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June 3, 2022

**VIA ECF**

Deborah S. Hunt  
Clerk of Court  
United States Court of Appeals for the Sixth Circuit  
540 Potter Stewart U.S. Courthouse  
100 E. Fifth Street  
Cincinnati, Ohio 45202-3988

Re: *Rop, et al. v. Federal Housing Finance Agency, et al.*, No. 20-2071 (scheduled for argument on June 9, 2022 before Judges Gibbons, Cook, and Thapar)

Dear Ms. Hunt:

Pursuant to Federal Rule of Appellate Procedure 28(j), the FHFA Defendants-Appellees write to bring to the panel's attention the attached new decision of the Federal Circuit in *Arthrex, Inc. v. Smith & Nephew, Inc.*, --- F.4th ---, 2022 WL 1696322 (Fed. Cir. May 27, 2022), on remand from the U.S. Supreme Court's decision in *United States v. Arthrex, Inc.*, 141 S. Ct. 1970 (2021).

The Federal Circuit held that the Commissioner for Patents, who was not appointed by the President or confirmed by the Senate, could validly perform the functions and duties assigned to the Director of the Patent and Trademark Office during a vacancy in that position, which does require Presidential nomination and Senate confirmation. 2022 WL 1696322, at \*2-4. The court rejected Arthrex's contention that, as an inferior officer operating without supervision by any superior office, the Commissioner for Patents could not perform those functions. That "Appointments Clause

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challenge runs headlong into *Eaton*,”<sup>1</sup> which “teaches that the Appointments Clause allows an inferior officer to temporarily wield the powers of an absent [Presidentially appointed, Senate-confirmed] officer.” *Id.* at \*3, \*4.

While Arthrex protested that *Eaton* only allows such service “for a limited time” which had been exceeded, the court observed that the authority under which the Commissioner was acting “was, from the outset, limited to the period in which the Director and Deputy Director offices remained vacant.” *Id.* at \*4; *cf.* 12 U.S.C. § 4512(f) (authorizing designation of FHFA Deputy Directors to serve as Acting Director “until ... the appointment of a successor [Senate-confirmed Director] pursuant to subsection (b)”).

The new decision supports the FHFA Defendants-Appellees’ position that plaintiffs’ Appointments Clause claim was correctly dismissed. *See* FHFA Br. Section I (pp. 18-36). We respectfully request that the decision be provided to the panel for their consideration.

Respectfully Submitted,

/s/ Robert J. Katerberg  
Robert J. Katerberg

*Counsel for Defendants-Appellees  
Federal Housing Finance Agency and  
Director Sandra L. Thompson*

Attachment

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<sup>1</sup> *United States v. Eaton*, 169 U.S. 331(1898).

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Robert J. Katerberg  
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