

**2019-1443, 2019-1447, 2019-1449, 2019-1450**

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

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INTEL CORPORATION, CAVIUM, LLC, and DELL, INC.,

*Appellants,*

v.

ALACRITECH, INC.,

*Cross-Appellant,*

UNITED STATES,

*Intervenor.*

*Appeals from the United States Patent and Trademark Office,  
Patent Trial and Appeal Board in No. IPR2017-01405*

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**PETITION FOR PANEL REHEARING OF APPELLEE &  
CROSS-APPELLANT ALACRITECH, INC.**

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## FORM 9. Certificate of Interest

Form 9  
Rev. 10/17

## UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Intel Corp. v. Alacritech, Inc.Case No. 19-1443, 19-1447, 19-1449, 19-1450

## CERTIFICATE OF INTEREST

Counsel for the:

☐ (petitioner) ☐ (appellant) ☐ (respondent) ☒ (appellee) ☐ (amicus) ☐ (name of party)Alacritech, Inc.

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
Alacritech, Inc.	None	None

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:

Mark Lauer of Silicon Edge Law Group, LLP; James M. Glass, Brian E. Mack, Ziyong Li, Iman Lordgooei, Antonio Sistos of Quinn Emanuel Urquhart & Sullivan, LLP.

## FORM 9. Certificate of Interest

Form 9  
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).

Federal Circuit Cases: Alacritech, Inc. v. Intel Corp., 19-1444; Alacritech, Inc. v. Intel Corp., 19-1445; Alacritech, Inc. v. Intel Corp., 19-1464; Alacritech, Inc. v. Intel Corp., 19-1466, Alacritech, Inc. v. Intel Corp., 19-1467; Alacritech, Inc. v. Intel Corp., 19-1468.

Eastern District of Texas Cases: Alacritech, Inc. v. CenturyLink, Inc., 2:16-cv-00693-RWS-RSP (E.D. Tex.); Alacritech, Inc. v. Wistron Corp., 2:16-cv-00692-RWS-RSP (E.D. Tex.); Alacritech, Inc. v. Dell Inc., 2:16-cv-00695-RWS-RSP (E.D. Tex.).

8/27/2019

Date

/s/ Sanford I. Weisburst

Signature of counsel

Please Note: All questions must be answered

Sanford I. Weisburst

Printed name of counsel

cc: All Counsel of Record

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
CERTIFICATE OF INTEREST .....	i
POINTS OF LAW OVERLOOKED .....	1
ARGUMENT .....	2
CONCLUSION .....	4
ADDENDUM .....	6

## **TABLE OF AUTHORITIES**

### **Page(s)**

#### **Cases**

<i>Arthrex, Inc. v. Smith &amp; Nephew, Inc.</i> , 941 F.3d 1320 (Fed. Cir. 2019) .....	1, 4
<i>Ciena Corp. v. Oyster Optics, LLC</i> , No. 19-2117, Doc. 31 (Order) (Fed. Cir. Jan. 28, 2020) (unpublished) .....	1, 2, 3
<i>Customedia Techs., LLC v. Dish Network Corp.</i> , 941 F.3d 1174 (Fed. Cir. 2019) .....	2, 3
<i>Freytag v. Comm’r</i> , 501 U.S. 868 (1991) .....	4
<i>Stern v. Marshall</i> , 564 U.S. 462 (2011) .....	3

#### **Rules and Regulations**

Fed. R. App. P. 28(j) .....	1, 3
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### **POINTS OF LAW OVERLOOKED**

Appellee-Cross-Appellant Alacritech, Inc. (“Alacritech”) respectfully seeks panel rehearing in Nos. 2019-1443 *et al.* (the “Group I appeals”) in one limited respect: the panel’s order should be modified so as to leave intact (and not vacate) the portion of the PTAB’s final written decision (Appx18) that found that Appellants Intel Corporation, Cavium, LLC, and Dell, Inc. (together, “Intel”) failed to demonstrate that claims 31-33 of U.S. Patent No. 7,124,205 are unpatentable.

Panel rehearing should be granted because the panel’s order does not address, and therefore may have overlooked, whether Intel forfeited any *Arthrex*/Appointments Clause-based challenge, *see Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), to that portion of the PTAB’s decision on either or both of two occasions, the first of which had not been brought to the panel’s attention, and the second of which was brought to the panel’s attention in a Fed. R. App. P. 28(j) submission on December 12, 2019 (Doc. 55):

1. Whether Intel forfeited an *Arthrex* challenge to the portion of the PTAB’s decision concerning claims 31-33 because Intel voluntarily chose to file a petition before the PTAB. *See Ciena Corp. v. Oyster Optics, LLC*, No. 19-2117, Doc. 31 (Order) at 2 (Fed. Cir. Jan. 28, 2020) (unpublished).

2. Whether Intel forfeited an *Arthrex* challenge to the portion of the PTAB's decision concerning claims 31-33 because Intel omitted such challenge from its opening brief in this Court. *See Customedia Techs., LLC v. Dish Network Corp.*, 941 F.3d 1174, 1175 (Fed. Cir. 2019) (*per curiam*).

If Intel did indeed forfeit an *Arthrex* challenge, then the panel should modify its order so as to so as to leave intact (and not vacate) the portion of the PTAB's final written decision that found that Intel failed to demonstrate that claims 31-33 of U.S. Patent No. 7,124,205 are unpatentable.

### **ARGUMENT**

The panel order warrants rehearing with regard to its vacatur of the portion of the PTAB's decision finding that Intel did not demonstrate that claims 31-33 are unpatentable. Rehearing is warranted because the panel's order did not discuss, and therefore may have overlooked, that Intel forfeited any *Arthrex*/Appointments Clause argument as to that portion of the PTAB decision.

*First*, a party like Intel that itself chose to proceed before the PTAB cannot invoke *Arthrex* as a basis for reversal of the PTAB's decision. As this Court recently held, a party who files a petition at the PTAB, "unlike the patent owner in *Arthrex*, [] sought out the Board's adjudication, knew or at least should have known of this structural defect, and was content to have the assigned Board judges adjudicate its invalidity challenges until the Board ruled against it." *Ciena Corp.*,

No. 19-2117, Doc. 31 (Order) at 2.<sup>1</sup> “Under those circumstances, [Appellant] has forfeited its Appointments Clause challenge.” *Id.* As this Court warned in *Ciena*, “the consequences of a litigant . . . remaining silent about its objection and belatedly raising the error only if the case does not conclude in its favor . . . can be . . . severe.” *Id.* at 4-5 (citing *Stern v. Marshall*, 564 U.S. 462, 482 (2011)) (alterations and quotations omitted). This passage indicates that this Court should not excuse such a forfeiture by the PTAB petitioner simply because (as here) the patent owner has advanced an *Arthrex* argument as to other portions of the PTAB’s decision concerning other claims, and Alacritech is not aware of any precedent (aside from this Court’s order in the instant case) doing so.

*Second*, Intel forfeited an *Arthrex* argument a second time by failing to advance it in Intel’s opening brief in this Court. *See Customedia Techs.*, 941 F.3d at 1175 (“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.”).<sup>2</sup>

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<sup>1</sup> *Ciena* was handed down following the completion of briefing in this appeal and following Alacritech’s submission of a Fed. R. App. P. 28(j) letter on December 12, 2019, Doc. 55.

<sup>2</sup> Alacritech did discuss *Customedia* in its Fed. R. App. P. 28(j) letter, Doc. 55 at 1.

Either of both of these forfeitures by Intel means that the portion of the PTAB decision (concerning claims 31-33) that Intel appeals should not be vacated based on *Arthrex* merely because Alacritech invoked *Arthrex* as to other portions of the PTAB's decision concerning other claims. An *Arthrex*/Appointments Clause challenge does not go to the PTAB's subject-matter jurisdiction, and thus does not require that the PTAB's decision stand or fall in its entirety. *See Arthrex*, 941 F.3d at 1340 ("Appointments Clause challenges are 'nonjurisdictional ....'" (quoting *Freytag v. Comm'r*, 501 U.S. 868, 878 (1991))). Instead, a party can forfeit such a challenge as to portions of such a decision, as Intel did here on two occasions.

### **CONCLUSION**

This Court should grant panel rehearing and modify its February 20, 2020 orders so as to vacate and remand the PTAB decision at issue in Nos. 2019-1443, -1447, -1449, and -1450 (the Group I appeals), *except* as to the portion finding that Intel had failed to demonstrate that these claims 31-33 of U.S. Patent 7,124,205 unpatentable.

Dated: February 21, 2020

Respectfully submitted,

/s/ Sanford I. Weisburst

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**ADDENDUM**

NOTE: This order is nonprecedential.

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

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**INTEL CORPORATION, CAVIUM, LLC, DELL, INC.,**  
*Appellants*

**v.**

**ALACRITECH, INC.,**  
*Cross-Appellant*

**UNITED STATES,**  
*Intervenor*

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2019-1443, -1447, -1449, -1450

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Appeals from the United States Patent and Trademark  
Office, Patent Trial and Appeal Board in Nos. IPR2017-  
01405, IPR2017-01735, and IPR2018-00336.

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**ALACRITECH, INC.,**  
*Appellant*

**v.**

**INTEL CORPORATION, CAVIUM, LLC, DELL, INC.,  
WISTRON CORPORATION,**  
*Appellees*

**UNITED STATES,**  
*Intervenor*

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2019-1444, -1445, -1466

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Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2017-01391, IPR2017-01392, IPR2017-01406, IPR2017-01707, IPR2018-00329, and IPR2018-00375.

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**ALACRITECH, INC.,**  
*Appellant*

**v.**

**INTEL CORPORATION, CAVIUM, LLC, DELL INC.,**  
*Appellees*

**UNITED STATES,**  
*Intervenor*

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2019-1464

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Appeal from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2017-01393, IPR2017-01714, and IPR2018-00374.

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**ALACRITECH, INC.,**  
*Appellant*

**v.**

INTEL CORPORATION v. ALACRITECH, INC.

3

**INTEL CORPORATION, CAVIUM, LLC, DELL, INC.,**  
*Appellees*

**UNITED STATES,**  
*Intervenor*

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2019-1467, -1468

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Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2017-01409, IPR2017-01410, IPR2017-01736, IPR2017-01737, IPR2018-00338, and IPR2018-00339.

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PER CURIAM.

### **O R D E R**

In its opening briefs in each of the above appeals and cross-appeals, Alacritech, Inc. argues that the final written decisions at issue in these appeals exceed the scope of the Patent Trial and Appeal Board's authority and violate the Constitution's Appointments Clause. In light of *Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320 (Fed. Cir. 2019), the court now vacates the Board decisions and remands for proceedings consistent with this court's decision in *Arthrex*. On remand, the Board may also wish to consider *Samsung Electronics America, Inc. v. Prisia Engineering Corp.*, 948 F.3d 1342 (Fed. Cir. 2020).

Accordingly,

IT IS ORDERED THAT:

(1) The Patent Trial and Appeal Board's decisions are vacated, and the cases are remanded to the Board for proceedings consistent with *Arthrex* and this order.

(2) Each side shall bear its own costs.

FOR THE COURT

February 20, 2020  
Date

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

**CERTIFICATE OF COMPLIANCE**

I certify that this petition for panel rehearing complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). The petition contains 868 words according to the word count of the word-processing system used to prepare the brief, excluding the parts of the petition exempted by Fed. Cir. R. 40(c)(1).

This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a). The brief has been prepared in a proportionally-spaced typeface, 14 point Times New Roman, using Microsoft Word 2013.

February 21, 2020

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**CERTIFICATE OF SERVICE**

I hereby certify that, on February 21, 2020, I filed or caused to be filed a copy of the foregoing document with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system and served or caused to be served a copy on all counsel of record by the CM/ECF system.

February 21, 2020

/s/ Sanford I. Weisburst

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