

No. 2015-1177

United States Court of Appeals
for the Federal Circuit

IN RE AQUA PRODUCTS, INC.

*Appeal from the United States Patent and Trademark Office
Patent Trial and Appeal Board
Case No. IPR2013-00159*

**BRIEF OF ASKELADDEN, L.L.C. AS
AMICUS CURIAE IN SUPPORT OF INTERVENOR DIRECTOR OF THE
UNITED STATES PATENT AND TRADEMARK OFFICE**

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November 2, 2016

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

IN RE AQUA PRODUCTS, INC.

No. 2015-1177

CERTIFICATE OF INTEREST

Counsel for the Amicus Curiae, Askeladden, L.L.C., certifies the following (use “None” if applicable; use extra sheets if necessary):

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

Askeladden, L.L.C.

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 corporations and 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 are:

Maynard, Cooper & Gale, P.C.: Kevin J. Culligan and John P. Hanish.

November 2, 2016

Date

/s/ Kevin J. Culligan

Kevin J. Culligan

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INTEREST OF AMICUS CURIAE

Askeladden, L.L.C. is an education, information and advocacy organization dedicated to improving the understanding, use, reliability and quality of patents pertinent to financial services and related industries. Askeladden seeks to improve the United States patent system by, among other things, submitting amicus curiae briefs on important issues of intellectual property law.

Askeladden is a wholly owned subsidiary of The Clearing Housing Payments Company L.L.C. (“The Payments Company”). The Payments Company is a banking association and payments company that is owned by the world’s largest commercial banks and dates back to 1853. The Payments Company owns and operates core payments system infrastructure in the United States and is currently working to modernize that infrastructure by building a new, ubiquitous, real-time payment system. The Payments Company is the only private-sector ACH and wire operator in the United States, clearing and settling nearly \$2 trillion in U.S. dollar payments each day, represents half of all commercial ACH and wire volume. Its affiliate, The Clearing House Association L.L.C., is a nonpartisan organization that engages in research, analysis, advocacy and litigation focused on financial regulation that supports a safe, sound and competitive banking system.

Askeladden believes that a strong patent system is vital to continued innovation, and that the health of that system depends on implementing the reforms

contemplated by the America Invents Act to check patent abuse, most notably the *inter partes* review and other post-grant review proceedings designed to allow interested parties to efficiently challenge and invalidate weak patents that should not have issued. Permitting patent owners to sidestep the probable invalidation of a weak patent in an *inter partes* review by substituting new claims without establishing the patentability of those new claims would invite abuse and compromise the effectiveness of *inter partes* review.

Financial services companies face unfair and unreasonable economic prejudice when abusive patent owners assert weak claims and allege that an important system, method or software that the company has used and on which it has relied infringes a patent. Such claims, which raise the possibility of substantial liability and significant costs in time and attorney's fees, exert pressure on financial services companies to settle even though the patent claims are weak. *Inter partes* review is a tool created by the America Invents Act to provide targets of such actions with an efficient mechanism to challenge the validity of weak patents. As frequent targets of abusive patent claims, financial services institutions have a strong interest in preserving the efficacy of *inter partes* review.¹

¹ No counsel for a party authored this brief in whole or in part, and no counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a monetary contribution to the brief's preparation or submission. Askeladden files

SUMMARY OF ARGUMENT

The Patent Office regulation that requires a patent owner in an *inter partes* review to satisfy the burden of persuasion that a proposed substitute claim is patentable should be upheld because, as the Intervenor Director of the United States Patent and Trademark Office has explained, the America Invents Act authorized the Patent Office to prescribe standards and procedures for the amendment of patents that are subject to *inter partes* review, the regulation in question does not violate the Patent Act and represents a reasonable exercise of the Patent Office’s rulemaking authority in view of the capabilities and workings of the Patent Office and the goals and purposes of *inter partes* review.

The America Invents Act provided the Patent Office with expansive rulemaking authority to implement new administrative review proceedings, including *inter partes* review. *See generally* 35 U.S.C. § 316(a); *In re Cuozzo Speed Techs., LLC*, 778 F.3d 1271, 1281-82 (Fed. Cir. 2015) (“[T]he AIA granted new rulemaking authority to the PTO.”). The AIA authorizes the Patent Office to “prescribe regulations ... establishing and governing” *inter partes* review proceedings and to specify “the relationship of such review to other proceedings under this title.” 35 U.S.C. § 316(a)(4).

this brief in accordance with this Court’s August 12, 2016 Order, which provides that briefs of amicus curiae may be filed without consent or leave of the Court.

With respect to amending a patent under review, the Act provides that “[d]uring an inter partes review instituted under this chapter, the patent owner may file 1 motion to amend the patent” to “cancel any challenged patent claim” and “for each challenged claim, propose a reasonable number of substitute claims.” 35 U.S.C. § 316(d). The Act expressly authorizes the Director to prescribe regulations “setting forth standards and procedures for allowing the patent owner to move to amend the patent under subsection (d) to cancel a challenged claim or propose a reasonable number of substitute claims”. 35 U.S.C. § 316(a)(9). Pursuant to those general and specific express statutory grants of rulemaking authority, the Director has prescribed that parties must file motions if they seek relief in any form other than what was sought in the initial petition. 37 C.F.R. § 42.20(c). The Patent Office regulations further specify, consistent with 35 U.S.C. § 316(d), that amendments to a patent in an *inter partes* review shall be sought by motion, and further prescribe the content (37 C.F.R. § 42.121(a) and (b)) and evidentiary standards for such motions, while specifically providing that the moving party has the burden of proof to establish that it is entitled to the requested relief (37 C.F.R. § 42.20). The Patent Trial and Appeal Board accordingly has held, and panels of this Court have affirmed, that under the statute and regulations promulgated by the Director, the patent owner must file a motion to amend patent

claims and bears the burden of persuasion to establish that substitute claims are patentable.

Contrary to Aqua Products' principal contention, the Patent Office rule placing a burden of persuasion on the patent owner to establish the patentability of substitute claims is not a violation of the Patent Act. Aqua Products contends that 35 U.S.C. § 316(e) governs the issue because it provides that "the petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence." This Court, however, has rejected that argument in two previous cases, holding that "[t]he introductory phrase [of 35 U.S.C. § 316(e)] referring to an 'inter partes review instituted under this chapter' makes clear that this provision specifically relates to claims for which inter partes review was initiated, *i.e.*, the original claims of the patent that a party has challenged in a petition for review. Inter partes review was not initiated for the claims put forward in the motion to amend." *Synopsys, Inc. v. Mentor Graphics Corp.*, 814 F.3d 1309, 1324 (Fed. Cir. Feb. 10, 2016); *Nike, Inc. v. Adidas AG*, 812 F.3d 1326, 1333-34 (Fed. Cir. Feb. 11, 2016).

The Patent Office regulation assigning the burden of persuasion for substitute claims to the patent owner is a reasonable exercise of its rulemaking authority. Indeed, it is the only workable standard for handling substitute claims. *Inter partes* review is not examination or reexamination. It is a separate,

adjudicative proceeding conducted before the Patent Trial and Appeal Board. The Board conducts a trial and rules on a record that is established by the parties. The Board does not examine patents and it does not search for prior art, which are functions performed by a patent examiner during examination or reexamination.

The Board also does not examine patent claims when performing its other major function – hearing appeals from the rejection of patent applications. When it hears appeals, the Board rules on a record established by the applicant and the examiner. If the applicant wishes to amend claims, it must withdraw the appeal and reopen prosecution before the examiner. The Patent Office’s rule placing the burden of persuasion on the patent owner to demonstrate the patentability of substitute claims is the only approach consistent with the capabilities of the Board given that it is not equipped to examine new claims.

Overturing the Patent Office regulation so that the patent owner no longer has to establish that substitute claims are patentable would subvert the purposes that *inter partes* review was designed to serve. It would lead to an increase in the survival of weak patents, and thereby stifle the efficacy and utility of *inter partes* review as a relatively low-cost and prompt alternative to litigation for invalidating low-quality patents. Certain patent owners that file the abusive patent infringement actions that plague the technology and financial services industries would welcome and abuse an enhanced ability to substitute slightly narrower

claims that survive *inter partes* review. That would result in the survival of many weak patents subjected to *inter partes* review — the somewhat narrower scope of the claims of such patents will not deter their owners from asserting them in meritless infringement actions. Filing a second petition for *inter partes* review to invalidate weak substitute claims that survive a first review would not be a satisfactory solution. The serial filing of multiple petitions for *inter partes* review would be prohibitively expensive, take too long and antithetical to the vision and purpose of *inter partes* review as a lower cost, faster alternative to district court litigation.

Upholding the Patent Office regulation to help maintain an efficacious *inter partes* review process is particularly important to the financial services industry. The existence of low-quality patents and abuse of the patent system marked by the assertion of low-quality patents is much more prevalent in the financial services industry and the technology industry that provides the hardware and software for the financial services industry than in pharmaceuticals or the life sciences. *Inter partes* review was established to provide a low-cost vehicle to re-test the validity of issued patents in the Patent Office and to invalidate weak patents that should not have been issued, particularly those weak systems, methods and software patents that are often asserted against the financial services industry. Contrary to assertions by amici supporting the position of Aqua Products, there is no evidence

that *inter partes* review, or specifically the burden on the patent owner to establish the patentability of substitute claims, is resulting in the invalidation of pharmaceutical drug patents or any other strong patents, including those strong patents in the technology and financial services sectors, that have traditionally served as a basis for commercial investment and product development. The patents that are being invalidated in *inter partes* review are weak patents that should not have issued. This en banc Court should uphold the Patent Office regulation because it is important to the maintenance of efficacious *inter partes* review.

ARGUMENT

I. **The AIA Authorized the Patent Office to Prescribe Standards for Substituting Claims**

A patent owner may not amend the claims of the patent in an *inter partes* review as a matter of right. Instead, under 35 U.S.C. § 316(d), the patent owner must file a motion to amend the patent claims. A patent owner may cancel a challenged claim or propose substitute claims only with the approval of the Board:

35 U.S.C. § 316 Conduct of inter partes review

...

(d) AMENDMENT OF THE PATENT. –

(1) IN GENERAL. – During an inter partes review instituted under this chapter, the patent owner may file 1 motion to amend the patent in 1 or more of the following ways:

(A) Cancel any challenged patent claim.

(B) For each challenged claim, propose a reasonable number of substitute claims.

The AIA did not define the standards and procedures to be utilized by the Board when deciding whether to grant a motion to amend or incorporate into the patent the substitute claims proposed by the patent owner.² Congress delegated that authority to the Director. Under 35 U.S.C. § 316(a)(9), the Director is required to prescribe regulations setting forth standards and procedures for allowing the patent owner to move to amend the patent:

35 U.S.C. § 316 Conduct of inter partes review

...

(a) REGULATIONS. – The Director shall prescribe regulations –

...

(9) setting forth standards and procedures for allowing the patent owner to move to amend the patent under subsection (d) to cancel a challenged claim or propose a reasonable number of substitute claims ...

The Director prescribed regulations at 37 C.F.R. § 42.121 setting forth procedures for a patent owner to move for amendment of the patent in an *inter partes* review. At 37 C.F.R. § 42.20, the Director set forth the evidentiary standard

² If the Board issues a final written decision in an *inter partes* review, “the Director shall issue and publish a certificate ... incorporating in the patent by operation of the certificate any new or amended claim determined to be patentable.” 35 U.S.C. § 318(b).

governing motion practice generally in an *inter partes* review, prescribing that “[t]he moving party has the burden of proof to establish that it is entitled to the requested relief.” The Board and multiple panels of this Court have interpreted those regulations to mean that with respect to substitute claims, “[t]he burden is not on the petitioner to show unpatentability, but on the patent owner to show patentable distinctions over the prior art of record and also prior art known to the patent owner.” *Microsoft Corp. v. Proxyconn, Inc.*, 789 F.3d 1292, 1304 (Fed. Cir. 2015), citing *Idle Free Systems, Inc. v. Bergstrom, Inc.*, IPR2012-00027, 2013 WL 5947697, *4-5 (PTAB June 11, 2013).

The question here is whether the Patent Office regulation requiring the patent owner to bear the burden of persuasion to establish patentability for substitute claims is proper. A Patent Office regulation prescribing a standard or procedure for carrying out its functions generally is proper if it does not violate the Patent Act and is a reasonable exercise of its rulemaking authority. “Where a statute leaves a ‘gap’ or is ‘ambiguous,’ we typically interpret it as granting the agency leeway to enact rules that are reasonable in light of the text, nature, and purpose of the statute.” *Cuozzo Speed Technologies, LLC v. Lee*, 136 S.Ct. 2131 (June 20, 2016) (Regulation issued by the Patent Office for standard of claim construction in *inter partes* review was proper because it did not violate the Patent

Act and represented a reasonable exercise of the rulemaking authority that Congress delegated to the Patent Office under the America Invents Act).

The Patent Office regulation providing that the patent owner bears a burden of persuasion to establish the patentability of a substitute claim in an *inter partes* review does not violate the Patent Act. Aqua Products argues that it contradicts the Patent Act because 35 U.S.C. § 316(e) states that “the petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence.” That provision is the central pillar for Aqua Products’ contention that the patent owner does not bear the burden of persuasion for substitute claims. Aqua Products, however, ignores the introductory phrase of the very provision that it relies on -- “*In an inter partes review instituted under this chapter*, the petitioner shall have the burden of proving a proposition of unpatentability by a preponderance of the evidence.” 35 U.S.C. § 316(e) (emphasis added). As two panels of this Court held, proposed substitute claims are not claims “in an *inter partes* review instituted under this chapter.” The assignment of the burden of persuasion to petitioner under Section 316(e) is applicable only to the original allowed claims for which *inter partes* review is instituted, not to the new unexamined substitute claims proposed by the patent owner to sidestep the invalidation of the allowed claims of the challenged patent.

In *Synopsys* 814 F.3d at 1323, the Board denied the patent owner's motion to substitute claims on the ground that the patent owner "has not met its burden to show that [the claims] would not have been obvious to a person of ordinary skill in the art based on the disclosure of [a prior art reference of record]." The patent owner appealed, arguing that it was improper for the Board to have placed the burden of establishing patentability on the patent owner because the burden of persuasion placed on the petitioner in 35 U.S.C. § 316(e) should apply to substitute claims. The Court affirmed the Board and explained that "Section 316(e) does not alter our analysis" because "[t]he introductory phrase referring to an 'inter partes review instituted under this chapter' makes clear that this provision specifically relates to claims for which inter partes review was initiated, *i.e.*, the original claims of the patent that a party has challenged in a petition for review. Inter partes review was not initiated for the claims put forward in the motion to amend." *Id.* at 1323, 1324; *see also Nike* 812 F.3d at 1333 ("Nike interprets [Section 316(e)] as also placing on the petitioner the burden of proving unpatentability of any newly proposed substitute claim that the patent owner seeks to introduce during the proceedings. ... But after considering the entire statute, we disagree that this section has such a broad command."). The Patent Office regulation placing the burden of persuasion on a patent owner proposing substitute claims does not violate the Patent Act. *Proxycorr*, 789 F.3d at 1307 ("Nor can we say that the

Board’s interpretation of § 42.20(c) in *Idle Free* – requiring the patentee to ‘show patentable distinction [of the substitute claims] over the prior art of record,’ ... is plainly erroneous or inconsistent with the regulation or governing statutes.”) (citation omitted).

II. The Standard Prescribed By the Patent Office Is a Reasonable Exercise of Its Rulemaking Authority

Placing the burden of persuasion on the patent owner to establish the patentability of substitute claims is a reasonable exercise of the rulemaking authority that Congress delegated to the Patent Office in the America Invents Act. It creates a workable mechanism for substituting claims that is consistent with functions and capabilities of the Board. It serves to maintain the efficacy and utility of *inter partes* review as a tool for eliminating invalid patents that should not have been granted.

A. Inter Partes Review Was Not Intended to Be a Continuation of Examination – The Board Is Not Equipped to Examine Patents

The Patent Office regulation is a reasonable exercise of its rulemaking authority because it is consistent with the purpose of *inter partes* review and the functions and capabilities of the Board. *Inter partes* review was created by the America Invents Act to provide a relatively quick and cost-effective mechanism to test and invalidate weak patents, in particular thousands of weak patents that have provided the basis for a plague of meritless patent infringement suits.

Inter partes review provides a petitioner with a forum in which to conduct a trial of the validity of a weak patent in a proceeding that must be completed in 18 months with limited discovery at a fraction of the cost of a district court proceeding. The purpose was not to create a proceeding in which the patent owner could, at the expense of the petitioner, engage the Board in a prolonged back-and-forth to successively amend the claims until arriving at claims that avoid the prior art of record. That is the purpose of continuing examination and reexamination, not an *inter partes* review. Indeed, the Board (and the petitioner) is ill-equipped to examine new claims. The Board does not examine claims or search for prior art and it does not reject claims.

Accordingly, the regulation assigning the burden of persuasion to the patent owner to establish the patentability of substitute claims is reasonable in view of the purpose of *inter partes* review and the capabilities of the Board. *Nike* 812 F.3d at 1333 (“placing this burden on the patent owner for its newly formulated claims is appropriate given the very nature of IPRs, which are distinctly different from a typical PTO examination or reexamination where a patent examiner performs a prior art search and independently conducts a patentability analysis of all claims, whether newly proposed or previously existing”) (citation omitted).

B. The Regulation Is Important to the Maintenance of the Efficacy and Utility of *Inter Partes* Review

The Patent Office regulation helps to preserve *inter partes* review as an

efficient and cost-effective tool for invalidating low-quality patents. If the patent owner does not bear the burden of persuasion to establish the patentability of substitute claims, low-quality substitute claims will more frequently survive *inter partes* review. In *Proxyconn*, 789 F.3d at 1307, this Court explained that “the very nature of IPRs” meant that the Board’s decision to “require[] the patentee to show that its substitute claims are patentable over the prior art of record” was appropriate. “During IPRs, once the PTO grants a patentee’s motion to amend, the substituted claims are not subject to further examination.” *Id.* Moreover, “the petitioner may choose not to challenge the patentability of substitute claims if, for example, the amendments narrowed the claims such that the petitioner no longer faces a risk of infringement.” *Id.* If the patentee is not required to establish patentability of substitute claims over the prior art of record, an amended patent could issue with new claims that also are invalid. *Id.* “Such a result would defeat Congress’s purpose in creating IPR as part of ‘a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.’” *Id.* at 1308, *citing* H.R. Rep. No. 112-98, pt. 1, at 40 (2011), 2011 U.S.C.C.A.N. 67, 69; *see also* *Cuozzo*, 136 S.Ct. at 2144 (“in addition to helping resolve concrete patent-related disputes among parties, *inter partes* review helps protect the public’s ‘paramount interest in seeing that patent monopolies ... are kept within their legitimate scope.’”) (citation omitted).

If the Patent Office regulation is not upheld and low-quality substitute claims more frequently survive *inter partes* review, the frequency of the use of *inter partes* review to challenge weak patents is likely to decline. Parties will hesitate to file petitions because of the uncertainty that would result if the ability of patent owners to obtain substitute claims is enhanced. Petitioners now can determine whether to file based on their analysis of the allowed claims and the prior art. If the Patent Office rule is overturned, petitioners would face uncertainty about the possibility that new unknown substitute claims will survive *inter partes* review and about the possible scope of such claims. Serial petitions for *inter partes* review would not remedy the problem. Although *inter partes* review is less costly than district court litigation, it is not inexpensive. Petitioners can expect a total direct cost for filing and prosecuting an *inter partes* review to range from \$150,000 to \$350,000. An *inter partes* review takes 18 months to complete. If petitioners fear that the investment of that much time and money may lead only to the survival of a weak patent with substitute claims, they are likely to increasingly forego *inter partes* review as a tool for challenging such patents.

C. **The Financial Services Industry Has a Substantial Interest in Maintaining the Efficacy of *Inter Partes* Review as a Tool for Challenging the Validity of Weak Patents**

Inter partes review was established to provide a low-cost vehicle to test the validity of issued patents in the Patent Office and invalidate weak patents that

should not have issued, particularly those weak systems, methods and software patents that have served as the basis for meritless infringement actions against financial services companies and the technology companies that provide the hardware and software upon which the financial services industry relies. Contrary to assertions by amici that support the position of Aqua Products, there is no evidence that *inter partes* review, or specifically the burden on the patent owner to establish the patentability of substitute claims, is resulting in the invalidation of pharmaceutical drug patents or any other strong patents including those in financial services that traditionally have been the basis for commercial investment and product development. The patents that are being invalidated in *inter partes* review are weak patents that should not have issued, and they predominantly are patents that adversely affect the financial services and technology industries. Other sectors have not been subjected to the abusive assertion of a multitude of low-quality patents in the same way or to the same extent as financial services institutions.

The distinctive effect that low-quality patents have on the financial services industry is highlighted by a recent study that used citations to academic literature as a measure of patent strength, finding that “[f]inance patents tend to cite fewer academic publications than do non-finance patents,” and that the difference is more pronounced when citations to leading journals are considered. “*Financial Patent Quality: Finance Patents After State Street*,” J. Lerner et al., Harvard Business

School, Working Paper 16-068, 3 (2015). That study also found that “finance patents are litigated more often and more intensely” and that “finance patents with more academic citations had less litigation.” *Id.* at 4. In other words, weaker financial patents are more likely to be litigated than stronger financial patents notwithstanding that the “[t]he same effect was not seen for non-finance patents.” *Id.*

Abusive patent owners that prey on the financial services and other industries will not hesitate to bring infringement actions alleging infringement of their substituted claims that survive *inter partes* review. The patents were weak in the first place – their value derived from their ability to provide a basis for an assertion of infringement and the associated costs that the alleged infringer must incur defend against allegations of infringement. With substituted claims, those weak patents will continue to provide abusive patent owners with a basis for threatened or actual meritless infringement litigation that must be litigated or settled by accused defendants – it will make no difference if their substitute claims are somewhat narrower than the original claims. If the Patent Office regulation is overturned, there will be more weak patents to assert against the financial services industry. Aqua Products incorrectly suggests that the low rate of allowance for motions to amend indicates that the outcomes for *inter partes* review are not properly balanced. On the contrary, it reflects that in these early years of *inter*

partes review, the procedure is working just as it was intended – it is ferreting out and invalidating weak systems, methods and software patents that should not have issued. *Cuozzo*, 136 S.Ct. at 2145 (“*Cuozzo* adds that, as of June 30, 2015, only 5 out of 86 motions to amend have been granted. ... But these numbers may reflect the fact that no amendment could save the inventions at issue, *i.e.*, that the patent should have never issued at all.”).

The experience of the financial services industry demonstrates the seriousness of the risk associated with the survival of more weak patents challenged by way of *inter partes* review. Financial services institutions have faced a steady stream of dubious infringement actions threatening the use of what have become basic and essential business practices, such as providing mobile banking to customers through smartphone applications. An increase in the number of weak patents surviving *inter partes* review would have far reaching and harmful consequences because it would increase the number of patents available to abusive patent owners focused on extorting settlement payments from participants in the financial services industry facing the risk and expense of litigation threatening well-established and highly valuable financial products and services.

CONCLUSION

For the foregoing reasons, the en banc Court should uphold the Patent Office regulation that places the burden of persuasion on the patent owner to establish the

patentability of substitute claims in an *inter partes* review. The America Invents Act authorized the Director to prescribe standards and procedures for allowing a patent owner to proposed substitute claims, the regulation prescribed by the Director does not violate the Patent Act and it is a reasonable exercise of the Patent Office's rulemaking authority.

Respectfully submitted,

Dated: November 2, 2016

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set for in Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,495 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Fed. Cir. R. 32(b). I further certify that the brief complies with the typeface requirements of Fed. R. App. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word.

Dated: November 2, 2016

/s/ Kevin J. Culligan

Kevin J. Culligan

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2016, I electronically filed the foregoing brief using the Court's CM/ECF system, which will send notice of such filing to counsel for all parties. Upon acceptance by the Court of the electronically filed document, thirty paper copies will be filed with the Court within the time provided in the Court's rules and the Court's August 12, 2016 Order.

Additionally, on this date, the following principal counsel for each party will be served with 2 paper copies:

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