Appeal No. 2023-103

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

In re NIMITZ TECHNOLOGIES LLC
Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the District of Delaware in Nos. 1:21-cv-01247-CFC, 1:21-cv-01362-CFC, 1:21-cv-01855-CFC, and 1:22-cv-00413-CFC, Chief Judge Colm F. Connolly

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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November 29, 2022

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2023-103

Short Case Caption In re: Nimitz Technologies LLC

Filing Party/Entity CNET Media, Inc., BuzzFeed, Inc., Imagine Learning LLC, and Bloomberg L.P.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 11/29/2022

Signature: /s/ Lance E. Wyatt, Jr.

Name: Lance E. Wyatt, Jr.

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ None/Not Applicable
CNET Media, Inc.		N/A
BuzzFeed, Inc.		NBC Universal Media LLC, a wholly-owned
		indirect subsidiary of Comcast Corporation,
		owns more than 10% of BuzzFeed, Inc.
Imagine Learning LLC		N/A
Bloomberg L.P.		N/A

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

FISH & RICHARDSON P.C.		
Neil J. McNabnay	Lance E. Wyatt, Jr.	David B. Conrad
Ricardo J. Bonilla	Jeremy D. Anderson	

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☑ Additional pages attached

Backertop Licensing LLC v. August Home, Inc., 1:22-cv-00573-CFC (D. Del.)	Lamplight Licensing LLC v Ingam Micro, Inc., 1:22-cv-01017-CFC (D. Del.)	Creekview IP LLC v. Skullcandy Inc., 1:22-cv-00427-CFC (D. Del.)
Backertop Licensing LLC v. Canary Connect, Inc., 1:22-cv-00572-CFC (D. Del.)	Mellaconic IP, LLC v. Timeclock Plus, LLC, 1:22-cv-00244-CFC (D. Del.)	Creekview IP LLC v. Jabra Corp., 1:22-cv-00426-CFC (D. Del.)
Lamplight Licensing LLC v ABB, Inc., 1:22-cv-00418-CFC (D. Del.)	Mellaconic IP, LLC v. Deputy, Inc., 1:22-cv-00541-CFC (D. Del.)	Swirlate IP LLC v. Quantela, Inc., 1:22-cv-00235 (D. Del.)

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

Additional Related Cases

- Swirlate IP LLC v. Lantronix, Inc., 1:22-cv-00249-CFC (D. Del.)
- Waverly Licensing LLC v. AT&T Mobility LLC, 1:22-cv-00420 (D. Del.)
- Waverly Licensing LLC v. Granite River Labs Inc., 1:22-cv-00422 (D. Del.)

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INTRODUCTION

There exists an entity, IP Edge, that has directed the filing of thousands of cases by hundreds of patent-assertion entities in federal courts across the country. Yet, it has never been an actual litigant in any of its cases. Its entire business model is to approach unsophisticated "investors" with an investment opportunity. These "investors" are set up as sole owners of patent-assertion vehicles that obtain and then assert patents of dubious quality. This deliberate scheme uses the patent assertion vehicle as a shield to protect IP Edge against penalties arising from bad faith litigation—penalties that were created to deter such behavior. That setup is concealed from the federal courts. Here, the district court, as is within its power, seeks to investigate misrepresentations in corporate disclosure statements. Its investigation should not be impeded because Petitioner (and IP Edge) wishes to avoid having its methods revealed to the public.

"[A] court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud." *Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991). "The power to unearth such a fraud is the power to unearth it effectively." *Universal Oil Co. v. Root Rfg. Co.*, 328 U.S. 575, 580 (1946). Chief Judge Connolly began conducting such an independent investigation into Petitioner's corporate disclosure statements and—as

one commentator put it—"flipped over a rock" to discover a litany of issues with Petitioner's method of conducting litigations.[1] An evidentiary hearing elicited testimony that the judge said "give[s] pause to anybody who really is concerned about the integrity of our judicial system, the abuse of our courts, and potential abuse, lack of transparency as to who the real parties before the Court, about who is making decisions in these types of litigation." Appx386 (107:14–19).

The Petition is an attempt to impede the district court's inherent powers to uncover whether there is fraud being committed on the judicial system. Petitioner does not identify any indisputable right to interrupt the investigation. Its concerns are merely speculative, and Petitioner does not show that there is no other avenue nor better time to address its concerns. The overall concerns here—transparency before and integrity of the judicial system—overwhelmingly favor denying the requested relief.

[1] *See* Andrew E. Russell, "A Wild Hearing: Chief Judge Connolly Flips Over Rock, Finds Mavexar LLC Crawling Around, Controlling Patent Litigation and Giving Hapless Patent Owners Just 5–10%," *IP/DE*, https://ipde.com/blog/2022/11/04/a-wild-hearing-chief-judge-connolly-flips-over-rock-finds-mavexar-llc-crawling-around-controlling-patent-litigation-and-giving-hapless-patent-owners-just-5-10/ (accessed on Nov. 25, 2022).

STATEMENT OF THE CASE

Between August 2021 and March 2022, Petitioner Nimitz Technologies LLC filed complaints for patent infringement against Respondents. Appx23–81; Appx82–155; Appx156–252; Appx253–351. On May 9, 2022, the district court held a hearing on Respondents' motions to dismiss for lack of patent eligibility. The court noted at the hearing, "I look at this patent, and I think this should not be a patent. This is abstract." Appx430 (33:6–7). The district court has not yet issued an order on Respondents' motions.

I. The District Court's Standing Orders and Resulting Evidentiary Hearing

A. The District Court Issues Two Standing Orders Related to Disclosure Statements

On April 18, 2022, Judge Connolly issued a standing order ("Disclosure Statements Standing Order") for all cases before him, requiring all "nongovernmental joint ventures, limited liability corporations, partnerships or limited liability partnerships" to include in corporate disclosure statements "the name of every owner, member and partner of the party, proceeding up the chain of ownership until the name of every individual and corporation with a direct or indirect interest in the party has been identified." Appx352. The same day, Judge Connolly issued another standing order ("TPLF Arrangements Standing Order") for all cases before him, requiring disclosure of third-party litigation funding arrangements

> where a party has made arrangements to receive from a person or entity that is not a party (a 'Third-Party Funder') funding for some or all of the party's attorney fees and/or expenses to litigate this action on a non-recourse basis in exchange for (1) a financial interest that is contingent upon the results of the litigation or (2) a non-monetary result that is not in the nature of a personal loan, bank loan, or insurance.

Appx353. Disclosing parties were required to disclose: (1) the identity, address, and place of formation of the third-party funder; (2) whether any third-party funder's approval is necessary for litigation or settlement decisions in the action, and if so, the nature of the terms and conditions relating to such approval; and (3) a brief description of the nature of the financial interest of the third-party funder. *Id.*

On May 13, 2022, the district court issued an oral order in Petitioner's case against CNET, instructing that "[t]he parties are directed to certify within five days that they have complied with Chief Judge Connolly's April 18, 2022 Standing Order Regarding Disclosure Statements Required by Federal Rule of Civil Procedure 7.1." Appx8. The oral order also reminded the parties "of their obligation to comply with Chief Judge Connolly's April 18, 2022 Standing Order Regarding Third-Party Funding Arrangements." *Id.*

B. Nimitz Fails to Timely Comply With Both Standing Orders

By May 18, 2022, Nimitz failed to file either an amended disclosure statement or the disclosure of any third-party funding arrangement. *See generally* Appx9. Accordingly, the district court issued an Order to Show Cause on May 23, 2022, ordering that "Nimitz shall within three days show good cause why it should not be held in contempt for failing to comply with the Court's May 13, 2022 order." *Id.*

In response, Nimitz explained that its failure was "that the Counsel focused on obtaining the necessary information to provide a complete and correct response to the Court's May 13, 2022 Oral Order and overlooked the 'within five days' language of the Oral Order." Appx432. Additionally, Nimitz filed an amended disclosure statement, disclosing that "[t]he sole owner and member of Nimitz Technologies LLC is Mark Hall, an individual." Appx355. Nimitz further explained that its interpretation of the district court's Disclosure Statements Standing Order "does not require disclosure of entities who may have a financial interest in the outcome of the litigation." *Id.* Nimitz also filed a statement in response to the district court's TPLF Arrangements Standing Order, stating that Nimitz "has not entered into any arrangement with a Third-Party Funder, as defined in the Court's Standing Order Regarding Third-Party Litigation Funding Arrangements." Appx357.

C. The District Court Sets an Evidentiary Hearing to Determine Nimitz's Compliance With the Standing Orders

Following Nimitz's disclosures, the district court issued an order on September 13, 2022, setting an evidentiary hearing for November 4, 2022, "to determine whether Plaintiff has complied with the Court's standing order regarding third-party litigation funding." Appx359. The district court also required that Mark Hall attend the hearing in person. *Id.* Further, on September 28, 2022, the district court stayed the underlying cases pending the outcome of the evidentiary hearing. *Id.*

II. Testimony at the Evidentiary Hearing Magnifies and Multiplies the District Court's Concerns

The district court held the evidentiary hearing on November 4, 2022, questioning the purported sole member of Petitioner's LLC, Mark Hall. Hall testified he made a living in software sales. Appx374 (57:13–16). Nimitz was an investment opportunity presented to him by a friend. Appx376–379 (67:25–69:10; 73:18–74:21; 77:4–6). Hall—and therefore Nimitz—does not make any decisions associated with its patent assertion activities. Appx378–379 (74:22–24; 77:7–11). Instead, a "[c]onsulting agency" known as

Mavexar[2] controls the litigations for Nimitz. Appx376–378 (67:25–68:19; 74:25–75:2).

A. Nimitz Does Not Have a Place of Business

Judge Connolly inquired about the "place of business" Nimitz alleged in its complaints—3333 Preston Road, Suite 300, Frisco, Texas. Hall confirmed that he had never been to that address and Nimitz did not own or lease any office space:

THE COURT:	Do you work out of an office at Frisco, Texas?
HALL:	I do not.
THE COURT:	Is there a suite that's either owned or leased by Nimitz at 3333 Preston Road?
HALL:	I don't understand the question. If that's what the documentation says, then yes.
THE COURT:	Well, you're the sole owner, and you don't know if you have a suite located at Preston Road in Frisco, Texas?
HALL:	I've never been to the suite in Frisco, Texas.
THE COURT:	Do you own a suite? Is it Nimitz? You're -- again, you're the sole owner. Does it own any office space?

[2] As one blog post notes, "Public records indicate that IP Edge's three principals are behind MAVEXAR." David B. Conrad et al., "Judge Connolly's New Standing Order Requiring Disclosure Behind Patent Assertion Entities Is Showing Its Teeth," https://www.fr.com/judge-connollys-new-standing-order-requiring-disclosure-behind-patent-assertion-entities-is-showing-it-has-teeth/ (accessed on Nov. 25, 2022).

HALL:	No.
THE COURT:	Does it lease any office space?
HALL:	No.
THE COURT:	So then, I take it, it doesn't own or lease a suite at 3333 Preston Road; is that right?
HALL:	Correct.
	***
THE COURT:	So it would not be accurate to state that Nimitz has an office address at 3333 Preston Road, Suite 300, correct?
HALL:	I guess not.

Appx376 (66:7–67:10). At sidebar, Judge Connolly informed Nimitz's counsel, "I think 'suite' is a problem." Appx379 (79:19). Judge Connolly stated, "I will question this witness about why somebody thought it was necessary to disingenuously put a suite to identify a post office box." *Id.* (80:11–14). Near the conclusion of Hall's testimony, Judge Connolly confirmed that Hall had never visited the address listed in the complaints and had "no idea if it's an office space or a post office or a FedEx center." Appx380 (82:12–18).

B. Nimitz is Merely a Passive Investment Vehicle

Hall also testified at the hearing that Nimitz was created for him as a passive investment opportunity:

THE COURT:	How did you come to acquire the '328 patent?
HALL:	I was presented an opportunity.

THE COURT:	By whom?
HALL:	Mavexar.
	***
THE COURT:	What did you mean by Mavexar? I'm sorry?
HALL:	Consulting agency.
THE COURT:	Consulting agency that does what?
HALL:	My understanding is they look for patents.
THE COURT:	How did you first learn of Mavexar?
HALL:	I was presented an opportunity by Mavexar and we discussed what they did, and what the opportunity would entail.
THE COURT:	Where did that presentation of the opportunity occur?
HALL:	Over the phone.
THE COURT:	Whom did you speak with?
HALL:	Linh Dietz.[3]
	***
THE COURT:	How did you pay for the patent?
HALL:	There was an agreement between Mavexar and myself where I would assume liability.
THE COURT:	What does that mean?
HALL:	No money exchanged hands from my end.

[3] Earlier in the hearing, the district court was informed that Linh Dietz is "not a lawyer." Appx370 (41:24-42:4). Hall also confirmed that Linh Dietz is not a lawyer. Appx377 (72:20-24).

THE COURT: You have to – I'm not a financial guy, so you have to explain it to me. So you own the patent, but no money -- you didn't exchange any money for it?

HALL: No.

Appx376–378 (67:25–75:2).

Judge Connolly asked further questions to clarify Nimitz's assumption of liability associated with the '328 patent:

THE COURT: Now, you said that you would assume liability for the patent, is that right, when you took ownership of it?

HALL: Correct.

THE COURT: What does that mean?

HALL: Liability in case of -- any monetary liability from a case that did not proceed well.

THE COURT: So is it your understanding, then, if, in this case, for instance, the Court assigned -- or awarded attorney fees to the other side, that you personally would have to pay for them; is that right?

HALL: I believe that's true, yes.

Appx377 (71:8–18).

Next, Judge Connolly inquired about Nimitz's benefit in return for assuming liability for the '328 patent:

THE COURT: And so what did you pay them that persuaded somebody to give you the patent?

HALL: My understanding of what it is, it's a business opportunity presented to me from Mavexar, similar to when I retained

a management company for my rental properties.

***

THE COURT: Okay. And how much, then -- well, then, is it your understanding that the revenue, the money that will be made from the patent, will be obtained through litigation of the patent; is that fair?

HALL: Yes.

THE COURT: What percentage of the litigation do you recover for assuming all this liability?

HALL: I believe it's 10 percent.

THE COURT: So you're the owner of the patent, but you only get one-tenth of it?

HALL: Correct.

THE COURT: Well, did anyone explain to you why Mavexar wanted you to assume liability for the patent?

HALL: No one explained it, no.

THE COURT: Do you have an understanding as to why you're assuming liability for the patent if you only would share -- or obtain 10 percent of the proceeds from it?

HALL: No. I viewed it as an investment, just like stocks.

***

THE COURT: So from your perspective, this is purely an investment opportunity, fair?

HALL: Fair.

Appx378–379 (73:18–74:21, 77:4–6). Hall confirmed that Nimitz's liability for the '328 patent has never resulted in the payment of any costs. Appx378

(76:3–8). As of the hearing, Nimitz had received approximately $4,000 from settlements relating to its patents. Appx380 (82:19–83:8).

C. Nimitz Does Not Control the Litigation—Mavexar Does

Although Nimitz assumes liability for its activities, Hall explained that Nimitz does not control the litigations filed in its name. Appx378–379 (74:22–75:2, 76:13–77:14). Mavexar is in control. *Id.* Specifically, Hall testified that Nimitz (1) is not "involved in the litigation decisions in the cases that are filed that assert the ['328] patent," (2) does not "have prior knowledge of the filing of complaints," and (3) does not "have any prior knowledge of settlements that are reached in litigation in which Nimitz patents are asserted." *Id.* Hall further testified that, instead, Mavexar makes "all the decisions associated with how the patent is asserted and how cases are settled." Appx379 (77:7–11).

Further testimony by Hall reinforced how much control he ceded to Mavexar. Despite being the sole member of Nimitz, Hall could not remember how many patents Nimitz owned, could not recall the name of the '328 patent, and did not know the technology covered by the '328 patent. Appx376 (65:18–66:6, 67:23–24).

During the hearing, both Hall and Nimitz's counsel urged that Mavexar was not providing legal services to Nimitz. *See, e.g.*, Appx370 (41:24-42:4);

see also Appx377 (72:20-24). Judge Connolly noted concerns related to this arrangement: "I don't know how you have attorney-client relationship issues if you're dealing with the client through a nonlawyer third party. That . . . doesn't sound right to me. Either you have that or, then, I think you have unauthorized practice of law issues that are arising perhaps in other states." Appx371 (46:14–21).

III. Testimony From Other Cases Demonstrates a Familiar Pattern and Raises Similar Concerns

Testimony from other plaintiffs from Judge Connolly's evidentiary hearings revealed similar "investment opportunities" presented and controlled by Mavexar and IP Edge.

A. Lamplight Licensing LLC

Judge Connolly first addressed an entity known as Lamplight Licensing at the November 4 evidentiary hearing. The sole owner of Lamplight, Sally Pugal—an office manager at a surgery center—was unable to attend the hearing due to medical issues. Appx361 (5:3–23). Instead, Judge Connolly questioned Lamplight's counsel, Jimmy Chong, to "get some background to understand some things about Lamplight." *Id.* (5:3–6). In response to questioning, Chong explained that Mavexar speaks on Pugal's behalf "as her representative." *Id.* (6:21–7:9). Chong further explained that he did not speak with Pugal before Lamplight's cases were filed, instead "communicat[ing]

through Mavexar," who reached out to Chong on Pugal's behalf. Appx362 (10:5–9). Judge Connolly raised questions about this arrangement:

> Do you know what the rules of ethics are about having a relationship with a client that is initiated by a third party? I'm trying to think of any other context, so help me out. I'm just trying to think what rules would be applicable. I'm not judging. I'm asking questions here. But I'm trying to understand how you end up in an attorney-client relationship with an LLC that is exclusively owned by an individual that you have never met and you've had no conversations with an employee of the LLC, and yet you end up in an attorney-client relationship with the LLC. Do you know what rules would be implicated by that?

Id. (11:4–17). Like Nimitz, Chong confirmed that Mavexar is not a law firm. Appx365 (21:1–2). In conclusion, Judge Connolly determined that he was "not able to make any more definitive judgments about the accuracy of the third-party funding statements, which is what gave rise to this hearing to amend the cases in the first instance without hearing directly from" Pugal. Appx369 (37:8–12).

B. Mellaconic IP LLC

Judge Connolly also heard testimony from Mellaconic IP at the November 4 evidentiary hearing. Mellaconic's sole owner, Hai Bui, testified that he is the owner of a food truck and a "fried chicken joint" in Waco, Texas. Appx381 (85:19–86:6). Like Hall, Bui testified that he was presented with an investment "opportunity" by Mavexar. *Id.* (86:18–88:7). Also like Nimitz, Mellaconic assumes liability for its patents: "So if, like, litigation goes wrong,

Mavexar has the right to come after me for the costs of what was loaned." Appx383 (95:11–12). Bui testified, however, that Mavexar did not determine whether Mellaconic could satisfy any adverse judgment:

> THE COURT: Did you have to have your credit checked or provide any financial information to anyone in order to assume ownership of the patents?
>
> BUI: No.
>
> THE COURT: So whoever assigned the patent to you would have no idea whether you could pay for any costs if the litigation went bad; is that fair?
>
> BUI: That's fair.
>
> THE COURT: For all they knew, you had no money whatsoever, fair?
>
> BUI: Fair.
>
> THE COURT: Who pays for the lawyer fees to go out and sue people using the patents owned by Mellaconic?
>
> MR. BUI: Mavexar.

Id. (95:23–96:10). In exchange for this assumption of liability, Mellaconic likewise receives a small portion of all settlement proceeds from its litigations—five percent. Appx382 (91:5–14).

Like its complete control over Nimitz's litigations, Mavexar also controls all of Mellaconic's litigations. First, Bui testified that Mavexar both named and formed Mellaconic. *Id.* (90:5-13). Next, he testified that Mavexar

handled all negotiations to engage its litigation counsel. Appx383 (93:13–18). He then testified that Mavexar entirely controls Mellaconic's performance in its litigations. Appx384 (99:21–100:10). Indeed, Mavexar controlled Bui's preparation for the evidentiary hearing, including drafting a declaration for Bui's signature, which he did not understand:

> THE COURT: It says, "Mellaconic does not have arrangements to receive from a person or entity that is not a party funding for some or all of the parties attorney fees and/or expenses to litigate this on a nonrecourse basis." What did you understand that to mean, a "nonrecourse basis"?
>
> BUI: I don't know the exact definition of "nonrecourse."
>
> THE COURT: So you signed it, and it's under oath. I mean, how do you feel comfortable signing that if you don't really know what it means?

Appx383–384 (96:18–97:19).

At the conclusion of the November 4 hearing, Judge Connolly stated, "I think the testimony has to give pause to anybody who really is concerned about the integrity of our judicial system, the abuse of our courts, and potential abuse, lack of transparency as to who the real parties before the Court are, about who is making decisions in these types of litigation." Appx386 (107:14–19).

C. Backertop Licensing LLC

On November 10, 2022, Judge Connolly held a separate evidentiary hearing involving a plaintiff called Backertop Licensing. At the outset of the hearing, Backertop's counsel discussed its interpretation of Judge Connolly's standing orders, to which Judge Connolly counseled, "if you have any questions, it seems to me, about an order, it seems to me, the appropriate recourse is to seek guidance from the Court." Appx443 (10:6–8).

Next, Judge Connolly heard testimony from Backertop's sole owner, Lori LaPray, a paralegal from Fort Worth, Texas. Appx445–446 (12:15–13:7). LaPray testified that her husband, Brandon LaPray, "is an independent contractor for Mavexar."[4] Appx446 (13:12–22). LaPray also testified that Mavexar "came up with the name" Backertop and "paid whatever it took to create Backertop, and they did all the work to create it." Appx447–448 (14:3–15:21). Accordingly, Backertop entered into an agreement with Mavexar, which provided that Mavexar "shall provide nonlegal services." Appx452–453 (19:25–20:5). Backertop does not have any offices, does not have any

[4] According to LinkedIn, Brandon LaPray is a Licensing Coordinator for IP Edge. https://www.linkedin.com/in/brandon-lapray-89167255/ (accessed on November 27, 2022).

employees, does not have any other owners, and does not have a bank account, but it does apparently own a P.O. box, of which the payment is "left up to Mavexar and [Backertop's] lawyers." Appx466 (33:6–16).

LaPray further testified to the control that Mavexar exerts over Backertop's litigation campaign. For example, LaPray testified that Backertop's litigation counsel was retained by Mavexar (Appx453–455 (20:16–22:6)), and LaPray did not know anything about and was not provided any background material on Backertop's counsel prior to their retention (Appx473 (40:7–23)). Additionally, LaPray testified that she relies on Mavexar to analyze the merits of the cases that Backertop files. Appx456 (23:4–11). When asked whether she had "any ability, through your knowledge of the patents or anything else, to question [Mavexar's] decisions," LaPray responded, "No, I trust them. I've known them for almost – Mavexar, for almost seven years, so I trust their judgment." Appx456–457 (23:17–24:2). When asked the "sources of funding that Backertop has for anything," LaPray responded, "My understanding is, it's through Mavexar, is the funding." Appx480 (47:2–5). Indeed, Mavexar both arranged and paid for LaPray's travel arrangements to appear at the hearing. Appx468 (35:14–19). At bottom, LaPray testified that Mavexar "ha[s] my full authority to make decisions on behalf of my entity." Appx455 (22:7–9); *see also* Appx467 (34:20–24).

Like Nimitz and Mellaconic, LaPray testified that her husband, an independent contractor for Mavexar, presented her an investment opportunity to "own some assets." Appx447 (14:6–10). With this opportunity, Backertop became the owner of five patents (Appx449 (16:18–21)) and receives five percent of any settlement proceeds from Backertop litigations (Appx474 (41:6–8)). LaPray further testified that proceeds from a settlement go directly to her personal bank account:

THE COURT:	Does Backertop have a bank account?
LAPRAY:	No, sir.
	***
THE COURT:	And where does it keep whatever it has? Where does it keep its money?
LAPRAY:	Well, any settlements that come in goes into my personal account.
THE COURT:	Your personal account? Is there anything in your personal account, other than what has come through Backertop?
LAPRAY:	Uh-huh. Yes, sir.
THE COURT:	But Backertop itself doesn't have any separate accounts, is what you're telling me; is that right?
LAPRAY:	Not that I'm aware of, no.

Appx465–466 (32:8–33:5). At the time of the hearing, Backertop had made "roughly around 2,000," which is paid by Mavexar via direct deposit to

LaPray's personal account. Appx468 (35:3–13). In exchange, LaPray testified that Backertop is liable for its patents, but LaPray is "insulate[d]" from such liability. Appx463–464 (30:17–31:24). Judge Connolly expressed doubt as to whether Backertop could satisfy such liability:

> THE COURT: Well, if Backertop were held liable to pay money to Canary Connect, where would it get its money?
>
> LAPRAY: I'm not sure.
>
> THE COURT: I mean, it doesn't have any bank accounts, right?
>
> LAPRAY: I mean, I guess we'd have to cross that bridge when we come to it. I'm -- I'm not sure. But I understand that I would have to -- you know, could be liable for that.
>
> ***
>
> THE COURT: I'm just trying to understand how you would hire a lawyer, hire Mavexar; they're out suing people. And it says -- it sounds like you think it's possible you could be liable for attorney fees of somebody who's sued. But you don't have any idea what they could be. How you would, kind of, you know, sleep soundly at night.

Appx472 (39:3–23).

Near the end of the hearing, Judge Connolly raised ethical concerns stemming from the testimony:

> How do you -- can you speak to the professional rules of conduct and the circumstance where a client is retained by a lawyer, but has no communication whatsoever with the lawyer? How does

> that work? How is the lawyer -- for instance, how can the lawyer run conflicts and be assured that it doesn't have a conflict? How can the lawyer apprise the client of the lawyer's obligations and the fiduciary responsibilities he owes to the client? I mean, all those questions. Have you looked into that?
>
> ***
>
> So tell me, what rules are implicated, and how is a lawyer able to do that under the Rules of Professional Conduct?

Appx482 (49:1–17). Finally, Judge Connolly expressed concern with Mavexar's involvement:

> And by structuring this litigation the way you have with Mavexar, you've basically put a plaintiff in this court asserting a patent, and the plaintiff has no assets. So you've immunized, effectively, the plaintiff from the consequences of a frivolous lawsuit, for instance. Mavexar, who's driving the train, isn't formally a party here, so you've insulated it, assuming nobody wanted to look into this.

Appx484–485 (51:24–52:7).

IV. The District Court Issues the Memorandum Order in Response to the Hearing Testimony

On November 10, after the hearing, the district court issued a memorandum order, requiring production by Petitioner "to the Court no later than December 8," of certain "documents and communications that are in the possession, custody, and control of Nimitz, Mark Hall, and/or O'Kelly & O'Rourke, LLC." Appx2–5. Specifically, the order requires production of:

- "Any and all retention letters and/or agreements between Nimitz and O'Kelly & O'Rourke, LLC";

- "Any and all communications and correspondence, including emails and text messages, that Mark Hall had with Mavexar, IP Edge, Linh Dietz, Papool Chaudhari, and/or any representative of Mavexar and/or IP Edge" regarding Nimitz's formation, assets, liability, '328 patent, settlements, dismissals, retention of counsel, and the November 4, 2022 hearing;
- "Any and all communications and correspondence, including emails and text messages, that George Pazuniak and/or any employee or representative of O'Kelly & O'Rourke, LLC had with Mavexar, IP Edge, Linh Dietz, Papool Chaudhari, and/or any representative of Mavexar and/or IP Edge" regarding Nimitz's formation, assets, liability, '328 patent, settlements, dismissals, retention of counsel, and the November 4, 2022 hearing;
- "Any and all monthly statements for any and all bank accounts held by Nimitz for the period July 1, 2021 through April 30, 2022"; and
- "Any and all documents relating to Nimitz's use, lease, purchase, and/or retention of 3333 Preston Road STE 300, # 104 7, Frisco, TX 75034."

Id. The order also requires that Hall submit a sworn declaration "that identifies any and all assets owned by Nimitz as of (1) August 30, 2021 ; (2) September 27, 2021 ; (3) December 31 , 2021 ; and (4) March 30, 2022." Appx5.

Nimitz's petition for writ of mandamus followed.

STANDARD OF REVIEW

A writ of mandamus is a "drastic and extraordinary remedy" reserved for "exceptional circumstances." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citations omitted). A petitioner must show that it has no other adequate means to obtain the desired relief and has a "clear and indisputable" right to the writ. *Id.* at 380–81 (internal quotation marks and citations omitted). And even when those two requirements are met, the issuing court, in the exercise of its discretion, must still be satisfied that the writ is appropriate under the circumstances. *Id.* at 381.

ARGUMENT

V. Petitioner Has No Clear and Indisputable Right to a Writ of Mandamus

The Petition rests upon a faulty premise, wrongly asserting that the district court's investigation into the real parties in interest is directed only to Petitioner's authorization to sue under the patent laws or the rules of civil procedure. Petition at 14–19. Rather, the court's concern about interested

parties was directed to preserving "the integrity of our judicial system, the abuse of our courts, and potential abuse, lack of transparency . . . about who is making decisions." Appx386 (107:14–19). It explained, in rejecting Petitioner's request to seal the proceedings, "The public has a right to know who the parties are in the case." Appx372 (50:7–8).

The district court's Order raised "concerns that include but are not limited to the accuracy of statements in filings" and found reason to suspect that interested parties were being concealed. Appx2. The court learned that Petitioner's corporate "suite" address was just a "post office box," not an "office space" where corporate meetings could be held. Appx380 (83:12–18). Disclosing this as a corporate address was "disingenuously" done (Appx379 (80:11–14)), and paralleled "fraudulent schemes" that Judge Connolly had previously prosecuted before ascending to the bench (Appx363 (16:1–5)). The court also learned that the founding of Petitioner's business did not originate with its sole member, Mark Hall, but rather arose because Hall was approached by representatives of Mavexar, LLC about a "potential investment opportunity." Appx378–379 (73:18-74:21, 77:4-6). Petitioner assumed liability for its conduct, but did not decide how to conduct operations. Hall

"defer[red] solely to Mavexar and the lawyers to make all the decisions associated with how the patent is asserted and how cases are settled." Appx379 (77:7–11).

Testimony the court elicited from the owners and counsel of other Mavexar-advised entities demonstrated a common *modus operandi* of control and funding by Mavexar. Yet, when specifically required by the Court to disclose interested parties and its source of litigation funding, Petitioner (and related entities) repeatedly failed to identify Mavexar.

Presented with the evidence it received in the hearings below, the district court has wide discretion to enforce its standing orders by an independent investigation into suspected false or fraudulent disclosures in court filings. *Chambers*, 501 U.S. at 44; *Universal Oil*, 328 U.S. at 580. It further has broad discretion to *sua sponte* request production of documents *in camera* to aid in that investigation—even when privilege is claimed over the materials. *Cf. In re Zolin*, 491 U.S. 554, 569—70 (1989). Petitioner does not have a clear and indisputable right to impede the district court's investigation.

A. The District Court Has Discretion Under Fed. R. Civ. P. 83(b) to Issue its Standing Order

The district court has discretion to regulate its practice in "any manner consistent with" federal law, the rules of evidence and procedure, and the

district's local rules. The disclosures required by the standing orders regarding identifying interested parties were consistent with—and even contemplated by—existing authority. FED. R. CIV. P. 83(b).

Disclosure of interested parties not named in a litigation is a necessary requirement across the federal judiciary to protect the integrity of the judicial system. Rule 7.1 of the Federal Rules of Civil Procedure requires that a non-governmental corporate party must identify "any parent corporation and any publicly held corporation owning 10% or more of its stock." One purpose of this disclosure, as explained in the Advisory Committee Notes, "reflects the 'financial interest' standard of Canon 3C(1)(c) of the Code of Conduct for United States Judges." FED. R. CIV. P. 7.1 advisory committee's note (2002). "This information will support properly informed disqualification decisions in situations that call for automatic disqualification under Canon 3C(1)(c)." *Id.*

The Advisory Committee Notes, however, recognize that Rule 7.1 "does not cover all of the circumstances that may call for disqualification under the financial interest standard, and does not deal at all with other circumstances that may call for disqualification." *Id.* Accordingly, the Notes advise that "Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1." *Id.*

Other district courts have thus implemented local rules or standing orders requiring disclosures beyond those found in Rule 7.1. *See, e.g.*, D.N.J. Local Civ. R. 7.1.1 (requiring disclosure of third-party litigation funding); N.D. Cal. Civil L.R. 3-15 (requiring disclosure of entities "hav[ing] a financial interest in the subject matter in controversy or in a party to the proceeding"). Appellate courts, including the Third Circuit, have similar disclosure requirements. *See, e.g.*, 3d Cir. L.R. 26.1.1(b) (requiring disclosure of publicly owned corporations having a financial interest in the outcome).

Petitioner's argument that 35 U.S.C. § 281 and Fed. R. Civ. P. 17(a)(1)—defining who may bring a patent infringement suit—somehow makes other interested parties inconsequential or irrelevant is incorrect and an affront to Rule 7.1. Judge Connolly's standing orders merely require disclosures complementary to those required by Rule 7.1. As Judge Connolly explained at the November 4 hearing, "I don't know how I can possibly preside over this case without knowing who the parties really are in front of me. That has all sorts of horrible implications." Appx372 (50:1–4).

Section 281 and Rule 17 have no bearing on Judge Connolly's standing orders on disclosure of interested parties, including third-party litigation funders.

B. The District Court Has Wide Discretion to Enforce Its Standing Order by Independent Investigation

The Memorandum Order explains that the district court has "concerns" about "the accuracy of statements in filings made by" Petitioner related to its disclosures about interested parties. Appx2. The Order therefore is a valid exercise of the court's inherent power to independently investigate suspected fraud on the court.

The Supreme Court long ago established that "'[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution,' powers 'which cannot be dispensed with in a Court, because they are necessary to the exercise of all others.'" *Chambers*, 501 U.S. at 43 (quoting *United States v. Hudson*, 11 U.S. 32, 34 (1812)). Accordingly, "Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates." *Id.* (quoting *Anderson v. Dunn*, 19 U.S. 204, 227 (1821)). "These powers are 'governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Id.* (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)).

One of these inherent powers is "the power to conduct an independent investigation in order to determine whether it has been the victim of fraud."

Id. (citing *Universal Oil*, 328 U.S. at 580). "The power to unearth such a fraud is the power to unearth it effectively." *Universal Oil*, 328 U.S. at 580. Indeed, "a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation." *Id.*

Judge Connolly set the evidentiary hearings over concerns "whether Plaintiff has complied with the Court's standing order regarding third-party litigation funding." The resulting hearings multiplied the court's concerns. For example, the testimony suggested that Petitioner had misrepresented its address in its complaints. Appx376 (66:7–67:10); Appx379 (80:11–14); *see also* Appx383–384 (96:18–97:19) (Mellaconic's owner testifying that he signed a declaration drafted by Mavexar despite not understanding all of its contents). Judge Connolly suggested that the Mavexar entities' representations of its P.O. boxes as "suites" may amount to fraud: "I prosecuted fraud cases as a prosecutor against folks that engaged in fraudulent schemes, you know, telemarketing schemes, in part, by using suite numbers for what were really P.O. Boxes." Appx363 (15:22–16:5).

Judge Connolly also questioned the ethics of Mavexar's retention and direction of each LLCs' counsel to the exclusion of each LLC:

> All right. Do you know what the rules of ethics are about having a relationship with a client that is initiated by a third party? I'm trying to think of any other context, so help me out. I'm just trying to think what rules would be applicable. I'm not judging. I'm

> asking questions here. But I'm trying to understand how you end up in an attorney-client relationship with an LLC that is exclusively owned by an individual that you have never met and you've had no conversations with an employee of the LLC, and yet you end up in an attorney-client relationship with the LLC. Do you know what rules would be implicated by that?

Appx362 (11:4-17); *see also* Appx482 (49:1–17).

The testimony also raised concerns about abuse of the corporate form. For example, Petitioner testified it (1) is not "involved in the litigation decisions in the cases that are filed that assert the ['328] patent," (2) does not "have prior knowledge of the filing of complaints," and (3) does not "have any prior knowledge of settlements that are reached in litigation in which Nimitz patents are asserted." Appx378–379 (74:22–75:2, 76:13–77:14). In fact, Mavexar makes "all the decisions associated with how the patent is asserted and how cases are settled." Appx 379 (77:7–11). The other Mavexar-controlled LLCs testified similarly. *See, e.g.*, Appx383 (93:13–18); Appx384 (99:21–100:10); *see also* Appx455 (22:7–9); Appx467 (34:20–24). During the Backertop hearing, Lori LaPray testified that all settlement proceeds are directly deposited by Mavexar into her personal bank account, which contains funds from other non-Backertop sources. Appx465–468 (32:8–33:5, 35:6–13). LaPray further testified that Mavexar both arranged and paid for her travel arrangements to appear at the court's evidentiary hearing. Appx468 (35:14–19).

The testimony also revealed a purpose of Mavexar's scheme: to insulate itself from adverse judgments. As Judge Connolly surmised in the Backertop hearing, "by structuring this litigation the way you have with Mavexar, you've basically put a plaintiff in this court asserting a patent, and the plaintiff has no assets. So you've immunized, effectively, the plaintiff from the consequences of a frivolous lawsuit, for instance. Mavexar, who's driving the train, isn't formally a party here, so you've insulated it, assuming nobody wanted to look into this." Appx484–485 (51:24–52:7).

Mavexar's overwhelming control over and funding of Petitioner and its litigations, as well as Mavexar's other LLCs, also raise standing concerns as to who is the lawful patent owner in each case. *See Preservation Techs. LLC v. MindGeek USA, Inc.*, No. 2:17-cv-8906-DOC-JPR, 2020 WL 10965161, at *6 (C.D. Cal. Dec. 18, 2020) ("[C]ourts have been more receptive to allowing [litigation funding] discovery in patent infringement cases, given patent cases' unique standing requirements . . . .").

In sum, the testimony from the evidentiary hearings multiplied Judge Connolly's concerns beyond mere *pro forma* compliance with his standing orders. The testimony "has to give pause to anybody who really is concerned about the integrity of our judicial system, the abuse of our courts, and potential abuse, lack of transparency as to who the real parties before the Court

are, about who is making decisions in these types of litigation." Appx386 (107:14–19). Accordingly, the district court has wide discretion "to conduct an independent investigation in order to determine whether it has been the victim of fraud." *Chambers*, 501 U.S. at 43 (citing *Universal Oil*, 328 U.S. at 580).

C. The District Court Has Broad Discretion to Review the Requested Materials Even if Privileged

Petitioner wrongly suggests that the court's Order prohibits Petitioner from asserting privilege or other protections over the requested documents. Petition at 19–21. The Memorandum Order does not require waiver of any privilege. It also does not order production to Respondents or to the general public. Production is ordered only "to the Court"—*i.e.*, for *in camera* review. Appx2.

The district court has broad discretion to require parties to make documents available *in camera* for inspection to decide relevant issues, including whether a privilege is properly asserted in view of alleged fraud. *In re Zolin*, 491 U.S. at 569–70. The practice is well-established in federal courts. *Id.*

Although a request by a litigant for *in camera* review requires a low threshold showing to prevent "groundless fishing expeditions," here the request was made *sua sponte* by the district court. There is no prohibition for

a district court to make such an inquiry. *See, e.g.*, *Fed. Election Comm'n v. Christian Coal.*, 178 F.R.D. 456, 462-63 (E.D. Va. 1998) (holding that a party's due process rights were not violated by *in camera* review of purportedly privileged documents beyond those requested by the movant). Even if the law required a threshold showing by the district court for *sua sponte* review, it would "not be a stringent one." *Zolin*, 491 U.S. at 572. That threshold is easily met by the evidence the district court uncovered of potentially false statements in Petitioner's disclosure filings.

Consequently, there is no need for this Court to evaluate Petitioner's assertion of privilege to determine that mandamus relief is not warranted. The claim of privilege is irrelevant. The district court is permitted to receive the materials *in camera*—privileged or not—to aid in its independent investigation into "the accuracy of statements in filings" by Petitioner.[5]

VI. Petitioner's Concerns are Purely Speculative Because It Has Other Adequate Means to Obtain Desired Relief

Petitioner's desired relief to not publicly disclose privileged documents and communications is premature because the court's Order requires only

[5] Petitioner's privilege concerns are questionable considering Petitioner and its counsel conceded that Mavexar is a third party that was not providing legal services. *See, e.g.*, Appx370 (41:24-42:4); *see also* Appx377 (72:20-24).

production "to the Court," *i.e.*, for *in camera* review. Appx2. There is no order to waive privilege. Even if there were any doubt about that, a mandamus from this Court guessing at what the district court would do is not the appropriate way to resolve that doubt. Petitioner could still seek clarification from the district court on the question of privilege but has not yet tried. It could request reconsideration but has not yet done so. *See, e.g.*, *In re Nat'l Oilwell Varco, L.P.*, No. 2015-140, 2015 WL 10936642, at *1 (Fed. Cir. Aug. 7, 2015) ("[A] petitioner must show it lacks alternative means—a requirement that cannot be met when a motion for reconsideration would provide a 'meaningful alternative legal remed[y]' available to petitioner.") (quoting *Canadian Tarpoly Co. U.S. Int'l Trade Comm'n*, 640 F.2d 1322, 1325 (C.C.P.A. 1981); *see also In re Sharon Steel Corp.*, 918 F.2d 434, 438 (3d Cir. 1990) (denying mandamus because district court's required action to take up reconsideration motion was an adequate means of relief). Judge Connolly indicated as much in the Backertop hearing, "if you have any questions, it seems to me, about an order, it seems to me, the appropriate recourse is to seek guidance from the Court." Appx443 (10:6–8). Petitioner has not yet tried alternative means. Instead of pursuing ordinary means of relief, Petitioner ran immediately to this Court for extraordinary relief.

Further, to the extent compliance with the memorandum order influences the outcome of the litigations, Petitioner can appropriately seek appellate relief ***after*** final judgment. *See Cheney*, 542 U.S. at 380-81 ("[T]he writ will not be used as a substitute for the regular appeals process."); *see also Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 383–84 (1953) (noting that the possibility of a "myriad of legal and practical problems as well as inconvenience" does not ordinarily warrant mandamus).

VII. Mandamus is Inappropriate Because Respondents—and the Public at Large—Have a Compelling Interest in Identifying the Entities Controlling Petitioner and the Underlying Litigations

Even if Petitioner could satisfy the two preceding requirements, the writ is still inappropriate under the circumstances because Respondents and the general public have a compelling interest in the district court identifying the real parties-in-interest controlling and funding Petitioner and its underlying litigations.

As demonstrated above, the evidentiary hearings revealed a systematic abuse of the corporate form by non-party Mavexar in bringing the instant lawsuits and many others. An individual was presented "investment opportunities" by Mavexar to own patents they do not understand and to file lawsuits for which they do not make the decisions. *See* Appx376–378 (67:25–75:2). The plaintiffs have no assets and their funds are comingled with their

individual owners' assets. *See* Appx465–466 (32:8–33:5). They never communicate with their attorneys, which were retained by Mavexar. *See* Appx482 (49:1–17). The owners cede all control over litigation to Mavexar but shield it from liability. *See, e.g.*, Appx484–485 (51:24–52:7). Respondents should be informed who truly controls and benefits from this lawsuit. Is it Mavexar? If so, who is behind Mavexar? What undisclosed persons or companies should be identified, so that Judge Connolly can determine whether recusal is required?

Without timely and accurate corporate disclosures, there can be no confidence that the district court has properly evaluated whether there is an appearance of impartiality for which the judge should recuse himself under 28 U.S. Code § 455 and related judicial ethics obligations. It was just last year that journalists discovered a systemic shortcoming with ensuring that such disqualifications occurred when needed.[6] The fallout of the belated discovery was significant: judges directed court clerks to notify parties in hundreds of

[6] James V. Grimaldi et al., "131 Federal Judges Broke the Law by Hearing Cases Where They Had a Financial Interest," *Wall Street Journal* (Sept. 27, 2021), https://www.wsj.com/articles/131-federal-judges-broke-the-law-by-hearing-cases-where-they-had-a-financial-interest-11632834421?mod=article_inline (last accessed Nov. 27, 2022).

lawsuits that they should have disqualified themselves and that cases could be reassigned and reopened.[7]

Judge Connolly underlined this transparency as one of his concerns at the November 4 hearing:

> I don't know how I can possibly preside over this case without knowing who the parties really are in front of me. That has all sorts of horrible implications. And I don't think I should be operating in a sealed star chamber to ascertain that. The public has a right to know who the parties are in the case.

Appx372 (50:1–8).

Petitioner seeks to halt the district court's investigation, which would help avoid a repeat of last year's incident and strengthen the public's confidence in a fair judicial system. Respondents have a right to know who is behind the lawsuit to ensure that the lawsuit Petitioner filed against them is being presided over an impartial member of the judiciary. Accordingly, the public interest in disclosure makes mandamus inappropriate under these circumstances.

VIII. Conclusion and Relief Sought

The petition for writ of mandamus should be denied.

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[7] Michael Siconolfi et al., "Dozens of Federal Judges Had Financial Conflicts: What You Need to Know," *Wall Street Journal* (Apr. 27, 2022), https://www.wsj.com/articles/dozens-of-federal-judges-broke-the-law-on-conflicts-what-you-need-to-know-11632922140 (last accessed Nov. 27, 2022).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This Brief complies with the type-volume limitation of Fed. Cir. R. 32(b)(1) because this Brief contains 7759 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in a proportionately spaced typeface using Microsoft Office Word in Georgia font, size 14.

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FOR THE FEDERAL CIRCUIT

CERTIFICATE OF SERVICE

Case Number 2023-103

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Person Served	Service Location (Address, Facsimile, Email)
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☐ Additional pages attached.

Date: 11/29/2022

Signature: /s/ Lance E. Wyatt, Jr.

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