

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRADIUM TECHNOLOGIES LLC,
Appellant,

Appeal Nos. 2017-2579, -2580

v.

ANDREI IANCU, Director, U.S. Patent
and Trademark Office,
Intervenor.

**USPTO DIRECTOR'S OPPOSITION TO APPELLANT'S MOTION FOR
LEAVE TO FILE SUPPLEMENTAL BRIEF**

This case involves an appeal from two related *inter partes* review proceedings before the Patent Trial and Appeal Board. The Board issued its Final Written Decisions in July 2017. Briefing in this appeal has been complete for over three months. Nevertheless, Bradium now seeks to inject a constitutional argument based on the Appointments Clause that Bradium did not raise before the Board or before this Court during the parties' briefing. Consistent with this Court's precedent, Bradium's failure to raise the Appointments Clause argument before the Board necessitates a finding that the argument has been waived. Thus, this Court should deny Bradium's motion for leave to file a supplemental brief.¹

¹ The Director notes that Bradium filed a motion for leave to file a supplemental brief without also filing a copy of the proposed supplemental brief, in contravention of this Court's instructions. *See U.S. Court of Appeals for the*

In a nearly identical case, this Court found that a party waived an Appointments Clause argument that was first raised in a supplemental brief. *In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008). There, the appellant argued that that the decision of the Board should be vacated because two of the administrative patent judges that heard the case were unconstitutionally appointed by the Director. *Id.* at 1377-78. This Court found waiver based on the appellant’s failure to raise the argument before the Board, stating that “[i]t is well-established that a party generally may not challenge an agency decision on a basis that was not presented to the agency.” *Id.* at 1378 (citing *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)). As this Court explained, the general rule serves two primary purposes – it gives the agency the opportunity to correct its own mistakes, and it promotes judicial efficiency because claims are more efficiently resolved before an agency than through litigation in court. *Id.* at 1378-79.

Here, the same logic applies. Bromium should have raised its Appointments Clause argument before the Board during the *inter partes* review proceedings. Instead, Bromium waited until briefing was complete in this appeal to raise the argument. Bromium’s choice to first raise the issue before this Court deprived the

Federal Circuit CM/ECF FAQ’s,
http://www.cafc.uscourts.gov/sites/default/files/cmecf/FAQ_-_Rev_Aug15.pdf at 12 (explaining that a motion for leave to file a supplemental brief must be accompanied by the proposed supplemental brief).

Board of the opportunity to address the issue and does not promote judicial economy. *See DBC*, 545 F.3d at 1378-79. Moreover, Bradium’s motion disregards this Court’s rule that “arguments not raised in the opening brief are waived.” *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006).

Bradium argues that this Court has identified exceptions to the general waiver rule, and that this case falls into one or more of the exceptions. Bradium Mot. at ¶¶ 10-11. The Court in *DBC* acknowledged that there are exceptions to the waiver rule, stating that it had to “consider whether this is one of those exceptional cases that warrants consideration of the Appointments Clause issue despite its tardy presentation.” *DBC*, 545 F.3d at 1379-80 (noting that the Court can review an untimely constitutional challenge in “rare cases”).

While Bradium contends that an Appointments Clause challenge is “a serious issue of public policy” that justifies an exception to the waiver rule, this Court has disagreed. *DBC*, 545 F.3d at 1380 (stating that “we do not view the circumstances of this case to warrant such an exceptional measure”). In declining to exercise its discretion to hear an Appointments Clause challenge for the first time on appeal, the Court emphasized the appellant’s failure to raise the Appointments Clause issue before the Board, even though the issue could have been raised. *Id.* (“We are not persuaded to overlook *DBC*’s lack of diligence to

present an issue of which it was, or should have been, aware.”). Here, the circumstances are no different. Bradium had an opportunity to raise the issue before the Board, and failed to do so. This Court should not excuse Bradium’s lack of diligence and allow the Appointments Clause issue to be introduced at such a late stage of the appeal.

Bradium asserts that the Supreme Court has recognized that Appointments Clause challenges qualify as a rare case that justifies an exception to the waiver rule. Bradium Mot. at ¶ 12 (quoting *Freytag v. Comm’r*, 501 U.S. 868, 879 (1991)). But the Court in *DBC* considered the same case law and still declined to excuse the waiver, explaining that the “Supreme Court has never indicated that such challenges must be heard regardless of waiver.” *DBC*, 545 F.3d at 1380.

Finally, Bradium states that it was made aware of the Appointments Clause issue only following the Supreme Court’s *Lucia* decision and article published on Law360.com that discusses an Appointments Clause challenge in another appeal pending before this Court. Bradium Mot. at ¶ 14; *see also id.* at ¶ 8. Bradium’s lack of prior knowledge of a potential Appointments Clause argument does not excuse its failure to raise the issue before the Board. *DBC*, 545 F.3d at 1380. And Bradium has offered no explanation for why the Supreme Court’s decision in *Lucia* serves as a justification for allowing its untimely Appointments Clause challenge. *Cf. Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340,

1352 (Fed. Cir. 2008) (rejecting a party's attempt to raise an untimely obviousness defense based on the Supreme Court's *KSR* decision). Even if the intervening *Lucia* decision served as legitimate basis for allowing Bradium to file a supplemental brief, Bradium offers no explanation why it waited more than two months after *Lucia* was decided to file the current motion.²

CONCLUSION

Accordingly, the Director respectfully requests that this Court deny Bradium's Motion for Leave to File a Supplemental Brief.

September 4, 2018

Respectfully submitted,

/s/ Michael S. Forman
JOSEPH MATAL
Acting Solicitor

THOMAS W. KRAUSE
Deputy Solicitor

MICHAEL S. FORMAN
BRIAN RACILLA
Associate Solicitors
Mail Stop 8
P.O. Box 1450

² Alternatively, Bradium proposes that the Court stay this appeal pending a resolution of the Appointments Clause issue in another case, and then apply that result in this case. Bradium Mot. at ¶ 9. In addition to introducing unnecessary delay in resolution of the appeal, the alternative proposal again seeks to allow Bradium to improperly rely on an argument that it has waived.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.