

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

CUSTOMEDIA TECHNOLOGIES, LLC,
Appellant

v.

**DISH NETWORK CORPORATION, DISH NETWORK
LLC,**
Appellees

2018-2239

Appeal from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. CBM2017-
00023.

CUSTOMEDIA TECHNOLOGIES, LLC,
Appellant

v.

**DISH NETWORK CORPORATION, DISH NETWORK
LLC,**
Cross-Appellants

2018-2240, -2310

Appeals from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. IPR2017-
00454.

CUSTOMEDIA TECHNOLOGIES, LLC,
Appellant

v.

**DISH NETWORK CORPORATION, DISH NETWORK
LLC,**
Appellees

2019-1000

Appeal from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. CBM2017-
00032.

CUSTOMEDIA TECHNOLOGIES, LLC,
Appellant

v.

**DISH NETWORK CORPORATION, DISH NETWORK
LLC,**
Cross-Appellants

2019-1002, -1003, -1027, -1029

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2017-00717 and IPR2017-00724.

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

In each of the above-captioned appeals, Customedia Technologies, LLC submits a notice of supplemental authority identifying 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 letters seek to assert the same challenge here, which the court construes as a motion to vacate the Board decisions here and remand in accordance with *Arthrex*.

We conclude that Customedia has forfeited its Appointments Clause challenges. "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 briefs or raise this challenge in a motion filed prior to its opening briefs. Consequently, we must treat that argument as forfeited in these appeals.

Accordingly,

IT IS ORDERED THAT:

The motions to vacate and remand are denied.

FOR THE COURT

November 1, 2019
Date

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