NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

CIENA CORPORATION,
Appellant

v.

OYSTER OPTICS, LLC,
Appellee

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

2019-2117

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. IPR2018-00070.

ON MOTION

Before MOORE, O'MALLEY, and STOLL, *Circuit Judges*.

O'MALLEY, *Circuit Judge*.

O R D E R

Ciena Corporation moves to vacate and remand for further proceedings in light of *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019). Oyster Optics, LLC and the Director of the United States Patent and Trademark Office oppose the motion.

Oyster owns U.S. Patent No. 8,913,898 ("the '898 patent"). In 2016, Oyster filed suit in district court, alleging that Ciena infringed several patents, including the '898 patent. Ciena petitioned the Patent Office for *inter partes* review of the asserted patents. At Ciena's request, the district court stayed the litigation. In May 2018, the Patent Trial and Appeal Board instituted review proceedings on the '898 patent. After conducting proceedings, the Board issued a final written decision in May 2019 that concluded that Ciena had failed to demonstrate by a preponderance of the evidence that any of the challenged claims are unpatentable. Ciena then filed this appeal.

Ciena argues that under *Arthrex*, the Board's decision must be vacated and remanded for a new hearing before a differently constituted panel because the Board panel that issued the decision was not appointed in compliance with the Appointments Clause. The trouble with accepting Ciena's argument is that, unlike the patent owner in *Arthrex*, Ciena sought out the Board's adjudication, knew or at least should have known of this structural defect, and was content to have the assigned Board judges adjudicate its invalidity challenges until the Board ruled against it. Under those circumstances, Ciena has forfeited its Appointments Clause challenge. *See Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1173, 1174 (Fed. Cir. 2019) (explaining that Appointments Clause challenges are not jurisdictional and subject to the rules of forfeiture).

The Supreme Court cases cited by Ciena do not compel a different conclusion. Ciena primarily relies on *Commodity Futures Trading Commission v. Schor*, 478 U.S. 833 (1986). In that case, Schor invoked the Commodity

Futures Trading Commission's reparations jurisdiction by filing complaints against his broker, while the broker filed a competing lawsuit in federal district court against Schor. Schor moved to stay or dismiss the district court action, arguing that the agency action would fully resolve and adjudicate all the rights of the parties. The broker subsequently dropped the civil suit and filed a counterclaim at the agency. After the agency ruled against Schor, Schor argued that the agency's adjudication of the counterclaim violated Article III of the Constitution.

Under those circumstances, the Court held that "Schor indisputably waived any right he may have possessed" to having the matter adjudicated in an Article III court. *Id.* at 849. The Court explained that "Schor expressly demanded that [the broker] proceed on its counterclaim in the reparations proceeding rather than before the District Court." *Id.* And like Ciena here, the Court explained that Schor "was content to have the entire dispute settled in the forum he had selected until the ALJ ruled against him on all counts; it was only after the ALJ rendered a decision to which he objected that Schor raised any challenge to the CFTC's consideration" of the counterclaim. *Id.*

It is true that the Court nonetheless addressed whether that Executive Branch tribunal's handling of those claims violated Article III. However, that was because "[w]hen these Article III limitations are at issue, notions of consent and waiver cannot be dispositive because the limitations serve institutional interests that the parties cannot be expected to protect." *Id.* at 851. *Schor* is of no help to Ciena here because Ciena is not raising an Article III violation such that we would have an independent

obligation to safeguard the role of the Judicial Branch against incursions by the Political Branches. *Id*. at 850.[1]

Nor does *Freytag v. Commissioner*, 501 U.S. 868 (1991) obligate us to take up Ciena's challenge. In *Freytag*, the petitioners sought review in the United States Tax Court and consented to having a special trial judge preside over their case. On appeal, the Fifth Circuit held that the petitioners had waived any constitutional challenge to the appointment of the special trial judge by their consent and by failing to raise the challenge at the Tax Court. *Id*. at 872. The Supreme Court did not disturb that conclusion, but nonetheless decided to take up the Appointments Clause challenge because it had included "Appointments Clause objections to judicial officers" in the category of cases to which it had previously exercised its discretion to consider even if not preserved below, *id.* at 878, and concluded that "this is one of those rare cases in which we should exercise our discretion to hear petitioners' challenge to the constitutional authority of the Special Trial Judge," *id.* at 879.

A balancing of the factors identified in *Freytag*—"the disruption to sound appellate process" and the judiciary's interest in remediating an Appointments Clause defect, *id*.—warrants a different conclusion here. The Court has generally noted that "the consequences of a litigant . . . remaining silent about [its] objection and belatedly raising the error only if the case does not conclude in [its] favor . .

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[1] Contrary to Ciena's suggestions, these cases do not stand for the proposition that courts are obligated to consider all structural challenges. At most, they stand for the proposition that courts have discretion to consider otherwise forfeited structural claims. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 231 (1995) (explaining that "the proposition that legal defenses based upon doctrines central to the court's structural independence can never be waived simply does not accord with our cases.").

. can be . . . severe." *Stern v. Marshall*, 564 U.S. 462, 482 (2011) (internal quotation marks and citations omitted). That concern is particularly acute here because Ciena had a perfectly good alternative forum in which it could have pursued its invalidity arguments. *Cf. Kuretski v. Commissioner*, 755 F.3d 929, 937 (D.C. Cir. 2014) (considering challenge in part because party had no alternative forum). This case is also meaningfully distinguishable from *Freytag* because *Arthrex* has already decided the issue raised here and remedied the structural defect.[2] For these reasons, this is not one of those rare situations in which we should exercise our discretion to excuse a forfeiture.

Accordingly,

IT IS ORDERED THAT:

(1) Ciena's motion to vacate and remand is denied.

(2) The opening brief is due within 30 days.

FOR THE COURT

January 28, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

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[2] Unlike *Freytag*, this challenge also does not directly implicate questions concerning Article III or the exercise of judicial power. *See Freytag*, 501 U.S. at 888 (taking up an Appointments Clause challenge that implicated whether "Courts of Law" in the Appointments Clause is limited to Article III courts); *Kuretski*, 755 F.3d at 939–40 (taking up an Appointments Clause challenge questioning whether an exercise of judicial power was made under Article III).