Docket No. 2018-2251

In the

United States Court of Appeals

For the

Federal Circuit

UNILOC 2017 LLC,

Appellant,

v.

FACEBOOK, INC. and WHATSAPP, INC.,

Appellees.

Appeal from Patent Trial and Appeal Board Proceeding
No. IPR2016-01756, re U.S. Patent No. 8,571,194 B2

COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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December 2, 2019

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CERTIFICATE OF INTEREST

Counsel for Appellees Facebook, Inc. and WhatsApp Inc. certifies the following:

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

   Facebook, Inc. and WhatsApp Inc.

2. The name of the real party in interest if the party named in the caption is not the real party in interest:

   N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   Facebook, Inc.: None
   WhatsApp Inc.: Facebook, Inc.

4. The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court and who are not already listed on the docket for the current case:

   None; all are already listed on the docket for the current case: Cooley, LLP, Heidi L. Keefe, Mark R. Weinstein, Phillip E. Morton, Andrew C. Mace and Yuan Liang

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:

No.	Case Name	Number	District	Date Filed
1	*Amazon.com, Inc., et al. v. Uniloc USA, Inc., et al.*	2-17-cv-01307	WAWD	2017-08-29
2	*Google, Inc. v. Uniloc Luxembourg SA et al.*	IPR2017-01683	PTAB	2017-06-29
3	*Uniloc USA, Inc., et al. v. RingCentral, Inc.*	2-17-cv-00354	TXED	2017-04-25

No.	Case Name	Number	District	Date Filed
4	*Uniloc USA, Inc., et al. v. RingCentral, Inc.*	2-17-cv-00355	TXED	2017-04-25
5	*Uniloc USA, Inc., et al. v. Kik Interactive, Inc.*	2-17-cv-00346	TXED	2017-04-21
6	*Uniloc USA, Inc., et al. v. Hike, Ltd.*	2-17-cv-00348	TXED	2017-04-21
7	*Uniloc USA, Inc., et al. v. Cisco Systems, Inc.*	2-17-cv-00527	WAWD	2017-04-04
8	*Uniloc USA, Inc., et al. v. Amazon.com, Inc. et al.*	2-17-cv-00228	TXED	2017-03-24
9	*Uniloc USA, Inc., et al. v. Google LLC*	2-16-cv-00566	TXED	2016-05-28
10	*Uniloc USA, Inc., et al. v. Facebook, Inc.*	6-16-cv-00223	TXED	2016-03-18
11	*Uniloc USA, Inc., et al. v. WhatsApp Inc.*	6-16-cv-00225	TXED	2016-03-18
12	*Uniloc USA, Inc., et al. v. Avaya, Inc.*	6-15-cv-01168	TXED	2015-12-28

Dated: December 2, 2019 COOLEY LLP

By: /s/ *Heidi L. Keefe*
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STATEMENT OF COUNSEL PURSUANT TO FED. CIR. R. 35(B)(2)

Based on my professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or precedent(s) of this Court:

- *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991).
- *Edmond v. United States*, 520 U.S. 651 (1997).

Based on my professional judgment, I believe this appeal requires an answer to the following two precedent-setting questions of exceptional importance:

1) Whether the appointment of Administrative Patent Judges (APJs) to the Patent Trial and Appeal Board (PTAB) violates the Appointments Clause of the U.S. Constitution, U.S. Const., Art 2, § 2, cl. 2, as the panel in *Arthrex, Inc. v. Smith & Nephew, Inc*., 941 F.3d 1320 (Fed. Cir. 2019) concluded; and

2) If the answer to question (1) is "yes," what appropriate judicial remedy, if any, can be fashioned to ameliorate the constitutional violation?

Dated: December 2, 2019 COOLEY LLP

By: /s/ *Heidi L. Keefe*
Heidi L. Keefe

Attorneys for Appellees
Facebook, Inc. and WhatsApp Inc.

On October 31, 2019, the Court *sua sponte* remanded this matter back to the Patent Trademark and Appeal Board ("PTAB") in light of the decision in *Arthrex, Inc. v. Smith & Nephew, Inc*., 941 F.3d 1320 (Fed. Cir. October 31, 2019), holding that the appointment of Administrative Patent Judges ("APJs") to the PTAB violates the Appointments Clause of the U.S. Constitution ("Appointments Clause"). (Dkt. Nos. 45, 46.) Respondents and IPR petitioners Facebook, Inc. and WhatsApp Inc. (collectively "Facebook") were never heard on the Appointments Clause issue, which was the sole basis of the *sua sponte* remand order. Facebook respectfully seeks rehearing and/or rehearing *en banc* on the following grounds.

I. This Appeal Should Track the Outcome in *Arthrex*

The United States has confirmed that it intends to file in *Arthrex* a petition for rehearing *en banc* on the Appointments Clause issue. *See, e.g.*, *VirnetX Inc. v. Cisco Systems, Inc.*, No. 19-1671, Dkt. No. 25 at 2 ("The United States intends to seek rehearing en banc in *Arthrex*. The United States hereby requests that proceedings in this case relating to *Arthrex* be stayed pending the Court's disposition of the government's forthcoming rehearing petition in that case."). The United States has also requested stays in other cases raising the Appointments Clause issue (where the

appellant properly provided notice under Fed. R. App. P. 44),[1] pending resolution of its *en banc* petition in *Arthrex*. *Id.* To the extent the Court grants rehearing and/or rehearing *en banc* in *Arthrex*, it should grant, at a minimum, panel rehearing here to forestall issuance of the mandate.[2]

Additionally, eight days after the *Arthrex* decision, a separate panel of this Court ordered the parties and the government to file supplemental briefing on many of the same constitutional questions addressed in *Arthrex*, including "whether severing the application of Title 5's removal restrictions with respect to APJs under 35 U.S.C. § 3(c) sufficiently remedies the alleged unconstitutional appointment at

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[1] This appeal stands out in one key regard from the many other pending appeals that raise Appointments Clause issues – the United States is not a party to this appeal. This is because Uniloc failed to provide the notice required by Federal Rule of Appellate Procedure 44(a) that its appeal raises constitutional issues. In fact, shortly after filing its opening brief in January 2019, Uniloc was specifically advised by the Clerk of Court to "submit the required notice if FRAP 44 applies." (Dkt. No. 24.) But Uniloc never submitted such notice, and as such, the United States never had the opportunity to intervene in this appeal pursuant to 28 U.S.C. § 2403(a). To the extent Uniloc's repeated decision to forego the notice required by FRAP 44(a) resulted in waiver or forfeiture of any arguments it had under the Appointments Clause, *see Customedia Techs, LLC v. Dish Network Corp.,* 2019 WL 5677703 (Fed. Cir. Nov. 1, 2019), the Court should vacate its remand decision and set this case for oral argument on the merits of Uniloc's appeal.

[2] Under Federal Circuit Rule 40(e), the United States has 45 days to file its petition, whereas Facebook has only 30 days. Although the United States has not yet filed its petition in *Arthrex* (due December 16, 2019), *see, e.g.*, *VirnetX*, No. 19-1671, Dkt. No. 25 at 2, Facebook has grounds for seeking rehearing that exist independently of the government's petitions in *Arthrex* as discussed *infra*.

issue in these appeals." *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 2018-1768, Dkt. No. 90, Order (nonprecedential) (Fed. Cir. Nov. 8, 2019); *see also Bedgear, LLC v. Fredman Bros. Furniture Co.*, No. 2018-2082, 2019 WL 5806893, at *4 n.8 (Fed. Cir. Nov. 7, 2019) (Dyk, J., concurring in the judgment) (questioning the correctness of the prospective remedy adopted in *Arthrex*). Moreover, the *Arthrex* decision itself may yet be modified as previously discussed.

For all of these reasons, there is a possibility that the *Arthrex* panel decision may not represent the final word from the Federal Circuit on the Appointments Clause issue. Because of these uncertainties, the remand order creates a risk of a potentially enormous waste of administrative and party resources, because it requires a new oral hearing before a different PTAB panel of APJs, to issue a new Final Written Decision on a record with which they are currently unfamiliar. Because the remand order here was based entirely on *Arthrex*, it makes sense to forestall any remand until the parties have the benefit of the Federal Circuit's final word on the Appointments Clause challenge. For example, if the Federal Circuit were to conclude on rehearing or rehearing *en banc* in *Arthrex* that there is no Appointments Clause violation, or that the remand remedy imposed by the *Arthrex* panel was unnecessary to ameliorate any such violation, the remand order here should be vacated. The Court should therefore decline to issue any mandate in this case until after anticipated petitions in the *Arthrex* case are decided.

II. The Panel in *Arthrex* Misapprehended Controlling Supreme Court Law on the Appointments Clause

Even without regard to petitions the United States might file in *Arthrex* and other cases in which a similar remand order was entered, Facebook separately submits that the panel incorrectly found that APJs were "principal" officers under the Appointments Clause, an issue that warrants rehearing *en banc*. Facebook's respondent brief provided an extensive analysis of the leading Supreme Court cases on this subject, *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), and *Edmond v. United States*, 520 U.S. 651 (1997), both of which found administrative judges to be "inferior" officers under the Appointments Clause.

Both *Freytag* and *Edmond* reject the core premise that underlies the panel decision in *Arthrex* – that an Article I judge cannot be an "inferior" officer unless her decisions are subject to further review by "principal" officers within the Executive Branch. A correct reading of precedent compels the conclusion that APJs are, at most, "inferior" officers under the Appointments Clause – meaning that a remand of the present matter back to the PTAB would be unnecessary.

For example, the Supreme Court in *Edmond* unanimously found military judges of the Court of Criminal Appeals to be "inferior" officers notwithstanding that they had more of the hallmarks of "principal" officers than APJs. The Supreme Court observed that decisions of these judges were statutorily immune from any review or modification whatsoever by the Judge Advocate General (JAG), whose

role is highly analogous to the PTO Director. (Dkt. No. 27, at 53-55.) The JAG "may not attempt to influence (by threat of removal or otherwise) the outcome of individual proceedings," and "has no power to reverse decisions of the court." *Edmond*, 520 U.S. at 664 (citing 10 U.S.C. § 837).

The *Arthrex* panel correctly observed that the PTO Director does not have unfettered discretion to reverse a decision issued by a PTAB panel, but he can convene a panel of APJs (which can include himself) to rehear such a matter. 941 F.3d at 1330. Although that authority is not without its limits, it goes far beyond the authority of the JAG in *Edmond*, who was statutorily prohibited from having any influence whatsoever on a decision by the Court of Criminal Appeals.

The *Arthrex* panel distinguished *Edmond* based on the fact that decisions of the Court of Criminal Appeals were also subject to review by the Court of Appeals for the Armed Forces ("CAAF"), an Executive Branch entity whose judges are appointed by the President with advice and consent of the Senate. *Arthrex*, 941 F.3d at 1330-31. But Facebook respectfully submits that the panel misapprehended the nature (and limits) of that review. As the Supreme Court explained, appeals to the CAAF are automatic only where "the sentence extends to death" or "the Judge Advocate General orders such review." *Edmond*, 520 U.S. at 664-65.

But where neither of those conditions is satisfied, review is at best discretionary – the CAAF must first grant a petition for review by the accused upon

a showing of good cause. *Id.* (citing 10 U.S.C. § 867(a) ("The Court of Appeals for the Armed Forces shall review the record in-- (3) all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review.")). The category of cases that can be reviewed only upon a granted "good cause" petition may involve significant punishments, including extended periods of criminal confinement. *Id.* at 662 (explaining that Court of Criminal Appeals judges review court martial proceedings "that result in the most serious sentences," including "dishonorable or bad-conduct discharge, or confinement for one year or more."). And unlike review by the PTAB Precedential Opinion Panel (POP), even where the CAAF agrees to review a matter, its review extends only to errors of law. *Id.* at 665.

The panel in *Arthrex* distinguished *Edmond* on the basis that APJs "have substantial power to issue final decisions on behalf of the United States without any review by a presidentially-appointed officer," *Arthrex*, 941 F.3d at 1331, but that same observation applies to the military judges found to be "inferior" officers in *Edmond*. As explained above, the CAAF has no obligation to grant petitions for review of decisions by the Court of Criminal Appeals – and it in fact rejects them in

more than 85% of cases.[3] This means that, for the vast majority of cases, the military judges of the Court of Criminal Appeals can issue decisions that represent the final word of the United States, *i.e.* will not be reviewed by the CAAF or any other Executive Branch official or entity. *Edmond* determined that those judges were "inferior" officers notwithstanding that they could, to use the *Arthrex* panel's words, issue "final decisions on behalf of the United States without any review by a presidentially-appointed officer." 941 F.3d at 1331. APJs thus cannot be distinguished from the "inferior" officer judges of *Edmond* on that basis.

Additionally, although the *Arthrex* panel addressed the facts of *Edmond*, it did not analyze the decision in *Freytag*. As Facebook explained in its respondent brief, *Freytag* concluded that the special trial judges of the U.S. Tax Court were "inferior" officers, notwithstanding that they could directly hear and decide certain matters (including declaratory judgment matters), with appeal only to an Article III court. (Dkt. No. 27, at 50-51.) And unlike the CAAF in *Edmond*, no intermediate

[3] For example, the CAAF granted only 13% of petitions between 2017-2018. (*See Report of the United States Court of Appeals for the Armed Forces*, 2017-2018, <https://www.armfor.uscourts.gov/annual/FY18AnnualReport.pdf>, at 7 (48 petitions granted out of 358 filed).) This rate is consistent with the grant rate of petitions by the CAAF at the time *Edmond* was handed down. (*See Report of the United States Court of Appeals for the Armed Forces,* 1997-1998, <https://web.archive.org/web/20000826222504/http://www.armfor.uscourts.gov/annual/FY98/FY98CourtReport.pdf> (approximately 14% of petitions granted).) Thus, the judges of the Court of Criminal Appeals are effectively the "last word" from the Executive Branch in the vast majority of cases.

Executive Branch entity existed in *Freytag* to review decisions by special trial judges. *See Edmond*, 520 U.S. at 665-66 (explaining that in *Freytag*, "there is no Executive Branch tribunal comparable to the Court of Appeals for the Armed Forces that reviews the work of the Tax Court; its decisions are appealable only to courts of the Third Branch."). *Freytag* thus provides another example in which Article I judges were found to be "inferior" officers notwithstanding their ability to *directly* issue decisions on behalf of the United States without further review by the Executive Branch, and appealable only to an Article III court.

The *Arthrex* decision accordingly placed too much importance on the fact that APJs enjoy protections against arbitrary removal from service by the PTO Director. The ability to remove from judicial service is but a single factor that must be weighed alongside the other factors analyzed in *Freytag* and *Edmond*. Although the PTO Director does not have unencumbered authority to remove APJs from service, he does have the authority to control assignments of APJs to individual cases. *See* 35 U.S.C. § 6(c). As this Court observed construing a predecessor to § 6(c), the Patent Act does allow the Director "to determine the composition of Board panels, and thus he may convene a Board panel which he knows or hopes will render the decision he desires, even upon rehearing…." *In re Alappat*, 33 F.3d 1526, 1535 (Fed. Cir. 1994), *abrogated on other grounds In re Bilski*, 545 F.3d 943, 959 (Fed. Cir. 2008) (en banc). And as the *Arthrex* panel observed, the PTO Director also has authority over

the compensation of PTAB judges. *Arthrex*, 941 F.3d at 1331 (citing 35 U.S.C. § 3(b)(6)). In light of the PTO Director's substantial oversight and control over APJs, the fact that he cannot arbitrarily remove them from service altogether should carry less weight in the analysis.

III. The Remedy Imposed by the Panel in *Arthrex* Was Improper Because it Destroys the Independence of PTAB Judges

Even if the *Arthrex* panel correctly found a constitutional violation under the Appointments Clause, Facebook respectfully submits that the remedy imposed by the panel decision is not the appropriate one. The *Arthrex* decision essentially stripped hundreds of APJs of the job security and independence provided by Title 5, which prohibits removal without a showing of "good cause." 5 U.S.C. § 7521.

This Court has previously recognized that the Title 5 protections provide an important safeguard to protect the independence and impartiality of administrative law judges (ALJs). "By protecting the tenure of the ALJ in this manner," this Court explained in discussing 5 U.S.C. § 7521, "Congress obviously intended to insulate and protect the judges from agency influence and manipulation." *Vesser v. Office of Personnel Management*, 29 F.3d 600, 605 (Fed. Cir. 1994). Title 5 protections ensure that PTAB judges can exercise decisional independence and issue rulings based on the facts and merits of each individual case. *See, e.g.*, *Butz v. Economou*, 438 U.S. 478, 513 (1978) ("[T]he process of agency adjudication is currently structured so as to assure that the [ALJ] exercises his independent judgment on the

evidence before him, free from pressures by the parties or other officials within the agency."); *Miles v. Chater*, 84 F.3d 1397, 1401 (11th Cir. 1996) ("The impartiality of the ALJ is thus integral to the integrity of the system.").

Arthrex effectively destroys this independence by transforming APJs into "at will" employees, subject to discharge without cause by the PTO Director. It is difficult to imagine how such a remedy would not undermine the public's confidence in the independence of APJs, and in the long term, its confidence in the integrity of the Patent Office as a whole. In other words, by potentially undermining the independence and impartiality of APJs, the *Arthrex* panel may have attempted to solve one purported constitutional problem by creating another one. *See Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("[D]ue process demands impartiality on the part of those who function in judicial or quasi-judicial capacities.").

The panel decision suggested (but rejected) an alternative remedy: "Allowing the Director to appoint a single Board member to hear or rehear any *inter partes* review (appeal, derivation proceeding, and post grant review), especially when that Board member could be the Director himself, would cure the Constitutional infirmity." *Arthrex*, 941 F.3d at 1336. The panel dismissed this proposal because it found the "current three-judge review system" preferable and more consistent with the overall statutory framework. *Id.*

The Court's concern appears to have been directed at eliminating three-APJ panels for all decisions. *Id.* ("Eliminating three-APJ panels from all Board proceedings would be a radical statutory change to the process long required by Congress in all types of Board proceedings.") (emphasis added). But complete elimination of three-APJ panels would not be required – a single APJ review by the Director (or an appointee of the Director) could be reserved only for the *rehearing* of Board decisions. PTAB proceedings could continue to be heard, in the first instance, by three-APJ panels. And the Appointments Clause would not require that this review be *de novo* – the CAAF in *Edmond*, for example, could only review the decisions of military judges for legal error. *See Edmond*, 520 U.S. at 665.

To the extent the Court believes that even rehearing must always be conducted by three APJs, one further remedy would involve making the POP more closely analogous to the CAAF in *Edmond*. The POP, similar to the CAAF in *Edmond*, has discretion to grant petitions for review of particular decisions – and can even do so *sua sponte*.[4] As explained above, the Supreme Court in *Edmond* found the possibility of review by the CAAF sufficient to render Court of Criminal Appeals judges "inferior" officers, notwithstanding that such review was discretionary in

[4] The POP's ability to review decisions *sua sponte* – a power that the CAAF in *Edmond* did not possess – is yet another indication of the expansive oversight to which PTAB judges are subject.

most cases. The POP provides a similar but more potent avenue of review as its scope is not restricted to errors of law.

The panel decision in *Arthrex* found that the POP provided insufficient safeguards under the Appointments Clause because the only member of the PTAB appointed by the President, with advice and consent of the Senate, was the PTO Director himself. *Arthrex*, 941 F.3d at 1330 ("[T]hus, even if the Director placed himself on the panel to decide whether to rehear the case, the decision to rehear a case and the decision on rehearing would still be decided by a panel, two-thirds of which is not appointed by the President. There is no guarantee that the Director would even be in the majority of that decision."). But the panel's reasoning itself suggests a path towards a possible remedy.

For example, one possible remedy would require that POP decisions always be issued by a three-judge panel whose members were appointed by the President with advice and consent of the Senate. The Patent Act specifies the PTAB includes not just the PTO Director, but also "the Deputy Director, the Commissioner for Patents, [and] the Commissioner for Trademarks," who are appointed by the Secretary of Commerce. *See* 35 U.S.C. §§ 6(a), 3(b). But the Court as a remedy could require that each of these officers be subject to appointment by the President with advice and consent of the Senate, in the same way as the Director under 35 U.S.C. § 3(a). The Deputy Director, the Commissioner for Patents, and/or the

Commissioner for Trademarks could then preside with the PTO Director over decisions by the POP. This would transform the POP into an internal body of Presidentially-appointed "principal" officers, making the POP even more closely analogous to the CAAF judges in *Edmond* who could review decisions by the "inferior" officer Court of Criminal Appeals judges.[5]

As an interim remedy until the PTAB has at least three Presidentially-appointed judges, the Court could hold that the POP be occupied only by the PTO Director. This would avoid the problem of identified in *Arthrex* of having "no guarantee that the Director would even be in the majority of that [POP] decision." *Arthrex*, 941 F.3d at 1330. As noted, the panel decision in *Arthrex* expressly held that "[a]llowing the Director to appoint a single Board member to hear or rehear any inter partes review… especially when that Board member could be the Director himself, would cure the Constitutional infirmity." *Id.* at 1336.

[5] Such a remedy need not require the two other positions to be filled by the Deputy Director, the Commissioner for Patents, or the Commissioner for Trademarks. The POP could also be filled by other Presidentially-appointed members within the Department of Commerce, such as the Deputy Secretary of Commerce and the General Counsel for the Department of Commerce.

These remedies would also not impose a significant workload burden on the POP because, as noted, the Appointments Clause does not require that the POP review every decision by APJs – or even a significant number of decisions. The CAAF in *Edmond*, as noted above, was sufficient to render Court of Criminal Appeals judges "inferior" officers notwithstanding that the CAAF only agreed to review a small fraction of the decisions by military judges of the Court of Criminal Appeals. Under *Edmond*, the availability of that review power over APJs would be sufficient to cure a constitutional violation, even if infrequently exercised.

The remedy adopted by the *Arthrex* panel was elegant in its simplicity but comes at a high cost – the independence of PTAB decision-making – that may fundamentally alter the Patent Office for generations to come. The alternatives proposed here would allow PTAB proceedings to continue to function as they have in the past, while providing a further internal safeguard of review by one or more Presidentially-appointed officers who can review APJ decisions in the same manner as the CAAF in *Edmond*. And most importantly this remedy recognizes "the importance of the decisional independence of ALJs," *Vesser*, 29 F.3d at 605, by preserving the Title 5 protections for APJs that Congress intended. *See* 35 U.S.C. §

3(c). Accordingly, Facebook respectfully requests that the Court grant panel hearing and/or rehearing *en banc* based on the reasons set forth above.

Dated: December 2, 2019 COOLEY LLP

By: /s/ *Heidi L. Keefe*
Heidi L. Keefe

Attorneys for Appellees
Facebook, Inc. and WhatsApp Inc.

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that FWP IP ApS's Petition For Rehearing complies with the type-volume limitation set forth in Fed. R. App. P. 35(b)(2). The relevant portions of the brief, including all footnotes, contain 3,697 words, as determined by Microsoft Word.

Dated: December 2, 2019 COOLEY LLP

By: /s/ *Heidi L. Keefe*
Heidi L. Keefe

Attorneys for Appellees
Facebook, Inc. and WhatsApp Inc.

ADDENDUM

United States Court of Appeals for the Federal Circuit

UNILOC 2017 LLC,
Appellant

v.

FACEBOOK, INC., WHATSAPP, INC.,
Appellees

2018-2251

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2016-01756.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

VACATED AND REMANDED

ENTERED BY ORDER OF THE COURT

October 31, 2019

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

CERTIFICATE OF SERVICE

I hereby certify that on December 2, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: December 2, 2019 COOLEY LLP

By: /s/ *Heidi L. Keefe*
Heidi L. Keefe

Attorneys for Appellees
Facebook, Inc. and WhatsApp Inc.