Appeal No. 2021-1128

United States Court of Appeals for the Federal Circuit

THINK PRODUCTS, INC.,

Plaintiff-Appellant

v.

ACCO BRANDS CORPORATION, ACCO BRANDS USA, LLC,

Defendants-Appellees

Appeal from the U.S. District Court for the Northern District of Illinois, Andrea R. Wood, *District Judge*, Civil Action No. 1:18-cv-07506

COMBINED PETITION FOR REHEARING AND/OR REHEARING *EN BANC* OF PLAINTIFF-APPELLANT THINK PRODUCTS, INC.

EDWIN D. SCHINDLER
4 High Oaks Court
P. O. Box 4259
Huntington, New York 11743-0777
(631)474-5373
EDSchindler@att.net
EDSchindler@optonline.net

JOHN F. VODOPIA
JOHN F. VODOPIA, P.C.
191 New York Avenue
Huntington, New York 11743
(631)673-7555, Ext.
JVodopia@gmail.com

Attorneys for Plaintiff-Appellant Think Products, Inc.

Dated: August 17, 2021

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-1128

Short Case Caption Think Products, Inc. v. ACCO Brands Corporation

Filing Party/Entity Plaintiff-Appellant Think Products, Inc.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: August 17, 2021

Signature: /s/***Edwin D. Schindler***

Name: Edwin D. Schindler

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☒ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☒ None/Not Applicable
Think Products, Inc.		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Edwin D. Schindler	Jay L. Dolgin	
John F. Vodopia	Dolgin Law Group, LLC	
John F. Vodopia, P.C.		

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☒ Additional pages attached

Think Products, Inc. v. ACCO Brands Corp., 722 F.Appx. 1031 (Fed. Cir. 2018) (Will Directly Affect Appeal)		

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☒ None/Not Applicable ☐ Additional pages attached

ADDENDUM TO CERTIFICATE OF INTEREST OF

PLAINTIFF-APPELLANT THINK PRODUCTS, INC.

STATEMENT OF RELATED CASES,

PURSUANT TO FEDERAL CIRCUIT RULE 47.5(a)

(1) *Think Products, Inc. v. ACCO Brands Corporation, ACCO Brands USA LLC*, Federal Circuit Appeal Nos. 2017-1360; 2017-1361

(2) Date of Decision: February 14, 2018

(3) Composition of the Panel: Alan D. Lourie, Raymond T. Chen, and Todd M. Hughes

(4) Citation: 722 F.Appx. 1031 (Fed. Cir. 2018)

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES………………………………………..	ii
Cases……………………………………………………	ii
United States Constitution Citations……………………...	iii
Federal Rules of Appellate Procedure Citations…………	iii
Federal Circuit Rules……………………………………..	iii
Secondary Authorities……………………………………	iv
I. STATEMENT OF COUNSEL………………………………	1
II. POINTS OF LAW OVERLOOKED BY THE PANEL…….	3
III. ARGUMENT……………………………………………….	8
The Supreme Court's Arthrex Decision Vacating this Court's Remedy for an Appointment Clause Challenge Represents an Intervening Change in Law, Preventing Forfeiture of the Challenge and Rendering the 2018 Judgment of this Court Retroactively Unconstitutional and Unavailable for Supporting ACCO Brands' Collateral Estoppel Defense...	8
IV. CONCLUSION……………………………………………..	16
ADDENDUM	
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

Cases

Page

Arthrex, Inc. v. Smith & Nephew, Inc.,
941 F.3d 1320 (Fed. Cir. 2019)…………………………… *passim*

Arthrex, Inc. v. Smith & Nephew, Inc.,
953 F.3d 760 (Fed. Cir. 2020)……………………………… 4, 9

Bobby v. Bies, 556 U.S. 825 (2009)……………………………..... 11

Commissioner v. Sunnen, 333 U.S. 591 (1948)…………………... 4, 5, 14

Customedia Technologies v. Dish Network Corp.,
941 F.3d 1173 (Fed. Cir. 2019)………………………… 1, 5-8, 12-14

Dow Chemical Co. v. Nova Chemicals Corp.,
803 F.3d 620 (Fed. Cir. 2015)…………………………... 11, 14, 15

Fairfax's Devisee v. Hunter's Lessee, 11 U.S. 603 (1812)………. 2, 9

Harper v. Virginia Dept. of Taxation, 509 U.S. 860 (1993)……... 4

In re Boloro Global Ltd., 963 F.3d 1380 (Fed. Cir. 2020)………. 5

New Hampshire v. Maine, 532 U.S. 742 (2001)…………………. 2, 4, 5, 14

Reynoldsville Casket Co. v. Hyde, 514 U.S. 749 (1995)…………. 3-4

Spiegla v. Hull, 481 F.3d 961 (7th Cir. 2007)……………………. 7

Think Products, Inc. v. ACCO Brands Corporation, ACCO Brands USA LLC, 722 F.Appx. 1031 (Fed. Cir. 2018)……. *passim*

United States v. Arthrex, Nos. 19-1434; 19-1452; 1458
(U.S., June 21, 2021)……………………………………… *passim*

TABLE OF AUTHORITIES

Cases

(continued)

Page

Vivint, Inc. v. Alarm.com, Inc. No. 2019-2438
(Fed. Cir., Apr. 13, 2021), ECF No. 68…………….. 6-7, 10, 13, 14

Vivint, Inc. v. Alarm.com Inc., No. 19-2438
(Fed. Cir., Jan. 16, 2020), ECF No. 29…………………… 7, 8, 13

Voter Verified, Inc. v. Election Systems & Software,
887 F.3d 1376 (Fed. Cir. 2018)…………………………… 11, 12

United States Constitution Citations

Page

Article II (Executive Branch)…………………………………… 9

Article II, §2, clause 2 (Appointments Clause)………………….. *passim*

Federal Rules of Appellate Procedure Citations

Page

Federal Rule of Appellate Procedure 28(j)…………………….. 7

Federal Circuit Rules Citations

Page

Federal Circuit Rule 36……………..…………………………… 3

TABLE OF AUTHORITIES

Secondary Authorities

Page

Restatement (Second) of Judgments §28(2) (1982)……………... 11

I. STATEMENT OF COUNSEL

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

1. The Supreme Court's decision in *United States v. Arthrex*, Nos. 19-1434; 19-1452; 1458 (U.S., June 21, 2021), held that three-member Administrative Patent Judge ("APJ") panels of the Patent Trial and Appeal Board ("PTAB") were unconstitutionally comprised under the Appointments Clause, Article II, §2, clause 2. In doing so, the Supreme Court vacated this Court's decision and "remedy" for ameliorating the constitutional infirmity announced in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019). This Court announced in *Customedia Technologies v. Dish Network Corp.*, 941 F.3d 1173, 1174 (Fed. Cir. 2019), that any challenge to the unconstitutional composition of a three-member APJ panel of the PTAB under the Appointments Clause, if not made in, or prior to the filing of, the opening brief in this Court is "forfeited," with an appellant being held to the result of a final written decision of the PTAB that is rendered constitutional *nunc pro tunc* and given force and effect. Nevertheless, because the Supreme Court's Judgment in *Arthrex* disapproved of, and vacated, the remedy of this Court in its *Arthrex* decision, it becomes "paradoxical" to have "forfeited" a

right for which no remedy existed prior to the Supreme Court's decision on June 21, 2021, *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603, 629 (1812) (Johnson, J.) (dissenting) ("To assert that he has a right, and yet admit that he has no remedy, appears to me rather paradoxical."), thereby calling into question the validity of the "forfeiture" rule announced in *Customedia* and whether any forfeiture was possible before June 21, 2021.

2. In a prior appeal to this Court, Plaintiff-Appellant Think Products, Inc. did not raise a constitutional challenge under the Appointments Clause and is not now seeking to reopen the prior case and its appeal. However, if no forfeiture of the right to challenge the Appointments Clause constitutional defect was possible prior to June 21, 2021, because no remedy existed, are prior PTAB decisions and appeals taken to, and decided by, this Court unconstitutionally rendered (and should be given no force or effect) and should therefore not be properly citable as precedent, whether for the purpose of *stare decisis, res judicata* or collateral estoppel, because such prior decisions were not "resolved in a valid court determination," *New Hampshire v. Maine*, 532 U.S. 742, 748-749 (2001)?

Dated: August 17, 2021

/s/***Edwin D. Schindler***
Edwin D. Schindler
Attorneys for Plaintiff-Appellant
Think Products, Inc.

II. POINTS OF LAW OVERLOOKED BY THE PANEL

The following points of law were overlooked by the panel or not clearly implicit in the panel's Judgment (Document No. 30, entered July 19, 2021), affirming the District Court's grant of summary judgment on the ground of collateral estoppel in favor of Defendants-Appellants ACCO Brands Corporation and ACCO Brands USA LLC (collectively "ACCO Brands") and against Plaintiff-Appellant Think Products, Inc. ("Think Products") under Federal Circuit Rule 36:

The panel's Judgment affirming the grant of summary judgment of the District Court applied this Court's Judgment rendered in an earlier appeal taken by Think Products from adverse final written decisions issued by the PTAB concerning related patents, *Think Products, Inc. v. ACCO Brands Corporation, ACCO Brands USA LLC*, 722 F. App'x 1031 (Fed. Cir. 2018), to hold that Think Products would be collaterally estopped from defending against the invalidity challenge raised by ACCO Brands in a later case that is now before this Court on appeal.

While Think Products does not dispute that the prior 2018 Judgment of this Court is "closed" and therefore will not be reopened or re-litigated, *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995), ("New legal principles, even when applied retroactively, do not apply to cases already

closed."), collateral estoppel only applies to bar successive litigation of an issue "resolved in a valid court determination," *New Hampshire v. Maine*, 532 U.S. 742, 748-749 (2001), and is not to be applied if "fraud or some other factor invalidating the [prior] judgment" is determined to exist, *Commissioner v. Sunnen*, 333 U.S. 591, 597-598 (1948).

The application of a change in federal law "requires every court to give retroactive effect to that decision," *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 89-90 (1993), and "[i]t is true that if . . . the appointment of APJs ran afoul of the Constitution, that fact was true from the time of appointment forward, rendering all APJ decisions under the AIA unconstitutional when rendered," *Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 766-767 (Fed. Cir. 2020) (O'Malley, J.) (concurring in denial of petition for rehearing *en banc*). "[T]he principle of retroactive application requires that [this Court] afford the same remedy afforded the party before the court to all others still in the appellate pipeline," *id*., and if it is retroactively true that all APJ decisions under the AIA have been unconstitutionally rendered, then the 2018 Judgment of this Court, which is the basis for ACCO Brands' collateral estoppel defense, was also unconstitutionally rendered.

To say that the prior Judgment is "closed" and therefore cannot be

reopened is distinct from determining that the prior Judgment was not a "valid court determination," *New Hampshire v. Maine*, *supra*, or has been "invalidated" by an intervening change-of-law as having been unconstitutionally issued, *Commissioner v. Sunnen*, *supra*, and therefore cannot be collaterally applied to estop Think Products from litigating certain validity issues that were earlier litigated between the parties.

Subsequent to the parties' briefing of this appeal and just prior to oral argument, the Supreme Court in its *Arthrex* decision issued June 21, 2021, vacated this Court's decision in *Arthrex. v. Smith & Nephew*, 941 F.3d 1320 (Fed. Cir. 2019), which included holding that the remedy devised by this Court "to vacate the Board's decision and to remand for the purpose of reassigning the matter to a different panel of APJs for a new hearing and decision," *In re Boloro Global Ltd.*, 963 F.3d 1380, 1381 (Fed. Cir. 2020), was not adequate for curing the constitutional violation of the Appointments Clause. This Court had previously held in *Customedia Technologies v. Dish Network Corp.*, 941 F.3d 1173, 1174 (Fed. Cir. 2019), that any challenge to the unconstitutional composition of a APJ panel of the PTAB under the Appointments Clause would be "forfeited" if not raised no later than in an appellant's opening brief, thereby permitting the unconstitutionally rendered PTAB decision to be given force and effect.

Prior to the Supreme Court's Arthrex decision of June 21, 2021, the "forfeiture" rule announced in Customedia would have meant that Think Products "forfeited" its Appointments Clause challenge in the first appeal to this Court and that this Court's 2018 Judgment would be given effect as though it had been constitutionally rendered, even though it had not been, *Vivint, Inc. v. Alarm.com, Inc.* No. 2019-2438 (Fed. Cir., Apr. 13, 2021), ECF No. 68 (forfeiture held: "Vivint failed to raise an Appointments Clause challenge in its *first appeal*, in which it contested the Board's findings of invalidity." (emphasis in original)), and could therefore be applied for ACCO Brands' collateral estoppel defense.

Once the Supreme Court rendered its *Arthrex* decision on June 21, 2021, vacating the remedy of this Court adopted in *Arthrex*, no forfeiture of an Appointments Clause challenge should have been possible because raising a timely challenge prior to the date of the Supreme Court's ruling would still not have rectified the unconstitutional rendition of the PTAB decisions issued prior thereto. If so, then Think Products could not have "forfeited" its Appointments Clause challenge in its first appeal and the 2018 Judgment of this Court would remain retroactively unconstitutionally rendered and unavailable for collaterally estopping Think Products in the parties' second case. And because it was not until the Supreme Court's

decision of June 21, 2021, that the absence of a remedy meant that no forfeiture by Think Products under *Customedia* would be possible, Think Products cannot be seen as having waived this argument which, if raised at an earlier time, would have been futile, if not frivolous, in light of *Vivint*. *See*, *also* *Vivint, Inc. v. Alarm.com Inc.*, No. 19-2438 (Fed. Cir., Jan. 16, 2020), ECF No. 29 (order denying motion to vacate and remand in second appeal in view of *Customedia*, notwithstanding vacate and remand motion having been filed prior to opening brief in second appeal); *Spiegla v. Hull*, 481 F.3d 961, 964-965 (7th Cir. 2007) ("A party cannot . . . waive an argument that did not exist when he submitted his brief.")

The panel of this Court rendering Judgment in this appeal on July 19, 2021, overlooked or, in all likelihood, never had an adequate opportunity to consider whether the vacatur of this Court's *Arthrex* remedy by the Supreme Court on June 21, 2021, meant that no forfeiture of an Appointments Clause challenge under *Customedia* was possible and that PTAB decisions issued before June 21, 2021, were (and remain) retroactively unconstitutional and therefore unavailable to support ACCO Brands' collateral estoppel defense, or properly citable as precedent generally.

Think Products first raised an outline of this argument in a letter filed under Federal Rule of Appellate Procedure 28(j) on June 23, 2021.

III. ARGUMENT

The Supreme Court's* Arthrex *Decision Vacating this Court's Remedy for an Appointment Clause Challenge Represents an Intervening Change in Law, Preventing Forfeiture of the Challenge and Rendering the 2018 Judgment of this Court Retroactively Unconstitutional and Unavailable for Supporting ACCO Brands' Collateral Estoppel Defense

Customedia created a "bright-line forfeiture rule" that foreclosed relief for an Appointments Clause challenge for appellants that failed to raise the issue in the opening brief or in a motion filed prior to the opening brief under this Court's *Arthrex* holding, *Vivint, Inc. v. Alarm.com, Inc.* No. 2019-2438 (Fed. Cir., Apr. 13, 2021) ECF No. 68 (Renya, J.) (dissenting). The Supreme Court's *Arthrex* decision on June 21, 2021, vacated this Court's decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), and refused to adopt this Court's remedy for curing an Appointments Clause violation.

Prior to the Supreme Court's *Arthrex* decision, the "forfeiture rule" of *Customedia* meant that an appellant not timely raising an Appointments Clause challenge would have forfeited the challenge under the "standard principles of waiver" and that the appellant would be bound by the PTAB decision that would be given effect, though unconstitutionally issued, *Vivint, Inc. v. Alarm.com, Inc.* No. 2019-2438 (Fed. Cir., Apr. 13, 2021) ECF No. 68. Upon issuance of the Supreme Court's decision vacating this Court's

Arthrex decision and its remedy, the result was that irrespective of whether an appellant timely raised an Appointments Clause challenge in this Court, no relief to rectify the constitutionally flawed PTAB decision existed prior to the Supreme Court's judgment of June 21, 2021.[1.]

Where no remedy existed, no forfeiture of the Appointments Clause constitutional infirmity should be possible because to assert that there was a "right" to a constitutionally composed PTAB panel of APJs, yet admit that there was "no remedy," would be "rather paradoxical," *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603, 629 (1812) (Johnson, J.) (dissenting). If "the appointment of APJs ran afoul of the Constitution, that fact was true from the time of appointment forward, rendering all APJ decisions under the AIA unconstitutional when rendered," *Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 766-767 (Fed. Cir. 2020) (O'Malley, J.) (concurring in denial of petition for rehearing *en banc*).

The District Court, as well as the panel on this appeal and the parties have proceeded with the understanding that the 2018 Judgment of this Court was constitutionally rendered and able to be applied by ACCO Brands in

1. The Supreme Court further held that review "outside Article II" (outside the Executive Branch) by taking "an appeal to the Federal Circuit – cannot provide the necessary supervision [because] APJs are still exercising executive power and must remain 'dependent upon the President,'" *United States v. Arthrex*, *Slip Op*. at 12-13.

support of its collateral estoppel defense; the parties differed on whether this Court's 2018 Judgment met the criteria of collateral estoppel under the regional law of the Seventh Circuit, but there was no legal basis for Think Products to question the validity of ACCO Brands' effort to apply the earlier Judgment for the purpose of collateral estoppel. As Judge Reyna made clear in his dissent in *Vivint, Inc. v. Alarm.com, Inc.* No. 2019-2438 (Fed. Cir., Apr. 13, 2021) ECF No. 68, the appellant, Vivint, was held to have forfeited its Appointments Clause challenge in its first appeal "two years before *Arthrex* issued" and that that forfeiture would carry over to a related second appeal decided after Think Products and ACCO Brands completed their briefing in their current appeal.

Under the law of this Circuit prior to the Supreme Court's *Arthrex* decision of June 21, 2021, the 2018 Judgment of this Court in the parties' prior appeal (through unconstitutionally rendered) would have been treated as constitutionally issued because Think Products did not raise an Appointments Clause challenge in its initial appeal, just as the appellant in *Vivint* had failed to do. Any challenge raised by Think Products to the application of the 2018 Judgment by ACCO Brands in support of its collateral estoppel defense would have been futile. Subsequent to the Supreme Court's *Arthrex* decision, it is clear that no remedy for curing the Appointments Clause

violation existed, that no forfeiture should have been possible, and therefore this Court's 2018 Judgment remains retroactively unconstitutional and Think Products only now (after the Supreme Court's *Arthrex* ruling) has a valid legal basis for challenging the application of the 2018 Judgment in support of ACCO Brands' collateral estoppel defense.

"[I]ssue preclusion does not apply where 'a new determination is warranted in order to take account of an intervening change in the applicable legal context,'" *Dow Chemical Co. v. Nova Chemicals Corp.*, 803 F.3d 620, 628-630 (Fed. Cir. 2015), *quoting Restatement (Second) of Judgments* 28(2) (1982), and "even if the core requirements for issue preclusion had been met, an exception to the doctrine's application would be warranted due to [the Supreme] Court's intervening decision," *Bobby v. Bies*, 556 U.S. 825, 836 (2009), in *United States v. Arthrex*.

This Court held in *Voter Verified, Inc. v. Election Systems & Software LLC*, 887 F.3d 1376, 1381-1382 (Fed. Cir. 2018), that for the change of law exception to issue preclusion to apply, three conditions must be satisfied: First, "the governing law must have been altered," *quoting Dow Chemical Co. v. Nova Chemicals Corp.*, *supra*, 803 F.3d at 629. Second, "the decision sought to be reopened must have applied the old law." *Id*. Third, the change in the law "must compel a different result under the facts

of the particular case." *Id*. In *Voter Verified, Inc. v. Election Systems & Software LLC*, *supra*, 887 F.3d at 1381, this Court further stated that "in order to be intervening, the change in the law must have occurred after the first case was finally decided."

The prior judgment of "the first case" upon which ACCO Brands relies for its collateral estoppel defense "was finally decided" in 2018. *Id*. This Court issued its *Arthrex* decision on October 31, 2019, holding the appointment of APJs to the PTAB to be unconstitutional and crafted a form of relief for rectifying the "constitutional infirmity." The next day, this Court ruled in *Customedia* that an appellant (such as Vivint and Think Products) that did not timely raise its Appointments Clause challenge "forfeited" the opportunity to avail itself of the relief announced the prior day in *Arthrex*.

On June 21, 2021, and after completion of the parties' briefing for this appeal, the Supreme Court issued its ruling in *Arthrex*. That ruling held that composition of APJ panels of the PTAB unconstitutional under the Appointments Clause and vacated this Court's *Arthrex* decision, including the relief suggested by this Court, and announced an "appropriate remedy," thereby resulting in no available remedy for the constitutional violation prior to June 21, 2021. If no remedy existed, then no "forfeiture" of an Appointments Clause challenge should be possible, thereby exposing this Court's 2018

Judgment relied upon by ACCO Brands' for its collateral estoppel defense as retroactively unconstitutional as a result of the June 21, 2021, change-of-law effected by the Supreme Court's *Arthrex* decision. Because "the change in the law . . . occurred after the first case was finally decided," *Voter Verified, Inc. v. Election Systems & Software LLC*, *supra*, 887 F.3d at 1381, the pertinent change in law was "intervening."

Prior to the *Arthrex* decisions of this Court and of the Supreme Court, the parties and the District Court understood the prior judgment to be valid and constitutional, and therefore available for application in ACCO Brands' collateral estoppel defense. *Customedia* and *Vivint* signified that Think Products had "forfeited" any Appointments Clause challenge by not timely raising it in the appeal in the prior litigation thereby continuing to permit reliance by the District Court on this Court's 2018 Judgment for collateral estoppel purposes. The Supreme Court's *Arthrex* decision on June 21, 2021, established that the composition of the PTAB for hearing *inter partes* reviews was, indeed, unconstitutional, but the "relief" allegedly "forfeited" by Think Products would have not rectified the constitutional disability, thereby rendering any "forfeiture" of the "relief" announced by the Federal Circuit academic. As such, this Court's 2018 Judgment should be recognized as being retroactively unconstitutional with Think Products having forfeited

nothing. "[T]he governing law [has therefore] been altered" by the Supreme Court's *Arthrex* judgment of June 21, 2021, thereby meeting the change in law exception of *Dow Chemical Co. v. Nova Chemicals Corp.*, *supra*, 803 F.3d at 629.

The prior judgment was unconstitutional and therefore not a "valid court determination," *New Hampshire v. Maine*, supra, 532 U.S. at 748-749, upon which the District Court could have properly granted ACCO Brands' summary judgment motion on its collateral estoppel defense. *See*, *also* *Commissioner v. Sunnen*, *supra*, 333 U.S. at 597-598 (collateral estoppel applicable "absent fraud or some other factor invalidating the judgment"). By, in fact, granting judgment to ACCO Brands on its collateral estoppel defense, the District Court "must have applied the old law," *Dow Chemical Co. v. Nova Chemicals Corp.*, *supra*, 803 F.3d at 629, either because the District Court presumed the prior judgment to be a "valid court determination" or because Think Products "forfeited" the then-available "relief" under *Customedia* and *Vivint* it could have otherwise attained under this Court's *Arthrex* decision. The second prong of the change in law exception set forth in *Dow Chemical Co. v. Nova Chemicals Corp.*, *supra*, 803 F.3d at 629, has also been satisfied by Think Products.

Finally, because the Supreme Court's *Arthrex* decision made clear that

APJ panels of the PTAB were unconstitutionally appointed for rendering final written decisions in *inter partes* reviews, and that by vacating this Court's *Arthrex* decision no available relief existed prior to June 2021, the prior judgment of the parties was retroactively unconstitutionally rendered and not a "valid court determination" and should therefore be unavailable for application in support of ACCO Brands' collateral estoppel defense.

Summary judgment was granted to ACCO Brands on its collateral estoppel defense by application of this Court's 2018 Judgment. If that prior Judgment was unconstitutionally rendered and therefore not a "valid court determination," and therefore could not validly be applied for supporting ACCO Brands' defense of collateral estoppel – the only basis for the District Court's entry of final judgment against Think Products – then the change-of-law effected by the Supreme Court's *Arthrex* decision would "compel a different result under the facts of the particular case," thereby meeting the third prong of the test for invoking the change in law exception to issue preclusion annunciated by *Dow Chemical Co. v. Nova Chemicals Corp.*, *supra*, 803 F.3d at 629. Without the availability of the unconstitutionally rendered 2018 Judgment of this Court in the parties' prior appeal, no basis for ACCO Brands' collateral estoppel defense, nor the entry of final judgment in ACCO Brands' favor, would exist.

IV. CONCLUSION

Accordingly, Plaintiff-Appellant Think Products, Inc. respectfully requests that the Court vacate the judgment of the panel and grant its *Combined Petition for Rehearing and/or Rehearing En Banc*.

Respectfully submitted,

THINK PRODUCTS, INC.

Dated: August 17, 2021

By /s/***Edwin D. Schindler***
Edwin D. Schindler
John F. Vodopia
Attorneys for Plaintiff-Appellant
Think Products, Inc.

ADDENDUM

Judgment under Federal Circuit Rule 36 (Document No. 30, Entered July 19, 2021)

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

THINK PRODUCTS, INC.,
Plaintiff-Appellant

v.

ACCO BRANDS CORPORATION, ACCO BRANDS USA, LLC,
Defendants-Appellees

2021-1128

Appeal from the United States District Court for the Northern District of Illinois in No. 1:18-cv-07506, Judge Andrea R. Wood.

JUDGMENT

EDWIN DAVID SCHINDLER, Edwin D. Schindler, Patent Attorney, Huntington, NY, argued for plaintiff-appellant. Also represented by JOHN FRANCIS VODOPIA, John F. Vodopia, PC, Huntington, NY.

MICHAEL R. WEINER, Marshall, Gerstein & Borun LLP, Chicago, IL, argued for defendants-appellees. Also represented by THOMAS LEE DUSTON, JOHN J. LUCAS, SANDIP PATEL.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (NEWMAN, REYNA, and HUGHES, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

July 19, 2021 — /s/ Peter R. Marksteiner
Date — Peter R. Marksteiner
Clerk of Court

CERTIFICATE OF COMPLIANCE

I, EDWIN D. SCHINDLER, hereby certify that the accompanying **COMBINED PETITION FOR REHEARING AND/OR REHEARING *EN BANC* OF PLAINTIFF-APPELLANT THINK PRODUCTS, INC.** is proportionally spaced, has a typeface of 14-point Times New Roman, was prepared using Microsoft Word 2003, and contains 3,371 words.

Dated: August 17, 2021

By /s/***Edwin D. Schindler***

Edwin D. Schindler
Attorney for Plaintiff-Appellant
Think Products, Inc.