Pursuant to the Board's email dated December 3, 2019, Patent Owner CyWee Group, Inc. hereby submits its Patent Owner's Objection and Motion to Terminate Proceedings Under United States Constitution Article II, Section 2, Clause 2.

I. The Panel is Composed of Unconstitutionally Appointed Officers

On October 31, 2019, the Federal Circuit Court of Appeals issued its opinion in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140, 2019 WL 5616010 (Fed. Cir. Oct. 31, 2019). In *Arthrex*, the Federal Circuit held "that APJs[1] are principal officers under Title 35 as currently constituted. As such, they must be appointed by the President and confirmed by the Senate; because they are not, the current structure of the Board violates the Appointments Clause." *Arthrex, Inc.*, 2019 WL 5616010, at *8.

The Director of the USPTO has unconditionally delegated the authority to make institution decisions to APJs. *See* 37 C.F.R. § 42.4 ("***The Board institutes*** the trial on behalf of the Director."); 37 C.F.R. § 42.108 ("When instituting *inter partes* review, ***the Board may authorize the review*** to proceed on all or some of the challenged claims and on all or some of the grounds of unpatentability asserted for each claim."). The regulations provide no mechanism for oversight by the Director (or any other presidentially-appointed officer), the ability for the parties to appeal the Board's decision to the Director, or the ability for the Director to overturn an

[1] APJs refers to Administrative Patent Judges.

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institution decision by the Board. In this case, the institution determination was made by the Board, and the Board alone without any right of appeal to a constitutionally appointed officer. Effectively, the Director has unconstitutionally abrogated any responsibility for institution determinations and delegated the Board's APJs complete and unchecked power to make institution determinations.

The Board's lack of oversight when rendering institution decisions is no different than the rendering of final written decisions. As the Federal Circuit noted in *Arthrex*, "[t]he lack of any presidentially-appointed officer who can review, vacate, or correct decisions by the APJs combined with the limited removal power lead us to conclude . . . [that APJs] are principal officers." *Arthrex, Inc.*, 2019 WL 5616010, at *8. There is no mechanism under the regulations for the Director to "review, vacate, or correct [institution] decisions by the APJs" so when rendering institution decisions APJs are acting as principal officers. Therefore, the unchecked delegation of authority to APJs renders institution determinations under the AIA unconstitutional ***as applied***.

II. Administrative Patent Judges are Judicial Officers

Inter partes reviews ("IPRs") replaced the previous reexamination procedure by converting the process from an examinational to an adjudicative one. *See Abbott Labs. v. Cordis Corp.*, 710 F.3d 1318, 1326 (Fed. Cir. 2013) (quoting H.R. Rep. No. 112–98, pt. 1, at 46–47 (2011)). An adjudicative proceeding is necessarily presided

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over by a judicial officer, APJs are, by the act of Congress that created them, judicial officers of the United States. The Federal Circuit confirmed APJs' status as judicial officers in *Abbot Labs*. To hold otherwise would make APJs simply re-titled patent examiners.

III. Judicial Officers' Actions are Void if Not Constitutionally Appointed

In *Arthrex*, the Federal Circuit effectively applied the *de facto* officer doctrine in an attempt to save all rulings made by the original APJ panel that was unconstitutionally appointed by remanding the case to the Patent Trial and Appeal Board ("PTAB") with instructions that a new APJ panel properly appointed could decide the case on the same record. *See Arthrex, Inc.*, 2019 WL 5616010, at *12 ("Finally, we see no error in the new panel proceeding on the existing written record but leave to the Board's sound discretion whether it should allow additional briefing or reopen the record in any individual case."). The Federal Circuit's allowance of the prior orders and decisions of the ***unconstitutionally appointed*** APJ panel to stand (but not the final written decision) was effectively a ruling that the *de facto* officer doctrine applied to all such non-final rulings of unconstitutionally appointed APJ panels.

But the United States Supreme Court has repeatedly ruled that the *de facto* officer doctrine does not apply to judicial officers of the United States. *Nguyen v United States,* 539 U.S. 69, 77 (2003). The *Nguyen* holding is consistent with and

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relies upon *Ryder v United States*, 515 U.S. 177 (1995). The rule that the *de facto* officer doctrine does not apply to administrative law judges ("ALJs") was made clear in *Lucia v. S.E.C.*, 138 S. Ct. 2044, 2055–56 (2018). APJs should not be treated any differently than their ALJ brethren.

The Federal Circuit has unconditionally ruled the decision to institute this IPR was made by an unconstitutionally appointed APJ panel. That institution decision is therefore void from its inception. *Nguyen*, 539 U.S. at 78 ("This Court succinctly observed: 'If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, ***and should certainly be set aside or quashed*** by any court having authority to review it by appeal, error or *certiorari.*'") (citing *American Constr. Co. v. Jacksonville, T. & K.W.R. Co.*, 148 U.S. 372, 387 (1893)) (emphasis added).

IV. Remand is the Only Option and Renders the Proceedings Time-Barred

The only option when a judicial officer is found unconstitutionally appointed is a remand to have the matter reheard in its entirety by a duly appointed officer in conformity with the Constitution. *Nguyen*, 539 U.S. at 83; *Lucia*, 138 S. Ct. at 2055–56. In this case, however, remand would be futile because the time for an institution decision by a properly appointed APJ panel has long since passed. 35 U.S.C. § 314(b)(2); *see PersonalWeb Tech., LLC v. FaceBook, Inc.*, 2014 WL 116350, at *2 (N.D. Cal. January 13, 2014) ("The PTO ***must decide whether to***

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institute IPR within three months of the patent owner's preliminary response, or in the event no response is filed, by the last date on which the response could have been filed.") (emphasis added). Even if a new APJ panel instituted, this IPR would be in direct violation of § 314(b)(2). Further, the final decision could not possibly be reached by a newly appointed panel within the 18-month deadlines[2] of 35 U.S.C. § 316(a)(11); 37 C.F.R. § 42.100(c). The deadline for a final written decision, like the institution deadline, is not extendable.

The PTAB's ability to make a new institution decision and, if necessary, issue a final written decision within the statutory deadline is further constrained by the fact that the supposed "fix" provided by the Federal Circuit in *Arthrex* violates statutory requirements of the Administrative Procedures Act. In *Arthrex*, the Federal Circuit struck down restrictions on the removal of APJs, thereby permitting the Director to remove APJs without cause. *Arthrex, Inc.*, 2019 WL 5616010, at *10. Administrative law judges presiding over proceedings governed by the Administrative Procedure Act, however, can only be removed in cases where "good cause [is] established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521. The Federal Circuit has already recognized that *inter partes* review is a formal adjudication

[2] This assumes a six-month extension was sought and granted before the 1 year deadline passed.

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In almost every pending IPR no possibility now exists of an institution decisions being made by a newly appointed APJ panel within the deadlines mandated by the AIA, nor is there any possibility of final written decisions being issued within the AIA final decision deadlines.¶
Because the new panels cannot possibly meet the mandatory deadlines, every pending

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