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November 3, 2019

VIA ELECTRONIC CASE FILING (ECF)

Colonel Peter R. Marksteiner
Circuit Executive & Clerk of the Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

Re: Fed. R. App. P. 28(j) Submission for *Arthrex, Inc. v. Smith & Nephew, Inc., et al.*,
Case No. 2018-1584

Dear Colonel Marksteiner,

This letter responds to the letter that Appellant Arthrex, Inc. (“Arthrex”) submitted to the Court on November 1, 2019 (Dkt. No. 72) concerning *Arthrex, Inc. v. Smith & Nephew*, No. 2018-2140, 2019 U.S. App. LEXIS 32613 (Fed. Cir. Oct. 31, 2019) (“the *Arthrex* decision”).

Through its letter, Arthrex seeks to raise *for the first time* “an Appointments Clause challenge in the present appeal.” Dkt. No. 72 at 1. Arthrex unquestionably did not raise such a challenge in its opening brief. Dkt. 19. “Consequently, [this Court] must treat that argument as forfeited in [this] appeal[.]” *Customedia Techs., LLC v. Dish Network Corp.*, Case No. 2018-2239 (Fed. Cir. Nov. 1, 2019) (precedential order) (finding Appointments Clause challenge raised for the first time in a notice of supplemental authority forfeited).

Arthrex’s forfeiture is even more inexcusable than Customedia’s forfeiture—unlike the Customedia appeals, oral argument has been heard in the present appeal (Dkt. No. 65), a precedential decision has issued (Dkt. No. 68), and Arthrex even filed a request for rehearing weeks ago that did not raise an Appointments Clause challenge (Dkt. No. 70).

Finally, Arthrex cannot credibly contend that the *Arthrex* decision represents the type of significant change in the law that may justify excusing Arthrex’s forfeiture. This Court finds such significant changes in law to occur only when any attempt to raise the challenge prior to the relevant change in the law would have been futile. *E.g., BioDelivery Scis. Int’l, Inc. v. Aquestive Therapeutics, Inc.*, 898 F.3d 1205, 1209 (Fed. Cir. 2018) (in the SAS-context, finding that “waiver does not apply” because the argument “would have been futile under the Board’s regulations and our precedent”). Arthrex cannot argue that it would have been futile to advance



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its Appointments Clause challenge—it was advancing that very challenge in its co-pending No. 2018-2140 appeal and the issue was one of first impression for this Court.

Arthrex's exceedingly belated attempt to introduce an Appointments Clause challenge into this appeal should be rejected.

Very truly yours,

WOLF, GREENFIELD & SACKS, P.C.

A handwritten signature in blue ink, appearing to read "Nathan R. Speed".

Nathan R. Speed

Counsel for Appellees Smith & Nephew,
Inc. and ArthroCare Corp.