No. 19-1202

United States Court Of Appeals for the Federal Circuit

POLARIS INNOVATIONS LIMITED,

Appellant,

v.

KINGSTON TECHNOLOGY COMPANY, INC.,

Appellee,

ANDREI IANCU, UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE,
Intervenor

APPEAL FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE, PATENT TRIAL AND APPEAL BOARD IN INTER PARTES REVIEW NO. IPR2016-01622

KINGSTON TECHNOLOGY CO., INC.'S PETITION FOR REHEARING *EN BANC*

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March 12, 2020

AMENDED CERTIFICATE OF INTEREST

Counsel for Appellee certifies the following:

1. The full name of every party represented by me is: Kingston Technology Company, Inc.

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: None

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

4. The names of all law firms and the partners and associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear for the party in this Court **(and who have not or will not enter an appearance in this case)** are: Fish & Richardson P.C.: Craig E. Countryman, Kenneth Hoover and Elizabeth Ranks; Law Offices of S.J. Christine Yang: Christine Yang and Martha Hopkins.

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: *Polaris Innovs. Ltd. v. Kingston Tech. Co., Inc.*, No. 18-1768 (Fed. Cir.); *Polaris Innovs. Ltd. v. Kingston Tech. Co., Inc.*, Appeal No. 18-1831,

(Fed. Cir.); *Polaris Innovs. Ltd. v. Kingston Tech. Co., Inc.*, 8:16-cv-00300 (C.D. Cal.); *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 18-2140 (Fed. Cir.).

Dated: March 12, 2020

/s/ Jeffrey A. Shneidman
Jeffrey A. Shneidman

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STATEMENT OF COUNSEL

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 the precedent(s) of this Court: *Edmond v. United States*, 520 U.S. 651 (1997); *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010); *Morrison v. Olson*, 487 U.S. 654, 692 (1988); *Masias v. Sec'y of HHS*, 634 F.3d 1283, 1295 (Fed. Cir. 2011).

Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

1. Whether APJs are inferior officers under the statutory scheme enacted by Congress, without their removal protection stripped; and
2. Assuming removal protection must be stricken from the statute to render APJs inferior officers, whether Board decisions must be remanded to be reheard by a new panel.

/s/ Jeffrey A. Shneidman
Jeffrey A. Shneidman

Attorney of Record for
Kingston Technology Company, Inc.

INTRODUCTION

The issues involved in this case, and the *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019) decision underlying it, epitomize those that the *en banc* Court should consider and rehear. *Arthrex* incorrectly deemed a portion of the statutory scheme for Patent Trial and Appeal Board APJs unconstitutional under the Appointments Clause, struck down a portion of the statute, and remanded the case to be reheard by a new panel of APJs. This sweeping precedent plainly involves issues of exceptional importance as it displaces congressionally enacted legislation. But *Arthrex* also impairs the livelihood of hundreds of APJs whose job security it strips and impacts likely hundreds of pending cases, sending a shockwave through the USPTO and the courts.

Kingston respectfully submits that this case was wrongly decided, in light of *Arthrex*, for several reasons. First, APJs are inferior—not principal—officers under Congress's scheme because they are subject to significant direction and control by the USPTO Director. Thus, *Arthrex* was wrong to strike APJ removal protection from the statute. Second, even if *Arthrex* was correct that APJs are principal officers unless their removal protection is stripped, that alone is a sufficient remedy. Rehearing before a new panel of APJs is not necessary, as other cases severing officer removal protection did not undo the officer's past actions where, like here, the officer's appointment was valid.

Disagreement among the bar and the Court on the *Arthrex* precedent controlling this case is palpable. All parties—appellant, appellee, and the Government—in both *Arthrex* and this case have petitioned for *en banc* review. Several opinions from this Court—including one in a case involving the same parties and Appointments Clause argument at issue here—have expressed disagreement with *Arthrex*. *See Polaris Innovs. Ltd. v. Kingston Tech. Co., Inc.*, No. 18-1831, 792 F. App'x 820, 821 (Fed. Cir. 2020) (non-precedential) (Hughes, J., joined by Wallach, J., concurring) ("18-1831 Concurring Op."); *Bedgear, LLC v. Fredman Bros. Furniture Co.*, 783 F. App'x 1029, 1030 (Fed. Cir. 2019) (non-precedential) (Dyk, J., joined by Newman, J., concurring). The *en banc* Court should convene in this case to reconsider *Arthrex* and provide certainty to the public on these immensely important issues.

BACKGROUND

This appeal arises from an IPR proceeding petitioned for by Kingston against Polaris's '414 patent. The Board found challenged '414 patent claims invalid, Appx503, Appx591, and Polaris appealed. In its appeal, Polaris argued that APJs serving on the Board are principal, rather than inferior, officers under the Constitution's Appointments Clause. Blue Br. 48-57. Polaris argued that APJs therefore must be nominated by the President and confirmed by the Senate, not appointed by Secretary of the Commerce as they are currently. *Id.* at 49. Polaris made these same arguments in two other appeals of IPR proceedings it had lost against Kingston, Nos. 18-1768 and 18-1831.

While awaiting oral argument in this case, the Federal Circuit decided *Arthrex*, which held that APJs are principal officers under the congressionally enacted statute. 941 F.3d at 1335. To cure this purported defect, *Arthrex* severed the "efficiency of the service" removal protection for APJs from the statute. *Id.* at 1335-38. *Arthrex* also remanded the case to the Board to be heard by a new panel. *Id.* at 1338-40. All parties to *Arthrex* petitioned for *en banc* review, and those petitions remain pending.

Following *Arthrex* in this case, the Court vacated the Board's final written decision and remanded the case to the Board for rehearing before a new panel before oral argument was heard. As to appeal Nos. 18-1768 and 18-1831 involving the same parties and Appointments Clause arguments, the Court heard argument two business days after *Arthrex* issued and requested supplemental briefing to address *Arthrex*. The Court, however, took the same action, although drawing a concurring opinion in the 18-1831 appeal that questioned the validity of *Arthrex*.

ARGUMENT

I. The Controlling *Arthrex* Precedent Unnecessarily Strikes Constitutionally Sound APJ Removal Protection from Congress's Statute

An officer is an inferior if his or her "work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 663 (1997). The Supreme Court's "cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes." *Id.* at

661. *Arthrex*'s narrow reading of past Appointments Clause cases eschews this guidance, leading to its flawed conclusion that APJs are only inferior officers if their removal protection is stricken from the congressionally enacted IPR statute.

The concurring opinion in the 18-1831 appeal correctly notes that "the *Arthrex* panel essentially distills the Supreme Court's direction and supervision test into two discrete questions: (1) are an officer's decisions reviewable by a principal officer and (2) is the officer removable at will?" 18-1831 Concurring Op., 792 F. App'x at 821. This formulaic approach simply does not square with the Appointments Clause jurisprudence, as "the Supreme Court would have announced such a simple test if it were proper." *Id.* Rather, Appointments Clause "cases employ an extremely context-specific inquiry, which accounts for the unique systems of direction and supervision in each case." *Id.* (internal cross-references omitted).

The direction and control the Director exerts over ALJs places them comfortably within the confines of inferior officer status for a host of reasons. ***First***, the Director exhibits supervisory power over the APJs consistent with other inferior officer cases. Indeed, *Arthrex* correctly holds "that the Director's supervisory powers weigh in favor of a conclusion that APJs are inferior officers." *Arthrex*, 941 F.3d at 1332. As *Arthrex* acknowledges, "[t]he Director is 'responsible for providing policy direction and management supervision' for the USPTO." *Id.* (quoting 35 U.S.C. § 3(a)(2)(A)). The decision also recognizes a multitude of statutory mechanisms enabling the Director's supervision of APJs, including the "authority to promulgate

regulations," "power to issue policy directives and management supervision of the Office, ability to "designate[] or de-designate[] as precedential" Board decisions, "authority to decide whether to institute an *inter partes* review," authority "to designate the panel of judges who decides each *inter partes* review," and "authority over the APJs' pay." *Id.* at 1331 (internal citations omitted).

Arthrex errs, however, by not deeming APJs inferior officers in light of this robust supervision. The Supreme Court's *Edmond* decision came to the opposite conclusion in a scheme where the principal officer "exercise[d] administrative oversight" and had the responsibility of "prescrib[ing] uniform rules of procedure" for the military judges the Court held were inferior officers. 520 U.S. at 664. And *Edmond* reached this conclusion while noting that the principal's supervisory powers there were not boundless, as the principal could not influence proceedings "by threat of removal or otherwise." *Id.*

Second, the Director has the power to effectively review APJ decisions. The Supreme Court has said that one's status as an inferior officer merely "connotes a relationship with ***some*** higher ranking officer or officers below the President" and requires only that the officer's work be "directed and supervised ***at some level*** by [a principal officer]." *Id.* at 662-63. In other words, there is no steadfast rule that plenary review of every officer action must exist for this consideration to weigh in favor of inferior officer status. *See Arthrex*, 941 F.3d at 1329-31. The concurring opinion in the 18-1831 appeal recognizes that *Arthrex* incorrectly suggests otherwise

by "pay[ing] insufficient attention to the significant ways in which the Director directs and supervises the work of the APJs and, instead, focuses on whether the Director can single-handedly review and reverse Board decisions . . . ." 18-1831 Concurring Op., 792 F. App'x at 821; *see also id.* at 9-12.

The Director does, in fact, have effective review of APJ decisions and possesses inherent power to reconsider them, even if he may not individually review each one. He, for example, has established the Precedential Opinion Panel ("POP"), which oversees ordinary APJ panels and issues agency-binding precedential decisions. *See* PTAB Standard Operating Procedure 2, at 4 (Sept. 20, 2018, rev. 10) (explaining POP may "rehear any case it determines warrants the [POP's] attention"). The POP comprises the Director and other members of his choosing. *Id.* Review of APJ panel decisions by the POP is secured either by party motion or, importantly, *sua sponte* by the Director. *Id.* at 5.

Arthrex also fails to recognize the interplay of the Director's different control mechanisms and instead views them in isolation. *See* 18-1831 Concurring Op., 792 F. App'x at 826 ("[B]y breaking up the analysis into three discrete categories—Review, Supervision, and Removal—the *Arthrex* panel overlooks how the powers in each category impact each other."). This defect is meaningful, as many of the Director's powers to supervise APJs *ex ante* also give him review of APJ decisions *ex post*. For example, the Director may use his power to promulgate binding policy guidance as a form of APJ decision review. The Director could conceivably promulgate binding

policy guidance after a final written decision issues, but while the decision is still subject to a rehearing petition. And the Director could order POP review of a decision not adhering to this policy guidance.

The Director's review function also flows from his power to control institution. As *Arthrex* correctly notes "the Director has the independent authority to decide whether to institute an *inter partes* review." 941 F.3d at 1331. *Arthrex* errs, however, in concluding that the Director does not exercise "any form of review" through his institution power. *Id.* at 1330. This Court has recognized that "'administrative agencies possess inherent authority to reconsider their decisions'" and that "[n]othing 'clearly deprives' the Board from exercising that inherent, 'default authority'" in revisiting and undoing a previous decision to institute. *BioDelivery Scis. Int'l, Inc. v. Aquestive Therapeutics, Inc.*, 935 F.3d 1362, 1366 (Fed. Cir. 2019) (quoting *Medtronic, Inc. v. Robert Bosch Healthcare Sys., Inc.*, 839 F.3d 1382, 1385 (Fed. Cir. 2016)). Indeed, the Director maintains this discretion to reexamine institution even after a panel of APJs reaches a final decision on the merits. *Id.* at 1364, 1367. Thus, if a panel concluded a challenged patent were unpatentable and the Director disagreed, he could simply undo institution for failing to meet the "reasonable likelihood" of success institution standard. 35 U.S.C. § 314(a).

With these review mechanisms, the Director possesses at least as much power to review APJs as in cases where the court found a challenged officer is inferior. In *Edmond*, inferior military judges' decisions were left unreviewed as a matter of course

unless they involved capital punishment or where a principal officer ordered review. 520 U.S. at 664–65. Even then, the review was highly deferential, with the reviewing principal officers not permitted to reevaluate factual findings so long as there was "some competent evidence in the record" supporting them. *Id.* at 665. Yet, the Supreme Court found that "[t]his limitation upon review does not in our opinion render the [challenged judges] principal officers." *Id.*; *see also Masias v. Sec'y of HHS*, 634 F.3d 1283, 1295 (Fed. Cir. 2011) ("[T]he fact that the review is limited does not mandate that [challenged officers] are necessarily 'principal officers.'" (citing *Edmond*, 520 U.S. at 665)). Here, even if the Director's review of APJ decisions is less direct than in *Edmond* and *Masias*, it is not encumbered with a deferential review standard review that handcuffs the Director's ability to act, weighing toward a finding that APJs are inferior officers.

Third, the Director had quite broad removal power over APJs even before *Arthrex* made APJs terminable at will. Under the statute as drafted, APJs could be removed "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). An "efficiency of the service" basis for removal may exist where an "employee's misconduct is likely to have an adverse impact on the agency's performance of its functions." *Brown v. Dep't of the Navy*, 229 F.3d 1356, 1358 (Fed. Cir. 2000). Such a showing could be made, for example, if an APJ shirked the Director's policy guidance. This conduct would hinder the Office's performance, and

the Director could remove the delinquent APJ for his conduct under the "efficiency of the service" standard.

Significantly, controlling caselaw holds that unfettered removal power over an officer is not required for the officer to be inferior. *See Morrison v. Olson*, 487 U.S. 654, 692 (1988) (dispelling that "the 'good cause' removal provision at issue . . . impermissibly burdens the President's power to control or supervise" an inferior officer); *Masias*, 634 F.3d. at 1295 (finding challenged officers removable only "for incompetency, misconduct, or neglect of duty or for physical or mental disability or for other good cause shown" to be inferior officers). The 18-1831 appeal concurring opinion recognized this precept: "[N]either the Supreme Court nor this court has required that a civil servant be removable at will to qualify as an inferior officer." 18-1831 Concurring Op., 792 F. App'x at 826. And as *Arthrex* acknowledges, the "efficiency of the service" removal protection that Congress afforded APJs is lesser than the "good cause" protection that existed in the controlling *Morrison* and *Masias* cases. *See Arthrex*, 941 F.3d at 1333 n.4.

Moreover, past cases demonstrate that the ability to terminate an officer's employment is not necessarily the lens through which to view removal power. Instead, as the Supreme Court's *Edmond* decision shows, a principal officer's ability to remove relevant judicial duties from an inferior can suffice. 520 U.S. at 664 (considering principal officer's ability to "remove a Court of Criminal Appeals judge from his judicial assignment," not to terminate his employment). The Director

possessed similar control over APJs before *Arthrex* severed their termination protection from the statute, as he may permissibly exercise his discretion to not assign an errant APJ to proceedings, effectively removing the APJ from his judicial assignment. *See* 35 U.S.C. § 6(c).

As such, the Director was able to direct and control APJs through removal before *Arthrex* issued. Coupling this removal power with the Director's supervision and review control mechanisms, APJs have always been inferior officers. The Court should convene *en banc* in this case to reconsider *Arthrex* and to hold that APJs are inferior officers under the statute as drafted, obviating the need to displace Congress's intent by striking APJ removal protection from the statute.

II. The *Arthrex* Remedy Applied Here—Remand for Rehearing by a New Panel—Does Not Attach to Cases that Strike Removal Restrictions

The Court should not have been remanded this case for rehearing before a new panel. Even assuming *Arthrex* was correct that APJ termination protection must be excised from the statute to render APJs inferior officers, it is still incorrect on the issue of remedy. *Arthrex* erroneously concludes that the Court must remand for rehearing—by an entirely new panel of APJs—all non-final Board appeals that preserve an Appointments Clause challenge on appeal, like this case. 941 F.3d at 1338-40. The law does not support this sweeping remedy, and it must be revisited. Indeed, the concurring opinion in *Bedgear* recognizes that the "remedy aspect of *Arthrex* (requiring a new hearing before a new panel) is not required . . . [and] imposes

large and unnecessary burdens on the system of *inter partes* review, requiring potentially hundreds of new proceedings, and involves unconstitutional prospective decision-making." 783 F. App'x at 1030.

Arthrex fails to recognize that a different remedy attaches when a court determines that (1) an officer has not, or has invalidly, been appointed, versus when a court determines that (2) a properly appointed officer's removal protection is constitutionally impermissible. True enough, in the first scenario the court must remand the case for a properly appointed officer to rehear it. *See Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018). But in the second scenario, no remediation of the officer's past actions is required if the reviewing court declares the removal protection void as unconstitutional. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477 (2010). *Arthrex*'s severance of APJ removal protection from the statute places it, and follow-on cases like this one, squarely within the second scenario.

Arthrex premises its rehearing remedy on the Supreme Court's *Lucia* decision. *See Arthrex*, 941 F.3d at 1340. But in *Lucia*, it was uncontested that neither the President nor a Department head had appointed the inferior officers in question, as the Appointments Clause requires. 138 S. Ct. at 2050-51. As such, *Lucia* was the prototypical first scenario described above. For this reason—i.e., that no constitutional appointment had ever occurred—*Lucia* ordered a rehearing. *See id.* at 2055 (explaining that the contested ALJ "heard and decided Lucia's case ***without the kind of appointment*** the Clause requires").

Lucia does not control here, where even Polaris agrees that if APJs are inferior officers, as they are, their appointment satisfies the Appointments Clause. *See* Polaris No. 18-1831 Blue Br. 58 ("The current means of appointment of APJs would satisfy the Appointments Clause if APJs were inferior Officers"). No matter whether APJs were inferior before *Arthrex* struck their removal protection, they undoubtedly now are and the Secretary of Commerce duly appointed them before they decided this case.

Arthrex should have instead followed the approach taken by *Free Enterprise*, a case exhibiting the second scenario of a properly appointed official having unconstitutional restrictions on his removal. In *Free Enterprise*, several constitutional challenges were made against Public Company Accounting Oversight Board ("PCAOB") members. Relevant here, it was argued that the PCAOB members': (1) good-cause removal protections violate separation of powers; and (2) appointment by the SEC Board violates the Appointments Clause because the PCAOB members are principal officers. *Free Enterprise*, 561 U.S. at 477, 487–88.

Addressing these arguments in turn, *Free Enterprise* first agreed that the removal restrictions were improper. Like in *Arthrex*, the Supreme Court preserved the overall statutory scheme but disposed of the removal protections. *Free Enterprise*, 561 U.S. at 509. The Supreme Court next analyzed the Appointments Clause argument, and determined that the PCAOB members were inferior officers *because* it had severed the removal restrictions. *Id.* at 510 (holding that "the statutory restrictions on the

Commission's power to remove [PCAOB] members are unconstitutional and void" and thus "the [PCAOB] members are inferior officers"). Critically, the Supreme Court then "conclude[d] that ***the [PCAOB] members have been validly appointed*** by the full Commission," even though that appointment came before the Court severed the removal restrictions. *Id.* at 513 (emphasis added). The opinion did not invalidate earlier decisions that the PCAOB had issued before the members' removal restrictions were severed. *Id.* at 514; *accord John Doe Co. v. CFPB*, 849 F.3d 1129, 1133 (D.C. Cir. 2017).

A recent *en banc* Fifth Circuit decision further recognizes that an improper removal restriction does not provide for the retroactive remedy *Arthrex* mandates for this case. After severing an improper statutory removal restriction, the Fifth Circuit concluded that the parties' "ongoing injury, if indeed there is one, ***is remedied by a declaration that the 'for cause' restriction is declared removed. We go no further***. . . ." *Collins v. Mnuchin*, 938 F.3d 553, 595 (5th Cir. 2019) (emphasis added) (internal footnote omitted), *petitions for cert. filed*, No. 19-422 (U.S. Sept. 25, 2019), No. 19-563 (U.S. Oct. 25, 2019). The *Collins* court "decline[d] to invalidate" the challenged past actions, holding that instead that the only "appropriate remedy [is] . . . to declare the 'for cause' provision severed." *Id.* (internal footnote omitted).

A concurring opinion in *Collins* elaborates that *Free Enterprise* "contrasted an unconstitutionally ***insulated*** officer with an unconstitutionally ***appointed*** officer," and so *Lucia*'s "backward-looking remedy" of vacating prior decisions does not apply "to

fix[ing] an unconstitutionally insulated agency head." *Id.* at 596 (Duncan, J., concurring) (emphasis in original). "Instead, as [*Free Enterprise*] indicates, the cure for that malady is narrower. Stripping away the . . . unconstitutional insulation is the minimalist remedy that maintain[s] presidential control while leaving in place the regulatory functions of an agency." *Id.* (internal quotation marks omitted); *see also Bedgear*, 783 F. App'x at 1032–34 & n.4 (Dyk, J., concurring) (discussing *Free Enterprise* and *Collins*).

Free Enterprise and *Collins* demonstrate that courts should give retroactive effect to their constitutional decisions, which the Supreme Court elaborated on in *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993). In *Harper*, the Supreme Court set out that "[b]oth the common law and our own decisions" have "recognized a general rule of retrospective effect for the constitutional decisions of this Court." *Id.* at 94. The Court then held that its application of a rule of law "***must be given full retroactive effect in all cases*** still open on direct review and as to all events, ***regardless of whether such events predate or postdate our announcement of the rule***." *Id.* at 97 (emphasis added); *see also Hulin v. Fibreboard Corp.*, 178 F.3d 316, 333 (5th Cir. 1999) (explaining *Harper* "leav[es] only an indistinct possibility of the application of pure prospectivity in an extremely unusual and unforeseeable case" (internal quotations omitted)).

So too must this Court correct *Arthrex*'s controlling determination that voiding APJ removal restrictions—even if necessary—did not have retroactive effect. As the *Bedgear* concurring opinion recognizes, citing *Harper*, "the statute here must be read as

though the PTAB judges had always been constitutionally appointed, 'disregarding' the unconstitutional removal provisions" and "the past opinions rendered by the PTAB should be reviewed on the merits, not vacated for a new hearing before a different panel." 783 F. App'x at 1032 (quoting *Marbury v. Madison*, 1 Cranch 137, 178, 2 L.Ed. 60 (1803))).[1]

CONCLUSION

For the foregoing reasons, the *en banc* Court should use this case as a vehicle to revisit *Arthrex* and vacate the decision remanding this case to the Board.

[1] Consistent with *Harper*, "severing" an unconstitutional portion of a statute can be viewed as a judicial interpretive determination to not enforce that portion, rather than an affirmative rewriting of the statute at a defined point in time. *See Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1486 (2018) (Thomas, J., concurring) ("[W]hen early American courts determined that a statute was unconstitutional, they would simply decline to enforce it in the case before them. . . . [T]he severability doctrine must be an exercise in statutory interpretation.").

Dated: March 12, 2020

Respectfully submitted,

/s/ Jeffrey A. Shneidman

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Addendum

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

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2019-1202

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2016-01622.

ORDER

PER CURIAM.

In light of this court's decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), and the

fact that Polaris Innovations Limited raised an Appointments Clause challenge in its opening brief in the above captioned case,

IT IS ORDERED THAT:

(1) The oral argument scheduled for March 2, 2020 is cancelled and the case is removed from the calendar.

(2) The Patent Trial and Appeal Board's decision in No. IPR2016-01622 is vacated and the case is remanded to the Board for proceedings consistent with the court's decision in *Arthrex*.

FOR THE COURT

January 27, 2020
Date

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

United States Court of Appeals for the Federal Circuit

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JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

VACATED AND REMANDED

ENTERED BY ORDER OF THE COURT

January 27, 2020

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

CERTIFICATE OF SERVICE AND FILING

I certify that I electronically filed the foregoing document using the Court's CM/ECF filing system on March 12, 2020. Counsel was served via CM/ECF on March 12, 2020.

/s/ Jeffrey A. Shneidman
Jeffrey A. Shneidman

CERTIFICATE OF COMPLIANCE

The undersigned attorney certifies that Kingston Technology Co., Inc.'s Supplemental Brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). The relevant portions of the brief, including all footnotes, contain 3,855 words, as determined by Microsoft Word.

Dated: March 12, 2020

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