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

PETITION FOR REHEARING EN BANC OF ORDER DENYING MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

Raymond W. Mort, III
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raymort@austinlaw.com

Counsel for Appellant
Customedia Technologies, LLC

Dated: November 21, 2019

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: November 21, 2019

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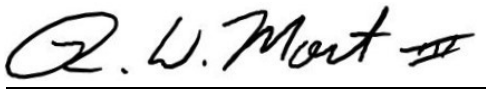
STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(s) of this court: *Hormel v. Helvering*, 312 U.S. 552, 61 S. Ct. 719, 85 L. Ed. 1037 (1941), and *BioDelivery Scis. Int'l, Inc. v. Aquestive Therapeutics, Inc.*, 898 F.3d 1205 (Fed. Cir. 2018). Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance: whether waiver precludes a party from raising an argument in a supplemental brief that arises from a significant change in law during the pendency of an appeal.



Raymond W. Mort, III

Counsel for Appellant
Customedia Technologies, LLC

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).

I. INTRODUCTION

The Panel's decision denying Customedia Technologies, LLC's ("Customedia") Motion for Leave to File Supplemental Brief ("Motion for Leave," Dkt. No. 48), based on waiver for not raising the Appointments Clause challenge in Customedia's opening brief, contradicts governing authority by the Supreme Court and a prior panel of this court.

Specifically, this Court has held that "[p]recedent holds that a party does not waive an argument that arises from a significant change in law during the pendency of an appeal." *BioDelivery Scis. Int'l, Inc. v. Aquestive Therapeutics, Inc.*, 898 F.3d 1205, 1209 (Fed. Cir. 2018) (quoting parenthetically *Polaris Indus. Inc. v. Arctic Cat, Inc.*, 724 F. App'x 948, 949 (Fed. Cir. 2018) (nonprecedential)); *see also Hormel v. Helvering*, 312 U.S. 552, 558-59, 61 S. Ct. 719, 85 L. Ed. 1037 (1941) (holding an exception to the waiver rule exists 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")

It is beyond question that this Court's holding in *Arthrex* represents a significant change in the law of "exceptional importance" that occurred

during the pendency of Customedia's appeal. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140, 2019 U.S. App. LEXIS 32613 (Fed. Cir, October 31, 2019).

This Court's order denying Customedia's Motion for Leave to File a Supplemental Brief raising the Appointments clause within 25 hours of the issuance of the *Arthrex* opinion was in contravention of the Court's precedential opinion in *BioDelivery* and the Supreme Court's guidance in *Hormel*.

II. BACKGROUND AND PROCEDURAL HISTORY

On July 25, 2018, a panel of three Administrative Patent Judge's ("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 September 21, 2018, Customedia filed its notice of appeal of the Final Written Decision in CBM2017-00019.

On February 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 Appointment's Clause challenge to the authority of the three APJs to issue the FWD.

On October 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.

Id. at *27.

On November 1, 2019 at 8:39 a.m., Customedia filed a Notice of Supplemental Authority Pursuant to Fed. R. App. P. 28(j) (Dkt. No. 46), which raised an Appointments Clause challenge in light of the significant change in the law based on the *Arthrex* opinion.

On November 1, 2019 at 2:40 p.m., Customedia filed a Motion to Vacate the Board's Final Written Decision and Remand ("Motion to Vacate and Remand," Dkt. No. 47) in light of the significant change in the law based on the *Arthrex* opinion.

On November 1, 2019 at 4:36 p.m., Customedia filed its Motion for Leave (Dkt. No. 48), along with a proposed supplemental brief, which raised the Appointments Clause challenged in light of the significant change in the law based on the *Arthrex* opinion.

On November 1, 2019 at 5:24 p.m., this Court issued a precedential order denying Customedia's Motion to Vacate and Remand ("Precedential Order," Dkt. No. 49). In its Order, the Court determined Customedia had waived the Appointments Clause challenge for failure to raise the issue in the opening brief.

On November 7, 2019, this Court issued an order denying Customedia's Motion for Leave citing its Precedential Order (Dkt. No. 51).

III. REASONS TO GRANT REHEARING

REVIEW IS NEEDED TO RESOLVE CONFLICTS BETWEEN PRECEDENTIAL OPINIONS AND ORDERS

1. Rehearing is warranted because *Arthrex* represents a significant change in the law of "exceptional importance"

In *Arthrex*, this Court determined "the current structure of the Board violates the Appointments Clause" of the Constitution. *Arthrex* at *27. In the opinion, the Court provided a remedy to cases that had reached a final written decision and in which a party had raised an Appointments Clause challenge in the opening brief (the "*Arthrex* Window.") For the cases in the *Arthrex* Window, the Court's remedy is to vacate and remand the cases to be reconsidered by a new panel of APJ's.

The Court further noted the "exceptional importance" of the issue and concluded waiver did not apply for failure to raise the issue before the Board. *Id.* at *6.

On November 8, 2019, this Court issued Orders in *Polaris Innovations Ltd. v. Kingston Tech. Co.*, Nos. 2018-1768, 2018-1831, (Fed. Cir. Nov. 8, 2019) requesting supplemental briefing regarding the constitutionality of the appointment of APJs and the appropriateness of the remedy announced in *Arthrex*. This briefing is due by December 6, 2019.

On November 13, 2019, the United States filed a motion in *Steuben Foods, Inc., v. Nestle USA, Inc.*, No. 20-1082, (Fed. Cir. Nov. 13, 2019) announcing the United States' intent to seek rehearing en banc in *Arthrex*.

On November 19, 2019, the House Intellectual Property Subcommittee held the first hearing to address the ramifications of the *Arthrex* opinion and potential remedies.

While the full impact of the *Arthrex* opinion, and forthcoming *Polaris* opinion, is not yet known, there is no question that *Arthrex* represents a significant change of "exceptional importance" in the law

with respect to the constitutionality of the appointment of APJs and the validity of any final written decision issued by the unconstitutionally appointed APJs.

2. Rehearing is warranted because the Court's Order Denying Customedia's Motion for Leave is in Conflict with *BioDelivery* and *Hormel*

In *BioDelivery*, this Court held that "[p]recedent holds that 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 1209. *Polaris*, 724 F. App'x at 949-50 (citing *Hormel v. Helvering*, 312 U.S. 552, 558-59, 61 S. Ct. 719, 85 L. Ed. 1037 (1941) (holding an exception to the waiver rule exists 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")); accord *In re Micron Tech., Inc.*, 875 F.3d 1091, 1097 (Fed. Cir. 2017) (acknowledging that "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"); *Hilton Davis Chem. Co. v. Warner-Jenkinson Co.*, 114 F.3d 1161, 1164 (Fed. Cir. 1997) (holding that "[g]iven

the change in law, it would be unfair at this stage of the case to apply Hilton Davis' statements against it or estop it from augmenting the record to show the reason for the claim amendment based on other facts that may be available").

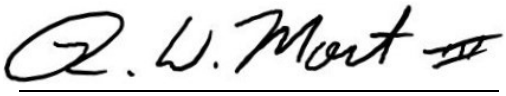
Based on *Hormel* and *BioDelivery*, and considering the significant change in the law announced in *Arthrex*, waiver does not apply in the present case. Accordingly, the Court's November 7, 2019 Precedential Order conflicts with the holdings in *Hormel* and *BioDelivery* and was in error. Customedia's Motion for Leave should have been granted.

IV. CONCLUSION AND RELIEF SOUGHT

En banc rehearing should be granted.

Respectfully submitted,

Dated: November 21, 2019



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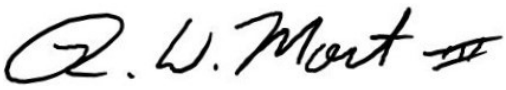
CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of November 2019, 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: November 21, 2019



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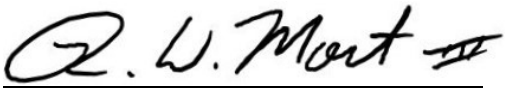
CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 35(b)(2)(A). This brief contains 1,236 words.

Dated: November 21, 2019



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Counsel for Appellant
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ADDENDUM

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

CUSTOMEDIA TECHNOLOGIES, LLC,
Appellant

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2019-1001

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

ON MOTION

Before REYNA, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

O R D E R

Appellant Customedia Technologies, LLC moves for leave to file a supplemental brief.

In light of the court's November 1, 2019 order,

IT IS ORDERED THAT:

The motion is denied.

FOR THE COURT

November 7, 2019
Date

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

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.

ON MOTION

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

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

PER CURIAM.

O R D E R

Customedia Technologies, LLC moves to vacate and remand in light of this court's recent decision in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140 (Fed. Cir. Oct. 31, 2019). That decision vacated and remanded for the matter to be decided by a new panel of Administrative Patent Judges ("APJs") at the Patent Trial and Appeal Board after this court concluded that the APJs' appointments violated the Appointments Clause. Customedia's motion seeks to assert the same challenge here.

We conclude that Customedia has forfeited its Appointments Clause challenge. "Our law is well established that arguments not raised in the opening brief are waived." *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) (citing *Cross Med. Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1320–21 n.3 (Fed. Cir. 2005)). That rule applies with equal force to Appointments Clause challenges. *See, e.g.*, *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018); *Turner Bros., Inc. v. Conley*, 757 F. App'x 697, 699–700 (10th Cir. 2018); *see also Arthrex*, slip op. at 29 (emphasizing that Appointments Clause challenges are not jurisdictional and that the court was granting relief only when the party had properly raised the challenge on appeal). Customedia did not raise any semblance of an Appointments Clause challenge in its opening brief or raise this challenge in a motion filed prior to its opening brief. Consequently, we must treat that argument as forfeited in this appeal.

Accordingly,

IT IS ORDERED THAT:

The motion to vacate and remand is denied.

FOR THE COURT

November 1, 2019
Date

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