

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

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CUSTOMEDIA TECHNOLOGIES, LLC,

*Appellant,*

– v. –

DISH NETWORK CORPORATION, DISH NETWORK LLC,

*Cross-Appellants.*

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

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**APPELLANT’S MOTION TO VACATE AND REMAND**

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*Customedia Technologies, LLC*

Dated: November 1, 2019

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**A. RELIEF SOUGHT**

Appellant Customedia Technologies, LLC (“Customedia”) (hereby “Appellant”) moves the Court Pursuant to Federal Rule of Appellate Procedure 27 and Federal Circuit Rule 27(f) for an order vacating and remanding the case to the Board.

**B. GROUNDS FOR THE REQUESTED RELIEF**

The present case is calendared for argument on November 6, 2019. Yesterday, this Court issued its opinion in *Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140, 2019 U.S. App. LEXIS 32613 (Fed. Cir, October 31, 2019). *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. In addressing this infirmity, the Court applied a narrow remedy and severed the statutory removal provisions as applied to APJs, thereby rendering APJs inferior rather than principal officers of the United States. *Id.* at \*34. Next, “[b]ecause the Board’s [final written]

decision was made by a panel of APJs that were not constitutionally appointed at the time of the decision was rendered, [the Court] vacate[d] and remand[ed] the Board’s decision without reaching the merits.” *Id.* at \*36. The Court further explained that for cases in which “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, [the case] must be vacated and remanded.” *Id.* at \*39. This Court determined that a new PTAB panel of APJs must be assigned to such cases. *Id.* at \*40.

Customedia hereby raises a challenge to the constitutionality of the Appointments Clause for the APJs assigned to CBM2017-00019. At the time of the final decision in this case, these APJs were principal officers of the United States who were not appointed by the President and confirmed by the Senate. Because these APJs were not properly appointed and confirmed, the APJs lacked the constitutional authority to issue a final decision in this case. Customedia respectfully requests this Court vacate the final decision of the Board and remand this case to the PTAB with an order to empanel a new Board of APJs in accordance with its decision in *Arthrex*.

**C. MOVANT’S STATEMENT UNDER FEDERAL CIRCUIT RULES  
27(A)(5)**

Customedia notified DISH of its intention of filing this motion but has not received a response as to whether DISH opposes or joins in this motion. Accordingly, Customedia is under the impression that DISH opposes. Due to the timing of the oral argument scheduled in five days, and the timing of the issuance of the *Arthrex* case, Customedia believed it needed to file this motion with undue delay to avoid prejudicing its rights to raise this issue and provide the Court an opportunity to consider the motion prior to the hearing.

**D. CONCLUSION**

For the foregoing reasons, the Court should grant this motion to vacate and remand this case.

Dated: November 1, 2019

Respectfully submitted,

A handwritten signature in black ink that reads "R. W. Mort III". The signature is written in a cursive style with a horizontal line underneath it.

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## 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 1, 2019



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## CERTIFICATE OF WORD COUNT

The total number of words of this Motion, excluding the Certificate of Interest, Certificate of Service, and Certificate of Word Count is 505 as counted automatically by Microsoft Word, which was used to create the document. The word count is below the word limit of 5,000 as set forth in Federal Rules of Appellate Procedure, 27(d)(2)(A).

Dated: November 1, 2019



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## CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: November 1, 2019



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