

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

VIRNETX INC.,)	
)	
Appellant,)	
)	
v.)	No. 19-1671
)	
CISCO SYSTEMS, INC.,)	
)	
Appellee.)	

**MOTION OF UNITED STATES TO STAY PROCEEDINGS
OR EXTEND ITS TIME TO RESPOND**

The United States hereby requests that the Court stay proceedings in this case pending resolution of a petition for rehearing en banc in *Arthrex Inc. v. Smith and Nephew, Inc.*, No. 18-2140 (Fed. Cir.). In the alternative, the United States requests a 30-day extension of the current deadline for the United States to intervene in this case and respond to the appellant’s motion for remand. Counsel for the parties have indicated that they do not oppose this motion. The grounds for this motion are as follows:

1. This is an appeal from a decision of the Patent Trial and Appeal Board (“Board”).
2. On October 31, 2019, this Court issued a decision in *Arthrex* holding that an Appointments Clause defect existed in the statutes governing the Board’s administrative patent judges (APJs), identifying a cure for the constitutional problem,

and remanding the Board's decision for a new hearing. The deadline for the government or the appellee in *Arthrex* to seek rehearing en banc is December 16, 2019. *See* Fed. R. App. P. 35(c), 40(a)(1). The mandate in *Arthrex* will issue no earlier than December 23, 2019. *See* Fed. R. App. P. 41(b).

3. On Thursday, November 7, 2019, the appellant filed a motion for remand in this case on the basis of the Court's holding in *Arthrex* regarding an Appointments Clause defect. On Friday, November 8, 2019, this Court issued an order certifying the appellant's constitutional challenge to the government, and providing that "[t]he United States' request to intervene and any response by the United States ... to the motion is due no later than ten days from the date of filing of this order." The United States' motion to intervene and any response to the motion are thus currently due November 18, 2019.

4. The United States intends to seek rehearing en banc in *Arthrex*. The United States hereby requests that proceedings in this case relating to *Arthrex* be stayed pending the Court's disposition of the government's forthcoming rehearing petition in that case. The government's decision regarding intervention under 28 U.S.C. § 2403 in this case will be informed by any further review of this Court's constitutional holding in *Arthrex*. Similarly, the propriety and scope of remands in any other cases on the basis of *Arthrex* will be affected by whether the Court grants rehearing in that case. It would be inefficient and burdensome for the court and the parties to engage in further proceedings in this case relating to the *Arthrex* decision

until the en banc Court decides what to do with that decision. Accordingly, the Court should stay further proceedings in this case relating to *Arthrex*, including the United States' deadline to intervene and respond to appellant's motion.

5. In the alternative, the United States hereby requests that the deadline to intervene in this case and provide a response to the motion for remand be extended by 30 days, from November 18, 2019, to and including December 18, 2019. Responsibility for deciding whether the United States will intervene in this appeal is vested in the Solicitor General. *See* 28 C.F.R. § 0.20(c). The decision requires review of the case and consultation with interested components of the Department of Justice and the U.S. Patent and Trademark Office. This Court typically allows 30 days for the Solicitor General to inform the Court whether the United States will exercise its intervention authority. This period reflects the time necessary for a decision to be made by the Solicitor General.

6. The United States has notified counsel for the appellant and the appellee of its intention to file this motion. Counsel for the parties have indicated that they do not oppose this motion.

Respectfully submitted,

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DECLARATION OF COUNSEL

I, Courtney L. Dixon, hereby declare as follows:

1. For the reasons set out below, if the Court denies the government’s request for a stay, the government respectfully requests a 30-day extension, to and including December 18, 2019, of the time for filing notice regarding intervention in this appeal and responding to appellant’s motion.

2. The requested extension is necessary in light of the need for intragovernmental consultation regarding the appellant’s constitutional challenges and motion for remand. The Solicitor General has responsibility for deciding whether the United States will intervene in this appeal. *See* 28 C.F.R. § 0.20(c). That decision requires review by and conferral with interested components of the Department of Justice and the U.S. Patent and Trademark Office. Because of the importance of the constitutional issues and the multiple government components involved, the

consultation and review process will take longer than the ten days provided in the Court's order.

3. For the foregoing reasons, good cause exists for extending the deadline for filing the government's notice regarding intervention in this appeal and response to the motion by 30 days, to and including December 18, 2019. *See* Federal Circuit Rule 26(b)(5). Because the Court issued its order providing the United States only ten days to respond the afternoon before a federal-holiday weekend, the requisite extraordinary circumstances also exist to grant this motion. *See* Federal Circuit Rule 26(b)(1).

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 13, 2019. *See* 28 U.S.C. § 1746(2).

/s/ Courtney L. Dixon
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CERTIFICATE OF COMPLIANCE

I hereby certify that the government's motion for a stay complies with the requirements of Federal Rule of Appellate Procedure 27(d)(2)(A). This motion contains 612 words, excluding the parts of the document exempted by Federal Rule of Appellate Procedure 32(f).

/s/ Courtney L. Dixon
COURTNEY L. DIXON

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2019, I electronically filed the foregoing motion with the Clerk of the Court by using the appellate CM/ECF system. I certify that the participants in this appeal are represented by registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Courtney L. Dixon
COURTNEY L. DIXON