Docket 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

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***Amicus Curiae* Brief of Acushnet Company, Garmin International, Inc., Red Hat, Inc., SAP America, Inc., SAS Institute Inc., and Symmetry LLC**

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Certificate of Interest

Counsel for *amici curiae* certify the following:

1. The full name of every party or *amicus* represented by us is:

   Acushnet Company
   Garmin International, Inc.
   Red Hat, Inc.
   SAP America, Inc.
   SAS Institute Inc.
   Symmetry LLC

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by us is:

   Not applicable.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by us are:

   Acushnet Company is wholly owned by Acushnet Holdings Corporation, a publicly traded company.

   Garmin International, Inc. is a wholly-owned subsidiary of Garmin Ltd.

   Red Hat, Inc. is indirectly owned by International Business Machines Corporation.

   SAP America, Inc. is wholly owned by parent company SAP SE.

   SAS Institute, Inc. has no parent corporation and no publicly traded corporation owns 10% or more of its shares.

   Symmetry LLC has no parent corporation and no publicly traded corporation owns 10% or more of its shares.

4. The names of all law firms and the partners or associates that appeared for the party or *amici* now represented by this firm in the trial court or agency or are expected to appear in this court are:

   Peter J. Brann
   David Swetnam–Burland
   Stacy O. Stitham
   BRANN & ISAACSON

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal.

   None.

6. Any information required under Fed. R. App. P. 26.1(b) and 26.1(c).

   None.

Dated: November 30, 2022

/s/ David Swetnam-Burland

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Interest of *Amici Curiae*

Although *Amici* Acushnet Company, Garmin International, Inc., Red Hat, Inc., SAP America, Inc., SAS Institute Inc., and Symmetry LLC have their headquarters across the country and operate in diverse industries, they share an interest in a robust, functioning patent system. *Amici* have obtained numerous patents to protect their intellectual property and invested millions of dollars in research and development in their cutting-edge technologies. *Amici* are parties to patent litigation across the nation. Secret litigation funding undermines trust in the judiciary and creates conflicts that erode the core of the judicial system *Amici* rely on to protect the patent rights they hold and their ability to defend themselves vigorously and meaningfully against allegations of patent infringement.[*]

Summary of Argument

"An independent and honorable judiciary is indispensable to justice in our society." Code of Conduct for United States Judges, Canon 1. *Amici* take no view on the merits of the underlying patent infringement lawsuits filed by Nimitz Technologies LLC against Bloomberg LP, Buzzfeed, Inc., CNET Media, Inc., and

[*] Pursuant to Fed. R. App. P. 29 and Fed. Cir. R. 29, *Amici* state that Petitioner Nimitz Technologies LLC does not consent to, but will not oppose, *Amici*'s motion for leave to file this brief; Respondents Bloomberg LP, Buzzfeed, Inc., CNET Media, Inc., and Imagine Learning, Inc. consent to its filing. No party's counsel authored this brief in whole or part; no party or party's counsel contributed money intended to fund preparing or submitting the brief; and no third party contributed money intended to fund preparing or submitting the brief.

Imagine Learning, Inc., each of which is in its infancy. *See* Appx414-427 (docket sheets). They write in support of the common interest of courts, litigants, and the public in knowing what third parties have a financial interest and decision-making authority in federal civil litigation. *Amici* submit this brief as businesses that are concerned about secret litigation funding and its impact on the ability of the judicial system to adjudicate cases fairly and transparently.

In the American legal system, the courts, the parties, and the public presume they can learn who has sued whom by reading the caption. In these cases, however, simple inquiries by the District Court revealed that Nimitz went to great lengths to obfuscate basic information about who is prosecuting these suits. While the District Court and the public knew precisely who Nimitz sued, who funded and made decision for Nimitz remained a mystery. The District Court had every right and reason to demand answers to those questions; and Nimitz has presented no reason why this Court should interfere with the District Court's legitimate management of its own cases. The petition for a writ of *mandamus* should be denied.

Argument

The District Court Acted within its Discretion in Requiring Nimitz to Identify its Funders.

Nimitz gives up the game when it frames the issue. It describes routine acts of judicial oversight—ordering the disclosure *to the Court* of confidential information; making determinations regarding the relevance of certain facts and

evidence and the credibility of certain witnesses; and considering questions of privilege—as an "unprecedented abuse of discretion." ECF 2-1 at 9. The authorities Nimitz invokes for this remarkable position are prohibitions it claims to be "implicitly" contained in the Patent Act, 35 U.S.C. §§ 1-390, and the Federal Rules of Civil Procedure. *Id*. Such implicit prohibitions—which Nimitz cannot establish even exist—cannot support the required showing of a clear and indisputable right to the writ. *Cheney v. U.S. Dist. Ct. for Dist. of Columbia*, 542 U.S. 367, 381 (2004).

Judicial conflicts are a growing problem. There are a number of good reasons why a court can and should inquire into the nature of the parties before it and the identities of the persons behind those parties. Most prominent among these is the reason behind the actual, existing federal rules at all levels of the federal judiciary that require nongovernmental corporate parties to identify their parents and any substantial public owners: to avoid judicial conflicts of interest. *See* S. Ct. R. 29.6; Fed. R. App. P. 26.1; Fed. Cir. R. 26.1 & 47.4; 3d Cir. L.A.R. 26.1.1 & 26.1.2; Fed. R. Civ. P. 7.1. Indeed, the Rules of this Court rightly require non-party filers, such as *Amici*, to provide such information as well.

As the 2002 Committee Notes to Fed. R. Civ. P. 7.1 make clear, the disclosure requirements "are calculated to reach a majority of the circumstances that are likely to call for disqualification on the basis of financial information that a judge may not know or recollect." Fed. R. Civ. P. 7.1, Committee Notes (2002). The Committee

further noted, "Rule 7.1 does not prohibit local rules that require disclosures in addition to those required by Rule 7.1," plainly contemplating that local practice might well require more expansive disclosures. *Id*. And a number of federal district courts have adopted such local rules. *See*, *e.g.*, D.Me. L.R. 7.1 (corporate disclosure "shall list all persons, associations of persons, firms, partnerships, limited liability companies, joint ventures, corporations (including parent or affiliated corporations, clearly identified as such), or any similar entities, owning 10% or more of the named party"); W.D. Wash. LCR 7.1 (requiring disclosure of, *e.g.*, members of limited liability corporations and partners in limited liability partnerships).

These concerns are not academic. *The Wall Street Journal* reported in April 2022 on an investigation that found that 152 federal judges had issued rulings in cases involving companies in which they or their family members held shares. *See* https://www.wsj.com/articles/dozens-of-federal-judges-broke-the-law-on-conflicts-what-you-need-to-know-11632922140 (last accessed Nov. 30, 2022). In one recent case in this Court, the Court vacated a $2.75 billion judgment in favor of a patent-owner "hold[ing] that the district judge was disqualified from hearing the case once he became aware of his wife's ownership of Cisco stock." *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, 38 F.4th 1025, 1027 (Fed. Cir. 2022) (brackets added).

Due process and transparency is a cornerstone of the American judicial system. Secret litigation funding, where the party controlling the plaintiff remains hidden from the court, the public, and the defendant, erodes confidence in the judiciary and its ability to adjudicate disputes fairly.

> Deference to the judgments and rulings of courts depends on public confidence in the integrity and independence of judges. The integrity and independence of judges depend in turn on their acting without fear or favor.

Code of Conduct for United States Judges, Canon 1.

In addition to its existing protections, Fed. R. Civ. P. 7.1 is itself about to expand. Effective December 1, 2022, the rule will require all parties to or intervenors in a federal diversity action to disclose the name and citizenship of any individual or entity whose citizenship is attributable to that party or intervenor. *See* https://www.uscourts.gov/sites/default/files/2022_congressional_package_final_for_website_0.pdf (last accessed Nov. 30, 2022). These early-case disclosures will facilitate accurate determinations of jurisdiction over a certain class of disputes in federal court. Far from prohibiting the kinds of disclosures set out in the District Court's challenged orders, then, the federal rules encourage and invite them.

Opposing parties have a right to be informed of potential conflicts. Anonymous litigation funding arrangements raise real concerns about who is participating in civil litigation in the federal courts and why. A report by the U.S. Chamber of Commerce's Institute for Legal Reform published this month, "A New

Threat: The National Security Risk of Third Party Litigation Funding," available at https://instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf (last accessed, November 30, 2022), highlights the lack of safeguards in third-party litigation funding and the potential for foreign actors to use litigation funding as a vehicle for surreptitiously intervening in the American legal system.

> Canon 3 requires disqualification of a judge in any proceeding in which the judge has a financial interest, however small. Canon 4D requires a judge to refrain from engaging in business and from financial activities that might interfere with the impartial performance of the judge's judicial duties.

Code of Conduct for United States Judges, Commentary to Canon 4D(1), (2), and (3). Not only do parties in federal civil actions have a right to know of possible judicial conflicts involving a judge and his or her staff, but parties also must be aware of conflicts involving their own attorneys. *See*, *e.g.*, Del. Lawyers' Rules of Professional Conduct, R. 1.7 (Conflict of Interest: Current Clients); 1.8 (Conflict of Interest: Current Clients: Specific Rules); 1.9 (Duties to former clients). If third-party litigation funding is not disclosed early in litigation, it may be impossible for a party's counsel to know if they or their law firms have a conflict. *Amici*, as companies that retain a range of law firms across the country that represent a wide swath of American businesses, would be obviously harmed if their chosen counsel unknowingly represented both a plaintiff and defendant in a funded litigation.

Secret litigation funding limits a defendant's recovery. Although there is nothing patent-specific about the federal rules, local rules, or routine case management orders governing party disclosures, the need for transparency is particularly acute in many patent cases brought by NPEs. "[R]ecent large-sample empirical evidence suggests that, on average, entities such as NPEs buy and litigate lower quality patents." Lauren Cohen, *et al.*, *"Troll" Check? A Proposal for Administrative Review of Patent Litigation*, 97 B.U.L. Rev. 1775, 1796 (2017). Non-practicing entities are generally less successful when patent cases are actually litigated. See Mark Lemley, *Missing the Forest for the Trolls*, 113 Colum. L. Rev. 1117, 1120 (2013). "Operating companies' success rates in adjudicated cases is more than twice as high as NPEs: operating companies won definitive rulings 30.6% of the time, compared to only 14.4% for NPEs." John R. Allison, *et al.*, *How Often Do Non-Practicing Entities Win Patent Suits?* 32 Berkeley Tech. L.J. 237, 269 (2017) (footnote omitted).

NPEs tend to be thinly capitalized, have few or no employees, and no offices other than owners' residences. Federal Trade Commission (FTC), *Patent Assertion Entity Activity*, 47 (2016); *see also, e.g.*, *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381 (Fed. Cir. 2010) (office space with no employees); *In re Microsoft Corp.*, 630 F.3d 1361, 1362 (Fed. Cir. 2011) (no employees); *In re Verizon Business Network Servs. Inc.*, 635 F.3d 559, 561-62 (Fed. Cir. 2011) (no employees); *In re Toyota*

Motor Corp., 747 F.3d 1338, 1339 (Fed. Cir. 2014) (one office shared by multiple NPEs). And they place artificial barriers between entities that own patents and the investors that bankroll litigation.

> Sophisticated trolls sue using shell companies created for the specific purpose of shielding their investors from liability and scrutiny. Structured correctly, the entity need not be connected to the corporation's sponsors or its assets. Faced with a sanction or attorney's fee award against it, the LLC could go bankrupt rather than pay the penalty.

Colleen V. Chien, *Reforming Software Patents*, 50 Hous. L. Rev. 325, 382-83 (2012) (footnote omitted); *see also* Ashli Weiss, *An Insight into the Apparel Industry's Patent Troll Problem*, 6 Hastings Sci. & Tech. L.J. 121, 127-28 (2014); Peggy P. Ni, *Rethinking Finality in the PTAB Age*, 31 Berkeley Tech. L.J. 557, 563 (2016).

This Court knows well the potential for abuses. *See Elec. Commc'n Techs., LLC v. Shopperschoice.com, LLC*, 963 F.3d 1371, 1378 (Fed. Cir. 2020); *see also SFA Sys., LLC v. Newegg, Inc.* 793 F.3d 1344, 1350 (Fed. Cir. 2015); *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1327 (Fed. Cir. 2011). Without the kinds of disclosures the District Court required of Nimitz, courts have found it hard to hold NPEs structured in this manner to account for misconduct.

Iris Connex, LLC v. Dell, Inc., 235 F. Supp. 3d 826 (E.D. Tex. 2017), is illustrative. After the accused infringer prevailed on the merits at considerable expense, it sought an award of attorneys' fees under 35 U.S.C. § 285. The district court permitted discovery relating to the fee petition because the defendant

"presented evidence that strongly implied that Iris Connex was an intentionally empty shell company and, as a consequence, had no capacity to pay such fees even if the case were ultimately declared to be exceptional." *Iris Connex*, 235 F. Supp. 3d at 832. Discovery confirmed that the plaintiff was a "shell corporation" with one asset, the patent-in-suit. *Id.* at 833. That company was a wholly-owned subsidiary of another "shell corporation." *Id.* Faced with the prospect of having to pay a fee award, both shell corporations filed for bankruptcy. *Id*. at 837-38. The court concluded that the plaintiff was so structured precisely to avoid paying attorneys' fees if a lawsuit ever "went south." *Id*. at 859. It was formed shortly before filing suit; had no assets other than the patent; had no working capital; had no employees; had no bank account until after it filed suit; had no other purpose than pursuing its rights under the patent; and was controlled by an undisclosed principal. *Id*. at 840–42. Ultimately, the court found an award of attorneys' fees against both the plaintiff and its undisclosed principal warranted both because of the weakness of the asserted claim and because the hidden power behind the throne "made an intentional decision to create and undercapitalize Iris Connex as an empty shell." *Id*. at 851; *cf. Dragon Intellectual Property, LLC v. Dish Network L.L.C.*, 2021 WL 3616147, *11 (D. Del. Aug. 16, 2021) (declining to impose fee award on plaintiff's counsel, but noting, "If Dragon's owners have abused the corporate form or intentionally undercapitalized

the company to avoid paying a fee award, there are theories under which they can be held accountable.").

Other courts have taken or approved similar measures. In *Alliance for Good Government v. Coalition for Better Government*, 998 F.3d 661 (5th Cir. 2021), the Fifth Circuit affirmed an award of exceptional case attorneys' fees against an individual principal of the losing party in a trademark action because she was directly responsible for some of the conduct rendering the case exceptional. In a case involving one of *Amici*, *SAP America, Inc v. InvestPic, LLC*, 2021 WL 1102085 (N.D. Tex. Mar. 23, 2021), SAP America sought to vacate a judgment in its favor so that it could amend its complaint to name specific individuals as defendants who might be held liable for the award of attorneys' fees. Post-judgment evidence demonstrated "that InvestPic is a sham or shell entity that is designed and intended to avoid liability." *Id*. at *5.

> With InvestPic owning essentially no assets and maintaining a near-zero balance in its bank account, the members of InvestPic made InvestPic judgment-proof and insulated themselves from any liability caused by their actions. In particular, this arrangement allowed InvestPic and the actors controlling InvestPic to act in a manner that made this case exceptional, without any fear of liability for their actions. InvestPic's refusal to provide proof that InvestPic was ever properly funded also indicates that InvestPic is a shell company.

Id. The court set aside the judgment and reopened the case to allow claims to be stated against additional parties with an ownership interest in the defendant NPE. *Id*. at *8-*9.

The District Court has broad authority to manage its cases. To cut this Gordian knot, a district court has the authority at the outset of litigation to require disclosures that allow the district judge to identify and address actual or potential conflicts of interest; know the nature of the parties and the identities of the persons with a financial stake in the proceedings; and to order the course of litigation to permit legitimate claims to be pursued and frivolous ones to be summarily addressed. Far from a clear abuse of discretion, this is good case management. Moreover, it is case management that, in this instance, in no way hinders Nimitz from asserting its patent against these (or any other) defendants.

"The Supreme Court has long recognized that district courts have broad discretion to manage their dockets…." *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842, 849-50 (Fed. Cir. 2008) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254-55 (1936)). And "this [C]ourt defers to the judgment of the trial court on matters closely associated with the standard functions of the adjudicative process, as long as that judgment is not an abuse of the trial court's discretion." *Univ. of W.Va. Bd. of Trustees v. Vanvoorhies*, 278 F.3d 1288, 1295 (Fed. Cir. 2002); *see also Abbott Labs. v. Brennan*, 952 F.2d 1346, 1351 (Fed. Cir. 1991) ("It is improper to disturb a district court's trial management, absent a clear abuse of judicial discretion.") (citation omitted); *Beatrice Foods Co. v. New England Printing & Lithographing Co.*, 899 F.2d 1171, 1177 (Fed. Cir. 1990). Standard functions

include the basic tools of case management, such as the disqualification of counsel, stays of proceedings, and the management of discovery. *W.Va. Bd. of Trustees*, 278 F.3d at 1295 (citations omitted).

Absent an issue unique to patent law, the exercise of authority under federal or local rules and court orders is controlled by regional circuit law. *See Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 857 (Fed. Cir. 1991) ("our practice has been to defer to regional circuit law when the precise issue involves an interpretation of the Federal Rules of Civil Procedure or the local rules of the district court."); *Computers Docketing Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1373 (Fed. Cir. 2008) (discovery disputes); *Celgene Corp. v. Mylan Pharms. Inc., Warner Chilcott Labs. Ireland Ltd. v. Impax Labs., Inc.*, 2009 WL 3627947, *2 (D.N.J. Oct. 29, 2009) (confidentiality order). The Third Circuit recognizes the broad discretion of the district court to manage discovery and control its own docket. *United States v. Washington*, 869 F.3d 193, 220 (3d Cir. 2017).

Even where, *unlike* here, a unique patent law issue is present, this Court's case law mandates significant deference to a district court's application and interpretation of its own orders "so as not to frustrate local attempts to manage patent cases according to prescribed guidelines." *Genentech, Inc. v. Amgen, Inc.*, 289 F.3d 761, 774 (Fed. Cir. 2002); *see Mortgage Grader, Inc. v. First Choice Loan Servs. Inc.*,

811 F.3d 1314, 1320-21 (Fed. Cir. 2016); *Keranos, LLC v. Silicon Storage Tech., Inc.*, 797 F.3d 1025, 1035 (Fed. Cir. 2015).

Nor may this Court use its statutory subject-matter jurisdiction over patent cases as a pretext for creating special rules for patent cases on routine procedural matters. Yet Nimitz invites the Court to do just that by miscasting the District Court's orders—which are not patent-specific—as somehow specially governed by the Patent Act. *See* ECF 2-1 at 1 (the standing order "has no basis in the Patent Act"); 2 ("the Patent Act prohibit[s] the court's consideration of facts about the persons with a financial stake in the litigation); 4 ("Does the Memorandum Order contradict the Patent Act…?"); 17 (District Court's orders "an affront to the plain language of the Patent Act"). The case law is clear that the rules that govern the administration of all federal litigation also govern the administration of patent litigation. *See*, *e.g.*, *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 557 (2014) (no special standard of proof of attorneys' fees in patent cases).

Neither the District Court's Standing Order Regarding Third-Party Litigation Funding Requirements, Appx353-354, nor the subsequent Memorandum Order to Nimitz, Appx1-5, raises an issue unique to patent law. The former is not limited to patent litigation or limited by the Patent Act. Appx353-354. It applies to "all cases" assigned to the district judge. *Id*. It seeks information about the identity of third-party funders and the nature of their interests in a party. *Id*. And it authorizes

discovery of third-party funding arrangements only on a showing that the funder has authority to make litigation decisions. *Id.*

The latter order, based on credibility determinations made by the district judge during an evidentiary hearing, Appx2, requires the production "to the Court" of certain documents that would show whether there is someone running these cases behind the curtain. *Id*. at Appx2-5. It is notable—indeed, glaring—that the following specific language is not once quoted in Nimitz's brief: "…it is HEREBY ORDERED that Plaintiff shall produce *to the Court*...copies of the following documents and communications…." Appx 2 (ellipses and emphasis added). At this stage, the District Court has asked Nimitz only to provide additional information to that court, not the defendants.

Stripped of its rhetoric, then, Nimitz's petition presents no real issue for this Court to resolve. As discussed, there are a number of valid case management reasons why a district court, opposing parties, and opposing counsel need to know who is funding litigation and who is making litigation decisions for the parties. The mere identification of funders and the financial terms of the funding does not deprive a patent-owner of any right to assert a patent it owns. The production of documents *to the Court* does not raise any privilege or work product concerns. *Cf. United States v. Zolin*, 491 U.S. 554, 565 (1989) (district court may conduct *in camera* review of allegedly privileged communications to determine whether they fall within crime-

fraud exception). And the district court may make decisions and issue orders based on its own credibility determinations of the veracity and reliability of witnesses, determinations entitled to near-complete deference. *See Agfa Corp. v. Creo Prods. Inc.*, 451 F.3d 1366, 1379 (Fed. Cir. 2006) ("This court must defer heavily to the trial court's credibility determinations."); *JVW Enters., Inc. v. Interact Accessories, Inc.*, 424 F.3d 1324, 1334 (Fed. Cir. 2005) ("[C]redibility determinations by the trial judge can virtually never be clear error.") (brackets added and citations and quotations omitted). Nimitz can point to nothing the District Court has yet done that exceeds that court's authority or actually harms Nimitz. *See Jang v. Boston Scientific Corp.*, 532 F.3d 1330, 1336-37 (Fed. Cir. 2008) (no advisory opinions).

CONCLUSION

Amici respectfully submit that the Court should deny Nimitz's petition.

Dated: November 30, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 30, 2022, I filed the foregoing with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: November 30, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and Fed. Cir. R. 21 and 32, counsel for the undersigned *Amici Curiae* certify that this brief complies with the type-volume limitation. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f) & Fed. Cir. R. 32(b), the brief contains 3,627 words.

The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: November 30, 2022

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