No. 20-1273

In The
Supreme Court of the United States

FRANEK OLSTOWSKI,

Petitioner,

v.

PETROLEUM ANALYZER COMPANY, L.P.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN J. KNIGHT
Counsel of Record
CHAMBERLAIN, HRDLICKA,
WHITE, WILLIAMS & AUGHTRY
1200 Smith Street, Suite 1400
Houston, Texas 77002
(713) 654-9603
steven.knight@chamberlainlaw.com

Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Are circuits divided about whether state court judgments confirming arbitration awards are "judicial proceedings" for purposes of 28 U.S.C. § 1738? Contrary to Petitioner's argument, the answer is no.

   Each case Petitioner cites recognizes that state court judgments confirming arbitration awards are "judicial proceedings" for purposes of 28 U.S.C. § 1738. The fact that courts reach different conclusions regarding the preclusive effect of the judgments is due to variations in state law, which, by statute, governs the full faith and credit analysis. *See* 28 U.S.C. § 1738 ("The . . . judicial proceedings of any court of any . . . state . . . shall have the same full faith and credit in every court within the United States . . . *as they have by law or usage in the courts of such state . . . from which they are taken*." 28 U.S.C. § 1738") (emphasis added).

2. In light of the full factual and procedural background of this case, most of which Petitioner omitted from his filing, was there a dispute about whether the confirmed arbitration award defined the technology in dispute? Once again, the answer is no.

   The central issue in this case was whether Petitioner established that Respondent used his technology as described in the confirmed arbitration award. The courts below gave full deference to the confirmed arbitration award in determining that Petitioner's claims lacked merit.

LIST OF PARTIES

1. Petitioner Franek Olstowski was the plaintiff in the district court and the appellant in the court of appeals.
2. Respondent Petroleum Analyzer Company, L.P. was the defendant in the district court and the appellee in the court of appeals.
3. Atom Instrument Corporation (and successor Atom Instrument, LLC) was a co-plaintiff in the district court and co-appellant in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Publicly traded company Roper Technologies, Inc. owns 10% or more of Petroleum Analyzer Company, L.P.'s shares.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OPINIONS BELOW

In *Atom Instrument Corporation v. Petroleum Analyzer Company, L.P.*, 969 F.3d 210 (5th Cir. 2020), the court affirmed the district court's determination that Olstowski failed to prove Petroleum Analyzer Company, L.P. misappropriated his trade secret as defined in the confirmed arbitration award.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The Fifth Circuit Court of Appeals entered its Judgment on August 7, 2020.

STATUTORY PROVISIONS INVOLVED

Olstowski suggests that there was a dispute about whether a state court's confirmation of an arbitration award is considered a "judicial proceeding" for purpose of 28 U.S.C. § 1738. However, there was no such dispute. Olstowski lost in the lower courts because he failed to prove that Petroleum Analyzer Company, L.P. misappropriated his trade secret as defined in the confirmed arbitration award.

STATEMENT OF THE CASE

Introduction

Franek Olstowski's claim that the circuits are divided about whether a confirmed arbitration award is a "judicial proceeding" for purposes of 28 U.S.C. § 1738 is incorrect. All of the cases he cites as exemplifying the supposed divide hold that state court orders confirming arbitration awards are "judicial proceedings" for purposes of 28 U.S.C. § 1738. That is why the courts turned to *state law* to decide whether the confirmed award was preclusive of further federal court litigation—an analysis that is mandated by statute. *See* 28 U.S.C. § 1738 ("The . . . judicial proceedings of any court of any . . . state . . . shall have the same full faith and credit in every court within the United States . . . *as they have by law or usage in the courts of such state . . . from which they are taken*.") (emphasis added). The fact that courts may reach different conclusions regarding the preclusive effect of the judgment is due to variations in state law, not a disagreement over the meaning of "judicial proceeding."

After misconstruing the cases, Olstowski sets up a strawman argument, and not a very good one. He presents this case as though the parties disputed whether the lower courts were required to afford the arbitration award and the state court's confirmation of the award full faith and credit in determining whether Petroleum Analyzer Company, L.P. ("Petroleum") misappropriated his trade secret as he erroneously accused. There was no such dispute. Consequently, the lower courts

never ruled that the state court order confirming the arbitration award is not a "judicial proceeding" for purposes of 28 U.S.C. § 1738, perpetuating some (nonexistent) conflict among the circuits.

Indeed, the parties, the district court, and the court of appeals all understood that the confirmed arbitration award defined the technology in dispute. That is why throughout the nearly decade-long litigation, including the bench trial, Olstowski's attorney never uttered the words "full faith and credit." Nor are those words found anywhere in Olstowski's Rule 59(e) motion to alter the judgment or his Fifth Circuit Appellant's Brief or Reply Brief. The fact of the matter is Olstowski's accusation that Petroleum misappropriated his trade secret was wrong—something that the state court told him this after confirming the arbitration award; something the district court told him after analyzing the award and conducting a bench trial; and something the Fifth Circuit told him after reviewing the complex record.

In his attempt to re-characterize the dispute, Olstowski's petition omits a lot of factual and procedural history. Petroleum, therefore, files this response to provide this missing history. As the Court will see, this case was never about a dispute over full faith and credit. It was about Olstowski's inability to prove his erroneous allegation that Petroleum misappropriated the narrowly defined technology the arbitrator and the state court found to be associated with him.

Ultraviolet fluorescence for sulfur detection

Over decades, scientists have developed high-tech instruments to detect sulfur in various substances, including petro-chemicals. *See* ROA.4078, 4081, 4090, 4096, 4111; *see also* ROA.2896. One common method involves the use of ultraviolet fluorescence lamps that excite and reveal sulfur molecules—a method that is so prevalent that in 2000, the American Society for Testing and Material published D-5453 titled "Standard Test Method for Determination of Total Sulfur in Light Hydrocarbons, Motor Fuels and Oils by Ultraviolet Fluorescence." The basic test method is as follows:

> A hydrocarbon sample is either directly injected or placed in a sample boat. The sample or boat, or both, is inserted into a high temperature combustion tube where the sulfur is oxidized to sulfur dioxide (SO_2) in an oxygen rich atmosphere. Water produced during the sample combustion is removed and the sample combustion gases are next *exposed to ultraviolet (UV) light*. The SO_2 absorbs the energy from the UV light and is converted to excited sulfur dioxide (SO_2*). The fluorescence emitted from the excited SO_2* as it returns to a stable state SO_2 is detected by a photomultiplier tube and the resulting signal is a measure of the sulfur contained in the sample.

ROA.4114 (emphasis added); *see also* ROA.4090 (1996 scientific article entitled "Efficient Excimer Ultraviolet Sources from a Dielectric Barrier Discharge in Rare-Gas/Halogen Mixtures," recognizing that "[a]pplications of photo-induced process using ultraviolet (UV)

radiation have over the years become essential technologies in several industrial sectors involving . . . chemical reactions").

The ultraviolet light can derive from different sources, each of which may produce a different wavelength, measured in nanometers or "nm." To detect sulfur, a lamp that produces an ultraviolet light with a wavelength of 190 nm to 230 nm is optimum. ROA.2906. Common ultraviolet light sources include zinc, mercury, tungsten, and a host of other elements. ROA.2906.

The Antek 9000

In the 1990s, Petroleum—a leading manufacturer of sulfur-detecting technology—developed its Antek 9000 instrument which measures sulfur using a zinc ultraviolet lamp in accordance with the D-5453 method. ROA.4143-49, 2900. A sample is inserted into the Antek 9000's combustion chamber, causing gases to flow into the irradiation chamber where they are hit with ultraviolet light that excites the sulfur, which is then captured by the photomultiplier and analyzed. ROA.4146, 2902.

Excimer lamps

In the 1990s, scientists developed excimer lamps, which also produce ultraviolet light. Excimer, short for "excited dimer," is a combination of a noble gas and a reactive gas that produces ultraviolet light when excited by electricity. ROA.2397. Excimer lamps are

generally credited for being efficient and producing a wavelength of around 220 nm. *See* ROA.4090. A common excimer combination is krypton and chloride, but others exist as well, including argon-fluoride, krypton-fluoride, etc. ROA.4090-92, 2914, 3925.

The physical attributes of an excimer lamp as well as the ratio of the gas mixtures and pressures impact the result. *See* ROA.4092. In 1996, for example, scientists who conducted a study of an excimer lamp that used krypton and chloride carefully described those characteristics:

> The excimer lamp used in our experiments was cylindrical in shape, and the UV generated radiated outwards. It is composed of two concentric quartz tubes, outer and inner metallic electrodes, an external high-voltage generator, and cooling water. The outer quartz tube was 30 nm in diameter and had an active length of 80 nm (defined by the lengthy of the external covering of electrically grounded wire mesh acting as a transparent outer electrode). A radio frequency voltage between 3.5 and 10 kV was fed to the inner electrode in the frequency range of 125-375 kHz. The total pressure of rare-gas halide mixtures used was varied between 0.03 and 1 bar.

ROA.4092.

Based on these physical attributes and gas pressure, the krypton-chloride combination produced band radiation at 222 nm. ROA.4093 ("Figure 7 shows the UV intensity of the 222 nm emission generated by the

KrCl excimer lamp as a function of total gas pressure with a fixed Kr pressure").

Olstowski's excimer lamp

In December 2002, Olstowski, who provides consulting services in the oil and gas industry, filed a patent application titled "Excimer UV Fluorescence Detection" for claims 1 through 5. ROA.4150, 4171-75. According to Olstowski, his technology broadly consists of any excimer lamp with a "quartz envelope having a krypton-chloride excimer gas mixture therein." ROA.4171.

The United States Patent Office rejected his application, noting that the technology already exists as documented in several prior patents issued to, among others, Tanaka *et al*., Suzuki *et al*., Jinbo *et al*., and Byatt *et al*. ROA.4192. The use of krypton-chloride in an excimer lamp, the patent examiner explained, was nothing new:

> [S]uch lamps are well known as UV sources emitting at a wavelength of about 220 nm. Byatt teaches that UV excimer lamps are particularly desirable for use as fluorescence excitation lamps because they have qualities of high stability and long service life. As such, it would have been obvious to a person of ordinary skill in the art to modify the system disclosed by Tanaka so as to utilize krypton-chloride excimer gas excitation source in view of the appropriate emission wavelength and the long life and stability thereof.

ROA.4194; *see also* ROA.4285 (recognizing that Suzuki *et al.'s* patent features "a chamber having krypton-chloride gas"). Similarly, the use of a quartz envelope is "well known and considered conventional for use in UV sources due to its ability to pass UV band light efficiently." ROA.4193.

In April 2005, Olstowski amended his application, making slight changes to the wording of his claims. *See* ROA.4200-06. The patent examiner again rejected his amendments, noting that his semantical changes "are not persuasive" because the technology he claimed to have invented already exists; his descriptions were open ended; and he failed to describe any of the physical features of his excimer lamp that would distinguish it from existing technology. ROA.4253-54.

In December 2006, Olstowski submitted an amendment to his patent application stating: "Please amend the above-entitled patent application as follows." ROA.4265. In his amendment, he *cancelled* claims 1 through 5 and submitted new claims 6 through 9, all of which focus on the physical features of the excimer lamp that he developed. ROA.4265-67. Among other things, he emphasized that his excimer lamp is unlike existing technology because it has "an inner electrode comprising a conductive solid metallic rod" and an "emission aperture at a remote end of the quartz envelope." ROA.4266; *see also* ROA.4308 ("[t]he electrode is required to be a solid metallic rod"); ROA.4312 (describing his emission aperture).

On further review, the patent examiner approved Olstowski's amended application and issued a narrow patent for the excimer lamp that he developed—one that uses "an inner electrode comprising a conductive solid metallic rod" and "an emission aperture at a remote end of the quartz envelope." ROA.3474, 4285-86.

The arbitration

Before Olstowski began developing his version of an excimer lamp in 2002, Petroleum retained him as a consultant for research and development. In his June 15, 2001 consultant agreement with Petroleum, Olstowski agreed that "[a]ll . . . technology, prototypes, [and] products" that he develops "while providing services for [Petroleum] shall be the exclusive property of [Petroleum]." ROA.115.

In early 2002, Olstowski informed Petroleum about a general idea for developing "an excimer light source specifically intended to measure sulfur using ultraviolet . . . fluorescence." ROA.119. Petroleum gave him funding for the project and permitted him to use its employees and equipment. ROA.122, 126. Olstowski completed the development of his lamp by the end of 2002 and later submitted his amended patent application as described above. ROA.122.

Petroleum claimed proprietary rights to the excimer lamp that Olstowski developed under the consultant agreement. Olstowski asserted that a January 28, 2003 mutual non-disclosure agreement and a March 14, 2005 non-disclosure/non-use agreement—

both executed after he developed his specific version of an excimer lamp—recognize his proprietary rights to the excimer lamp that he developed. ROA.220, 138.

To resolve the dispute, in 2006, Petroleum filed a declaratory judgment lawsuit against Olstowski and his company, ATOM, in state court. ROA.514, 524, 90. Olstowski filed a counterclaim for fraud, negligent misrepresentations, and misappropriation of trade secrets. *See* ROA.197. The court ordered the claims to arbitration because the non-disclosure/non-use agreement included an arbitration clause. ROA.227.

On October 15, 2007, the arbitration panel issued its award. The panel determined that Petroleum did not misappropriate any trade secrets; that "[t]he closed-loop technology incorporated into [Petroleum's] Instruments is a technology that has been in the public domain for decades"; and that Petroleum is entitled to recover $211,493.05 from Olstowski. ROA.125-31.

Rejecting Olstowski's claimed ownership of the broad and pre-existing technology that he generally disclosed to Petroleum in early 2002 (*i.e.*, developing "an excimer light source . . . to measure sulfur using ultraviolet fluorescence"), the panel declared Olstowski to be the owner of the specific excimer lamp he developed before entering into the 2003 mutual non-disclosure agreement and the 2005 non-disclosure/non-use agreement. Specifically, in paragraph 5 of its conclusions of law, the panel determined that Olstowski's trade secret consists of:

a. the technology and methods embodied in the patent applications styled "Improved Ozone Generator with Duel Dielectric Barrier Discharge," "Improved Close-Loop Light Intensity Control and Related Fluorescence Application Method"; and "Excimer UV Fluorescence Detection";

b. all of the accompanying drawings, blueprints, schematics and formulas created or drawn by either Olstowski or Virgil Stamps of the application identified in or in support of (a) and (b) hereinafter referred to as the "Excimer Technology"); and

c. issued Patents and/or Patent Applications pending entitled: Ozone Generator with Dual Dielectric Barrier Discharge and Methods for Using Same, Improved Closed-Loop Light Intensity Control and Related Fluorescence Application Method, and Excimer UV Fluorescence Detection (as amended).

ROA.128.

The language "technology and methods" is important. Even looking to the pre-amended version of his patent application, Olstowski described his technology as having a specific "emission aperture at a remote end of the quartz envelope." ROA.3460. He described his method in the following terms: "the photons will leave the lamp via the emission aperture." ROA.3461.

The issued patent describes the technology and methods consistently. His technology has "an emission aperture at a remote end of the quartz envelope." ROA.3474. His method involves "the photons . . . leav[ing] the lamp via the emission aperture." ROA.3473. It goes on to describe his technology as including an internal power supply. ROA.3473. The technology also has "an inner electrode comprising a conductive solid metallic rod." ROA.3474. His method involves the electrodes working in tandem with the internal power supply: "A charge will begin to build between the electrodes. As the voltage or strength of the applied field continues to increase, **a critical point** known as dielectric breakdown is reached." ROA.3473. In sum, for Olstowski's excimer lamp to work, it required: (1) emission aperture; (2) internal power supply; (3) inner electrode comprising a conductive solid metallic rod.

The arbitration panel found no misappropriation but enjoined Petroleum "from claiming ownership in or using the technology developed by Olstowski" and "from interfering with Olstowski's use and enjoyment of *his excimer* and closed loop technology." ROA.129 (emphasis added). On November 6, 2007, the state court entered a one-page order confirming the arbitration award. ROA.136.

The Heraeus excimer lamp

In 2009, Petroleum developed its MultiTek instrument, which was similar to its Antek 9000, but instead

of using a zinc lamp, it used an excimer lamp that Petroleum purchased from Heraeus Noblelight—a German company founded in 1851 that is a leading developer of excimer technology. ROA.3074. Other than using the Heraeus excimer lamp in place of the zinc lamp, the MultiTek functioned in the same manner as the Antek 9000—it detected sulfur in accordance with the D-5453 method. ROA.2910.

The Heraeus excimer lamp is designed differently than Olstowski's excimer lamp. It has a hollow cylindrical inner electrode formed from polished aluminum ribbon, and it lacks an emission aperture, which permits the maximum amount of output to be emitted from the lamp. ROA.901, 953-54. Additionally, the Heraeus excimer lamp has to be plugged in, meaning it derives its power from a separate power source, while Olstowski's excimer lamp has a built-in power source. ROA.2805; *see also* ROA.2792.

In developing its MultiTek, Petroleum created a "clean room" environment, removing from the design and production process anyone who worked with Olstowski. ROA.3074, 2919. Further, it is undisputed that Olstowski never told Petroleum what the gas mixtures are in his excimer lamp, what the pressures are in his excimer lamp, or what the ratio of krypton to chloride is in his excimer lamp. ROA.944-47; *see also* ROA.2917-18. Thus, Petroleum could never have duplicated his excimer lamp or commissioned anyone else to duplicate it with the limited information it possessed. ROA.2918. Unsurprisingly, upon inspection of the Heraeus excimer lamp, Olstowski confirmed—

while testifying under oath at his deposition—that it simply was not his technology.[1] ROA.947.

Petroleum manufactured and sold its MultiTek that used Heraeus excimer lamps from approximately November 2009 through October 2011, when it switched back to a zinc lamp, which performed better in the MultiTek. ROA.2811. During that period, it sold 220 units, earning about $984,000 in net profit. ROA.2931, 2934.

The state court proceedings

Olstowski attempted to prevent Petroleum from marketing its MultiTek through a barrage of motions for contempt, motions for sanctions, and motions to enforce the panel's injunction—all filed in the same state court that confirmed the arbitration award. ROA.705-06. Olstowski urged the court to "immediately require [Petroleum] to cease and desist any and all activities whereby it uses the process of simultaneously using an excimer lamp to measure substances with fluorescence." ROA.4066. No doubt recognizing that this

[1] If there is any similarity between Olstowski's excimer lamp and the Heraeus excimer lamp, it is necessitated by the D-5453 process. Therefore, both excimer lamps (i) generate ultraviolet light; (ii) that is absorbable by sulfur dioxide (SO2), (iii) such that the SO2 is converted to excited SO2; (iv) thereby causing the excited SO2 to fluoresce in such a way that it can be detected by a photomultiplier tube; and (v) causing the photomultiplier tube to generate a signal that represents the amount of sulfur in the sample. ROA.901, 903. However, Olstowski did not invent this process. Other scientists did, long before he came up with his idea to develop a version of an excimer lamp.

technology has been in the public domain for decades and that Olstowski did not invent it, the court denied each motion. ROA.705-706.

Undeterred, Olstowski filed additional motions to hold Petroleum in contempt and for sanctions, arguing that Petroleum "has claimed ownership in the technology developed by Olstowski by developing . . . a product that uses an excimer light source that uses krypton-chloride specifically to measure sulfur using ultraviolet fluorescence." ROA.4909-10, 3935. Olstowski asked the court to require Petroleum to stop selling its MultiTek and to "disgorge itself," to the benefit of ATOM and Olstowski, all of its profits. *See* ROA.4021.

After conducting an evidentiary hearing on those motions, as well as a motion to enforce the injunction that Olstowski had filed previously, the court denied the motions "with prejudice," finding that Olstowski's technology is not nearly as broad as he claims and that Petroleum did not misappropriate his trade secrets. ROA.1070-71; *see also* ROA.2026. During the course of these proceedings, the court entered its October 17, 2011 order to clarify certain phrases used in the original confirmation order that a different judge signed four years earlier. ROA.3057. In doing so, the court confirmed that Olstowski's "excimer technology" consists of the "technology and methods" that the arbitration panel described in paragraph 5 of its conclusions of law, including the "technology and methods embodied in the patent application."

The federal court proceedings

ATOM filed for bankruptcy in early 2012, and, a couple months later, it and Olstowski filed another adversary proceeding, this time seeking $6.67 million from Petroleum for allegedly misappropriating trade secrets, engaging in unfair competition and committing civil theft as described in Texas Civil Practice & Remedies Code § 134.005. ROA.2745, 2323. ATOM and Olstowski demanded a jury trial but they would not consent to one in the bankruptcy court. *See* ROA.22. The district court removed the reference to the bankruptcy and asserted jurisdiction over the claims under 28 U.S.C. § 1334. ROA.23.

Early in the case, the district court asked the parties to "report on what they believe must be done next to progress the litigation." ROA.30. In response, and presumably seeking a more expansive and favorable definition of what constitutes their trade secret to ease their burden of proof with respect to their misappropriate claims, ATOM and Olstowski invoked the federal court's jurisdiction and asked the court to "make a ruling . . . defining what technology in dispute belongs to the Plaintiffs, to the exclusion of [Petroleum]." ROA.39.

Later, the court entered an order that stated, "Petroleum . . . will be liable for using the trade secrets of . . . Olstowski and ATOM . . . *if* it used his technology in its Multi-Tek." ROA.890 (emphasis added). The court then asked Petroleum to "file a one-page explanation of the similarities and differences of the specific

excimer light it used and Olstowski's technology." ROA.894. Petroleum described in detail the important technical and physical differences, including the differences discussed above. ROA.901. The court then ordered ATOM and Olstowski to "specify in technical terms exactly what Petroleum . . . was doing and how it infringed on their patent." ROA.111. ATOM and Olstowski filed a short response that failed to identify a single technical aspect of the excimer lamps. *See* ROA.1569-82.

In response to Atom and Olstowski's request "to make a ruling . . . defining what technology in dispute belongs to the Plaintiffs," ROA.39, the court entered an order that simply referred to the confirmed arbitration award, finding that Olstowski's technology consisted of:

> A. the technology and methods embodied in the patent applications styled "Improved Ozone Generator with Dual Dielectric Barrier Discharge," "Improved Closed-Loop Light Intensity Control and Related Fluorescence Application Method," and "Excimer UV Fluorescence Detection";
>
> B. all of the accompanying drawings, blueprints, schematics, and formulae created or drawn by either Franek Olstowski or Virgil Stamps of the application identified in or in support of items (A) and (B); and
>
> C. issued patents or patent applications pending, entitled "Ozone Generator with

> Dual Dielectric Barrier Discharge and Methods for Using Same," Improved Closed-Loop Light Intensity Control and Related Fluorescence Application Method," and "Excimer UV Fluorescence Detection" (as amended).

ROA.2043-44. ATOM and Olstowski did not quibble with the court's description. On the contrary, they advised the court that they were ready for trial. ROA.2052.

The trial

The bench trial occurred on July 24, 2018, and lasted only about six hours. *See* ROA.2777, 2955. Olstowski, who admitted that the Heraeus excimer lamp was not his technology, was present for the trial but chose not to testify. Instead, Olstowski's counsel called just two witnesses, Jonathan Goudy and Aaron Mendez, both former Petroleum employees. ROA.2781, 2820. While inspecting the Heraeus excimer lamp, Goudy testified: "It's a unique lamp. The center of its hollow . . . I mean, there's a number of things about this that make it unique." ROA.2804-05. In contrast, as Goudy explained, Olstowski's excimer lamp has "two solid electrodes." ROA.2805. Goudy also pointed out that the Heraeus excimer lamp has to be plugged in, meaning it derives its power from a separate power source while Olstowski's excimer lamp has a build-in power source. ROA.2805; *see also* ROA.2792. Moreover, Goudy acknowledged that the MultiTek technology

was patterned after Antek 9000 technology, not anything Olstowski developed. ROA.2814.

Mendez likewise acknowledged that there are differences in the excimer lamps including the fact that they are available through different vendors. That testimony prompted Olstowski's counsel to quibble with his witness, drawing judicial interference. ROA.2827-2828 ("You're arguing with him about his answer. His answer was there were differences in the source. One of the differences was it came from a different vendor, which sometimes is a big difference"). Moreover, Mendez acknowledged that he performed no comparative analysis of the two excimer lamps. *See* ROA.2848 ("I don't have the knowledge to detect those details of the lamp. I'm not an electrical engineer"); *see also* ROA.2851 (Mendez explaining that he cannot discuss physical attributes of the excimer lamps "unless I perform tests on it"). After Goudy and Mendez testified, Olstowski rested, choosing not to testify in support of his claims. ROA.2862.

Petroleum then presented two witnesses—Lisa Houston and David Oliveaux. ROA.2896, 2925. Oliveaux testified that Petroleum sold only 220 MultiTek units that used Heraeus excimer lamps and derived $984,000 in profit—a far cry from the $6.67 million ATOM and Olstowski demanded. ROA.2931, 2934. Houston, who worked at Petroleum for 19 years, testified that she had worked with Olstowski while he provided consulting services but never saw the physical features of his excimer lamp. ROA.2917. Houston explained that Olstowski never divulged the

combination, proportion, or pressures of the gases in his excimer lamp and that Petroleum was not privy to any information that would enable it to duplicate it. ROA.2916-2918. Houston also testified that anyone who worked with Olstowski was not involved with developing the MultiTek. ROA.2919. Choosing again not to testify, Olstowski did not rebut anything Houston said.

The findings

Recognizing the fundamental differences between the technology and methods used in the Heraeus excimer lamp and Olstowski's excimer lamp, the district court rejected Olstowski and ATOM's misappropriation and theft claims and entered a take-nothing judgment. ROA.2397, 2403. As the court correctly summarized:

> ATOM and Olstowski have not proved that the MultiTek used Olstowski's technology. They argue that the inclusion of the patent applications in the arbitration award's definition of Olstowski's technology means that it includes all excimer lamps to detect sulfur using ultraviolet fluorescence; however much of the general description of excimer-lamp technology in his patent applications can be found in other sources. Earlier scientific articles and patents disclose descriptions of how to use excimer technology to detect sulfur. What ATOM and Olstowski have shown is that Petroleum used an excimer lamp to detect sulfur using ultraviolet fluorescence. Petroleum agrees.

> What they have not shown is that the Multi-Tek's excimer lamp was sufficiently similar to Olstowski's excimer lamp to be his technology.
>
> . . .
>
> Olstowski's technology and the MultiTek are different in structure. The MultiTek's inner electrode is hollow—an aluminum spiral. Olstowski's is solid—a rod of some conductive metal. The MultiTek does not have an emission aperture; Olstowski's does. The emission aperture concentrates the output. Not having one allows the maximum output. Both lamps use krypton and chloride in some proportion. Whether they use those gases in the same proportion is unknown, because Olstowski did not tell Petroleum what ratio of krypton and chloride he used.
>
> . . .
>
> Petroleum did not use Olstowski's technology in its MultiTek.

ROA.2400.[2]

ATOM and Olstowski filed a motion to alter the judgment under Rule 59(e) and, the following day, a motion for amended and additional findings. ROA.2521, 2529. The district court denied those motions and

---

[2] Because Petroleum was the prevailing party, the district court also awarded its attorneys' fees pursuant Section 134.005(b) of the Texas Civil Practice and Remedies Code.

ATOM and Olstowski filed their appeal. ROA.2616-17, 2634.

The Fifth Circuit's Opinion

In their Appellants' Brief and their Reply Brief, ATOM and Olstowski never mentioned the words "full faith and credit." Rather, they described the central issue on appeal as follows: "this case . . . presents significant legal questions regarding the interpretation of the language and text of the patent application and patent that were the subject of the 2007 state court order and 2007 arbitration award." Appellants' Br. at iii.

Recognizing that the confirmed arbitration award described Olstowski's trade secret in terms of "the technology and methods" from his patent and application, referring to the specific "drawings, blueprints, schematics, and formula" and having reviewed the evidence presented at the bench trial, the court properly affirmed the judgment. Having reviewed the lengthy and complex record, the court reasoned that ATOM and Olstowski's two witnesses failed to demonstrate any significant similarities between Olstowski's technology and methods and those used in the MultiTek. *Petroleum Analyzer Company*, 969 F.3d at 216.

Plainly, neither the district court nor the court of appeals disregarded the confirmed arbitration award

in determining whether ATOM and Olstowski presented sufficient evidence to maintain a misappropriation of trade secret claim. To the contrary, unlike Olstowski who picks and chooses certain words and phrases from the award, the courts below gave effect to the award as a whole, recognizing that the case requires an analysis of the technology and methods he described in his patent—technology and methods that were unlike the MultiTek.

C**omment about Olstowski's Statement of the Case**

Olstowski states: "On December 27, 2002, Olstowski filed a patent application titled 'Excimer UV Fluorescence Detection,' which was granted later based on amendments to the application." Petition at 2. However, he does not explain the amendments. Olstowski cancelled claims 1 through 5 of his December 27, 2002 application after the patent examiner informed him that the broad technology he claimed already existed. *See* ROA.4265, 4193-94, 4285, 4253-54. The issued patent only includes Olstowski's claims 6 through 9 that he later added via an amendment of the application, which requires "an inner electrode comprising a conductive solid metallic rod" and "an emission aperture at a remote end of the quartz envelope." *See* ROA.3464, 3474; *see also* ROA.4268.

Olstowski claims that the allowed patent application included language that it "can take many and numerous forms." Petition at 4. However, this notion was

merely descriptive of his original patent application for claims 1 through 5 concerning the general idea of using an excimer light to measure sulfur using ultraviolet fluorescence. Olstowski later cancelled claims 1 through 5 after the patent examiner informed him that the technology already existed. *See* ROA.4265, 4193-94, 4285, 4253-54. The allowed amended patent application pertains to *his* excimer lamp, which uses "an inner electrode comprising a conductive solid metallic rod" and "an emission aperture at a remote end of the quartz envelope." ROA.4308, 3474. That is the developed technology he sought to protect under the 2003 mutual non-disclosure agreement and the 2005 non-disclosure/non-use agreement, both signed after he completed the development of his lamp in late 2002. ROA.122.

Olstowski states that the state court order confirming the arbitration award "did not stop [Petroleum] from selling about $10 million of devices (MultiTek) containing Olstowski's trade secret." Petition at 5-6. However, the United States Patent Office, the arbitration panel, the state court and the district court have all rejected Olstowski's broad claim that he has a claim to *all* excimer lamp technology used for detecting sulfur. Moreover, as noted, Petroleum sold only 220 MultiTek units that used Heraeus excimer lamps and derived $984,000 in profit. ROA.2931, 2934.

Olstowski suggests that the 2011 order somehow broadened the arbitration award and the state court order confirming the award. It did not. Consistent with the confirmation order, the 2011 order refers to "the

technology and methods embodied in the patent application styled, 'Excimer UV Fluorescence Detection,' as well as all of the accompanying drawings, blueprints, schematics, and formulae created or drawn by either Olstowski or Virgil Stamps." ROA.3057-58. It also refers to "the technology and methods substantially identical to at least one of the embodiments of the inventions described in the patent issued by U.S. Patent No. 7,268,355, titled, 'Excimer UV Fluorescence Detection.'" *Id.*

Olstowski states: "Significantly, an affidavit by [Petroleum's] then-president . . . conceded that the 2011 Order prohibited [Petroleum's] use of an excimer light source using krypton-chloride specifically to measure sulfur using UV fluorescence." Petition at 7-8. That is incorrect. In his affidavit, Tim Winfrey did not say that the October 2011 order "prohibited" anything. He said the order "could be interpreted" in a certain way, particularly by someone who does not understand the limitations contained in the patent application, the patent, as well as the arbitration award. ROA.3077.

Lastly, Olstowski states, "the Fifth Circuit concluded that what the state-court orders declared was Olstowski's trade secret—'an excimer light source that uses Krypton-Chloride specifically to measure sulfur using ultraviolet fluorescence'—was not a trade secret at all." Petition at 9. That is also incorrect. Consistent with the district court's findings and the full text of the confirmed arbitration award, the court recognized that Olstowski's trade secret was more complex and must be reviewed with reference to his technologies and

method embodied in his patent and patent application, as well as is blueprints, schematics, and formulae. *Petroleum Analyzer Company*, 969 F.3d at 213.

REASONS FOR DENYING THE PETITION

I. The circuits are not divided over whether a state court order confirming an arbitration award is a "judicial proceeding" under 28 U.S.C. § 1738.

28 U.S.C. § 1738 provides in pertinent part: "The records and judicial proceedings of any court of any . . . state . . . shall have the same full faith and credit in every court within the United States . . . *as they have by law or usage in the courts of such state . . . from which they are taken*." 28 U.S.C. § 1738 (emphasis added). According to Olstowski, five circuit decisions reflect a conflict over whether state court confirmation orders are "judicial proceedings" for purposes of 28 U.S.C. § 1738. However, there is no conflict. Each case recognizes that a confirmed arbitration award is a "judicial proceeding," thereby invoking an analysis of state law concerning the preclusive effect of the confirmation order. Any variation in the results of that analysis reflects variances in state law, as 28 U.S.C. § 1738 expressly contemplates, not disagreement over whether a confirmed arbitration award constitutes a "judicial proceeding."

In *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir. 1989), the Ninth Circuit recognized: "The state

court's confirmation of the arbitration award constitutes a judicial proceeding for purposes of section 1738, and thus must be given the full faith and credit it would receive under state law." *Id*. at 1178. Because the confirmed arbitration award was preclusive under Hawaii law, the court held that the matter decided in arbitration was preclusive. *See id*. at 1178-89.

In *Ryan v. City of Shawnee*, 13 F.3d 345 (10th Cir. 1993), the Tenth Circuit recognized: "Under the full faith and credit statute, federal courts must give the judicial proceedings of any state court the same preclusive effect that those judgments would be given by the courts of that state." *Id.* at 347. It then explained: "[W]here the arbitration award was challenged and reviewed in state court, as here, section 1738 requires that we ascertain and give the same effect to the state court judgments as the courts of Oklahoma would give a state court decision affirming the arbitration award." *Id.* After analyzing Oklahoma law, the court held that "Oklahoma courts would not give preclusive effect to a decision affirming an arbitration award under the circumstances here." *Id.* at 348.

In *Fayer v. Town of Middlebury*, 258 F.3d 117 (2d Cir. 2001), the Second Circuit recognized: "The mandate of 28 U.S.C. § 1738 requires that 'judicial proceedings [of any court of any State] shall have the same full faith and credit in every court within the United states . . . as they have . . . in the Court of such State.' The statute requires that we 'give the same preclusive effect to [the] state Court judgments that those judgments would be given in the courts of the State from

which the judgments emerged.'" *Id*. at 123-24. Because "the award was confirmed by the Connecticut Superior Court," *id*. at 120, "[i]t poses the question whether Connecticut courts would give the judicial proceedings in which the arbitration award was confirmed preclusive effect barring litigation of Fayer's First Amendment claims." *Id.* at 124. After analyzing Connecticut law, the court held: "We conclude that Connecticut courts would not give preclusive effect to the confirmation judgment at issues here." *Id.*

In *Myer v. Americo Life, Inc*., 469 F.3d 731 (8th Cir. 2006), the Eighth Circuit recognized: "28 U.S.C. § 1738, the Full Faith and Credit statute, provides in pertinent part [that] 'Such Acts, records and judicial proceedings . . . shall have the same full faith and credit in every court within the United States . . . as they have . . . in the courts of such State . . . from which they are taken.'" *Id.* at 734 n.9. Because "the Texas state court issued a final judgment confirming the arbitration award," *id*. at 732, the court turned to Texas law, which it recognized "determines the preclusive effect of the Texas state court's judgment." *Id.* at 733 n.7. Ultimately, the court held that "[t]he Texas state court has now fully and finally resolved the same issues Myer pressed before the district court." *Id.* at 734.

Lastly, in *W.J. O'Neil Co. v. Shepley, Bulfinch, Richardson & Abbott, Inc*., 765 F.3d 625 (6th Cir. 2014), the Sixth Circuit held: "Here, the record contains no indication that the arbitration award was confirmed or otherwise reviewed by a Michigan court, so the Full

Faith and Credit Act does not require our court to consult Michigan preclusion law." *Id.* at 629.

Olstowski's take away from these cases—that "courts of appeals have taken starkly different views on the meaning of 'judicial proceedings' "—is incorrect. All of the cases are consistent on this issue: Confirmed arbitration awards are judicial proceedings for purposes of 28 U.S.C. § 1738.

II. Olstowski failed to prove his claims.

The lower courts properly determined that Petroleum did not misappropriate Olstowski's trade secrets or technology. The confirmed arbitration award as well as the order the federal district entered after Olstowski asked it to "make a ruling . . . defining what technology in dispute belongs to the Plaintiffs, to the exclusion of [Petroleum]," recognize that his technology consists of "the technology and methods embodied in the patent application" including the "drawings, blueprints, schematics and formulas." Olstowski's patent application and approved patent recognizes that he invented a version of an excimer lamp that has "an inner electrode comprising a conductive solid metallic rod" and "an emission aperture at a remove end of the quartz envelope." It is undisputed that the Heraeus excimer lamp that Petroleum used in its MultiTek did not have the same physical features as Olstowski's lamp. Accordingly, the district court properly rejected

Olstowski's misappropriation and theft claim and the Fifth Circuit properly affirmed.

CONCLUSION

Petroleum, which has been defending against the onslaught of bogus allegations that its MultiTek product misappropriated ATOM and Olstowski's technology since at least as far back as 2009, respectfully requests this Court to deny Olstowski's petition for writ of certiorari.

Respectfully submitted,

STEVEN J. KNIGHT
Texas Bar No. 24012975
CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & AUGHTRY
1200 Smith Street, Suite 1400
Houston, Texas 77002
(713) 654-9603
steven.knight@chamberlainlaw.com