No. 2018-1018

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

FORD MOTOR COMPANY,

Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,

Defendant-Appellant,

On Appeal from the United States Court of International Trade
in Case No. 13-291, Judge Mark A. Barnett

RESPONSE TO PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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INTRODUCTION AND SUMMARY

Ford Motor Company (Ford) designed, marketed, sold, and delivered the Transit Connect 6/7 (Connect 6/7) exclusively as a two-person cargo van. There is no reasonable dispute that the Connect 6/7—as designed, marketed, sold, and delivered—cannot be classified as a vehicle "principally designed for the transport of persons" under Heading 8703 of the Harmonized Tariff Schedule of the United States (HTSUS). Ford nevertheless imported the vans under Heading 8703, relying on the presence of a temporary and cheaply designed rear seat that Ford installed to "obtain[] favorable tariff treatment." Resp. Br. 66. This seat—which Ford dubbed the Cost-Reduced Seat Version 2 (CRSV-2)—was designed to "be scrapped"; it would "not be used anytime." Appx000029. Ford removed all CRSV-2 seats from all Connect 6/7s after they cleared Customs but before they left their port of entry.

The panel properly classified the Connect 6/7 not as a vehicle "principally designed" for passengers but as a vehicle "for the transport of goods." The panel held that the van's design features—including the CRSV-2 seat—"compel the conclusion that" the van "is designed to transport cargo." *Ford Motor Co. v. United States*, 926 F.3d 741, 757 (Fed. Cir. 2019). The panel buttressed that conclusion with evidence of use. *Id.* at 757-58. In so holding, the panel correctly applied the Court's longstanding interpretation of Heading 8703. *See Marubeni Am. Corp. v. United States*, 35 F.3d 530 (Fed. Cir. 1994). Because that holding was correct, and because it does

not conflict with any decision of the Supreme Court or this Court, additional review is unwarranted.

STATEMENT

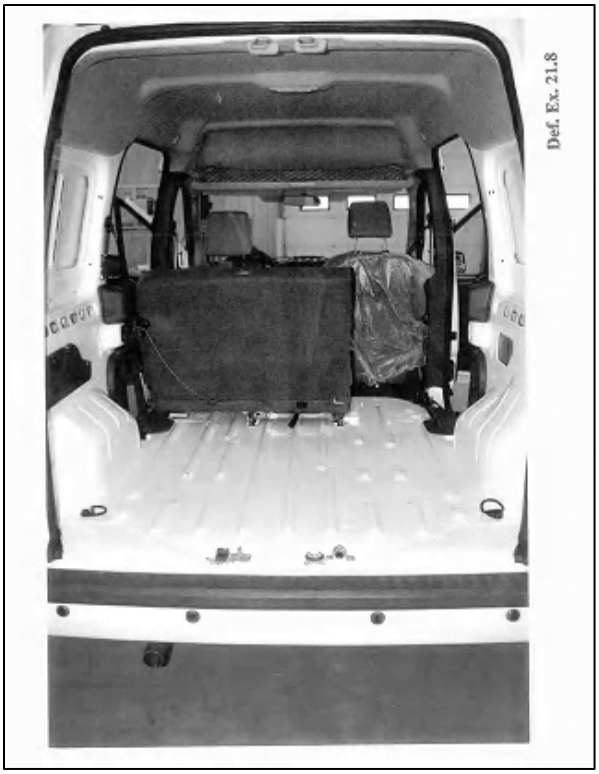
1. As relevant here, the HTSUS establishes two different rates of duty for motor vehicles. Heading 8703 subjects "vehicles principally designed for the transport of persons" to a 2.5 percent duty. Heading 8704 subjects "vehicles for the transport of goods" to a 25 percent duty. This Court distinguished between these headings in *Marubeni America Corp. v. United States*, 35 F.3d 530 (Fed. Cir. 1994). For Heading 8703 to apply, "the vehicle must be designed 'more' for the transport of persons than goods"; that is, the "vehicle's intended purpose of transporting persons must outweigh an intended purpose of transporting goods." *Id.* at 534-35. The classification of a vehicle equally capable of transporting both passengers and goods is Heading 8704. *Id.* at 534.

2. This case concerns an entry of Ford Transit Connect 6/7 vans. *Ford Motor Co. v. United States*, 926 F.3d 741, 745 (Fed. Cir. 2019). This line has two models: the Transit Connect 6/7 and the Transit Connect 9. *Id.* Ford imported and sold the Connect 9, whose classification is not at issue, with second-row seating. *Id.* at n.4. But Ford advertised and sold all Connect 6/7s without rear seats. *Id.* at 758. This reflected Ford's market research, which revealed that the Transit Connect had "little appeal to personal use customers," who preferred vehicles with comfort features such as rear airbags, rear vents, and comfortable seats. Appx004751.

Despite marketing and selling the Connect 6/7 exclusively as a two-person cargo van, Ford imported the van as a vehicle "principally designed for the transport of persons." When imported, each van had a temporary rear seat that Ford called the Cost-Reduced Seat Version 2. *Ford*, 926 F.3d at 747. The CRSV-2 seat was a stripped-down version of the Cost-Reduced Seat Version 1, which already lacked features designed for durability, safety, and passenger comfort. *Id.* at 746-47. The CRSV-2 additionally lacked several seatback wires used to provide lumbar support to passengers; indicator flags and housings for its tumble-forward mechanism; and a pad used to decrease noise and vibration. *Id.* at 747. It was upholstered with cheap fabric that did not match the front seats. *Id.* Its bottom was no longer covered by a fabric mesh, and the visible metal portions of its frame were no longer painted. *Id.* Ford made these choices because the seat would "be scrapped in [the] US" and "will not be used anytime." *Id.* at 756 (quoting email from Ford engineer). The CRSV-2 was installed on all Connect 6/7s in the entry at issue. *Id.*

The CRSV-2 was not the only feature indicative of the Connect 6/7's cargo-van status at the time of importation. The vehicle lacked a finished interior; it instead had a metal floor with a small hole next to the CRSV-2. *Ford*, 926 F.3d at 746-47. The vehicle also lacked rear vents, rear speakers, rear handholds, side airbags, and a cargo mat. *Id.* at 746. The interior and exterior of the Connect 6/7 in its condition as imported are depicted below.

Figure 1: Interior/Exterior of Connect 6/7, as Imported[1]



[1] Appx002926, Appx002929.

Ford "entered into a contract with its port processor to remove and discard 100 percent of the second row seats." *Ford*, 926 F.3d at 756 n.7. The processor did so after each van cleared Customs but while each van "was still within the confines of the port." *Id.* at 747 (brackets omitted). Because Ford made each Connect 6/7 "to order, it knew that none of the CRSV-2s . . . would actually be used." *Id.* at 756 n.7.

3. Ford failed to seek a ruling letter from Customs before importing any Transit Connects. Appx005548. Instead, Ford self-certified that all Connect 6/7 vans were "principally designed for the transport of persons" under Heading 8703. Appx000098-000099. Customs uncovered Ford's conduct during a routine training exercise and initiated an investigation. Appx000033-000034; *see Ford*, 926 F.3d at 747-48. That investigation resulted in a ruling letter classifying the Connect 6/7 as a vehicle "for the transport of goods" under Heading 8704. Appx005623-005635.

Customs acknowledged that, to create the impression that the Connect 6/7 was principally designed for passengers, Ford had equipped each van with the CRSV-2 seat. Appx005628. But Customs disregarded the seat as a "disguise or artifice" installed to make the van appear like a vehicle principally designed for passengers. Appx005634. Customs further explained why its decision was appropriate even taking the seat into account. Customs noted that the van had many design features typically associated with cargo vehicles, and lacked many amenities typically associated with passenger vehicles. Appx005627-005629. Customs also noted that Ford marketed the Connect 6/7 exclusively as a cargo van; that the Connect 6/7 was sold

to consumers exclusively as a cargo van; that consumers overwhelmingly viewed the Connect 6/7 as a cargo van; and that Ford identified the Connect 6/7 as a cargo van to its contractors. Appx005629-005630.

4. After unsuccessfully protesting Customs' decision, Ford sued the United States in the Court of International Trade. The Trade Court entered summary judgment for Ford. *Ford Motor Co. v. United States*, 254 F. Supp. 3d 1297 (Ct. Int'l Trade 2017). A unanimous panel of this Court reversed.

The panel held that Heading 8703 is an *eo nomine* tariff heading for which consideration of use is appropriate. *Ford*, 926 F.3d at 753. The panel explained that Heading 8703's "purposeful language—that asks whether the merchandise is *chiefly intended* for the transportation of persons—inherently suggests intended use." *Id.* at 750-51 (emphasis in original). That conclusion "follows from [this Court's] precedent in *Marubeni*," which "endors[ed] the consideration of use" under Heading 8703. *Id.* at 751.

Applying the *Marubeni* framework, the panel agreed with Customs that the Connect 6/7 was not "principally designed for the transport of persons." *Ford*, 926 F.3d at 754. The Court held that, although the Connect 6/7 shared structural characteristics with vehicles principally designed for passengers, "the auxiliary design features of the rear seating area . . . demonstrate" that the vehicle should not be so classified. *Id.* at 756. That area was unfinished, lacked many passenger amenities, and featured the cheaply designed and temporary CRSV-2 seat. *Id.* The "reason behind

these design decisions" was to "reduce costs[] while facilitating" the conversion of the Connect 6/7 "into cargo vans by using sham rear seats that would be stripped from the vehicles." *Id.* These features collectively "compel the conclusion that the [vehicle] is designed to transport cargo." *Id.* at 757. The panel buttressed its conclusion by examining the "relevant use considerations," which "strongly disfavor classification as a vehicle principally designed for the transport of passengers." *Id.*

Because the panel held that the Connect 6/7 cannot be classified as a vehicle "principally designed" for passengers even taking the CRSV-2 into account, the panel reversed the Trade Court's judgment without addressing whether the CRSV-2 was a "disguise or artifice" meant to make the vehicle appear as if it was principally designed for passengers. *Ford*, 926 F.3d at 758 n.11.

ARGUMENT

1. The panel correctly held that the Connect 6/7 cannot be classified as a vehicle "principally designed for the transport of persons," and must instead be classified as a vehicle "for the transport of goods." To reach that conclusion, the panel properly applied the framework adopted by *Marubeni America Corp. v. United States*, 35 F.3d 530 (Fed. Cir. 1994), for determining whether a vehicle is "principally designed" for passengers. That framework involves three factors: (1) the vehicle's structural design features, (2) the vehicle's auxiliary design features, and (3) certain use considerations, such as the vehicle's "marketing and engineering design goals (consumer demands, off the line parts availability, etc.)." *Id.* at 535-36. The panel

held that, taken together, the Connect 6/7's "design features demonstrate the subject merchandise is tailored to meet the specific needs of consumers seeking to transport goods." *Ford Motor Co. v. United States*, 926 F.3d 741, 759 (Fed. Cir. 2019) (quotation marks omitted). The panel further determined that the Connect 6/7 is "principally (if not exclusively) used for the transport of goods, rather than passengers." *Id.* Those determinations were correct.

Ford does not dispute that, if use is considered, the Connect 6/7 cannot be classified as a vehicle principally designed for passengers. Ford instead argues (Pet. 8-14) that the panel was required to ignore evidence of use. But consideration of such evidence is consistent both with *Marubeni* and with the Court's longstanding recognition that the "use of subject articles may . . . be considered in tariff classification" when certain *eo nomine* provisions are at issue. *GRK Can., Ltd. v. United States*, 761 F.3d 1354, 1359 (Fed. Cir. 2014) (holding that use was relevant to the *eo nomine* heading for "other wood screws"); *see Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1313-14 (Fed. Cir. 2003) (same for "vanity cases"); *CamelBak Prods., LLC v. United States*, 649 F.3d 1361, 1368-69 (Fed. Cir. 2011) (same for "backpacks"); *accord United States v. Quon Quon Co.*, 46 C.C.P.A. 70, 73 (C.C.P.A. 1959) ("[U]se cannot be ignored in determining whether an article falls within an eo nomine tariff provision.").

Consideration of use is *a fortiori* appropriate given the uniquely purposive language of Heading 8703, which covers vehicles "principally designed for the transport of persons." This phrase plainly suggests a type of use: the transport of

persons. *Marubeni*, 35 F.3d at 534. The phrase also expressly requires a weighing of intent: whether "a vehicle's intended purpose of transporting persons . . . outweigh[s] an intended purpose of transporting goods." *Id.* at 535. A vehicle's "structural and auxiliary design features" are relevant to this inquiry because they supply evidence of "design intent and execution." *Id.* at 536. Also relevant, however, are the "demands" of the vehicle's "consumer[s]"; the vehicle's "marketing and engineering design goals"; and the manner in which the manufacturer executes those goals. *Id.* at 536.

The Trade Court decision affirmed by *Marubeni* confirms that consideration of such evidence is proper. The court held a three-week trial to determine whether the vehicle at issue—the Nissan Pathfinder—was "principally designed for the transport of persons." *Marubeni Am. Corp. v. United States*, 821 F. Supp. 1521, 1523 (Ct. Int'l Trade 1993), *aff'd*, 35 F.3d 530 (Fed. Cir. 1994). The court heard testimony from Nissan's three principal design engineers about the extent to which the Pathfinder's design features reflected Nissan's desire to appeal to "ordinary passenger car buyers." *Marubeni*, 821 F. Supp. at 1524. The court confirmed that testimony by taking sample vehicles on test drives. *Id.* at 1523, 1525. And the court consulted evidence of the vehicle's off-road use; market studies indicating buyers' desire for "off-road cachet"; "[p]roduct development documentation and advertising" emphasizing "family use, loading groceries and sports equipment and 'go anywhere' élan"; and "customer use information" "consistent with" the Pathfinder's "much more passenger oriented" marketing. *Id.* at 1527-28. Under Ford's view of Heading 8703, the Trade Court's

reliance on this evidence was unlawful. Yet *Marubeni* held that the Trade Court had "carefully applied the proper standards in making its decision." 35 F.3d at 536.

For these reasons, the panel's application of the *Marubeni* framework is consistent both with the Court's longstanding interpretation of Heading 8703, and with the Court's acknowledgement that use may be considered when evaluating certain *eo nomine* tariff headings. Ford's petition thus falls well short of the standard for en banc review.

2. Although Ford implies that the *Marubeni* Court's interpretation of Heading 8703 was incorrect, Ford does not argue that *Marubeni* must be overruled. Indeed, Ford's petition does not even cite *Marubeni*, much less rebut *Marubeni*'s persuasive analysis of the text of Heading 8703. The question whether *Marubeni* correctly interpreted Heading 8703 is thus not before this Court.

In any event, Ford's interpretation of Heading 8703 lacks merit. Ford contends (Pet. 16-17) that consideration of use is permissible only when a tariff heading contains the word "use." As *Marubeni* held, however, the phrase "principally designed for the transport of persons" plainly encompasses a type of use: the transport of persons. And this Court has previously considered evidence of use when evaluating tariff headings from which the word "use" was absent. *Aromont USA, Inc. v. United States*, 671 F.3d 1310, 1312 (Fed. Cir. 2012) (holding that Heading 2104, which covers "[s]oups and broths and preparations therefor," is a principal-use provision notwithstanding absence of the word "use").

Ford contends (Pet. 10) that, in assessing Heading 8703, courts may not examine factors akin to those that determine an article's principal use. *See United States v. Carborundum Co.*, 536 F.2d 373, 377 (C.C.P.A. 1976). But that examination is consistent with *Marubeni*'s holding that the Heading 8703 inquiry encompasses a vehicle's "marketing and engineering design goals" and the "demands" of its "consumer[s]." 35 F.3d at 536. The Trade Court decision affirmed by *Marubeni* likewise examined those same factors—such as the channels of trade in which the vehicle moved; the environment of the vehicle's sale; and the vehicle's recognition in the trade. 821 F. Supp. at 1526-29. None of Ford's authorities casts doubt on *Marubeni*'s sensible interpretation of Heading 8703. Indeed, none even concerned an *eo nomine* heading for which consideration of use is appropriate.

Ford contends (Pet. 10) that use may be consulted only to "better understand" the condition of a good at importation, and not to "override" that condition. But Ford cites no authority for this counterintuitive proposition. As this case illustrates, such evidence can shed light on a product's condition by undermining a manufacturer's disingenuous staging of that product. Moreover, Ford is wrong that the panel deployed evidence of use to override the classification that would otherwise be appropriate. Ford's argument assumes that, absent evidence of use, the Connect 6/7 is properly classified as a vehicle principally designed for passengers. As the panel held, however, the vehicle's design features—and particularly the design of its "rear seating area"—"compel" the opposite conclusion. *Ford*, 926 F.3d at 756-57. Ford

responds (Pet. 11) that, because the CRSV-2s were "capable of functioning as passenger seats," the Connect 6/7 must be classified under Heading 8703. This reads the word "principally" out of the heading. In Ford's view, any vehicle capable of transporting passengers must be classified as a vehicle "principally designed for the transport of persons." *But see Marubeni*, 35 F.3d at 534-35.

3. Ford argues (Pet. 14) that rehearing is warranted because the panel's decision conflicts with *Western States Import Co. v. United States*, 154 F.3d 1380 (Fed. Cir. 1998). As the panel explained, *Western States* does not bear on this case. *Western States* involved Subheading 8712.00.25, which covers bikes "not designed for use with" wide tires. *Id.* at 1381. The bikes in question could be used with wide tires. But the importer argued that the bikes were "not designed for use with" wide tires because it intended that they be used with narrow tires. *Id.* The Court rejected that argument because, even if the bikes were "'principally designed' with narrow tires in mind," "this would not prove that the bicycles were not designed for use with wide tires." *Id.* at 1382, 1383.

This holding rested on the wording of Subheading 8712.00.25. Unlike Heading 8703, Subheading 8712.00.25 requires an importer "to establish affirmatively that its product is *not* designed for a specific use, rather than . . . 'principally' designed for a specific purpose." *Western States*, 154 F.3d at 1382 (emphasis in original). The word "not" limits Subheading 8712.00.25 "to bikes with design features that make them not suitable for or capable of use with wider tires." *Id.* Accordingly, evidence that the

importer intended its bikes be principally used with narrow tires was not enough to prove the negative—that the bikes were *not* designed for use with wide tires—particularly when the bikes could in fact be used with wide tires. The Court did not prohibit consideration of use when assessing Subheading 8712.00.25. Still less did the Court impliedly overrule *Marubeni* to prohibit consideration of use when assessing Heading 8703—which the *Western States* panel would not have had authority to do. *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1316 (Fed. Cir. 2013) (en banc).

4. Ford argues (Pet. 11-12) that the Court should overrule its longstanding rule that evidence of use is relevant to certain *eo nomine* provisions. The Court recently declined to do so. *GRK Can., Ltd. v. United States*, 773 F.3d 1282 (Fed. Cir. 2014) (per curiam). And Ford has supplied no reason why the Court should do so here.

Ford contends (Pet. 11-12) that the rule is inconsistent with the principle that every imported article must be classified according to "the condition in which it is imported." *Worthington v. Robbins*, 139 U.S. 337, 341 (1891). But consideration of use "does not controvert this rule." *Ford*, 926 F.3d at 753. As Ford acknowledges (Pet. 16-17), the HTSUS is replete with principal-use and actual-use headings for which evidence of use may be considered; indeed, Ford conceded as much at oral argument. *Ford*, 926 F.3d at 753. Ford cannot explain how consideration of use as to certain *eo nomine* headings would violate the condition-as-imported doctrine, while consideration of use as to principal- and actual-use headings would not.

Ford's authorities do not support its theory. Indeed, *United States v. Citroen*, 223 U.S. 407 (1912), undermines it. *Citroen* involved pearls, which at the time were subject to two mutually exclusive tariff provisions. A lower duty applied to "[p]earls in their natural state, not strung or set" than to "pearls set or strung." *Id.* at 413. At issue was a set of pearls that arrived at the border unstrung. *Id.* Customs classified them as "pearls set or strung" because the pearls had been strung before importation and would be restrung after importation. *Id.* at 413-14. The Supreme Court recognized that this classification would have been appropriate had the relevant provision been defined in terms of the pearls' intended use, such as "pearls that can be strung" or to "pearls . . . that are assorted or matched so as to be suitable for a necklace." *Id.* at 415. But the provision instead referred, in "terms which shelter no ambiguity," to pearls that are "set or strung" when imported. *Id.* at 416. Heading 8703, by contrast, requires consideration of the "intended purpose" of a vehicle's "structural and auxiliary design features." *Marubeni*, 35 F.3d at 535. Heading 8703 is thus akin to the hypothetical provisions for which *Citroen* deemed consideration of use appropriate.

Worthington is even further afield. At issue was whether a shipment of raw enamel could be classified as "watch materials" simply because the importer intended that the enamel later be processed into watch-dials. 139 U.S. at 338. The Court held that materials "bear[ing] marks of [their] special adaption for use in making watches" should be classified as "watch materials." *Id.* at 341. The Court did not hold that consideration of use violates the condition-as-imported doctrine.

Ford contends (Pet. 11) that the panel's decision conflicts with the General Agreement on Tariffs and Trade (GATT). But GATT's implementing statute provides that, "in the event of a conflict between a GATT obligation and a statute"—here, Heading 8703 as construed by *Marubeni*—"the statute must prevail." *Federal-Mogul Corp. v. United States*, 63 F.3d 1572, 1581 (Fed. Cir. 1995) (discussing 19 U.S.C. § 2504(a)). In any event, no conflict exists, as GATT merely affirms the principle that articles must be classified in their condition as imported.

Ford contends (Pet. 13-14) that examining use in the *eo nomine* context will adversely affect the tariff system. But Ford can only speculate about what those consequences might be—despite the fact that both Customs and the courts have examined such evidence for decades, and despite *Marubeni*'s decades-old mandate that Heading 8703 be assessed by reference to such evidence.

Even if Ford were correct, two independent reasons militate against reaching the question in this case. There is no reasonable dispute that Heading 8703—which covers vehicles "principally designed for the transport of persons"—permits consideration of use. *See Aromont*, 671 F.3d at 1312 (holding that a heading covering "preparations therefor" is a principal-use provision). Thus, even if evidence of use may never be considered when assessing any *eo nomine* heading, such evidence may not be considered here only if Heading 8703 must still be construed as *eo nomine*. In such circumstances, however, the only way to effectuate Heading 8703's purposive language would be to construe it as a "use provision governed by the use analysis."

Cf. GRK Can. Ltd., 773 F.3d at 1287 (Wallach, J., dissenting). And Ford does not dispute that evidence of use may be considered when assessing use provisions.

There is also no reasonable dispute that, without the CRSV-2 seat, the Connect 6/7 must be classified as a two-person cargo van. Customs properly disregarded that seat as a "disguise or artifice" installed to transform a vehicle for the transport of goods into an article that "appear[s] otherwise." *Citroen*, 223 U.S. at 415; *see* Opening Br. 20-28; Reply Br. 6-18. Thus, even if evidence of use may never be considered, the disguise-or-artifice doctrine justifies classifying the Connect 6/7 as a cargo van notwithstanding Ford's creative staging.

5. Finally, Ford argues (Pet. 17-20) that rehearing should be granted to allow Ford to advance two alternative arguments in the Trade Court. Even assuming such relief were appropriate, the government notes that both arguments—raised in a perfunctory footnote, Resp. Br. 72 n.8—lack merit. Customs was not required to issue its ruling under the notice-and-comment provisions of 19 C.F.R. § 177.12(c) because the regulation is inapplicable, not least because of Ford's "material omission[s] in connection" with its entries of the Connect 6/7. Reply Br. 21-23. For the same reasons, equity would not preclude Customs from properly classifying the Connect 6/7 under Heading 8704 on account of an allegedly contrary "established and uniform practice." *Id.*

CONCLUSION

For these reasons, the petition should be denied.

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULES OF APPELLATE PROCEDURE 32 AND 35

I hereby certify that this response complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. I further certify that this response complies with the word limitation of Federal Rule of Appellate Procedure 35(b)(2)(A) because it is 3,892 words, excluding the parts exempted under Circuit Rule 35(c)(2).

/s/ Michael Shih
MICHAEL SHIH

CERTIFICATE OF SERVICE

I hereby certify that, on September 12, 2019, I electronically filed this response with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. I further certify that I will cause 18 paper copies to be filed with the Court within two days unless another time is specified by the Court, in accordance with Circuit Rule 35(c)(4) and this Court's Administrative Order Regarding Electronic Case Filing, ECF-10(D).

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