

2018-2170

**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*

**APPELLANT BEDGEAR, LLC'S COMBINED PETITION
FOR PANEL REHEARING AND REHEARING EN BANC**

JOSEPH J. RICHETTI
ALEXANDER D. WALDEN
BRYAN CAVE LEIGHTON PAISNER LLP
1290 Avenue of the Americas
New York, New York 10104
(212) 541-2000

K. LEE MARSHALL
BRYAN CAVE LEIGHTON PAISNER LLP
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
(415) 675-3400

Counsel for Appellant

November 8, 2019

CERTIFICATE OF INTEREST

Counsel for Appellant Bedgear, LLC certifies the following:

1. The full name of every party or amicus represented by me is:

Bedgear, 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:

Not applicable

3. All parent corporations and any publicly held companies that own 10 percent of the stock of the party or 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 agency or are expected to appear in this court are:

BRYAN CAVE LEIGHTON PAISNER LLP: Joseph J. Richetti, K. Lee Marshall, Alexander D. Walden, Frank Fabiani, Kevin Paganini

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 Company d/b/a Glideaway Sleep Products, Case No. 1:15-cv-6759-KAM-AKT (E.D.N.Y.)

November 8, 2019

/s/ Joseph J. Richetti

Joseph J. Richetti

TABLE OF CONTENTS

	Page
CERTIFICATE OF INTEREST.....	i
STATEMENT OF COUNSEL UNDER FEDERAL CIRCUIT RULE 35(B)(2).....	1
INTRODUCTION	1
ARGUMENT	4
I. The Court Should Grant Panel Rehearing.....	4
II. In The Alternative, The Court Should Grant Rehearing En banc.....	7
CONCLUSION	9
ADDENDUM	
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Abbvie Biotechnology, Ltd. v. United States,
Nos. 2017-2304, -2305, -2306, -2362, -2363 (Fed. Cir.)4

Arthrex, Inc. v. Smith & Nephew, Inc. et al.,
No. 2018-2140, slip op. (Fed. Cir., Oct. 31, 2019)2, 5, 7

Audatex North America, Inc. v. Mitchell International, Inc.,
No. 2018-2108 (Fed. Cir.)4

Bedgear, LLC v. Fredman Bros. Furniture Co., Inc.,
No. 2018, slip. op. (Fed. Cir., Nov. 7, 2019)3, 5, 6, 8

Customedia Techs., LLC v. Dish Network Corp., et al.,
No. 2019-1001 (Fed. Cir., Nov. 1, 2019).....6

Image Processing Technologies, LLC v. Samsung Electronics Co., Ltd.,
No. 2018-2156 (Fed. Cir.)4

Image Processing Technologies, LLC v. Samsung Electronics Co., Ltd.,
Nos. 2019-1408, 2019-1485 (Fed. Cir.)4

Koninklijke Philips N.V. v. Microsoft Corporation,
No. 2019-1178 (Fed. Cir.)4

Polaris Innovations Ltd. v. Kingston Tech. Co. Inc.,
No. 2018-1768 (Fed. Cir. argued No. 4, 2019).....4

Polaris Innovations Limited v. Kingston Technology Company, Inc.,
No. 18-1831 (Fed. Cir. argued Nov. 4, 2019)4

Rovi Guides, Inc. v. Comcast Cable Communications, LLC,
Nos. 19-1293, -1294, -1295 (Fed. Cir.).....4

Rovi Guides, Inc. v. Comcast Cable Communications, LLC,
Nos. 2019-1215, -1216, -1218 (Fed. Cir.).....4

Uniloc 2017 LLC, v. Facebook, Inc., et al.,
No. 2018-2251, slip op. (Fed. Cir., Oct. 31, 2019)3, 6

Uniloc 2017 LLC v. Cisco Systems, Inc.,
No. 19-1064 (Fed. Cir.)4

STATEMENT OF COUNSEL UNDER FEDERAL CIRCUIT RULE 35(B)(2)

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court or precedents of this Court:

- *Lucia v. S.E.C.*, 138 S. Ct. 2044 (2018); *Arthrex, Inc. v. Smith & Nephew, Inc. et al.*, No. 2018-2140, slip op. (Fed. Cir., Oct. 31, 2019)

Dated: November 8, 2019

/s/ K. Lee Marshall/

K. LEE MARSHALL

INTRODUCTION

The Court should grant rehearing, pursuant to Federal Rule of Appellate Procedure 40 or, in the alternative, rehearing en banc pursuant to Federal Rule of Appellate Procedure 35, to ensure that the decision in this case aligns with other decisions in currently pending and recently decided cases in this Circuit, all of which raise an identical and important constitutional question related to the appointment of the Patent Trial and Appeal Board's Administrative Patent Judges ("APJs").

Pursuant to Federal Rule of Appellate Procedure 40, and Federal Circuit Rule 40, Bedgear submits this petition for rehearing by the Panel on the sole ground that the Board's Final Written Decision in this case was issued by APJs whose appointments violated the Appointments Clause, U.S. Const., art. II, § 2, cl. 2, and

the only remedy for that constitutional harm is vacatur and remand of the Board's decision to a properly appointed panel of the Board's APJs. In the alternative, if the Panel does not grant rehearing, Bedgear respectfully petitions for rehearing en banc pursuant to Federal Rule of Appellate Procedure and Federal Circuit Rule 35.

Bedgear timely raised this Appointments Clause violation in its opening brief in this appeal as an independent ground on which the Board's underlying decision should be vacated. *See* Dkt. No. 18 at 2, 63–64. The argument was therefore properly preserved. On October 14, 2019, however—less than two weeks before contrary decisions by other panels in separate cases—the Panel here affirmed the judgment below without opinion. Bedgear respectfully submits that, in so doing, the panel may have inadvertently overlooked Bedgear's Appointments Clause challenge and, in the process, issued a decision that directly conflicts with a number of other currently pending and recently-decided cases in this Circuit.

This Court addressed this same Appointments Clause issue in another case, *Arthrex, Inc. v. Smith & Nephew, Inc. et al.*, No. 2018-2140, slip op. (Fed. Cir., Oct. 31, 2019), and held that the Board's appointment of APJs was unconstitutional, vacated the Board's underlying decision, and remanded the case “to a new panel of APJs to which Arthrex is entitled.” *Id.* at *27–30. The same rationale and remedy should be applied to the instant case and all other pending cases that timely raised this Appointments Clause question. *See id.* at *29 (noting that the decision is

applicable “to those cases where final written decisions were issued and where litigants present an Appointments Clause challenge on appeal.”); *see also Uniloc 2017 LLC, v. Facebook, Inc., et al.*, No. 2018-2251, slip op. at *1, 29–30 (Fed. Cir., Oct. 31, 2019) (per curiam) (non-precedential) (vacating and remanding the case “to the Board for proceedings consistent with this court’s decision in *Arthrex*” based on “the fact that [Appellant] has raised an Appointments Clause challenge in its opening brief.”).

Earlier this week, this Court again did precisely the same thing—holding the underlying APJ appointments unconstitutional and vacating and remanding the Board’s decisions—in another, consolidated appeal involving the same parties in this appeal, *Bedgear and Glideaway. See Bedgear, LLC v. Fredman Bros. Furniture Co., Inc.*, No. 2018, slip. op., *2 (Fed. Cir., Nov. 7, 2019) (per curiam) (non-precedential) (“*Bedgear II*”). There, like in *Arthrex* and *Uniloc*, but unlike here, the Court found that *Bedgear*’s opening brief raised the question of whether the Board’s decisions “exceeded the scope of the Patent Trial and Appeal Board’s authority and violate the Constitution’s Appointments Clause.” *Id.* at *2. The Court in that consolidated appeal held that the appointments clause was violated and issued a judgment vacating the Board’s three underlying decisions and remanding the case back “to the Board for proceedings consistent with the Court’s decision in *Arthrex*.” *Id.*

Finally, the same question is currently pending in a number of other cases before this Court, including *Polaris Innovations Ltd. v. Kingston Tech. Co. Inc.*, No. 2018-1768 (Fed. Cir. argued No. 4, 2019).¹ In that case—which was argued earlier this week—the scope of the constitutional harm and the appropriate remedy for that harm were central questions in the briefs and at oral argument. *See id.*, Dkt. No. 22, at 52–60; *id.*, Oral Argument Recording, November 4, 2019, available at: http://www.cafc.uscourts.gov/oral-argument-recordings?title=Polaris&field_case_number_value=&field_date_value2%5Bvalue%5D%5Bdate%5D=.

ARGUMENT

I. The Court Should Grant Panel Rehearing

Bedgear respectfully requests that the Panel grant rehearing for the purpose of addressing Bedgear’s timely-raised challenge under the Appointments Clause

¹ *See also Polaris Innovations Limited v. Kingston Technology Company, Inc.*, No. 18-1831 (Fed. Cir. argued Nov. 4, 2019); *Audatex North America, Inc. v. Mitchell International, Inc.*, No. 2018-2108 (Fed. Cir.); *Rovi Guides, Inc. v. Comcast Cable Communications, LLC*, Nos. 19-1293, -1294, -1295 (Fed. Cir.); *Image Processing Technologies, LLC v. Samsung Electronics Co., Ltd.*, Nos. 2019-1408, 2019-1485 (Fed. Cir.); *Rovi Guides, Inc. v. Comcast Cable Communications, LLC*, Nos. 2019-1215, -1216, -1218 (Fed. Cir.); *Abbvie Biotechnology, Ltd. v. United States*, Nos. 2017-2304, -2305, -2306, -2362, -2363 (Fed. Cir.); *Uniloc 2017 LLC v. Cisco Systems, Inc.*, No. 19-1064 (Fed. Cir.); *Koninklijke Philips N.V. v. Microsoft Corporation*, No. 2019-1178 (Fed. Cir.); *Image Processing Technologies, LLC v. Samsung Electronics Co., Ltd.*, No. 2018-2156 (Fed. Cir.).

and vacating and remanding the case to the Board for further proceedings consistent with this Court's recent decisions in *Arthrex*, *Uniloc*, and *Bedgear II*.

It is readily apparent that the Board's final written decision in this case suffers from precisely the same infirmity as the underlying decision in *Arthrex*, *Uniloc*, and *Bedgear II*. As in *Arthrex*, "the Board's decision in this case was made by a panel of APJs that were not constitutionally appointed at the time the decision was rendered." *Arthrex*, No. 2018-2140, slip op. at *27. Accordingly, the Board's decision in this case must be vacated and remanded because "[it] issued while there was an Appointments Clause violation." *Id.* at *1–2; *see also id.* at *27; *Bedgear II*, No. 2018-2082, slip. op. at *2.

Moreover, like in *Arthrex*, *Bedgear*'s "Appointments Clause challenge was properly and timely raised before the first body capable of providing it with the relief sought—a determination that the Board judges are not constitutionally appointed." *Id.* at *28; *see also id.* at *29 (explaining that this type of "Constitutional challenge is one in which the Board had no authority to provide any meaningful relief and that it was thus futile for *Arthrex* to have raise[d] the challenge before the Board."). Here, *Bedgear*'s opening brief raised the Appointments Clause violation as an "independent ground" upon which the Board's decision should be vacated and remanded. *See* Dkt. No. 18 at 63–64 (raising this issue under a separate heading, titled: "The Board's Final Written Decision Violates

the Constitution’s Appointments Clause”); *id.* at 2 (including within the Statement of the Issues, “whether the Board’s administrative procedures and *inter partes* review proceedings were unconstitutional under the Appointments Clause”)²; *see also* Dkt. No. 35 at 50–52; Dkt. No. 39 at 35–36.

Similarly, Bedgear’s opening brief in the other consolidated appeal between the parties set forth a substantially identical Appointments Clause challenge to the three underlying Board decisions at issue in that case. *Compare*, Dkt. No. 18 at 2, 63–64 *with Bedgear II*, No. 2018-2082, Dkt. No. 24 at 2, 66. In vacating and remanding those Board decisions, this Court found that Bedgear had properly and timely raised its Appointments Clause challenge. *See Bedgear II*, No. 2018-2082, slip op. at *2. Thus, Bedgear’s Appointments Clause challenge was properly and timely raised in its opening brief. *Compare Uniloc 2017*, No. 2018-2251, slip op. at *1 (cancelling oral argument and vacating and remanding the case to the Board for proceedings consistent with the decision in *Arthrex*, based on “the fact that Uniloc has raised an Appointments Clause challenge in its opening brief in this case.”) (*per curiam*) (non-precedential) *with Customedia Techs., LLC v. Dish Network Corp., et*

² Along with its Opening Brief, Bedgear also submitted a “Notice of Constitutional Challenge to Federal Statute,” providing notice that Bedgear “is challenging the constitutionality of 35 U.S.C. § 6 with respect to the Constitution’s Appointments Clause, Art. I, § 2, cl. 2.” *See* Dkt. No. 16. In response, the Director of the United States Patent and Trademark Office intervened in the appeal. *See* Dkt. No. 22. The government subsequently withdrew from the appeal prior to submitting its Intervenor brief.

al., No. 2019-1001 (Fed. Cir., Nov. 1, 2019) (treating Customedia’s argument as forfeited because it “did not raise *any semblance* of an Appointments Clause challenge in its opening brief.”) (per curiam) (emphasis added).

Accordingly, Bedgear respectfully submits that the Board’s final written decision should be vacated and the case remanded to a newly designated panel of APJs. *See Arthrex*, No. 2018-2140, slip op. at *29–30 (“on remand we hold that a new panel of APJs must be designated and a new hearing granted.”).

II. In The Alternative, The Court Should Grant Rehearing En banc

If the Court does not grant panel rehearing, Bedgear respectfully requests that the full Court grant rehearing en banc. En banc review is necessary to secure and maintain uniformity in the Court’s decisions in all pending cases that raise the same important constitutional question whether the appointment of APJs violated the Constitution and, if it did, what the proper remedy for that constitutional harm should be.

The alleged constitutional harm here is of a serious and systemic type, and the remedy for that harm raises important questions of retroactivity and remedy for constitutional violations. Failing to rehear this case en banc, while the central dispositive issues remain in flux in this Circuit, would work a basic injustice to Bedgear by acknowledging and remedying a constitutional violation it suffered in *some but not all* pending cases in which it raised this question. Bedgear, like all

litigants who timely raised this issue in pending cases, deserves the benefit of consistent application of the Court's important constitutional decisions, and should not be subject to a decision issued without opinion which was subsequently rejected by three other panels, and is currently under review by a number of other panels, and which may well be considered by the full Court en banc in any of these other pending cases.

En banc review is likewise warranted because, as Judge Dyk explained in his concurrence in *Bedgear II*, there is a deep and serious split among the Courts of Appeals regarding the appropriate remedy for a constitutional harm of this type. *See Bedgear II*, No. 2018-2082, slip op. at 6 (J. Dyk concurring) (noting that “the Circuits appear to be divided as to the retroactivity issue in the Appointments Clause and similar cases” and collecting cases). Whatever the proper remedy to an Appointments Clause violation—and *Bedgear* submits that the *Arthrex* decision got it right when it required vacatur and remand to remedy this constitutional harm—the question itself is extraordinarily important and implicates a wide and deepening circuit split. Rehearing en banc is therefore warranted to ensure that this Court's decision on the merits of the Appointments Clause question, and the remedy it adopted in *Arthrex*, is given the full retroactive effect it deserves.

CONCLUSION

For the foregoing reasons, Bedgear requests that the Panel grant rehearing, or in the alternative, rehearing en banc, to vacate the Board's final written decision and remand the case to the Board for proceedings consistent with this Court's recent decisions in *Arthrex*, *Uniloc*, and *Bedgear II*, as well as the forthcoming decision in *Polaris* and other pending cases.

Date: November 8, 2019

Respectfully submitted,

By: /s/ K. Lee Marshall

K. Lee Marshall

BRYAN CAVE LEIGHTON PAISNER LLP

Three Embarcadero Center, 7th Floor

San Francisco, CA 94111

Phone: (415) 675-3400

Fax: (415) 675-3434

Email: klmarshall@bclplaw.com

Attorney for Appellant Bedgear, LLC

ADDENDUM

Contents of Addendum

Bedgear, LLC v. Fredman Bros. Furniture Company, Inc., No. 18-2170
(Fed. Cir. Oct. 11, 2019)

NOTE: This disposition is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

BEDGEAR, LLC,
Appellant

v.

FREDMAN BROS. FURNITURE COMPANY, INC.,
Appellee

2018-2170

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2017-00524.

JUDGMENT

JOSEPH J. RICHETTI, Bryan Cave Leighton Paisner LLP, New York, NY, argued for appellant. Also represented by ALEXANDER DAVID WALDEN; K. LEE MARSHALL, San Francisco, CA.

JASON R. MUDD, Erise IP, P.A., Overland Park, KS, argued for appellee. Also represented by ERIC ALLAN BURESH.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (LOURIE, MAYER, and TARANTO, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

October 11, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

CERTIFICATE OF COMPLIANCE
PURSUANT TO FEDERAL CIRCUIT RULE 32

Certificate of Compliance with Type Volume Limitation, Typeface Requirements, and Type Style Requirements:

1. This brief complies with the type volume limitation of Fed. R. App. P. 35(b)(2) and 35(b)(3) because:
 - this brief contains 1,966 words, excluding parts of the brief exempted by Fed. R. App. P. 32(f), and Federal Circuit Rules 32(b) and 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), because:
 - this brief has been prepared in a proportionally spaced typeface, using Microsoft Office Word 2010 in 14 Times New Roman font.

Date: November 8, 2019

Respectfully submitted,

By: /s/ K. Lee Marshall

K. Lee Marshall
BRYAN CAVE LEIGHTON
PAISNER LLP
Three Embarcadero Center, 7th Floor
San Francisco, CA 94111
Phone: (415) 675-3400
Fax: (415) 675-3434
Email: klmarshall@bclplaw.com

Attorney for Appellant Bedgear, LLC

CERTIFICATE OF SERVICE

I hereby certify that, on this 8th day of November, 2019, I filed the foregoing Appellant Bedgear, LLC's Combined Petition for Panel Rehearing and Rehearing En banc with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Date: November 8, 2019

Respectfully submitted,

By: /s/ K. Lee Marshall

K. Lee Marshall

BRYAN CAVE LEIGHTON

PAISNER LLP

Three Embarcadero Center, 7th Floor

San Francisco, CA 94111

Phone: (415) 675-3400

Fax: (415) 675-3434

Email: klmarshall@bclplaw.com

Attorney for Appellant Bedgear, LLC