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

APPELLEES' RESPONSE TO APPELLANT'S COMBINED PETITION FOR REHEARING AND REHEARING EN BANC

FEBRUARY 18, 2020

G. HOPKINS GUY III
ELIOT D. WILLIAMS
BAKER BOTTS L.L.P.
1001 Page Mill Road
Building One, Suite 200
Palo Alto, CA 94304
(650) 739-7500 (telephone)
(650) 739-7699 (facsimile)
hopkins.guy@bakerbotts.com
eliot.williams@bakerbotts.com

MICHAEL HAWES
ALI DHANANI
BAKER BOTTS L.L.P.
910 Louisiana St
Houston, TX 77002
(713) 229-1234 (telephone)
(713) 229-1522 (facsimile)
ali.dhanani@bakerbotts.com
michael.hawes@bakerbotts.com

Attorneys for Appellees, DISH Network Corporation and DISH Network L.L.C.

FORM 9. Certificate of Interest **Form 9 Rev. 10/17**

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Customedia Technologies, LLC v. DISH Network Corporation

Case No. 19-1001

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ■ (appellee) ☐ (amicus) ☐ (name of party)

DISH Network Corporation and DISH Network L.L.C.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
DISH Network L.L.C	DISH Network L.L.C	DISH DBS Corporation
DISH Network Corporation	DISH Network Corporation	Telluray Holdings, LLC
		Dodge & Cox
		The Vanguard Group Inc.
		DISH Orbital Corporation

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:
n/a

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Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

Customedia Techologies, L.L.C. v DISH Network Corporation, et al., United States District Court for the Eastern District of Texas, Case No. 2:16-cv-00129 (JRG)

7/2/2019
Date

/s/ Eliot D. Williams
Signature of counsel

Eliot D. Williams
Printed name of counsel

Please Note: All questions must be answered

cc: All Counsel of Record

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STATEMENT OF RELATED CASES

The following cases may be affected by this Court's decision:

Customedia Technologies, L.L.C. v. DISH Network Corporation et al., United States District Court for the Eastern District of Texas, Case No. 2:16-CV-00129 (JRG).

I. INTRODUCTION

As requested in the January 27, 2020, letter from the Court, DISH Network Corporation and DISH Network L.L.C. (collectively, "DISH") file this response to Customedia Technologies, LLC's ("Customedia") Combined Petition for Rehearing and Rehearing En Banc ("Petition"). DISH opposes the Petition.

The Court already rejected Customedia's request for en banc review of its procedural arguments related to *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019). *See* ECF No. 63. Specifically, the Court rejected Customedia's motion for panel reconsideration and reconsideration en banc of the Court's November 1, 2019 precedential order finding that Customedia forfeited its Appointments Clause challenge. *Id.*; ECF No. 49. Customedia now seeks rehearing and rehearing en banc of the Court's merits Judgment based on those same previously rejected procedural arguments, and it raises an entirely new version of its procedural argument for the first time in its Petition. This Court should not rehear a case based on arguments that could have been, but were not, raised prior to the merits determination.

Moreover, Appointments Clause challenges can be forfeited, as Customedia did here. Customedia failed to present any semblance of an Appointments Clause challenge either before the PTAB or in its briefing to this Court. The *Arthrex* court explained that "Appointments Clause challenges are 'nonjurisdictional structural

constitutional objections' that can be waived when not presented" in an opening brief. *Arthrex*, 941 F.3d at 1340 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878–79 (1991)). Customedia could have chosen to raise this constitutionality issue in its opening brief, as did other appellants. *See, e.g.*, *Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 2018-1768, Polaris Br. at 52-59 (Fed. Cir. July 12, 2018), ECF No. 22; *Uniloc 2017 LLC v. Facebook, Inc.*, 783 F. App'x 1020 (Fed. Cir. 2019).

The *Arthrex* opinion did not overturn controlling precedent of this Court, nor did it announce a change of law that could justify a departure from the well-settled law regarding waiver. On the contrary, *Arthrex* expressly followed Supreme Court precedent issued in June 2018, over a month before the PTAB issued the Final Written Decision from which Customedia appealed. *See Arthrex* at 1327-28 (citing *Lucia v. SEC,* 138 S. Ct. 2044, (June 21, 2018)). Thus, Customedia waived this constitutionality challenge.

II. ARGUMENT

A. Merits Rehearing Is Not An Appropriate Vehicle to Challenge this Court's Prior En Banc Denial of Customedia's Request

This Court should deny Customedia's request for rehearing and rehearing en banc because it has already considered Customedia's principal argument and determined that Customedia waived any Appointments Clause challenge. On October 31, 2019, this Court issued the *Arthrex* opinion. *Arthrex*, 941 F.3d 1320. Customedia subsequently filed a Notice of Supplemental Authority Pursuant to Fed.

R. App. P. 28(j) and a motion to vacate raising, for the first time, a challenge to the Final Written Decision under the Appointments Clause. ECF Nos. 46, 47. The Court issued a precedential order finding that Customedia forfeited its Appointments Clause challenge and denying its motion to vacate. ECF No. 49. Customedia also filed a motion for leave to submit a supplemental brief on the *Arthrex* issues. ECF No. 48. Citing its precedential order, this Court also denied that request. ECF No. 51.

This Court affirmed the Board's final written decision pursuant to Fed. Cir. R. 36. ECF No. 52. Customedia then filed a petition for rehearing en banc of the Court's denials of Customedia's motion to vacate and motion for leave to submit a supplemental brief. ECF No. 54. The Court denied Customedia's petition for rehearing en banc because a petition for rehearing en banc was not the proper vehicle to request review of the issues. ECF No. 55. The Court explained that "[b]ecause the court's orders . . . were not dispositive, any request for further review of those orders is governed by Federal Circuit Rule 27(l)." ECF No. 55 at 2. The clerk of court invited Customedia to file a "motion for reconsideration and/or reconsideration en banc in accordance with Fed. Cir. R. 27(l)," which it did. ECF Nos. 56, 61. In that motion for reconsideration, Customedia argued that "*Arthrex* represents a significant change in the law of 'exceptional importance.'" ECF No. 61 at 9. Customedia's motion for reconsideration cited many of the same cases found in its

present Petition, including *BioDelivery Scis. Int'l, Inc. v. Aquestive Therapeutics, Inc.*, 898 F.3d 1205 (Fed. Cir. 2018), and *In re Micron Tech., Inc.*, 875 F.3d 1091 (Fed. Cir. 2017). This Court denied Customedia's motion for reconsideration. ECF No. 63.

Customedia now rehashes the same arguments under the guise of a petition for rehearing and rehearing en banc of the Rule 36 affirmance. ECF No. 64. Although it argues for rehearing of the judgment on the merits, Customedia's Petition raises no issues other the procedural one related to *Arthrex* and waiver. *Id.* Customedia once again argues that "*Arthrex* ushered in a 'significant change of law'" and that "[t]he Court [o]verlooked the [e]xceptional [c]ircumstances [e]xcusing [w]aiver." *Id.* at 10, 14. These are the same issues presented and rejected in Customedia's prior motion for reconsideration. That Customedia raises them now with regards to the judgment on the merits does not change the substance of those arguments. Thus, this Court should deny Customedia's Petition.

B. Customedia's Petition Should be Denied Because Customedia Forfeited Any Appointments Clause Challenge

This Court should deny Customedia's Petition because it waived and forfeited any Appointments Clause challenge by failing to properly present it on appeal and because this Court already denied similar requests on this very issue. Although Customedia's Petition presents the same questions regarding waiver as Customedia's prior requests for relief, its argument was copied nearly *verbatim* from

a petition for rehearing en banc submitted by Sanofi-Aventis in a different appeal. *See Sanofi-Aventis Deutschland GMBH v. Mylan Pharm. Inc.*, No. 2019-1368, Sanofi Pet. at 6-14 (Fed. Cir. Dec. 19, 2019), ECF No. 63. This Court has since rejected the Sanofi petition. *See Sanofi-Aventis*, Order at 2, ECF No. 69. That decision is equally appropriate here.

1. *Arthrex* Makes Clear that Customedia's Failure to Present Any Appointments Clause Challenge in its Briefing Constitutes a Forfeiture and Waiver of the Issue

Citing the Supreme Court, the *Arthrex* court explained that "Appointment Clause challenges are 'nonjurisdictional structural constitutional objections' that can be waived when not presented." *Arthrex,* 941 F.3d at 1340 (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878-79 (1991)). The Court directly addressed the question of whether an Appointments Clause challenge can be forfeited "by not raising the issue ***before the Board***." *Arthrex*, 941 F.3d at 1326 (emphasis added). The Court held that Arthrex had not waived its challenge by failing to present it to the Board because "the Board could not have corrected the problem." *Id.* at 1327. However, the court limited its holding to situations "where the final decision was rendered by a panel of APJs who were not constitutionally appointed *and where the parties presented an Appointments Clause challenge on appeal*." *Id.* at 1340 (emphasis supplied). Specifically, the Court explained that the applicability of *Arthrex* is "limited to those cases" where the challenge was preserved on appeal. *Id.*

This Court confirmed that holding in the *precedential* order ruling that an Appointments Clause challenge under *Arthrex* is forfeited if it is not raised in a party's opening appellate brief. *See* ECF No. 49. This Court then confirmed that same holding in *Pers. Audio, LLC v. CBS Corp.*, No. 2018-2256, 2020 WL 111270, at *2 (Fed. Cir. Jan. 10, 2020). Customedia does not dispute that it did not present an Appointments Clause challenge in any of its briefs to this Court. *See* ECF No. 64. Thus, Customedia forfeited its right to have this Appointments Clause challenge heard because it did not raise the challenge in its appellate briefs.

2. *Arthrex* Does Not Constitute a "Significant Change in Law" that Warrants Excusing Customedia's Waiver

Customedia's argument that this Court should excuse its waiver mischaracterizes several prior precedential decisions and their characterization of a "significant change in law." *See* ECF No. 64 at 8-14. Customedia correctly notes that "the ordinary rule of appellate practice is that 'arguments not raised in [an] opening brief are waived.'" *Id.* at 9 (quoting *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006)). Customedia also correctly explains that an exception to this rule exists where the waiver "arises from a significant change in law during the pendency of an appeal." *Id.* (quoting *BioDelivery*, 898 F.3d at 1209) (quotations omitted). *Arthrex*, however, did not present a "significant change in law."

Arthrex did not overturn any binding precedent regarding Appointments Clause challenges. Indeed, *Arthrex* relied upon the Supreme Court's *Lucia* holding that appointment of ALJs who presided over enforcement proceedings did not comply with the Appointments Clause. *Lucia*, 138 S. Ct. at 2055. The import of this June 2018 decision on the constitutionality of APJs was immediately apparent such that the appellants in *Arthrex* and other cases raised it, and it was in wide discussion among the bar, in the almost eight months before Customedia filed its opening brief in February 2019. *See* Rebecca Lindhorst and Jason D. Eisenberger, *Do You Want An Inferior Judge?: Why PTAB Judges May Be Unconstitutional And What Happens If They Are* (July 2018), https://www.sternekessler.com/news-insights/publications/do-you-want-inferior-judge-why-ptab-judges-may-be-unconstitutional-and ("Is the appointment of PTAB administrative patent judges (APJs) constitutional?"); Eric Hydorn, *Supreme Court Decision Raises Questions About the Authority of USPTO Administrative Judges*, (Aug. 3, 2018) https://www.patentco.com/supreme-court-decision-raises-questions-about-the-authority-of-uspto-administrative-judges/; Ryan Davis, *Are PTAB Appointments Unconstitutional? A Closer Look*, LAW360 (Sept. 5, 2018, 9:14 PM), https://www.law360.com/appellate/articles/1080125.

Subsequently, the *Arthrex* panel answered that question, applying the holding of *Lucia* to the PTAB, noting: "Like the … SEC Administrative Law Judges in

Lucia, who have 'equivalent duties and powers as [Tax Court special trial judges] in conducting adversarial inquiries' [*Lucia*] 138 S.Ct. at 2053, the APJs exercise significant authority rendering them Officers of the United States." *Arthrex* at 1328. Additionally, the *Arthrex* court applied the remedy of *Lucia*, noting that "[t]he Lucia court explained that Appointments Clause remedies are designed to advance structural purposes of the Appointments Clause and to incentivize Appointments Clause challenges." *Id.* at 1340 (citing *Lucia*, 138 S. Ct. at 2055 n.5). The Court explained that "both of these justifications support our decision today to vacate and remand." *Id.*

The Supreme Court issued the *Lucia* decision on June 21, 2018, more than seven months before Customedia filed its opening brief in this case. *See Lucia*, 138 S. Ct. 2044. Customedia provides no reason that it was unable to raise an Appointments Clause challenge in its opening brief, as other appellants did.

Moreover, the case law relied upon by Customedia does not support its argument that it should be permitted to raise this issue after this Court's merits judgment. To the extent that *Arthrex* substantively addressed waiver issues, that discussion was limited to Arthrex's failure to present the Appointments Clause challenge *to the Board*, not whether Arthrex forfeited the challenge by failing to raise it in its appellate briefing, as Customedia did here. *See id.* at 1326-27. The *Arthrex* court reasoned that Arthrex did not waive its Appointments Clause

challenge by failing to present it to the Board because "the Board could not have corrected the problem." *Id.* at 1327.

The other cases relied on by Customedia do not support its position that *Arthrex* constitutes a "significant change in law." Instead, those cases stand for the proposition that waiver is excused when attempts to raise the issue before this Court would have been futile. For instance, in *BioDelivery*, the Court addressed whether BioDelivery waived its right to seek relief under the Supreme Court's decision in *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018), which required the Board to issue a final written decision on all challenged claims in an *inter partes* review proceeding. *BioDelivery*, 898 F.3d at 1207-08. The Supreme Court's *SAS* opinion, however, overturned prior binding precedent of this Court, which had held that challenges to partial institution were inappropriate—namely this Court's opinion in the same matter. *See SAS Inst., Inc. v. ComplementSoft, LLC.*, 825 F.3d 1341, 1352 (Fed. Cir. 2016), *rev'd and remanded sub nom. SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018). Because of that binding precedent, the *BioDelivery* court noted that "'any attempt to argue against partial institution [prior to *SAS*] would have been futile under the Board's regulations and our precedent.'" *BioDelivery*, 898 F.3d at 1209 (quoting *Polaris Indus. Inc. v. Arctic Cat, Inc.*, 724 F. App'x 948, 949 (Fed. Cir. 2018)). Customedia can show no such futility here that justifies its failure to raise the issue in its opening brief to this Court.

Similarly, *Micron* addressed waiver in the context of failure to raise a venue defense prior to the Supreme Court's ruling in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017). *Micron*, 875 F.3d at 1093. The *Micron* court concluded that Micron did not waive the defense because "*TC Heartland* changed the controlling law" that had been expressly applied by this Court in *V.E. Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990). *Micron*, 875 F.3d at 1094. The Court reasoned that, "before the Court decided *TC Heartland*, the venue defense now raised by Micron (and others) based on *TC Heartland*'s interpretation of the venue statute was not 'available.'" *Id.*

Customedia's reliance on cursory citations to *Oil States Energy Servs. v. Greene's Energy Grp.*, 138 S. Ct. 1365 (2018), and *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1031–33 (Fed. Cir. 2016), are to no avail. Neither of those cases addressed the Appointment Clause issues that were raised in *Lucia* and applied to APJs in *Arthrex*, and therefore, neither case demonstrates that it would have been futile to assert an Appointment Clause challenge in Customedia's opening brief. *Oil States* addressed the constitutionality of *inter partes* review proceedings generally, with no discussion of whether APJs were properly appointed. *Oil States*, 138 S. Ct. at 1370. In *Ethicon*, the issue of whether APJs are "principal" or "inferior" officers—the principle substantive issue in *Arthrex*—was not part of the discussion or holding. *Ethicon*, 812 F.3d at 1031-33. Thus, the *Arthrex* decision does not

conflict with either of these prior opinions and does not constitute a "significant change" in the law that prevented Customedia from raising its Appointments Clause challenge in its opening appellate brief.

Similarly, in *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008), the Court focused on whether the USPTO Director's appointments of APJs to a predecessor of the PTAB violated the Appointments Clause, but included no discussion of whether APJs were "principal" or "inferior" officers. The Court's statement—that Congress's shift of the authority to appoint APJs to the Secretary of Commerce "eliminat[ed] the issue of unconstitutional appointments going forward"—did not address the principal/inferior officer issue presented and decided in *Arthrex*. *Id.* at 1380. Therefore, Customedia could, and should, have raised in its opening brief any Appointments Clause challenge based on arguments that APJs appointed by the Secretary of Commerce were principal officers. Customedia failed to do so, thereby forfeiting this argument.

Indeed, *DBC* is instructive in its analysis of waiver. The appellee argued that "DBC waived [the Appointments Clause challenge] by failing to raise it either before the Board or in its opening brief in this appeal." *Id.* at 1377. In rejecting *DBC*'s request, the *DBC* court noted that "[i]t is well-established that a party generally may not challenge an agency decision on a basis that was not presented to the agency."

Id. at 1378. Critically, the *DBC* court explained that "[t]he Supreme Court has never indicated that such challenges must be heard regardless of waiver." *Id.* at 1380.

Customedia could have raised an Appointments Clause challenge of the APJs in its opening brief in this case. As noted, such an argument here would not have been futile, because no binding precedent prevented Customedia from challenging the panel's authority under the Appointments Clause. Arthrex itself raised the argument without the need for this Court to sit *en banc* to overrule any prior precedent. Other parties similarly managed to properly preserve this issue in the aftermath of *Lucia*. For instance, Polaris raised similar Appointments Clause challenges while the *Arthrex* appeal was pending. *See Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 2018-1768, Polaris Br. at 52-59 (Fed. Cir. July 12, 2018), ECF No. 22. Additionally, *Uniloc*, which was decided the same day as *Arthrex*, was able to obtain a remedy consistent with *Arthrex* since it had raised the Appointments Clause challenge in its opening brief. *See Uniloc*, 783 F. App'x 1020. Customedia simply chose not to pursue such a challenge, even though it was available, was asserted by similarly-situated appellants, and had been in public discussion among the bar since the Supreme Court's *Lucia* decision. While Customedia may not have expected the substantive result in *Arthrex*, that does not make the ruling in that case a "significant change in law" that excuses Customedia's failure to raise the argument in this Court.

3. Exceptional Circumstances Do Not Warrant Excusing Customedia's Waiver

Customedia's argument that its waiver should be excused mistakenly relies on cases where the question presented was whether an issue was properly raised to the lower tribunal and therefore preserved for appeal. As discussed above, Customedia failed to present its *Arthrex* issue in its briefing *to this Court* and no significant change of law exists that would excuse that failure. *See supra* Section B.2. Thus, the mere fact that Appointments Clause challenges address important concerns does not excuse Customedia's forfeiture.

Customedia provides no authority for the proposition that forfeiture should be excused in an appeal where, as here, the issue was not presented in its opening briefs and there has been no "significant change in law." Unlike Customedia's failure to raise its Appointments Clause challenge in its appellate briefing, *Automated Merch. Sys., Inc. v. Lee*, 782 F.3d 1376, 1379 (Fed. Cir. 2015), addressed the situation where "the PTO did not raise the issue *before the district court*." *Id.* (emphasis added). Similarly, in *Freytag*, the Supreme Court addressed whether petitioners "waived their right to challenge the constitutional propriety of § 7443A" because they "fail[ed] to raise a timely objection to the assignment of their cases to a special trial judge" and "consent[ed] to the assignment." 501 U.S. at 878. As this Court has noted, the *Freytag* decision did not hold that Appointment Clause challenges must be heard regardless of waiver. *DBC*, 545 F.3d at 1380 (citing Justice Scalia's

concurring opinion in *Freytag* "observing that the court did not create a general rule excusing waiver."). This point was reiterated in *Arthrex:* "Appointment Clause challenges are 'nonjurisdictional structural constitutional objections' that can be waived when not presented." *Arthrex,* 941 F.3d at 1340 (quoting *Freytag*, 501 U.S. at 878-79).

The only case cited by Customedia allowing review of an issue first raised after the initial appellate briefing is inapplicable. The plurality opinion in *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962), was clarified in the Court's subsequent *Freytag* decision. *See Freytag*, 501 U.S. at 878-79; *see also id.* at 898-99 (concurrence in part). Justice Scalia, concurring in part and joined by Justices O'Connor, Kennedy, and Souter, explained that *Glidden* addressed "a structural defect that went to the validity of the very proceeding under review." *Id.* at 898. Justice Scalia distinguished the *Freytag* case from *Glidden*, noting that Freytag argued that "a structural separation of powers [argument] is not a matter of personal rights and therefore *is not waivable*." *Id.* at 898-99 (emphasis in original). Justice Scalia concluded that "Justice Harlan's plurality opinion in *Glidden* does not stand for the proposition that forfeiture can *never* be imposed, but rather the more limited proposition, which the Court reiterates today, that forfeiture need not *always* be imposed." *Id.* at 899. Thus, *Glidden* does not stand for the idea that an Appointments Clause challenge can never be waived.

Customedia's Petition centers on whether an Appointments Clause challenge is waivable when not presented on appeal. *See* Petition at 1. Applying the *Freytag* decision itself, *Arthrex* already unequivocally answered this question. *Arthrex*, 941 F.3d at 1340 ("Appointments Clause challenges are 'nonjurisdictional structural constitutional objections' that can be waived when not presented.") (quoting *Freytag*, 501 U.S. at 878-79). Unlike *Arthrex*, where the appellant failed to present the Appointments Clause challenge to the Board but properly presented it on appeal, Customedia failed to present any semblance of an Appointments Clause challenge in its briefs to this Court. *Glidden* does not apply, and this Court should continue to confirm that Customedia forfeited this argument.

Further, Customedia's argument that "DISH could not be prejudiced by applying *Arthrex* here" ignores the state of this case. Petition at 15. Had Customedia timely raised this issue, DISH would have been on notice of the argument, and would have had an opportunity to seek to intervene or submit an amicus brief in the *Arthrex* case itself, where initial merits briefing was still ongoing at the time Customedia filed its opening merits brief in this case in February of 2019. By failing to raise this issue in a timely manner, Customedia deprived DISH of the opportunity to be heard. Moreover, DISH has expended considerable time and resources litigating the '437 Patent, and other patents asserted by Customedia. If Customedia's forfeiture is

excused, DISH will be forced to expend more time and resources litigating a patent in this Court, the invalidity of which has already been summarily affirmed.

C. Customedia Also Waived Arguments 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

For the first time in this case, Customedia raises a new argument in its rehearing request, arguing that "[t]he 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." Petition at 20. Customedia forfeited this new argument for the same reasons discussed above but is also waived because Customedia did not present it in any of its numerous supplemental briefs, notices, motions, or requests for reconsideration. ECF Nos. 46, 47, 48, 54, 58. Further, Customedia's arguments on this issue were, again. copied nearly word for word from another petition for rehearing in a different case. *See Duke Univ. v. Biomarin Pharm. Inc.*, No. 2018-1696, Duke Pet. at 16-18 (Fed. Cir. Dec. 11, 2019), ECF No. 54.

Again, no exceptions warrant excusing Customedia's forfeiture of this argument. Specifically, *Arthrex* does not constitute a "significant change in law" that excuses Customedia's failure to present it on appeal because it does not overturn *Ethicon*, nor does it create a constitutional challenge based on the reasoning of *Ethicon* that did not exist at the time Customedia filed its opening brief in this case. The *Ethicon* court's holding, that nothing "precludes the same panel of the Board

that made the decision to institute inter partes review from making the final determination," never discussed the issue of whether APJs are "principal" or "inferior" officers. *Ethicon*, 812 F.3d at 1640. Thus, Customedia could have presented this issue in its opening brief, just as others properly did. *See Arthrex*, 941 F.3d at 1327; *see also Polaris Innovations Ltd. v. Kingston Tech. Co.*, No. 2018-1768, Polaris Br. at 52-59 (Fed. Cir. July 12, 2018), ECF No. 22; *Uniloc*, 783 F. App'x 1020.

III. CONCLUSION

In view of the above, Customedia's Petition should be denied.

February 18, 2020

/s/ Eliot D. Williams

G. Hopkins Guy III
hopkins.guy@bakerbotts.com
Eliot D. Williams
eliot.williams@bakerbotts.com
BAKER BOTTS L.L.P.
1001 Page Mill Road
Building One, Suite 200
Palo Alto, CA 94304
(650) 739-7500 (telephone)
(650) 739-7699 (facsimile)

Michael Hawes
michael.hawes@bakerbotts.com
Ali Dhanani
ali.dhanani@bakerbotts.com
BAKER BOTTS L.L.P.
910 Louisiana St
Houston, TX 77002
(713)-229-1234 (telephone)
(713)-229-1522 (facsimile)

Attorneys for Appellees DISH Network Corporation and DISH Network L.L.C.

PROOF OF SERVICE

I hereby certify that on this 18th day of February, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit through the Court's CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF

Dated: February 18, 2020

/s/ Eliot D. Williams
Eliot D. Williams

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 35(e)(4). This brief contains 3,898 words as calculated by the word-count" feature of the word processing program used to prepare 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).

/s/ Eliot D. Williams
Eliot D. Williams