 'hearing before a properly appointed official.'") (quoting *Ryder*, 515 U.S. at 182-183, 188)); *see also Ryder*, 515 U.S. at 182 ("[P]etitioner raised his objection to the judges' titles before those very judges and prior to their action on his case."). And, as the Government has noted, the *Arthrex* panel was incorrect to suggest that the Board "could not have corrected the problem" and "was not capable of providing any meaningful relief to this type of Constitutional challenge," because the Board could have, for example, declined to institute the IPR, vacated the institution, or adopted a saving construction of the statute if it considered one necessary to correct any violation. *Government's En Banc Pet*., No. 18-2140, Dkt. 77 at 13. Thus, affording appellants the remedy of a new hearing before a new panel where they failed to first raise that issue before the Board (as Bedgear failed to do here) is not called for by Supreme Court precedent. *Cf.* Dkt. 68, at 3 (Nov. 7, 2019) (Dyk, J., concurring) (noting "it seems to me that

the remedy aspect of *Arthrex* (requiring a new hearing before a new panel) is not required by [*Lucia*], imposes large and unnecessary burdens on the system of *inter partes* review, requiring potentially hundreds of new proceedings, and involves unconstitutional prospective decision-making"). And, importantly, as this Court has explained, allowing parties to raise such Appointments Clause challenges for the first time on appeal would improperly permit "sandbagging" where parties, for strategic reasons, pursue a certain course before a lower tribunal and only later argue the course followed was reversible error if the outcome is unfavorable. *DBC*, 545 F.3d at 1380.

IV. If The Court Entertains Bedgear's Petition And Does Not Stay The Case, En Banc Rehearing Should Be Granted To Reconsider Arthrex's Holding That PTAB APJs Are Principal Officers.

Finally, Fredman respectfully requests that the Court grant rehearing en banc to reconsider the holding in *Arthrex* that APJs are unconstitutionally appointed, because the APJs of the PTAB are inferior, not principal, officers as argued by Fredman in its appellee brief. Dkt. 35 at 51-52. En banc rehearing should be granted for at least the reasons expressed by the Government and Appellee in their en banc petitions in *Arthrex* and for the reasons expressed in Fredman's pending combined petition for rehearing and rehearing en banc in the *Bedgear II* case. *See* No. 18-2082, Dkt. 73.

CONCLUSION

Appellee Fredman Bros. Furniture Company, Inc. respectfully requests that the Court deny Bedgear's petition for rehearing, or, alternatively, that this case be stayed, or, alternatively, that rehearing en banc be granted to reconsider *Arthrex*.

Dated: January 10, 2020

Respectfully submitted,

/s/ Jason R. Mudd
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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2020, I caused this APPELLEE'S RESPONSE TO APPELLANT'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC to be electronically filed using the Court's CM/ECF filing system. Counsel for the Appellant was electronically served by and through the Court's CM/ECF filing system pursuant to Fed. R. App. P. 25(c) and Fed. Cir. R. 25(e).

/s/ Jason R. Mudd

Counsel for Appellee Fredman Bros. Furniture Company, Inc.

CERTIFICATE OF COMPLIANCE
PURSUANT TO FED. R. APP. P. 32(g)

1. This Response complies with the type-volume limitation of Fed. Cir. R. 35(e)(4). This Response contains 3,877 words, as determined by the Microsoft Word word-processing program used to prepare this paper, excluding the parts of the Petition exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b) and 35(c)(2).

2. This paper complies with the typeface requirements of Fed. R. App. P. Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface that includes serifs using Microsoft Word in Times New Roman 14-point font.

/s/ Jason R. Mudd

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