

**United States Court of Appeals
for the Federal Circuit**

CYWEE GROUP LTD.,
Appellant

v.

**GOOGLE LLC, SAMSUNG ELECTRONICS CO.,
LTD., LG ELECTRONICS INC., HUAWEI DEVICE
USA, INC., HUAWEI DEVICE CO., LTD., HUAWEI
TECHNOLOGIES CO., LTD., HUAWEI DEVICE
(DONGGUAN) CO., LTD., HUAWEI INVESTMENT &
HOLDING CO., LTD., HUAWEI TECH.
INVESTMENT CO., LTD., HUAWEI DEVICE (HONG
KONG) CO., LTD.,**
Appellees

**KATHERINE K. VIDAL, UNDER SECRETARY OF
COMMERCE FOR INTELLECTUAL PROPERTY
AND DIRECTOR OF THE UNITED STATES
PATENT AND TRADEMARK OFFICE,**
Intervenor

2020-1565, 2020-1567

Appeals from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in Nos. IPR2018-
01257, IPR2018-01258.

Decided: February 8, 2023

JAY P. KESAN, DiMuroGinsberg PC - DGKeyIP Group, Tysons Corner, VA, for appellant. Also represented by CECIL E. KEY, HENNING SCHMIDT; MICHAEL W. SHORE, The Shore Firm, Dallas, TX.

MATTHEW A. SMITH, Smith Baluch LLP, Washington, DC, for appellee Google LLC. Also represented by ANDREW BALUCH, ELIZABETH LAUGHTON.

NAVEEN MODI, Paul Hastings LLP, Washington, DC, for appellee Samsung Electronics Co., Ltd. Also represented by CHETAN BANSAL.

ANDREW V. DEVKAR, Morgan Lewis & Bockius LLP, Los Angeles, CA, for appellee LG Electronics Inc. Also represented by NATALIE A. BENNETT, Washington, DC.

STEVEN MARK GEISZLER, Futurewei Technologies, Inc., Addison, TX, for appellees Huawei Device USA, Inc., Huawei Device Co., Ltd., Huawei Technologies Co., Ltd., Huawei Device (Dongguan) Co., Ltd., Huawei Investment & Holding Co., Ltd., Huawei Tech. Investment Co., Ltd., Huawei Device (Hong Kong) Co., Ltd.

MICHAEL S. FORMAN, Office of the Solicitor, United States Patent and Trademark Office, Alexandria, VA, for intervenor. Also represented by THOMAS W. KRAUSE, FARHEENA YASMEEN RASHEED, MEREDITH HOPE SCHOENFELD.

Before PROST, TARANTO, and CHEN, *Circuit Judges*.

PROST, *Circuit Judge*.

CyWee Group Ltd. (“CyWee”) requested that the Director of the U.S. Patent and Trademark Office (“PTO”) rehear two inter partes review (“IPR”) proceedings, each of which

had resulted in a final written decision of the Patent Trial and Appeal Board (“Board”) determining all challenged claims unpatentable. CyWee’s request was denied as to each IPR. CyWee appeals those denials. We affirm.

BACKGROUND

In June 2018, Google LLC (“Google”) filed two petitions for IPR challenging certain claims of CyWee’s patents. CyWee filed a preliminary response to each petition on September 14, 2018. On December 11, 2018—within three months of CyWee’s preliminary responses—the Board instituted (for each petition) IPR on all challenged claims. After institution, each IPR was joined by other parties. Because of those joinders, on December 4, 2019, the Board extended its deadline for the final written decisions—a deadline that’s typically one year from institution—by one month, making the new deadline January 10, 2020. *E.g.*, J.A. 7869–73. On January 9, 2020, the Board issued its final written decision in each IPR, determining all respective challenged claims unpatentable for obviousness.

CyWee appealed both Board decisions to this court in March 2020, and we consolidated the appeals. In addition to challenging the merits of the Board’s unpatentability determinations, CyWee challenged the appointment of Board administrative patent judges (“APJs”) as unconstitutional in view of the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2. In a March 2021 decision, we affirmed. We rejected CyWee’s Appointment Clause challenge as foreclosed by our then-governing precedent, including *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019). *See CyWee Grp. Ltd. v. Google LLC*, 847 F. App’x 910, 913 (Fed. Cir. 2021). We also rejected or otherwise disposed of CyWee’s other challenges. *Id.* at 912–14. CyWee petitioned for panel and en banc rehearing. After denying both, this court issued its mandate on June 10, 2021.

Eleven days after the mandate, the Supreme Court issued its decision in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021) (“*Arthrex*”). The Court held in *Arthrex* that APJs’ power to render final patentability decisions unreviewable by an accountable principal officer gave rise to an Appointments Clause violation. *Id.* at 1980–82, 1985. The Court remedied the violation by (1) vitiating anything in 35 U.S.C. § 6(c) that prevented the Director from reviewing final Board decisions in the IPR context and (2) “re-mand[ing] to the Acting Director for him to decide whether to rehear” the case. *Id.* at 1987.

After *Arthrex* issued, CyWee moved this court to recall its mandate and remand to the PTO for proceedings consistent with *Arthrex*. We recalled the mandate, remanded “for the limited purpose of allowing CyWee the opportunity to request Director rehearing of the final written decisions,” and required CyWee to inform this court within 14 days of any decision denying rehearing. Order at 3 (Sept. 23, 2021), ECF No. 109. On remand, CyWee’s requests for Director rehearing were referred to the Commissioner for Patents, who at the time was performing the non-exclusive functions of the Director and Deputy Director (those two offices were vacant at the time). The Commissioner denied rehearing and ordered that the Board’s final written decisions were “the final decision[s] of the agency.” J.A. 41578. CyWee thereafter filed, in accordance with an order of this court, amended notices of appeal challenging the rehearing denials.

CyWee’s opening brief challenged, among other things, the Commissioner’s authority to perform the review *Arthrex* contemplates. Before any response brief was filed, Google moved to stay the appeal, citing the relatively advanced state of this court’s consideration of the same issues in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 18-2140, as argued and submitted to a panel of this court on March 30, 2022. We stayed the instant case pending this court’s mandate in that case.

Less than three weeks after we stayed the instant case, the referenced panel issued its decision, rejecting challenges concerning the Commissioner’s authority to perform the review *Arthrex* contemplates. *Arthrex, Inc. v. Smith & Nephew, Inc.*, 35 F.4th 1328 (Fed. Cir. 2022) (“*Arthrex II*”). After this court’s mandate in *Arthrex II*, we lifted the stay in the instant case and directed CyWee to file a supplemental brief identifying the arguments from its opening brief that it believed were not foreclosed or otherwise resolved by *Arthrex II*. Order (Sept. 7, 2022), ECF No. 135.

We have jurisdiction under 28 U.S.C. § 1295(a)(4)(A).

DISCUSSION

CyWee seems to acknowledge that *Arthrex II* compels rejecting its challenges to the Commissioner’s authority to perform the review *Arthrex* contemplates, including CyWee’s challenges under the Appointments Clause, the Federal Vacancies Reform Act, and the Constitution’s separation of powers. See Appellant’s Supp. Br. 2–3.¹ CyWee also seems to acknowledge that our decision in *In re Palo Alto Networks, Inc.*, 44 F.4th 1369 (Fed. Cir. 2022), compels rejecting its Appointments Clause challenge regarding the institution decisions. See Appellant’s Supp. Br. 3–4. And regardless of CyWee’s willingness to concede the points, we conclude that *Arthrex II* and *In re Palo Alto Networks* compel rejecting those challenges. See *Arthrex II*, 35 F.4th at 1333–40; *In re Palo Alto Networks*, 44 F.4th at 1375 (“[T]he statutory and regulatory provisions concerning institution do not violate the Appointments Clause.”).

CyWee also argues that the Board’s institution decisions and final written decisions were untimely. Appellant’s Br. 19–21;² see *id.* at 39–40 (styling the untimeliness

¹ “Appellant’s Supp. Br.” refers to ECF No. 136.

² “Appellant’s Br.” refers to ECF No. 124.

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