Appeal Nos. 2017-2597, -2598, -2600, -2602, -2605, -2606, -2609, -2611, -2612, -2627, -2628, -2629, -2630, -2631, -2632, -2633, -2634 and 2018-1006

United States Court of Appeals

for the

Federal Circuit

PRINCETON DIGITAL IMAGE CORPORATION,

Plaintiff-Cross-Appellant,

– v. –

OFFICE DEPOT INC., J.C. PENNEY COMPANY, INC., QVC INC., SEARS HOLDINGS CORPORATION, LIMITED BRANDS INC., GAP, INC., WILLIAMS-SONOMA, INC., COSTCO WHOLESALE CORPORATION, NORDSTROM.COM LLC, NORDSTROM.COM INC., NORDSTROM INC.,

Defendants,

ADOBE SYSTEMS INCORPORATED,

Defendant-Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE IN CASE NOS. 1:13-cv-00239-LPS, 1:13-CV-00287-LPS, 1:13-CV-00288-LPS, 1:13-CV-00289-LPS, 1:13-CV-00326-LPS, 1:13-CV-00330-LPS, 1:13-CV-00331-LPS, 1:13-CV-00404-LPS AND 1:13-CV-00408-LPS
LEONARD P. STARK, CHIEF JUDGE

REPLY BRIEF FOR PLAINTIFF/CROSS-APPELLANT PRINCETON DIGITAL IMAGE CORPORATION

GEORGE PAZUNIAK
O'KELLY ERNST & JOYCE, LLC
901 North Market Street, Suite 1000
Wilmington, Delaware 19801
gp@del-iplaw.com
(302) 778-4000

Attorneys for Plaintiff-Cross-Appellant

Date Filed: April 2, 2018
Corrected: April 3, 2018

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, Counsel for the Plaintiff/Cross-Appellant, Princeton Digital Image Corporation certifies the following:

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

   Princeton Digital Image Corporation.

2. The name of the real party in interest represented by me is:

   Not applicable.

3. All parent corporations and any publicly held companies that own 10% or more of the stock of the party or *amicus* 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:

Sean O'Kelly, Daniel Murray, Michael Botts, O'Kelly Ernst & Joyce, LLC

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:

   None.

April 2, 2018

/s/ George Pazuniak

GEORGE PAZUNIAK
O'KELLY ERNST & JOYCE, LLC
901 North Market Street, Suite 1000
Wilmington, DE 19801
(302) 478-4230
gp@del-iplaw.com

TABLE OF CONTENTS

CERTIFICATE OF INTEREST i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF RELATED CASES 1

SUMMARY OF REPLY 1

STATEMENT OF THE ISSUES 5

ARGUMENT 6

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN AWARDING ATTORNEY FEES IN THE NORDSTROM DEFAULT MATTER 6

A. Adobe Mischaracterizes The Facts 6

1. PDIC Did Respond To Adobe's Default Motion 6

2. District Court Did Not Hold That PDIC Acted In Bad-Faith, And Such Finding Can Not Be Made On Present Record 7

a. The Court Never Found Bad-Faith 7

b. Bad-Faith Cannot Be Sustained On The Undisputed Facts 8

3. Other Adobe Errors 10

B. The Court May Decide Whether Fed.R.Civ.P Rule 55 Authorizes Attorney Fees 12

C. Adobe Cites No Authority For Granting Attorney Fees Absent Bad-Faith, Which The Court Never Found 15

D. Adobe Virtually Concedes That The Clerk's Entry of Default Was Illegal Because The Court Had Already Denied Adobe's Motion For Default....17

E. Reversal Is Required In View Of Adobe's Failure To Address Rule 12(a)(4)(A)....18

F. Adobe Does Not Justify The District Court's Grant of Attorney Fees....20

II. THE COURT ERRED IN AWARDING ATTORNEY FEES IN CONNECTION WITH ADOBE'S DEPOSITION OF PDIC....21

A. Adobe Does Not Challenge PDIC's Dispositive Legal Issues....21

B. Adobe's Silence On Critical Dispositive Issues Confirm The District Court's Violation of Rule 37(d)(3)....22

C. Adobe Concedes That The Second Deposition Comprised New Unrelated Testimony....24

D. The Appeal Involves Legal Error, Not Discretion....24

E. Adobe's Answering Brief Is Largely Irrelevant, But Confirms That The District Court Applied An Erroneous Standard....24

F. Adobe Did Not Properly Support Its Fee Petition....27

G. The Court's Award Is Inadequately Explained....30

H. The Court Improperly Punished PDIC For Raising Legitimate Objections to Adobe's Fee Request....31

CONCLUSION....31

TABLE OF AUTHORITIES

CASES

Amgen Inc. v. Sandoz Inc.,
877 F.3d 1315 (Fed. Cir. 2017) 13, 14

Arcadia, Ohio v. Ohio Power Co.,
498 U.S. 73 (1990) 13

Automated Merch. Sys., Inc. v. Lee,
782 F.3d 1376 (Fed. Cir. 2015) 13

Chambers v. NASCO, Inc.,
501 U.S. 32 (1991) 16

Emcasco Ins. Co. v. Sambrick,
834 F.2d 71 (3d Cir. 1987) 15

Foy v. Dicks,
146 F.R.D. 113 (E.D. Pa. 1993) 16

Gass v. Virgin Islands Tel. Corp.,
311 F.3d 237 (3d Cir. 2002) 14

Goodyear Tire & Rubber Co. v. Haeger,
137 S.Ct. 117, (2017) 16

Gross v. Stereo Component Sys., Inc.,
700 F.2d 120 (3d Cir. 1983) 10

Gunter v. Ridgewood Energy Corp.,
223 F.3d 190 (3d Cir.2000) 8

Hensley v. Eckerhart,
461 U.S. 424 (1983) 29, 30

Hritz v. Woma Corp.,
732 F.2d 1178 (3d Cir. 1984) 10

Icon Health & Fitness, Inc. v. Strava, Inc.,
849 F.3d 1034 (Fed. Cir. 2017) 13

In re Pierce,
102 F.3d 1264 (D.C.Cir. 1996).....29

International Bhd. of Elec. Workers, Local Union No. 313 v. Skaggs,
130 F.R.D. 526 (D. Del. 1990).....16

McKenna v. City of Philadelphia,
582 F.3d 447 (3d Cir. 2009).....29

Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec,
854 F.2d 1538 (9th Cir. 1988).....15

Pa. Envtl. Def. Found. v. Canon–McMillan Sch. Dist.,
152 F.3d 228 (3d Cir.1998).....8

Planned Parenthood of Cent. New Jersey v. Attorney Gen. of State of New Jersey,
297 F.3d 253 (3d Cir. 2002).....8

Rode v. Dellarciprete,
892 F.2d 1177 (3d Cir.1990).....8

Sage Prods., Inc. v. Devon Indus., Inc.,
126 F.3d 1420 (Fed. Cir. 1997).....14

United Auto. Workers Local 259 Soc. Sec. Dep't v. Metro Auto Ctr.,
501 F.3d 283 (3d Cir. 2007).....28

RULES

Fed.R.Civ.P. Rule 12(b).....18

Fed.R.Civ.P. Rule 30(d)(1)..... 21, 22, 25

Fed.R.Civ.P. Rule 37(b)(2)(C).....15

Fed.R.Civ.P. Rule 55 ..... passim

Fed.R.Civ.P. Rule 6(b)(1)(B).....19

Fed.R.Civ.P. Rule 12(a)(4).....9

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, Plaintiff/Cross-Appellant, Princeton Digital Image Corporation ("PDIC") states that:

No appeal in this case has ever been heard before this Court or any other appellate court;

No other case known to counsel will directly affect or be directly affected by this Court's decision in the pending appeal.

SUMMARY OF REPLY

PDIC had challenged on this appeal the District Court Orders that PDIC pay Adobe attorney fees in the amounts of $42,631.75 in connection with a default in the Nordstrom case, and an additional $34,861 in connection with a deposition.

Adobe's defenses of these fee awards fail. The issues are not matters of discretion, but that the District Court committed errors of law. As detailed below, Adobe largely ignores undisputed facts and PDIC's main legal arguments, and the facts and issues ignored by Adobe are sufficient to require reversal of the District Court's orders.

Attorney Fee Order In The Nordstrom Case

With respect to the Nordstrom fee award, Adobe ignores entirely the August 6, 2015 Scheduling Conference, even though that is the central event leading to the fee award. At that Conference, the parties and the Court addressed Adobe's motion

for default in the Nordstrom case, and the District Court "directed" PDIC to file its motions to dismiss in Nordstrom. Neither the Court nor Adobe suggested that PDIC was required to take any steps other than pursue its motions to dismiss. Upon the filing of the judicially-authorized motions to dismiss, any obligation for PDIC to answer the Nordstrom Complaint was deferred, as a matter of law, until 14 days after the District Court decided the motions to dismiss by force of Fed.R.Civ.P. Rule 12(a)(4)(A). PDIC's motions to dismiss were successful in that the Court dismissed one of the two Counts which Adobe had pled in Nordstrom. PDIC_Open.Br.18; Appx18-21. Unfortunately, while the motions to dismiss were *sub judice*, the clerk had entered a default in Nordstrom, even though the District Court had effectively overruled Adobe's motion by requiring briefing on the motions to dismiss, and the plain language of Rule 12(a)(4)(A) deferred any obligation to answer.

The District Court was not authorized to sanction PDIC with attorney fees in connection with PDIC's motion to vacate the clerk's illegal entry of default and pay for Adobe's whole unprofessional efforts to sustain that illegal entry of default. The District Court found PDIC culpable solely due to what the District Court viewed as PDIC's ignoring the District Court's statements at the Scheduling Conference, when, in fact, PDIC did exactly as ordered by the Court. In defending the District Court's fee award, Adobe pretends that there was no Scheduling Conference and no discussion of its pending default motion at that Scheduling Conference, and its brief

never acknowledges that the Court "directed" PDIC to file motions to dismiss in the Nordstrom case – without requiring any other action by PDIC – or that Rule 12(a)(4)(A) even exists. In short, Adobe is unable to support its Dostoyevskian-like fee award where a party is judicially punished for fully following a court's order and the Rules, and the adversary is rewarded for its unsuccessful and unprofessional attempt to sustain a plainly erroneous default.

Deposition Sanctions Order

As to the deposition sanctions order, Adobe ignores entirely any discussion of Fed.R.Civ.P. Rule 37(d)(3), which allows only "reasonable expenses, including attorney's fees, *caused by* the failure" of a party to appear for a deposition. Adobe also ignores entirely the established law that the District Court could only award attorney fees which Adobe would not have incurred "but-for" PDIC's alleged deposition default. Instead, Adobe argues that the District Court ordered a second deposition and allowed Adobe to interrogate PDIC on the same "topics" as were interrogated in the first deposition. That is true, but irrelevant. The District Court may extend depositions, but Rule 37(d)(3) does not authorize the District Court to order PDIC to pay for those extended depositions. Rule 37(d)(3) authorizes, on the undisputed facts of this case, at most, only the reasonable expenses of basically re-asking the questions that were left unanswered at the first deposition, which are the only expenses that could have been "caused" by PDIC's default. The District Court

ignored the "but-for" standard of Rule 37(d)(3) in its award, and Adobe still ignores this basic law on appeal.

Moreover, Adobe fails to respond to PDIC demonstration that many of Adobe's questions during the second deposition were manifestly outside the scope of the topics covered in the first deposition, and, thus, even by Adobe's proposed standard, the District Court erred in awarding fees.

Finally, Adobe never presented a proper fee application. Despite Adobe's attempt to force-fit its fee application within the scope of governing authority, Adobe supported its fee application by a single chart that presented no information as to what Adobe did during the 75 hours of attorney time that Adobe claims was required to compensate for PDIC's inability to answer a relatively small number of questions during the first deposition. Appx5812.

By ignoring both PDIC's primary legal arguments and the undisputed facts, Adobe concedes that the lower court's two sanctions orders cannot be sustained under the law.

STATEMENT OF THE ISSUES

The Nordstrom Award

1. May the Court consider PDIC's arguments based on Fed.R.Civ.P. Rule 55? If so, does Rule 55 authorize the grant of attorney fees?

2. Was the District Court authorized to award any attorney fees on the facts of this case?

3. Can PDIC be sanctioned for challenging a clerk's entry of default, when (a) the District Court had already effectively overruled the default motion during the August 6, 2015 Scheduling Conference; and (b) additionally or alternatively, the default was illegally entered in violation of Fed.R.Civ.P. Rule 12(a)(4)(A).

The Deposition Award

4. Is "but-for" the correct standard for attorney fees under Fed.R.Civ.P. Rule 37(d)(3)?

5. Does Fed.R.Civ.P. Rule 37(d)(3) authorize a District Court to order one party to pay an adversary's attorney fees for the preparation and taking of the entire second deposition, when, as a matter of law, the deposing party could not have asked the questions during the first deposition?

6. Does Fed.R.Civ.P. Rule 37(d)(3) authorize a District Court to order one party to pay an adversary's attorney fees for the preparation and interrogation of a witness on unrelated topics?

7. Did Adobe properly support its fee application, when Adobe demanded compensation of 75 hours of attorney time without any description whatsoever of what Adobe's attorneys did during any of the claimed fee events?

8. Did the District Court adequately explain on the record the reasons for its decision?

ARGUMENT

I. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN AWARDING ATTORNEY FEES IN THE NORDSTROM DEFAULT MATTER

A. Adobe Mischaracterizes The Facts

1. PDIC Did Respond To Adobe's Default Motion

Adobe errs in asserting that "PDIC did not respond" to Adobe's request for entry of default. Answr.Br. 37.[1] As described in PDIC's opening brief, PDIC responded to Adobe's motion for default immediately after Adobe had filed it by raising it in the parties' proposed Scheduling Order and at the August 6, 2015 Scheduling Conference. PDIC_Open.Br.15-18, 59-60. Moreover, in the papers

[1] PDIC's Opening And Response Brief is here referenced as "PDIC_Open.Br." Adobe's Response And Reply Brief is here referenced as "Answr.Br." The designations are followed the page number of the brief.

submitted before the Conference, and at the Conference, PDIC explained that it did not answer the Nordstrom complaint because the case had been marked "Terminated" on the Court's docket. Further, PDIC asked permission to file motions to dismiss both Counts of the Nordstrom Complaint. *Id*. After hearing the parties, the District Court "directed" PDIC to file its motions to dismiss Adobe's Nordstrom Complaint. *Id.* Adobe does not explain how PDIC did not respond to Adobe's default motion, when PDIC promptly raised the default motion with the Court and sought leave to file motions to dismiss the Nordstrom complaint.

2. District Court Did Not Hold That PDIC Acted In Bad-Faith, And Such Finding Can Not Be Made On Present Record

a. The Court Never Found Bad-Faith

Contrary to Adobe's argument, the District Court never found that PDIC acted in bad-faith, or vexatiously, wantonly or oppressively. *Cf*., Appx114-116; Appx5666; Appx5736-5738.

Adobe argues that the District Court held that PDIC acted in bad-faith when it described PDIC's conduct as "culpable." Answr.Br.39,45,48-51. However, "culpable" is not synonymous with bad faith, or vexatious, wanton or oppressive conduct. More importantly, the District Court stated that PDIC was "culpable" only because PDIC had not filed an answer after the August 6, 2015 Scheduling Conference (albeit without acknowledging the District Court's statements and

actions at that Conference). PDIC_Open.Br.60; Appx5668. Even if the District Court were correct that PDIC should have filed an answer, in addition to its motions to dismiss, after the conference, the District Court's statement, that PDIC was "culpable" because it failed to file an answer, is not a finding of bad-faith, or vexatious, wanton or oppressive conduct.

b. Bad-Faith Cannot Be Sustained On The Undisputed Facts

Further, any finding of bad-faith, or vexatious, wanton or oppressive conduct in this case could not be sustained, because a "district court 'must explain on the record the reasons for its decisions.'" *Planned Parenthood of Cent. New Jersey v. Attorney Gen. of State of New Jersey*, 297 F.3d 253, 266 (3d Cir. 2002) (quoting *Rode v. Dellarciprete*, 892 F.2d 1177, 1187 (3d Cir.1990), and citing *Pa. Envtl. Def. Found. v. Canon–McMillan Sch. Dist*., 152 F.3d 228, 232 (3d Cir.1998) ("[T]he district court must provide a concise but clear explanation of its reasons for [a] fee award")). Further, "if the district court's fee-award opinion is so terse, vague, or conclusory that we have no basis to review it, we must vacate the fee-award order and remand for further proceedings." *Planned Parenthood, supra (quoting Gunter v. Ridgewood Energy Corp*., 223 F.3d 190, 196 (3d Cir.2000)). Given that the District Court had never "explain[ed] on the record the reasons" for any finding of bad-faith, or vexatious, wanton or oppressive conduct, any such finding would have to be vacated.

Moreover, there is no basis for finding bad-faith, or vexatious, wanton or oppressive conduct. Adobe has not challenged PDIC's factual showing, and the undisputed facts are that PDIC had timely answered eight of the nine complaints filed by Adobe, and failed to file an answer in the Nordstrom case because the official docket stated that the Nordstrom case was "Terminated." PDIC_Open.Br.15. Adobe itself had recognized the issue created by the "Case Terminated" designation. PDIC_Open.Br.15-16. Then, upon Adobe filing its motion for default, PDIC promptly raised the issue with the District Court during the August 6, 2015 Scheduling Conference. PDIC_Open.Br.15-18. The District Court heard PDIC and Adobe, and directed PDIC to file its motions to dismiss in Nordstrom. *Id.* PDIC followed the District Court's directive and filed the motions to dismiss in Nordstrom. PDIC_Open.Br.16-18. PDIC reasonably relied upon the plain words of Fed.R.Civ.P. Rule 12(a)(4)(A) that no answer was due until the Court ruled on the motions to dismiss. PDIC_Open.Br.18, 59-60. Neither the District Court nor Adobe suggested that PDIC had to take steps other than to file its motions to dismiss, which PDIC proceeded to do. If either the District Court or Adobe had intended that PDIC should still have filed an answer during the pendency of the briefing on the motions to dismiss, then the District Court or Adobe should have so advised PDIC. Otherwise, PDIC was privileged to rely on Rule 12(a)(4)(A) that no answer was due until the Court ruled on the motions to dismiss.

In short, that PDIC followed the District Court's order in filing motions to dismiss the Nordstrom Complaint, and relied on the plain language of Rule 12(a)(4)(A), cannot be a basis for finding bad-faith, or vexatious, wanton or oppressive conduct.

Without any finding or evidence of sanctionable conduct, Adobe argues that "Failing to file an answer in compliance with the Federal Rules—particularly when repeatedly reminded to do so—demonstrates bad faith or, at least, vexatious conduct." Answr.Br.50. Preliminarily, Adobe did not "repeatedly" remind PDIC about the answer. Adobe contacted PDIC only twice, and then filed its motion for default before PDIC could address the "Case Terminated" notation in the docket. PDIC_Open.Br.15-16; Answr.Br.37. Neither of the two cases cited by Adobe, *Hritz v. Woma Corp*., 732 F.2d 1178, 1183 (3d Cir. 1984) and *Gross v. Stereo Component Sys., Inc*., 700 F.2d 120, 123-124 (3d Cir. 1983), are relevant. They merely hold that a District Court may find bad-faith on certain facts. But, there is no finding of bad-faith in this case, and, further, Adobe does not even attempt to compare the facts of those cases to the present facts.

3. Other Adobe Errors

Adobe argues that PDIC's motions to dismiss were frivolous and caused "multiplication of the proceedings" that "warranted sanctions." Answr.Br.46,47. Adobe does not explain the basis for its charge. Its argument is without merit,

because the District Court in fact granted PDIC's motions in part, and dismissed one of the two Counts that Adobe had pled in the Nordstrom case. PDIC_Open.Br.18; Appx18-21. Adobe never explains how PDIC could have multiplied proceedings and "warranted sanctions" for filing motions to dismiss the Nordstrom complaint, when the District Court in fact dismissed one of the two counts in the Nordstrom complaint. PDIC's motions to dismiss were filed in good-faith and its motions significantly reduced the size of the case.

Adobe implies that the Court's entire $42,631.75 fee sanction reflected the costs of Adobe filing for the default. That is demonstrably incorrect. The time required to file the default was insignificant, reflecting perhaps 2 hours of the 75 hours included in the Court's award to Adobe. Appx115-116; Appx5726-5727. The vast majority of Adobe's time was incurred in trying to sustain the clerk's entry of default, notwithstanding the entry's clear illegality.

Finally, Adobe argues that PDIC did not address the default during a March 8, 2016 omnibus hearing covering "pending motions." Answr.Br.45-46. But, as PDIC argued below, Adobe's motion for default had already been resolved and was not pending when the District Court held the omnibus hearing. Appx5607-5609; Appx5662. The District Court did not rely on the 2016 hearing, and the hearing is not relevant.

B. The Court May Decide Whether Fed.R.Civ.P Rule 55 Authorizes Attorney Fees

PDIC had argued in its opening brief that Fed.R.Civ.P. Rule 55 did not authorize the District Court to award attorney fees. PDIC_Open.Br. 57-58.

Adobe argues that PDIC waived this argument by not raising it below. Answr.Br. 48-49. PDIC did not waive the argument, because the District Court ordered that PDIC "shall compensate Adobe for attorney fees and related costs associated with all default-related filings" on its own, without Adobe having made any actual motion for attorney fees.[2] Appx5666.

Adobe blames PDIC for not seeking reconsideration of the District Court's ruling. But, Adobe itself has pointed out that the District of Delaware's standard for reconsideration is very strict. See Adobe's Opening Brief (Doc.18) at 58. Adobe has not pointed to any provision in the District of Delaware standards for reconsideration that would have applied to this situation. In any event, Adobe has not pointed to any authority for finding waiver because a party had not sought reconsideration.

---

[2] Adobe's brief in the District Court did include a footnote suggesting "monetary sanctions." Appx5643. However, that was not a motion for fees, and, in fact, did not request attorney fees.

Even if there was a waiver, there are exceptions to waivers. The Supreme Court has held it appropriate to decide cases based on an issue that was not raised below if the newly-raised issue is "antecedent" to the matters that the Court must resolve. *Arcadia, Ohio v. Ohio Power Co*., 498 U.S. 73, 77 (1990).

Consistent with the Supreme Court's approach, this Court has repeatedly agreed to consider issues that were not raised in the lower court if:

> (1) "the issue involves a pure question of law and refusal to consider it would result in a miscarriage of justice"; (2) "the proper resolution is beyond any doubt"; … (4) "the issue presents significant questions of general impact or of great public concern"; or (5) "the interest of substantial justice is at stake."

Amgen Inc. v. Sandoz Inc., 877 F.3d 1315, 1324 (Fed. Cir. 2017) (agreeing to review preemption issue although waived below, because "the issue presents significant questions of general impact or of great public concern"). See also *Icon Health & Fitness, Inc. v. Strava, Inc*., 849 F.3d 1034, 1040 (Fed. Cir. 2017) (the issue of PTAB's reliance on declaration considered, even though not raised below, because "the arguments raise an issue of general impact in that the issue potentially could affect the weight afforded to a large number of expert declarations containing similar statements"); *Automated Merch. Sys., Inc. v. Lee*, 782 F.3d 1376, 1379-80 (Fed. Cir. 2015) ("public concern").

Whether Rule 55 authorizes attorney fees in connection with a default is a "question antecedent to" the determination of the propriety of granting attorney fees

for a default. Further, this Court's exceptions apply, because the Rule 55 issue is (a) "a pure question of law, and refusal to consider it would result in a miscarriage of justice"; (b) "the proper resolution is beyond any doubt"; and (c) "the issue presents significant questions of general impact or of great public concern." *Amgen, supra*.

The authorities cited by Adobe do not require the Court to ignore this basic underlying legal issue of whether, and under what circumstances, Rule 55 permits granting of attorney fees. Answr.Br.48. In *Gass v. Virgin Islands Tel. Corp*., 311 F.3d 237 (3d Cir. 2002), the Court stated that it will "depart from this [waiver] rule when manifest injustice would result from a failure to consider a novel issue." 126 F.3d at 246. This is exactly such a case. PDIC has raised a pure issue of law as to an award of $42,631.75 in attorney fees made by the District Court on its own and without any motion or opportunity for PDIC to argue. It would be manifestly unjust to not consider whether the District Court was authorized to grant such fees.

Adobe's second case, *Sage Prods., Inc. v. Devon Indus., Inc*., 126 F.3d 1420, 1426 (Fed. Cir. 1997), is not in point. It states the waiver rule, but that general rule has exceptions, as set forth in other Federal Circuit cases, such as *Amgen*, cited above. Thus, *Sage* does not preclude review.

Thus, PDIC did not waive. Even if PDIC waived, Adobe's own authorities recognize exceptions to the waiver rule, which apply here.

C. Adobe Cites No Authority For Granting Attorney Fees Absent Bad-Faith, Which The Court Never Found

Even if PDIC is deemed to have waived its Rule 55 argument, the District Court's authority to award attorney fees remains an issue. The District Court ordered that PDIC "shall compensate Adobe for attorney fees and related costs associated with all default-related filings," without citing any authority. Appx5666.

Adobe's response does not identify any governing authority that would allow attorney fees in this case. Answr.Br.43,49-50. Instead, Adobe misstates the main authority upon which it relies. Thus, Adobe argued:

> Indeed, in the Third Circuit, a district court considering a motion to set aside a default must consider "the effectiveness of alternative sanctions," *such as a monetary penalty*. *Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71, 73 (3d Cir. 1987).

Answ.Br.43 (emphasis supplied); see also Answr.Br.49. Adobe errs, because *Emcasco* never used the term "monetary" and never suggested that attorney fees were available in a default proceeding. In fact, the *Emcasco* Court reversed the lower court's refusal to vacate a default and remanded with directions to the district court to permit the filing of the proffered answer with "Each party to bear its own costs." *Emcasco*, 834 F.2d at 75–76. Thus, *Emcasco* stands for the opposite of what Adobe argues.

Adobe's second-cited case, *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538, 1546-1547 (9th Cir. 1988), is neither

governing authority, nor in point. In that case, attorney fees were granted under Fed.R.Civ.P. Rule 37(b)(2)(C), which expressly provides for attorney fees. The case does not support granting fees in cases of default in the absence of the particular Rule 37(b)(2)(C) context of that case.

Adobe next cites *Foy v. Dicks*, 146 F.R.D. 113 (E.D. Pa. 1993) and *International Bhd. of Elec. Workers, Local Union No. 313 v. Skaggs*, 130 F.R.D. 526 (D. Del. 1990). These are district court cases, and not governing authority. Further, neither court ever considered the issues presented on this appeal.

Adobe ends by citing *Goodyear Tire & Rubber Co. v. Haeger*, 137 S.Ct. 117, (2017) and *Chambers v. NASCO, Inc*., 501 U.S. 32 (1991). Answr.Br.50. Yet, as Adobe itself notes, these cases involve the inherent authority of a court to grant attorney fees, and they hold that a court may award fees only upon a showing of "bad faith, vexatious[], wanton[], or …oppressive' conduct." *Chambers*, 501 U.S. at 45-46; *Goodyear,* 137 S. Ct. at 1186 (allowing fees against "a party that has acted in bad faith"); Answer.Br.50.

Chambers and *Goodyear* cannot support attorney fees here, because, as noted earlier, the District Court never held that PDIC acted in "bad faith, vexatiously, wantonly, or oppressively," and, in any event, the record could not justify such a finding. Pp. 7-10, *supra*.

In short, when a District Court awards $42,631.75 in attorney fees, it is reasonable to ask for the District Court's authority. Yet, neither the District Court nor Adobe has pointed to any governing authority allowing attorney fees against PDIC on the facts here. The District Court did not cite Fed.R.Civ.P. Rule 55, and the Rule does not provide for attorney fees. OpenBr.58. Nor can any right to attorney fees be implied in view of the Supreme Court's governing law that the District Court's inherent authority extends only to "willful disobedience of a court order" and situations "when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" PDIC_Open.Br.58-59.

D. Adobe Virtually Concedes That The Clerk's Entry of Default Was Illegal Because The Court Had Already Denied Adobe's Motion For Default

Even if the District Court could award attorney fees in the present case, the District Court could not have awarded attorney fees for PDIC's motion to vacate the clerk's default, because the Court had already overruled Adobe's default motion. As Adobe itself notes, "PDIC argued that when the district court gave PDIC permission to move to dismiss Adobe's claims for lack of jurisdiction at an August 6, 2015 scheduling conference, it impliedly denied Adobe's request for default." Answr.Br.38. PDIC did so argue in the District Court and in its opening brief. Appx5607-5609; Appx5658-5660; PDIC_Open.Br.17-18, 59, 61. Yet, neither the

District Court nor Adobe answered this argument below, and Adobe never addresses the issue on appeal.

The District Court's and Adobe's silences, however, cannot avoid the undisputed facts that (i) Adobe had objected to PDIC being able to file its motions to dismiss in the Nordstrom matter in view of Adobe's default motion, but (ii) the District Court overruled Adobe's objection. PDIC_Open.Br.17-18; Appx2586-2587(21:14-22:12). Later, the District Court dismissed one of the two Counts in Adobe's Nordstrom Complaint. PDIC_Open.Br.18; Appx18-21.

Adobe cannot avoid the plain illegality of the clerk's entry of default after the District Court had necessarily overruled Adobe's default motion at the August 6, 2015 Scheduling Conference by simply refusing to acknowledge the matter.

E. Reversal Is Required In View Of Adobe's Failure To Address Rule 12(a)(4)(A)

It is undisputed that the Court heard the parties' arguments as to the default, and then directed PDIC to file its Fed.R.Civ.P. Rule 12(b) motions in the Nordstrom case. PDIC_Open.Br.15-18, 59-61. At that point, Rule 12(a)(4)(A) came into play to postpone any obligation to answer Adobe's Nordstrom Complaint.

Remarkably, despite the centrality of the District Court's rulings at the August 6, 2015 Scheduling Conference and resulting aftereffect of Rule 12(a)(4)(A), Adobe entirely ignores PDIC's arguments regarding the Scheduling Conference, and avoids any discussion of Rule 12(a)(4)(A).

Instead of addressing PDIC's dispositive arguments, Adobe asserts – without any hint of authority or analysis – that "PDIC's motion to dismiss for lack of jurisdiction did not reset the clock for PDIC to file an answer or moot Adobe's pending request for entry of default." Answr.Br.47. But, Adobe never explains why Rule 12(a)(4)(A) did not postpone any obligation to answer as a matter of law. Adobe simply never mentions Rule 12(a)(4)(A).

Adobe does argue that accepting PDIC's argument would allow any party to avoid a default by filing a motion to dismiss. Answr.Br.47-48. Adobe's argument flops, however, because PDIC did not unilaterally file a motion to dismiss. Instead, PDIC sought the District Court's authorization to file its motions to dismiss, and, in response to PDIC's motion, the District Court "directed" PDIC to file its motions. PDIC_Open.Br.17; Appx2582(17:15-23). The transcript of the Scheduling Conference cannot lead to any conclusion other than that the District Court extended the time for PDIC to respond, which the District Court had the full authority to do under Fed.R.Civ.P. Rule 6(b)(1)(B). To answer Adobe's argument in the context of the actual facts, a defaulting party may ask the District Court for leave to file a belated response to a Complaint, and, if the District Court so directs the filing of the motions to dismiss, then, as Adobe puts it, the District Court's order, in view of Rule 12(a)(4)(A), did "reset the clock for PDIC to file an answer [and] moot[ed] Adobe's pending request for entry of default." Answr.Br.47.

In fact, Adobe's proposed result is irrational. The District Court directed PDIC to file its motions to dismiss, which resulted in one of the two Counts of the Nordstrom Complaint being dismissed. Yet, a default would mean a judgment in Adobe's favor as to that dismissed Count. The only reasonable rationale if that the Court necessarily did what Adobe says it did not – which is to extend the time for PDIC to respond to the Nordstrom Complaint, which PDIC did by filing its motions to dismiss.

F. Adobe Does Not Justify The District Court's Grant of Attorney Fees

Adobe's many legal misstatements and refusal to address PDIC's well-supported legal arguments based on undisputed facts should not mask the overall defect of the District Court's award of attorney fees. Adobe cannot justify $42,631.75 in attorney fees. The most that can be said for Adobe and the District Court's judgment is that PDIC delayed for a short period in responding to Adobe's Nordstrom Complaint, because it misunderstood the "Case Terminated" designation on the court's docket. PDIC then promptly raised the Nordstrom matter with the District Court; and the District Court by all appearances resolved the matter by directing PDIC to proceed with its motions to dismiss. The motions were partially successful in reducing the scope of Adobe claims in the Nordstrom Complaint. While the motions were *sub judice*, the District Court did not require any other action by PDIC, and the plain language of Rule 12(a)(4)(A) postponed as a matter of law

any further obligation for PDIC to do anything more. The clerk's entry of judgment was, thus, a legal nullity. It is truly unconscionable for PDIC to be charged with $42,631.75 of Adobe's attorney fees for its failed and unprofessional defense of that illegal default.

II. THE COURT ERRED IN AWARDING ATTORNEY FEES IN CONNECTION WITH ADOBE'S DEPOSITION OF PDIC

A. Adobe Does Not Challenge PDIC's Dispositive Legal Issues

The District Court relied upon Fed.R.Civ.P. Rule 37(d)(3) in awarding Adobe $34,861 in attorney fees. PDIC_Open.Br.63. In its appeal, PDIC presented specific cogent arguments why Rule 37(d)(3) did not support the District Court's ruling as a matter of law in view of dispositive undisputed facts of the case. Yet, in its answer brief, Adobe simply ignores these dispositive issues. Specifically, Adobe never addresses PDIC's Argument VIII.A (PDIC_Open.Br.63-67).

Thus, Adobe does not dispute that Rule 37(d)(3) governs and that the Rule authorized the District Court to award only those attorney fees and expenses necessary to reimburse Adobe for a loss "caused by" PDIC's default. PDIC_Open.Br.63

Further, Adobe does not dispute that the "but-for" standard applies. PDIC_Open.Br.64-66. Adobe may recover only those fees that Adobe "would not have paid but for" PDIC's alleged failure to make discovery. *Id*.

Finally, Adobe does not dispute that Adobe had the burden of proving that all its requested fees and expenses were "caused by [PDIC's] failure," and would not have been incurred "but-for" PDIC's failure. PDIC_Open.Br.65.

B. Adobe's Silence On Critical Dispositive Issues Confirm The District Court's Violation of Rule 37(d)(3)

The plain language of Rule 37(d)(3) limits the District Court authority to award fees only to recompense reasonable expenses "caused by the failure" of a party to make discovery. PDIC_Open.Br.63-67. PDIC presented evidence that the District Court's fee order contravened Rule 37(d)(3), based on the following undisputed facts:

1. Adobe was allowed to depose PDIC for only 7 hours. Fed.R.Civ.P. Rule 30(d)(1). Adobe does not dispute that its first deposition maxed-out the allotted time for deposition. PDIC_Open.Br.20,64,67.

2. Adobe argued below and argues now on appeal that 30 pages of the transcript reflected questions that Meagher was allegedly not able to answer. Appx5761-5762; Answr.Br.51. Even if these Adobe assertions were accepted, these 30 pages constitute less than 8% of the 377-page deposition, which would be roughly half-an-hour of the 7-hour total deposition time.

3. Even if Meagher had answered those questions in the first deposition, Rule 30(d)(1) prevented Adobe from asking any other questions, because Adobe

would then have gone over the 7-hour limit for a deposition. Consequently, Adobe lost no more than 30 pages or half-an-hour of deposition.

Fed.R.Civ.P. Rule 37(d)(3) provides that a court may assess "reasonable expenses including attorney's fees, caused by the failure" to make discovery. In light of the above undisputed facts, PDIC argued in the lower court and on appeal that the only conceivable attorney's fees that could be assessed are for the time to ask the unanswered questions reflected in the 30 pages of the first deposition. PDIC_Open.Br.63-67. The plain language of Rule 37(d)(3) does not permit assessment of fees for anything but answers to those unanswered questions, because no other loss could have been "caused by [PDIC's] failure." Yet, Adobe does not address Rule 37(d)(3) or PDIC's argument.

Instead, Adobe demanded, and the District Court awarded, attorney fees for 75 hours of attorney time incurred in preparing for, and taking, a second deposition that took 6 hours and 278 pages of transcript. PDIC_Open.Br.21,64,67; Appx5812; Appx5814. Neither Adobe, nor the District Court, have explained how PDIC could have "caused" Adobe to lose 75 hours of attorney time and 278 pages of transcript when Adobe was entitled to recover only the maximum of 30 pages of testimony and a half-hour of deposition time, for which Adobe had already previously prepared.

This is a case where the District Court's legal error is a mathematical certainty.

C. Adobe Concedes That The Second Deposition Comprised New Unrelated Testimony

Additionally, Adobe has not challenged PDIC's demonstration that much of Adobe's examination of Meagher during the second deposition was unrelated to anything asked at the first deposition – i.e., was pure new discovery. OpenBr.21-22.

Adobe manifestly violated Rule 37(d)(3) in seeking attorney fees associated with such questions, and the District Court erred as a matter of law in awarding Adobe's requested fees associated with such testimony. This concession is alone sufficient basis to vacate the District Court's sanctions award.

D. The Appeal Involves Legal Error, Not Discretion

Adobe argues that the District Court exercised proper discretion. Answer.Br.51. That is incorrect. The issues on appeal involve matters of law. A District Court had no discretion to award attorney fees that are not allowed by Rule 37(d)(3).

E. Adobe's Answering Brief Is Largely Irrelevant, But Confirms That The District Court Applied An Erroneous Standard

Adobe's arguments in support of the award only highlight the District Court's legal error. Adobe first argues that the District Court "properly awarded Adobe its requested attorneys' fees" because the District Court ordered a second deposition "at PDIC's expense," and second deposition stayed on "the topics on which Thomas

Meagher had previously been unprepared." Answr.Br.52. Adobe also argues that "the second deposition was not limited to any particular questions; Adobe was permitted to 'delve fully' into the topics on which Meagher had previously been unprepared." Answr.Br.53.

Adobe's arguments may be correct, but they are irrelevant. A District Court may certainly grant a party additional deposition time to ask whatever questions that the District Court deems fit at that extended deposition. It may even be assumed that the District Court ordered the extended deposition as sanctions for PDIC's failure to answer the handful of questions in the first deposition. But, the District Court's grant of the second deposition is an entirely separate issue from whether Rule 37(d)(3) authorized the District Court to order PDIC to pay for the entirety of Adobe's preparation and the taking of that second deposition. The District Court's authority to award attorney fees is strictly governed by Rule 37(d)(3), and that Rule does not permit a District Court to order attorney fees, unless PDIC "caused" those attorney fees. Adobe does not argue to the contrary. Thus, Adobe could only have requested, and the District Court could only have granted, attorney fees that were necessary to recompense Adobe for having to take the time and transcript pages to re-ask the questions that were unanswered in the first deposition. That can be the only loss "caused" by PDIC. The remainder of the second deposition allowed by the District Court, even if it was intended to be a sanction, was on "Adobe's nickel."

Otherwise stated, the extended 6-hour and 278-page deposition was Adobe's choice, and not something that would not have been incurred "but-for" PDIC failure to answer the questions appearing on 30 pages of the first transcript.

In addition, forcing PDIC to pay Adobe's attorney fees that extend beyond the questions that were previously unanswered would violate the American Rule and well-established Supreme Court authority that precludes Adobe and the District Court from shifting to PDIC any fees associated with any deposition questioning beyond that not answered in the first deposition. PDIC_Open.Br.63-64.

Adobe argues that the Court could order a deposition longer than 7 hours. Answr.Br.53-54. The Court can extend a deposition, but the District Court had not extended the first deposition, which was limited to 7 hours by Rule. Fed.R.Civ.P. Rule 30(d)(1). Because Adobe had "maxed-out" that 7 hours, the only loss that PDIC could have "caused" and which Adobe could have suffered is the loss in asking questions that were unanswered. Again, the American Rule and established law do not permit the District Court to charge the additional deposition to PDIC.

Finally, Adobe argues that "a contrary ruling would have rewarded PDIC's earlier misconduct by preventing Adobe from fully exploring Meagher's testimony." Answr.Br.54. But, given that Adobe had already maxed-out its 7-hour limit in the first deposition, Adobe could not have asked any further questions during the first deposition. Even if it were assumed that a party has some "wiggle-room" to ask

follow-up questions in the ordered second deposition, the 6 hours and 277 pages of testimony were certainly beyond any such authority.

Adobe then remarkably argues that "the district court properly awarded Adobe its requested attorneys' fees, none of which would have been expended had PDIC fulfilled its obligation to prepare Thomas Meagher for his deposition in the first place." Answr.Br.52-53. But, this is clearly untrue. Adobe had fully expended its 7 hours of deposition time during the first deposition. Adobe does not explain, as it cannot, how it could have squeezed in another 6 hours of deposition into the first deposition.

F. Adobe Did Not Properly Support Its Fee Petition

Adobe argues that PDIC waived any objection to the incompleteness of Adobe's fee application. Answr.Br.54-55. That is plainly incorrect. The District Court limited briefing of Adobe's fee application to only three pages. Appx156(#208). Thus, PDIC was limited in how much it could say on any issue. Nevertheless, in those three allowed pages, PDIC argued that "Adobe's fee demand should be rejected, because Adobe has withheld all information relating to what work it allegedly did to support the fee claim," and that Adobe's "failure to provide any support for the fees and its unjustified demand for fees unrelated to the basis for the Court's Order should counsel outright denial of any fees." Appx5814-5815.

Further, PDIC had previously twice detailed the law of fee applications in connection with the Nordstrom fee application. Appx5674-5677; Appx5720-5722.

Thus, PDIC had properly presented the issue below.

The remainder of Adobe's argument has nothing to do with the record of this case. Adobe cites to only a single chart to support its fee application, and that is found at Appx5812. Answer.Br.55 fn.17. That chart shows nothing except dates, timekeeper, hours and fees, which total 75 hours and $46,041 in fees. There is no indication as to what was done during those 75 hours of time. Given the paucity of information in its actual fee application, Adobe cites to an email from Adobe's counsel to PDIC's counsel, Appx5801. Answr.Br.56-57. But, even if that email was properly part of Adobe's fee application, that email is conclusory and provides no further detail.

The single chart (even if supplemented by Adobe's email) does not meet the Supreme Court and Third Circuit standards. PDIC_Open.Br. The case cited by Adobe are not to the contrary. Thus, Adobe cites *United Auto. Workers Local 259 Soc. Sec. Dep't v. Metro Auto Ctr*., 501 F.3d 283 (3d Cir. 2007). Answer.Br.56. But, the case states:

> A request for fees must be accompanied by "fairly definite information as to hours devoted to various general activities, e.g., partial discovery, settlement negotiations, and the hours spent by various classes of attorneys."

501 F.3d at 291. The case states that the work reflected by any particular time entry may be short, provided it is descriptive. The Court never said that that the entire fee application, much less 75 hours of fees, could be supported by a simple statement such as "preparing for and taking a deposition." Such a holding would fly in the face of the Supreme Court's ruling in *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). PDIC_Open.Br.65,67,69. And, would be inconsistent with the other Third Circuit cases which specifically point out that that fee petition must permit review of "whether the hours set out were reasonably devoted to *each of the particular purposes described*, and then excluding the hours that were "excessive, redundant, or otherwise unnecessary." *McKenna v. City of Philadelphia*, 582 F.3d 447, 456 (3d Cir. 2009); PDIC_Open.Br.68.

Adobe then justifies its withholding of all description of its alleged work on the grounds that it could be privileged, citing *In re Pierce*, 102 F.3d 1264, 1266 (D.C.Cir. 1996). Answer.Br.56. But, Adobe had asked for attorney fees, and, having asked for those fees, it has to disclose sufficient information to determine what work was allegedly performed during the hours it claims, even if it waives some allegedly privileged information in doing so. The attorney-client privilege cannot be utilized as a sword to seek attorney fees, but then prevent an adversary from discovering the basis for the requested fees. In any event, when Adobe provides no information, it has not "provided adequate information for the district court to determine whether

Adobe's attorneys spent time that was 'excessive, redundant, or otherwise unnecessary' in preparing for Meagher's deposition." Answer.Br.56, quoting *Hensley*, *supra*.

Third, Adobe erroneously argues that PDIC had the burden of disproving Adobe's application. That is incorrect, because *Hensley* holds that "the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." 461 U.S. at 437. PDIC may be obliged to challenge, but it is only after Adobe has presented a proper complete fee application. PDIC obviously cannot challenge any time as "excessive, redundant, or otherwise unnecessary," if PDIC does not know what Adobe purportedly did during the claimed hours.

G. The Court's Award Is Inadequately Explained

Given that Adobe did not file a proper fee petition, the Court did not have a proper basis for allowing fees, and the District Court did not explain the basis for allowing 75.1 hours of time by Adobe to make-up for PDIC's failure to answer the questions posed during 30 pages of transcript and half-hour of deposition time. PDIC_Open.Br. Adobe argues that PDIC did not make "specific objections." Answr.Br.57. But, PDIC could not have been specific, when Adobe's fee application lacked specificity. In any event, a court must explain the basis for its fee

award, and that rule is not limited to only addressing specific objections, as argued by Adobe. PDIC_Open.Br.

H. The Court Improperly Punished PDIC For Raising Legitimate Objections to Adobe's Fee Request

Adobe argues that a court may allow Adobe the costs of bringing a motion for fees. Answr.Br.58-59. The problem here, however, is that Adobe's fee application was fatally defective, as detailed above.

Having filed a defective fee application, Adobe is not entitled to any fees in its preparation and prosecution.

CONCLUSION

Based on the foregoing analysis of fact and law, PDIC respectfully requests that this Court reverse or vacate the awards of attorneys' fees granted to Adobe.

Respectfully Submitted,

April 2, 2018

/s/ George Pazuniak

GEORGE PAZUNIAK
O'KELLY ERNST & JOYCE, LLC
901 North Market Street, Suite 1000
Wilmington, DE 19801
(302) 478-4230
gp@del-iplaw.com

Attorney for Plaintiff-Cross-Appellant

United States Court of Appeals
for the Federal Circuit

Princeton Digital Image Corp. v. Office Depot Inc., No. 17-2597

CERTIFICATE OF SERVICE

I, Simone Cintron, 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 O'Kelly Ernst & Bielli, LLC, Attorneys for Plaintiff/Cross-Appellant Princeton Digital Image Corporation, to print this document. I am an employee of Counsel Press.

On April 3, 2018, counsel authorized me to electronically file the foregoing corrected **Reply Brief for Plaintiff/Cross-Appellant Princeton Digital Image Corporation** with the Clerk of Court using the CM/ECF System, which will serve via e-mail notice of such filing to any of the following counsel registered as CM/ECF users:

Tara Elliott
Brittany Blueitt Amadi
Rachel Weiner Cohen
Wilmer Cutler Pickering Hale and Dorr LLP
1875 Pennsylvania Avenue NW
Washington DC 20006
202-663-6748
tara.elliott@wilmerhale.com
brittany.amadi@wilmerhale.com
rachel.cohen@wilmerhale.com

-and –

Tasha Joy Bahal
Wilmer Cutler Pickering Hale and Dorr LLP
60 State Street
Boston MA 02109
617-526-6106
tasha.bahal@wilmerhale.com

The Reply brief was originally filed and served on April 2, 2018. Upon acceptance by the Court of the e-filed document, six paper copies of the correctetd Reply will be filed with the Court within the time provided in the Court's rules.

April 3, 2018

/s/ Simone Cintron
Counsel Press

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Circuit Rule 28.1(b)(3).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) and Federal Circuit Rule 32(b), the brief contains 6,807 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

April 2, 2018

/s/ George Pazuniak

GEORGE PAZUNIAK
O'KELLY ERNST & JOYCE, LLC
901 North Market Street, Suite 1000
Wilmington, DE 19801
(302) 478-4230
gp@del-iplaw.com