

Case Nos. 23-2158, 23-2159

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

VLSI TECHNOLOGY LLC,
Appellant,

v.

OPENSKY INDUSTRIES, LLC,
Cross-Appellant

INTEL CORPORATION,
Appellee, and

JOHN A. SQUIRES, Under Secretary of Commerce for Intellectual
Property and Acting Director of the United States Patent and
Trademark Office,
Intervenor.

Appeals from the U.S. Patent & Trademark Office, Patent Trial and
Appeal Board, Proceeding No. IPR2021-01064 and IPR2022-00366

**REPLY BRIEF OF
CROSS-APPELLANT OPENSKY INDUSTRIES, LLC**

November 23, 2025

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CERTIFICATE OF INTEREST

Counsel for Cross-Appellant OpenSky certifies the following:

1. **Represented Entities.** The full name of every entity represented by undersigned counsel in this case:
OpenSky Industries, LLC
2. **Real Party in Interest.** There are no real parties in interest other than the entities named in 1.
3. **Parent Corporations and Stockholders.** All parent corporations and any publicly held companies that own 10 percent or more of the stock of any entity represented by me are: None
4. **Legal Representatives.** The names of all law firms, partners, and associates that have appeared for the represented entities in the trial court or agency or are expected to appear in this court, and have not already entered an appearance in this court, are:
Andrew T. Oliver, Vinay V. Joshi, AMIN, TUROCY & WATSON
LLP
Matthew K. Blackburn, Evan E. Boetticher, SULLIVAN
BLACKBURN PRATT LLP, LEWIS & ROCA LLP, and
WOMBLE BOND DICKINSON (US) LLP
POTOMAC LAW GROUP, PLLC
5. **Related Cases** that meet the criteria of Fed. Cir. R. 47.4(a)(5):
See corrected Form 9A Notice of Related Case Information,
ECF 90 filed February 12, 2025
6. This is neither a criminal case with organizational victims, nor a bankruptcy.

Date: November 23, 2025

/s/ David E. Boundy

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REPLY ARGUMENT

During intra-agency proceedings, the Director shifted from one theory of the case, to another, to another. In this appeal, the Director and VLSI must show that the Director gave notice and opportunity to be heard, that procedures were consistent with law, and that a non-arbitrary, non-capricious explanation connected ultimate conclusions on remedy to earlier findings of fact and conclusions of law, despite all the shifts. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (“a reviewing court ... must judge the propriety of [an agency’s] action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm...”). Now, neither the Director nor VLSI defends the Director’s decision. Instead, the Director shifts position *again*, disclaiming earlier reasoning and substituting new. This “court[] may not accept appellate counsel’s *post hoc* rationalizations for agency action.” *Burlington Truck Lines, Inc. v. U.S.*, 371 U.S. 156, 168 (1962).

I. Standard of Review

The Director’s brief (at 17) invokes the standard of review for court decisions. But this is an appeal from a formal agency adjudication. In review of an agency adjudication, compliance with the Administrative Procedure Act (APA) and underlying fact-finding

procedure are reviewed for “reliable, probative, and substantial evidence,” and non-arbitrary, non-capricious “reasoned decisionmaking” under 5 U.S.C. §§ 554(b)(3), 556(d), and 706(2). *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). *See* OpenSky Br. 12, n.4, 18-20. These issues are reviewed *de novo*. *See also, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971). The Director’s suggestion (at 17) of “clearly erroneous” review is incorrect. *Dickinson v. Zurko*, 527 U.S. 150, 154-56 (1999) (APA standard of review applies, and “clearly erroneous” does not, unless a statutory carveout is “clear”).

Although the standards for reviewing a jury verdict and an agency adjudication are both labeled “substantial evidence,” they are different. *See Chen v. Mukasey*, 510 F.3d 797, 801-02 (8th Cir. 2007). VLSI suggests (at 45-46) that mere “support” is sufficient for “substantial evidence.” That is the wrong standard of review. Under the “substantial evidence” standard for an agency adjudication, an agency decision must “examine the relevant data,” must rationally explain fact inferences, must “take into account whatever evidence fairly detracts,” must explain any contrary evidence, and must explain a “rational connection between the facts found and the choice made.” *State Farm*,

463 U.S. at 43; *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *In re Van Os*, 844 F.3d 1359, 1362 (Fed. Cir. 2017). An agency may not pick-and-choose only the inferences that support a pre-ordained conclusion; inferences must “compl[y] with ... foundation[s] of all honest and legitimate adjudication.” *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 378-79 (1998).

II. The Director’s appellate brief abandons the only reasoning below and substitutes a new theory for which the Director never gave notice and opportunity to be heard

The Director’s appellate brief itself confirms the *Chenery* and due-process violations in this case. It effectively banishes Paper 102 (Appx00065-81)—the only findings of fact and conclusions of law on “abuse of process”—and instead relies on an entirely different factual and legal basis. But Paper 102 was the *only* agency decision on liability. The Director must defend *it*, not some new *post hoc* rationalization.

II(A) Background: Paper 102 is the only set of findings of fact and conclusions of law on liability for abuse of process, and the decision the Director must defend

In Paper 102, the Director’s abuse-of-process conclusion rests on two acts alone: (1) filing this IPR “in an attempt to extract payment from VLSI [and] Intel,” and (2) “offering to undermine and/or not

vigorously pursue this matter in exchange for a monetary payment.” (Appx00040, Appx00065–81). Although the Director discussed a variety of supporting facts and circumstances, these were the only two acts she found to constitute sanctionable abuse of process.

Paper 102 not only decided abuse of process liability, but closed the record to further discussion, leaving open only questions of an attorney fee award *for the abuse of process*. Appx00041 (“OpenSky is precluded from filing further papers into the record”); Appx00087-88 (“OpenSky is ... precluded from presenting or contesting any particular issue; ... or filing any additional papers, unless specifically directed”).

Paper 109 further confirmed that the abuse of process findings of Paper 102 were conclusive and not subject to further challenge:

I did not order briefing to allow OpenSky to “reply” to my Decision. Instead, I ordered OpenSky to provide narrow briefing on a narrow issue, i.e., whether OpenSky should be ordered to pay compensatory expenses, including attorney fees and, if so, how such fees should be determined. ... OpenSky’s brief must respond to those questions only.

Appx02665.

By locking out further briefing on either abuse of process or discovery, the Director locked herself into the reasoning of Paper 102.

After OpenSky invoked the *Noerr-Pennington* doctrine and *Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101 (2017) in its

remedies brief (Appx02765-67), the Director shifted to an entirely new theory of liability in Paper 127. That Paper discarded the two bases (filing with bad intent and offering to undermine/not vigorously pursue) that formed the basis of liability in Paper 102, and replaced them with a completely different, amorphous “totality of circumstances” and “throughout the proceeding” rationale. Appx00135, Appx00137. But Paper 127 did not identify what conduct goes into the “totality of circumstances,” and offered no revised findings of fact or conclusions of law. Appx00126-42. Moreover, Paper 127’s amorphous “totality of the circumstances” with no discussion of any facts was itself arbitrary and capricious. *Prosperity Tieh Enter. Co. v. U.S.*, 965 F.3d 1320, 1327 (Fed. Cir. 2020) (agency “must explain how each factor weighs in the balance and why. The failure to [do so] results in an ‘I know it when I see it test,’ which is no test at all.”).

After Paper 102, the Director never gave notice and opportunity to be heard on “totality of circumstances,” “throughout the proceeding,” “only post-filing conduct” without consideration of motive, or any of the other shifting theories raised after Paper 102. Indeed, any such opportunity was actively precluded. Appx00041, Appx00087-88,

Appx02665. The Director never set forth any replacement conclusion of law, so the Director cannot be affirmed on any later rationale, either.

Paper 102 also found discovery misconduct, for which “*the* proper sanction is to hold disputed facts as established against OpenSky.” Appx00064-65 (emphasis added). After Paper 102 imposed adverse inferences as the *exclusive* remedy for discovery misconduct, it treated that issue as fully resolved, and then turned to abuse-of-process as a separate matter. *Contrast* Appx00052-65 (discovery issues) *with* Appx00065-81 (abuse of process). Papers 102 and 109 precluded any further discussion of discovery sanctions. Appx00087-88, Appx02665. Because the Director gave neither opportunity to cure or to be heard, discovery was off the table as an element of abuse of process.

II(B) The Director’s disclaimer

The Director’s brief now disclaims the reasoning of both Papers 102 and 127: now the case is only about “post-filing conduct” without consideration of motive. Director Br. 49-51, 60 (“The Director’s final sanction determination was based only on OpenSky’s post-filing conduct;” “The Director’s sanction decision did not rely on petitioning-related conduct;” “the Director ... determine[ed] not to base sanctions on OpenSky’s motive.”).

The Director’s disclaimer of “motive” disclaims both actions that underlie abuse of process in Paper 102 (filing with bad intent and offer to undermine/not vigorously pursue). The disclaimer down to “only post-filing conduct” disclaims Paper 102’s filing with bad intent, and Paper 127’s “throughout the proceeding.”

II(C) The Director’s shift of position concedes *Noerr-Pennington*

This Court may treat the Director’s disclaimer as a concession that Paper 102’s rationale cannot survive *Noerr-Pennington* scrutiny. An agency cannot salvage a constitutionally-defective decision by disclaiming its own words on appeal. *See Chenery*, 332 U.S. at 196.

Paper 116 and OpenSky’s brief explain how *Noerr-Pennington* invalidates the Director’s reasoning in Papers 102 and 127. Appx02765-67; OpenSky Br. 41-45. A petition (even with bad intent) and adjacent conduct (such as settlement negotiations) are within the constitutionally-protected right to petition and its surrounding “breathing space,” so long as the action is not objectively baseless. *See BE&K Const. Co. v. NLRB*, 536 U.S. 516, 526, 531 (2002); *Industrial Models, Inc. v. SNF, Inc.*, 716 Fed.Appx. 949, 957 (Fed. Cir. 2017) (nonprecedential) (conduct “attendant upon” litigation, such as failed settlement offer with an “invitation to collude,” have *Noerr-Pennington*

immunity). *At the time*, the Director asserted that the constitutional protection of *Noerr-Pennington* was abrogated by agency regulation and her personal inference of “congressional intents.” Appx00133-34. The Director did not explain how either trumps a Constitutional provision.

The Director’s brief *now* (at 51-52) substitutes a different theory for abuse of process, but does not offer any defense for the *Noerr-Pennington* defects in the Director’s decision *at the time*. Because the Court may not sustain an agency decision on a ground never relied on below, the sanctions cannot be affirmed. *See Chenery*, 332 U.S. at 196.

VLSI complains (at 64) that OpenSky “cites no case where *Noerr-Pennington* immunized a party from sanctions for litigation misconduct.” VLSI has it backwards. The issue is not whether *Noerr-Pennington* shields litigation misconduct; the issue is whether the sanctions were based an abuse of process that the Director is willing to defend. VLSI points to no decision on abuse of process based on the “post-filing conduct only, no motive” theory the Director *is* willing to defend.

II(D) *Chenery*: the Director no longer defends the only decision below

The Director’s brief no longer defends the factual rationale of Paper 102. Apparently to avoid the *Noerr-Pennington* infirmity

discussed in § II(C), *supra*, the Director now disclaims the earlier theory. Now *only* post-filing conduct is at issue, and “motive” is likewise off the table. Director Br. 49-51, 60. The Director’s brief does not identify any point during intra-agency proceedings where the Director analyzed abuse of process within the newly-disclaimed scope. *Contrast* Director Br. 49-51, 60 *with* Appx00040, Appx00065-81. After the Director’s brief disclaims the only two actions alleged to be misconduct in Paper 102, the Director’s decision cannot be affirmed. *Burlington Truck*, 371 U.S. at 168-69.

The Director’s brief never quotes, cites, or defends the actual language of Paper 102’s finding abuse “by filing this IPR.” The brief offers no response to OpenSky’s showing that sanctioning the act of filing for an improper purpose punishes constitutionally-protected petitioning activity. Instead, the Director now simply pretends Paper 102 never said what it plainly says, and substitutes a replacement history, that sanctions were limited to post-filing conduct without consideration of motive. Director Br. 49-51, 60.

The shift on discovery misconduct is as startling. Paper 102 found discovery misconduct but imposed adverse inferences as the complete remedy (Appx00062-65) and expressly separated it from the abuse-of-

process theory that supported monetary sanctions (Appx00065-81). Yet Paper 127 resurrected those same discovery violations as part of its new “throughout the proceedings” rationale for awarding hundreds of thousands of dollars in fees (Appx00133-38). After the Director had locked up her findings and thrown away the key for any further discussion (Appx00041, Appx00087-88, Appx02665), expanding the basis for liability was “without observance of procedure,” arbitrary, and capricious in Paper 127, and barred by *Chenery* in the Director’s brief now.

The Director no longer defends the legal basis, either. *At the time*, the legal basis was whether proceedings were used for an improper purpose. Appx00040 (citing *Woods Servs., Inc. v. Disability Advocs., Inc.*, 342 F.Supp.3d 592, 606 (E.D. Pa. 2018) (“The essence of an abuse of process claim is that proceedings are used for a purpose not intended by the law.”). Now, the Director goes 180° the other way, entirely disclaiming “motive.” Director Br. 60. OpenSky showed (65-66) that the *holding* of *Woods* does not support the Director’s conclusion in Paper 102. Neither the Director nor VLSI defend *Woods* now.

If the Director no longer defends the only finding of abuse of process, the Director effectively concedes it, and the underlying due

process and *Noerr-Pennington* defects. *Burlington Truck*, 371 U.S. at 168-69; *contrast* Director Br. 49-51, 60 *with* Appx00040, Appx00062-81. The disclaimer also severs any plausible factual basis for the monetary award under *Goodyear*. *See* § IV(B), *infra*.

III. The Director’s decision-making violated basic guarantees of due process and the Administrative Procedure Act

The Director’s appellate pivot not only violates *Chenery*; it also independently confirms the due-process and APA notice defects OpenSky raised in its opening brief. 5 U.S.C. § 554(b)(3) requires timely notice of “the matters of fact and law asserted,” not open-ended policy questions or exploratory interrogatories. OpenSky’s opening brief explained numerous violations of Constitutional and APA due process, and how the Director’s zigzagging denied OpenSky fair opportunity to be heard. OpenSky Br. 7-9, 14-16, 53-70. The Director’s brief essentially confesses the errors.

OpenSky’s brief argued (at 7-9, 67-70) that the Director gave no notice and opportunity to be heard before Paper 102, in which the Director reached her conclusion that “abuse of process” had occurred. The Director’s brief essentially agrees. The Director never identifies any pre-Paper 102 notice of the specific facts and law she ultimately relied on; she simply asserts (at 60) that Paper 47 gave “scope” notice

and then states that the October 2022 decision (Paper 102) “extensively details” the sanctionable conduct and findings — conceding that Paper 102 was the first notice of the actual charges. The Director’s brief identifies no earlier point at which OpenSky had § 554(b)(3) notice.

The Director’s claim (at 60-61) that Paper 47 “identified the scope” is less than meets the eye. Paper 47 posed open-ended questions, soliciting the parties and amici to propose what conduct *should* be considered abuse of process, how such a standard *should* be applied, and fact interrogatories to the parties. Appx00030–31. Paper 47 asked the parties to supply theories and facts rather than identifying the “matters of fact and law asserted” required by § 554(b)(3). The only reference to “sanctions” in Paper 47 was a boilerplate caution that the Director may consider disciplinary sanctions for “misrepresentation” in briefing. Appx00035. That generic ethics warning does not satisfy § 554(b)(3). Paper 47 also barred argument on application of law to fact and precluded further substantive briefing. Appx00035. Whatever “scope” was provided in Paper 47, it was not notice of law, notice of facts, or opportunity to respond.

A tribunal violates due process when it renders judgment simultaneously with first notice. *Nelson v. Adams USA, Inc.* 529 U.S.

460, 463 (2000). The Director’s brief does not contest the due process defect OpenSky raised: Paper 102 is the first notice of the § 554(b)(3) matters of fact and law asserted, *and simultaneously the judgment on liability*. The Director’s brief identifies no opportunity to respond to the “extensive details” in between.

The Director precluded further briefing (Appx00041, Appx00087-88, Appx02665), so the failure of notice and opportunity to be heard was never cured.

OpenSky’s brief noted that the Director gave no notice before Paper 102 of the legal standard that would apply, and that OpenSky’s acts did not meet the Restatement definition of “abuse of process.” OpenSky Br. 9-10, 63-64. The Director responds (at 59), “OpenSky supplies no evidence to suggest that Congress intended to import the common law tort definition of ‘abuse of process.’” The Director has it backwards, thrice. First, the default assumption is that the common law applies, unless Congress “speaks directly” to displace it. *U.S. v. Texas*, 507 U.S. 529, 534 (1993). Second, due process demands notice of the law to be applied. 5 U.S.C. § 554(b)(3). The first notice that an “essence” would apply (instead of the tort with all its elements) came in Paper 102, the very paper that decided the issue. Appx00040. Third,

the Director applied Pennsylvania law. *Id.* But under *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981), a tribunal may not apply the law of a state with no contacts with the parties or transaction. OpenSky warned the Director of the *Allstate* obligation to choose a rationally-related law and inform OpenSky of the standard, and analyze all elements of the tort, not an isolated “essence.” Appx02760. But the Director never walked back any of the three errors. Neither the Director’s nor VLSI’s brief identify any point at which the Director applied a constitutionally-permissible body of law, or considered all elements of the tort.

OpenSky also noted (at 57-58) that the Director’s “gag rule” against declaratory evidence (Appx00034) had made it literally *impossible* for OpenSky to present evidence responsive to the Director’s inquiries (Appx00031-32)—in a single-member LLC, the single member’s memories, reduced to a declaration, are the only *possible* evidence on many of the issues the Director asked about.

The Director’s and VLSI’s briefs, and the Director’s decisions, fault OpenSky for not “request[ing] permission” to present declaratory evidence. Director Br. 56-57; VLSI Reply 56; Appx00131. That is not the way due process works. The right to present evidence is a

fundamental *right*, 5 U.S.C. § 556(d), not an indulgence at the grace of the tribunal. Due process rights can only be waived “voluntarily, intelligently, and knowingly,” after an opportunity for hearing, early enough that error can be prevented. *Fuentes v. Shevin*, 407 U.S. 67, 81-82, 94-95 (1972). OpenSky put the Director on notice promptly after the error surfaced, giving her an opportunity to correct it. Appx02762-63. She declined. Appx00131.

OpenSky further noted (at 61-62) four prerequisites for adverse inferences, imposed by due process and substantial evidence. The Director’s Brief claims (at 58), “OpenSky identifies no flaw in the Director’s application of adverse inferences,” but identifies no legal exception, and no point at which the Director set forth the four prerequisites for any of the adverse inferences (Appx00040, Appx00067, Appx00074). The Director’s failure to explain “an important aspect of the problem” *is* the “flaw” that renders her adverse inferences arbitrary and capricious. *State Farm*, 463 U.S. at 43.

Finally, the Director only has authority to *review* PTAB decisions, not to *sua sponte* jump in *as* a party. *U.S. v. Arthrex, Inc.*, 594 U.S. 1, 25-26 (2021) (“The Director accordingly may review final PTAB decisions”). OpenSky argued that the PTAB’s regulations only empower

parties to request discovery, that the PTAB had disclaimed authority to request privileged documents, and that the Director had no authority to promise that her *in camera* review would preserve privilege.

OpenSky Br. 55-56, 58-59 (citing 77 Fed. Reg. 48639). The Director's brief (at 56) cites 35 U.S.C. § 316(a)(5) and the catch-all provision of 37 C.F.R. § 42.5(a) to plug those authority gaps. But the Director fails to explain how § 316(a)(5) is self-executing. Section 316(a)(5) is an authorization to "prescribe regulations" so everyone has consistent notice, not an open-ended license to act unpredictably *in absence* of regulation. Likewise, OpenSky argued (at 7-8, 58-59) that if the PTO's other discovery regulations only authorize party discovery, then § 42.5(a) must be construed consistently with its neighbors, not as an expansive power for the Director to demand anything she wants and to summarily overrule objections with no opportunity to cure. The Director identifies no counter principle of regulatory construction, or authority that allows the Director to walk away from assurances in the Federal Register. And neither the Director nor VLSI explain how the Director's *in camera* review would **not** be a waiver of privilege. If the Director had no authority to request discovery of privileged documents, there was no misconduct in OpenSky pointing that out, and no

misconduct in declining to follow an *ultra vires* order. At the very least, the Director jumping to adverse inferences with no opportunity to cure (Appx00040, Appx00067, Appx00074) was arbitrary and capricious.

As shown, the intra-agency proceeding was in excess of statutory authority, arbitrary, capricious, and contrary to constitutional and statutory right. It should be set aside.

IV. *Goodyear*: the Director relied on an obsolete legal standard, and the Director’s new shifts of position leave the fee award unsupported

The Director’s and VLSI’s briefs fail to address the fundamental problem with the Director’s fee award: it is based on the wrong standard. Paper 127 expressly relied on *Monolithic Power Sys., Inc. v. O2 Micro Int’l Ltd.*, 726 F.3d 1359 (Fed. Cir. 2013)—a § 285 fee-shifting case—to justify a “misconduct throughout the proceeding” totality test. Appx00137. That reliance is contrary to law. *Goodyear* overruled the very “egregiousness” shortcut *Monolithic* applied, holding that *misconduct* sanctions (unlike § 285 “exceptional case” awards) require strict, line-item “because of, and solely because of” causation regardless of how pervasive the misconduct appears. 581 U.S. at 112-13. The Director’s invocation of a pre-*Goodyear* § 285 “exceptional case”

standard is contrary to controlling Supreme Court authority for *sanctions*.

To effectuate its concern that attorney fees be *only* compensatory, *not* punitive, the Supreme Court in *Goodyear* required that, in any attorney fee award, a tribunal must “assess and allocate specific litigation expenses [and] determine whether a given legal fee— say, for taking a deposition or drafting a motion—would or would not have been incurred in the absence of the sanctioned conduct.” 581 U.S. at 109-10. *Goodyear* resolved a circuit split, between courts applying a strict “but for” standard, and those applying a looser “related to” or “during the time of” or “egregious conduct” test. *Id.* at 107, 112-13. *Goodyear* resolves that split in favor of the stricter test: compensable fees are only those “incurred because of, and *solely because of*, the misconduct at issue (however serious, or concurrent with a lawyer’s work, it might have been).” *Id.* at 113 (emphasis added); *see also Fox v. Vice*, 563 U.S. 826, 841 (2011) (recoverable fees are those “solely because of” the misconduct—when costs are incurred in two parallel proceedings, one sanctionable, one not, no attorney fees are “but for” the misconduct, so none are reimbursable). *Goodyear* establishes a “need ... to establish a causal link” between misbehavior and legal fees, as a check against

slipping into punitive territory, *Id.* at 108, and as a check against sanctioning conduct that wasn't "misconduct" at all (*e.g.*, because of *Noerr-Pennington*). The *Goodyear* standard applies to "discovery abuse" just as to any other misconduct. *Id.* at 109.

IV(A) By the Director's own admission, the sanctions were punitive

The fee awards fail because the award was punitive, not compensatory. *See Goodyear*, 581 U.S. at 108 (fees "must be compensatory rather than punitive"). The Director stated that the awarded sanctions were intended "to punish OpenSky." Appx00129. She stated that sanctions are "necessary to deter such conduct by ... others," Appx00041, a rationale that is "essentially punitive."

Unbelievable, Inc. v. NLRB, 118 F.3d 795, 805 (D.C. Cir. 1997). While both the Director's and VLSI's briefs make *post hoc* assertions that the awards were "compensatory" (Director Br. 52; VLSI Reply 61), neither disputes that *at the time* the Director acted with punitive intent.

Argument now cannot undo the Director's stated intent then.

Burlington Truck, 371 U.S. at 168-69 ("courts may not accept appellate counsel's *post hoc* rationalizations for agency action").

The Director admitted that the sanction was punitive. Merely uttering the word "compensatory" does not make it so. In *Goodyear*, the

Ninth Circuit spent two full pages characterizing its award as “compensatory” rather than “punitive.” 813 F.3d 1233, 1250-52 (9th Cir. 2016). But the Supreme Court reversed, because the lower courts failed to make conduct-cost-causation showings. 581 U.S. at 113, 115. The “need to establish a causal link” is what separates “compensatory” from “punitive,” not arguments in an appellate brief.

IV(B) In avoiding *Noerr-Pennington*, the Director’s position now conflicts with the factual underpinnings for the Director’s fee award

The Director’s failure to apply a *Goodyear* conduct-cost-causation standard creates a larger problem for the Director: the Director’s position on *Goodyear* and *Noerr-Pennington* are mutually contradictory. In Paper 102, the acts the Director identified as “abuse of process” were (1) *filing this IPR in an attempt to extract payment from VLSI and Intel* and (2) *offering to undermine and/or not vigorously pursue the IPR in exchange for money*. Appx00040, Appx00080-81. Any *Goodyear* conduct-cost-causation analysis had to be tethered to those two acts, not to an amorphous “misconduct throughout the proceeding.”

Instead, in attempting to evade the *Noerr-Pennington* defect, the Director backpedaled, stating OpenSky was not sanctioned “based on whether it filed a meritorious Petition.” Appx00134. The Director’s

brief *now* goes even further—the Director now disclaims “motive,” and limits the case to only “post-filing conduct.” Director Br. 49-51, 60.

But *at the time*, the Director’s determination on abuse of process—and apparently fee amount—lumped in actions and inferred motives, like formation of OpenSky, intent in filing the petition, minimal effort in preparing the petition, and not engaging the expert before filing.

Contrast Appx00074, Appx00079-80 *with* Director Br. 49-51, 60.

Though the Director’s brief doesn’t say, perhaps the Director still considers the private February 23 settlement email to be “misconduct,” even after the Director now disclaims consideration of motive (see § II(B), *supra*). If so, that email is the *only* act of “misconduct” remaining in the case. The Director never explained how the awarded costs were “solely because of” that email, without being based on motive. In the fee award of Paper 147, the Director failed to explain any causal connection between misconduct the Director defends *now* and specific fees awarded *then*.

One example shows how the Director’s *Noerr-Pennington*-driven inconsistent and shifting definitions of “misconduct” led the Director into *Goodyear* error, even before the Director’s new disclaimer. The Director divided the fee award into buckets divided by “particular

subject matter or activities.” Director Br. 53, Appx00226-32. For Bucket 2, “Precedential Opinion Panel (“POP”) Request for Review” (Appx00227-28), VLSI’s fee motion cites Paper 20 and its preparation as the only cost it bore for this bucket. Appx02960-61, and Table 2.1 Appx11532-33. But Paper 20 was filed on January 6, 2022, and the time entries for VLSI’s exhibit ended on that day. Appx01276-99, Appx11533. As of January 6, 2022, the only actions OpenSky had taken were filing its meritorious petition, and a Petitioner’s Reply on *Fintiv* factors and the merits (Appx01174-85), which no one has ever alleged to be misconduct. If the Director had followed *Goodyear*, the only conduct that could have supported a sanctions award for this bucket was OpenSky’s meritorious petition. But the Director disclaimed that, both then and now. Director Br. 49-51 (sanctions were based “only on OpenSky’s post-filing conduct”); Appx00134 (“I am not sanctioning OpenSky based on whether it filed a meritorious Petition”). This mismatch forces a conclusion that the Director’s decision did *not* faithfully apply the *Goodyear* standard.

Bucket 2 is a symptom of the larger disease. *At the time*, the Director failed to explain a “solely because of” link between the awarded fees and any conduct, still less the “post-filing, no motive” conduct the

Director defends *now*. The Director’s sanctions order *at the time* was internally-contradictory between *Goodyear* and *Noerr-Pennington*. In briefing now, the Director cannot show that the fee award was ***not*** based on a *Noerr-Pennington* meritorious petition. The entire fee award lacks *Goodyear* explanation, and should be set aside.

IV(C) The Director applied the wrong test

In *Goodyear*, the district court had “disclaimed the ‘usual’ need to find a ‘causal link’ between misconduct and fees when the sanctioned party’s behavior ... rose to a truly egregious level,” *Goodyear*, 581 U.S. at 112 (cleaned up). That was the error the Court reversed, *id.* at 113, and that the Director duplicated here. Appx00137 (“Throughout the Proceeding”). In contrast, *Goodyear* requires on-the-record explanations of conduct-cost-causation to check the impulse toward punishment. *Goodyear*, 581 U.S. at 108. Neither the Director nor VLSI identify where the Director set forth the relevant explanation. Because Paper 102 is the only decision setting out findings of abuse of process, *Goodyear*’s “but for” causation requirement had to be applied to the two specific acts Paper 102 actually found sanctionable—not to a shifting, amorphous notion of “misconduct throughout the proceeding.”

The Director’s brief now concedes that the proper standard for linking OpenSky’s misconduct to VLSI’s costs was the *Goodyear* “but for” test. But neither the Director nor VLSI identify where the Director even mentioned *Goodyear* (except to bat it away, Appx00137, Appx00224). Neither shows that the Director ever relied on the “because of, and solely because of” test. Instead, the Director coined other tests with more tenuous correlations—“relevant to,” “linked to,” “part of,” “associated with,” “unusual and serious,” “numerous novel and complex issues,” or “tied to” (Appx00137, Appx00224, Appx00228-29, Appx00231-2, Director Br. 52)—none of which are *but-for causation* tests. The Director used the words “but for” only once, in Paper 127 setting out general ground rules (Appx00137), and never in Paper 147, the paper that should have brought conduct, cost, and causation to a “solely because of” focus. Appx00209-39.

Though the Director’s brief never identifies what conduct survives the “post-filing, motive irrelevant” disclaimer, at most the only act remaining is the February 2022 settlement email. **Over 85%** of the \$413,264.15 award was for Bucket 5, “Director Review Process” (Appx00230-31, Appx00237, Appx02996). The Director *at the time* did not explain how hundreds of thousands of legal fees and the *entire*

Director Review Process was caused “because of, and solely because of” any specific misconduct, let alone one email. *Goodyear* (and § 556(d)) confine sanctions to only misconduct actually *found* (and defended), not the total constellation of misconduct ever alleged.

The Director could not *possibly* have conducted a proper *Goodyear* analysis, because of the zigzagging between internally-inconsistent definitions of misconduct—sometimes initial filing is part of the misconduct, Appx00040 (“I determine that OpenSky ... abused the IPR process by filing this IPR”), Appx00135 (“misconduct ... throughout the proceeding”), sometimes not, Appx00134 (“I am imposing sanctions because of the manner in which OpenSky conducted itself *after* the Petition was filed,” emphasis added). Sometimes discovery is outside the abuse of process (Appx00052-82), sometimes it’s in (Appx00136). Paper 147 refers to “OpenSky’s actions,” “OpenSky’s misconduct,” and similar generic terms (Appx00227-32), but Paper 147 identifies no ***specific*** conduct. Because the Director never landed on a consistent description of the “misconduct,” the Director never explained any causal link to VLSI’s fees. And several of the buckets are inconsistent with the “post-filing, motive irrelevant” characterization now. Neither the Director nor VLSI can point to actual use of the proper test below, so

post hoc rationalizations cannot be heard now. *Burlington Truck*, 371 U.S. at 168-69.

The Director’s brief argues (at 53) that Paper 147’s “fee groupings relate to particular subject matter or activities.” “Subject matter” is neither conduct or causation. The Director does not explain “solely because of” causation flowing from either the “misconduct” identified in Paper 102 (Appx00065-81) or the “post-filing, no motive” conduct the Director asserts now. Because the Director never identifies misconduct that was the cause for each bucket, Paper 147 never explains the necessary causal link.

VLSI’s evidence presented no explanation to connect specific costs to specific misconduct. Appx02970-72. Instead, VLSI used a “readily foreseeable” test. *Id.* The facts cited by VLSI were the formation of OpenSky, filing a meritorious petition, and plausible objections to discovery (Appx02970-72)—none of which are misconduct. *Goodyear* is not mentioned in VLSI’s table of authorities. Appx02942. VLSI failed to put forward any relevant evidence or explanation of causation under the *Goodyear* standard, and has waived the right to do so now. *Goodyear*, 581 U.S. at 114-15. Since VLSI failed to provide the necessary evidentiary underpinning, the Director had no evidence to

support a “because of, and solely because of” causation showing (Appx00227-31). Any fee award lacks substantial evidence, is contrary to law for applying the wrong test, and arbitrary and capricious for failure to explain “relevant factors” and “an important aspect of the problem.” *State Farm*, 463 U.S. at 42-43.

V. Under the American Rule, the Director lacks authority to impose attorney fee sanctions

The American Rule, “deeply rooted in our history and in congressional policy,” bars recovery of attorney’s fees absent Article III inherent authority or a “specific and explicit” Congressional directive. *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 259, 271 (1975); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991); *Peter v. NantKwest, Inc.*, 589 U.S. 23, 30 (2019). Congress has not “extended any roving authority ... to allow counsel fees as costs or otherwise whenever [a decision-maker] might deem them warranted.” *Alyeska*, 421 U.S. at 260. The American Rule applies to administrative agencies. *Unbelievable*, 118 F.3d at 806 (“[W]e may not lightly allow an administrative agency, any more than a court, to depart from the [American] Rule.”). The Supreme Court has never allowed attorney fees based on a general statutory word like “costs” or “sanctions”—the wording must be “specific and explicit,” *NantKwest*, 589 U.S. at 30, as in

every one of four hundred statutes listed in the Congressional Research Service report cited in OpenSky's opening brief (at 22-23).

V(A) The American Rule applies equally to sanctions and fee shifting

The Director and VLSI seek to sidestep the American Rule by arguing the American Rule is limited to fee shifting and does not apply to sanctions. Director Br. 41-47; VLSI Reply 60-61, Appx00128-29. But neither points to any case that has ever drawn that line.

Counterexamples show that the Director is wrong on both counts.

The American Rule is *not* limited to “fee shifting.” The two hallmarks of “fee shifting” are whether the shift is “tied to the outcome of litigation” and whether it “shift[s] the entire cost of litigation.”

Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 553 (1991). *Contra* the Director's brief, *NantKwest* applied the American Rule to 35 U.S.C. § 145, a statute that shifts fees independent of outcome, and that singles out discrete fees line-item-by-line-item (costs and expert fees are reimbursable, attorney fees are not), rather than the entire cost of litigation.

The American Rule *does* apply to sanctions. *Zambrano v. City of Tustin*, 885 F.2d 1473, 1481 (9th Cir. 1989). The Ninth Circuit held that a district court's sanction was beyond Article III inherent authority

and without a “specific and explicit” statutory grant. *Id.* Because the sanction lacked authority under either possible head, the Ninth Circuit invoked the American Rule to vacate the sanction. *Id.* *Zambrano* reminds that decision-makers cannot “shift attorneys’ fees merely because a party has ... offended some legal norm” unless the sanction has either Article III inherent authority or a “specific and explicit” statute. *Id.*

In declining to follow *Goodyear*, the Director cited *Monolithic*, a § 285 fee shifting case. Appx00137. Under the Director’s “fee-shifting vs. sanctions” dichotomy, *Monolithic* was irrelevant on the *Goodyear* issue. The Director’s internally-contradictory reasoning is arbitrary and capricious. *IBG LLC v. Trading Techs. Int’l Inc.*, 757 Fed.Appx. 1004, 1008 (Fed. Cir. 2019) (nonprecedential).

The Director (at 41-45) and VLSI (at 60-61) point to cases that draw distinctions between fee shifting and sanctions *for purposes other than the American Rule*. But none of these cases suggest that the differences extend to application of the American Rule. It is commonplace that two things can be similar for some purposes and different for others. For example, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) notes differences between FRCP 11 and FRAP 38: Rule

11 “permit[s] an award only of those expenses directly caused by the filing,” *Id.* at 406 (foreshadowing *Goodyear*), while FRAP 38 allows sanctioning the entirety of a frivolous appeal. *Id.* at 407. But nowhere does *Cooter* suggest that the American Rule applies differently.

Likewise, in *Business Guides*, 498 U.S. at 552-54, the issue was whether Rule 11 sanctions against a *party* were within the Rules Enabling Act—but neither decision nor *dicta* discusses different applicability of the American Rule (*Business Guides* cites *Alyeska* for an unrelated proposition).

The Director then (at 43-44) presents a long string cite of cases that explain that fee-shifting and sanctions can be different for *other* purposes. None mention the American Rule, let alone suggest any difference in application. Many of the Director’s cites state that they only apply to “courts” or “Rule 11,” so there is no analogy, as explained next.

V(B) The Director’s analogies to Article III sanctions fail because they confuse two different heads of authority

Both the Director and VLSI’s briefs start from a fundamental misunderstanding. Article III courts may award attorney fees under their inherent authority. *Chambers*, 501 U.S. at 35, 45. But agencies

have no such inherent authority. *HTH Corp. v. NLRB*, 823 F.3d 668, 679 (D.C. Cir. 2016) (“it is wrong to speak of agencies as having *any* inherent authority”); *Ethicon v. Quigg*, 849 F.2d 1422, 1427 (Fed. Cir. 1988) (“The [Director] ... has no inherent authority.”). Both the PTO and VLSI assume that if an Article III court can do it, so can the Director. Director Br. 44-45 (“The authority for Rules 11 and 37 is exactly like the Director’s authority here.”) Neither explains any basis for the analogy. The Director is “a creature of statute,” having “only those powers conferred upon it by Congress,” and an agency errs when it analogizes itself to an Article III court. *HTH*, 823 F.3d at 679; *Killip v. Office of Pers. Mgmt.*, 991 F.2d 1564, 1569 (Fed. Cir. 1993) (“Any and all authority pursuant to which an agency may act ultimately must be grounded in an express grant from Congress.”); *Trapp v. U.S.*, 668 F.2d 1114, 1115-16 (10th. Cir. 1977) (“Agencies may not award attorney’s fees without express statutory authority. ... Where Congress has spoken to authorize an award of attorney’s fees, it has done so in no uncertain terms.”).

Because agencies do not have Article III inherent authority, the only possible source for an agency’s attorney fee sanctions authority is a

“specific and explicit” Congressional delegation. *NantKwest*, 589 U.S. at 30.

Nearly every case that the Director cites (at 43-44), states the fundamental principle: an attorney’s fee award requires a specific head of authority, either in the inherent authority of Article III courts or a “specific and explicit” Congressional statute. The Director’s brief identifies no analogy between Article III inherent authority and authority of agencies. Without that, most of the Director’s and VLSI’s arguments are simply irrelevant.

V(C) Canons of statutory construction show that the word “sanctions” is not sufficient

Both the Director’s and VLSI’s argument for statutory authority come down to the presence of the bare word “sanctions” in 35 U.S.C. § 316(a)(6). Director Br. 44-45; Appx0129; VLSI Reply 58-60. Neither the Director’s decision below nor the Director’s or VLSI’s briefs here present any principle of statutory construction that counters the American Rule. Nor do they identify a single case in which a court has ever interpreted the generic word “sanctions” to be sufficiently “specific and explicit” to embrace attorney fees. Nor do they distinguish holdings where similarly capacious words like “costs” or “expenses” have been found wanting. *NantKwest*, 589 U.S. at 30-31; *see also Baker Botts*,

L.L.P. v ASARCO LLC, 576 U.S. 121, 128-29 (2015) (narrowly construing “reasonable compensation”).

OpenSky squarely raised the statutory construction issue. Appx02754-58. At the time, the Director evaded it, claiming that 37 C.F.R. § 42.12 (a regulation) and *dicta* in *Apple Inc. v. Voip-Pal.com*, 976 F.3d 1316 (Fed. Cir. 2020) and *Amneal Pharms. LLC v. Almirall, LLC*, 960 F.3d 1368 (Fed. Cir. 2020) (which, in turn, were based only on the regulation, not the statute) allowed her to avoid considering the scope of her statutory authority (Appx0129-30). The Director’s failure to “consider[] the relevant factors” *at the time* was arbitrary and capricious. *State Farm*, 463 U.S. at 43. The Director no longer defends reliance on *Apple* or *Amneal*. It’s too late for either the Director or VLSI to offer an alternative rationale on statutory construction now. *Burlington Truck*, 371 U.S. at 168-69.

OpenSky’s brief (at 20-36) walked through several canons of statutory construction to show that “sanctions” is insufficient to support an award of attorney’s fees. Most of these have gone unrebutted by the Director and VLSI. The few direct rebuttals offered are off the mark.

The Director’s brief argues (at 46) that the ITC statute (19 U.S.C. § 1337) is “no more explicit” than § 316. But the differences between the ITC statute and PTAB statute tell the story:

19 U.S.C. § 1337(f) and (h)	35 U.S.C. § 316(a)(6)
(h) Sanctions for abuse of discovery and abuse of process The Commission may by rule prescribe sanctions for abuse of discovery and abuse of process to the extent authorized by Rule 11 and Rule 37 of the Federal Rules of Civil Procedure. (f)(2) ... the United States district courts may issue mandatory injunctions incorporating the relief sought by the Commission ...	(a) Regulations.—The Director shall prescribe regulations— (6) prescribing sanctions for abuse of discovery, abuse of process...

The ITC is granted authority to prescribe sanctions for abuse of discovery and abuse of process to the extent authorized by Rules 11 and 37. Rules 11 and 37 both expressly authorize attorney fee sanctions. The PTAB statute lacks this language or anything like it. Differences in statutory language like this are presumed to convey differences in meaning. *Wisconsin Central Ltd. v. U.S.*, 585 U.S. 274, 279 (2018).

OpenSky argued (at 28) that the lack of any enforcement provision supports the inference that Congress did not intend attorney fee

awards. The Director argues (at 46-47) that lack of an enforcement mechanism traces back to the distinction between fee shifting and sanction awards. But the Director does not explain why an enforcement mechanism would be necessary for one and not the other. The Director also says (at 47) that the ITC statute has no such enforcement mechanism. But the Director overlooks 19 U.S.C. § 1337(f)(2) which authorizes injunctive remedies in District Court. *See also* 19 C.F.R. § 210.75(b) (ITC rule implementing this authority).

VLSI argues (at 59) that legislative history shows that attorney's fees are within the scope of "sanctions," citing H.R. Rep. No. 110-314 and 37 C.F.R. § 1.616(a)(5). OpenSky (at 27) pointed out the flaws in these arguments. VLSI offers no sur-rebuttal now. Further, the Director did not set forth *any* reasoning on statutory construction (Appx00129-30). The Director gave no reasoning that can be affirmed, and VLSI's argument is now barred by *Chenery*.

CONCLUSION

This Court should set aside the Director's decisions awarding attorneys' fees to VLSI from OpenSky.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Federal Circuit Rule 32(b)(1), because:

1. Excluding the portions exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2), this brief contains 6968 words. As permitted by Federal Rule of Appellate Procedure 32(g)(2), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

2. This brief has been prepared in 14-point Century Schoolbook, a proportionally spaced typeface that complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6).

Dated: November 23, 2025

/s/ David E. Boundy

David Boundy