

No. 2019-1584

**United States Court of Appeals
for the Federal Circuit**

BOSTON SCIENTIFIC
NEUROMODULATION CORPORATION,
Appellant,

v.

NEVRO CORP.,
Appellee.

On appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in No. IPR2017-01899

**RESPONSE IN OPPOSITION TO APPELLANT'S PETITION FOR
RECONSIDERATION**

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January 6, 2020

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CERTIFICATE OF INTEREST

Counsel for Cross-Appellant Nevro Corp. certifies the following:

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

Nevro Corp.

2. The names of the real parties in interest represented by me are:

N/A

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

Nevro Corp. has no parent corporation, but publicly held T. Rowe Price Associates, Inc. owns 10% of Nevro Corp.'s stock based on currently available ownership reports filed with the Securities and Exchange Commission.

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 the following (some of whom are no longer with their respective firms):

Sidley Austin LLP: Thomas Broughan III

Sterne, Kessler, Goldstein & Fox PLLC: Richard D. Coller III, Brian Lee

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 is:

Boston Scientific Corp. & Boston Scientific Neuromodulation Corp. v. Neuro Corp., C.A. No. 16-1163-CFC (D. Del.)

/s/ Ching-Lee Fukuda

Ching-Lee Fukuda

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INTRODUCTION

Boston Scientific presents no grounds that could warrant reconsideration of the Court's November 22, 2019 Order, which concluded that Boston Scientific has forfeited an Appointments Clause challenge to the Patent Trial & Appeal Board (PTAB) panel in this case, and denied Boston Scientific's request for supplemental briefing on that challenge.¹ ECF No. 36, at 2. The Court based its Order on its precedential decision in *Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1173 (Fed. Cir. 2019) (Mem.). In *Customedia*, the Court held that an appellant forfeits an Appointments Clause challenge based on *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), by failing to raise that challenge in its opening brief. Boston Scientific now seeks reconsideration by contending that the Court's Order raises questions of exceptional importance. But nothing in Boston Scientific's motion is exceptional or otherwise warrants this Court's attention.

¹ Nevro submits this Response to Boston Scientific's request for reconsideration of the Court's denial of Boston Scientific's motion to file supplemental briefs addressing the Appointments Clause. Should the Court be inclined to allow Boston Scientific's requested supplemental briefing, Nevro will respond more fully on the merits of the Appointments Clause issue in any supplemental brief.

Boston Scientific presents nothing new or that otherwise is inconsistent with the course charged by the Court in *Customedia* and similar cases.

ARGUMENT

I. The Court's Order Is Consistent With The Applicable Law On Appeal.

Relying on *Customedia*, this Court properly concluded that Boston Scientific “forfeited” an Appointments Clause challenge based on *Arthrex*, which Boston Scientific had attempted to raise only after all briefing in this case had already concluded. ECF No. 36, at 2. Boston Scientific now seeks reconsideration of that decision, citing cases for the proposition that a change in law “applies to ‘all cases still open on direct review’ at the time.” Pet. 7. But this line of cases is inapplicable.

These cases deal with the substantive legal standard that applies to an issue properly raised, *not* whether the result of a case should apply to all open cases regardless of whether it was actually presented on appeal. *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), for instance, addressed whether the Court's rule of decision in *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), should apply retroactively to a state tax scheme that pre-dated *Davis*. The challenge was unquestionably raised, and the sole question was whether the rule

of decision in *Davis* should apply retroactively to conduct that pre-dated that decision. The Supreme Court explained that when the 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.” *Harper*, 509 U.S. at 97 (emphasis added). Similarly, *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103 (1801), addressed a change in the governing rule of law and the substantive standard that applies on appeal. If “a law intervenes and positively changes the rule which governs, the law must be obeyed.” *Id.* at 110.

This principle is unremarkable and irrelevant here. The rule of decision in *Arthrex* would undoubtedly apply to any currently pending appeal that timely presented an Appointments Clause challenge. Similarly, if this Court had announced a new standard for obviousness, that standard would undoubtedly apply to all cases on appeal raising an issue of obviousness. If, however, an appellant failed to raise an issue of obviousness on appeal, a new obviousness standard would not obligate this Court to open and alter that aspect of a lower court’s judgment.

The Court retains the discretion to deem certain issues closed or forfeited. *See In re DBC*, 545 F.3d 1373, 1379-80 (Fed. Cir. 2008). And

that is precisely what the Court did in *Customedia*, holding that if the Appointments Clause challenge was not raised in the appellants' briefing, it was forfeited. Boston Scientific's cases do nothing to undermine the propriety of that holding.

Boston Scientific tries to close the gap by relying on cases such as *BioDelivery Sciences International, Inc. v. Aquestive Therapeutics, Inc.*, 898 F.3d 1205 (Fed. Cir. 2018), and *In re Micron Technology, Inc.*, 875 F.3d 1091 (Fed. Cir. 2017). Pet. 7–8. Those cases merely articulate the well-known exception to waiver/forfeiture for arguments which would have been futile to raise. *BioDelivery*, 898 F.3d at 1209 (finding that it would have been futile to raise an argument before *SAS*); *Micron*, 875 F.3d at 1097–98 (describing principle of futility). Boston Scientific offers several excuses for its failure to raise an Appointments Clause challenge, and describes the uphill climb for such a challenge, Pet. 8–11, but comes nowhere close to showing that it would have been *futile* for Boston Scientific to raise an Appointments Clause challenge. And it certainly does not provide any basis for futility that would be unique to this case, or that would differentiate this case from *Customedia* or similar cases holding that an appellant forfeits an Appointments Clause

challenge by failing to raise it at all during principal briefing in the case.²

II. This Court Has Already Rejected A Blanket Forfeiture Exemption for Appointments Clause Challenges.

In a last-ditch effort, Boston Scientific suggests that Appointments Clause challenges stand on unique footing and should not be subject to forfeiture. Pet. 13–17. This Court in *In re DBC* already considered and rejected this same line of argument. There, the Court explained that the “Supreme Court has never indicated that such challenges must be heard regardless of waiver.” 545 F.3d at 1380 (citation omitted). Furthermore, this “Court has proceeded on a case-by-case basis, determining whether the circumstances of the particular case warrant excusing the failure to timely object.” *Id.* (citation omitted). Indeed, the Court expressly stated that its “excusal of ...

² Boston Scientific asserts that the Court’s decision in *In re DBC*, 545 F.3d 1373 (Fed. Cir. 2008), “strongly suggested” that Boston Scientific could not raise an Appointments Clause challenge in its opening brief because it did not raise one before the PTAB. Pet. 11. And it says that “it was not unreasonable for Boston Scientific” to view *In re DBC* this way. *Id.* But this is far from showing that raising an Appointments Clause challenge would have been futile.

waiver” of Appointments Clause challenges “is discretionary.” *Id.* (citation omitted).

The Court’s decisions in *Customedia* and this case are, thus, entirely consistent with this Court’s and the Supreme Court’s precedent. The Court has exercised its discretion in several precedential decisions to establish when an Appointments Clause challenge is properly before the Court—i.e., when the appellant raises such a challenge in its opening brief. Because Boston Scientific failed to raise an Appointments Clause challenge in its opening brief—or in any of its principal briefs in this case—it has forfeited that challenge. Nothing it cites draws that conclusion into question, much less presents a question of exceptional importance.

CONCLUSION

For these reasons, the Court should deny Boston Scientific's motion for reconsideration.

Date: January 6, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2020, a true and correct copy of the foregoing was timely filed with the Clerk of the Court using the appellate CM/ECF system.

/s/ Ching-Lee Fukuda

Ching-Lee Fukuda

CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2) and the Rules of this Court, because it contains 1,165 words (as determined by the Microsoft Word word-processing system used to prepare the brief).

This response complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(d)(1)(E) because it has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing system in 14-point Century Schoolbook font.

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