

2018-1768

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**IN THE  
UNITED STATES COURT OF APPEALS FOR  
THE FEDERAL CIRCUIT**

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**POLARIS INNOVATIONS LIMITED,**  
*Appellant*

v.

**KINGSTON TECHNOLOGY COMPANY, INC.,**  
*Appellee*

**UNITED STATES,**  
*Intervenor*

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APPEAL FROM THE UNITED STATES PATENT AND TRADEMARK  
OFFICE, PATENT TRIAL AND APPEAL BOARD NO. IPR2016-01621

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**APPELLANT POLARIS INNOVATIONS LIMITED'S CORRECTED  
PETITION FOR REHEARING *EN BANC***

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February 28, 2020

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## CERTIFICATE OF INTEREST

Counsel for Appellant Polaris Innovations Limited (“Polaris”) in Appeal No. 2018-1768 certifies the following:

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

Polaris Innovations Limited

**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:**

Quarterhill Inc.

**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:**

Wi-LAN Inc.

**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:**

Parham Hendifar, Lowenstein & Weatherwax LLP.

**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 are:**

*Polaris Innovations Limited v. Kingston Technology Company, Inc.*, 8:16-cv-00300 (C.D. Cal); *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140 (Fed. Cir.).

Dated: February 28, 2020

/s/ Matthew D. Powers

Matthew D. Powers

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**STATEMENT OF COUNSEL**

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

- Whether severance of the tenure protections for Administrative Patent Judges (“APJs”) was not available to the *Arthrex* panel to remedy the violation of the Appointments Clause by the IPR statute, 35 U.S.C. § 311 *et seq.*, because Congress would not have denied APJs such protection;
- Whether the *Arthrex* decision’s removal of APJ tenure protections is insufficient to cure the violation of the Appointments Clause by the IPR statute; and
- Whether it was proper for the panel to remand this matter for new proceedings before a three-judge panel of non-tenured APJs whose appointment continues to violate the Appointments Clause.

Dated: February 28, 2020

/s/ Matthew D. Powers  
ATTORNEY OF RECORD FOR  
APPELLANT POLARIS  
INNOVATIONS LIMITED

## PETITION FOR REHEARING EN BANC

### I. INTRODUCTION AND STATEMENT OF THE CASE

Polaris Innovations Limited (“Polaris”) agrees with the decision in *Arthrex, Inc. v. Smith & Nephew, Inc.* that Administrative Patent Judges (“APJs”) in *Inter Partes* Review (“IPR”) proceedings before Patent Trial and Appeal Board (“Board”) are principal officers and that their actions thus violate the Constitution’s Appointments Clause. Polaris further agrees with this Court’s determination that, in light of *Arthrex*, the Final Written Decision issued by such APJs concerning the Polaris patent at issue here cannot stand. If an IPR proceeding is to determine the validity of Polaris patents, it must be conducted and decided by a panel of APJs appointed under a constitutionally valid statutory scheme.

Instead, this matter must be reheard *en banc* because ***no such APJs exist***. The *Arthrex* remedy for the constitutional violation, which severed the APJs’ statutory protections from removal, was neither available to the *Arthrex* court nor effective to “cure” the constitutional defect. First, the severance imposed by *Arthrex* was unavailable to the Court, given that removal of APJ job protections was contrary to the unmistakable intent of Congress. The IPR statute and its legislative history demonstrate that Congress intended to provide APJs with protection from arbitrary interference, such as at-will removal, so as to ensure their ability to render impartial and independent decisions. Second, even after removal of their tenure protections,

APJs remain unconstitutionally appointed principal officers, because in the absence of any meaningful review of final written decisions by a principal officer, the threat of prompt removal is insufficient to transform APJs into inferior officers.

The *Arthrex* decision erred by applying a lower threshold for the constitutional appointment of inferior officers with broad adjudicatory power than any precedent binding on this Court has ever endorsed. It did so by imposing a supposed form of supervision by threat of firing that undermines the independence and impartiality of the APJs whose appointments it purports to cure and contravenes the Congressional design it tries to save. After *Arthrex* there are still no constitutionally appointed APJs to which this Court *can* remand the Polaris patents for further proceedings. Accordingly, the decision to remand this case merits rehearing by the *en banc* Court because it concerns the substantive rights not only of Polaris, but of every patent owner and petitioner who will henceforth proceed through an IPR under the auspices of the *Arthrex* “cure.”

## **II. PROCEDURAL BACKGROUND**

Before the Court, Polaris contended that the final written decision of a three-judge panel in an IPR proceeding concerning a Polaris patent violated the Constitution’s Appointments Clause. *See* ECF No. 22 at 52-59. Shortly after the Court’s decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, finding that the IPR statute violated the Appointments Clause, and purporting to remedy the constitutional flaw

by severing the tenure protections for APJs, 941 F.3d 1320 (Fed. Cir. 2019), the panel in this action ordered supplemental briefing to address the consequences of the *Arthrex* decision for the Polaris patent. ECF No. 90.

In that supplemental briefing, Polaris explained, *inter alia*, that making APJs removable at will by the Director, as *Arthrex* did, did not convert them from unconstitutionally appointed principal officers to constitutionally valid inferior officers. ECF No. 100 at 1-8. Polaris further explained that courts are not free to sever statutory provisions in a manner that undermines Congressional intent, and the facts here show that Congress intended for APJs to have protection from arbitrary removal. *Id.* at 8-13.

Following supplemental briefing, the Court issued an Order vacating the Board's final written decision regarding the Polaris patent, and remanded the case to the Board for "proceedings consistent with this court's decision in *Arthrex*" (ECF No. 106).

### **III. ARGUMENT**

#### **A. SEVERANCE OF APJs' TENURE PROTECTIONS WAS UNAVAILABLE TO REMEDY THEIR UNCONSTITUTIONAL APPOINTMENT**

While it is true that courts "must refrain from invalidating more of the [unconstitutional] statute than is necessary," *see* No. 2018-1831, ECF No. 97 at 15 (Concurring Opinion) (quoting *United States v. Booker*, 543 U.S. 220, 258–59

(2005)), it is equally true that a court’s power to “cure” constitutional defects through severance is a limited one. The *Arthrex* panel’s remedy breached those limits by imposing a form of “severance” that none of the leading severance cases support, and which is totally inconsistent with Congressional intent in enacting the IPR statute.

There is no support in the law for a remedy that purports to salvage constitutionality by “severing” a *different*, and constitutionally valid, statute than the one found invalid, and doing so only partially, as the *Arthrex* court did. The Supreme Court’s severance cases permit courts to sever the unconstitutional language (or its application) in a specific statute, leaving the remainder of that same statute intact. *See, e.g., Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 480 (2010) finding “unconstitutional tenure provisions are severable from the remainder of the statute.”); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 586 (2012) (invalidating the application of a statute). Here, the *Arthrex* court performed radically different surgery. Instead, it looked to Title 5 – a completely different statute under a different federal title – whose employment protections for federal employees are not constitutionally suspect and existed long before the IPR statute. Once there, the *Arthrex* court severed the application of Title 5 protections under 35 U.S.C. § 3(c), but only with respect to its removal protections, and only with respect to APJs, not other Board officers and employees. 941 F.3d at 1337-38.

In fact, the *Arthrex* panel considered, and specifically rejected, a severance like those in other cases that would have removed APJ job protections by striking “officers and” from the IPR statute, because, the Panel acknowledged, it was not the minimal change required by precedent and it is far from clear that Congress would have accepted stripping all of Title 5’s protections and doing so for officers beyond APJs. *Id.* at 1338. The panel’s reticence to perform the only real severance available to it further shows the impropriety of its chosen remedy. Nor, for this reason, is the *Arthrex* panel correct that its remedy follows the approach of the D.C. Circuit in *Intercollegiate Broad Sys. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1339-1341 (D.C. Cir. 2012). *Intercollegiate* involved a real severance—striking the offending language from the statute and leaving the rest – unlike in *Arthrex*, which left the offending language in place and purported to partially sever the partial application of a different statute.

The *Arthrex* remedy also disregarded that judicial authority to sever must always yield to Congressional intent. The law is clear that this Court may not sever portions of a statute to cure a constitutional defect unless Congress would have made that severance if given the option. *Murphy v. NCAA*, 138 S. Ct. 1461, 1482 (2018) (severance unavailable where it is “evident that [Congress] would not have enacted those provisions which are within its power, independently of [those] which [are]

not.”); *Bowsher v. Synar*, 478 U.S. 714, 735 (1986) (severance unavailable if it “would lead to a statute that Congress would probably have refused to adopt”).

Under this standard, there is no “high” bar for finding non-severability, as the concurrence in a related Polaris Appointments Clause challenge has suggested. No. 2018-1831, ECF No. 97 at 15. Polaris is aware of no case holding that there is such a “high” bar, and there has never been such a “high” bar in the face of evidence that Congress would not have enacted the statute as severed. As the Supreme Court explained in *Booker*, courts “must retain those portions of the Act that are (1) constitutionally valid, (2) capable of ‘functioning independently,’ and (3) consistent with Congress’ basic objectives in enacting the statute.” *Booker*, 543 U.S. at 258-259 (internal citations omitted). When what is left of the statute after severance would be inconsistent with those objectives, the statute is non-severable and the inquiry should stop. *Murphy*, 138 S. Ct. at 1482-83 (portion of statute regarding gambling nonseverable because resulting scheme differed sharply from what Congress contemplated). Here, there is no evidence that Congress would have chosen to deprive the APJs of their employment protections, and there are four strong sources of evidence that Congress would not have done so.

First, it is the wrong way to attempt to supervise judges. The concept behind the *Arthrex* “cure” apparently is that the Director would exert sufficient control over the APJs’ decisionmaking by the *in terrorem* threat of firing them if they do not

decide cases as he wants. *See Arthrex*, 941 F.3d at 1338 (Director’s policy guidance, combined with removal without cause, “provides significant constraint on issued decisions.”). That concept is the opposite of the traditional concept that judges should be independent and that an adjudicative process should be transparent. After all, patents are a form of property, and their owners are entitled to due process protections, including having their rights decided by independent and impartial decision-makers. *Oil States Energy Services, LLC v. Greene’s Energy Group, LLC*, 138 S. Ct. 1365, 1379 (2018); *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”); *Belden, Inc. v. Berk-Tek LLC*, 805 F.3d 1064, 1080 (Fed. Cir. 2015) (citations omitted) (“indispensable ingredient[] of due process” is opportunity to be heard by a “disinterested decision-maker.”). As the concurrence in the related Polaris Appointments Clause challenge observes, making APJs removable at will is also entirely inconsistent with the fact that “Congress has maintained federal employment protections for USPTO officers and employees, including APJs and their predecessors, from 1975 to today.” No. 2018-1831, ECF No. 97 at 16.

Second, the legislative history of the AIA shows that Congress intended that APJs be more like judges in an adversarial proceeding and less like bureaucrats, precisely to achieve such independence and transparency. *See, e.g.*, H.R. Rept. No.

112- 98, Pt. 1, at 46 (2011) (statute sought to “convert[] inter partes reexamination from an examinational to an adjudicative proceeding”); 157 Cong. Rec. S5319 (daily ed. Sept. 6, 2011) (statement of Sen. Kyl) (“The overarching purpose and effect of the present bill is to create a patent system that is clearer, fairer, more transparent, and more objective....”). Consistent with this intent, the IPR statute creates a series of procedures that closely resemble district court litigation, including discovery, depositions, the introduction of evidence based on the Federal Rules of Evidence, and adversarial hearings. *See* 35 U.S.C. § 316.

Under the structure chosen by Congress, APJs would function as independent decision-makers who decided patentability issues “fair[ly]” and “transparent[ly],” 157 Cong. Rec. S5319 (daily ed. Sept. 6, 2011) (statement of Sen. Kyl) – which necessarily requires that they be insulated from overt or secret political pressure from the Director (and by extension, the President). In keeping with this intent, the IPR statute consistently seeks to ensure that APJs will remain independent from such influence. As the *Arthrex* panel found, the IPR system provides for no meaningful review of APJ patentability decisions by the Director. 941 F.3d at 1329-1331. The IPR statute explicitly describes the decisions on patentability issued by APJs as “final” written decisions, precisely *because* they are “final” agency decisions, not subject to review by the Director or the Secretary of Commerce. 35 U.S.C. §§ 318, 328. The Director’s membership on the PTAB also does not allow him to directly

review or change any unpatentability decision—because at least three PTAB members must hear each case. 35 U.S.C. § 6(c). Once they issue a final decision, “the Director *must* ‘issue and publish a certificate’,” even if he disagrees. 35 U.S.C. § 318(b). Nor does the PTAB’s rehearing procedure provide the Director with meaningful control over APJ decisions, since the decision to rehear is not made by the Director, but by a panel of at least three members of the Board. 35 U.S.C. § 6(c).

Third, the structure chosen for the AIA makes clear that Congress intended APJs to have the very removal protections which *Arthrex* stripped away. While the Director serves at the pleasure of the President and may be removed for any reason at all, 35 U.S.C. § 3(a)(4), and the Commissioner of Patents may be removed “for misconduct or nonsatisfactory performance” “without regard to the provisions of title 5,” 35 U.S.C. § 3(b)(2)(C), only these two Board officers lack meaningful job protections. All other Board officers and employees, including APJs, “shall be subject to the provisions of title 5,” 35 U.S.C. § 3(c), which provides that they may be removed “only for such cause as will promote the efficiency of the service” and only after 30 days’ written notice, an opportunity to answer and be represented by counsel, a written removal decision and an opportunity to appeal to the Merit Systems Protection Board. 5 U.S.C. § 7513(a)-(d). The fact that Congress specifically enumerated in the IPR statute that only two officers would lack meaningful employment protections strongly suggests that protecting APJs from

such arbitrary removal was an integral part of the statutory design to ensure APJ independence and impartiality.

Finally, following *Arthrex*, several members of Congress made quite clear they did not approve of depriving APJs of their statutory employment protections. *Hearing Before the Subcomm. On Courts, Intellectual Property, and the Internet of the H. Comm. on the Judiciary*, 116th Congress (2019) (statement of Rep. Jerrold Nadler, Chair, H. Comm. on the Judiciary) (“I do have concerns with the current ‘remedy’ of removing APJs’ civil service protections. . . . ***The extent to which the Director’s views are incorporated into any decision will not be transparent***, and that is generally not consistent with the way that adjudicatory tribunals are structured.”), available at <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2155>; *Id.* (statement of Rep. Johnson) (“I find it inconsistent with the idea of creating an adjudicatory body to have judges who have no job security.”), available at <https://hankjohnson.house.gov/media-center/press-releases/chairman-rep-johnson-s-ip-subcommittee-statement-patent-trial-appeal>.

Given this evidence, there was no basis for the *Arthrex* panel to conclude that Congress would have preferred to have IPR proceedings in which APJs were subject to arbitrary removal over no IPR statute at all. Rather, stripping these protections cannot be deemed “consistent with Congress’ basic objectives in enacting the statute,” as severance requires. *Booker*, 543 U.S. at 258-259. No Supreme Court

decision has ever held that a judicial severance imposing removal-at-will, in the absence of additional, more transparent mechanisms for the review of decision-making, would be consistent with Congressional intent. In *Free Enterprise*, the Supreme Court found that severance of removal restrictions for officers of an SEC oversight board was not inconsistent with Congressional intent where, under the statute, a duly appointed principal officer also had the ability to “start, stop, or alter individual [Board] investigations,” and otherwise had significant “power over [Board] activities,” thereby demonstrating other transparent and impartial review mechanisms. 561 U.S. at 504. In such circumstances, the Court held, “nothing in the statute’s text or historical context makes it ‘evident’ that Congress. . . would have preferred no Board at all to a Board whose members are removable at will.” *Id.* at 509. Here, as discussed above, the opposite is true. *See also Inventing America presents The U.S. Patent System: Promoting U.S. Job Creations, Competitiveness, and National Security*, (statement of Rep. Johnson) (“If the Appointments Clause requires that a Presidentially-appointed, Senate-confirmed officer have the last word in these cases, ***that power should be exercised transparently rather than through the ever-present threat of losing one’s job.***”), available at

<https://hankjohnson.house.gov/media-center/speeches/inventing-america-presents-us-patent-system-promoting-us-job-creations>.<sup>1</sup>

**B. APJs REMAIN UNCONSTITUTIONALLY APPOINTED PRINCIPAL OFFICERS AFTER THE ARTHREX “CURE”**

Even assuming that severance was available to the *Arthrex* panel in view of Congressional intent, that remedy fails to cure the constitutional defect. After *Arthrex*, PTAB APJs remain principal officers in violation of the Appointments Clause, even when removable at will by the Director. Under the binding cases, removability alone does not suffice to make an officer an inferior one; instead, the touchstone for inferior officer status is some mechanism for review of that officer’s decision by a principal officer before that decision becomes final. *Arthrex* specifically found “insufficient review within the agency over APJ panel decisions,” yet such review mechanisms remain absent following the *Arthrex* “cure,” and thus the APJs remain principal officers, only with fewer job protections. 941 F.3d at 1331.

All of the binding cases finding that adjudicatory officers were inferior officers featured significant review by a principal officer, and none permit curing

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<sup>1</sup> Although not a Supreme Court decision, *Intercollegiate* does not instruct otherwise. In *Intercollegiate*, the D.C. Circuit severed tenure protections for Copyright Royalty Judges (“CRJs”) to “cure” an Appointments Clause violation, without any discussion of whether that would be consistent with Congressional intent, as required. 684 F.3d at 1340-42. Nonetheless, principal officers exercised numerous supervisory powers over CRJs, including approving regulations, providing opinions on novel questions of law, and correcting the judges’ legal errors. *Id.* at 1338-39.

the absence of such review by imposing additional removability. In *Edmond v. United States*, which concluded that Coast Guard Court of Criminal Appeals judges were inferior officers, the judges' decisions were subject to review and reversal by the Court of Appeals for the Armed Forces, which consists of principal officers. 520 U.S. 651, 664-66 & n.2 (1997). The Supreme Court concluded that what is "significant" is that the judges "have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers" who "review[] every decision" they make. *Id.* In *Lucia v. SEC*, the SEC Commissioners, who are constitutionally appointed principal officers, had "a discretionary right to review" the action of an ALJ, who is an inferior officer, on their own initiative or on petition of a party. 138 S. Ct. 2044, 2051 & n.3, 2055, 2066 (2018). The ALJs' decisions only became final agency decisions if the SEC decided not to review them, confirming the significance of such review. *Id.* at 2053-54. Similarly, this Court held in *Masias v. Secretary of HHS*, that Vaccine Act special masters were inferior officers, including because their decisions were subject to review by the judges of the Court of Federal Claims, who are constitutionally appointed principal officers. 634 F.3d 1283, 1294-95 (Fed. Cir. 2011).

None of these binding cases supports the notion that removability is enough; meaningful review is required. Indeed, *Edmond* involved Coast Guard judges who could already be fired at will. Nevertheless, the Court still relied upon the fact that

the Coast Guard judges' decisions were subject to review by a principal officer in finding them to be inferior officers. 520 U.S. at 665. *Arthrex* itself specifically holds that the lack of review of APJs' decisions supports finding them principal officers, but then refuses to admit the necessity of such review in providing relief. 941 F.3d at 1329-31. Instead, it wrongly holds that a combination of removability at will and some quantum of other supervision is sufficient to make officers inferior absent meaningful review, and none of the binding precedent *Arthrex* relies upon supports this contention.

No Supreme Court case has implemented the approach adopted by *Arthrex*. *Arthrex* relies upon *Free Enterprise* as principal support for its proposed removability remedy. 941 F.3d at 1337. But that case required not only removability, but also review, such as the SEC's power to alter the sanctions imposed by the Board. 561 U.S. at 510; *see id.* (“Board members are inferior” “[g]iven that the Commission is properly viewed, under the Constitution, as possessing the power to remove Board members at will, **and** given the Commission's other oversight authority.”).

*Arthrex* should also not have purported to follow the D.C. Circuit's *Intercollegiate* decision. Not only is the *Arthrex* “severance” of a different statute unlike *Intercollegiate*'s severance of a portion of the statute found unconstitutional, *Intercollegiate* is not binding authority and is inconsistent with the binding Supreme Court authority discussed above. *Intercollegiate* specifically identified the lack of

review of the CRJ's decisions as a problem but only addressed the removal restriction. 684 F.3d at 1339-1341. It thus failed to follow *Edmond*, *Lucia*, *Free Enterprise*, and *Masias* (binding on this Court)—which make clear that whether removable at will or not, inferior officers cannot issue final agency decisions without review. Under that binding precedent, the final written decisions issued by APJs continue to violate the Appointments Clause, because they lack the necessary review by a principal officer prior to becoming final.

**C. THE COURT'S REMAND FOR FURTHER PROCEEDINGS IN FRONT OF APJs WHOSE APPOINTMENT REMAINS UNCONSTITUTIONAL MERITS *EN BANC* REVIEW**

Since severance was unavailable to the *Arthrex* panel as a matter of law, and severance of APJ job protections fails to remedy the constitutional defects in the IPR statute in any event, this Court's remand of the Polaris patent for further IPR proceedings before such judges raises questions of exceptional importance that warrant rehearing *en banc*. Rather than remand, the Court should declare the APJ system unconstitutional, dismiss this case to protect Polaris's rights, and leave Congress to craft a remedy.

These issues are important not only for Polaris, but for other patent owners and petitioners that continue to litigate patentability in IPR proceedings before APJs whose appointments have ostensibly been remedied by *Arthrex* but in reality remain unconstitutional. And this is the only case with a pending *en banc* petition in which

the availability and effectiveness of the *Arthrex* severance remedy has been indisputably placed at issue.<sup>2</sup> In keeping with the importance of the issues raised, the United States agrees that this Court “should set *Polaris* for hearing en banc in tandem with rehearing in [*Arthrex*].” See U.S. Pet. for Reh’g En Banc at 3, 12, 14, *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140 (Fed. Cir. Dec. 16, 2019), ECF No. 77.

#### IV. CONCLUSION AND STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, this matter should be set for rehearing *en banc*.

Dated: February 28, 2020

Respectfully submitted,

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<sup>2</sup> There is some disagreement in the *Arthrex* case itself, now pending for rehearing *en banc*, whether the patent owner ever disputed that severance could cure the constitutional defects in the IPR statute. *Arthrex* Pet. for Reh’g En Banc at 5-6, *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140 (Fed. Cir. Dec. 16, 2019), ECF No. 78. There is no such dispute here; *Polaris* has explicitly contended that severance was unavailable and ineffective as a remedy.

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**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT****CERTIFICATE OF SERVICE**I certify that I served a copy on counsel of record on 2/28/2020

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# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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

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/s/ Matthew D. Powers

(Signature of Attorney)

Matthew D. Powers

(Name of Attorney)

Appellant  
(State whether representing appellant, appellee, etc.)

February 28, 2020

(Date)

Reset Fields

# **ADDENDUM**

## INDEX

<b>Date</b>	<b>Description</b>	<b>2018-1768, ECF No.</b>
1/31/2020	Opinion	106
1/31/2020	Judgment	107

NOTE: This disposition is nonprecedential.

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

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**POLARIS INNOVATIONS LIMITED,**  
*Appellant*

v.

**KINGSTON TECHNOLOGY COMPANY, INC.,**  
*Appellee*

**UNITED STATES,**  
*Intervenor*

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2018-1768

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Appeal from the United States Patent and Trademark  
Office, Patent Trial and Appeal Board in No. IPR2016-  
01621.

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Decided: January 31, 2020

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MATTHEW D. POWERS, Tensegrity Law Group LLP,  
Redwood Shores, CA, argued for appellant. Also repre-  
sented by JENNIFER ROBINSON; AZRA HADZIMEHMEDOVIC,  
AARON MATTHEW NATHAN, SAMANTHA A. JAMESON,  
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les, CA.

2 POLARIS INNOVATIONS LIMITED v. KINGSTON TECHNOLOGY  
CO. INC.

MICHAEL JOHN BALLANCO, Fish & Richardson PC,  
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MELISSA N. PATTERSON, Appellate Staff, Civil Division,  
United States Department of Justice, Washington, DC, ar-  
gued for intervenor. Also represented by COURTNEY DIXON,  
DENNIS FAN, SCOTT R. MCINTOSH, JOSEPH H. HUNT;  
THOMAS W. KRAUSE, JOSEPH MATAL, FARHEENA YASMEEN  
RASHEED, Office of the Solicitor, United States Patent and  
Trademark Office, Alexandria, VA.

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Before REYNA, WALLACH, and HUGHES, *Circuit Judges*.

PER CURIAM.

In its opening brief, Polaris Innovations Limited ar-  
gues that the final written decision at issue in this appeal  
exceeds the scope of the Patent Trial and Appeal Board's  
authority and violates the Constitution's Appointments  
Clause. *See* Appellant's Br. 52 (citing U.S. Const. art. II,  
§ 2, cl. 2). This court recently decided this issue in *Arthrex*,  
*Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir.  
2019). Accordingly, the Board's decision in No. IPR2016-  
01621 is vacated, and the case is remanded to the Board for  
proceedings consistent with this court's decision in *Arthrex*.

**VACATED AND REMANDED**

COSTS

No costs.

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

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**POLARIS INNOVATIONS LIMITED,**  
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v.

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01621.

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**JUDGMENT**

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THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

**VACATED AND REMANDED**

ENTERED BY ORDER OF THE COURT

January 31, 2020

/s/ Peter R. Marksteiner

Peter R. Marksteiner

Clerk of Court