


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DEERE & COMPANY,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 18-827 (CFC)
)	CONSOLIDATED
AGCO CORPORATION and)	
PRECISION PLANTING LLC,)	
)	
Defendants.)	

REDACTED - PUBLIC VERSION

**AGCO CORPORATION’S AND PRECISION PLANTING LLC’S MOTION
FOR FURTHER CLAIM CONSTRUCTION IN LIGHT OF DEERE’S
POSITIONS ASSERTED IN IPR PROCEEDINGS**

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Pursuant to the Court’s instructions at the June 9, 2021 Status Conference, AGCO Corporation and Precision Planting LLC (collectively, “Precision”) respectfully submit this motion requesting that the Court conduct further claim construction proceedings. 6/9/21 Tr., 23:12-21.

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

The Federal Circuit has made clear that, when a patent owner takes positions in IPR proceedings, those positions become a relevant part of the prosecution history that should be considered in claim construction. *Aylus Networks, Inc. v. Apple Inc.*, 856 F.3d 1353, 1359-61 (Fed. Cir. 2017). The rationale, according to the Federal Circuit, is to ensure that “claims are not argued one way in order to maintain their patentability and in a different way against accused infringers.” *Id.* at 1360. That is exactly why further claim construction is necessary here. Deere persuaded this Court to adopt certain broad claim constructions. But in subsequent IPR proceedings, Deere took positions that directly contradict the constructions it successfully urged upon the Court:

- “***Delivery system***” ***terms***: Deere persuaded this Court that the claimed “delivery system” of the asserted patents ***permitted a “gravity drop”*** between the seed meter and endless member. 12/3/19 Tr., 105:16-18. But Deere then took precisely the opposite position in the IPRs, arguing that the asserted patents are distinguishable over the prior art because, in the claimed delivery system, there

“would be *no chance for a gravity drop.*” Ex. 1, Glancey 6/10/20 Tr., 284:18-285:11 (submitted to PTAB as Ex. 1113); Ex. 2, ’663 Surreply, 24 (arguing to PTAB that prior art combination does not invalidate because “seeds would necessarily *drop some distance* from its release position to the belt”).

- “*Endless member*”: Deere convinced this Court that the “endless member” should not be construed as a belt that grips seed but instead could be any “continuous conveyor forming a loop, such as a belt or a chain.” D.I. 159, 18-25. But Deere then prevailed in the IPRs by taking the opposite position: Deere conceded that the Hedderwick prior art reference in Precision’s obviousness combination included a continuous conveyor forming a loop (Ex. 3, Glancey 6/12/20 Tr., 253:12-17; Ex. 4, ’663 POR, 88-89), but it argued that the asserted patents should nevertheless survive because Precision failed to further establish that its prior art combination included *a belt that grips seed*. Ex. 4, ’663 POR, 19 (arguing that Precision failed to show the combination would “us[e] a brush-belt for retaining and conveying seeds”).
- “*Loading wheel*” terms: Deere took the position before this Court that the “loading wheel” terms did not require construction and could cover wheels that project seeds to a belt. D.I. 159, 13. But it then argued in the IPRs that a prior art paddle wheel—described in the prior art reference as one with which seeds are “extracted” from a seed meter, “held captive,” and then “projected”—and

used in Precision’s combination to guide seeds into a belt, “*cannot be a loading wheel.*” Ex. 10, Benac, 4:11-27, 5:4-8, 5:24-26; Ex. 2, ’663 Surreply, 29. Deere’s PTAB argument constitutes a clear and unequivocal disclaimer and it should no longer be permitted to argue that its claimed loading wheel covers systems that project seeds to a belt.

It would be fundamentally unfair—and contrary to Federal Circuit precedent—to permit Deere to maintain broad constructions to argue for infringement after it relied on far narrower applications of its claims to preserve validity. *Aylus*, 856 F.3d at 1361 (“[S]tatements made by a patent owner during an IPR proceeding can be considered during claim construction and relied upon to support a finding of prosecution disclaimer.”). Precision thus requests further claim construction proceedings to address the proper construction of these terms.

II. NATURE AND STAGE OF THE PROCEEDING

Deere asserts 11 patents relating to seed planting systems. The Court held a claim construction hearing on December 3, 2019 and issued a claim construction order on December 17, 2019. D.I. 191. On December 18, 2019, the case was stayed pending IPR proceedings involving 8 of the 11 asserted patents. D.I. 196. The PTAB did not find any of the challenged claims unpatentable. Precision is appealing the PTAB decisions to the Federal Circuit. Precision filed its opening brief on May 11, 2021, Deere’s responsive brief is due on July 6, 2021, and briefing is scheduled

to be complete with Precision's reply on July 27, 2021. Precision submits this motion for further claim construction proceedings pursuant to the Court's instructions at the June 9, 2021 status conference.¹

III. STATEMENT OF FACTS

A. Deere's Arguments to the PTAB Regarding the "Delivery System" Terms Contradict Its Claim Construction Arguments To This Court

Eight of the asserted patents—each of the patents in the '663 family—claim a "*delivery system*" or variation thereof. D.I. 159, 62-63. In claim construction proceedings before this Court, Precision argued that "delivery system" should be construed as a system that "removes seed from the seed meter by capturing the seed and then delivers it to a discharge position." *Id.* Precision also argued that the patents disclaim systems in which seeds move by gravity (a "gravity drop") between the seed meter and discharge. *Id.* Precision pointed to statements in the "Summary of the Invention" section of the patents explaining that the prior art was flawed because "there is *still a gravity drop* between the seed meter and the brush wheel" and asserting that the claimed delivery system solved this problem by capturing seed directly from the meter and thus eliminating any gravity drop. *Id.*, 79-80.

¹ Before the stay, the Court reserved judgment on the construction of two additional sets of terms. First, means-plus-function "delivery system" terms in claim 1 of the '199 patent and claim 3 of the '998 patent. D.I. 191, 4. The parties already submitted supplemental briefing on these terms. D.I. 192, 193. Second, "sidewall having inner and outer surfaces" in the '998 and '799 patents. The parties argued this term at the December 2019 hearing. 12/3/19 Tr., 201:23-212:20.

Deere argued in response that the patents did *not* disclaim a gravity drop but instead could cover systems that permitted a gravity drop. *Id.*, 65-68; 12/3/19 Tr., 105:16-18 (“This is not a clear and unmistakable disclaimer of anything whatsoever that happens to rely on gravity.”); D.I. 159, 68. The Court agreed with Precision that the “delivery system” terms require a system that “removes seed from the seed meter by capturing the seed and then delivers it to a discharge position.” D.I. 191, 3. But, relying on Deere’s arguments, the Court held that there was no disclaimer of a “gravity drop.” *Id.*

In the IPRs, however, Deere then took precisely the opposite position. Deere argued that the claimed “delivery system” is distinct over the prior art because it does *not* allow for a gravity drop. Deere’s expert, for instance, distinguished the prior art by asserting that:

- In the challenged patents, there “would be ***no chance for a gravity drop.***” Ex. 10, Glancey 6/10/20 Tr., 284:18-285:11 (submitted to PTAB as Ex. 1113).
- In the invention described by the specification of the ’663 family, “***there is no gravity drop.***” Ex. 3, Glancey 6/12/20 Tr., 58:12-21, 59:15-22 (submitted to PTAB as Ex. 1115).
- Proposed combination does not invalidate because “seeds would ***necessarily drop some distance*** from its release position to the belt.” Ex. 2, ’663 Surreply, 24.

Deere’s expert asserted that the Benac prior art reference—French Published Application No. 2,414,288—does not disclose the claimed “delivery system” because it allows for a gravity drop:

Q. Right. But when the Benac paddlewheel has removed and, as you said, briefly retained the seed in one of its cells, has that seed been removed by being captured [as required by the district court’s “delivery system” construction]?

A. Yea, I don’t, no.

Q. Why not?

A. Because it is struck by one of the paddles. It is knocked off the orifice and *the seed is allowed to drop* through the dropping zone. So the seed is not retained. The paddlewheel does not retain, capture and retain the seed. It does not and Benac doesn’t teach that.

Ex. 1, Glancey 6/10/20 Tr., 298:7-18.

Deere then argued to the PTAB that the alleged gravity drop in Benac precluded the use of the reference in Precision’s obviousness combination. Ex. 2, ’663 Surreply, 24 (arguing prior art combination would not work because “seeds would *necessarily drop some distance* from its release position to the belt”); Ex. 5, 10/13/20 IPR Hr’g Tr., 46:3-22. The PTAB relied on these arguments to find the asserted claims not invalid. Ex. 6, ’663 FWD, 28-30, 43-44 (“Patent Owner further undermines Petitioner’s case with its evidence of the difficulties that ordinarily skilled artisans would have expected to face in attempting to release seeds into a moving brush belt.”).

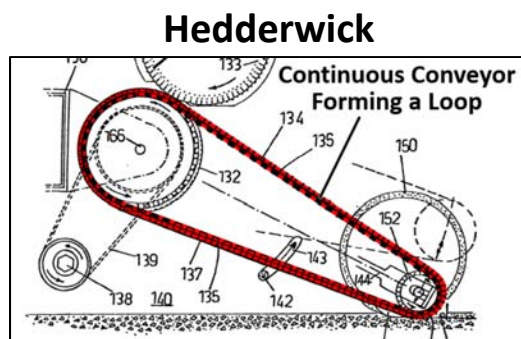
B. Deere’s Arguments to the PTAB Regarding “Endless Member” Contradict Its Claim Construction Arguments To This Court

Nine of the asserted patents require an “*endless member*.” D.I. 159, 18. Precision argued to this Court that the patents make clear that the endless member is a “brush belt with bristles, or belt with other materials, that grip the seed,” including

because the patents describe the purpose of the claimed invention to tightly control seeds as they are delivered to ground; the patents exclusively (and repeatedly) describe the endless member as a belt that grips seed; and the patents specifically distinguish the claimed inventions from prior art that did not include a belt that grips seed. *Id.*, 27-35.

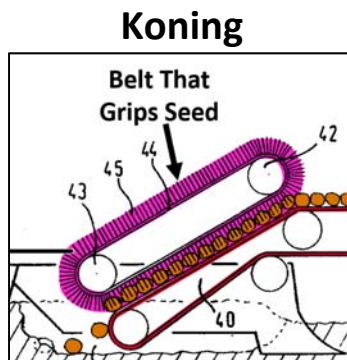
Deere argued in contrast that the “endless member” does *not* require a belt that grips seed. D.I. 159, 22 (“the term ‘endless member’ by itself, is not limited to a gripping structure”). Based on Deere’s arguments, the Court adopted a broad construction of the term that would cover virtually any type of belt: “a continuous conveyor forming a loop, such as a belt or a chain.” D.I. 191, 2.

But Deere then took the opposite position in its attempts to defend its patents in the IPRs. Deere conceded that the Hedderwick prior art reference (U.K. Published Application No. GB 2,057,835) included in Precision’s prior art combination discloses an endless member under its broad construction, i.e., a continuous conveyor forming a loop:



Ex. 7, Hedderwick, Fig. 4 (annotated); Ex. 3, Glancey 6/12/20 Tr., 253:12-17

(admitting that Hedderwick “meet[s] [Deere’s] endless member construction”); Ex. 4, ’663 POR, 88-89 (arguing that a flighted belt can be the claimed endless member). But Deere argued that the asserted patents should nevertheless survive because Precision failed to further establish that its combination includes *a belt that grips seed*. Specifically, Precision relied in the IPRs on U.S. Patent No. 4,193,523 to Koning for the disclosure of a belt that grips “seed crop” as it is delivered to ground:



Ex. 8, Koning, Fig. 4 (annotated). Deere repeatedly argued to the PTAB that the challenged claims should survive because Precision allegedly failed to establish that a skilled artisan would have had a reasonable expectation of success of including Koning’s belt that grips seed with the other references (e.g., Hedderwick and Benac) in Precision’s combination:

- “A POSA [person of ordinary skill in the art] would not have been motivated to isolate and extract Koning’s [brush] belt, adapt it for a new system... and repurpose it to perform a new function (conveying seed, not holding ‘potatoes or the like’) and expect it to work for that purpose.” Ex. 4, ’663 POR, 21.
- “A POSA thus would have understood that adding Koning’s belt to Hedderwick’s seeder would simultaneously destroy Hedderwick’s objective of using moving cells to achieve synchronization and Koning’s objective of using a belt for covering [sic] potatoes being carried by separate conveying

members.” *Id.*, 24.

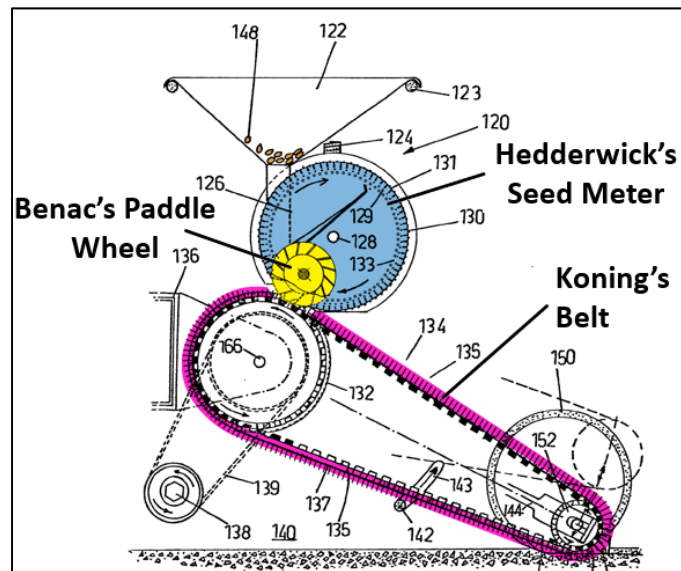
The PTAB ultimately agreed with Deere and declined to invalidate based on its conclusion that a skilled artisan would not have had a reasonable expectation of success of combining Koning’s belt that grips seeds—i.e., the same limitation that Deere had successfully argued to this Court is not required by the claims—with the other references in Precision’s combination (that indisputably already included an endless member under Deere’s construction). Ex. 6, ’663 FWD, 38-39, 43, 45; Ex. 13, ’173 FWD, 41 (“Petitioner’s arguments do not acknowledge the different function of Koning’s brush belt, or explain why a person of ordinary skill would have had reason to adapt Koning’s brush belt to such a use with a reasonable expectation of success in doing so.”).

C. Deere’s Arguments to the PTAB Regarding the “Loading Wheel” Terms Contradict Its Arguments to This Court

Four of the asserted patents claim a “*loading wheel*” or variation thereof. ’663 patent, claims 1, 6 (“loading wheel”); ’031 patent, claims 8, 16 (“loading surface”); ’955 patent, claims 19, 20 (“rotating wheel”); ’173 patent, claim 1 (“seed transfer device”). Deere took the position before this Court that these terms did not require construction and that they could cover a system using a wheel to project seeds to a belt. *See* D.I. 159, 13. But Deere again changed course before the PTAB.

In the IPRs, Precision relied on the prior art Benac reference in combination with the Hedderwick planting system and Koning brush belt to show the “loading

wheel” limitations. Benac describes a paddle wheel with which seeds are “extracted” from the seed meter, “held captive,” and then “projected.” Ex. 10, Benac, 4:11-27, 5:4-8, 5:24-26; Ex. 9, ’663 Pet., 26-29. In the combination with Hedderwick and Koning, the Benac paddle wheel extracts seeds from the meter, holds them captive in cells, and then guides them into Koning’s belt:



Contrary to its position before this Court (in which it argued that the plain meaning of the terms could cover a wheel that projects seeds to a belt), Deere argued to the PTAB that the Benac paddle wheel—as used in Precision’s combination—“*cannot be*” the claimed loading wheel:

- “Benac’s paddle wheel *cannot be a ‘loading wheel.’*” Ex. 2, ’663 Surreply, 29.
- “Benac does not teach ‘loading’—*i.e.*, inserting—a seed into anything. Rather, Benac’s paddles are designed only to dislodge seed from the disk.” Ex. 2, ’663 Surreply, 25; Ex. 1, Glancey 6/10/20 Tr., 291:22-292:2.
- Benac’s paddle wheel cannot “achieve a ‘loading wheel’” because it “*los[es] contact with the seeds*” before they are loaded. Ex. 4, ’663 POR, 54, 56.

- “[A] broad ‘dropping zone’ is located downstream of Benac’s paddle wheel, where seeds *fall freely or are projected rearward toward the ground*. ... A POSA would have realized that Benac’s paddle wheel, with its ‘dropping zone,’ is *not suitable to perform Hedderwick’s synchronized handoff into belt cells*, and any attempt to do so would render both inoperable.” *Id.*, 46.

Relying on Deere’s arguments, the PTAB found that a POSA would not have a reasonable expectation of success combining Benac’s paddle wheel to meet the claimed loading wheel/surface/device limitations. Ex. 6, ’663 FWD, 28-30, 33-36; Ex. 11, ’031 FWD, 34-36; Ex. 12, ’955 FWD, 34-36.

IV. ARGUMENT

Courts have made clear that where a patentee makes statements in IPRs that contradict a prior district court position, additional claim construction is warranted.

First, it is a fundamental rule of patent law that patent owners should not be permitted to interpret claims one way to preserve validity and another way to try to show infringement. *Aylus*, 856 F.3d at 1359-61 (courts should ensure that “claims are not argued one way in order to maintain their patentability and in a different way against accused infringers”); *X One, Inc. v. Uber Techs., Inc.*, 440 F. Supp. 3d 1019, 1042-46 (N.D. Cal. 2020) (revising prior claim construction “as a result of [patentee’s] own arguments during the [Asserted] Patent IPR proceeding that took place after the Court’s claim construction”).

Second, where a patent owner succeeds in convincing the PTAB that a patent does not cover certain subject matter, it should not then be permitted to take the

opposite position in district court. *See Aylus*, 856 F.3d at 1361 (“statements made by a patent owner during an IPR proceeding can be considered during claim construction and relied upon to support a finding of prosecution disclaimer”); *Acceleration Bay LLC v. Activision Blizzard, Inc.*, 2017 WL 6539507, at *6 (D. Del. Dec. 20, 2017) (construing claims to be consistent with plaintiff’s “**binding argument to the PTAB**”).

Third, statements the Patent Owner makes to the PTAB that contradict prior claim construction positions create new claim construction disputes that must be resolved under *O2 Micro*. *See O2 Micro Int’l Ltd. v. Beyond Innovation Tech. Co.*, 521 F.3d 1351, 1360 (Fed. Cir. 2008) (court must resolve disputes regarding the scope of patent claims); *MagSil Corp. v. Seagate Tech.*, 2010 WL 4864810, at *3 (D. Del. Nov. 16, 2010) (further construing term eight months after initial hearing pursuant to *O2 Micro* “[b]ecause the court’s current construction of ‘reverses’ has not resolved the parties’ dispute”).

A. Deere’s PTAB Arguments Require Further Construction of “Delivery System”

After persuading this Court that the “delivery system” of the asserted patents **allows** a gravity drop (12/3/19 Tr., 105:16-18 (“This is not a clear and unmistakable disclaimer of anything whatsoever that happens to rely on gravity”)), Deere took the opposite position in the IPRs, successfully arguing that the asserted patents are distinct over the prior art because the claimed delivery system **does not allow** a

gravity drop (Ex. 3, Glancey 6/12/20 Tr., 59:15-22 (“*there is no gravity drop*”); Ex. 1, Glancey 6/10/20 Tr., 284:18-285:11 (there “would be no chance for a gravity drop”). Deere should not be permitted to have it both ways. Precision should have the opportunity to show that the new intrinsic evidence that Deere created in the IPRs constitutes a clear and unequivocal disclaimer of a gravity drop. *Aylus*, 856 F.3d at 1359 (“Prosecution disclaimer ‘preclud[es] patentees from recapturing through claim interpretation specific meanings disclaimed during prosecution.’”) (internal citation omitted); *X One, Inc.*, 440 F. Supp. 3d at 1042-46 (changing claim construction to mirror arguments that patent owner made to PTAB during IPR).²

B. Deere’s PTAB Arguments Require Further Construction of “Endless Member”

After successfully arguing to this Court that “endless member” should *not* be construed as a belt that grips seeds (D.I. 159, 22 (“the term ‘endless member’ by itself, is not limited to a gripping structure”)), Deere prevailed in the IPRs by arguing that Precision failed to establish that its obviousness combination included a belt that grips seed. Ex. 4, ’663 POR, 21 (arguing that Precision failed to show that POSA would have been motivated to combine Koning’s belt that grips with Hedderwick).

² The PTAB’s decisions embraced Deere’s arguments. But even if they had not, the mere fact that Deere made those arguments is sufficient to constitute prosecution disclaimer. *See Seachange Int’l, Inc. v. C-COR Inc.*, 413 F.3d 1361, 1374 (Fed. Cir. 2005) (“An applicant’s argument made during prosecution may lead to a disavowal of claim scope even if the Examiner did not rely on the argument.”); *Am. Piledriving Equip., Inc. v. Geoquip, Inc.*, 637 F.3d 1324, 1336 (Fed. Cir. 2011) (same).

This is precisely the type of inconsistent position that warrants a change to the district court's construction. *See X One, Inc.*, 440 F. Supp. 3d at 1042-46.

Deere has argued that its IPR statements are not inconsistent with this Court's claim construction because Deere was simply responding to the only prior art combination that Precision presented to the PTAB, which included Koning. But Precision made clear in the IPRs that, to the extent Deere argued that "endless member" is broader than a belt that grips seed, the challenged claims were unpatentable even without Koning. Ex. 9, '663 Pet., 43, n.9. Indeed, Deere admitted that the Hedderwick reference in Precision's prior art combination has an "endless member" under Deere's construction. Ex. 3, Glancey 6/12/20 Tr., 253:12-17; Ex. 4, '663 POR, 88-89. But it nevertheless argued that the combination did not invalidate because Precision allegedly failed to further establish that the combination would include a belt that grips seed, i.e., Koning's brush belt. Ex. 4, '663 POR, 21, 24. In other words, Deere made the strategic decision to argue at the PTAB that Precision had failed to establish a limitation in its prior art combination—a belt that grips seed—that Deere had argued to this court is ***not*** required by the claims.

This new intrinsic evidence, coupled with the fact that the patents exclusively describe the endless member as a belt that grips seed and distinguish prior art on the basis that it did not include a belt that grips seed, requires further construction of the "endless member."

C. Deere’s PTAB Arguments Require Further Construction of the “Loading Wheel” Terms

After taking the position in this Court that the “loading wheel” terms should be given their plain meaning (and could cover systems that project seeds to a belt), Deere then changed course and argued in the IPRs that a paddle wheel described in the prior art as one that extracts, holds captive, and projects seed, and used in Precision’s combination to guide seeds into a belt, cannot be the claimed loading wheel. Ex. 2, ’663 Surreply, 29 (“Benac’s paddle wheel *cannot* be a ‘loading wheel’”); Ex. 4, ’663 POR, 56 (arguing that a wheel that “*los[es] contact with the seeds*” before they are loaded cannot be the claimed loading wheel). This constitutes an unequivocal disclaimer of systems that use such wheels. See *UltimatePointer, L.L.C. v. Nintendo Co.*, 816 F.3d 816, 823 (Fed. Cir. 2016) (written description’s distinction of invention’s “direct pointing” system over prior art “indirect pointing” systems constituted disclaimer of such indirect pointing systems). At a minimum, Deere’s argument raises a new dispute over the scope of the term “loading wheel,” which the Court, not the jury, should resolve. See *O2 Micro Int’l Ltd.*, 521 F.3d at 1360.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ Jeremy A. Tigan

OF COUNSEL:

Michael J. Summersgill
Jordan L. Hirsch
Michaela P. Sewall
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

Grant Rowan
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Avenue NW
Washington, DC 20006
(202) 663-6000

June 23, 2021

Jack B. Blumenfeld (#1014)
Jeremy A. Tigan (#5239)
Anthony D. Raucci (#5948)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
jblumenfeld@morrisonichols.com
jtigan@morrisonichols.com
araucci@morrisonichols.com

*Attorneys for Defendants AGCO
Corporation and Precision Planting LLC*

CERTIFICATION

Precision hereby certifies that that this Motion for Further Claim Construction is 15 pages long. Precision also hereby certifies that this paper is 14-point and Times New Roman typeface. As such, this paper complies with the type and font limitations of this Court's Standing Order Regarding Briefing in All Cases and this Court's Order during the June 9, 2021 Status Conference.

Date: June 23, 2021

/s/ Jeremy A. Tigan

Jeremy A. Tigan (#5239)

CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2021, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on June 23, 2021, upon the following in the manner indicated:

Adam W. Poff, Esquire
Pilar G. Kraman, Esquire
YOUNG CONAWAY STARGATT
& TAYLOR LLP
Rodney Square
1000 North King Street
Wilmington, DE 19801
Attorneys for Plaintiff

VIA ELECTRONIC MAIL

Richard L. Rainey, Esquire
Kevin B. Collins, Esquire
Jay I. Alexander, Esquire
Nicholas L. Evoy, Esquire
Daniel E. Valencia, Esquire
R. Jason Fowler, Esquire
Rajesh Paul, Esquire
COVINGTON & BURLING LLP
One CityCenter
850 Tenth Street, NW
Washington, DC 20001-4956
Attorneys for Plaintiff

VIA ELECTRONIC MAIL

/s/ Jeremy A. Tigan

Jeremy A. Tigan (#5239)