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March 6, 2018

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VIA CM/ECF

Peter R. Marksteiner, Clerk of Court
U.S. Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, D.C. 20439

Re: *Rule 28(j) Notice of Supplemental Authority in Hyatt v. U.S. Patent & Trademark Office, No. 17-1722*

Dear Mr. Marksteiner:

At oral argument, the panel inquired whether the D.C. Circuit has limited, in any relevant respect, its “longstanding rule” that “a claim that agency action was violative of statute may be raised outside a statutory limitations period, by filing a petition for amendment or rescission of the agency’s regulations, and challenging the denial of that petition.” *Pub. Citizen v. Nuclear Reg. Com’n*, 901 F.2d 147, 152 (D.C. Cir. 1990).

The D.C. Circuit reaffirmed the vitality of that “general rule” as recently as 2013, recognizing an exception only for statutes like the Clean Air Act with jurisdiction-stripping provisions that have no analog in the Patent Act. *American Road & Transp. Builders Ass’n v. EPA*, 705 F.3d 453, 457 (D.C. Cir. 2013). The D.C. District has also recently recognized the rule’s continued force under D.C. Circuit law. *CREW v. FEC*, 243 F. Supp. 3d 91, 102 n.6 (D.D.C. 2017) (party may “petition the agency for amendment or rescission of the regulations and then to appeal the agency’s decision”) (quotation marks omitted).

Moreover, the First Circuit adopted the same approach just last year, citing decisions of the Fifth, Ninth, and D.C. Circuits. *Rodriguez v. United States*, 852 F.3d 67, 82 (1st Cir. 2017) (citing *Dunn–McC Campbell Royalty Interest, Inc. v. Nat’l Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997); *Wind River Min. Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991); *Pub. Citizen v. Nuclear Reg. Comm’n*, 901 F.2d 147, 152 (D.C. Cir. 1990)). No circuit has adopted a contrary approach, so far as the undersigned is aware.

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In any instance, Ninth Circuit law controls here, and the Plaintiffs' challenge is timely under Ninth Circuit law because it was brought within 6 years of the denial of Mr. Hyatt's petition. Reply Br. at 10–11 & n.3.

Sincerely,

A handwritten signature in blue ink, appearing to read "Andrew M. Grossman", with a long horizontal flourish extending to the right.

Andrew M. Grossman

CC: All counsel of record via CM/ECF