Appeal No. 2019-1001

United States Court of Appeals

for the

Federal Circuit

CUSTOMEDIA TECHNOLOGIES, LLC,

Appellant,

– v. –

DISH NETWORK CORPORATION, DISH NETWORK L.L.C.,

Appellees.

Appeal from the United States Patent and Trademark Office
Patent Trial and Appeal Board, Case No. CBM2017-00019

APPELLANT'S COMBINED PETITION FOR REHEARING AND REHEARING EN BANC

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Counsel for Appellant
Customedia Technologies, LLC

Dated: January 7, 2020

CERTIFICATE OF INTEREST

Counsel for Customedia Technologies, LLC, certifies the following:

1. The full name of every party represented by me is:

   Customedia Technologies, LLC.

2. The name of the real party in interest represented by me is:

   Customedia Technologies, LLC.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by me are:

   Texas Customedia LLC.

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or agency or are expected to appear in this court are:

   The Mort Law Firm, PLLC: Raymond W. Mort, III,

   Ross D. Snyder & Associates, Inc.: Ross Snyder,

   Pillsbury Winthrop Shaw Pittman, LLP: Steven Tepera,

   Kasha Law, LLC: John R. Kasha, Kelly L. Kasha, and

   Reed & Scardino, LLP: Daniel Scardino.

5. Pursuant to Fed. Cir. R. 47.4, counsel for Customedia states that this case may directly affect or be directly affected by this Court's decision in the pending appeal:

United States District Court actions involving the patent at issue

Customedia Technologies, LLC v. DISH Network Corporation, and DISH Network L.L.C., Civ. No. 2:16-CV-00129 (JRG), United States District Court for the Eastern District of Texas (filed on February 10, 2016).

Dated: January 7, 2020

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STATEMENT OF RELATED CASES

Pursuant to Fed. Cir. R. 47.5(a), counsel for Customedia, certifies that no other appeal from the same proceeding was previously before this Court or any other appellate court, whether under the same or a similar title.

Pursuant to Fed. Cir. R. 47.5(b), counsel for Customedia states that the Court's decision in this appeal may affect the following judicial and administrative matters:

United States District Court actions involving the patent at issue

Customedia Technologies, LLC v. DISH Network Corporation, and DISH Network L.L.C., Civ. No. 2:16-CV-00129 (JRG), United States District Court for the Eastern District of Texas (filed on February 10, 2016).

STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the following decisions of the Supreme Court and this Court: *Harper v. Virginia Department of Taxation*, 509 U.S. 86 (1993); *BioDelivery Science International, Inc. v. Aquestive Therapeutics, Inc.*, 898 F.3d 1205 (Fed. Cir. 2018).

Based on my professional judgment, this appeal requires an answer to questions of exceptional importance: (1) whether a litigant can waive a constitutional defense based on an intervening change of law that implicates important issues of public concern; and (2) whether, after *Arthrex*, the Director's delegation of institution authority to APJs acting as principal officers violated 35 U.S.C. § 324 and due process of law.

Raymond W. Mort, III

Counsel for Appellant
Customedia Technologies, LLC

PRELIMINARY STATEMENT

Arthrex, Inc. v. Smith & Nephew, Inc., 941 F.3d 1320 (Fed. Cir. 2019), announced a significant change of law. This Court held that Patent Trials and Appeals Board ("PTAB") judges, who have presided over thousands of *inter partes* review and post-grant review proceedings, were unconstitutionally appointed. Significantly, the Court announced this change after twice rejecting the same Appointments Clause arguments on Rule 36.

This petition gives the full *en banc* Court the opportunity to decide whether *Arthrex* applies to parties in all open cases, or merely the few that raised an Appointments Clause challenge in an opening brief filed before *Arthrex* issued. Rehearing by the *en banc* Court is warranted because the rigid imposition of waiver here conflicts with this Court's precedents that excuse waiver when a party promptly raises an issue following a significant change of law. *See, e.g.*, *BioDelivery Sci. Int'l, Inc. v. Aquestive Therapeutics, Inc.*, 898 F.3d 1205 (Fed. Cir. 2018). Moreover, the underlying issue involves "exceptionally important" questions of private property rights that, by definition, have been decided by officials who were unconstitutionally appointed and thus acting *ultra vires*.

Arthrex, 941 F.3d at 1327. This issue, arising in dozens of pending appeals, carries wide significance both to the public and for how this Court will consistently and fairly address the application of new law to pending cases. Further, the Nov. 1 precedential order on the waiver question was issued without the benefit of any briefing or argument regarding waiver. Dkt. No. 49. *En banc* review is warranted to fully consider these issues.

What's more, the *Arthrex* decision undermines the Director's authority to delegate the institution of BioMarin's petition under 35 U.S.C. § 324 to APJs acting not as subordinates, but as independent principal officers outside the Director's review. This Court should also grant *en banc* review to resolve the implications of *Arthrex* on the Director's unconstitutional delegation of institution authority to ALJs acting as principal officers.

STATEMENT OF THE CASE

On July 25, 2018, a panel of three Administrative Patent Judges ("APJs") issued a Final Written Decision ("FWD") determining Claims 1, 9, 10, and 13-16 of U.S. Patent No. 7,840,437 (the "'437 Patent") unpatentable.

On Sept. 21, 2018, Customedia timely filed its notice of appeal of the FWD in CBM2017-00019.

On Feb. 13, 2019, Customedia filed its opening brief, and on June 5, 2019, Customedia filed its reply brief. In neither the opening nor the reply brief did Customedia raise an Appointments Clause challenge.

On Oct. 31, 2019 at 3:47 p.m., this Court issued its opinion in *Arthrex*. *Arthrex* addressed the constitutionality of the appointment of the Board's Administrative Patent Judges ("APJs"). This Court held:

> [T]hat APJs are principal officers under Title 35 as currently constituted. As such, they must be appointed by the President and confirmed by the Senate; because they are not, the current structure of the Board violates the Appointments Clause.

Arthrex, 941 F.3d at 1320.

On Nov. 1, 2019 at 8:39 a.m., Customedia filed a Notice of Supplemental Authority Pursuant to Fed. R. App. P. 28(j) (Notice of

Supp. Auth.), which raised an Appointments Clause challenge in light of the significant change in the law based on the *Arthrex* opinion. Dkt. No. 46.

On Nov. 1, 2019 at 2:40 p.m., Customedia filed its Motion to Vacate in light of the significant change in the law based on the *Arthrex* opinion. Dkt. No. 47.

On Nov. 1, 2019 at 4:36 p.m., Customedia filed its Motion for Leave which raised an Appointments Clause challenge. Dkt. No. 48 (arguing that the *Arthrex* decision declaring the Appointments Clause for APJs was a significant change in the law). The Motion for Leave included a Supplemental Brief ("Supp. Br.") addressing the Appointments Clause violation in the appointment of APJs. *Id*.

On Nov. 1, 2019 at 5:24 p.m., without the benefit of briefing or argument on the applicability of the *Arthrex* holding and whether waiver applied, this Court issued an order denying Customedia's Motion to Vacate. Dkt. No. 49. In this order, the Court determined Customedia had waived the Appointments Clause challenge for failure to raise the issue in the opening brief.

On Nov. 6, 2019, the Court heard oral arguments on the merits.

On Nov. 7, 2019, this Court issued an order denying Customedia's Motion for Leave. Dkt. No. 52.

On Nov. 8, 2019, this Court issued a summary affirmance pursuant to Federal Circuit Rule 36. Dkt. No. 52.

On Nov. 8, 2019, Bedgear filed a Petition for Rehearing arguing the holding in *Arthrex* applied because *Bedgear* raised the Appointments Clause challenge in its opening brief. *Bedgear, LLC v. Fredman Bros. Furniture Co.*, 18-2170, Dkt. No. 56. On Nov. 12, 2019, the Court invited the appellee to respond to the petition.

On Nov. 22, 2019, the Court granted Customedia a 30-day extension to for it to file a petition for rehearing. Dkt. No. 55.

On Dec. 12, 2019, Duke University filed a Petition for Rehearing arguing the holding in *Arthrex* applies to all pending appeals and that waiver does not apply due to a significant change in the law. *Duke University v. BioMarin Pharmaceutical Inc.*, No. 18-1696, Dkt. No. 54. Duke had not raised the Appointments Clause challenge in its opening brief. On Jan. 2, 2020, the Court invited the appellee to respond to the petition.

On Dec. 16, 2019, *Arthrex*, Arthrocare, and the United States each filed a Petition for Rehearing challenging the holdings and applicability *Arthrex*. *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 18-2140, Dkt. Nos. 77-79. On Jan. 3, 2020, the Court invited all parties to respond to the petitions.

On Dec. 16, 2019, Customedia filed a motion for reconsideration of the Nov. 1 and Nov. 7 orders.

On Dec. 19, 2019, Sanofi filed a Petition for Rehearing arguing the holding in *Arthrex* applies to all pending appeals and waiver does not apply due to a significant change in the law. *Sanofi-Aventis Deutschland v. Mylan Pharmaceuticals Inc.*, No. 19-1368, Dkt. No. 63. Sanofi had not raised the Appointments Clause challenge in its opening brief. The Court has not yet announced whether it will invite the appellee to respond to the petition.

On Dec. 23, 2019, the *en banc* Court denied Customedia's motion for reconsideration. Dkt. No. 63.

On Jan. 6, 2020, Polaris, Kingston, and the United States filed supplemental briefs addressing four issues relating to the constitutionality of the appointment of APJs. *Polaris Innovations*

Limited v. Kingston Technology Co., Inc., No. 18-1768, Dkt. Nos. 96, 98, 100.

ARGUMENT

I. The *En Banc* Court Should Decide Whether *Arthrex* Applies to all Pending PTAB Appeals

A. The Court Failed to Apply an Intervening Change of Law

Both the Supreme Court and this Court have long held that when the law changes while a case is pending on appeal, "an appellate court must apply the law in effect at the time it renders its decision." *Thorpe v. Hous. Auth. of Durham*, 393 U.S. 268, 281 (1962). As the Supreme Court explained, "[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review." *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993). This principle preserves "the integrity of judicial review": after courts announce a new rule, courts are required to "apply that rule to all similar cases pending on direct review." *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987). Federal courts thus have no "constitutional authority" to

"disregard current law or to treat similarly situated litigants differently." *Harper*, 509 U.S. at 97 (citation omitted).

Thus, although the ordinary rule of appellate practice is that "arguments not raised in [an] opening brief are waived," *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006), that rule is subject to an important exception. "[A] party does not waive an argument that arises from a significant change in law during the pendency of an appeal." *BioDelivery*, 898 F.3d at 1208–09 (citation omitted); *see also Hormel v. Helvering*, 312 U.S. 552, 558–59 (1941) (waiver does not apply in "those [cases] in which there have been judicial interpretations of existing law after decision below and pending appeal—interpretations which if applied might have materially altered the result"). As this Court has emphasized, "a sufficiently sharp change of law sometimes is a ground for permitting a party to advance a position that it did not advance earlier in the proceeding when the law at the time was strongly enough against that position." *In re Micron Tech., Inc.*, 875 F.3d 1091, 1097 (Fed. Cir. 2017).

Accordingly, in *BioDelivery*, this Court held that a party did not waive its request for a remand under *SAS Institute, Inc. v. Iancu*, 138 S.

Ct. 1348 (2018), raised for the first time in a Rule 28(j) letter after oral argument, because *SAS* reflected an intervening change of law. 898 F.3d at 1209. Rejecting arguments that BioDelivery should have raised the issue in briefing before the law changed, this Court held that "BioDelivery acted promptly" by filing a Rule 28(j) letter nine days after *SAS* issued. *Id.*; *see also In re Micron*, 875 F.3d 1091 (entertaining arguments based on the change of law articulated in *TC Heartland v. Kraft Food Brands Group*, 137 S. Ct. 1514 (2017)).

Arthrex ushered in a "significant change of law" within the meaning of these precedents. Before *Arthrex*, this Court had reviewed thousands of PTAB appeals, without questioning the PTAB's constitutionality. Indeed, this Court had *twice* rejected—under Rule 36—precisely the same Appointments Clause challenge that ultimately was successful in *Arthrex*. *See Trading Techs. Int'l, Inc. v. IBG LLC*, 771 F. App'x 493 (Fed. Cir. 2019); *Bedgear, LLC v. Fredman Bros. Furniture Co.*, 779 F. App'x 748 (Fed. Cir. 2019).[1]

[1] The Supreme Court also denied certiorari in a case presenting the same Appointments Clause question. *Smartflash LLC v. Samsung Elecs. Am., Inc.*, 139 S. Ct. 276 (2018); Petition for Writ of Certiorari at 18, *Smartflash LLC*, No. 18-189, 2018 WL 3913634 (2018).

Moreover, the Supreme Court last year upheld the constitutionality of the IPR proceedings, including against a challenge that the PTAB judges exercised powers beyond their authority as non-Article III judges. *Oil States Energy Servs. v. Greene's Energy Grp.*, 138 S. Ct. 1365 (2018). Prior decisions of this Court, too, strongly suggested that the statutory scheme, including as it related to the appointment of APJs, *was* permissible. *See, e.g.*, *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1031–33 (Fed. Cir. 2016) (holding that the Director was permitted to delegate institution authority to "subordinate officers" (*i.e.*, APJs) under the statute); *In re Alappat*, 33 F.3d 1526, 1533– 35 (Fed. Cir. 1994) (en banc) (*abrogated on other grounds*) (under predecessor *inter partes* reexamination regime, holding then-Commissioner's ability to "determine the composition of Board panels" provided the necessary officer oversight). This Court had also held that Congress's reaction to a 2008 Appointments Clause challenge by re- delegating the appointment of APJs to the Secretary of Commerce "eliminat[ed] the issue of unconstitutional appointments going forward." *In re DBC*, 545 F.3d 1373, 1380 (Fed. Cir. 2008).

Observers also viewed *Arthrex* as marking a dramatic change in the law. For example, the Chairman of the House Committee on the Judiciary described it as "remarkable" that *Arthrex* questioned "the constitutionality of the PTAB's structure" after "the many cases that have gone before the PTAB and then to federal court, and an earlier constitutional challenge to the PTAB that the Supreme Court rejected." *The PTAB & the Appointments Clause: Implications of Recent Court Decisions Before the Subcomm. on Courts, IP, and the Internet of the H. Comm. of the Judiciary*, 116th Cong. (Nov. 19, 2019) (statement of Rep. J. Nadler).

Against this background of the existing state of the law and the apparent constitutionality of the PTAB and its judges, Customedia did exactly as this Court's precedent instructs, raising *Arthrex*—a change of law occurring after the close of briefing—"in a citation of supplemental authority as authorized by Fed. Cir. R. 28(j)," within 16 hours of the issuance of the *Arthrex* decision. *Mylan Pharm. Inc. v. Research Corp. Techs.*, 914 F.3d 1366, 1377 (Fed. Cir. 2019). A few hours later, Customedia followed with a motion to vacate and remand. Thereafter,

within hours, Customedia filed a motion for leave to file supplemental briefing, along with a supplemental brief, to raise the *Arthrex* issue.

Indeed, rigidly imposing a waiver rule notwithstanding such a significant change in the law can "encourage frivolous objections and appeals," thus working *against* the judicial efficiency that waiver rules aim to promote. *United States v. Viola*, 35 F.3d 37, 42 (2d Cir. 1994) (*abrogated on other grounds*); *see also McKnight v. Gen. Motors Corp.*, 908 F.2d 104, 108 (7th Cir. 1990) (Posner, J.) ("A party should be allowed to take advantage of a decision rendered during the pendency of his case, even if he had not reserved the point decided A contrary rule would induce parties to drown the trial judge with reservations.").

The *en banc* Court's guidance is warranted to reaffirm the importance of the intervening change in the law exception. To ensure "[t]he foundation of a nation ruled by law," *Arthrex* and other changes of law must be "applied in the same way to parties in pending litigation."[2] Dissent at 7. If left to stand, the panel's holding here risks disrupting

[2] Several *en banc* petitions have been relating to *Arthrex*. Should the Court grant any, it should also rehear this case in tandem, to determine all issues pertaining to *Arthrex*, including as to preservation.

those foundations not only with respect to *Arthrex*, but in future cases affected by intervening changes of law.

B. The Court Overlooked the Exceptional Circumstances Excusing Waiver

En banc rehearing is also warranted because the panel majority ignored several of the additional considerations the Supreme Court and this Court have identified as "relevant to overlooking a failure to preserve an issue." *Automated Merch. Sys., Inc. v. Lee*, 782 F.3d 1376, 1379 (Fed. Cir. 2015). These include the fact that the underlying Appointments Clause issue involves "a pure question of law" on a "significant question of continuing public concern" and that the "proper resolution of the issue is beyond any doubt" given that *Arthrex* conclusively answers the Appointments Clause question. *Id. En banc* rehearing is warranted for the Court to consider these important factors, many of which the Court already acknowledged in *Arthrex*, and which weigh in favor of excusing waiver here.

At the outset, the Appointments Clause issue is a pure question of law—and it is one that this Court had already conclusively answered before the panel issued its decision here. *Arthrex* held that APJs were unconstitutionally appointed and that the remedy was a remand for a

new proceeding before properly appointed APJs. Thus, the "proper resolution" of the Appointments Clause question was not debatable: all the panel had to do in this case was to follow binding circuit precedent and supply the relief *Arthrex* directs—vacate and remand. For the same reason, DISH could not be prejudiced by applying *Arthrex* here. Even if Customedia had raised the Appointments Clause issue in its opening brief, the result would have been the same: the panel would have followed *Arthrex* and vacated and remanded. *See, e.g.*, *Uniloc 2017 LLC v. Facebook, Inc.*, 783 F. App'x 1020 (Fed. Cir. Oct. 31, 2019). Any argument DISH might have made in response could not have changed that outcome. *See Automated Merch.*, 782 F.3d at 1380.

Moreover, structural constitutional challenges—in particular, those implicating separation of powers questions—pose important public concerns, and generally "should not be deemed waived when they relate to the foundations of governmental process." *Ninestar Tech. Co. v. Int'l Trade Comm'n*, 667 F.3d 1373, 1382 (Fed. Cir. 2012); *cf. Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850–51 (1986) ("To the extent that this structural principle is implicated in a given case, the parties cannot by consent cure the constitutional difficulty.").

That is why, in *Freytag v. C.I.R.*, the Supreme Court recognized that Appointments Clause challenges raise important structural constitutional questions that warranted review notwithstanding the parties' consent and failure to raise the issue below. 501 U.S. 868, 878–79 (1991). "The Clause is a bulwark against one branch aggrandizing its power at the expense of another branch, but it is more: it 'preserves another aspect of the Constitution's structural integrity by preventing the diffusion of the appointment power.'" *Ryder v. United States*, 515 U.S. 177, 182 (1995) (quoting *Freytag*, 501 U.S. at 878). Thus, "the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers" overcomes the usual rule of entertaining only preserved issues on appeal. *Freytag*, 501 U.S. at 879 (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)). Consequently, the Supreme Court has allowed Appointments Clause challenges where, as here, a party first raised the issue in "a supplemental brief upon a second request for review." *Glidden*, 370 U.S. at 536 (citing *Lamar v. United States*, 241 U.S. 103, 117 (1916)).

Indeed, *Arthrex* echoed these concerns, and itself recognized the "exceptional importance" of the Appointments Clause concerns in

exercising its "discretion to decide the issue over a challenge of waiver." 941 F.3d at 1327. This Court further emphasized that "[s]eparation of powers is a fundamental constitutional safeguard and an *exceptionally important* consideration in the context of *inter partes* review proceedings." *Id.* at 1326–27 (internal quotation marks and citation omitted) (emphasis added). Specifically, this Court recognized, the Appointments Clause issue "has a wide-ranging effect on property rights and the nation's economy," requiring timely resolution to "provid[e] certainty to rights holders and competitors alike who rely upon the *inter partes* review scheme to resolve concerns over patent rights." *Id.* at 1327. Because the Board's IPR process "exercise[s] the executive power" over these rights, *id.*, it is vital that determinations be made by officers appointed by those "accountable to political force and the will of the people." *Freytag*, 501 U.S. at 884.

The Appointments Clause and separation of powers issues are no less "exceptionally important" here than they were in *Arthrex*. It remains the case that, just as in *Arthrex*, the APJs who heard and decided the CBM proceeding were unconstitutionally appointed. This implicates the same concerns about significant constitutional safeguards that *Arthrex*

recognized and that the Supreme Court has insisted on for decades. Consistency with this Court's and the Supreme Court's precedents warrants applying the same considerations here. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 537 (1991) ("[T]he principle that litigants in similar situations should be treated the same [is] a fundamental component of *stare decisis* and the rule of law.").

II. After *Arthrex*, The Director's Delegation of Institution Authority to APJs Acting as "Principal Officers" Violated 35 U.S.C. § 324 and Due Process of Law

In § 324, Congress expressly assigned institution authority to the Director. 35 U.S.C. § 324(a), (c) ("The Director shall determine whether to institute a post-grant review"). The Director, however, has delegated institution authority to the Board. 37 C.F.R. § 42.4(a).

In *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1031-33 (Fed. Cir. 2016), this Court held that the Director was permitted to delegate institution authority to "subordinate officers"—APJs—under 35 U.S.C. § 314(a). *Arthrex*, however, is clear that APJs were not subordinate after all—rather, they were "principal officers." 941 F.3d at 1327-1335. Indeed, the Director's "control and supervision of the APJs is not sufficient to render them inferior officers." *Id*. at 1335.

As Judge Newman noted in her *Ethicon* dissent, "[t]he statute requires that these proceedings be separated, the first decision required to be made by the Director, and the second decision made by the Board." 812 F.3d at 1035 (Newman, J., dissenting). In fact, bifurcation between the Director and the Board was critical to protecting due process guarantees of "a fair trial in a fair tribunal." *Id*. at 1038 (citation omitted); *see also Ethicon Endo-Surgery, Inc. v. Covidien LP*, 826 F.3d 1366, 1367-69 (Fed. Cir. 2016) (Newman, J., dissenting from denial of reh'g en banc) (Congress expressly vesting the Director with the authority to institute review ensures that "constitutionally mandated patent rights were not abrogated without due process of law"). Nevertheless, the majority in *Ethicon* justified the Director's delegation of institutional decisions based, at least in part, on the APJs' status as "subordinate officers." 812 F.3d at 1031-33.

This Court's decision in *Arthrex* is a fundamental change in the law that undermines the core of the *Ethicon* majority's rationale. *See Polaris*, 724 F. App'x at 949-50 (holding waiver inapplicable). APJs did not institute trials as "subordinate officers" as contemplated in *Ethicon*, 812 F.3d at 1031-33, but as independent principal officers that the Director

could not "review, vacate, or correct." *Arthrex*, 941 F.3d at 1335. The Director's delegation under 37 C.F.R. § 42.4(a) of institution authority to APJs acting as principal officers cannot be squared with 35 U.S.C. § 324, which requires the Director—not a panel of unreviewable APJs—to authorize institution.

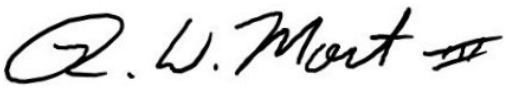
This Court should grant *en banc* review to resolve the apparent conflict between *Arthrex* and *Ethicon* and make clear that the Director's delegation of institution authority to APJs acting as principal officers violated 35 U.S.C. § 324 and due process of law.

CONCLUSION

En banc rehearing should be granted.

Respectfully submitted,

Dated: January 7, 2020



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ADDENDUM

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

CUSTOMEDIA TECHNOLOGIES, LLC,
Appellant

v.

DISH NETWORK CORPORATION, DISH NETWORK LLC,
Appellees

2019-1001

Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in No. CBM2017-00019.

JUDGMENT

RAYMOND WILLIAM MORT, III, The Mort Law Firm, PLLC, Austin, TX, argued for appellant.

ELIOT DAMON WILLIAMS, Baker Botts LLP, Palo Alto, CA, argued for appellees. Also represented by GEORGE HOPKINS GUY, III; ALI DHANANI, MICHAEL HAWES, Houston, TX.

THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (REYNA, HUGHES, and STOLL, *Circuit Judges*).

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

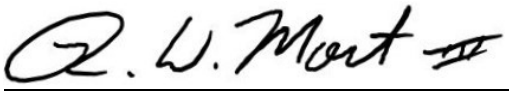
November 8, 2019
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2020, I electronically filed the foregoing document with the Clerk of the United States Court of Appeals for the Federal Circuit using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: January 7, 2020



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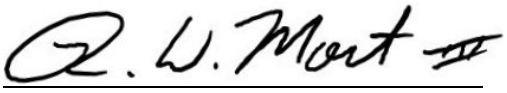
CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 35(b)(2)(A). This brief contains 3,685 words as calculated by the "Word Count" feature of Microsoft Word 2010, the word processing program used to create it.

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14 point font.

Dated: January 7, 2020



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