2019-2339

United States Court of Appeals for the Federal Circuit

VAPORSTREAM, INC,

Appellant,

v.

SNAP INC.,

Appellee,

ANDREI IANCU, Director, U.S. Patent and Trademark Office

Intervenor.

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2018-00404

PETITION FOR REHEARING *EN BANC*

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February 24, 2020

CERTIFICATE OF INTEREST

Counsel for the Appellee Snap Inc., certifies the following:

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

Snap Inc.

2. The name of the real party in interest represented by me, and not identified in response to Question 3, is:

None

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:

None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

COOLEY LLP: Heidi L. Keefe, Reuben H. Chen, Mark R. Weinstein, Yuan Liang, Dustin M. Knight, Andrew Mace, Adam Pivovar, Joseph Van Tassel

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. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b):

- *Vaporstream, Inc. v. Snap Inc. d/b/a Snapchat, Inc.*, Case No. 2:17-cv-00220-MHL (C.D. Cal.);
- *Vaporstream, Inc. v. Snap Inc.*, Appeal Nos. 19-2231, 19-2290 (consolidated with 19-2231), 19-2337 (consolidated with 19-2231), and 20-1030 (consolidated with 19-2231) (Fed. Cir.);
- *Snap Inc. v. Vaporstream, Inc.*, Appeal Nos. 19-2425, 19-2427 (consolidated with 19-2425) (Fed. Cir.); and
- *Snap Inc. v. Vaporstream, Inc.*, Appeal Nos. 19-2354, 19-2355 (consolidated with 19-2354) and 19-2428 (consolidated with 19-2354) (Fed. Cir.)

Dated: February 24, 2020

COOLEY LLP

/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 vacating the final written decisions of the Patent Trial and Appeal Board (PTAB) and remanding for further proceedings in light of *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019) is contrary to the following decision(s) of the Supreme Court of the United States or precedent(s) of this Court:

(1) *Edmond v. United States*, 520 U.S. 651 (1997).

(2) *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991).

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 to the PTAB violates the Appointments Clause of the U.S. Constitution, Art. 2, § 2, cl. 2, as the panel in *Arthrex* decided; and

(2) If the answer to the first question is "yes," what appropriate judicial remedy, if any, can be applied to cure the constitutional violation?

Dated: February 24, 2020

COOLEY LLP

/s/ Heidi L. Keefe
Heidi L. Keefe
Counsel for Appellee Snap Inc.

On January 23, 2020, the Court ordered that the decisions of the Patent Trial and Appeal Board (PTAB) be vacated and remanded this matter back to the PTAB for further proceedings in light of the decision in *Arthrex, Inc. v. Smith & Nephew, Inc*., 941 F.3d 1320 (Fed. Cir. 2019), which held that the appointment of Administrative Patent Judges (APJs) violates the Appointments Clause (the "Appointments Clause issue"). (Dkt. No. 29.) Appellee Snap Inc. ("Snap") respectfully seeks rehearing *en banc* of this decision on the following grounds.

ARGUMENT

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

In view of the similarities between the present appeal and that in *Arthrex*, as discussed below, this appeal should mirror the ultimate outcome of the Appointments Clause issue in *Arthrex*, which has not yet been finally resolved.

Indeed, on December 16, 2019, the appellant (Arthrex, Inc.), the appellees (Smith & Nephew, Inc. and Arthrocare Corp.), and the United States each filed petitions for rehearing of the *Arthrex* decision. In its petition for rehearing *en banc*, the government took the positions (i) that *Arthrex* was wrongly decided, arguing that APJs are inferior officers under the correct interpretation of the statute, (ii) that the patent owner/appellant in *Arthrex* had forfeited its ability to raise this constitutional challenge on appeal because it had not raised it before the PTAB and that the constitutional question had been properly preserved in *Polaris Innovations Ltd. v.*

Kingston Tech. Co., No. 2018-1831, and should be heard *en banc*, and (iii) that *Arthrex*'s remedy of a new hearing conducted by a new panel of APJs was not appropriate in view of appellant's untimely challenge.[1] *See Arthrex, Inc. v. Smith & Nephew, Inc.,* No. 2018-2140, Petition for Rehearing *En Banc*, Dkt. No. 77 at 2-3 (Fed. Cir. Dec. 16, 2019). The government further asserted that *en banc* review was warranted given the exceptional importance of these issues, this Court's recent orders that "demonstrate that the [*Arthrex*] panel's analysis is open to fair question," and the significant burdens imposed on the government and private parties under the remedy adopted by the *Arthrex* panel. *Id*. at 4, 15-16.

In addition, in subsequent decisions applying *Arthrex*, a number of judges on this Court have issued separate concurrences expressing disagreement with the merits of the decision reached on the Appointments Clause issue and/or the remedy adopted by the *Arthrex* panel. *See Bedgear, LLC v. Fredman Bros. Furniture Co.*, 783 F. App'x 1029, 1030-31 (Fed. Cir. 2019) (Dyk, J., concurring in the judgment) (asserting that "the panel in *Arthrex* ignored governing Supreme Court authority"

[1] In their respective petitions for rehearing and/or rehearing *en banc*, Appellees Smith & Nephew, Inc. and Arthrocare Corp. took positions generally similar to those articulated by the government, while Appellant Arthrex Inc. took the position that remedy adopted by the *Arthrex* panel failed to cure the alleged constitutional defect, arguing that that the entire IPR statute cannot be saved and must be ruled unconstitutional. *See Arthrex,* No. 18-2140, Petition for Rehearing *En Banc*, Dkt. 79 at 2-4 (Fed. Cir. Dec. 16, 2019); *Arthrex,* No. 2018-2140, Combined Petition for Rehearing And/Or Rehearing *En Banc*, Dkt. No. 78 at 3-4 (Fed. Cir. Dec. 16, 2019).

and "improperly declined to make its ruling retroactive"); *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 2018-1831, -- F. App'x --, 2020 WL 504974, at *1 (Fed. Cir. Jan. 31, 2020) (Hughes, J., concurring) ("I write separately to note that I disagree with the merits and question the remedy of the *Arthrex* panel decision."). Accordingly, it is far from certain that the *Arthrex* panel's decision will be the final word from this Court on these issues.

Further, like the appellant in *Arthrex*, the appellant in this proceeding, Vaporstream, Inc. ("Vaporstream") did not raise an Appointments Clause challenge previously at the PTAB and instead raised its constitutional challenge for the first time on appeal. In light of this identical posture and the fact that this Court's order vacating and remanding the PTAB's decisions rests entirely on the *Arthrex* panel decision (*see* Dkt. No. 29), this appeal should mirror the outcome of *Arthrex*.

A failure to tie resolution of the Appointments Clause challenge in the present appeal with the final resolution of *Arthrex* would create a risk of an enormous waste of administrative and party resources, as well as a risk of an undeserved windfall for Vaporstream. The remand order requires a new oral hearing before a different PTAB panel, whose members would have to issue a new Final Written Decision. The members of this new panel would have to familiarize themselves with the record in this case, placing additional, unnecessary burdens on the parties and the PTAB. Because the remand order here was based entirely on *Arthrex*, it would be most

prudent to stay remand in this case until the parties and the PTAB have the Federal Circuit's final word on the Appointments Clause challenge. If the Federal Circuit were to conclude on rehearing or rehearing *en banc* in *Arthrex* that there is no Appointments Clause violation, or that remand is not necessary because the judicially applied cure for any Appointments Clause issue applied retroactively, for example, the remand order here would be vacated.

More troublingly, beyond the waste of resources, allowing the remand order to take effect before final resolution of *Arthrex* creates a potential for unjust disparate outcomes between the two cases. In one potential scenario, a different PTAB panel could issue a new Final Written Decision in the Snap-Vaporstream IPRs, reaching the opposite conclusion as the original PTAB panel and finding that the challenged claims were not shown to be unpatentable. Meanwhile, this Court could later decide *en banc* that Arthrex's Appointments Clause challenge was without merit or that the remedy for any constitutional violation applied retroactively and did not require remand of the original PTAB panel's decision. Such a scenario, in which Vaporstream might secure an undeserved windfall based solely on a (un)fortunate timing of events, can and should be avoided by tying the outcome of the constitutional challenge and appropriate remedy (if necessary) presented in this appeal to the final resolution of these issues in *Arthrex*.

The Court should therefore decline to issue any mandate in this case until after the petitions in the *Arthrex* case are decided.

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

In addition to the arguments made in the petitions for rehearing *en banc* filed by the United States and the appellees in *Arthrex*, Snap separately submits that the *Arthrex* panel incorrectly found that APJs were "principal" officers under the Appointments Clause. Because the *Arthrex* panel incorrectly interpreted and applied controlling Supreme Court precedent on this issue, *Edmond v. United States*, 520 U.S. 651 (1997) and *Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991), both of which found administrative judges to be "inferior" officers under the Appointments Clause, *en banc* review of the panel's decision is warranted.

Under the correct reading of *Edmond* and *Freytag*, APJs should be considered, at most, "inferior officers" under the Appointments Clause. As such, the statutory scheme under which APJs were appointed and supervised did not violate the Appointments Clause, and no remand of the present matter back to the PTAB is necessary.

A. The *Arthrex* Panel Misinterpreted and Misapplied *Edmond*

In *Edmond*, the Supreme Court ruled that military judges of the Court of Criminal Appeals were "inferior" officers, despite the fact that decisions of these judges were not subject to review or modification by the Judge Advocate General

(JAG). Indeed, the Supreme Court noted that 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 PTO Director's role is analogous to that of the JAG. Unlike the JAG, however, the PTO Director has some broader authority to review or modify a decision issued by a PTAB panel. While this authority is not unlimited, as the *Arthrex* panel observed, the PTO Director can convene a new panel of APJs, which can include the Director himself, to rehear a matter. *Arthrex*, 941 F.3d at 1330. The PTO Director thus has appreciably more power to supervise, review, and influence the decisions of PTAB panels when compared to the JAG in *Edmond*, who was statutorily prohibited from exerting any influence over the decisions of the Court of Criminal Appeals. In view of *Edmond's* ruling that the military judges on the Court of Criminal Appeals were "inferior officers," despite these limits on the JAG's supervisory authority, it follows that APJs should also be found to be, at most, "inferior officers," as the PTO Director has a greater ability to review and influence their decisions.

While the *Arthrex* panel noted that decisions of the Court of Criminal Appeals were subject to review by the Court of Appeals for the Armed Forces (CAAF), *Arthrex*, 941 F.3d at 1330-31, Snap respectfully submits that this fact is insufficient

to distinguish *Edmond*, due to the limits of this review. The CAAF is required to hear appeals only where "the sentence extends to death" or "the Judge Advocate General orders such review." *Edmond*, 520 U.S. at 664-65. In all other circumstances, review by the CAAF is discretionary, wherein the accused must show "good cause" that is typically connected to serious punishments. *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.")); *see also 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."). Further, in contrast to review by the PTAB Precedential Opinion Panel (POP), review by the CAAF is limited to only errors of law. *Id.* at 665.

In fact, evidence shows that the CAAF rejects more than eighty-five percent of the petitions for review that it receives. [2] As a result, the military judges on the

[2] The CAAF granted only 13% of petitions between 2017-2018, for example, which is consistent with rate at the time *Edmond* was decided. (*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 (46 petitions granted out of 358 filed); *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, at 6 (approximately 14.8% of petitions granted).)

Court of Criminal Appeals that were found to be "inferior officers" in *Edmond* are effectively the "final word" from the Executive Branch in the vast majority of cases. So, the *Arthrex* panel's reliance on the fact 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, is misplaced and insufficient to distinguish APJs from the military judges of the Court of Criminal Appeals found to be "inferior officers" in *Edmond*.

B. The *Arthrex* Panel Did Not Address *Freytag*

In addition, the *Arthrex* panel did not address the relevant authority of *Freytag*. In *Freytag*, the Supreme Court ruled that the special trial judges of the U.S. Tax Court were "inferior officers," even though such judges could issue final decisions on behalf of the United States on certain matters, with appeal only to an Article III court. *See Freytag*, 501 U.S. at 873, 882, 891-92. And, as the Supreme Court explained in *Edmond*, 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." *Edmond*, 520 U.S. at 665-66. *Freytag* is thus another example in which administrative judges were found to be "inferior" officers despite their ability to

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Thus, the judges of the Court of Criminal Appeals are effectively the "last word" from the Executive Branch in the vast majority of cases.

directly issue decisions on behalf of the United States without further review by any "principal" officers in the Executive Branch.

The *Arthrex* panel failed to recognize that the decisions of APJs are subject to appreciably more review and influence than similar decisions made by the administrative judges found to be "inferior officers" in *Edmond* and *Freytag*, and thus failed to appropriately weigh these considerations in its analysis. In contrast, the panel placed too much weight in its analysis on the fact that APJs enjoy protections against arbitrary removal from service by the PTO Director. This is particularly true in view of the fact that, while the PTO Director's authority to remove APJs from service is circumscribed, he does have the authority to control assignments of APJs. *See* 35 U.S.C. § 6(c); *In re Alappat*, 33 F.3d 1526, 1535 (Fed. Cir. 1994) (noting that the Patent Act allows 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. . . ."), *abrogated on other grounds In re Bilski*, 545 F.3d 943, 959 (Fed. Cir. 2008) (en banc). When determining the status of the APJs under the Appointments Clause, the fact that the director cannot arbitrarily remove APJs from service does not outweigh the substantial oversight and control over APJs wielded by the PTO Director.

III. The Remedy Adopted by the *Arthrex* Panel Was Misguided Because it Destroys the Independence of APJs

Further, even if the *Arthrex* panel correctly found that the statutory scheme governing the appointment of APJs violated the Appointments Clause, Snap respectfully submits that the remedy adopted by the panel is not the appropriate one. The *Arthrex* decision unnecessarily stripped hundreds of APJs of the job security and independence provided by the limits on the PTO Director's ability to arbitrarily remove an APJ from service. These protections from arbitrary removal are designed to promote the decisional independence of the APJs and ensure that they issue rulings based on the 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."). The remedy adopted in *Arthrex* effectively destroys this independence by transforming APJs into "at will" employees. There is a significant danger that this remedy will serve to undermine the public's confidence in the independence of APJs, which, in turn, could threaten its confidence in the Patent Office as a whole.

Other potential remedies that do not extinguish the decisional independence of APJs are available to this Court. Indeed, the *Arthrex* panel suggested one such

remedy before ultimately rejecting it. It proposed: "[a]llowing 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," but it dismissed this idea because it found the "current three-judge review system" preferable and more consistent with the overall statutory framework. *Arthrex*, 941 F.3d at 1336.

The *Arthrex* panel should not have dismissed this potential remedy so readily, however, as the deficiencies in this solution that the panel identified can be addressed and cured. For example, to the extent that the panel was concerned that this remedy could lead to the elimination of three-APJ panels for all PTAB decisions (*see id*.), the Court could specify that single APJ review by the Director (or an appointee of the Director) could be reserved only for the *rehearing* of Board decisions.

Further, to the extent that the Court believes that even rehearing must always be conducted by three-APJ panels, the judicial remedy could be adapted to make the POP even more closely analogous to the CAAF in *Edmond*. The POP, similar to the CAAF, has discretion to grant petitions for review of PTAB decisions. In fact, the POP's review authority is even more expansive than that of the CAAF, as the POP can choose to review PTAB decisions *sua sponte* and its review is not restricted to errors of law. The *Arthrex* panel found, however, that review by the POP, as

currently formulated, was not sufficient to eliminate the Appointments Clause violation because the PTO Director is the only member of the PTAB that has been appointed by the President, with advice and consent of the Senate. *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."). This potential infirmity could readily be addressed, however, by specifying that the POP only contain members that were appointed by the President with advice and consent of the Senate (*e.g.*, the PTO Director, the Deputy Director, the Commissioner for Patents, etc.). Such a solution would transform the POP into a body of Presidentially-appointed "principal" officers, making the POP even more closely analogous to the CAAF judges in *Edmond*, which could review decisions by the "inferior" officer Court of Criminal Appeals judges.[3]

The alternative judicial remedies proposed here would allow PTAB proceedings to continue to function as they have in the past, while providing an

[3] This solution would not impose a significant burden on the POP because the Appointments Clause does not require that the POP review every decision by APJs—or even a significant number of decisions—as evidenced by the limited number of cases reviewed by the CAAF. The mere availability of such review by the CAAF was found to be sufficient to render the military judges "inferior" officers in *Edmond*.

additional safeguard of review by one or more Presidentially-appointed officers who can review APJ decisions in the same manner as the CAAF in *Edmond*. These alternative remedies importantly also do not risk jeopardizing the public's trust in the PTAB and the Patent Office by casting doubt on the decisional independence of the APJs.

Accordingly, Snap respectfully requests that the Court grant rehearing *en banc* based on the reasons set forth above.

Dated: February 24, 2020

COOLEY LLP

/s/ Heidi L. Keefe
Heidi L. Keefe
Counsel for Appellee Snap Inc.

ADDENDUM

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

VAPORSTREAM, INC.,
Appellant

v.

SNAP INC.,
Appellee

ANDREI IANCU, Director, U.S. Patent and Trademark Office,
Intervenor

2019-2231, -2290, -2337, 2020-1030

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2018-00200, IPR2018-00312, IPR2018-00369, and IPR2018-00458.

VAPORSTREAM, INC.,
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v.

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ANDREI IANCU, Director, U.S. Patent and Trademark Office,
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2019-2339

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2018-00404.

ON MOTION

Before MOORE, O'MALLEY, and STOLL, *Circuit Judges*.

O'MALLEY, *Circuit Judge*.

O R D E R

In the above-captioned appeals, Vaporstream, Inc. moves to vacate the decisions of the Patent Trial and Appeal Board and remand for further proceedings in light of *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019). Snap, Inc. opposes the motions. The Director of the United States Patent and Trademark Office intervenes and requests that the court hold any decision on the motions in abeyance pending en banc consideration of *Arthrex*.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) The Director of the United States Patent and Trademark Office is added as an intervenor. The revised official captions are reflected above.

(2) The motions to vacate and remand are granted. The Patent Trial and Appeal Board's decisions are vacated, and the cases are remanded to the Board for proceedings consistent with this court's decision in *Arthrex*.

(3) Each side shall bear its own costs.

FOR THE COURT

January 23, 2020
Date

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

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CERTIFICATE OF SERVICE

I, Robyn Cocho, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

Counsel Press was retained by COOLEY LLP, Attorneys Appellees to print this document. I am an employee of Counsel Press.

On **February 24, 2020**, Counsel for Appellant has authorized me to electronically file the foregoing **Petition for Rehearing** with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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In addition, the required paper copies will be filed with the Court, via Federal Express, within the time provided in the Court's rules.

/s/ Robyn Cocho
Counsel Press

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(a). Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(a), the brief contains 3,302 words.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in proportionally spaced typeface using Microsoft Word in 14 point Times New Roman font.

Dated: February 24, 2020

/s/ Heidi L. Keefe
Heidi L. Keefe
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