No. 2015-1574

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

IMMERSION CORPORATION,

Plaintiff-Appellant,

v.

HTC CORPORATION and HTC AMERICA, INC.

Defendants-Appellees.

Appeal from the United States District Court for the District of Delaware
in case no. 1:12-cv-00259-TBD, Hon. Richard G. Andrews & Hon. Timothy B. Dyk

REPLY BRIEF FOR PLAINTIFF-APPELLANT IMMERSION CORPORATION

HAROLD J. MCELHINNY
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
Telephone: (415) 268-7000

BRYAN J. WILSON
MARC DAVID PETERS
MORRISON & FOERSTER LLP
755 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 813-5600

JOSEPH R. PALMORE
MARC A. HEARRON
BRYAN J. LEITCH
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 887-6940
JPalmore@mofo.com

Counsel for Plaintiff-Appellant Immersion Corporation

CERTIFICATE OF INTEREST

Counsel for plaintiff-appellant Immersion Corporation certifies the following:

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

Immersion Corporation

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:

N/A

3. All parent corporations and any publicly held companies that own 10% or more of the stock of the party or amicus curiae represented by me are:

N/A

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 are expected to appear in this court are:

MORRISON & FOERSTER LLP: David J. Austin, Wynne Erickson*, Marc A. Hearron, Michael Kryston, Bryan J. Leitch, Harold J. McElhinny, Joseph R. Palmore, Marc David Peters, Stefan Szpajda*, Daniel Wan*, Bryan Wilson

POTTER ANDERSON & CORROON LLP: Richard L. Horwitz, David E. Moore, Stephanie E. O'Byrne, Bindu A. Palapura

BAYARD, P.A.: Stephen B. Brauerman, Sara E. Bussiere, Richard D. Kirk, Vanessa R. Tiradentes

* *No longer with firm*

Dated: January 11, 2016 /s/ Joseph R. Palmore

TABLE OF CONTENTS

CERTIFICATE OF INTEREST i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

ARGUMENT 3

I. UNDER THE CORRECT READING OF 35 U.S.C. § 120, IMMERSION'S '720, '181, AND '105 PATENTS ARE ENTITLED TO THE BENEFIT OF THE '846 PATENT'S FILING DATE 3

A. HTC Disavows The District Court's Rationale 3

B. HTC's Alternative Reading Of Section 120 Is Incorrect 4

1. The PTO's procedural rule is consistent with Section 120's text 4

2. HTC's theory requires rewriting the statutory text 6

3. Section 120 codified the longstanding practice of permitting same-day continuation filings 10

4. Congress ratified the PTO's settled practice of allowing same-day continuation applications 15

C. The PTO's Longstanding Interpretation Of Section 120 Is Owed Considerable Deference 18

1. The PTO's interpretation is entitled to *Chevron* deference 18

2. The PTO's interpretation is entitled to *Auer* deference 22

3. The PTO's interpretation is entitled to *Skidmore* deference 23

4. Reliance interests strongly support the PTO's interpretation 25

II. EVEN IF THE DISTRICT COURT'S VIEW OF SECTION 120 IS CORRECT, SUMMARY JUDGMENT STILL SHOULD BE SET ASIDE.....27

CONCLUSION.....30

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Hoist & Derrick Co. v. Sowa & Sons, Inc., 725 F.2d 1350 (Fed. Cir. 1984) 28

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).....29

Auer v. Robbins, 519 U.S. 452 (1997).....22

Badische Anilin & Soda Fabrik v. A. Klipstein & Co., 125 F. 543 (C.C.S.D.N.Y. 1903).....12

Barnhart v. Walton, 535 U.S. 212 (2002).....19

Bettcher Indus., Inc. v. Bunzl USA, Inc., 661 F.3d 629 (Fed. Cir. 2011) 19

Canon Comput. Sys., Inc. v. Nu-Kote Int'l, Inc., 134 F.3d 1085 (Fed. Cir. 1998) 30

Cathedral Candle Co. v. ITC, 400 F.3d 1352 (Fed. Cir. 2005).....23

Chase Bank USA, N.A. v. McCoy, 562 U.S. 195 (2011).....22

Christensen v. Harris Cty., 529 U.S. 576 (2000) 20

Clark Blade & Razor Co. v. Gillette Safety Razor Co., 194 F. 421 (3d Cir. 1912), (C.C.D.N.J. 1911).....12, 14

Cooper Techs. Co. v. Dudas, 536 F.3d 1330 (Fed. Cir. 2008).....17, 19, 21

Corley v. United States, 556 U.S. 303 (2009).....8

Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers, AFL-CIO, 6 F.3d 1511 (Fed. Cir. 1993) 16

Director, Office of Workers' Compensation Programs v. Sun Ship, Inc., 150 F.3d 288 (3d Cir. 1998) 8

Energy E. Corp. v. United States, 645 F.3d 1358 (Fed. Cir. 2011).....8

Ethicon, Inc. v. Quigg, 849 F.2d 1422 (Fed. Cir. 1988) 20

Ex parte Kruse, 133 O.G. 229 (Comm'r Pat. 1908) 13

Ex parte Miller, 305 O.G. 419 (Comm'r Pat. 1922).....13

Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd., 535 U.S. 722 (2002) 25

Forest Grove Sch. Dist. v. T.A., 557 U.S. 230 (2009) 15

Godfrey v. Eames, 68 U.S. 317 (1863) 11, 12, 24

Haas v. Peake, 525 F.3d 1168 (Fed. Cir. 2008) 23

Harder v. Hayward, 150 F.2d 256 (C.C.P.A. 1945).....15

In re Certain Video Game Sys. & Wireless Controller & Components Thereof, 2011 WL 7092316 (Dec. 22, 2011) 16 n.1

In re Donaldson Co., 16 F.3d 1189 (Fed. Cir. 1994) (en banc) 17

In re Febrey, 135 F.2d 751 (C.C.P.A. 1943) 15

In re Henriksen, 399 F.2d 253 (C.C.P.A. 1968).....10

In re Inphi Corp., No. 15-126 (Fed. Cir. June 30, 2015) 20

Kasten v. Saint-Gobain Performance Plastics Corp., 536 U.S. 1 (2011) 24

Margolis v. Banner, 599 F.2d 435 (C.C.P.A. 1979).....20

Mars, Inc. v. H.J. Heinz Co., L.P., 377 F.3d 1369 (Fed. Cir. 2004).....27

Microsoft Corp. v. i4i Ltd. P'ship, 131 S. Ct. 2238 (2011) 29

Patlex Corp. v. Mossinghoff, 758 F.2d 594 (Fed. Cir. 1985) 20, 27

Russello v. United States, 464 U.S. 16 (1983).....8

SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC, 807 F.3d 1311 (Fed. Cir. 2015).....10

Sebelius v. Auburn Reg'l Med. Ctr., 133 S. Ct. 817 (2013) 17

Skidmore v. Swift & Co., 323 U.S. 134 (1944) 23

Smith v. Goodyear Dental Vulcanite Co., 93 U.S. 486 (1877) 12

Syntex (U.S.A.) Inc. v. U.S. Patent & Trademark Office, 882 F.2d 1570 (Fed. Cir. 1989) 20

Tech. Licensing Corp. v. Videotek, Inc., 545 F.3d 1316 (Fed. Cir. 2008) 29

Transco Prods., Inc. v. Performance Contracting, Inc., 38 F.3d 551 (Fed. Cir. 1994) 10

United States v. Locke, 471 U.S. 84 (1985) 8

United States v. Mead Corp., 533 U.S. 218 (2001) 19, 24

Zenith Radio Corp. v. United States, 437 U.S. 443 (1978) 26

STATUTES

5 U.S.C. § 553(b) 19

35 U.S.C. § 2(b)(2)(A) 18

35 U.S.C. § 3(f)(2) 7

35 U.S.C. § 6(d) 7

35 U.S.C. § 21(a) 5, 7

35 U.S.C. § 41(b)(2) 7

35 U.S.C. § 42(e) 7

35 U.S.C. § 100(i) 7

35 U.S.C. § 102(b)(1) 7

35 U.S.C. § 111(a)(4) 7

35 U.S.C. § 115(f) 7

35 U.S.C. § 119(a) 7

35 U.S.C. § 120 ..... 1, 2, 4, 6, 7, 12

35 U.S.C. § 154(a)(2) 9

35 U.S.C. § 154(b)(2)(B) 7

35 U.S.C. § 156(d)(1)(E) 5

35 U.S.C. § 156(d)(5)(E) 7

35 U.S.C. § 183 7

35 U.S.C. § 321(c) 7

OTHER AUTHORITIES

37 C.F.R. § 1.10(a)(1) 5

37 C.F.R. § 1.78 ..... 6, 18

37 C.F.R. § 1.78(d) 22

Eustace S. Glascock & Emerson Stringham, Patent Soliciting and Examining: A Guide to Ex Parte Practice in the United States Patent Office § 241 (1934) 13

H.R. Rep. No. 82-1923 (1952) 10

Lincoln B. Smith, *Continuing Applications*, 10 J. Pat. Off. Soc'y 105 (1927) 12

Manual of Patent Examining Procedure § 201.11 (2d ed. 1953) 24

Manual of Patent Examining Procedure § 211.01 22

Manual of Patent Examining Procedure § 211.01(b)(I) 6, 12

Manual of Patent Examining Procedure § 711.01 15

Manual of Patent Examining Procedure § 711.02(c) (3d ed. 1961) 24

P.J. Federico, *Commentary on the New Patent Act*, 35 U.S.C.A. (1954), *reprinted in* 75 J. Pat. & Trademark Off. Soc'y 161 (1993) 11

S. Rep. No. 82-1979 (1952) 10

Towson Price, *Comments on Commissioner's Decision "In re Application Filed July 10, 1940" 526 O. G. 857*, 23 J. Pat. Off. Soc'y 628 (1941).....15

INTRODUCTION

Immersion, like thousands of patentees, specifically relied on the longstanding rule of the Patent and Trademark Office (PTO) permitting same-day filings of continuation applications. That rule embodies a reasonable administrative determination of which of two purely administrative actions, both deemed to occur on the same day, should be understood to come "before" the other.

Immersion explained in its principal brief that the district court erroneously interpreted 35 U.S.C. § 120 as foreclosing this long-settled rule. The district court concluded that determining whether a continuation application filed on the day the parent patent issues is entitled to the parent's filing date requires a comparison of the time of day that the continuation application was filed with the time of day that the parent patent issued. But as Immersion and its amici explained, that cannot be correct because nothing in the Patent Act specifies a particular time that either action occurs. Indeed, the PTO does not even maintain such time-of-day information for filing or patenting.

In response, HTC implicitly agrees that the district court erred because neither filing nor "patenting" can be isolated to a particular time of day. Instead of defending the district court's rationale, HTC provides an entirely different one. Under HTC's view, continuation applications can *never* be filed on the same day

that the parent patent issues because "the patenting" purportedly occurs at the beginning of the day, at midnight Eastern Time.

But HTC's interpretation rewrites the statute. Section 120 requires that a continuation application be "filed before the patenting" of the parent. 35 U.S.C. § 120. HTC injects words into Section 120, reading it to require that the application be "filed before *the date of* the patenting." In other sections of the Patent Act, Congress specified that events must occur before a "date," and, in particular, in relation to the "date" of issuance of a patent. Congress did not do so here, thus allowing the PTO to adopt a reasonable sequencing rule when a continuation-application filing and "the patenting" take place on the same day. The PTO exercised that authority more than fifty years ago by specifying that a same-day continuation application filing is deemed to occur "before the patenting" of its parent. That longstanding rule was itself based on patent practice dating to the Civil War.

As Immersion's amici explain, well more than *10,000* currently-in-force continuation patents issued in reliance on that rule. Few, if any, cases present such concrete and extensive evidence of reliance. HTC cavalierly posits that not *all* those patents would be invalidated under its interpretation of the statute, only some unspecified subset. Yet the fact that HTC's construction would extend a cloud of

potential invalidity over so many patents applied for in good-faith reliance on an express PTO procedure counsels strongly against adopting HTC's view.

This Court should instead uphold the PTO's longstanding interpretation of Section 120 and reverse the grant of summary judgment of invalidity.

ARGUMENT

I. UNDER THE CORRECT READING OF 35 U.S.C. § 120, IMMERSION'S '720, '181, AND '105 PATENTS ARE ENTITLED TO THE BENEFIT OF THE '846 PATENT'S FILING DATE

A. HTC Disavows The District Court's Rationale

HTC offers no defense of the district court's rationale for granting summary judgment of invalidity to HTC. Indeed, HTC disavows the district court's interpretation of Section 120, instead advancing alternative arguments that the district court rejected.

The district court ruled that because filing of Immersion's '875 continuation application and issuance of the '846 patent occurred on the same day, it was Immersion's burden to offer evidence establishing that the '875 application was filed earlier in the day. A7. Because Immersion did not do so, the district court entered summary judgment against it. A7.

Immersion explained in its principal brief that the time-of-day comparison demanded by the district court is impossible. The Patent Act does not specify any particular point in time at which an application is deemed filed or at which "the

patenting" occurs. Immersion Br. 21-23. Nor does the PTO record such times. Agreeing with Immersion, the United States explains (at 13) that "even if PTO wanted to track precise time-of-day information, Congress has provided no indication of what events should matter."

In response, HTC does not even attempt to support the district court's reasoning. Indeed, HTC acknowledges (at 18) that the filing of a continuation application and the patenting of a parent patent do not occur "at particular times of day," thus rendering impossible the comparison the district court required. Accordingly, it is now common ground that the district court's analysis is wrong.

B. HTC's Alternative Reading Of Section 120 Is Incorrect

Instead of defending the district court's reasoning, HTC presses a theory that the district court correctly rejected (A7): that an application filed on the same day that the parent patent issues can *never* be a valid continuation application. According to HTC, "[w]hen both events occur on the same day, neither can come 'before' the other." HTC Br. 22. That theory is foreclosed by the Patent Act's text, structure, and history.

1. The PTO's procedural rule is consistent with Section 120's text

Section 120 requires that a continuation application be "filed before the patenting or abandonment of or termination of proceedings on the first application." 35 U.S.C. § 120. HTC argues at length that "before" is unambiguous

and "means 'before,' not 'on or before.'" HTC Br. 14. But there is no disagreement about that. Immersion Br. 21. Rather, the dispute here is over the circumstances in which an application's filing can be understood to have come before "the patenting." The answer depends on when those two purely administrative actions are deemed to occur—a question on which the Patent Act is silent. *Cf.* 35 U.S.C. § 156(d)(1)(E) (providing detailed rules for determining "the date" on which an administrative action is deemed to have taken place).

As the United States explains (at 8), "[n]othing in the Patent Act . . . indicates when a continuing application should be deemed 'filed' or when precisely 'the patenting' occurs." First, the Patent Act allows, but does not require, the PTO to deem an application filed "on the date on which it was deposited with the United States Postal Service." 35 U.S.C. § 21(a). The PTO did adopt such a rule, 37 C.F.R. § 1.10(a)(1), but it could have chosen to deem an application "filed" at other points, such as upon physical receipt by the PTO, upon docketing of the application, or upon PTO personnel's placing the application into the PTO's files. *See* U.S. Br. 13.

Second, "the patenting" is also a purely administrative action whose timing is within the PTO's discretion. HTC does not dispute that the phrase, "the patenting," is not defined or used anywhere else in the Patent Act. Immersion Br. 22; U.S. Br. 12. Moreover, nothing in the Patent Act specifies the precise

event that causes "the patenting" to occur. As the United States explains (at 14), "'the patenting' might reasonably be deemed to occur when the notice of allowance is issued; when the patent is signed; when the issuance of the patent is recorded by the agency; when the signed certificate is deposited with the Postal Service; or at any other reasonable point as determined by PTO."

Given that both relevant events are administrative, their timing and sequence are within the purview of the administrator—the PTO—to reasonably determine. And the PTO has done so by effectively declaring that when an applicant uses an approved filing method to "file" a continuation application on the same day that "the patenting" of the parent application occurs, the PTO does not perform the administrative act of "patenting" until after the continuation application is deemed filed. *See* 37 C.F.R. § 1.78; Manual of Patent Examining Procedure ("MPEP") § 211.01(b)(I). According to the PTO's decades-long practice, a continuation application filed on the same day that the parent patent issues is therefore "filed before the patenting" of the parent patent. 35 U.S.C. § 120.

2. HTC's theory requires rewriting the statutory text

HTC contends that a continuation application must be filed not only before "the patenting" but before the start of the day on which the patent issues. HTC reads Section 120 as if it required the continuation application to be "filed before *the date of* the patenting or abandonment of or termination of proceedings on the

first application." Injecting this "date of" requirement into Section 120 (and then equating issuance of the patent with the undefined term, "the patenting"), HTC asserts that "[i]f a statute requires a filing 'before' or 'prior to' *a certain day*, a filing on that day is not timely." HTC Br. 21 (emphasis added and omitted); *see id.* at 23 ("[A] filing *on* a given date does not qualify as a filing 'before' that date.").

But the specific words that Congress chose matter. Congress could have written Section 120 to include the "date of" language on which HTC's theory relies. As Immersion explained (at 25), Congress included reference to a "date" or "day" in many other Patent Act provisions. *See, e.g.*, 35 U.S.C. §§ 3(f)(2) ("on the day before the effective date"); 6(d) ("before the date"); 21(a) ("on the date"); 41(b)(2) ("on or before the date"); 42(e) ("on the day"); 100(i) ("effective filing date"); 102(b)(1) ("effective filing date"); 111(a)(4) ("filing date"); 115(f) ("no later than the date"); 119(a) ("on the date"); 154(b)(2)(B) ("beyond a specified date"); 156(d)(5)(E) ("beginning on the date"). Indeed, Section 120 itself refers to "*the date* of the prior application" immediately before it uses the phrase "the patenting" without any reference to "the date" thereof. *Id.* § 120 (emphasis added). Moreover, other sections of the Patent Act refer specifically to the "date" of issuance of a patent. *See, e.g.*, *id.* §§ 183 ("after the date of issuance of such patent"); 291(b) ("the date of the issuance of the first patent"); 321(c) ("the date of the grant of the patent").

Had Congress intended to alter longstanding patent practice by requiring filing of a continuation application no later than the day before issuance of the parent patent, "it could have drafted language to effectuate that result" by using the "date of" formulation. *See Energy E. Corp. v. United States*, 645 F.3d 1358, 1362 (Fed. Cir. 2011). It did not. And when "Congress includes particular language in one section of a statute"—such as reference to an event in relation to a particular "date"—"but omits it in another section of the same Act"—as Congress did in Section 120—"it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983).

HTC relies on decisions in which the relevant statutory text was different, thus dictating a different result. HTC Br. 15-17. In *United States v. Locke*, for example, the statute required that a filing be made "prior to December 31." 471 U.S. 84, 93-94 (1985). And in *Director, Office of Workers' Compensation Programs v. Sun Ship, Inc.*, the statutory deadline was "before September 12, 1996." 150 F.3d 288, 291 (3d Cir. 1998) (emphasis omitted). In both decisions, the statute expressly required filing before a specified calendar date. Here, "Congress did not write the statute that way." *Corley v. United States*, 556 U.S. 303, 315 (2009).

HTC argues that filing of a continuation application must occur on the previous day because "the patenting" happens at "the stroke of midnight in the Eastern time zone" on the day the patent issues. HTC Br. 22. HTC cites no authority for its "stroke of midnight" theory. Instead, HTC attempts to tease it out of 35 U.S.C. § 154(a)(2), which provides that the patent "grant shall be for a term beginning on *the date* on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States." 35 U.S.C. § 154(a)(2) (emphasis added). HTC surmises that because a patent term covers the day when the patent issues, "the patenting" must take place at midnight on that date.

But Section 154(a)(2) does not help HTC. To the contrary, that provision is yet another part of the Patent Act that establishes timing in reference to a "date" on which an administrative action occurs. Section 120, by contrast, omits any reference to a "date" and instead establishes a timing requirement based on the administrative action itself. Indeed, the fact that Section 154(a)(2) provides that the patent term begins "on the date on which the patent issues," *id.*, suggests that the patent issues at some unspecified point on that "date."

Section 154(a)(2) does not specify when "the patenting" occurs; rather, it delineates a patent's "term." HTC observes (at 19) that the start of the patent "term" for purposes of Section 154(a)(2) is defined with "date-level granularity"

and that infringement suits may be filed on the term's first day. But that does not compel the conclusion that "the patenting" for purposes of Section 120 must occur at midnight or that Congress stripped the PTO of authority to sequence "the patenting" with other same-day administrative actions.

3. Section 120 codified the longstanding practice of permitting same-day continuation filings

As Immersion explained (at 6-7, 26-29), Congress enacted Section 120 to codify the longstanding continuation-application practice, which permitted same-day filings.

The en banc Court recently emphasized that "Congress's purpose in enacting the Patent Act [of 1952] was to codify the prevailing law wholesale, except where changes were expressly noted." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311, 1324 (Fed. Cir. 2015). This Court has also explained that, consistent with Congress's overall approach in enacting the Patent Act, it intended Section 120 "merely [to] codif[y] the procedural rights of an applicant with respect to" pre-1952 "continuing application practice." *Transco Prods., Inc. v. Performance Contracting, Inc.*, 38 F.3d 551, 556 (Fed. Cir. 1994); *see* S. Rep. No. 82-1979, at 6 & H.R. Rep. No. 82-1923, at 7 (1952). It is therefore "clear from the express words of the committe[e] reports and from the reviser's notes that the practice prior to the 1952 Act is pertinent." *In re Henriksen*, 399 F.2d 253, 258 (C.C.P.A. 1968). HTC's effort to distinguish *Transco* and

Henriksen as being about different aspects of Section 120 misses the key point: that provision generally codified the continuation-application practice dating back to *Godfrey v. Eames*, 68 U.S. 317 (1863). *See* P.J. Federico, *Commentary on the New Patent Act*, 35 U.S.C.A. (1954), *reprinted in* 75 J. Pat. & Trademark Off. Soc'y 161, 192 (1993).

HTC admits that "*Godfrey* did give rise to modern continuation practice" but argues that *Godfrey* "did not pronounce any rule on when a continuing application must be filed vis-à-vis any patenting, abandonment, or other termination of proceedings on the parent application." HTC Br. 26. But *Godfrey* expressly held that a new application can count as a continuation of the prior application where the prior application "was withdrawn and refiled *on the same day* with an amended specification." 68 U.S. at 324 (emphasis added). One of the key questions in *Godfrey* was whether the fact that "the old application was withdrawn, and a new one filed, *simultaneously*," "broke the continuity of the claim." *Id.* at 318, 325 (emphasis in *Godfrey*). The Court said it did not. *Id.* at 325-26.

Trying to reconcile *Godfrey* with HTC's reading of Section 120, HTC places a revisionist gloss on *Godfrey*. HTC suggests that the applicant in *Godfrey* had merely submitted a "request to withdraw" his application and that actual withdrawal or abandonment does not occur until the PTO "acts on the applicant's request." HTC Br. 25, 27 (emphasis omitted). But that reasoning is nowhere

found in *Godfrey* itself. Moreover, the Supreme Court later explained that in *Godfrey*, "the first application was *actually withdrawn*, and a new petition was presented *at the time of the withdrawal*." *Smith v. Goodyear Dental Vulcanite Co.*, 93 U.S. 486, 500 (1877) (emphases added).

In the decades following *Godfrey*, the courts and the Patent Office consistently treated two applications as part of the same transaction with a common filing date when filing of the second application happened no later than the day that proceedings on the first application terminated. *See Smith*, 93 U.S. at 500-01; *Clark Blade & Razor Co. v. Gillette Safety Razor Co.*, 194 F. 421, 421-22 (3d Cir. 1912), *aff'g* 187 F. 149, 154-55 (C.C.D.N.J. 1911); *Badische Anilin & Soda Fabrik v. A. Klipstein & Co.*, 125 F. 543, 554-55 (C.C.S.D.N.Y. 1903); Lincoln B. Smith, *Continuing Applications*, 10 J. Pat. Off. Soc'y 105, 107 (1927). HTC argues that those cases did not involve issuance of a patent on the parent application. HTC Br. 29. But that does not matter; the pre-1952 practice under *Godfrey* was to treat second applications as a continuation even if filed on the same day that the proceedings on the first application terminated. The patenting of the original application is just another way of terminating proceedings on that application. MPEP § 211.01(b)(I) ("The expression 'termination of proceedings' includes the situations when an application is abandoned or when a patent has been issued . . . ."). Section 120 provides that a continuation application must be filed

"before the patenting *or* abandonment of *or* termination of proceedings on the first application." 35 U.S.C. § 120 (emphases added). There is no basis to distinguish "patenting" from the other methods of termination. Nor is there any indication that Congress intended different rules to apply to each, as HTC's interpretation of the statute would require.

Moreover, for decades before the Patent Act, the PTO exercised its discretion to sequence administrative events that happened on the same day. The general rule was that "in ex parte matters the order of events occurring on the same day is assumed to have been that most favorable to the applicant." Eustace S. Glascock & Emerson Stringham, Patent Soliciting and Examining: A Guide to Ex Parte Practice in the United States Patent Office § 241, at 493 (1934). For example, in *Ex parte Miller*, the examiner mailed the notice of allowance on the same day that the applicant's amendment to the claims was received but before the amendment reached the examiner. 305 O.G. 419, 419-20 (Comm'r Pat. 1922). The Commissioner ordered that the patent "be withdrawn from issue" and that the amendment be entered, explaining: "When several actions are made in an application on the same day, no particular order as to the time of the receipt or the mailing of the actions can be assumed, but consideration of the case must be given as far as possible as though all the papers on file that day were before the Examiner

at the time he made his action." *Id.* at 420; *see Ex parte Kruse*, 133 O.G. 229 (Comm'r Pat. 1908).

HTC argues that pre-1952 decisions concerning continuation applications "treated the later applications as continuations of the original applications because they found there had been no *abandonment*." HTC Br. 29 (emphasis by HTC). To the extent HTC suggests that the parties in those cases had merely requested abandonment of their application, but that abandonment did not actually occur until the PTO processed that request, HTC is incorrect. Those courts treated the applications as having been abandoned on the day of the request. *See, e.g.*, *Clark Blade*, 194 F. at 422 ("[H]e abandoned his first application and substituted therefor a second.").

HTC notes (at 27) that under current PTO practice, requests for abandonment are ineffective until the PTO takes action on them and suggests that this is the reason a "continuation's filing may be simultaneous with the *request* for abandonment." But the fact that abandonment requires PTO action only reinforces that Section 120's parallel terms "patenting," "abandonment," and "termination of proceedings" all refer to administrative acts by the PTO and that the PTO determines when they occur. Indeed, the PTO allows continuation applications to be filed on the same day that abandonment becomes effective: "where a continuing application is filed with a request to abandon the prior application *as of*

the filing date accorded the continuing application, the date of the abandonment of the prior application will be in accordance with the request once it is recognized." MPEP § 711.01 (emphasis added). Thus, a continuation application can be filed on the same day as patenting or abandonment; in both cases, the PTO administratively determines that the continuation's filing occurs first.

HTC also cites a handful of pre-1952 Patent Office decisions holding that an application is not a continuation application if filed after the allowance of the prior application. HTC Br. 28-29. HTC does not actually contend that the Patent Act was meant to codify that rule, which would be even more disruptive to settled practice than HTC's proposal. In any event, those decisions were broadly recognized as incorrect. Towson Price, *Comments on Commissioner's Decision "In re Application Filed July 10, 1940" 526 O. G. 857*, 23 J. Pat. Off. Soc'y 628, 628-30 (1941) (criticizing these decisions as "clearly in *error*," "inconsistent" with precedent, and based on "unjustified 'judge-made' law"). Indeed, as HTC acknowledges (at 29), the Court of Customs and Patent Appeals quickly overruled the decisions on which HTC relies. *In re Febrey*, 135 F.2d 751, 755-56 (C.C.P.A. 1943); *see Harder v. Hayward*, 150 F.2d 256, 259-61 (C.C.P.A. 1945).

4. Congress ratified the PTO's settled practice of allowing same-day continuation applications

"Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute

without change." *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009). Thus, Congress's refusal to "repeal [an] agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Daewoo Elecs. Co. v. Int'l Union of Elec., Elec., Tech., Salaried & Mach. Workers, AFL-CIO*, 6 F.3d 1511, 1522 (Fed. Cir. 1993).

Here, the PTO has published for decades its interpretation that the "copendency" requirement is satisfied if the continuation application is filed on the same day that its parent patent issues. Courts likewise have routinely accepted same-day filings without dispute. *See* Immersion Br. 30-31 & n.2.[1] Tens of thousands of continuation applications have been filed in specific reliance on this rule. U.S. Br. 3; IPO Br. 14. And although Congress once reenacted Section 120 in its entirety and has repeatedly modified the provision, Congress has never repealed the PTO's interpretation. *See* Immersion Br. at 31 & n.3. Congress's decades-long acquiescence in this practice further confirms the soundness of the PTO's longstanding interpretation of Section 120.

[1] HTC correctly points out (at 49) that *In re Certain Video Game Sys. & Wireless Controller & Components Thereof*, 2011 WL 7092316 (Dec. 22, 2011), which Immersion cited (at 31) as a decision of the International Trade Commission ("ITC"), was actually a brief written by the ITC staff. The brief nevertheless reflects the consistent, decades-long position on which parties and courts have relied.

HTC contends that Congressional acquiescence cannot occur unless there is specific evidence that Congress knew of the PTO's practice. HTC Br. 32-33. Not so: where the "statute that Congress amended dealt specifically with Patent Office procedures, and the Patent Office had previously published its interpretation of that statute," this Court "will *presume* that Congress has knowledge of the Patent Office's interpretation." *Cooper Techs. Co. v. Dudas*, 536 F.3d 1330, 1342-43 (Fed. Cir. 2008) (emphasis added); *see Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 827-28 (2013) (finding congressional acquiescence in 40-year-old agency procedural rule without citing any evidence of actual congressional knowledge thereof).

HTC mistakenly relies on *In re Donaldson Co.*, 16 F.3d 1189 (Fed. Cir. 1994) (en banc). HTC Br. 32. In that case, there was no suggestion that the PTO had published its "allegedly sweeping practice" in any official publication, *In re Donaldson Co.*, 16 F.3d at 1193 n.3, so there was little basis for presuming Congressional awareness. Here, by contrast, the PTO has published its interpretation for more than fifty years, and courts and parties have relied on that interpretation extensively. Congressional knowledge and acquiescence can therefore be presumed. *Auburn Reg'l Med. Ctr.*, 133 S. Ct. at 827-28; *Cooper Techs.*, 536 F.3d at 1342-43.

C. The PTO's Longstanding Interpretation Of Section 120 Is Owed Considerable Deference

To the extent Section 120 is ambiguous, the PTO's interpretation is reasonable and entitled to substantial deference.

1. The PTO's interpretation is entitled to Chevron *deference*

Congress expressly delegated to the PTO the authority to issue procedural rules that "govern the conduct of proceedings in the Office." 35 U.S.C. § 2(b)(2)(A). The PTO's rule concerning when a continuation application must be filed is a quintessential procedural rule within the PTO's ambit and is a reasonable interpretation of Section 120. It is therefore entitled to *Chevron* deference.

HTC suggests that the PTO's interpretation of Section 120 in the MPEP is not entitled to *Chevron* deference because it was not established through notice-and-comment rulemaking. HTC Br. 36. As the United States explains (Br. 26), however, 37 C.F.R. § 1.78, which was promulgated through notice-and-comment rulemaking and which interprets the statute by using the term of art "copending," is entitled to *Chevron* deference. And HTC cannot logically reconcile its position with Section 1.78. HTC characterizes the regulation's use of the term "copending" as "uncontroversial because a parent application ceases to be 'pending' when the patent on that application issues." HTC Br. 36. Yet HTC also states that "'[f]iling' and 'patenting' are both determined at date-level granularity" and that a "'date' refers to an entire day, not a time of day." HTC Br. 18. Accordingly, even

under HTC's view, when a continuation application is filed on the day of the parent's "patenting," the applications are copending on that "entire day." At the very least, that is a reasonable interpretation of the regulation. *See infra* Section I.C.2.

In any event, the PTO's statement in the MPEP would be entitled to *Chevron* deference regardless of the regulation. Deference can be appropriate even if an agency reaches its interpretation "through means less formal than 'notice and comment' rulemaking." *Barnhart v. Walton*, 535 U.S. 212, 221 (2002); *see United States v. Mead Corp.*, 533 U.S. 218, 230-31 (2001). Indeed, in *Cooper Technologies*, this Court afforded *Chevron* deference to the PTO's interpretations stated only in the MPEP, Official Gazette, and a Federal Register notice. *See* 536 F.3d at 1332-34, 1336. The Court did so even though (contrary to HTC's suggestion, Br. 36) those statements were not embodied in a regulation published in the Code of Federal Regulations. *Cooper Techs.*, 536 F.3d at 1337; *see also Bettcher Indus., Inc. v. Bunzl USA, Inc.*, 661 F.3d 629, 646 (Fed. Cir. 2011) (concluding that *Chevron* deference would be owed to PTO statutory interpretation in MPEP if statute were ambiguous). The PTO is not required to go through the notice-and-comment process to establish "interpretative rules, general statements of policy, or rules of agency organization, *procedure, or practice*," 5 U.S.C.

§ 553(b) (emphasis added), yet such rules may still be entitled to *Chevron* deference, *see Cooper Techs.*, 536 F.3d at 1336-37.

HTC argues that the MPEP's status as an agency manual categorically precludes *Chevron* deference. HTC Br. 35 (citing *Christensen v. Harris Cty.*, 529 U.S. 576 (2000)). But the MPEP is unlike the agency manuals described in *Christensen*, which merely provided guidelines for the agency. *See Christensen*, 529 U.S. at 587. By contrast, the MPEP is part of the PTO's "detailed rules and regulations" governing the proceedings within the PTO. *Patlex Corp. v. Mossinghoff*, 758 F.2d 594, 606 (Fed. Cir. 1985). The MPEP "commands notice as an official interpretation of statutes and regulations with which it does not conflict." *Syntex (U.S.A.) Inc. v. U.S. Patent & Trademark Office*, 882 F.2d 1570, 1571 n.3 (Fed. Cir. 1989).

Although the "MPEP states that it is a reference work on patent practices and procedures and does not have the force of law," it nevertheless "'has been held to describe *procedures* on which the public can rely.'" *Ethicon, Inc. v. Quigg*, 849 F.2d 1422, 1425 (Fed. Cir. 1988) (emphasis added) (quoting *Patlex*, 758 F.2d at 606). Indeed, this Court has granted mandamus to compel an examiner to follow the MPEP, stating that there is no reason why parties "and this court should not be able to rely on the PTO's own official interpretation" set forth in the MPEP. *In re Inphi Corp.*, No. 15-126, Order at 6, (Fed. Cir. June 30, 2015); *see also Margolis v.*

Banner, 599 F.2d 435, 442-44 (C.C.P.A. 1979) (granting mandamus where examiner misapplied MPEP provision).

HTC also contends that *Chevron* deference is not owed because the PTO's interpretation of Section 120 is purportedly substantive, and Congress has delegated authority only over procedural matters. HTC Br. 37-39. But the PTO's interpretation concerns the *timing* of the issuance of the patent vis-à-vis the same-day filing of a continuation application, which is a purely procedural matter. HTC acknowledges that "the PTO can decide on what day it will issue a patent once the examiner has allowed the claims." HTC Br. 38. But deciding at what point during the day such issuance occurs is equally a procedural determination well within the PTO's authority. The mere fact that the PTO's interpretation may have substantive consequences in certain cases does not make it any less procedural than any other rule prescribing a filing deadline. Moreover, because the PTO's interpretation merely codified the longstanding interpretation of the copendency requirement, it is an "interpretive" rule, not a substantive one. *See Cooper Techs.*, 536 F.3d at 1336.

HTC argues that even if *Chevron* deference applies, no deference is owed because Section 120 unambiguously "says 'before,' not 'on or before.'" HTC Br. 40. But the ambiguity in Section 120 is not in the meaning of the word "before"; rather, it concerns "when precisely a continuing application is 'filed,' when 'the

patenting' of a parent application occurs, and how PTO should apply Section 120 when those two events occur[] on the same calendar day." U.S. Br. 24.

HTC also suggests (at 39) that "the PTO's interpretation should be rejected at [*Chevron*] step two because it is an unreasonable interpretation," but HTC does not try to explain why that is so. Because the statute does not expressly address at what point during the day the filing and the patenting occur, and because it is the PTO that performs "the patenting," it was eminently reasonable for the PTO to decide that the patenting happens after the filing of the continuation application when both occur on the same day.

2. The PTO's interpretation is entitled to Auer *deference*

The PTO's interpretation is also entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). An agency's interpretation of its own regulation is "controlling unless plainly erroneous or inconsistent." *Id.* at 461 (internal quotation marks omitted). *Auer* deference must be accorded even to an agency interpretation advanced in an amicus brief, such as the United States' brief in this case. *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011).

Here, MPEP § 211.01 is a reasoned interpretation of the PTO's regulation requiring an application to be "copending" with the earlier application to qualify as a continuation, 37 C.F.R. § 1.78(d); *see supra* pp. 18-19. HTC argues that MPEP § 211.01 is exclusively an interpretation of the statute rather than of the PTO's

regulation. HTC Br. 42-43. If so, the provision would be entitled to *Chevron* deference for the reasons stated above. *See supra* Section I.C.1. But HTC is not correct that the "copendency" requirement in the regulation merely restates the "before the patenting" requirement in the statute.

Before Section 120's enactment, the term "copending" had become a term of art; courts permitted an application to be treated as a continuation of an earlier application if the two had been "copending." U.S. Br. 16-17 (collecting cases). By using that term of art, the PTO's regulation "is intended to invoke the body of judicial decisions that developed before the 1952 enactment of Section 120." U.S. Br. 16. And, as discussed, the practice before Section 120 was to allow same-day filing. *See* Immersion Br. 6-7, 27-28; *supra* p. 12. Thus, by using the word "copending," the PTO was not merely parroting the statutory requirement but instead was invoking the longstanding practice that the statute was intended to codify. *Cf. Haas v. Peake*, 525 F.3d 1168, 1187 (Fed. Cir. 2008) (*Auer* applicable where regulation "elaborates on the statutory phrase").

3. The PTO's interpretation is entitled to Skidmore *deference*

At the very least, the PTO's interpretation is entitled to deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Among the reasons for deferring, the PTO's interpretation "represents an agency-wide position" adopted relatively soon after the statute's enactment and "has been adhered to consistently" for more

than fifty years. *Cathedral Candle Co. v. ITC*, 400 F.3d 1352, 1365-67 (Fed. Cir. 2005). "The length of time" the PTO has held this view "suggests that [it] reflect[s] careful consideration, not *post hoc* rationalization." *Kasten v. Saint-Gobain Performance Plastics Corp.*, 536 U.S. 1, 15-16 (2011) (quotation marks and brackets omitted). There is significant "value of uniformity in . . . administrative and judicial understandings of what a national law requires," and the PTO's interpretation has provided such uniformity for decades. *Mead*, 533 U.S. at 234.

HTC argues (at 44-45) that the PTO's interpretation is inconsistent with the 1953 version of the MPEP, but that is incorrect. That version merely mirrored the statutory language by stating that the second application is copending with the first application if filed "before the patenting of the first application." MPEP § 201.11 (2d ed. 1953). The current version, adopted in 1961, does not contradict the initial one; it simply provides additional specificity, making clear when "the patenting" occurs if it is on the same day that the second application is filed.

The PTO's 1961 interpretation did not "rest[] on an improper equation of 'before' with 'on or before' and 'not later than.'" *Contra* HTC Br. 45. In a *different* section of the MPEP directed to "termination of proceedings," the 1961 MPEP stated that "'[b]efore' has consistently been interpreted, in this context, to mean 'not later than.'" MPEP § 711.02(c) (3d ed. 1961). That is most likely a

reference to the *Godfrey* fact pattern, in which the first application was withdrawn and the second application submitted "simultaneously." 68 U.S. at 318 (emphasis omitted). It does not undermine the consistency of the interpretation embodied in MPEP § 211.01.

Nor does the absence of "'an extensive explanation'" in the 1961 edition of the MPEP bar deference. *Contra* HTC Br. 44 (quoting U.S. Br. 28). The PTO undoubtedly saw no need to offer such an analysis given that it was merely codifying long-settled practice that Congress intended to incorporate into Section 120. That is a reason for deference, not a strike against it.

4. Reliance interests strongly support the PTO's interpretation

This Court should be extremely hesitant to set aside the PTO's interpretation because doing so would "disrupt the settled expectations of the inventing community." *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 739 (2002). Parties have justifiably relied on that interpretation for more than fifty years. As reported by amici the United States and the Intellectual Property Owners Association, well more than 10,000 in-force patents resulted from continuation applications that have a filing date that is the same as the parent patent's issue date. U.S. Br. 3; IPO Br. 14. Rejecting the PTO's interpretation now would "surely come as a shock to the many inventors that believed (in conformity with PTO's regulations and longstanding guidance) that they had

timely filed their continuing applications." U.S. Br. 3. "In light of these substantial reliance interests," the PTO's "longstanding administrative construction" of Section 120 "should 'not be disturbed except for cogent reasons.'" *Zenith Radio Corp. v. United States*, 437 U.S. 443, 457-58 (1978) (citation omitted).

HTC unpersuasively attempts to downplay the grave ramifications of its position. That "[t]his issue has arisen in only a handful of cases," HTC Br. 50, despite the tens of thousands of in-force patents potentially affected, actually demonstrates the vast extent to which parties have relied on and accepted the PTO's interpretation. The PTO's view is so ingrained that it has been accepted nearly universally and challenged only rarely.

While those patents would not be *automatically* invalidated en masse, HTC Br. at 50-51, they all would be put at significant risk. That is particularly true for fields in which technology evolves rapidly, where there would be a greater likelihood that invalidating art would have emerged between the filing of the first and second applications. And invalidation would be almost certain whenever, as here, the patentee filed the specification in a foreign counterpart application because that application itself would be the invalidating prior art.

Finally, HTC suggests that Immersion and others should not have waited until the day of patenting to submit their continuation applications. HTC Br. 49-

50. But it is common practice for parties to file documents on their due date, in reliance on well-established rules. For example, HTC filed its brief in this Court on the due date, not early. HTC also contends that reliance on the MPEP rule was misplaced in the absence of court rulings expressly approving it. HTC Br. 48-49. But this Court has explained that "the public can rely" on the MPEP's procedures and has not suggested such reliance is appropriate only when those procedures have been judicially blessed. *Patlex*, 758 F.2d at 606; *see Mars, Inc. v. H.J. Heinz Co., L.P.*, 377 F.3d 1369, 1375-76 (Fed. Cir. 2004) ("[A]n applicant should be entitled to rely not only on the statutes and Rules of Practice but also on the provisions of the MPEP in the prosecution of his patent application." (internal citation omitted)). Numerous patentees conformed their conduct to PTO procedure in good faith, and their compelling reliance interests weigh heavily in favor of upholding the PTO's longstanding rule.

II. EVEN IF THE DISTRICT COURT'S VIEW OF SECTION 120 IS CORRECT, SUMMARY JUDGMENT STILL SHOULD BE SET ASIDE

Even assuming *arguendo* that the district court's view of Section 120 were correct, summary judgment of invalidity still should be reversed because the district court effectively required Immersion to prove the validity of its patents. Immersion Br. 41-52. The district court held that when a continuation application is filed on the same day as "the patenting" of the parent application, Section 120

requires a factual inquiry into which event occurred earlier on that day. A7. The district court at summary judgment then required Immersion to come forward with evidence establishing what time its continuation application was filed and what time "the patenting" of the parent application occurred. And because no such evidence exists, the court granted summary judgment of invalidity. But Immersion's patent should have been presumed valid, and it was HTC's burden to "convince the court of invalidity by clear evidence." *Am. Hoist & Derrick Co. v. Sowa & Sons, Inc.*, 725 F.2d 1350, 1360 (Fed. Cir. 1984). Accordingly, in the absence of the time-of-day evidence demanded by the district court, summary judgment should not have been granted to HTC.

HTC's responses to Immersion's argument about the district court's misapplication of the summary judgment standard are based on HTC's interpretation of Section 120, not the district court's. HTC maintains that summary judgment was proper because the "'940 application was undisputedly mailed *on* August 6, 2002, not *before* August 6, 2002." HTC Br. 53. For the reasons stated in Part I, HTC's interpretation of Section 120 is wrong, so it could not have supported summary judgment. But, in any event, HTC's fallback on its own view of Section 120 does not respond to the argument Immersion actually made in Part II of its brief: that even if *the district court's* view is correct, summary judgment still should be reversed.

Indeed, HTC does not contest most of Immersion's points. HTC, as the proponent of invalidity, "bears a heavy burden of persuasion" to establish invalidity by clear and convincing evidence—a burden that never shifts to Immersion. *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245 (2011). In deciding summary judgment, the court must take into account this heightened evidentiary standard. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-55 (1986). Accordingly, it was HTC's burden to prove that, viewing the evidence in the light most favorable to Immersion, a reasonable jury would have to find by clear and convincing evidence that Immersion's patents were invalid.

Immersion met its burden of production for an earlier filing date by putting forward "evidence and argument" that its later-filed applications were continuation applications. *Tech. Licensing Corp. v. Videotek, Inc.*, 545 F.3d 1316, 1327 (Fed. Cir. 2008). Immersion pointed to evidence that the PTO had determined the applications to be continuation applications, A23, A464, and argument that Immersion is entitled to a presumption that the PTO's determination is correct and that, as continuation applications, they are entitled to the benefit of earlier filing dates. HTC argues that this alone does not show that the PTO determined the later-filed applications to have "priority" to the international counterpart application. HTC Br. 54-55. But even if the examiner did not decide such *priority*, the examiner fulfilled his MPEP-imposed duty to determine that the later-

filed applications are continuation applications, as stated on the face of the patents, A23, A464. Immersion Br. 45-47 & n.5. In any event, Immersion's burden was only one of production, and "where the challenger fails to identify any persuasive evidence of invalidity, the very existence of the patent satisfies the patentee's burden on the validity issue." *Canon Comput. Sys., Inc. v. Nu-Kote Int'l, Inc.*, 134 F.3d 1085, 1088 (Fed. Cir. 1998).

CONCLUSION

For the foregoing reasons and those in Immersion's principal brief, the district court's grant of summary judgment for HTC should be reversed.

Dated: January 11, 2016

Respectfully submitted,

/s/ Joseph R. Palmore

JOSEPH R. PALMORE
MARC A. HEARRON
BRYAN J. LEITCH
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Telephone: (202) 887-6940
JPalmore@mofo.com

HAROLD J. MCELHINNY
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105
Telephone: (415) 268-7000

BRYAN J. WILSON
MARC DAVID PETERS
MORRISON & FOERSTER LLP
755 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 813-5600

Counsel for Plaintiff-Appellant Immersion Corporation

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on January 11, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 11, 2016 /s/ Joseph R. Palmore

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a) of the Federal Rules of Appellate Procedure because it contains 6,954 words.

Dated: January 11, 2016 /s/ Joseph R. Palmore

dc-812689