

Appeal No. 2016-1794

United States Court of Appeals
for the
Federal Circuit

NANTKWEST, INC.,

Plaintiff-Appellee,

– v. –

MICHELLE K. LEE, Director, U.S. Patent and Trademark Office,
Deputy Under Secretary of Commerce for Intellectual Property,

Defendant-Appellant.

APPEAL FROM A DECISION OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA, NO. 1:13-CV-01566-GBL-TCB,
HONORABLE GERALD BRUCE LEE, U.S. DISTRICT JUDGE

**BRIEF OF THE INTERNATIONAL TRADEMARK ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE**

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CERTIFICATE OF INTEREST

Counsel for Amicus Curiae certifies the following:

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

The International Trademark Association

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:

The party named above in (1) is the real party in interest.

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

No publicly-held corporation owns 10% or more of the stock of Amicus Curiae

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court are:

Mark N. Mutterperl
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September 13, 2016
Date

/s/ Mark N. Mutterperl
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**IDENTITY OF *AMICUS CURIAE*, ITS INTEREST,
AND SOURCE OF AUTHORITY TO FILE¹**

Founded in 1878, *amicus curiae* The International Trademark Association (“INTA”) is a not-for-profit organization dedicated to the support and advancement of trademarks and related intellectual property concepts as essential elements of trade and commerce. INTA has more than 6,000 members in more than 190 countries. Its members include trademark and brand owners, as well as law firms and other professionals who regularly assist brand owners in the creation, registration, protection, and enforcement of their trademarks. All INTA members share the goal of promoting an understanding of the essential role that trademarks play in fostering effective commerce, fair competition, and informed decision-making by consumers.

INTA was founded in part to encourage the enactment of federal trademark legislation following invalidation on constitutional grounds of the United States’ first trademark act. Since then, INTA has been instrumental in making recommendations and providing assistance to legislators in connection with major

¹ In accordance with Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *amicus curiae* states that this brief was authored solely by INTA and its counsel, and no part of this brief was authored by counsel to a party. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, and its counsel made such a monetary contribution to its preparation or submission.

trademark and related legislation, and has participated as *amicus curiae* in numerous cases in courts across the country involving significant Lanham Act issues.² Moreover, INTA's members frequently participate in litigations in courts and in administrative proceedings before the United States Patent and Trademark Office ("PTO") and Trademark Trial and Appeal Board ("TTAB") with respect to actions brought under the Lanham Act, and therefore are interested in the development of clear, consistent, and equitable principles of trademark law.

Although this case deals specifically with patents and federal court review of Patent Trial and Appeal Board ("PTAB") decisions, INTA has a substantial interest in this matter as it relates directly to the Fourth Circuit's opinion in

² Recent Supreme Court and Circuit Court cases in which INTA has filed *amicus* briefs include, without limitation: *Shammas v. Focarino*, 784 F.3d 219 (4th Cir. 2015), *cert. denied sub nom. Shammas v. Hershfeld*, 136 Ct. 1376 (2016); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377 (2014); *Pom Wonderful LLC v. Coca-Cola Co.*, No. 12-761, 2014 WL 844597 (U.S. Mar. 3, 2014); *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013); *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004); *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003); *Moseley v. V Secret Catalogue, Inc.*, 537 U.S. 418 (2003); *TrafFix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001); *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992); *Ferring Pharm. Inc. v. Watson Pharm., Inc.*, No. 13-2290, 2013 WL 5427582 (3d Cir. Sept. 20, 2013); *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206 (2d Cir. 2012); *Rosetta Stone Ltd. v. Google, Inc.*, 676 F.3d 144 (4th Cir. 2012); and *Fleischer Studios, Inc. v. A.V.E.L.A., Inc.*, 654 F.3d 958 (9th Cir. 2011).

Shammas v. Focarino, 784 F.3d 219 (4th Cir. 2015), upholding the grant of attorneys’ fees to the PTO as part of the “expenses” of a district court proceeding. As this Court is well-aware, the attorneys’ fees provision at issue in this case is identical to the provision in the Lanham Act that was the subject of the *Shammas* decision. Accordingly, this Court’s decision is of particular interest to INTA and its members, because its interpretation of Section 145 will invariably have implications for courts’ future interpretation of the parallel Lanham Act provision. Moreover, in the *Shammas* case, INTA took the same position espoused by the court below (and the minority in *Shammas*), and thus INTA has an interest in this Court affirming the decision below.

All parties to this litigation have consented to the filing of this *amicus* brief.

SUMMARY OF ARGUMENT

Few principles are more deeply entrenched in the American judicial system than the principle that litigants ordinarily are required to bear their own attorneys’ fees. Time after time, this “American Rule” has been reaffirmed by the Supreme Court and this Court, which have unequivocally held that awards of attorneys’ fees are only available where Congress has *clearly and explicitly* authorized them. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 602 (2001); *Bywaters v. U.S.*, 670 F.3d 1221, 1226-27 (Fed. Cir. 2012).

Section 145 of the Patent Act, which provides for the payment of the PTO's "expenses" by parties bringing a civil action in federal district court to obtain review of a PTAB determination, makes no such clear or explicit authorization of "attorney's fees." 35 U.S.C. § 145. This alone is sufficient to affirm the district court's conclusion that "attorney's fees" are not included within the awardable "expenses" under Section 145.

Yet, even beyond the lack of any reference to attorneys' fees in the text of Section 145 itself, there are other indications that Congress intended *not* to award attorneys' fees under that section. For example, as the district court noted, Congress is well aware of how to include attorneys' fees as a remedy when it wishes to do so, and routinely modifies the term "expenses" to make the availability of attorneys' fees clear, including in the Patent Act. We have found nothing in the legislative history of Section 145 that reveals any Congressional intent to award attorneys' fees under these circumstances.

Moreover, as a policy matter, interpreting "expenses" to include the PTO's attorneys' fees would create a chilling effect by imposing a prohibitive cost—one that only applicants with significant resources could afford. Such a result is anathema to the principles undergirding U.S. intellectual property rights. Perhaps even worse, it effectively writes out of existence a critical mechanism of review expressly permitted under Section 145, *i.e.*, the ability to initiate an action in

district court and benefit from the discovery process (rather than pursuing an appeal to this Court where further development of the record is not available under the relevant statute).

Consequently, the district court correctly held that Section 145's provision for "expenses" does not include attorneys' fees, and its decision should be affirmed.

LEGAL BACKGROUND

A. Dual Mechanism for Review of PTAB Decisions

Like the Lanham Act's provisions regarding TTAB determination of the registrability of a trademark, the Patent Act provides a party disputing a PTAB determination two procedural options. The first option, set forth in 35 U.S.C. §§ 141-144, is an appeal to this Court, which is taken solely "on the record before the Patent and Trademark Office." 35 U.S.C. § 144. The second option, set forth in Section 145, and the option pursued by NantKwest here, is to file a civil action in the United States District Court for the Eastern District of Virginia against the Director of the PTO. *See id.* at § 145. In cases brought under Section 145, the PTO record may be supplemented through additional discovery. However, the pursuit of additional discovery comes with a cost, and Section 145 mandates that "[a]ll the *expenses* of the proceeding shall be paid by the applicant." *Id.* (emphasis

added). But like the Lanham Act, the Patent Act does not expressly define “expenses of the proceedings.”

B. The District Court Proceedings and Decision

NantKwest filed a Section 145 civil action in the Eastern District of Virginia seeking review of the PTAB’s decision rejecting patent claims for a method of treating cancer by administering natural killer cells.³ Following additional discovery, including expert discovery, the district court granted summary judgment in favor of the PTO, which NantKwest has also appealed. *See NantKwest, Inc. v. Lee*, No. 15-2095 (Fed. Cir. Sept. 30, 2015).

Upon entry of the judgment, the PTO filed a motion seeking “expenses of the proceeding” pursuant to Section 145. Included in that request were “personnel expenses” of the PTO attorneys and paralegals staffed on the case, calculated by prorating each employee’s yearly salary based on the number of hours actually devoted to the district court proceeding.

The district court denied the PTO’s motion in part, specifically declining that portion of the request that was identified as attorneys’ fees. The court noted that pursuant to the Supreme Court’s recent decision in *Baker Botts L.L.P. v.*

³ INTA takes no position with respect to the merits of the PTAB’s determination denying NantKwest’s application or NantKwest’s appeal thereof to the district court.

ASARCO LLC, — U.S. —, 135 S. Ct. 2158 (2015), the “American Rule,” which requires litigants to pay their own attorneys’ fees, may only be overridden by statutory language evidencing a specific and explicit congressional intent to shift attorneys’ fees to another party. The court held that the statutory language of Section 145 did not constitute such a specific and explicit provision.

The district court also explicitly rejected the Fourth Circuit’s majority conclusion in *Shammas* that the American Rule applies only in the context of shifting fees to the prevailing party. The court held that the *Shammas* court’s “prevailing party” standard was “erroneous” and in direct conflict with *Baker Botts*. Observing that neither the *Shammas* court nor the PTO had cited any Supreme Court authority affirmatively stating that the American Rule only applied in the context of prevailing parties, and that no court since has followed *Shammas*’s rationale, the district court concluded that *Shammas* was incorrectly decided and the language of Section 145 did not demonstrate Congress’s specific and explicit authorization for attorneys’ fees.

The PTO subsequently filed this appeal, seeking reversal of the district court’s determination that “personnel expenses” are not included in the “expenses” provision of Section 145.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY INTERPRETED SECTION 145 AGAINST THE BACKDROP OF THE “AMERICAN RULE”

A. Attorneys’ Fees Are Not to be Awarded Pursuant to Federal Statute Unless Expressly and Clearly Authorized by Congress

Any discussion of attorneys’ fees awards must begin with the “‘bedrock principle known as the American Rule: Each litigant pays his own attorney’s fees, win or lose, unless a statute or contract provides otherwise.’” *Baker Botts*, 135 S. Ct. at 2164 (quoting *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252–253 (2010)). As the Supreme Court has made clear, “Congress legislates against the strong background of the American Rule” and “unless Congress provides otherwise, parties are to bear their own attorney’s fees.” *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 533 (1994). Guided by this “deeply rooted” principle of federal jurisprudence, *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 271 (1975), courts must follow “‘a general practice of not awarding fees to a prevailing party *absent explicit statutory authority.*’” *Buckhannon*, 532 U.S. at 602 (emphasis added) (quoting *Key Tronic Corp. v. United States*, 511 U.S. 809, 819 (1994)).

The presumption that parties bear their own legal costs, win or lose, is not easily overcome, and as the Supreme Court has recently re-emphasized, “departures from the American Rule [are recognized] only in ‘*specific and explicit provisions* for the allowance of attorneys’ fees under selected statutes.’” *Baker Botts*, 135 S. Ct. at 2164 (emphasis added) (quoting *Alyeska Pipeline*, 421 U.S. at 260.).

Appellant attempts to redefine this bedrock principle in an unduly narrow and incorrect manner. Rather than recognizing that the American Rule is a fixed presumption applicable to all fee-shifting cases—that parties shall bear their own legal fees—Appellant confusingly asserts that Section 145 “does not implicate the American Rule” because ““the imposition of all expenses on a plaintiff in an ex parte proceeding, *regardless of whether he wins or loses*, does not constitute fee-shifting” (Brief at 23-24 (quoting *Shammas*, 784 F.3d at 221) (emphasis in original).) That premise is simply incorrect. Apart from *Shammas*, no court, including the Supreme Court, has even intimated that the American Rule applies *only* in the context of fee-shifting arrangements for prevailing parties. Indeed, the Supreme Court’s recent discussions of the American Rule in *Hardt* and *Baker Botts* directly contradict Appellant’s position and demonstrate that the presumption against fee-shifting inherent in the American Rule applies to *all* statutes, not simply those that would potentially award such fees to successful litigants.

In *Hardt*, the Court considered whether an award of attorneys’ fees pursuant to 29 U.S.C. § 1132(g)(1) was limited to an award to a prevailing party. The statute itself—unlike the statute at issue in the current litigation—explicitly provided for an attorney’s fee award, but stated that “the court in its discretion may allow a reasonable attorney’s fee and costs of action *to either party*.” 29 U.S.C. § 1132(g)(1) (emphasis added). The Court noted that its ““prevailing party’

precedents . . . do not govern the availability of fees awards under § 1132(g)(1), because this provision does not limit the availability of attorney’s fees to the ‘prevailing party.’” *Hardt*, 560 U.S. at 242, 253. Instead, the Court “interpret[ed] § 1132(g)(1) in light of [its] precedents addressing *statutory deviations from the American Rule that do not limit attorney’s fees awards to the ‘prevailing party.’*”

Id. at 254 (emphasis added). Moreover, the Court found:

[s]tatutory changes to th[e American] rule take *various forms*. Most fee-shifting provisions permit a court to award attorney’s fees only to a “prevailing party.” Others permit a “substantially prevailing” party or a “successful” litigant to obtain fees. Still others authorize district courts to award attorney’s fees where “appropriate,” or simply vest district courts with “discretion” to award fees.

Id. at 253 (emphasis added) (citations omitted).

In light of the Court’s unambiguous language and recognition that the rule covers “various forms” of fee shifting and not just fee shifting to the prevailing party, it simply cannot be the case that “[a] ‘statute that mandates the payment of attorney[’]s fees without regard to a party’s success is not a fee-shifting statute that operates against the backdrop of the American Rule.” (Brief at 29-30 (quoting *Shammas*, 784 F.3d at 223).). To the contrary, *Hardt* makes clear that the American Rule requires parties to bear their own fees absent some form of *explicit* statutory authorization to the contrary, irrespective of whether that explicit authorization applies to “prevailing parties” or otherwise. *See also Hensley v. Eckerhart*, 461 U.S. 424, 443 n.2 (1983) (noting that “parties bear their own

attorney's fees *no matter what the outcome of a case,*" and thus a party's status as a winner or loser does not in itself dictate the applicability of the American Rule (emphasis added); *Astrue v. Ratliff*, 560 U.S. 586, 591 (2010) (recognizing that "statutes that award attorney's fees to a prevailing party are exceptions to the 'American Rule' that each *litigant* 'bear [his] own attorney's fees'" (alterations in original) (citations omitted)).⁴

Moreover, a limitation of the presumption against fee-shifting provided by the American Rule to situations where such fees would only be awarded to a prevailing party makes little sense in light of the Rule's policy underpinnings. The Supreme Court has explained that "one of the primary justifications for the American Rule is that 'one should not be *penalized* for merely defending or prosecuting a lawsuit.'" *Summit Valley Indus. Inc. v. Local 112, United Bhd. of Carpenters & Joiners of Am.*, 456 U.S. 717, 724 (1982) (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 386 U.S. 714, 718 (1967)). But that is precisely the result that would occur if Appellant's position is adopted: the fee award to the PTO occurs regardless of the outcome, thus imposing a significant "penalty" to patent applicants merely for asserting their rights under Section 145.

⁴ As the district court discussed in depth the impact of *Baker Botts* on Appellant's position, amici will not do so here.

If Congress intends to create such a penalty, it may do so; but that is for Congress to do (and to do so clearly and explicitly), not the courts.

B. Section 145 Lacks “Explicit Authorization from Congress” to Award Attorneys’ Fees

Because the American Rule plainly applies whenever fee-shifting is at issue, parties to a Section 145 litigation must bear their own legal fees ““absent explicit statutory authority”” to the contrary. *Baker Botts*, 135 S. Ct. at 2164 (citation omitted). Section 145 makes no mention whatsoever of attorneys’ fees, instead referring only to payment by the applicant of “all the expenses of the proceedings” 35 U.S.C. § 145. At best, whether attorneys’ fees can be awarded is ambiguous. Accordingly, there is no “explicit” Congressional mandate to award attorneys’ fees, and a court should not award them. *See Dean v. United States*, 556 U.S. 568, 572 (2009) (explaining that courts should ““ordinarily resist reading words or elements into a statute that do not appear on its face”” (quoting *Bates v. United States*, 522 U.S. 23, 29 (1997))).

Moreover, as noted by the district court, Congress’s explicit provision for attorneys’ fees in other statutes, including in other sections of the Patent Act, but not in Section 145, forms a critical distinction impacting the interpretation of “expenses.” *See NantKwest Inc. v. Lee*, No. 1:13-cv-1566-GBL-TCB, --- F. Supp. 3d ---, 2016 WL 520993, at *3 (E.D. Va. Feb. 5, 2016) (citing statutory provisions

explicitly providing for attorneys' fees, including 35 U.S.C. § 285). It is a basic canon of statutory interpretation that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, 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) (internal quotation marks omitted); see *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (noting the "duty to refrain from reading a phrase into the statute when Congress has left it out") (internal quotation marks omitted).

Appellant's reliance on *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997 (2012) and the reasoning in *Shammas* misses the point. As the district court below recognized, although the phrase "all expenses" *could* be read to encompass attorneys' fees, the standard for overcoming the American Rule is much higher. Appellant bears the burden of demonstrating that Congress spoke *explicitly* and *specifically* to overcome the presumption against fee-shifting. Because "expenses" is at most ambiguous with respect to attorneys' fees, Appellant has not carried this burden. Indeed, the mere fact that Appellant must rely on Supreme Court precedent interpreting the meaning of "costs" under an entirely different statute demonstrates that Section 145 is not specific or explicit with respect to attorneys' fees.

**C. The Legislative History of Section 145 Provides
No Authority for the Award of Attorneys' Fees**

Given the American Rule and the lack of any reference to attorneys' fees in Section 145, attorneys' fees should not be awarded as "expenses of the proceeding." Yet, even if this Court turned to extrinsic materials such as the statute's legislative history to aid statutory construction, it would fail to uncover any suggestion of Congressional intent—let alone the requisite *explicit intent*—to award attorneys' fees. See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) ("Extrinsic materials have a role in statutory interpretation . . . to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms.").

The expense-shifting language of Section 145 can be traced back to similar language from the Patent Act of 1839, under which a patent applicant could appeal the Commissioner of Patent's refusal to register a patent to either predecessor courts of the Federal Circuit (on the limited record presented to the Commissioner) or to any court of equity, provided that "the whole of the expenses of the proceeding shall be paid by the applicant, whether the final decision shall be in his favor or otherwise."⁵ Ch. 88, § 10, 5 Stat. 353-54 (1839). Attorneys' fees are not

⁵ This language was revised slightly in the Patent Act of 1870: "all the expenses of the proceeding shall be paid by the applicant, whether the final decision is in his favor or not." Ch. 230, § 52, 16 Stat. 198, 205 (1870). Alternate language was proposed by the House of Representatives in the course of the 1870 Patent

mentioned in that provision of the 1839 Patent Act despite the fact that, even in those early years, Congress was already legislating against the backdrop of the American Rule and would have included a reference to attorney's fees if it desired to impose fee-shifting. *See Arcambel v. Wiseman*, 3 U.S. (3 Dall.) 306, 306 (1796) (“We do not think that this charge [of attorneys’ fees] ought to be allowed. The general practice of the United States is in opposition to it; and even if that practice were not strictly correct in principle, it is entitled to the respect of the Court, till it is changed, or modified, by statute.”).

Appellant’s argument regarding the legislative history of the Patent Act, rather than support its position, further demonstrates the lack of explicit intent to include attorneys’ fees as part of the “expenses.” As Appellant points out, the 1836 Patent Act specifically stated that the “expenses of the Patent Office” included the “salaries of the officers and clerks herein provided for.” (Brief at 21 (quoting 1836 Act, § 9, 5 Stat. at 121).) However, when Congress adopted the Patent Act of 1839, just three years later, it failed to include similar language specifying that the expenses of the proceedings included the salaries of Patent

Act revisions that read: “all costs shall be paid by the complainant, and the whole amount of costs taxed against the complainant shall not exceed the sum of twenty-five dollars.” 41st Cong., 2d Sess., H.R. 1714 (April 7, 1870). The Senate, however, rejected this proposal. 41st Cong., 2d Sess., H.R. 1714 (May 31, 1870).

Office employees. If anything, this demonstrates that Congress was well-aware of the potential for including attorneys' fees such as Patent Office salaries, and actively decided not to include those fees as part of the recoverable "expenses" under the statute. It certainly does not provide any evidence in support of the contention that Congress *explicitly* intended attorneys' fees to be included in the statute.

Further, it is telling that in the nearly 180-year history of the Patent Act, other than the instant case, we are not aware of any in which the PTO even sought, let alone recovered, attorneys' fees under Section 145. If Congress's intent was so clear, it would not have taken the PTO this long to seek attorneys' fees under the statute in just a single case.

D. Including Attorneys' Fees as an "Expense" Will Chill the Right to Resort to the District Courts

If the decision of the district court is reversed, and the Appellant's position is adopted, such a narrow interpretation of the American Rule would effectively eliminate the right to district court review for many patent applicants by imposing the significant and unpredictable cost of the PTO's attorneys' fees on any plaintiff who elects to supplement the limited PTAB record through a discovery process that is not available on direct review to this Court.

By creating a review process that allows applicants to commence a plenary

action in district court, Congress recognized that an applicant may need a district court's broad jurisdiction and expansive discovery process in order to introduce facts outside the scope of the PTO and PTAB review process. To be sure, and as Appellant points out throughout its brief, Congress' imposition of a requirement for the applicant to pay "[a]ll the expenses of the proceedings" already creates some disincentive for pursuing an action in district court instead of this Court. But that disincentive pales in comparison to the exponentially higher costs an applicant would face in having to pay two sets of attorneys' fees—its own and the PTO's. Moreover, the applicant would have no control over how much time and investment the PTO invests into an action, thus injecting a great deal of uncertainty about potential costs that would unquestionably deter such litigation.

Thus, the Appellant's proposed approach would create a chilling effect and introduce such a prohibitive expense that it would effectively remove district court review under Section 145 as a viable procedure for all but the wealthiest applicants. Such a result runs counter to the dual system of review of PTAB decisions as drafted by Congress. This Court should avoid any interpretation of Section 145 that allows for such a result.

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's order and hold that attorneys' and paralegals' fees are not included within the scope of "[a]ll the expenses of the proceedings" under Section 145 of the Patent Act.

September 13, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29 AND 32

1. This memorandum complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B)(i) because it contains 4,160 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This memorandum complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: September 13, 2016
New York, New York

/s/ Mark N. Mutterperl
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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Robyn Cocho
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