22-1915

IN THE

United States Court of Appeals for the Federal Circuit

LEONARD COOPERMAN,

Petitioner,

v.

SOCIAL SECURITY ADMINISTRATION,

Respondent.

On Petition for Review from the
Merit Systems Protection Board

CORRECTED BRIEF OF AMICUS CURIAE ASSOCIATION OF ADMINISTRATIVE LAW JUDGES/IFPTE IN SUPPORT OF REVERSAL AND IN SUPPORT OF PETITIONER LEONARD COOPERMAN

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 22-1915

Short Case Caption Cooperman v. Social Security Administration

Filing Party/Entity Association of Administrative Law Judges/IFPTE

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).

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Name: Sommattie Ramrup

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
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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).

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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).

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INTEREST OF AMICUS CURIAE[1]

The Association of Administrative Law Judges/IFPTE (AALJ) is the duly certified exclusive bargaining representative for non-supervisory administrative law judges (ALJs) employed by Respondent Social Security Administration (SSA or Agency). SSA ALJs comprise over 85% of all ALJs serving across the federal government.[2] As will be discussed more fully below, the Merit System Protection Board's (MSPB or Board) decision contains incorrect statements of SSA policy. Because its members must apply Agency policy when adjudicating cases, the AALJ has an interest in the correct articulation of the Agency's policy.

SUMMARY OF ARGUMENT

The Board erroneously found that the Agency's Program Operations Manual System (POMS) is not Agency policy in hearing level adjudications and that the Hearings, Appeals and Litigation Law Manual (HALLEX) was binding Agency policy at the hearing level. The Board's erroneous findings of fact and conclusions

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[1] This brief is filed with the written consent of all parties. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *Amicus Curiae* AALJ, made a monetary contribution intended to fund the brief's preparation or submission. As noted by the Board, the AALJ/IFPTE twice attempted to submit an Amicus to the Board, but the AALJ/IFPTE's request was rejected. *See* Appx154.

[2] *See* Office of Personnel Management (OPM) data at https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency.

of law as it relates to the POMS, the import of the HALLEX provisions, and the meaning of the Agency's Acquiescence Rule (AR) policy pervade its decision to such an extent that these findings and conclusions are not supported by substantial evidence, thereby causing the Board's penalty rationale to be arbitrary and capricious.

ARGUMENT

I. The Board Erroneously Found that the POMS Is Not Binding on the Agency's Hearing Level

The Board and the MSPB ALJ both relied on the testimony of Agency witness Mark Sochaczewsky to find that the POMS is not "a prime source" of Agency policy at the hearing level and that the HALLEX is Agency policy at the hearing level. Appx10-11[3]; *see also* Appx8.[4] Upon questioning, Judge

[3] Citations are to the Appendix filed by the Petitioner.

[4] Associate Chief Administrative Law Judge Mark Sochaczewsky testified as follows:

> [A] In terms of HALLEX, yes, that is Agency policy for ODAR. POMS are internal policy usually geared for the field, the Social Security field, not at the hearing office level. In the absence of HALLEX or other subregulatory or regulatory guidance, POMS can be utilized for guidance in terms of, for example, non-disability matters. But routinely, POMS is not a prime source of ODAR SSA policy. It's geared more for the field, for the lower administrative levels, not for the hearing operations.
> ***

Sochaczewsky conceded that he could not identify any documentary evidence to support his contention.[5] This is because no such documentary evidence exits.

The Board's factual finding that the Agency's POMS is not a prime source of policy at the hearing level is demonstrably incorrect. This error infects the Board's entire decision and leads to errors in conclusions of law and with respect to the application of the law to the facts, especially as it relates to the penalty imposed. As articulated below, the POMS contains Agency's policy

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> [Q] And would you agree that it [POMS] also indicates that it covers adjudicators, in the very start of that paragraph? It indicates adjudicators must consider.
> [A] No. I don't read it that way. I believe this is referring to adjudicators within the state agency, not at the hearing office level. To my knowledge, POMS does not specifically apply to the hearing office level as binding Agency policy.

Appx186, Appx187 (Transcript (Tr.) Volume (Vol.) 5, pp. 139-40, 147). Judge Sochaczewsky's testimony that the use of the term "adjudicators" is not applicable to the hearing level is belied by reference to adjudicators in other SSA guidance. For example, Social Security Ruling (SSR) 16-3p relating to evaluation of symptoms talks about the function of "adjudicators". SSA regulations dictate that SSRs are binding on all components of the Agency. 20 C.F.R. § 402.35(b)(1).

[5] As to whether he could identify any documentary evidence in support of his contention, he stated: "I don't know if I can document it, but that's what I've been advised, instructed over the course of years during trainings and others. So I believe it is used for guidance in the absence of regulatory or subregulatory ODAR information, such as the HALLEX. It is not, to my knowledge, something that applies in every instance to ODAR." *See* Appx187 (Tr. Vol. 5, p. 147).

pronouncements applicable throughout the administrative process; the HALLEX articulates procedures for processing cases at the hearing level.

Decisions by the United States Supreme Court directly contradict the testimony of Agency witnesses with respect to the POMS. The Supreme Court has recognized that the POMS are the Agency's publicly available operating instructions, and they warrant deference. *See Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003), citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944); *see also Barnhart v. Walton*, 535 U.S. 212, 221-22 (2002)(POMS have value, effect and persuasive force as the Agency's interpretation of the statutory mandate and deserve deference as long as they are reasonable and consistent with the statute).

Indeed, courts in the First Circuit, where the Petitioner adjudicated cases, have repeatedly required SSA, through its administrative law judges (ALJs), to follow the standards set forth in the POMS. *See, e.g., Da Rosa v. Sec'y of Health & Human Svcs.,* 803 F.2d 24, 26 (1st Cir.1986)(vacating and remanding "for proceedings consistent with the interpretive guidelines set forth in the POMS instructions"); *accord Avery v. Sec'y of Health and Human Svcs.,* 797 F.2d 19, 24 (1st Cir. 1986). In fact, the Court in *Avery* rejected the plaintiff's argument, the same one made by Agency witnesses in this case, that the POMS do not apply to the Agency's ALJs and its Appeals Council, finding that a POMS section issued to

clarify an existing Social Security Ruling (SSR) was intended "to guide [not] only the deciders of first instance" but was also "the latest word on departmental pain policy, committing the [Commissioner] and superceding any inconsistent discussion and examples." *Avery* 797 F.2d at 24. Accordingly, district courts in the First Circuit interpret the POMS as "directing ALJs" to consider the provisions of the POMS. *See, e.g., Ronald A. v. Saul*, 2021 WL 2525575, *4 (D.Me. 2022).

On its public website, the Agency explains that the POMS contains SSA policies and is the primary source of information used by Social Security employees to process claims for Social Security benefits. *See* SSA's Policy Information Site - POMS - About POMS. Contrastingly, and contrary to the testimony of the Agency's managers, the Agency describes the HALLEX as a procedural manual, not a policy manual. *See* HALLEX I-1-0-3. This difference is apparent when reviewing various provisions of the HALLEX. For example, HALLEX I-1-1-1, pertaining to representation of claimants, instructs adjudicators to refer to the POMS for an overview of this issue. *See* HALLEX I-1-1-1 (ssa.gov). Likewise, HALLEX I-2-2-42, relating to issues pertaining to a claimant's age, instructs adjudicators to reference the POMS. *See* HALLEX I-2-2-42 (ssa.gov). These are just two of many examples demonstrating that the HALLEX merely provides hearing level context for interpreting Agency policy articulated elsewhere, i.e., POMS, SSRs or Agency regulations.

Unlike the POMS, Courts have generally found that the HALLEX is not entitled to any particular deference.[6] Indeed, the Agency has taken this position in numerous court cases, including in the First Circuit, where the Petitioner heard cases. *See Justiniano v. Berryhill*, 876 F.3d 14, 29 (1st Cir. 2017); *see also Wallaga v. Berryhill*, 2019 WL 2004318 (D.N.H. 2019)("as the Acting Commissioner correctly points out, the Court of Appeals for this circuit has stated that the HALLEX is not binding on the SSA. [citing *Justiniano*]…. Therefore, an ALJ's violation of the HALLEX, standing alone, is not a reversible error in the First Circuit."). This fact rebuts the Board's conclusion as to the *Douglas* factors. The Board noted that Petitioner's conduct "negatively impact[ed] the legal sufficiency and defensibility of his [closed period] decisions." Pet. App. at 189

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[6] *See, e.g., Cage v. Commissioner of Social Security*, 692 F.3d 118, n.2 (2nd Cir. 2012)(HALLEX does not have the force of law and is entitled to deference only insofar as it has the power to persuade); *Bunnell v. Barnhart*, 336 F.3d 1112, 1115 (9th Cir. 2003)(HALLEX is a source that does not carry the force and effect of law); *Moore v. Apfel*, 216 F.3d 864, 868–69 (9th Cir. 2000)(holding the HALLEX does not have the force and effect of law and is not binding on the Commissioner). Courts that have concluded that an ALJ's failure to comply with the HALLEX constitutes reversible error have required a claimant to demonstrate that he or she suffered some prejudice from the ALJ's misstep before remanding. *See Butterick v. Astrue,* 430 Fed.Appx. 665, 667 & n.3 (10th Cir. 2011)(claimant not entitled to relief because "she has not established that she was prejudiced by the ALJ's failure to follow the HALLEX provisions."); *see also Newton v. Apfel*, 209 F.3d 448, 450 (5th Cir. 2000).

(Board Decision p. 24). This finding is rebutted by the fact that the POMS (which the Petitioner followed) are entitled to deference but HALLEX provisions are not.

Thus, the distinction between the POMS as the Agency's stated policy applicable throughout the adjudicatory process and the HALLEX, as the procedural manual used to process hearings, is significant, and invalidates the Agency's unsubstantiated management testimony that the HALLEX alone articulates the Agency's policy at the hearing level. Instead, the Agency's own documents, legal arguments in court and court decisions all confirm the Petitioner's testimony that the POMS are sub-regulatory guidance upon which ALJs at SSA rely. Appx185 (Tr. Vol. 6, p. 295).

II. The Board's Erroneous Finding as to the Agency's CPOD Policies Vitiates its Decision

A. The Board Erroneously Found that the HALLEX Provides Guidance Pertaining to Closed Periods of Disability

At issue in this case is the evidentiary findings required to make a determination of medical improvement (MI) in a closed period of disability (CPOD) case.[7] Of note, POMS DI 28010.015 provides that "improvement in

[7] During, as well after, the period here at issue, it was unclear whether the medical improvement standard even applied to CPOD cases. *Lagasse v. Berryhill*, 2018 WL 1871454, *2; *see also Huse v. Colvin*, 2014 WL 1125361, at *1, n.1 (D.N.H. Mar. 20, 2014). Yet, the Board found that the Petitioner had ample notice of the Agency's CPOD policy. Appx156-158.

symptoms alone, without associated changes in signs or laboratory findings, may support an MI determination." SSA - POMS: DI 28010.015 - Comparison of Symptoms, Signs, and Laboratory Findings - 11/23/2021. Despite the clarity of this POMS provision, Agency managers testified, and the Board accepted, that Agency's regulations require more than a claimant's acknowledgment that his or her condition has medically improved. *See* Appx11; Appx156-157. Agency witnesses stated that HALLEX I-2-8-25 supports their position in this regard, and the Board accepted that this HALLEX provision corroborates the managerial testimony about the Agency's CPOD policy. Appx155.

This is an error. This HALLEX provision titled "Writing the Decision" does not contain *any* instructions regarding CPODs; it only contains general instructions for drafting ALJ decisions that apply to all types of ALJ decisions. *See* HALLEX I-2-8-25 (ssa.gov). In fact, there is no HALLEX section that addresses policy specific to closed period instructions. In contrast, there are multiple POMS sections that explain the details of Agency policy regarding CPOD decisions. *See* POMS DI 25510.001; POMS DI 25510.010; POMS DI 25510.015; POMS DI 24501.[8]

The POMS's allowance for finding medical improvement based solely on the claimant's testimony, as the Petitioner did in a number of his cases that formed

[8] These POMS sections can be found here: SSA's Policy Information Site - POMS.

the basis of the Agency's charges, is understandable in the context of disability law. The ability to cite to medical evidence showing improvement in closed period of disability cases can sometimes be an impossibility. This is because claimants may request closed periods of disability because they stop receiving medical care once they experience improved symptomatology. *See, e.g., Newbold v. Colvin*, 718 F.3d 1257, 1267-68 (10th Cir. 2013)(discussed more fully below). In these situations, it is the claimant's own testimony, as opposed to any medical evidence, that shows the medical improvement.

The Board's failure to recognize that the Agency's policy on CPODs is contained in the POMS controverts its factual findings and legal conclusions.

B. The Board Mis-Construed the Agency's Acquiescence Policy

The Board made errors of fact and law when it declined to consider caselaw that corroborated the Petitioner's testimony that the POMS articulates Agency policy at the hearing level and that he properly relied on the POMS to find MI based solely on the claimant's testimony when adjudicating CPOD cases. *See* Appx157-59; *Newbold* 718 F.3d at 1263-64 (finding that POMS DI 28010.015(A)(2) applied to an ALJ hearing decision and was Agency policy regarding MI in CPOD cases adjudicated before an ALJ); *see also Draper v. Colvin*, 779 F.3d 556 (8th Cir. 2015)(POMS policy at issue was entitled to "relatively strong *Skidmore* deference").

The Board concluded that because the Agency had not issued Acquiescence Rulings after *Newbold* and *Draper*, these decisions were not binding on the Board or SSA. Appx157-158 ("Indeed, in the absence of any evidence that SSA issued an Acquiescence Ruling regarding *Newbold, Draper*, or any other circuit court decision that was inconsistent with SSA policy, such decisions do not constitute 'applicable' decisions [as described in the ALJ position description]"). These findings are a misstatement and misapplication of the SSA's AR policy.

Contrary to the Board's finding, the fact that the Agency did not issue an AR is evidence that the *Newbold and Draper* decisions are *consistent* with Agency policy. The Agency's AR policy provides that an AR *will be* issued when a U.S. Circuit Court of Appeals decision *conflicts* with the Agency's interpretation of a provision in the Social Security Act or regulations and the government declines to seek further judicial review. 20 C.F.R. § 404.985; *see also* POMS GN 00306.270; POMS RS 00207.030. Thus, the Board's finding that *Newbold* and *Draper* do not apply because the Agency did not issue any ARs is flatly wrong. Rather, the opposite is true: these cases are consistent with Agency policy. Both are cases where the Agency's arguments prevailed at the circuit court. *Newbold*, 718 F.3d at 1264; *Draper,* 779 F.3d at 561-62. Thus, *Newbold* and *Draper* do not offer different policies; they just acknowledge the Agency's policy as articulated by the POMS and presented by the Agency in its briefs in these cases.

The Board's misapplication of the Agency's AR policy is a significant legal error because the Board repeatedly relied on the clarity and consistency of the notice the Petitioner had about the Agency's CPOD policies in finding that the Agency proved its charges and that the removal penalty was appropriate. Appx155-159, Appx174-175. But even a cursory review of POMS DI 28010.015(A)(2) and the *Newbold* arguments and holding reveals that the testimony of the Agency's managers is not supported.[9] Notably, the Board does not cite to, and the Agency did not proffer, any other written Agency policy on CPOD decisions that is inconsistent with the POMS DI 28010.015(A)(2). As such, the Board's finding that the Petitioner repeatedly violated the Agency's CPOD policies rests solely on the unsupported (and refuted) testimony of Agency managers. Appx174-175.

C. Instructing Petitioner Not to Follow Agency Policy Infringes on His Decisional Independence

The Board's decision finding good cause to remove the Petitioner suggests that ALJs can be disciplined and removed from their positions for following Agency policy articulated in the POMS. This finding interferes with the decisional independence afforded ALJs by the Administrative Procedure Act and amounts to

[9] Significantly, the new evidence that the Petitioner sought to introduce to the Board, also contained additional examples of instances in which the Agency advocated for the use of POMS among SSA ALJ's at the hearing level. The Board summarily found that this evidence was not "material." Appx154.

a substantive review of an ALJ's quasi-judicial functions. This Court has held that a charge cannot constitute "good cause" if it is "based on reasons which constitute an improper interference with the ALJ's performance of his quasi-judicial functions." *Brennan v. Dep't of Health and Human Servs.,* 787 F.2d 1559, 1563 (Fed.Cir.1986). Instructing ALJs not to follow Agency policy interferes with those functions, and consequently the charges alleging violation of Agency policy do not establish good cause.

III. The Board's Penalty is Not Supported by Substantial Evidence

Amicus does not dispute the fact that some of Petitioner's conduct during the period at issue constitute serious offenses. However, even if the Board has established that some conduct was improper, the Board's reliance on erroneous findings of fact and law, as described above, corrupts the penalty analysis and establishes that the Board's penalty is arbitrary, capricious and overly harsh. *See Brennan,* 787 F.2d at 1563.

In determining the most appropriate penalty, the Board uses the factors articulated in *Douglas v. Veterans Administration,* 5 M.S.P.R. 280 (1981), to guide its good cause penalty decisions. Here, the Board made factual and legal errors that corrupt its penalty analysis with respect to the nature and seriousness of the misconduct, the notoriety of the offense, the effectiveness of alternative sanctions, and the Petitioner's potential for rehabilitation. The common thread in the Board's

analysis of the appropriateness of removal as a penalty was "the serious and repeated nature of the misconduct" as it relates to the Agency's policy on CPOD decisions.

A. Nature and Seriousness of the Offense

The Board's assessment of the nature and seriousness of the misconduct is not supported by substantial evidence. As the Board acknowledged, this is the most significant *Douglas* factor (Appx174), and as such, the errors of fact and law made here are particularly relevant to the reasonableness of the imposed penalty. The Board agreed with the ALJ's analysis that the nature and seriousness of the Petitioner's conduct warranted a significant penalty. Appx174. Yet, the Board enhanced the ALJ's proposed penalty from a 180-day suspension to removal relying on *Social Security Administration v. Steverson,* 111 M.S.P.R. 649, ¶ 18 (2009)(finding good cause to remove an ALJ based on charges of conduct unbecoming, lack of candor, misuse of Government equipment, and failure to follow agency policy). As articulated above, the Board's finding on Agency policy is not supported by substantial evidence and, thus, cannot establish good cause for removing Petitioner. *See Tartaglia v. Dep't of Veterans Affs.*, 858 F.3d 1405, 1409 (Fed. Cir. 2017)(remand was appropriate when "substantial evidence does not support the MSPB's factual finding… and that the erroneous finding infected the MSPB's analysis of certain *Douglas* factors.").

B. Notoriety

The Board's analysis of notoriety is similarly flawed. The Board considered that the Petitioner had been "admonished" for his errors in *Betancourt v. Astrue*, 824 F.Supp.2d 211 (D. Mass 2011). However, an admonition of legal error in a federal district court case is not evidence of notoriety and does not impact the Agency's reputation. Significantly, an appeal of an ALJ decision cannot get to federal court without undergoing review by the Agency's policy component, the Appeals Council (AC). *See* 20 C.F.R. §§ 404.967, 404.970, 404.981; HALLEX I-3-1-4. This means that the AC reviewed the Petitioner's findings and legal analysis in the *Betancourt* case and found that the claimant had not established any basis to disturb the ALJ's decision. Additionally, federal court remands for failure to sufficiently follow the guidelines articulated in Agency regulations, rulings and policy documents are exceedingly common. SSA data from 2010 to 2020 show that federal court remand rates ranged from 37 to 57%.[10] This data does not account for cases remanded by the Appeals Council, which as noted above, did not happen with *Betancourt*.[11]

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[10] https://www.ssa.gov/appeals/DataSets/AC05_Court_Remands_NCC_Filed.html
[11] *See* AC Remands as a Percentage of all AC Dispositions | Public Data Files (ssa.gov)

C. Prior Discipline

The Board erred when it failed to consider the Petitioner's lack of prior discipline when it disagreed with the ALJ that a 180-day suspension was a sufficient alternative sanction. *See* Appx174-174. The ALJ noted that the Petitioner had no prior discipline and found that the record did not show that removal would be more effective than a long suspension to deter similar future misconduct. *Id.* The Board disagreed, finding that the Agency had issued a directive to the Petitioner in December 2011. *Id.* Yet, the Agency's issued directive was not prior discipline, merely a warning that discipline could result. Appx174. The Board's failure to explain why the lack of any prior discipline throughout the Petitioner's career was not considered as a mitigating factor was error.

D. Potential for Rehabilitation

The Board also erred by not giving "sound reasons" for rejecting the ALJ's demeanor-based credibility determinations when it found that the Petitioner did not have a strong potential for rehabilitation. Appx173. The Board rejected the ALJ's assessment of testimony offered by the Petitioner and his supervisor (an Agency witness) showing that the Petitioner had improved his handling of personally identifiable information (PII) and in summarizing off-the-record conversations. Appx173. The Board noted that the extent of improvement was "unclear" but did

not identify any evidence to contradict the testimony of Petitioner or his manager. *See Long v. Social Security Administration*, 635 F.3d 526, 530 (Fed. Cir. 2011)("the Board is not 'free to overturn an administrative judge's demeanor based credibility findings merely because it disagrees with those findings." citing *Leatherbury v. Department of the Army*, 524 F.3d 1293, 1304-05 (Fed. Cir. 2008)).

The Board also cited the Petitioner's failure to follow CPOD policy as an aggravating factor to his potential for rehabilitation. Appx173. As noted above, the Board's findings with respect to this issue contain many errors of law and fact, as fully articulated above. These errors pervade its finding and penalty rationale to such an extent that it is not supported by substantial evidence and is arbitrary and capricious.

CONCLUSION

The errors of fact and law involving the Petitioner's purported violation of Agency policy as it relates to the HALLEX and POMS, the Board's misapplication of the Agency's AR policy, and the Board's failure to give good reasons for reassessing the MSPB ALJ's demeanor-based findings show that the Board's decision is not supported by substantial evidence, and make the Board's penalty arbitrary, capricious and overly harsh.

Respectfully submitted,

/s/ *Sommattie Ramrup*

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October 17, 2022

FORM 19. Certificate of Compliance with Type-Volume Limitations

Form 19
July 2020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 22-1915

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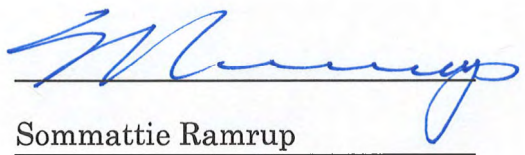
Signature: 

Name: Sommattie Ramrup

CERTIFICATE OF SERVICE

I hereby certify that, on October 17, 2022, I served the foregoing brief upon counsel of record by filing a copy of the document with the Clerk through the Court's electronic docketing system.

/s/ *Sommattie Ramrup*