No. _____

In the Supreme Court of the United States

CELLSPIN SOFT, INC.,

Petitioner,

v.

FITBIT LLC, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

28 U.S.C. § 455 outlines the grounds for disqualification of judges and magistrates due to potential biases or conflicts of interest. This Honorable Court has previously highlighted the fact that: "We must *first* determine whether § 455(a) can be violated based on an appearance of partiality." *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858 (1988). This Court has also highlighted the fact that "*failure* to consider objective standards requiring recusal is not consistent with the imperatives of due process." *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 886 (2009).

This unique case raises three questions under that well-established framework:

1. Should the merits as to the question of recusal under 28 U.S.C. § 455(a) be decided *first*, before reaching the merits of any potential abuse of discretion in excluding evidence in the district court?

2. Is the *failure* to rule on the merits under § 455(a) a due process violation, especially when the spouse of the district court judge has accepted $700 Million in part from Google (which is a party to ongoing litigation), and has five publicly-announced strategic partnerships with Google?

3. Should federal judges be allowed to hold investments of $5 Million and as much as a $25 Million in hedge funds under 28 U.S.C. § 455(d)?

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Cellspin Soft, Inc.

Respondent and Defendants-Appellees below

- Fitbit LLC (owned by Google, Inc.)
- Under Armour, Inc.
- Fossil Group, Inc.
- Nike, Inc.
- Nikon Americas, Inc.
- Nikon, Inc.
- Garmin International, Inc.
- Garmin USA, Inc.

CORPORATE DISCLOSURE STATEMENT

Cellspin Soft, Inc. is not a publicly traded company, and has no parent company. There is no publicly held company with more than 10% ownership stake in Cellspin Soft, Inc.

LIST OF PROCEEDINGS

These cases all concern the same nucleus of parties, all of whom were present in the original District Court proceedings. The various District Court Orders which gave rise to the action in the Court of Appeals for the Federal Circuit concerned all parties, as recognized by the Federal Circuit in one of the subject Orders at issue here ("The actions were not consolidated but were litigated in conjunction with each other"). More specifically, the summary judgment opinion plainly concerned all defendants below (and all Respondents here), and the recusal opinion likewise impacted all defendants, given the fact that Petitioner Cellspin has argued in favor of full recusal from all actions at the District Court. The final district court order denying the motion for recusal combined all the case numbers and defendant names onto the same order. (App.51a).

U.S. Court of Appeals, Federal Circuit

Nos. 2022-2025, 2022-2028, 2022-2029, 2022-2030, 2022-2032, 2022-2037

Cellspin Soft, Inc., *Plaintiff-Appellant,* v. Fitbit LLC, Et Al., *Defendants-Appellees*

Opinion: November 1, 2024

U.S. Court of Appeals, Federal Circuit

Nos. 2023-1526

Cellspin Soft, Inc., *Plaintiff-Appellant,* v. Fitbit LLC, Et Al., *Defendants-Appellees*

Opinion: November 1, 2024

U.S. District Court, N.D. California

No. 4:17-cv-05928

Cellspin Soft, Inc., *Plaintiff,* v.
Garmin International, Inc., Et Al., *Defendants.*

No. 4:17-cv-05931

Cellspin Soft, Inc., *Plaintiff,* v.
Fitbit LLC, *Defendant*

No. 4:17-cv-05932

Cellspin Soft, Inc., *Plaintiff,* v.
Under Armour, Inc., *Defendant.*

No. 4:17-cv-05933

Cellspin Soft, Inc., *Plaintiff,* v.
Fossil Group, Et Al., *Defendant.*

No. 4:17-cv-05934

Cellspin Soft, Inc., *Plaintiff,* v.
Garmin International, Inc., Et Al., *Defendant.*

No. 4:17-cv-05936

Cellspin Soft, Inc., *Plaintiff,* v.
Nikon Americas, Inc., Et Al., *Defendant.*

Judgments: June 15, 2022

Order Denying Recusal: February 15, 2023
(Order combined all defendants and case numbers into a single order)

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

CORPORATE DISCLOSURE STATEMENT ii

LIST OF PROCEEDINGS iii

TABLE OF AUTHORITIES x

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS AND PROCEEDINGS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Introduction 3

B. Background 6

C. Proceedings Below 6

REASONS FOR GRANTING THE PETITION 8

I. SHOULD MERITS OF JUDGE'S RECUSAL UNDER 28 U.S.C. § 455(a) BE DECIDED FIRST, BEFORE DECIDING JUDGE'S ABUSE OF DISCRETION TO EXCLUDE EVIDENCE IN THE CASE? 11

A. Legal Precedents 15

B. Compromised Fairness 15

C. Erosion of Public Trust 15

TABLE OF CONTENTS – Continued

Page

II. IN A GOOGLE CASE WHERE JUDGE'S VENTURE CAPITALIST SPOUSE HAS ACCEPTED $700 MILLION IN PART OF GOOGLE MONEY AND HAS FIVE PUBLICLY ANNOUNCED STRATEGIC PARTNERSHIPS WITH GOOGLE, IS FAILURE TO RULE ON § 455(a) MERITS REQUIRING RECUSAL A DUE PROCESS VIOLATION? 16

III. SHOULD FEDERAL JUDGES BE ALLOWED TO OWN $5 MILLION AND AS MUCH AS A $25 MILLION IN HEDGE FUND WITHOUT TRIGGERING RECUSAL UNDER 28 U.S.C. § 455(d)?..... 20

IV. FAILURE TO VACATE JUDGE'S TAINTED RULING IS PLAINLY NOT HARMLESS ERROR 23

V. FACTS OF THE CASES DICTATE THAT PRECLUSIVE EFFECT APPLIES IN THE OPPOSITE DIRECTION 26

CONCLUSION..... 31

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

PUBLIC APPENDIX

FEDERAL CIRCUIT CASE NOS. 2022-2025, 2022-2028, 2022-2029, 2022-2030, 2022-2032, 2022-2037

Opinion, U.S. Court of Appeals for the Federal Circuit (November 1, 2024) 1a

Judgment, U.S. Court of Appeals for the Federal Circuit (November 1, 2024) 22a

Mandate, U.S. Court of Appeals for the Federal Circuit (December 9, 2024)..... 24a

FEDERAL CIRCUIT CASE NO. 2023-1526

Opinion, U.S. Court of Appeals for the Federal Circuit (November 1, 2024) 26a

Judgment, U.S. Court of Appeals for the Federal Circuit (November 1, 2024) 39a

Mandate, U.S. Court of Appeals for the Federal Circuit (December 9, 2024)..... 41a

U.S. DISTRICT COURT, N.D. CALIFORNIA NOS. 4:17-CV-05928-YGR, 4:17-CV-05931-YGR, 4:17-CV-05932-YGR, 4:17-CV-05933-YGR, 4:17-CV-05934-YGR, 4:17-CV-05936-YGR

Order Revising Judgment Under Federal Rule of Civil Procedure 54(b), U.S. District Court for the Northern District of California (July 19, 2022) 43a

TABLE OF CONTENTS – Continued

Page

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 45a

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 46a

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 47a

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 48a

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 49a

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 50a

Order Denying Motion for Recusal Pursuant to Section 455, U.S. District Court for the Northern District of California (February 15, 2023) 51a

CASE MATERIAL

Opening Brief of Plaintiff-Appellant (April 24, 2023) 78a

Reply Brief of Plaintiff-Appellant (August 7, 2023) 144a

TABLE OF CONTENTS – Continued

Page

SEALED SUPPLEMENTAL APPENDIX

U.S. DISTRICT COURT, N.D. CALIFORNIA NOS. 4:17-CV-05928-YGR, 4:17-CV-05931-YGR, 4:17-CV-05932-YGR, 4:17-CV-05933-YGR, 4:17-CV-05934-YGR, 4:17-CV-05936-YGR

[Sealed] Summary Judgment Orders, U.S. District Court for the Northern District of California (June 7, 2022) 175a

CASE MATERIAL

[Confidential] Second Corrected Opening Brief of Plaintiff-Appellant (February 10, 2023) 296a

[Confidential] Reply Brief of Plaintiff-Appellant (May 1, 2023) 407a

TABLE OF AUTHORITIES

Page

CASES

Aetna Life Ins. v. Lavoie,
475 U.S. 813 (1986) 18

Caperton v. A. T. Massey Coal Co.,
556 U.S. 868 (2009) ..... i, 4, 8, 9, 12, 16, 17, 20

Chapman v. California,
386 U.S. 18 (1967) 5, 11, 24, 25

FTC v. Cement Institute,
333 U.S. 683 (1948) 18

Ignacio v. Judges of U.S. Court of Appeals,
453 F.3d 1160 (9th Cir. 2006) 13

In re Murchison,
349 U.S. 133 (1955) 9, 17, 18

Liljeberg v. Health Services Acquisition Corp.,
486 U.S. 847 (1988) ..... i, 4, 8, 12

Liteky v. United States,
510 U.S. 540 (1994) 12

Mayberry v. Pennsylvania,
400 U.S. 455 (1971) 18

Puckett v. United States,
556 U.S. 129 (2009) 5, 11, 25

Shell Oil Co. v. United States,
672 F.3d 1283 (Fed. Cir. 2012)..... 29, 30

Tumey v. Ohio,
273 U.S. 510 (1927) 18

Williams v. Pennsylvania,
579 U.S. 1 (2016) 5, 9, 10, 24

TABLE OF AUTHORITIES – Continued

Page

Withrow v. Larkin,
421 U.S. 35 (1975) 18, 20

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 455.....i, 2-4, 6, 8, 9, 12-14, 17, 25, 27, 29

28 U.S.C. § 455(a) .....i, 4-6, 8-17, 20, 23-26

28 U.S.C. § 455(a)–(d) 7

28 U.S.C. § 455(d) i

28 U.S.C. § 455(d)(4)(i) 22

28 U.S.C. § 455(f) 30

35 U.S.C. § 101..... 6

35 U.S.C. § 285..... 7

PETITION FOR A WRIT OF CERTIORARI

Cellspin Soft, Inc. petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Federal Circuit.

OPINIONS AND PROCEEDINGS BELOW

The Federal Circuit's opinions are not reported, but are available at 2024 WL 4648069 and 2024 WL 4647992. (App.1a, App.26a). The Northern District of California's orders are likewise not reported, but are available at 2023 WL 2176758 and 2022 WL 2784467.

Specifically, Petitioner appeals and seeks review of the following:

Cellspin Soft, Inc. v. Fitbit LLC, 2022-2025, 2022-2028, 2022-2029, 2022-2030, 2022-2032, 2022-2037, 2024 WL 4648069 (Fed. Cir. Nov. 1, 2024). (App.1a)

Cellspin Soft, Inc. v. Fitbit LLC, 2023-1526, 2024 WL 4647992 (Fed. Cir. Nov. 1, 2024). (App.26a).

JURISDICTION

The opinions of the Federal Circuit were entered on November 1, 2024. (App.1a, 26a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

. . .

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

. . .

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

. . .

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

STATEMENT OF THE CASE

A. Introduction

This case goes to the heart of 28 U.S.C. § 455. The following are direct quotes from the erroneous opinion of the Court of Appeals for the Federal Circuit (emphasis added):

> We therefore affirm the district court's denial of the motion to recuse on the Ajax ground <u>*without reaching the merits*</u>.

Cellspin Soft, Inc. v. Fitbit LLC, 2024 WL 4647992 at *6 (Fed. Cir. Nov. 1, 2024). (App.38a).

> We also conclude that, even if there was error as to the remaining part (an issue <u>we do not decide</u>), any such *error was harmless*.

Id. at *1. (App.28a).

This Court has specifically determined that "We must first determine whether § 455(a) can be violated based on an appearance of partiality" *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 858 (1988). The Federal Circuit plainly disregarded this rule by refusing to *first* resolve the merits of the issues raised under 28 U.S.C. § 455 in the appeal below. This failure is made more egregious in light of the evidentiary record which shows the following with respect to the district court judge and her spouse in a case involving Google as a party: the venture capitalist spouse has taken $700 million in part from Google, the spouse has five separate publicly-announced strategic partnerships with Google, and the judge herself owns anywhere between $5–$25 Million in a specific hedge fund. If these circumstances do not warrant recusal under 455(a) then *nothing* does. Again, the Federal Circuit's refusal to rule on the merits of 28 U.S.C. § 455 is plainly erroneous and cannot stand.

This Court has also highlighted the fact that the "*failure* to consider objective standards requiring recusal is not consistent with the imperatives of due process." *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 886 (2009). Moreover, due process requires recusal when a judge has a significant financial interest in a case, or when there is a probability of actual bias that is too high to be constitutionally tolerable. *Id.* Here, the Federal Circuit violated Cellspin's right to due process by not *first* reaching the merits on the 455(a) recusal.

Before deciding on the Judge's abuse of discretion of *excluding evidence* via local rules, the Federal Circuit needed to first decide if the matter is properly before the court and thus Federal Circuit needed to decide 28 U.S.C. § 455(a) for the Judge first. This Federal

Circuit interpretation of not deciding the merits of the § 455(a) will have significance impact on the judiciary not only in the Federal Circuit, where many important cases are heard, but in other courts throughout the country for recusal provisions. Merits of the recusal need to be decided first before deciding on the error amounting *to an abuse of discretion review standard* that are not do novo. By addressing recusal issues *before* considering the merits of the underlying case at the Federal Circuit, it will ensure a fair and just legal process *at every level of the judiciary*.

A structural error that the Federal Circuit expressly decided *not* to rule on cannot be considered "harmless." This Court has highlighted the fact that a "structural error" can never be considered harmless, and that the judge recusal constitutes a structural error. *Williams v. Pennsylvania*, 579 U.S. 1, 14 (2016) ("the Court holds that an unconstitutional failure to recuse constitutes structural error"); *id.* at 16 ("When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless"); *id.* at 2 ("an unconstitutional failure to recuse constitutes structural error that is "not amenable" to harmless-error review") (citing *Puckett v. United States*, 556 U.S. 129, 141 (2009)).

This Court has also highlighted the fact that for a structural–constitutional error to be considered harmless, a court must be able to declare its belief that it was harmless beyond a reasonable doubt. "Before a constitutional error can be held to be harmless the court must be able to declare its belief that it was *harmless beyond a reasonable doubt*." *Chapman v. California*, 386 U.S. 18, 24 (1967). In this

case the Federal Circuit disregarded all the Supreme Court case law regarding harmless error doctrine.

The skirting of the § 455 merits issue on the part of the Federal Circuit is not acceptable under controlling precedent, especially that which relies on the appearance of impartiality by the judiciary. Public confidence in the judiciary requires confidence in judges' impartiality – in cases that may evoke strong passions no less than in cases of little moment. Public confidence requires that a judge avoid deciding cases when "his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The Federal Circuit's interpretation of the recusal law essentially deletes this key, by deciding the "abuse of discretion" issues by the district court Judge before deciding the merits of 28 U.S.C. § 455(a) Judge recusal and in turn then *never reaching* the merits of the 455(a) case because it already decided on the "abuse of discretion" of excluding evidence to get rid of the case.

B. Background

Cellspin Soft, Inc. is a small inventor led company that has been awarded nineteen patents relating to media upload technologies using Bluetooth. The central questions in the appeal below were: (i) whether the district court judge erred in failing to recuse herself under 28 U.S.C. § 455; and (ii) whether the district court erred in granting each of defendant's individual motions for summary judgment of non-infringement.

C. Proceedings Below

First in 2018: the Federal Circuit associated all the cases on appeal following the District Court's earlier erroneous Orders invalidating all Asserted Claims under 35 U.S.C. § 101 at the pleading stage.

(2018-1817; 2018-1819; 2018-1820; 2018-1821; 2018-1822; 2018-1823; 2018-1824; 2018-1825; and 2018-1826). The Federal Circuit also associated all the cases on appeal for § 285 against Cellspin.

In 2019 the Federal Circuit reversed and remanded the District Court's Orders. *Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306 (Fed. Cir. 2019).

Second in 2022: the Federal Circuit again consolidated all the cases for review of the Summary Judgment opinion of the District Court. (2022-2025; 2022-2028; 2022-2029; 2022-2030; 2022-2032; and 2022-2037).

Third in 2023: the Federal Circuit rejected Cellspin's Motion to Deconsolidate the pending appeals, finding that the district court's Summary Judgment Order relies upon essentially identical reasoning throughout. *See* Dkt. No. 33 (Order Denying Motion to Deconsolidate) in CAFC-2022-2025.

Subsequent to the docketing of the co-pending consolidated appeals at the Federal Circuit, Cellspin became aware of numerous facts which reasonably called into question the impartiality of the District Court Judge in the underlying matters. Those facts were promptly presented to the District Court via Cellspin's Motion for Recusal under 28 U.S.C. § 455(a)–(d), which was filed in the District Court on January 20, 2023. The District Court denied Cellspin's Motion by way of its written opinion dated February 15, 2023. That Opinion was clearly erroneous. Cellspin immediately filed its Notice of Appeal on February 17, 2023.

Both the originating Motion for Recusal and the Order Denying Recusal each clearly concerned all Defendants, and the Order itself was filed in the dockets of all cases, notwithstanding the fact that the

Motion was only filed in the lead Fitbit case. Further, to remove all doubt, the Motion itself expressly requested recusal "from the Google (Fitbit, Inc.) litigation, and its related cases," and the Order plainly recognized the fact that all Defendants were party to the Motion. *See* Appx. 5928-376 at Fn. 1 (recognizing that the Motion was captioned as to all Defendants) and FN. 4 (same; also confirming that "all oppositions" filed by all Defendants were considered by the District Court).

Again, the original Motion for Recusal was filed only in the Fitbit case number, and docketed to be applied across all related cases (including Nikon). Further, the District Court's Order was filed across all related cases (even though the Motion was only filed in Fitbit); as such, all parties were on notice of the fact that the omnibus Motion and Order were tendered as to each individual Defendant in each individual cause.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to promote the public perception of judicial impartiality and to ensure that judges strictly adhere to the text of 28 U.S.C. § 455. This case is of national significance because the Federal Circuit has upended longstanding precedent which requires: "We must <u>first</u> determine whether § 455(a) can be violated based on an appearance of partiality" *Liljeberg*, 486 U.S. at 858. "The <u>failure</u> to consider objective standards requiring recusal is <u>not</u> consistent with the imperatives of due process." *Caperton*, 556 U.S. at 886. Due process requires

recusal when a judge has a significant financial interest in a case, or when there is a probability of actual bias that is too high to be constitutionally tolerable. *Id.* at 872. This Court has emphasized that due process guarantees "an absence of actual bias" on the part of a judge. *In re Murchison*, 349 U.S. 133, 136 (1955). Of course, bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is likely to be neutral, or whether there is an unconstitutional potential for bias." *Williams*, 579 U.S. at 9.

The Federal Circuit avoiding the merits under 28 U.S.C. § 455(a) should not be acceptable in a functioning democracy that relies upon appearance of impartiality by the judiciary. Public confidence in the judiciary requires confidence in judges' impartiality – in cases that may evoke strong passions no less than in cases of little moment. Public confidence requires that a judge avoid deciding cases when "his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

The Federal Circuit's interpretation of the recusal law essentially deletes this key aspect by affirming the district court's denial of the motion to recuse *without reaching the merits* of the § 455 recusal motion. The Federal Circuit's wrong interpretation of deciding the underlying merits of the case like *excluding evidence* first, and then avoiding the issue altogether

by not ruling on the merits of the 455(a) case, should not be acceptable.

Again, the Federal Circuit failed to rule[1] on the § 455(a) recusal merits for a Judge presiding over a Google Case, whose venture capitalist spouse has taken $700 million in part from Google and has five publicly announced strategic partnerships with Google (the "Ajax Ground"), and the Judge owns anywhere between $5–$25 Million in a hedge fund is beyond the pale. If these circumstances are not a sign of § 455(a) recusal *then nothing is*. Due process requires the Federal Circuit to rule on any potential conflicts of interest or biases *before* evaluating the substantive merits of a case.

To make matters worse, the Federal Circuit's first refused to rule on the structural–constitutional error and then in turn ruled that the structural–constitutional error would be a "harmless error" without following this courts precedence and without doing the "harmless beyond a reasonable doubt" analysis, this level of disregard for the settled law should not be acceptable. *Williams*, 579 U.S. at 14 ("the Court holds that an unconstitutional failure to recuse constitutes structural error"); *id.* at 16 ("When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless"); *id.* at 2 ("an uncon-

[1] The Court of Appeals for the Federal Circuit expressly declined to rule on the timeliness of the Ajax Ground: "[W]e need not and do not further pursue the specific facts bearing on timeliness of Cellspin's assertion of this ground. The same is true regarding the specific facts bearing on assessment of the Ajax relationships on the merits." *Cellspin v. Fitbit*, 2024 WL 4647992 at *5 (Fed. Cir., Nov. 1, 2024). (App.36a).

stitutional failure to recuse constitutes structural error that is "not amenable" to harmless-error review") (citing *Puckett v. United States*, 556 U.S. 129, 141 (2009)); *see also Chapman*, 386 U.S. at 24 ("Before a constitutional error can be held to be harmless the court must be able to declare its belief that it was *harmless beyond a reasonable doubt*.")

This Federal Circuit's erroneous interpretation will have significant repercussions not only in the Federal Circuit, where many important cases are heard, but in other courts throughout the country for recusal provisions. The merits of the recusal motion need to be decided *first* before considering the merits of the underlying case.

I. SHOULD MERITS OF JUDGE'S RECUSAL UNDER 28 U.S.C. § 455(a) BE DECIDED FIRST, BEFORE DECIDING JUDGE'S ABUSE OF DISCRETION TO EXCLUDE EVIDENCE IN THE CASE?

The short answer must be: Yes, the merits of a judge's recusal under 28 U.S.C. § 455(a) should indeed be decided first before addressing any issues related to the judge's abuse of discretion in excluding evidence. This is because the integrity of the judicial process hinges on ensuring impartiality and fairness from the outset. If a judge's impartiality might reasonably be questioned, then recusal is required in order to prevent any appearance of bias or conflict of interest.

As noted, the principle of recusal mandates that any potential conflicts of interest or biases must be addressed before any substantive matters, or the merits, are evaluated. Addressing recusal first helps maintain the integrity of the judicial process and ensures that any subsequent decisions are made without

any doubts about the judge's impartiality. Once recusal is resolved, the court can then proceed to evaluate other matters, such as the exclusion of evidence, with a clear and unbiased perspective.

28 U.S.C. § 455 outlines the grounds for disqualification of judges and magistrates due to potential biases or conflicts of interest. The case law interpreting this statute includes several important decisions:

1. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988): This case highlighted the importance of addressing recusal promptly to maintain the integrity of the judicial process. "We must first determine whether § 455(a) can be violated based on an appearance of partiality". The Court noted that even the appearance of bias or conflict can undermine public confidence in the judiciary.

2. *Liteky v. United States*, 510 U.S. 540 (1994): This case established the "extrajudicial source" doctrine, which limits recusal to instances where the bias or prejudice arises from an external source, not from the judge's participation in the case. This Court highlighted the importance of addressing recusal issues early in the judicial process to ensure that the proceedings are fair and just from the outset. By handling recusal matters upfront, the judicial system aims to maintain the integrity and trust of the process, ensuring that all decisions are made without any hint of partiality or prejudice.

3. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868 (2009): "The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process." This case emphasized that due process requires recusal when a judge has a significant financial

interest in a case, or when there is a probability of actual bias that is too high to be constitutionally tolerable.

4. *Ignacio v. Judges of U.S. Court of Appeals*, 453 F.3d 1160 (9th Cir. 2006) *wrote verbatim that* "Before reaching the merits, we must first address the issue of recusal."

These cases collectively underscore the importance of addressing potential conflicts of interest and biases *before* proceeding to the merits of a case. These cases help ensure that the judicial process remains fair and impartial. Precedent demands that, before the court reaches the merits of petitioner's claims, the court must first decide the merits of the 28 U.S.C. § 455(a) recusal.

In this case the Federal Circuit disregarded ALL Supreme Court case law regarding 28 U.S.C. § 455. In the process, and rather than first deciding the merits of 28 U.S.C. § 455(a), the Federal Circuit first decided that the Judge did NOT abuse her discretion and then <u>denied</u> Cellspin motion to recuse on Ajax Ground <u>without reaching the merits</u> of 455(a).

Quote from the Recusal decision:

> We therefore affirm the district court's denial of the motion to recuse on the Ajax ground *without reaching the merits*.

Cellspin v. Fitbit, 2024 WL 4647992 at *6 (Fed. Cir., Nov. 1, 2024). (App.38a).

Quotes from the Summary Judgment decision:

> We review the district court's application of the local court rules for any abuse of discretion.

Cellspin v. Fitbit, 2024 WL 4648069 at *5 (Fed. Cir., Nov. 1, 2024). (App.14a).

> . . . we cannot find an abuse of discretion by the district court."

Id. at *6. (App.16a).

> . . . the district court did not abuse its discretion under the local rules.

Id. at *6. (App.15a).

By this ruling the Federal Circuit has turned Supreme Court case law regarding 28 U.S.C. § 455 on its head. The merits of the 455 recusal must be ruled on first before deciding on the Judge's abuse of discretion to *exclude evidence*. If this ruling is not overturned it will reverberate across all court systems nationally and will render the U.S.C. § 455 meaningless.

The Federal Circuit cannot review the Judge's abuse of discretion of *excluding evidence* via local rules *de novo*. The biased error on the part of the district court judge in finding that Cellspin offered "a different infringement theory" involving "OAuth" tokens was an error amounting *to an abuse of discretion review standard*. This same issue applied to Fitbit/Google and Garmin.

In any event, before deciding on the Judge's abuse of discretion of *excluding evidence* via local rules, the Federal Circuit needed to decide if the matter is properly before the court and Federal Circuit needed to decide 28 U.S.C. § 455(a) for the Judge first.

The existence of certain issues to be heard on an abuse of discretion standard on appeal across all cases, as opposed to *de novo*, weighs heavily in favor of

deciding the merits of the 455(a) recusal first. In refusing to reach the merits on the issue of $700 Million Google funding for Ajax first, the Federal Circuit has the issue backward. If the merits of the Ajax grounds are found for 455(a) recusal, then the district court ruling on *local rules* was not properly before the Federal Circuit court for review.

It is imperative that this Court rules and thereby establishes in no uncertain terms that the appellate court should address recusal issues before considering the merits of the case. By addressing recusal issues before considering the merits ensures a fair and just legal process *at every level of the judiciary*. When an appellate court fails to address the genuine merits of recusal issues before delving into the Judges abuse of discretion of excluding key evidence in the case, several problematic outcomes can occur:

A. Legal Precedents

Failing to address recusal can establish problematic legal precedents, potentially influencing future cases in a way that undermines the importance of judicial impartiality.

B. Compromised Fairness

The fundamental fairness of the judicial process might be questioned, as decisions made without first ensuring impartiality can be perceived as biased.

C. Erosion of Public Trust

Public confidence in the legal system can be undermined. People expect courts to uphold the highest standards of fairness and impartiality, and neglecting

recusal issues can damage this trust. The appearance of fairness is crucial at all levels of the judiciary.

To avoid these issues, it is essential for this Court to demand that appellate courts prioritize addressing any potential conflicts of interest or biases before evaluating the substantive merits of a case.

II. IN A GOOGLE CASE WHERE JUDGE'S VENTURE CAPITALIST SPOUSE HAS ACCEPTED $700 MILLION IN PART OF GOOGLE MONEY AND HAS FIVE PUBLICLY ANNOUNCED STRATEGIC PARTNERSHIPS WITH GOOGLE, IS FAILURE TO RULE ON § 455(a) MERITS REQUIRING RECUSAL A DUE PROCESS VIOLATION?

As noted above, the Federal Circuit decision states that "We therefore affirm the district court's denial of the motion to recuse on the Ajax ground *without reaching the merits*." *Cellspin v. Fitbit*, 2024 WL 4647992 at *6 (Fed. Cir., Nov. 1, 2024). (App.38a).

The Federal Circuit thus violated Cellspin's right to due process by not deciding the merits of the § 455(a) recusal first.

"The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process." *Caperton*, 556 U.S. at 886.

"Due process requires recusal when a judge has a significant financial interest in a case, or when there is a probability of actual bias that is too high to be constitutionally tolerable." *Id.*

Here, the Judge's venture capitalist spouse accepting $700 Million in part from Google and having five strategic partnerships with Google clearly show a probability of actual bias that is too high to be constitution-

ally tolerable. The Federal Circuit denied effective appellate review of recusal by not reaching the merits on the Ajax ground. The Federal Circuit skirted its responsibility by not weighing in on the § 455(a) merits for Judge's venture capitalist Google connection when the judge is the one deciding the Google Case. The main purpose of § 455(a) is to preserve an appearance of impartiality in order to foster public confidence in the judiciary. Indeed, § 455(a) vindicates the interests of the judicial system as a whole. When the extra measure of safety brought to the system by § 455(a) fails, "the judicial system as a whole suffers". Federal Circuit skirting the § 455 merits issue should not be acceptable in a functioning democracy that relies on appearance of impartiality by the judiciary.

This Court emphasized that "Due process guarantees "an absence of actual bias" on the part of a judge. *In re Murchison*, 349 U.S. at 136. Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court's precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, "the average judge in his position is 'likely' to be neutral, or whether there is an unconstitutional 'potential for bias.'" *Caperton*, 556 U.S. at 881.

The impartiality and neutrality of judges is an indispensable feature of the American justice system. An impartial judiciary is imperative to ensure procedural fairness to individual litigants and to preserve public confidence in the integrity of the judicial process. The public requires a judicial system that maintains

the appearance of fairness. Indeed, the appearance of justice may well be even more important in the long run than the fact of impartiality.

"The Due Process Clause incorporated the common-law rule re quiring recusal when a judge has "a direct, personal, substantial, pecuniary interest" in a case, *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), but this Court has also identified additional instances which, as an objective matter, require recusal where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable," *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. at 136. As the Court has previously recognized, however, "most matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v. Cement Institute*, 333 U.S. 683, 702 (1948). The Due Process Clause has been implemented by objective standards that do not require proof of actual bias. *See Tumey*, 273 U.S. at 532; *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-466 (1971); *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 825 (1986).

Courts depend for their power almost entirely on the perceived legitimacy of their activities and the Federal Circuit ignored all the due process precedent in this case and violated Cellspin's right to due process by failing to reach the objective standards test requiring recusal for the Judge.

The facts relevant to the spouse of the district court judge's Ajax-Google affiliation are listed below, and none of them have been disputed by Google at the District Court or at the Federal Circuit:

1. The spouse is an operating partner at Ajax Strategies, a Venture Capital Firm in San Francisco.
2. Google has invested with others combined total of $700 Million dollar in Ajax Strategies Portfolio companies.
3. Ajax portfolio company "Planet" is funded by Google.
4. Ajax portfolio company hydropower startup "Natel Energy" is funded by Google.
5. Ajax portfolio company start-up "Ripple Food" is funded by Google.
6. Ajax portfolio company "Lime" has strategic partnership with Google.
7. Ajax portfolio company "Voltus" has partnership with Google.
8. Ajax portfolio company "StreetLight Data" has partnership with Google.
9. Ajax portfolio company "Descartes Labs" has customer partnership with Google.
10. Ajax portfolio company "Regrow" has partnership with Google.

Still further, the district court judge admitted the following facts:

1. The spouse "has been an Operations Partner at Ajax since April 2022."
2. The spouse "is a contractor for Ajax."
3. The spouse "represents Ajax's interests."

4. The spouse is "serving on the board of Natel" an Ajax Strategies company.
5. The spouse is "a board advisor to another company" Ojjo, another Ajax Strategies portfolio company.
6. "Planet Labs . . . is one of . . . customers of Natel"
7. Natel, Ojjo and Planet Labs are Ajax portfolio companies.

If the Federal Circuit would have reached the merits on the Ajax ground, it would have correctly found that the recusal statute § 455(a) applies and the Judge should be recused, thus tainting the judge's erroneous summary judgment order. These rulings have become "tainted by the appearance of partiality."

It is essential for this Court to rule that due process requires appellate courts to rule on any potential conflicts of interest or biases before evaluating the substantive merits of a case. This Court's precedent sets forth an objective standard that requires recusal when the likelihood of bias on the part of the judge "'is too high to be constitutionally tolerable.'" *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Applying this standard, the Court should conclude that due process compelled the justice's recusal in Cellspin case.

III. SHOULD FEDERAL JUDGES BE ALLOWED TO OWN $5 MILLION AND AS MUCH AS A $25 MILLION IN HEDGE FUND WITHOUT TRIGGERING RECUSAL UNDER 28 U.S.C. § 455(d)?

Judges, particularly those in the federal judiciary, are not allowed to own hedge funds due to the

potential conflicts of interest and the appearance of partiality. The Code of Conduct for United States Judges prohibits judges from engaging in financial activities that could compromise their impartiality or create a conflict of interest

The Federal Circuit again skirted the issue regarding the district court judge's large Hedge Fund holdings. Rather, the Federal Circuit offered a passing mention of "a "Special Situations Fund" managed by the McKinsey Investment Office" and says that Cellspin is somehow time-barred.

That is categorically not true. Before her Recusal Order, *no one* had any idea that the district court judge owned a Hedge Fund called "Special Situations Fund" managed by the McKinsey Investment Office. This Hedge Fund issue cannot be time-barred because it was only made public for the first time in 2023 in the Judge's own order. The Hedge Fund issue is timely and this Court should rule on it or remand to the Federal Circuit to rule on it because it is not untimely. The Hedge Fund issue was laid out in great detail to the Federal Circuit below.

Just as a brief recap, the district court judge's 2020 and earlier financial disclosures included a $5–$25 Million dollar investment holding by the name of "McKinsey & Company Special Situations Aggressive Long-Term".

For the first time in her Recusal Order, the district court judge gave additional detail about this opaque holding, and changed the name of the fund in her Order to a MIO "Special Situation Fund." (*citing* https://www.miopartners.com/). But the MIO Website has

no mention of any "McKinsey & Company Special Situations Aggressive Long-Term."

The misidentification of funds in an annual disclosure for years by the district court judge warrants recusal because it thwarts the ability of the public to assess potential judicial conflicts and it is not approved under § 455(d)(4)(i), which recites, in pertinent part, that

> (4) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that: (i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund; . . .

A judge is allowed to own a mutual or common investment fund. The SEC explains mutual funds and investment funds are considered open-end companies. *See* https://www.sec.gov/answers/mfinvco.htm as last visited on March 22, 2023. While the district court judge provided an updated name, it was still not accurate. The actual name of her investment is the *Compass Special Situation Fund*, LLC, managed by MIO. It is not a mutual fund. It is a closed-end investment company. Again, MIO even files every year to exempt it from the Investment Company

The district court judge took the mistaken position that the "Special Situation Fund [ ] functions in essence like a mutual fund." *Cellspin Soft, Inc. v. Fitbit*, 2023 WL 2176758 at *10 (N.D. Cal. 2023). (App.75a). This is incorrect. A mutual fund is regulated by the

SEC under the authority of Investment Company Act of 1940. In stark contrast, MIO's Special Situation Fund, which has the full name of "Compass Special Situation Fund, LLC") is not regulated by the SEC and each year MIO files an exemption under Section D to avoid being regulated by the SEC like open-end funds. The district court judge is investing in a closed-end fund. According to the SEC, Compass Special Situation Fund is not a Mutual fund or a Pension Fund. According to MIO partners own website under "What We Do" it says: "The majority of MIO's active assets under management are managed with full discretion by third-party managers (*i.e.*, hedge funds, private equity, and other alternative investment managers)."

Cellspin cannot be time-barred for something the public and Cellspin learned for the first time in 2023 in the Judge's recusal order. And the Federal Circuit did not properly weigh that Cellspin did not want to move to recuse a judge for fear of retaliation, but had no choice when yet another perception of impartiality presented itself with her husband being involved with Ajax.

In re *School Asbestos Litigation*, the Third Circuit emphatically declared that it will consider no litigation too massive or complex to disqualify a presiding district judge in order to maintain the appearance of impartiality fostered by section 455(a).

IV. FAILURE TO VACATE JUDGE'S TAINTED RULING IS PLAINLY NOT HARMLESS ERROR.

In its erroneous decision below, the Federal Circuit expressly stated as follows: "We also conclude that, even if there was error as to the remaining part

(an issue we do not decide), any such *error was harmless*." (App.28a).

"Harmless error" is a legal doctrine that refers to a ruling by a trial judge that, although incorrect, does not meet the standard for reversing the judgment. It is well established that certain errors are considered so fundamental that they can never be deemed "harmless." These are known as *structural errors* and typically result in automatic reversal. Here, the bias of the district court judge is a clear structural error which cannot be viewed as harmless. *Williams*, 579 U.S. at 14 ("the Court holds that an unconstitutional failure to recuse constitutes structural error").

This Honorable Court has also held that "Before a constitutional error can be held to be harmless the court must be able to declare its belief that it was *harmless beyond a reasonable doubt*." *Chapman*, 386 U.S. at 24. The Federal Circuit below did not demonstrate *beyond a reasonable doubt* that the Judge did not have an appearance of impartiality and that perceived bias did not contribute to her decision. This Court has established that "When the objective risk of actual bias on the part of a judge rises to an unconstitutional level, the failure to recuse cannot be deemed harmless" *Williams*, 579 U.S. at 14.

How can an error that the Federal Circuit expressly decided *not* to rule on be considered harmless? The error has to be first acknowledged and ruled on (if the error was committed), before it can be ruled if that error was harmless or not. The Federal Circuit *not* ruling on the § 455(a) merits suggests that the Federal Circuit itself had doubts about the impartiality of the district court judge. Those doubts can be clearly ascertained by the transcript of the CAFC oral argument

audio for case 23-1526 at (23:24–23:36) taking about Ajax and Google connections.

(Audio Transcript)

> Google Lawyer: "District Court Judge called it an attack on judiciary"
>
> CAFC Judge: "Let's assume that at least for the Ajax, I don't share that characterization"
>
> Google Lawyer: "Yes, that's fair your honor"

The clear and unambiguous *doubt* expressed at the oral argument by the Federal Circuit Judge cannot overcome the standard set by this court, that is "Before a constitutional error can be held to be harmless the court must be able to declare its belief that it was *harmless beyond a reasonable doubt*." *Chapman*, 386 U.S. at 24.

The error of *not* ruling on the merits under § 455(a), and the error of allowing the district court judge to *exclude evidence* for the benefit of Google, plainly had a substantial impact on the outcome of the case. Neither error is harmless.

The Federal Circuit *not* ruling on the merits of the § 455 recusal also amounts to structural error. Just like "an unconstitutional failure to recuse constitutes structural error that is "not amenable" to harmless-error review, regardless of whether the judge's vote was dispositive." *Puckett*, 556 U.S. at 141.

Cellspin vehemently disagrees with the finding of the Federal Circuit that it was harmless error, and the pertinent facts make it abundantly clear that the error was very harmful to Cellspin and had a substantial impact on the outcome of the case. The rulings are

tainted by the appearance of partiality. Plainly, the public can only be confident in rulings which are not tainted by bias, or by the question of partiality. There are scarce numbers of judges (if any) with tens of millions of dollars available to invest in improper Hedge Funds, and even fewer who are married to a venture capitalist having substantial business dealings with technology defendants. Rarer still is the District Court Judge who meets these criteria and sits in Silicon Valley where these facts actually matter and these defendants are commonly hailed into Court.

V. FACTS OF THE CASES DICTATE THAT PRECLUSIVE EFFECT APPLIES IN THE OPPOSITE DIRECTION.

To avoid the merits of the § 455(a) bias of a judge with significant Google ties, the Federal Circuit offers a strained explanation of the preclusive effects of the district court's summary judgment decision.

The summary judgment order from the district court lays bare the fact that it was the Fitbit/Google *excluding evidence* ruling that was adopted for Garmin, and *not* any Garmin ruling adopted for Fitbit/Google. For Example, in the Order, the district court first ruled on Fitbit/Google and *excluded* Cellspin from using "user information" contained inside Fitbit code variable "OAuth" as evidence based on her interpretation of the local rules.

Then, when it came to address the issues pertinent to defendant Garmin, the district court simply reiterated and relied upon its earlier discussions and findings as to Fitbit. *Cellspin*, 2022 WL 2784467 at *39. (App.276a). ("As in other cases, *see supra* Sections III.A.3;" referring to Fitbit excluding evidence section based on her interpretation of the local rules); *see also id.* at Fn. 54 ("This

is the same issue contested in Fitbit, *see supra* Section III.A.3"). (App.275a).

The district court ruled on the merits for *excluding evidence* for Fitbit first and applied that same ruling to Garmin and others. The Federal Circuit misapplies what was in the district court's order and reverses it; that is, the Federal Circuit ruled on Garmin first and then applies preclusive effect theory on Fitbit. Whereas the facts of the underlying order are *complete opposite*. The summary judgment order was written and discussed for Google/Fitbit first and then the court applied Fitbit reasoning to Garmin. If according to Federal Circuit the issue of *excluding evidence* is the same then Fitbit should have been decided first not Garmin. The plain facts of the district court order demands that the § 455 issue be resolved <u>first</u>.

In its opening brief to the Federal Circuit regarding MSJ ruling CAFC-22-2025, Cellspin made the case and wrote for Fitbit regarding for "OAuth" and the Judges abuse of discretion for *excluding evidence*, BUT when it came for arguing for Garmin details, regarding the same issue, Cellspin incorporated by reference all arguments made supra concerning Fitbit. Just like the underlying summary judgment order had done.

> "*As such, Cellspin hereby adopts and incorporates by reference all arguments made supra concerning Fitbit*."

8. "ATTACHING" "USER IDENTIFIER" TO "NEW DATA"[19]

In the same manner in which the District Court erred with respect to its rulings relating to Defendant Fitbit, the District Court also necessarily erred in finding that Cellspin offered "a different infringement theory" involving OAuth tokens in its case against Garmin. Appx0099-0100 at 69:15-70:7. As such, Cellspin hereby adopts and incorporates by reference all arguments made *supra* concerning Fitbit. *See supra* at § VI.D.5.

Transcription:

8. "Attaching" User Identifier to "New Data"

In the same manner in which the District Court with respect to its rulings relating to Defendant Fitbit, the District Court also necessarily erred in finding that Cellspin offered "a different infringement theory" involving OAuth tokens in its case against Garmin. Appx0099-0100 at 69:15-70:7. As such, Cellspin hereby adopts and incorporates by reference all arguments made *supra* concerning Fitbit. *See supra* at § VI.D.5.

In sum, the Federal Circuit cannot rule on Garmin without ruling on Fitbit *first*. Because Garmin is dependent on Fitbit and NOT the other way around.

In fact, Cellspin pointed out in its briefing to the Federal Circuit that the District Court itself did <u>not</u> spend any time on the Garmin "OAuth", "user identifier" and "user information" issues and used Fitbit arguments from the District Court's erroneous Summary Judgment Order, as follows:

> With respect to Garmin's argument that Cellspin's failure to devote scarce pages of its Blue Brief to this issue specifically for Garmin,

> Plaintiff responds by pointing out the obvious fact that the District Court likewise devoted zero specific energies in discussing Garmin on this "user identifier" issue. Because the District Court's erroneous Order relied exclusively upon its faulty findings relating to Fitbit, Cellspin here rests on its arguments supra specific to Fitbit concerning the "user identifier" and "user information" limitations.

Given the facts of the case, applying "preclusive" should be the other way around. The judiciary cannot abdicate its responsibility and *not* rule on the merits of § 455 recusal. Here the Federal Circuit came up with a wrong *new* preclusive effect theory *sua sponte*, that is contrary to the underlying facts. It was neither proposed by the district court, nor by Fitbit/Google, nor by Garmin or Fossil or any other defendant. Cellspin never had a chance to respond on how the facts on the underlying case do not support this wrong *new* preclusive effect theory that is based on ruling on Garmin first.

In this consolidated case, preclusion (if applied at all) should have been applied in the opposite direction from Fitbit/Google to Garmin and *not* from Garmin to Fitbit/Google.

Moreover, in ruling on the preclusion issue, the Federal Circuit disregarded its own precedent as announced in *Shell Oil Co. v. United States*, 672 F.3d 1283 (Fed. Cir. 2012). In *Shell Oil*, as here, there were multiple parties involved, and the Federal Circuit said that the recusal issue could not be simply severed from the case when there is substantial overlap with respect to the issues involved among the remaining parties. In *Shell Oil*, the Federal Circuit addressed

the same argument as in the instant case: "Because the divestment exception set forth in § 455(f) applies only to divesting a financial interest in a party, and there is no indication that Congress intended to create an exception whereby a judge can sever or 'divest' certain parties from the case to resolve a conflict, we find Plaintiffs' argument *is not well-taken*. This is particularly true where, as here, there is substantial overlap with respect to the issues involved in the remaining parties' claims, and the matters had been considered jointly throughout the proceedings." *See Shell Oil*, 672 F.3d at 1291 (further holding: "The judge's decision to *sua sponte* sever Texaco and Union Oil did not satisfy the statutory requirement of disqualifying himself from the entire proceeding.")

As in *Shell Oil*, the Federal Circuit here even consolidated the six (6) Cellspin appeals on its own accord and denied Cellspin's motion to deconsolidate due to the "overlap" of issues that the Court itself identified. In view of *Shell Oil*, it was thus plain error to deny recusal as to all defendants.

CONCLUSION

For these reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 30, 2025

PUBLIC APPENDIX

FEDERAL CIRCUIT CASE NOS. 2022-2025, 2022-2028, 2022-2029, 2022-2030, 2022-2032, 2022-2037

Opinion, U.S. Court of Appeals for the Federal Circuit (November 1, 2024) 1a

Judgment, U.S. Court of Appeals for the Federal Circuit (November 1, 2024) 22a

Mandate, U.S. Court of Appeals for the Federal Circuit (December 9, 2024)..... 24a

FEDERAL CIRCUIT CASE NO. 2023-1526

Opinion, U.S. Court of Appeals for the Federal Circuit (November 1, 2024) 26a

Judgment, U.S. Court of Appeals for the Federal Circuit (November 1, 2024) 39a

Mandate, U.S. Court of Appeals for the Federal Circuit (December 9, 2024)..... 41a

U.S. DISTRICT COURT, N.D. CALIFORNIA NOS. 4:17-CV-05928-YGR, 4:17-CV-05931-YGR, 4:17-CV-05932-YGR, 4:17-CV-05933-YGR, 4:17-CV-05934-YGR, 4:17-CV-05936-YGR

Order Revising Judgment Under Federal Rule of Civil Procedure 54(b), U.S. District Court for the Northern District of California (July 19, 2022) 43a

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 45a

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 46a

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 47a

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 48a

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 49a

Judgment, U.S. District Court for the Northern District of California (June 15, 2022) 50a

Order Denying Motion for Recusal Pursuant to Section 455, U.S. District Court for the Northern District of California (February 15, 2023) 51a

CASE MATERIAL

Opening Brief of Plaintiff-Appellant (April 24, 2023) 78a

Reply Brief of Plaintiff-Appellant (August 7, 2023) 144a

SEALED SUPPLEMENTAL APPENDIX

U.S. DISTRICT COURT, N.D. CALIFORNIA
NOS. 4:17-CV-05928-YGR, 4:17-CV-05931-YGR, 4:17-CV-05932-YGR, 4:17-CV-05933-YGR, 4:17-CV-05934-YGR, 4:17-CV-05936-YGR

[Sealed] Summary Judgment Orders, U.S. District Court for the Northern District of California (June 7, 2022) 175a

CASE MATERIAL

[Confidential] Second Corrected Opening Brief of Plaintiff-Appellant (February 10, 2023) 296a

[Confidential] Reply Brief of Plaintiff-Appellant (May 1, 2023) 407a

OPINION, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT (NOVEMBER 1, 2024)

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CELLSPIN SOFT, INC.,

Plaintiff-Appellant,

v.

FITBIT LLC, NIKE, INC., UNDER ARMOUR, INC., FOSSIL GROUP, INC., MISFIT, INC., NIKON AMERICAS, INC., NIKON INC., GARMIN INTERNATIONAL, INC., GARMIN USA, INC.,

Defendants-Appellees.

Nos. 2022-2025, 2022-2028, 2022-2029, 2022-2030, 2022-2032, 2022-2037

Appeals from the United States District Court for the Northern District of California in Nos. 4:17-cv-05928-YGR, 4:17-cv-05931-YGR, 4:17-cv-05932-YGR, 4:17-cv-05933-YGR, 4:17-cv-05934-YGR, 4:17-cv-05936-YGR, Judge Yvonne Gonzalez Rogers.

Before: PROST, REYNA, and TARANTO, Circuit Judges.

TARANTO, Circuit Judge.

In 2017, Cellspin Soft, Inc. brought patent-infringement actions in the Northern District of California against the following companies: Fitbit LLC; Nike, Inc.; Under Armour, Inc.; Fossil Group, Inc. and Misfit, Inc.

(collectively, Fossil); Nikon Americas, Inc. and Nikon, Inc. (collectively, Nikon); and Garmin International, Inc. and Garmin USA, Inc. (collectively, Garmin). The actions were not consolidated but were litigated in conjunction with each other, along with several other actions not at issue here. As now relevant, Cellspin alleged infringement of various claims of three of its patents. The district court granted summary judgment of noninfringement for all defendants. Cellspin appeals. We affirm.

I

A

The patents at issue are Cellspin's U.S. Patent Nos. 8,738,794; 8,892,752; and 9,749,847, which have a common specification and a common title: "Automatic Multimedia Upload for Publishing Data and Multimedia Content." The patents address issues associated with distributing multimedia content. '794 patent, col. 1, lines 48–54. Under the prior art, the specification says, a user might use one device (*e.g.*, a camera) to take a photograph, use a memory device (*e.g.*, a memory stick) to transfer the image to an internet-capable device (*e.g.*, a personal computer), and then manually upload the image to a website. *Id.*, col. 1, lines 37–47. The patents, generalizing from images to data, describe automating the distribution process: The data-capture

device (*e.g.*, a camera) connects directly to the mobile device (*e.g.*, a phone) via a paired, wireless Bluetooth connection, *id.*, col. 2, lines 10–13; and the mobile device automatically publishes the new content to the internet, *id.*, col. 2, lines 35–54.

Independent claim 1 of the ’794 patent recites:

> A method for acquiring and transferring data from a Bluetooth enabled data capture device to one or more web services via a Bluetooth enabled mobile device, the method comprising:
>
> providing a software module on the Bluetooth enabled data capture device;
>
> providing a software module on the Bluetooth enabled mobile device;
>
> *establishing a paired connection between the Bluetooth enabled data capture device and the Bluetooth enabled mobile device*;
>
> acquiring new data in the Bluetooth enabled data capture device, wherein new data is data acquired after the paired connection is established;
>
> detecting and signaling the new data for transfer to the Bluetooth enabled mobile device, wherein detecting and signaling the new data for transfer comprises:
>
> > determining the existence of new data for transfer, by the software module on the Bluetooth enabled data capture device; and
> >
> > sending a data signal to the Bluetooth enabled mobile device, corresponding to

existence of new data, by the software module on the Bluetooth enabled data capture device automatically, over the established paired Bluetooth connection, wherein the software module on the Bluetooth enabled mobile device listens for the data signal sent from the Bluetooth enabled data capture device, wherein if permitted by the software module on the Bluetooth enabled data capture device, the data signal sent to the Bluetooth enabled mobile device comprises a data signal and one or more portions of the new data;

transferring the new data from the Bluetooth enabled data capture device to the Bluetooth enabled mobile device automatically over the paired Bluetooth connection by the software module on the Bluetooth enabled data capture device;

receiving, at the Bluetooth enabled mobile device, the new data from the Bluetooth enabled data capture device;

applying, using the software module on the Bluetooth enabled mobile device, a user identifier to the new data for each destination web service, wherein each user identifier uniquely identifies a particular user of the web service;

transferring the new data received by the Bluetooth enabled mobile device along with a user identifier to the one or more web services, using the software module on the Bluetooth enabled mobile device;

> receiving, at the one or more web services, the new data and user identifier from the Bluetooth enabled mobile device, wherein the one or more web services receive the transferred new data corresponding to a user identifier; and
>
> making available, at the one or more web services, the new data received from the Bluetooth enabled mobile device for public or private consumption over the internet, wherein one or more portions of the new data correspond to a particular user identifier.

'794 patent, col. 11, line 48, through col. 12, line 38 (emphases added).

Independent claim 1 of the '752 patent recites:

> A method for transferring data from a Bluetooth enabled data capture device to a remote internet server via a Bluetooth enabled mobile device comprising:
>
> performing at the data capture device:
>
> > establishing a secure paired Bluetooth connection between the Bluetooth enabled data capture device and the Bluetooth enabled mobile device, wherein the secure paired Bluetooth connection uses a cryptographic encryption key;
> >
> > acquiring new data in the Bluetooth enabled data capture device, wherein new data is data acquired after the secure paired Bluetooth connection is established;

detecting and signaling the new data for transfer, to the Bluetooth enabled mobile device, wherein detecting and signaling the new data for transfer comprises:

receiving a message from the Bluetooth enabled mobile device, over the established secure paired Bluetooth connection, to enable event notifications, corresponding to new data for transfer, on the Bluetooth enabled data capture device;

enabling event notification on Bluetooth enabled data capture device, corresponding to new data for transfer;

determining existence of the new data for transfer; and

sending an event notification to the Bluetooth enabled mobile device, corresponding to existence of new data for transfer, over the established secure paired Bluetooth connection, wherein the Bluetooth enabled mobile device is configured to listen for the event notification sent from the Bluetooth enabled data capture device;

encrypting, using the cryptographic encryption key, the new data acquired in the Bluetooth enabled data capture device; and

transferring the encrypted data from the Bluetooth enabled data capture device to the Bluetooth enabled mobile device, over the established secure paired Bluetooth connection, wherein the Bluetooth enabled mobile

> device has access to the internet, wherein the Bluetooth enabled mobile device is configured to receive the encrypted data and obtain the new data from the encrypted data using the cryptographic encryption key, *wherein the Bluetooth enabled mobile device is configured to attach a user identifier, an action setting and a destination web address of a remote internet server to the obtained new data, wherein the user identifier uniquely identifies a particular user of internet service provided by the remote internet server*, wherein action setting comprises one of a remote procedure call (RPC) method and hypertext transfer protocol (HTTP) method, and wherein the Bluetooth enabled mobile device is configured to send the obtained new data with the attached user identifier, an action setting and a destination web address to a remote internet server.

'752 patent, col. 11, line 48, through col. 12, line 37 (emphases added).

Independent claim 1 of the '847 patent recites:

> A system comprising:
>
> a Bluetooth enabled data capture device, comprising: a first memory device;
>
> a first processor coupled to the first memory device;
>
> a first Bluetooth communication device configured to establish a paired Bluetooth wireless connection between the Bluetooth enabled data capture device and a Bluetooth

enabled cellular phone, wherein the Bluetooth enabled data capture device is configured to cryptographically authenticate identity of the Bluetooth enabled cellular phone when the first Bluetooth communication device establishes the paired Bluetooth wireless connection;

a data capture circuitry;

said first processor configured to acquire new-data using the data capture circuitry after the paired Bluetooth wireless connection between the Bluetooth enabled data capture device and the Bluetooth enabled cellular phone is established;

said first processor configured to store the acquired new-data in the first memory device; and said first processor configured to send an event notification and the acquired new-data to the cryptographically authenticated Bluetooth enabled cellular phone over the established paired Bluetooth wireless connection, wherein the event notification corresponds to the acquired new-data and comprises sending a signal to the cryptographically authenticated Bluetooth enabled cellular phone;

a mobile application in the Bluetooth enabled cellular phone comprising executable instructions that, when executed by a second processor inside the Bluetooth enabled cellular phone controls the second processor to:

detect and receive the acquired new-data, comprising:

listen for the event notification, sent from the Bluetooth enabled data capture device, over the established paired Bluetooth wireless connection, wherein the event notification corresponds to the acquired new-data; and

receive the event notification and the acquired new-data, from the Bluetooth enabled data capture device, over the established paired Bluetooth wireless connection, wherein receiving the event notification comprises receiving the signal sent by the Bluetooth enabled data capture device corresponding to the acquired new-data;

store the new-data received over the established paired Bluetooth wireless connection, in a second memory device of the Bluetooth enabled cellular phone before transfer to a website; and

use HTTP to transfer the new-data received over the established paired Bluetooth wireless connection, along with user information stored in the second memory device of the cryptographically authenticated Bluetooth enabled cellular phone, to the website, over the cellular data network; wherein the mobile application further comprises executable instructions to control the processor to provide a graphical user interface (GUI) for the new-data.

’847 patent, col. 12, line 13, through col. 13, line 3 (emphases added).

B

In April 2018, the district court dismissed several of the actions before it under Federal Rule of Civil Procedure 12(b)(6), concluding that the asserted claims of the three patents (and of one other patent) were invalid under 35 U.S.C. § 101 for claiming ineligible subject matter. But this court vacated the dismissal in 2019 and remanded the case to the district court. *Cellspin Soft, Inc. v. Fitbit, Inc.*, 927 F.3d 1306, 1320 (Fed. Cir. 2019).

In April 2021, the district court issued a claim-construction order. *Cellspin Soft, Inc. v. Fitbit, Inc.*, No. 4:17-cv-05928, 2021 WL 1417419 (N.D. Cal. Apr. 14, 2021) (*Claim Construction Order*). The court there construed "Bluetooth enabled data capture device" to require a device "separate and apart from the mobile device." *Id.* at *5. Relying on a prosecution disclaimer, the court also construed "paired connection" to require a connection that is "established and maintained on a continuous basis." *Id.* at *9.

In January 2022, Fitbit, Nike, Under Armour, Fossil, Nikon, and Garmin moved for summary judgment of noninfringement. The claims in the case were: claims 1, 2–4, 7, 9, 16, 17, 18, 20, and 21 of the '794 patent; claims 1, 2, 4, 5, and 12–14 of the '752 patent; and claims 1–3 of the '847 patent. The district court granted all six motions, addressing them in a single opinion explaining all six "orders." *Cellspin Soft, Inc. v. Fitbit, Inc.*, No. 4:17-cv-05928, 2022 WL 2784467 (N.D. Cal. June 15, 2022) (*Summary Judgment Opinion*).

The court addressed the asserted grounds for summary judgment defendant by defendant and ground by ground. But not all the court's determinations need

to be summarized here. Certain defendants shared certain grounds for summary judgment. A limited subset of the court's determinations suffices to support the bottom-line grants of summary judgment.

Notably, for Fitbit, Fossil, and Garmin, the district court granted summary judgment because they each had shown the absence of a genuine dispute of material fact regarding whether the accused products had the claimed "user identifier" or "user information" required to be attached to the data. *Id.* at *10–11, *32–33, *39. For Nike, the district court granted summary judgment because it had shown the absence of a genuine dispute of material fact regarding whether the "user identifier" is attached by the mobile device and whether a first processor performs the claimed trio of functions (acquiring new data, storing said data, and sending an event notification). *Id.* at *17–20. For Under Armour and Nikon, the district court granted summary judgment because each had shown the absence of a genuine dispute of material fact regarding whether a paired connection is maintained on a continuous basis. *Id.* at *24–26, *41–43.

On June 15, 2022, the district court entered judgments of noninfringement for all six defendants. (As noted *infra*, that judgment was not then final in three of the cases.)[1] Cellspin filed notices of appeal for the

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[1] The district court amended its judgment in Garmin's case on July 19, 2022—not in substance but only to make clear that it was issued under Federal Rule of Civil Procedure 54(b), reflecting the fact that it applies only to the '794, '752, and '847 patents that were the subject of the *Summary Judgment Opinion* and not to another patent that was asserted against Garmin in the case but was not the subject of that opinion or another adjudication. We and the parties see no need for a new or amended

six judgments by July 15, 2022, within the time allowed by 28 U.S.C. § 2107(a), and the six appeals were consolidated for briefing in this court.

II

The appeals before us are from the district court's judgments, in June 2022, that Fitbit, Nike, Under Armour, Fossil, Nikon, and Garmin do not infringe the '794, '752, and '847 patents. We have jurisdiction over the appeals if and only if the decisions appealed are "final decisions." 28 U.S.C. § 1295(a). Final decisions are "decisions that end litigation on the merits and leave nothing for the court to do but execute the judgment." *Amgen Inc. v. Amneal Pharmaceuticals LLC*, 945 F.3d 1368, 1374 (Fed. Cir. 2020); *see also Robert Bosch, LLC v. Pylon Manufacturing Corp.*, 719 F.3d 1305, 1308 (Fed. Cir. 2013) (en banc) ("This court's jurisdiction is governed by the final judgment rule.").

The judgments of noninfringement in the cases against Nike, Under Armour, and Nikon were final judgments, there being no outstanding counterclaims. But the judgments in the cases against Fitbit, Fossil, and Garmin, when issued, were not final. Those three defendants had filed counterclaims against Cellspin that remained outstanding after the district court's June 2022 summary-judgment orders, as they were not addressed in those orders and some of them remained unadjudicated after an April 2021 ruling on a motion for summary judgment of ineligibility under

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notice of appeal in this circumstance. *See State Contracting & Engineering Corp. v. State of Florida*, 358 F.3d 1329, 1334– 35 (Fed. Cir. 2001).

35 U.S.C. § 101, *see Cellspin Soft, Inc. v. Fitbit, Inc.*, No. 4:17-cv-05928, 2021 WL 1421612, at *18 (N.D. Cal. Apr. 14, 2021). "[A] judgment that does not dispose of pending counterclaims is not a final judgment." *Nystrom v. TREX Co., Inc.*, 339 F.3d 1347, 1351 (Fed. Cir. 2003) (quoting *Pandrol USA, LP v. Airboss Railway Products, Inc.*, 320 F.3d 1354, 1362 (Fed. Cir. 2003)).

At oral argument before this court, however, counsel representing Fitbit, Fossil, and Garmin volunteered to dismiss the remaining counterclaims without prejudice, and Cellspin agreed. Oral Arg. at 7:51–8:41, https://oralarguments.cafc.uscourts.gov/default.aspx?fl=22-2025_10072024.mp3. That representation cures the jurisdictional defect and renders the district court's judgment a final decision that is reviewable within our jurisdiction. *See Amgen*, 945 F.3d at 1374 (finding jurisdiction where party "represented that it would 'give up' its invalidity defense and claim"); *Synchronoss Technologies, Inc. v. Dropbox, Inc.*, 987 F.3d 1358, 1365–66 (Fed. Cir. 2021) (finding jurisdiction where party "agreed to give up its invalidity counterclaims" at oral argument); *Atlas IP, LLC v. Medtronic, Inc.*, 809 F.3d 599, 604–05 (Fed. Cir. 2015) (determining that "a consented-to dismissal without prejudice" of counterclaims "produces a final decision under § 1295(a)(1)"). Accordingly, we have jurisdiction over all six appeals under § 1295(a)(1).

III

We decide the correctness of the district court's grant of summary judgment de novo, following Ninth Circuit law and asking if there is no genuine dispute of material fact, such that the movant is entitled to judgment as a matter of law when the evidence is

viewed in the light most favorable to the non-movant. *Treehouse Avatar LLC v. Valve Corp.*, 54 F.4th 709, 714 (Fed. Cir. 2022) (citing Fed. R. Civ. P. 56(a)); *San Diego Police Officers' Association v. San Diego City Employees' Retirement System*, 568 F.3d 725, 733 (9th Cir. 2009); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 257 (1986). We review the district court's application of the local court rules for any abuse of discretion. *SanDisk Corp. v. Memorex Products, Inc.*, 415 F.3d 1278, 1292 (Fed. Cir. 2005). Thus, we uphold the district court's application of the local rules unless it was (1) clearly unreasonable, arbitrary, or fanciful; (2) based on erroneous conclusions of law; (3) clearly erroneous; or (4) unsupported by any evidence. *Id.*

Our discussion below addresses four issues. Finding no error in the district court's decision as to those issues suffices for us to affirm the grant of summary judgment of noninfringement. We need not and do not address other rulings of the district court.

A

In seeking summary judgment of noninfringement, Fitbit, Fossil, and Garmin argued that the evidence did not permit a reasonable finding of satisfaction of the claim element "user identifier" or "user information," which the parties treat as indistinguishable and which (in one form or the other) are present in all asserted claims of the '794, '752, and '847 patents, with particular roles to be played by that element. Cellspin responded by relying on a product feature called "OAuth" as satisfying that element. But the district court barred Cellspin's reliance on "OAuth" as

too late. *Summary Judgment Opinion*, at *10–11, *32–33, *39.

Under the local patent-case procedural rules of the Northern District of California, Cellspin was required to serve a "Disclosure of Asserted Claims and Infringement Contentions" containing a "chart identifying specifically where and how each limitation of each asserted claim is found within each Accused Instrumentality." Patent Local Rules 3-1(c). Cellspin served a disclosure of its infringement contentions on Fitbit, Fossil, and Garmin on June 9, 2020. Notice of Compliance, *Cellspin Soft, Inc. v. Fitbit LLC*, No. 4:17-cv-05928 (N.D. Cal. June 22, 2020), ECF No. 137; Notice of Compliance, *Cellspin Soft, Inc. v. Fossil Group, Inc.*, No. 4:17-cv-05933 (N.D. Cal. June 22, 2020), ECF No. 165; Notice of Compliance, *Cellspin Soft, Inc. v. Garmin International, Inc.*, No. 4:17-cv-05934 (N.D. Cal. June 22, 2020), ECF No. 114. But in those infringement contentions, Cellspin did not identify OAuth as the infringing "user identifier" or "user information"; instead, it said that the element was found in a "username or email address, or information based off of a user or the user's associated wearable device," J.A. 10005, 10285, and "information relating to the user, such as a username/email address, and/or a code identifying the user or the [accused device]," J.A. 10452.

The district court correctly determined that Cellspin's infringement contentions did not disclose that Cellspin was relying on OAuth to meet the claim element, and the district court did not abuse its discretion under the local rules in barring Cellspin from later reliance on OAuth. Cellspin referred to OAuth for the first time in its opening expert reports

filed in September 2021—at the close of fact discovery. Cellspin could have sought to amend its infringement contentions: The relevant local rule allows such amendment with a "timely showing of good cause" and notes that the "[r]ecent discovery of nonpublic information about the Accused Instrumentality which was not discovered, despite diligent efforts, before the service of the Infringement Contentions" can provide the requisite showing. Patent Local Rules 3-6. Yet Cellspin did not seek to amend its contentions, and so whether the standards for amendment would have been met (in complex, related cases, involving claims having numerous claim limitations asserted against a variety of different products) was never tested.

In these circumstances, we cannot find an abuse of discretion by the district court in excluding the OAuth assertion. In opposing summary judgment, Cellspin did not present evidence of any other product feature as satisfying the "user identifier" or "user information" element (in the various claim limitations). It follows that the district court correctly granted summary judgment of noninfringement because Cellspin did not create a genuine dispute of material fact as to whether Fitbit, Fossil, and Garmin's products "apply," "attach," or "store" a "user identifier" or "user information." On that basis, we affirm the grant to Fitbit, Fossil, and Garmin of summary judgment of noninfringement of the '794, '752, and '847 patents.[2]

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[2] For Garmin, the district court granted summary judgment on this basis only as to the '752 and '794 patents, but Garmin noted in its brief to us that the district court's conclusion about the "user identifier"/"user information" issue requires summary judgment of noninfringement by Garmin on the '847 patent as well, Brief for Appellee Garmin at 15 n.2, and Cellspin acknow-

B

The asserted claims of the '752 and '794 patents require that the mobile device "apply[]" or "attach[]" the "user identifier" to new data it receives from the data capture device. The district court granted Nike summary judgment of noninfringement of those patents on the ground that Cellspin's evidence did not allow a reasonable finding that those requirements were satisfied. *Summary Judgment Opinion*, at *17–19. Cellspin challenges that ruling, but we reject Cellspin's challenge.

The district court's claim construction, which Cellspin does not dispute, distinguishes the mobile device, which attaches the user identifier, from the data capture device, which acquires the new data. *Claim Construction Order*, at *5. Nike presented evidence that when the Apple Watch Nike—which is the accused data capture device—is used to acquire activity data, the Apple Watch Nike attaches "an identifier associated with the user" when it packages the activity data for transmission. J.A. 15689–91. It is the data capture device, not the mobile device, that attaches the identifier; indeed, the Apple Watch Nike can send data directly to the cloud without connecting to a mobile phone. J.A. 15691. Cellspin failed to rebut this clear evidence of noninfringement, as Cellspin's evidence establishes at most that a user identifier is

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ledged at oral argument that "there's no distinction" regarding the applicability of this ground across the three asserted patents—all of which recite a "user identifier" or "user information." Oral Arg. at 19:46–58, https://oralarguments.cafc.uscourts.gov/default .aspx?fl=22-2025_10072024.mp3.

associated with the data—not that the mobile phone *attaches* a user identifier to the data.

Thus, we see no error in the district court's ruling that Cellspin did not establish a genuine issue of material fact as to whether Nike satisfies an element of the asserted claims of the '752 and '794 patents. Accordingly, we affirm the grant to Nike of summary judgment of noninfringement of those two patents.

C

Regarding the '847 patent, the district court granted Nike summary judgment of noninfringement on a different ground. The asserted claims of the '847 patent require a "first processor" configured to do three things—acquire new data, store the acquired new data, and send an event notification and the acquired new data to the mobile phone. The district court ruled that the evidence would not permit a reasonable jury to find that requirement satisfied by the accused Nike product. *Summary Judgment Opinion*, at *19–20. We agree with the district court.

To argue that Nike practices the "first processor" limitation, Cellspin cites its expert's testimony generally asserting that "the presence of a first processor is evident based upon the functionality of the Accused Devices and the fact that there is operating code." Cellspin's Opening Brief at 93 (citing J.A. 615 ¶ 86, 617–21 ¶¶ 90–93). The evidence cited by Cellspin, however, does not show that the "first processor" limitation is practiced, as Cellspin's expert identified a "first processor" but did not demonstrate that the identified processor was configured to perform each of the claim-specified functions. J.A. 9445–48, 9475–9509. Although the Apple Watch Nike contains multiple

processors, Cellspin did not point to any evidence that any one of them was configured to perform all the claim-required functions. J.A. 8912–13.

For those reasons, we affirm the district court's grant to Nike of summary judgment of noninfringement of the '847 patent.

D

For Nikon and Under Armour, a dispositive issue involves the requirement of "a paired connection" (sometimes a "paired Bluetooth connection"), which is recited in each of the asserted claims for the '794, '752, and '847 patents. The district court's claim construction, which Cellspin does not appeal, requires that the "paired connection" be "established and maintained on a continuous basis." *Claim Construction Order*, at *9. The district court concluded that the evidence would not allow a reasonable finding that the requirement was met by Nikon's or Under Armour's accused products. *Summary Judgment Opinion*, at *22–26, *41–45. We reject Cellspin's challenge to that conclusion.

Nikon uses a two-connection process: First, the Nikon products use a low-speed connection to signal to the mobile phone that there are new images ready to transfer. Then, the mobile phone detects that transfer request and disconnects the low-speed connection before initiating a high-speed connection. As the district court correctly identified, this two-connection process is not "maintained on a continuous basis," and Cellspin did not present evidence permitting a contrary finding.

Cellspin's arguments focus on the *pairing* between the Nikon products and the mobile phone rather than

the *connection* between the Nikon products and the mobile phone. During prosecution, however, Cellspin differentiated "establishing a pairing" from "establishing a constant connection," using this distinction to avoid the prior art and asserting that "having a constant *connection* would be the key." J.A. 8177 (emphasis added). Thus, Cellspin's arguments relating to pairing through the exchange of link keys provide no basis for finding that a continuous connection is maintained.

The Under Armour products use a connection that activates for a short period of time before going to sleep and disconnecting until the next connection event. J.A. 14717–27. That disconnecting feature saves power and makes the Bluetooth connection "Low Energy." J.A. 14639–40, 14717–19. Cellspin failed to provide evidence contrary to Under Armour's evidence of this noncontinuous connection. Instead, Cellspin repeats its pairing arguments, asserting that "the condition of having an exchanged link key" constitutes a continuous connection— an assertion at odds with the district court's claim construction. J.A. 720 ¶ 69.

Given this record, we affirm the district court's grant to Nikon and Under Armour of summary judgment of noninfringement of the '794, '752, and '847 patents.

III

As discussed above, we do not address the remaining aspects of the district court opinion. Our conclusions on the four issues reviewed here suffice to support summary judgment as to all claims and all parties. We therefore affirm the district court's grant of summary judgment of noninfringement of the '794, '752, and '847 patents.

AFFIRMED

JUDGMENT, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT (NOVEMBER 1, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CELLSPIN SOFT, INC.,

Plaintiff-Appellant,

v.

FITBIT LLC, NIKE, INC., UNDER ARMOUR, INC., FOSSIL GROUP, INC., MISFIT, INC., NIKON AMERICAS, INC., NIKON INC., GARMIN INTERNATIONAL, INC., GARMIN USA, INC.,

Defendants-Appellees.

Nos. 2022-2025, 2022-2028, 2022-2029, 2022-2030, 2022-2032, 2022-2037

Appeals from the United States District Court for the Northern District of California in Nos. 4:17-cv-05928-YGR, 4:17-cv-05931-YGR, 4:17-cv-05932-YGR, 4:17-cv-05933-YGR, 4:17-cv-05936-YGR, 4:17-cv-05934-YGR, Judge Yvonne Gonzalez Rogers.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

FOR THE COURT

/s/ Jarrett B. Perlow
Clerk of Court
[SEAL]

Date: November 1, 2024

MANDATE, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT (DECEMBER 9, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CELLSPIN SOFT, INC.,

Plaintiff-Appellant,

v.

FITBIT LLC, NIKE, INC., UNDER ARMOUR, INC., FOSSIL GROUP, INC., MISFIT, INC., NIKON AMERICAS, INC., NIKON INC., GARMIN INTERNATIONAL, INC., GARMIN USA, INC.,

Defendants-Appellees.

Nos. 2022-2025, 2022-2028, 2022-2029, 2022-2030, 2022-2032, 2022-2037

Appeals from the United States District Court for the Northern District of California in Nos. 4:17-cv-05928-YGR, 4:17-cv-05931-YGR, 4:17-cv-05932-YGR, 4:17-cv-05933-YGR, 4:17-cv-05936-YGR, 4:17-cv-05934-YGR, Judge Yvonne Gonzalez Rogers.

MANDATE

In accordance with the judgment of this Court, entered November 1, 2024, and pursuant to Rule 41 of

the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT

/s/ Jarrett B. Perlow
Clerk of Court
[SEAL]

Date: December 9, 2024

OPINION, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT (NOVEMBER 1, 2024)

NOTE: This disposition is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CELLSPIN SOFT, INC.,

Plaintiff-Appellant,

v.

FITBIT LLC, NIKON AMERICAS, INC.,
NIKON INC.,

Defendants-Appellees.

No. 2023-1526

Appeal from the United States District Court for the Northern District of California in Nos. 4:17-cv-05928-YGR, 4:17-cv-05931-YGR, 4:17-cv-05932-YGR, 4:17-cv-05933-YGR, 4:17-cv-05934-YGR, 4:17-cv-05936-YGR, Judge Yvonne Gonzalez Rogers.

Before: PROST, REYNA, and TARANTO,
Circuit Judges.

TARANTO, Circuit Judge.

Cellspin Soft, Inc., alleging infringement of several of its patents, brought separate actions against Fitbit

LLC and other companies, including Nikon Americas, Inc. and Nikon, Inc. (collectively, Nikon), in the District Court for the Northern District of California. In June 2022, after years of litigation before Judge Gonzalez Rogers, the district court granted summary judgment of noninfringement to Fitbit, Nikon, and others in their separate actions (which were not consolidated but were litigated in conjunction with each other). Today, we affirm the summary judgment rulings in the several cases, which include cases against Fitbit and Nikon and (as will be relevant here) against Fossil Group, Inc. and Misfit, Inc. (collectively, Fossil) and Garmin International, Inc. and Garmin USA, Inc. (collectively, Garmin), among others. *Cellspin Soft, Inc. v. Fitbit LLC*, Fed. Cir. Nos. 2022-2025, 2022-2028 to-2030, 2022-2032, 2022-2037 (*Summary Judgment Appeal Decision*).

Seven months after the district court entered summary judgment in June 2022, Cellspin filed a motion under 28 U.S.C. § 455 arguing that Judge Gonzalez Rogers should recuse herself from the case and that the summary judgment should be vacated because the grounds for disqualification existed at the time it was entered. The several arguments for recusal rested on the fact that, in February 2021, Fitbit had become a subsidiary of Google LLC (itself an indirect subsidiary of Alphabet Inc., a publicly traded company). Judge Gonzalez Rogers denied the motion. *Cellspin Soft, Inc. v. Fitbit, Inc.*, 2023 WL 2176758 (Feb. 15, 2023) (*Recusal Opinion*). Cellspin timely appealed.

We first dismiss the appeal in the case against Nikon because Cellspin failed to file a notice of appeal in the Nikon case. That dismissal leaves only the

appeal in the case against Fitbit. We conclude that the bulk of the recusal motion was properly denied by the district court as untimely. We also conclude that, even if there was error as to the remaining part (an issue we do not decide), any such error was harmless. We reach that conclusion because the outcome of Cellspin's infringement case against Fitbit could not be altered by Judge Gonzalez Rogers's recusal from that case, given that we have affirmed the summary judgment of noninfringement in the Fossil and Garmin cases—as to which Cellspin has not preserved a recusal challenge—on a ground directly applicable to the case against Fitbit. We therefore dismiss the appeal as to Nikon and affirm as to Fitbit.

I

Cellspin filed its complaint against Fitbit, along with complaints against Nikon, Fossil, Garmin, and others, asserting infringement of U.S. Patent Nos. 8,738,794, 8,892,752, and 9,749,847, in October 2017. The Fitbit case and others were assigned to Judge Yvonne Gonzalez Rogers on October 31, 2017, and deemed to be related for coordinated treatment. Extensive litigation in the cases ensued. In February 2021, Fitbit amended its corporate disclosure statement to reflect the completion of its acquisition by Google (an indirect subsidiary of Alphabet), an acquisition that had been announced publicly months earlier. From that time, Google and Alphabet (collectively, Google) were owners of Fitbit, a party to Cellspin's case.

Nearly a year later, in January 2022, Fitbit and other defendants moved for summary judgment of noninfringement in their respective cases. Cellspin

did not raise any issue of recusal based on Google's ownership of Fitbit since February 2021. The district court granted summary judgment in June 2022. *Cellspin Soft, Inc. v. Fitbit, Inc.*, No. 4:17-cv-05928, 2022 WL 2784467, at *1 (N.D. Cal. June 15, 2022). We have today affirmed that decision. *See Summary Judgment Appeal Decision*, *supra*.

In the meantime—in January 2023, months after the grant of summary judgment and the filing of notices of appeal from that grant—Cellspin filed a motion to recuse Judge Gonzalez Rogers. Cellspin presented several arguments tied to Google concerning investments she and her husband had and concerning certain of her husband's business activities. Cellspin sought vacatur of the district court's summary-judgment ruling under Federal Rule of Civil Procedure 60 because the investments and activities pre-dated that ruling. Cellspin sought recusal and vacatur not just in its case against Fitbit (a subsidiary of Google since February 2021) but also in the cases against other defendants, the latter on the asserted ground that determinations regarding Fitbit may have infected determinations regarding other defendants.

The district court denied the motion to recuse and vacate on several grounds. *Recusal Opinion*, *supra*. First, the district court concluded that it would lack authority to vacate the summary judgment decisions because of Cellspin's pending appeals from those decisions. *Id.* at *3–4. Second, the district court determined that the motion was untimely. *Id.* at *4–6. Third, the district court denied the motion to recuse on the merits. *Id.* at *6–11. Cellspin timely filed an appeal.

II

We first address Nikon's presence before us. To appeal the district court's denial of the recusal motion in Nikon's case, Cellspin was required to file a notice of appeal in the Nikon docket designating the appealed judgment under Federal Rule of Appellate Procedure 3(a)(1). *See Smith v. Barry*, 502 U.S. 244, 248 (1992) ("Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review."). Cellspin did not do so.

Cellspin filed its notice of appeal—listing Fitbit as the only defendant—only in the Fitbit docket. J.A. 2167–68. Cellspin's argument that its single notice of appeal should apply to a separate case is unconvincing. Cellspin's cases against Fitbit and Nikon were docketed separately by the district court, *Cellspin Soft, Inc. v. Fitbit, Inc.*, No. 4:17-cv-05928 and *Cellspin Soft, Inc. v. Nikon Americas, Inc.*, No. 4:17-cv-05936, and the district court entered an order denying Cellspin's recusal motion in each action. Order Denying Motion for Recusal, *Cellspin Soft, Inc. v. Nikon Americas, Inc.*, No. 4:17-cv-05936 (N.D. Cal. Feb. 15, 2023), ECF No. 260; Order Denying Motion for Recusal, *Cellspin Soft, Inc. v. Fitbit, Inc.*, No. 4:17-cv-05928 (N.D. Cal. Feb. 3, 2023), ECF No. 376.[1]

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[1] Nikon's opposition to Cellspin's recusal motion was initially added to the Fitbit docket instead of the Nikon docket, which resulted in Nikon's temporary addition to the Fitbit docket. *See* J.A. 2226; Opposition to Motion for Recusal, *Cellspin Soft, Inc. v. Fitbit, Inc.*, No. 4:17-cv-05928 (N.D. Cal. Feb. 3, 2023), ECF No. 374. Nikon has since been removed from the Fitbit docket. Order Granting Nikon's Request, *Cellspin Soft, Inc. v. Fitbit, Inc.*, No. 4:17-cv-05928 (N.D. Cal. May 4, 2023), ECF No. 381.

Because Cellspin did not file a notice of appeal from the district court's denial of the recusal motion as it relates to Nikon, we do not have jurisdiction over Cellspin's appeal against Nikon. We dismiss the appeal as to Nikon.

III

Regarding the case against Fitbit, we have jurisdiction under 28 U.S.C. § 1295(a)(1). Cellspin appeals only insofar as it seeks, based on recusal, to vacate the summary judgment ruling in favor of Fitbit; it does not identify any prospective decisions still to be made in the case. Accordingly, as the district court indicated, *Recusal Opinion*, at *4, the motion to recuse and vacate is properly viewed as a motion for relief from the judgment under Federal Rule of Civil Procedure 60(b). (The summary judgment from which relief is sought is final, as explained in our *Summary Judgment Appeal Decision*.) A district court has authority to *deny* a Rule 60(b) motion, as the district court did, even while an appeal is pending. *See* Fed. R. Civ. P. 62.1, Advisory Committee Note ("After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it. . . . "). A denial of such a motion is final and appealable. *See, e.g.*, *CEATS, Inc. v. Continental Airlines, Inc.*, 755 F.3d 1356, 1360 (Fed. Cir. 2014); 15B Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice & Procedure* § 3916 (2d ed.).

We review the district court's denial of the motion for recusal according to the law of the regional circuit —here, the Ninth Circuit. *See Baldwin Hardware Corp. v. FrankSu Enterprise Corp.*, 78 F.3d 550, 556

(Fed. Cir. 1996) ("In reviewing [a] . . . denial of recusal, which raises substantive and procedural issues not within our exclusive jurisdiction, we are guided by the law of the regional circuit."). The Ninth Circuit reviews the denial of motions for recusal under 28 U.S.C. § 455 for abuse of discretion. *See In re Marshall*, 721 F.3d 1032, 1039 (9th Cir. 2013) ("We review the denial of a § 455(a) motion for recusal for abuse of discretion."). We have adopted the same standard of review in recusal matters that are subject to our own circuit's law. *See Shell Oil Co. v. United States*, 672 F.3d 1283, 1288 (Fed. Cir. 2012).

A

Two bases for Cellspin's argument for recusal are (a) certain financial-investment holdings of Judge Gonzalez Rogers and her husband (Mr. Rogers) and (b) certain collaborations between Google and the consulting firm McKinsey when Mr. Rogers worked there for many years. As to the former, the allegations do not concern direct ownership of Google stock by the judge or her husband, but rather, participation in large independently managed multi-company funds such as mutual funds (Cellspin focusing on funds that do or would be expected to have Google stock in their portfolios). As to the latter, the allegations seem to focus on McKinsey's general offering of Google cloud or other services to McKinsey clients, not any direct work by Mr. Rogers (who focused on energy firms) for Google as a consulting client. We do not thoroughly probe the specifics, however, because for these asserted bases for recusal, we find no abuse of discretion in Judge Gonzalez Rogers's conclusion that Cellspin's motion was untimely. *Recusal Opinion*, at *4–6.

Section 455 sets no specific time limit on seeking recusal, but timeliness is a well-established consideration in application of the statute. "In deciding motions to vacate orders issued by an allegedly disqualified judge, the courts have used 'untimely' as a synonym for 'unfair' when the circumstances, like those present here, are such that a grant of the motion would produce a result inequitable, unjust, and unfair." *Polaroid Corp. v. Eastman Kodak Co.*, 867 F.2d 1415, 1419 (Fed. Cir. 1989); *see, e.g.*, *Kolon Industries Inc. v. E.I. DuPont de Nemours & Co.*, 748 F.3d 160, 170–72 (4th Cir. 2014); *United States v. Rogers*, 119 F.3d 1377, 1380–83 (9th Cir. 1997). Recusal motions must be filed with reasonable promptness after the ground for such a motion is ascertained, *i.e.*, known to the movant. *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992) (citing *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991)). The Ninth Circuit has found "untimeliness" when "unexplained delay in filing a recusal motion suggests that the recusal statute is being misused for strategic purposes." *United States v. Mikhel*, 889 F.3d 1003, 1026 (9th Cir. 2018) (citing *E. & J. Gallo*, 967 F.2d at 1296) (internal quotation marks omitted).

Here, Cellspin did not seek recusal until January 2023, well after it had lost on the summary judgment motion. Yet Cellspin is charged with knowing of Fitbit's acquisition by Google by February 3, 2021, a year and a half earlier, when Fitbit updated its corporate disclosures. Amended Corporate Disclosure Statement, *Cellspin Soft, Inc. v. Fitbit, Inc.*, No. 4:17-cv-05928 (N.D. Cal. Feb. 3, 2021), ECF No. 165. The timing raises obvious concerns of lack of equity and strategic misuse of recusal. *Recusal Opinion*, at *5.

Concerning the McKinsey-related basis: Cellspin's recusal motion cited Judge Gonzalez Rogers's 2011 Senate Judiciary Committee Questionnaire, which has been publicly available since 2011, to establish Mr. Rogers's employment with McKinsey (which lasted until March 2021). For the McKinsey-Google collaboration, Cellspin cited to one undated source, J.A. 930, and to a McKinsey webpage, J.A. 112–13, that, when checked by following the Cellspin-provided uniform resource locator address, reveals that it was published on March 7, 2022. J.A. 112–13. Cellspin did not remotely establish that the information it relies on was unavailable with reasonable diligence substantially before the summary judgment ruling issued and the recusal motion was filed.

Concerning the investment-related basis: Cellspin was similarly untimely in raising its concerns. Cellspin argued that Judge Gonzalez Rogers's investments in certain Vanguard funds and a "Special Situations Fund" managed by the McKinsey Investment Office merit recusal because the funds contain interests in Google among their many assets. For these grounds, Cellspin drew upon Judge Gonzalez Rogers's 2020 financial disclosures, which were filed on October 27, 2021, according to Cellspin. J.A. 2137. Judge Gonzalez Rogers noted that "the investments at issue in the motion have been publicly known since the 2012 Financial Disclosure and have not changed," and Cellspin does not argue otherwise. *Recusal Opinion*, at *5 (emphasis in original). As discussed above, Cellspin was aware of Fitbit's acquisition by Google by February 3, 2021. Therefore, Judge Gonzalez Rogers's investments and the alleged connection to Google were available to Cellspin by October 27, 2021, at the

latest—a few months before summary judgment was sought, half a year before summary judgment was granted, and more than a year before Cellspin sought recusal.

The Ninth Circuit has affirmed determinations of untimeliness underlying denials of recusal motions in similar circumstances. *See Mikhel*, 889 F.3d at 1027 (affirming denial of recusal motion where movant learned of grounds during trial but did not file recusal motion until after jury verdict); *E. & J. Gallo*, 967 F.2d at 1295 (affirming denial of recusal motion where movant learned of grounds upon case transfer but did not seek disqualification until after final judgment). For the grounds discussed here—the bulk of the Cellspin's asserted grounds for recusal—we affirm the denial of the recusal motion for untimeliness in the present matter.

B

Cellspin's separate asserted basis for recusal involves Mr. Rogers's "Operations Partner" role at Ajax Strategies Venture Capital, which is allegedly a venture-capital firm funded in part by Google that makes investments in start-up firms. *See Recusal Opinion*, at *7. As Judge Gonzalez Rogers noted, this basis raises a different timeliness issue, at least because the relationship of Mr. Rogers with Ajax seemingly did not begin until March 2022. *See Recusal Opinion*, at *2, *5, *7. The facts relating to this relationship, and to Google's relationship with Ajax, which remain unclear on the record before us even now, may well have been less publicly available to Cellspin than were facts relating to the asserted bases for recusal discussed above.

But we need not and do not further pursue the specific facts bearing on timeliness of Cellspin's assertion of this ground. The same is true regarding the specific facts bearing on assessment of the Ajax relationships on the merits. It is relevant to note that, given what Cellspin has put forward, the assessment seems to call for application of 28 U.S.C. § 455(a), and not the brighter-line rules of § 455(b), and for consideration of, *e.g.*, the multi-factor approach set forth in the U.S. Judicial Conference Committee on Codes of Conduct's Advisory Opinion 107: Disqualification Based on Spouse's Business Relationships, which elaborates on standards of Canon 3C(1) of the Code of Conduct for United States Judges that are closely related to those of 28 U.S.C. § 455. But we need not and do not make further inquiry into those matters because, even if we were to conclude that Judge Gonzalez Rogers abused her discretion in this respect, an issue we do not reach, that conclusion would not warrant vacating the summary judgment for Fitbit under the harmless-error standards set forth in *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988). *See also Centripetal Networks, Inc. v. Cisco Systems, Inc.*, 38 F.4th 1025, 1034–39 (Fed. Cir. 2022); *Shell Oil*, 672 F.3d at 1292– 94.

Under *Liljeberg*, when deciding whether a judgment should be vacated for violation of § 455, we are to consider "the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." 486 U.S. at 864. Here, and most critically, the risk of injustice to the parties from denying vacatur would be essentially nonexistent. As we hold

today in the *Summary Judgment Appeal Decision*, Judge Gonzalez Rogers did not abuse her discretion by barring Cellspin's "OAuth" theory of infringement for the two separate defendants, Garmin and Fossil, and our holding in that respect—which is not subject to any Cellspin-preserved recusal objection for those defendants—has preclusive effect and resolves against Cellspin its infringement assertions against Fitbit.

To elaborate slightly: Although Cellspin filed its recusal motion in the dockets for Garmin and Fossil as well as Fitbit, Cellspin did not appeal the denial of the recusal motions in the cases against Garmin and Fossil. J.A. 2167– 68. Accordingly, Cellspin no longer has any argument that the district court's grants of summary judgment for Garmin and Fossil were tainted by a lack of recusal. In our *Summary Judgment Appeal Decision*, we today uphold the district court's barring of Cellspin from presenting its OAuth theory of infringement. Our affirmance of the district court's decision on that issue does not rest on any Fitbit-specific analysis, and in that appeal, Cellspin addressed its OAuth theory as a single issue uniformly applicable to Fitbit, Garmin, and Fossil. *See* Cellspin's Opening Brief in *Summary Judgment Appeal Decision* at 65, 73 ("Cellspin hereby adopts and incorporates by reference all arguments made *supra* concerning Fitbit."). It follows that our affirmance of the OAuth bar for Garmin and Fossil decides the issue in favor of Fitbit as well. Vacating the June 2022 grant of summary judgment therefore could not properly alter the ultimate outcome of Cellspin's case against Fitbit (if transferred to another trial judge): Cellspin still would be barred from presenting its OAuth theory, which

means that Cellspin still would not have evidence that Fitbit infringes the asserted claims of the three patents.

Under *Liljeberg*, a decision to affirm the denial of Cellspin's recusal motion would create no risk of injustice to Cellspin. *See* 486 U.S. at 864. At the same time, we see no risk of injustice in other cases, and we see no risk of undermining the public's confidence in the judicial process. Neither *Liljeberg* nor our *Centripetal* and *Shell Oil* cases involved circumstances similar to the ones here, such as a focus only on a § 455(a) ground not subject to a bright-line rule, a significant delay in bringing forth the ground, and a collection of related cases among which are several in which the decisive merits issue in the case has been conclusively decided (without a § 455 taint) against the recusal-seeking party. We therefore affirm the district court's denial of the motion to recuse on the Ajax ground without reaching the merits.

IV

For the foregoing reasons, we dismiss the appeal as to Nikon, and we affirm the district court's denial of Cellspin's motion to recuse and to vacate as to Fitbit.

Costs to Nikon and Fitbit.

DISMISSED IN PART AND AFFIRMED IN PART

JUDGMENT, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT (NOVEMBER 1, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CELLSPIN SOFT, INC.,

Plaintiff-Appellant,

v.

FITBIT LLC, NIKON AMERICAS, INC.,
NIKON INC.,

Defendants-Appellees.

No. 2023-1526

Appeal from the United States District Court for the Northern District of California in Nos. 4:17-cv-05928-YGR, 4:17-cv-05936-YGR, 4:17-cv-05931-YGR, 4:17-cv-05932-YGR, 4:17-cv-05934-YGR, 4:17-cv-05933-YGR, Judge Yvonne Gonzalez Rogers.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

DISMISSED IN PART AND AFFIRMED IN PART

FOR THE COURT

/s/ Jarrett B. Perlow
Clerk of Court
[SEAL]

Date: November 1, 2024

MANDATE, U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT (DECEMBER 9, 2024)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CELLSPIN SOFT, INC.,

Plaintiff-Appellant,

v.

FITBIT LLC, NIKON AMERICAS, INC.,
NIKON INC.,

Defendants-Appellees.

2023-1526

Appeal from the United States District Court for the Northern District of California in Nos. 4:17-cv-05928-YGR, 4:17-cv-05936-YGR, 4:17-cv-05931-YGR, 4:17-cv-05932-YGR, 4:17-cv-05934-YGR, 4:17-cv-05933-YGR, Judge Yvonne Gonzalez Rogers.

MANDATE

In accordance with the judgment of this Court, entered November 1, 2024, and pursuant to Rule 41 of the Federal Rules of Appellate Procedure, the formal mandate is hereby issued.

FOR THE COURT

/s/ Jarrett B. Perlow
Clerk of Court

December 9, 2024
Date

ORDER REVISING JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 54(B), U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (JULY 19, 2022)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CELLSPIN SOFT, INC.,

Plaintiff,

v.

GARMIN INTERNATIONAL, INC., ET AL.,

Defendants.

Case No. 17-cv-05934-YGR

Before: Yvonne GONZALEZ ROGERS, Judge.

ORDER REVISING JUDGMENT UNDER FEDERAL RULE OF CIVIL PROCEDURE 54(B)

On June 7, 2022, the Court granted Defendant Garmin International, Inc.'s motion for summary judgment on Plaintiff Cellspin Soft, Inc.'s patent infringement claims. Dkt. No. 218. On June 15, 2022, the Court issued an order directing the Clerk of Court to enter judgment and close the matter. Dkt. No. 220. However, because United States Patent No. 9,258,698 (the " '698 patent") remains asserted in this case,

see Dkt. Nos. 170, 231, the Court revises its final judgment under Federal Rule of Civil Procedure 54(b) to apply only to the claims granted at summary judgment.

This order VACATES the Friday, July 22, 2022 compliance hearing.

IT IS SO ORDERED.

/s/ Yvonne Gonzalez Rogers
U.S. District Judge

Dated: July 19, 2022

JUDGMENT, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (JUNE 15, 2022)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CELLSPIN SOFT, INC.,

Plaintiff,

v.

FITBIT LLC,

Defendant.

Case No. 17-cv-05928-YGR

Before: Yvonne GONZALEZ ROGERS, Judge.

JUDGMENT

Having granted defendant's motion for summary judgment, the Court hereby orders, adjudges, and decrees that judgment be entered in favor of defendant.

The Clerk of Court shall enter judgment and close the matter.

IT IS SO ORDERED.

/s/ Yvonne Gonzalez Rogers
U.S. District Judge

Dated: June 15, 2022

JUDGMENT, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (JUNE 15, 2022)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CELLSPIN SOFT, INC.,

Plaintiff,

v.

NIKE, INC.,

Defendant.

Case No. 17-cv-05931-YGR

Before: Yvonne GONZALEZ ROGERS, Judge.

JUDGMENT

Having granted defendant's motion for summary judgment, the Court hereby orders, adjudges, and decrees that judgment be entered in favor of defendant.

The Clerk of Court shall enter judgment and close the matter.

IT IS SO ORDERED.

/s/ Yvonne Gonzalez Rogers
U.S. District Judge

Dated: June 15, 2022

JUDGMENT, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (JUNE 15, 2022)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CELLSPIN SOFT, INC.,

Plaintiff,

v.

UNDER ARMOUR, INC.,

Defendant.

Case No. 17-cv-05932-YGR

Before: Yvonne GONZALEZ ROGERS, Judge.

JUDGMENT

Having granted defendant's motion for summary judgment, the Court hereby orders, adjudges, and decrees that judgment be entered in favor of defendant.

The Clerk of Court shall enter judgment and close the matter.

IT IS SO ORDERED.

/s/ Yvonne Gonzalez Rogers
U.S. District Judge

Dated: June 15, 2022

JUDGMENT, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (JUNE 15, 2022)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CELLSPIN SOFT, INC.,

Plaintiff,

v.

FOSSIL GROUP, ET AL.,

Defendant.

Case No. 17-cv-05933-YGR

Before: Yvonne GONZALEZ ROGERS, Judge.

JUDGMENT

Having granted defendant's motion for summary judgment, the Court hereby orders, adjudges, and decrees that judgment be entered in favor of defendant.

The Clerk of Court shall enter judgment and close the matter.

IT IS SO ORDERED.

/s/ Yvonne Gonzalez Rogers
U.S. District Judge

Dated: June 15, 2022

JUDGMENT, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (JUNE 15, 2022)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CELLSPIN SOFT, INC.,

Plaintiff,

v.

NIKON AMERICAS, INC., ET AL.,

Defendant.

Case No. 17-cv-05936-YGR

Before: Yvonne GONZALEZ ROGERS, Judge.

JUDGMENT

Having granted defendant's motion for summary judgment, the Court hereby orders, adjudges, and decrees that judgment be entered in favor of defendant.

The Clerk of Court shall enter judgment and close the matter.

IT IS SO ORDERED.

/s/ Yvonne Gonzalez Rogers
U.S. District Judge

Dated: June 15, 2022

JUDGMENT, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (JUNE 15, 2022)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CELLSPIN SOFT, INC.,

Plaintiff,

v.

GARMIN INTERNATIONAL, INC.,

Defendant.

Case No. 17-cv-05934-YGR

Before: Yvonne GONZALEZ ROGERS, Judge.

JUDGMENT

Having granted defendant's motion for summary judgment, the Court hereby orders, adjudges, and decrees that judgment be entered in favor of defendant.

The Clerk of Court shall enter judgment and close the matter.

IT IS SO ORDERED.

/s/ Yvonne Gonzalez Rogers
U.S. District Judge

Dated: June 15, 2022

ORDER DENYING MOTION FOR RECUSAL PURSUANT TO SECTION 455, U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (FEBRUARY 15, 2023)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CELLSPIN SOFT, INC.,

Plaintiff,

v.

FITBIT, INC.,
NIKE, INC.,
UNDER ARMOUR, INC.,
FOSSIL GROUP, ET AL.,
GARMIN INTERNATIONAL, INC.,
NIKON AMERICAS, INC., ET AL.,

Defendants.

Case No. 4:17-CV-05928-YGR

Case No. 4:17-CV-05931-YGR

Case No. 4:17-CV-05932-YGR

Case No. 4:17-CV-05933-YGR

Case No. 4:17-CV-05934-YGR

Case No. 4:17-CV-05936-YGR

Before: Yvonne GONZALEZ ROGERS, Judge.

ORDER DENYING MOTION FOR RECUSAL PURSUANT TO SECTION 455

Pending before the Court is a futile attempt to evade the Federal Circuit's review of this Court's June 7, 2022, 83-page comprehensive order granting defendants' motions for summary judgment. (Dkt. No. 331.)[1] Plaintiff's chosen vehicle is a motion for recusal of the undersigned under 28 U.S.C. §§ 455(a)-(d). (Dkt. No. 366.)

In short, plaintiff's attack on the integrity of the judiciary, through the undersigned,[2] not only demonstrates a measure of desperation, but is divorced from the law and the facts. Reduced to its essence, and extended to its illogical conclusion, the motion would seek to have federal judges recuse after the appeal of their objective findings, based upon nothing but speculation and attenuation. The argument is extreme and meritless.

Notably, plaintiff's motion is also plagued by myriad procedural deficiencies. While the Court is

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[1] These defendants include Fitbit, Inc. ("Fitbit"), Nike, Inc. ("Nike"), Under Armour, Inc. ("Under Armour"), Fossil Group ("Fossil"), Garmin International, Inc. ("Garmin"), and Nikon Americas, Inc. ("Nikon"). Plaintiff's caption also extends its motion to defendant Moov, Inc. ("Moov"). Judgment was not entered as to Moov.

All docket references are to Case No. 4:17-cv-5928-YGR unless otherwise indicated.

[2] Through convoluted allegations, the plaintiff also seeks to attack the business affiliations of the undersigned's husband. The undersigned's husband is only affiliated with this case by way of the undersigned's role as an officer of the court. While his name has been extensively highlighted in the record, the Court finds no reason to inject it further into this dispute.

under no obligation to address the meritless assertions in detail, it does so at exacting length to increase transparency[3] and reassure the public that members of the judiciary take seriously their obligation to be impartial and objective. Unfortunately, the judiciary cannot predict when lawyers and parties will grasp to bypass the normal avenues of appellate review hoping for the proverbial second bite at the apple.

Simply put, the undersigned has no material financial stake in the outcome of this case and there is no other reason why her impartiality might reasonably be questioned to justify recusal. Evidence does not exist to support a contrary result. Nor do bald attorney arguments divorced from law and fact compel a different finding. For the following reasons, the motion for recusal is DENIED.[4]

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[3] Plaintiff baldly suggests that the Court has been derelict by failing to submit its 2021 and 2022 financial disclosures. This attack on the Court's integrity is inconsistent with fact. The 2022 deadline has not passed. As to the 2021 fiscal year, the Court did timely submit a disclosure. Its public release has been temporarily stayed because the Administrative Office of the U.S. Courts, not the undersigned, found that the undersigned and her husband actually over-disclosed, further demonstrating the Court's commitment to transparency. That disclosure will ultimately be released and will not change the outcome of this motion.

[4] Fitbit, Nike, Under Armour, Fossil, and Nikon all filed briefs opposing the motion in their respective cases or the docket concerning Fitbit. Garmin filed an unopposed request for leave to file its opposition, which is granted. All oppositions are considered.

Since plaintiff failed to notice the motion for hearing consistent with Civil Local Rule 7-2, Fitbit noticed the motion for hearing on February 28, 2023. Pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b), the Court finds that the

I. Background

The Court assumes the parties' familiarity with the factual underpinnings of this lawsuit, which are largely irrelevant to the pending motion.

This lawsuit was commenced in 2017 when plaintiff filed over a dozen complaints alleging infringement of one or more patents. In December 2017, the undersigned related fourteen cases. (Dkt. No. 18.) Subsequently, on April 10, 2018, the Court dismissed plaintiff's claims finding that the asserted patents at issue were directed to unpatentable subject matter pursuant to 35 U.S.C. § 101. (Dkt. No. 79, 81.) That order was appealed and subsequently reversed by the Federal Circuit. (Dkt. No. 108.) Following remand, the cases proceeded through claim construction and discovery.

Relevant to the pending motion, on February 3, 2021, Fitbit submitted an Amended Corporate Disclosure Statement and Amended Certification of Interested Parties disclosing that "it is a subsidiary of Google LLC, which is a subsidiary of XXVI Holdings Inc., which is a subsidiary of Alphabet Inc., a publicly traded company." (Dkt. No. 165.) According to plaintiff's pending motion, Google's[5] introduction into these proceedings via Fitbit gave rise to publicly known circumstances which plaintiff now claims, over – months later, required the undersigned to recuse herself from these

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motion is appropriate for decision without oral argument. Therefore, the hearing noticed for February 28, 2023 is VACATED.

[5] Plaintiff broadly uses "Google" to refer to myriad projects, investments, entities, partnerships, and services. Through this shotgun tactic, plaintiff has substantially failed to articulate the legal foundation throughout the vast majority of its filings.

patent cases. Plaintiff did not move for disqualification and proceedings continued.

In January 2022, the defendants moved for summary judgment of noninfringement. A joint hearing on the motions was held on April 22, 2022, where the nuances of the various motions were addressed extensively. After taking the motions for summary judgment under submission, the Court issued a comprehensive omnibus order on June 7, 2022. (Dkt. No. 331.) That order addressed the particularities of each motion brought by the defendants. Where the order addressed all pending claims, judgment was entered in favor of the defendants on June 15, 2022.

Approximately one month later, plaintiff filed its notice of appeal on July 13, 2022. (Dkt. No. 346.) Taking judicial notice of the appellate record, the appeal was docketed on July 15, 2022, and plaintiff filed an opening brief on December 16, 2022.

Nearly seven months after entry of judgment and after substantial progress on appeal, plaintiff has now moved to recuse the undersigned pursuant to 28 U.S.C. §§ 455(a)-(d) and requests that the Court vacate the entry of summary judgment in favor of the defendants due to the alleged violations of section 455. In short, the motion asserts that the Court has an appearance of bias in favor Google or financial interests in Google. Plaintiff bases these allegations on at least three reasons: (1) the undersigned's husband's employment with McKinsey & Company, Inc. ("McKinsey"); (2) the undersigned's husband's employment with Ajax Strategies Venture Capital as an Operating Partner ("Ajax") where he purportedly handles over eight companies funded and/or in partnership with Google; and (3) the undersigned's purported investments in

Google and the defendants through the Vanguard 500 Index Fund, Vanguard Total International Stock Index Fund, and the McKinsey Special Situations Aggressive Long-Term fund ("Special Situations Fund"). While plaintiff's motion attaches over 1500 pages of exhibits, the Court notes that plaintiff does not cite to the documents with any degree of particularity. As addressed below, the accusations are frivolous and devoid of any evidentiary merit. While unnecessary, this order provides detail to support transparency and any appellate review.

II. Legal Standards

The standard for recusal is not in serious dispute. The Court's duty to recuse here is governed by 28 U.S.C. § 455.

First, a judge "shall disqualify [her]self in any proceeding in which [her] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). In analyzing the Court's impartiality, the Ninth Circuit "employ[s] an objective test: 'whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" *Clemens v. U.S. Dist. Ct.*, 428 F.3d 1175, 1178 (9th Cir. 2005) (quoting *Herrington v. County of Sonoma*, 834 F.2d 1488, 1502 (9th Cir. 1988)). It is well-known that "the 'reasonable person' is not someone who is 'hypersensitive or unduly suspicious,' but rather is a 'well-informed, thoughtful observer.' The standard must not be so broadly construed that it becomes, in effect, presumptive, so that recusal is mandated upon the merest unsubstantiated suggestion of personal bias or prejudice." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (internal citations omitted).

Second, a judge "shall also disqualify [her]self . . . [when she] knows that [s]he, individually or as a fiduciary, or [her] spouse . . . has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4). A "financial interest" is statutorily defined as "ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party." 28 U.S.C. § 455(d)(4). However, "[o]wnership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund." 28 U.S.C. § 455(d)(4)(i).

Notably, "[j]udges are presumed to be impartial and, accordingly, parties seeking recusal bear the substantial burden of proving otherwise." *Stebbins v. Polano*, No. 21-cv-04184-JSW, 2021 WL 8532245, at *1 (N.D. Cal. Oct. 22, 2021) (internal quotations and citations omitted); *see also Pope v. Fed. Express Corp.*, 974 F.2d 982, 985 (8th Cir. 1992) ("A party introducing a motion to recuse carries a heavy burden of proof; a judge is presumed to be impartial and the party seeking disqualification bears the substantial burden of proving otherwise.").

III. Discussion

A. Jurisdiction

Before diving into the merits of the pending motion, the Court addresses jurisdictional matters. It is well-established that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it

confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982). As acknowledged by the Ninth Circuit, this is a "judge-made doctrine designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time." *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir. 1988) (internal quotation marks and citation omitted). Since judgment has been entered and plaintiff has filed an appeal, this Court has been divested of jurisdiction over the summary judgment order. Jurisdiction continues to exist over post-judgment proceedings ancillary to issues raised on appeal.

To the extent plaintiff is seeking to disqualify the undersigned from post-judgment proceedings such as cost motions that have not been decided, that request is properly before the Court. However, plaintiff asks for much more. Plaintiff "moves to vacate entry of the joint Summary Judgment Order in favor of all Defendants and all subsequent orders thereto." (Dkt. No. 366 at 1.) Procedurally, the request to vacate the summary judgment order is defective for at least two reasons.

First, the summary judgment order is before the Federal Circuit. The Court has no authority to vacate the order because the appeal divested it of jurisdiction. Plaintiff should have filed a motion for an indicative ruling pursuant to Federal Rule of Civil Procedure 62.1. That rule would permit this Court to defer consideration of the motion, deny it, or state that it would grant it. Notably, the rule and relevant standard is nowhere within plaintiff's motion. Even though plaintiff is not pro se and is proceeding through

counsel, the Court generously construes a request for an indicative ruling into plaintiff's filing to promote judicial economy for the Court and parties.

Second, requests to vacate are made pursuant to Federal Rule of Civil Procedure 60. Under Rule 60, a district court "may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief." Plaintiff's vague gestures to Rule 60 in its motion fails to identify the precise basis upon which it relies to vacate the summary judgment. Once more, the Court generously construes counsel's motion as a request to vacate the judgment "as void" in light of the conflicts asserted.

For the reasons addressed below, the motion fails. No conflict or extraordinary circumstances exist to void the judgment. The Court would also deny the motion if jurisdiction existed over the summary judgment order.

B. The Motion is Untimely

Another threshold issue, separate and apart from the jurisdictional issues identified, the Court considers whether plaintiff's motion pursuant to section 455 is

timely. *United States v. Rogers*, 119 F.3d 1377, 1380 (9th Cir. 1997). The Court has little difficulty determining that it is not. This on its own is a sufficient basis to deny plaintiff's motion.

Section 455 does not have a statutory deadline. Nevertheless, as the Ninth Circuit has instructed, "[a]bsent a timeliness requirement, parties would be encouraged to withhold recusal motions, pending a resolution of their dispute on the merits, and then if necessary invoke section 455 in order to get a second bite at the apple." *Rogers*, 119 F.3d at 1380. Such an open-ended approach without any measure of deterrence "would result in increased instances of wasted judicial time and resources and a heightened risk that litigants would use recusal motions for strategic purposes." *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991). Notably, "[w]here unexplained delay in filing a recusal motion suggests that the recusal statute is being misused for strategic purposes, the motion will be denied as untimely." *United States v. Mikhel*, 889 F.3d 1003, 1027 (9th Cir. 2018). Further, "[w]hile no per se rule exists regarding the time frame in which recusal motions should be filed after a case is assigned to a particular judge, if the timeliness requirement is to be equitably applied, recusal motions should be filed with reasonable promptness after the ground for such a motion is ascertained." *Preston*, 923 F.2d at 733. Courts have also long recognized that waiting to raise the issue until after an unfavorable order was on appeal is sufficient grounds to deny a motion. *See, e.g.*, *Oglala Sioux Tribe of Pine Ridge Indian Rsrv. v. Homestake Min. Co.*, 722 F.2d 1407, 1414 (8th Cir. 1983) ("[A] timeliness requirement is appropriate, especially in this case where the Oglala Sioux were aware of the

alleged grounds for disqualification at the time the case was assigned to Judge Bogue, but the suggestion for disqualification was not raised until this appeal."); *In re United Shoe Mach. Corp.*, 276 F.2d 77, 79 (1st Cir. 1960) ("One of the reasons for requiring promptness in filing is that a party, knowing of a ground for requesting disqualification, cannot be permitted to wait and decide whether he likes subsequent treatment that he receives.").

Plaintiff's motion is not reasonably prompt as demonstrated by plaintiff's own filings. According to plaintiff's motion, Fitbit disclosed its affiliation with Google on February 3, 2021 after a well-known merger, by filing its amended certification on the docket. Plaintiff is charged with knowledge of this document as a user of ECF. Notably, plaintiff's allegations concerning the Court's financial interests and affiliations with Google are based on the undersigned's 2020 Financial Disclosure. That disclosure was available through the balance of 2021 and 2022. While plaintiff highlights the 2020 Financial Disclosure, the investments at issue in the motion have been publicly known since the 2012 Financial Disclosure and have not changed. Remarkably, plaintiff also extensively relies upon this Court's Questionnaire for Judicial Nominees to criticize affiliations with McKinsey. That questionnaire was submitted and has been publicly available since 2011. Both sources of public information predate Fitbit's disclosure. While an affiliation with Ajax developed after that disclosure was filed, plaintiff's own motion and evidence demonstrate that the undersigned's husband was in the position nine months prior to the motion being brought and that at a minimum plaintiff knew of the position in November (roughly one month

prior to substantially commencing appeal). As set forth below, this is immaterial since there are no financial interests or affiliations related to these proceedings.

Despite these public disclosures, plaintiff sat on the motion and strategically litigated this case through summary judgment. This is a dipositive fact the reply brief ignores in its entirety.[6] After appealing that ruling, filing an opening brief on appeal, and triggering the defendants' obligation to respond to the appeal, plaintiff then filed the present motion before the Court. There is little doubt that filing the motion nearly seven months after judgment was entered and after an appeal has been substantially commenced is gamesmanship. Indeed, plaintiff's blanket request to vacate the judgment as to *all defendants*, not just Fitbit, illuminates plaintiff's true intention of securing an unwarranted second bite at the apple.

The procedural deficiencies of the motion are replete. First, it was only filed in the action concerning Fitbit even though separate judgments were issued as to each defendant in each underlying action and relief was sought against all. Second, the motion also fails to include a notice of motion as required by Civil Local Rule 7-2(b).[7] This requirement exists to alert non-

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[6] Plaintiff raises a futile argument that it did not know the Federal Circuit was going to decide *Centripetal Networks* until 2022. The inference plaintiff seeks to make is that the decision substantially altered the legal landscape. As explained *infra*, that decision has no bearing on this motion.

[7] Under controlling rules, motions in this District must contain a notice that includes the date and time of a hearing, as well as "a concise statement of what relief or Court action the movant seeks." Civ. L.R. 7-2(b)(1)-(3).

movants of their rights and obligations with respect to the movant's assertions. Failing to comply is significant. Consideration of the defendants' oppositions highlight the concern.

Third, proper motion practice requires identification of supporting evidence, not present here. Throughout these proceedings, plaintiff has cited extensively to voluminous documents without explanation and proper pincites. The Court noted as much in the summary judgment order: "Cellspin's citations to swaths of documents without explanation does not create a genuine dispute of material fact." (Dkt. No. 331 at 2:12-13.) Despite the admonishment, plaintiff's counsel has once again submitted approximately 1500 pages in connection with the motion. Plaintiff makes broad string cite references to its exhibits without any pincites. This sends the Court and defendants on a fishing expedition to identify the relevance of a document that is not always apparent. As noted below, some of the documents cited do not exist, others are illegible copies,[8] and many more do not stand for the proposition asserted even under a liberal construction. Finally, plaintiff has not submitted any declaration to justify its lack of diligence, and instead, once again relies upon misplaced attorney argument divorced from fact and law.

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[8] Plaintiff appreciated that substantial portions of its initial filing were illegible and filed a correction without withdrawing the original set of exhibits. (Dkt. No. 371.) Rather than create a legible filing in the first instance, plaintiff's correction required the Court to evaluate two sets of exhibits to verify the information being provided and discern why they were being corrected.

For these reasons, the motion is untimely and can be denied.

C. Purported Bases for Recusal

Substantial justification exists to deny the motion on procedural grounds and the Court does not need to reach the accusations raised. Nonetheless, to promote transparency and maintain the Court's credibility in light of plaintiff's sweeping assertions, the Court addresses the plaintiff's accusations and evidentiary submission at great lengths. In short, the accusations have no merit. The order addresses affiliations with McKinsey and Ajax that are unrelated to these proceedings, as well as the Court's independent financial investments.

1. Affiliations with McKinsey

The Court begins by addressing whether the undersigned's prior familial affiliations with McKinsey have created financial interests in this case or create a reasonable appearance of impartiality to justify recusal in this case. They do not.

Plaintiff writes that the undersigned's husband consults in the oil, gas, and energy sectors as a Senior Partner at McKinsey, where he has authored over 20 articles related to the oil and gas industries. From there, plaintiff asserts that McKinsey has a strategic partnership with Google and has teamed up with Google to assist clients in the oil, gas, and energy sectors as demonstrated by various McKinsey blog postings. Highlighting one such partnership, which is not directly tied to the undersigned's husband (even on information and belief), plaintiff alleges that McKinsey assisted an energy sector client in avoiding more forest

fires and associated power outages in California after the wake of the Dixon Fire in 2021.[9] According to the plaintiff "being a senior partner at McKinsey & Company . . . doing substantial business with Google looks inappropriate for Google to appear before [the undersigned]. Google and [the undersigned's] husband's firm provide for profit joint solutions to their clients, which creates the objective appearance that [the undersigned] would be biased in favor of Google." (Dkt. No. 366 at 8.) For the first time in reply, plaintiff asserts that the undersigned's husband sells Google services and that "his pay and bonus is dependent on his client's satisfaction and success through the use of Google services." (Dkt. No. 375 at 12.) Plaintiff's evolving theory for recusal is nothing but unsubstantiated speculation divorced from any evidence.

First, the Court clarifies that the undersigned's husband has not been a Senior Partner at McKinsey since July 31, 2021. This is eleven months prior to the summary judgment order being issued in this case. Plaintiff's selective quote of the undersigned's nomination disclosures to justify recusal does not persuade. The May 2011 disclosure provided in full: "[m]y husband is a senior partner at McKinsey. Matters relating to McKinsey and, more broadly, *to my husband's primary clients* would also likely require recusal." (Emphasis supplied.) This disclosure differs significantly from plaintiff's reconstruction in its motion which claims

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[9] The Court notes that the motion references Exhibit 5a to support this factual assertion. This appears to be missing from the record. Ultimately, this is immaterial because plaintiff has not demonstrated that the undersigned's husband had any involvement with this project, nor is the Court aware of any of the work alleged.

that the undersigned "disclosed that if a 'primary' client of her husband's consulting firm, McKinsey, became a party before her, she would have to recuse herself." (Dkt. No. 366 at 4.) In short, McKinsey has never been a party to these proceedings. Despite the substantial commentary available online that the plaintiff leverages in its motion, the plaintiff did not, *and cannot*, point to a single instance tying the undersigned's husband to a Google project or partnership, including without limitation any related to Fitbit or a party in these proceedings. None exists. Nor has plaintiff proffered any admissible evidence that Google was a client, let alone a primary client or partner, of the undersigned's husband and that he profited from such a relationship. No such evidence exists. Nor does any evidence exist that the parties to this infringement action were clients of my husband in any capacity that would support recusal.[10]

In short, plaintiff carries a heavy burden to justify disqualification. It has failed to demonstrate that the undersigned or her husband have a material financial stake in the outcome of this case due to McKinsey's affiliations with Google and there is no other reason why the undersigned's impartiality might reasonably be questioned.[11] The motion is denied on this basis.

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[10] As a matter of practice, the Court consistently recuses on all matters that have concerned my husband's clients and this case would be no exception were there any basis to do so.

[11] The motion sets forth essentially no foundation for alleged partnerships or projects concerning the undersigned's husband. At most, it appears that Google was one of several cloud-based service providers for McKinsey, providing services as part of the regular course of business. Consistent with Advisory Opinion

2. Affiliations with Ajax

Next, plaintiff alleges that the undersigned's husband has obtained financial benefits from Google since at least March of 2022 through his role as Operations Partner at Ajax. The motion as presented raises two categories of affiliations to suggest that recusal is proper. First, the motion alleges that the undersigned's husband has overseen the operations of three start-up companies funded by Google since at least March of 2022. This specifically includes: (1) Planet Labs, Inc. ("Planet Labs"); (2) Natel Energy ("Natel"); and (3) Ripple Foods. Second, the motion alleges that the undersigned's husband has handled several strategic partnerships with Google in his role as Operations Partner. These partnerships include (1) Lime; (2) Voltus; (3) Streetlight Data; (4) Descartes Lab; and (5) Regrow. Again, this argument is frivolous, lacks any merit, and makes substantial misrepresentations of the record provided.

To begin, it is true that the undersigned's husband has been an Operations Partner at Ajax since April 2022. However, plaintiff seeks to create an inference that the undersigned's husband has equity in Ajax based solely on the title "Operations Partner." Plain-

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107, when a "service provider's transactions with the judge's spouse or the spouse's business are in the regular course of business, routine in nature, and are unaccompanied by special circumstances suggesting that the selection of the spouse or spouse's business may have been influenced by the judge's position, recusal is ordinarily not required." This applies with equal force here. Adopting plaintiff's contrary theory would mean the undersigned is required to recuse anytime a business integrates something as simple as a Google search into its internal platforms. No authority supports such a grasping theory.

tiff is wrong. The undersigned's husband is a contractor for Ajax with no equity in any Ajax portfolio.

In his role as an Operations Partner, he represents Ajax's interests by serving on the board of Natel and as a board advisor to another company not implicated in the motion.[12] These are his only engagements. Despite plaintiff's bald accusations, the undersigned's husband has no interest or relationship with Lime, Voltus, Streetlight Data, Descartes Lab, Regrow, and Ripple Foods. Planet Labs, which is identified in the motion, is one of approximately sixty customers of Natel's software business. He has no equity interest in Planet Labs, at most his affiliation is attenuated.[13]

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[12] In furtherance of transparency, the company is Ojjo. The undersigned knows of no affiliations with Google, Ojjo, and other parties in this case that would justify recusal.

[13] While the foregoing is sufficient to dispense of the motion with respect to all Ajax affiliations, the Court makes note of additional attenuated arguments for recusal that fail to persuade. First, plaintiff speculates that Natel's foundation was improper and bears on this litigation. This is false. Natel was funded in 2009 by a grant from the U.S. Department of Energy ("DOE"), which overlaps with the undersigned's husband's tenure as senior advisor to the U.S. Secretary of Energy. The undersigned's husband had no personal involvement with awarding a grant to Natel. However, the DOE's funding of Natel from a decade prior is so attenuated, recusal is not warranted, and the nexus to these proceedings is speculative at best. Attenuated speculation is insufficient to support recusal.

Second, plaintiff relies on a "Power Technology" article to suggest that Natel was funded by Google in November 2019. Not only was the article dated over two years before any connection to Ajax, plaintiff misrepresents the substance of the article. As noted, plaintiff represents that Google funded Natel as shown by the article. However, the article only indicates that Google funded eleven start-ups. Unrelated to this funding, the article then

Other evidentiary submissions are similarly deficient. One, to create the appearance of a non-existent personal interest to Ripple Foods, plaintiff relies upon a July 14, 2016, article from AgFunder Network Partners to note that Ripple Foods raised $30 million from Google and other investors. Per plaintiff's own evidence, this alleged conduct pre-dates the undersigned's husband's tenure by approximately six years. No evidence supports any personal affiliation because none exists. Two, with respect to Streetlight Data, the sole exhibit relied upon is from April 7, 2020, which would predate any personal affiliation with Ajax by two years. No evidence supports any personal affiliation because none exists. Three, with respect to Lime's nexus to Ajax, plaintiff relies upon a blog post from Lime that apparently touts the benefits it obtains from Google. No evidence supports any personal affiliation because none exists. Four, as to Descartes Lab, Regrow, and Voltus, no evidence supports any personal affiliation because none exists.

Once more, plaintiff carries a heavy burden to justify disqualification. Relying on nothing but speculation, it has failed to demonstrate that the undersigned or her husband have a material financial stake in the outcome of this case due to Ajax's affiliations and there is no other reason why the undersigned's impartiality might reasonably be questioned. The motion is denied on this basis.

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proceeds generically to describe five companies that received funding during the COVID-19 pandemic, including Natel. According to the article, Natel secured funding from two venture funds. It does not establish that Google invested in Natel. The undersigned and her husband have no knowledge of any investment by Google into Natel.

3. Financial Investments

Lastly, plaintiff criticizes the Court for three investments that the undersigned has disclosed since her nomination to the bench in 2011. These include a Vanguard 500 Index Fund, a Vanguard Total International Stock Index Fund, and the Special Situations Fund. Each is addressed in turn.

a. Vanguard Funds

Given the substantial overlap concerning the Vanguard 500 Index Fund and Vanguard Total International Stock Index Fund, the Court addresses both together. According to the plaintiff, Google is a Top 10 holding in the Vanguard Index Fund and public sources confirm that it includes significant shares of Nike, Under Armour, Garmin, and Fossil. As to the Vanguard Total International Stock Index, plaintiff alleges that it is publicly known that Samsung and Nikon are significant holdings, and this is significant since Under Armour's accused devices are made by Samsung. With respect to each fund, plaintiff argues that the undersigned somehow actively manages the investments. Ultimately, this argument is divorced from law and fact, and does not justify recusal.[14]

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[14] Plaintiff argues in reply that the defendants should have affirmatively denied the undersigned's financial relationships to aid public perception. Again, the attorney argument, which is devoid of any citation to legal authority, is inconsistent with law placing a heavy burden on plaintiff as the party seeking recusal. Despite having no obligation to respond, defendants went to great lengths to debunk plaintiff's new conspiracy to evade appeal. The truth prevalent in those oppositions is one the plaintiff ignores in lodging new criticism at the defendants.

As set forth above, judges must disqualify themselves from a case where it is known that the judge or his or her spouse has "a financial interest in the subject matter in controversy or in a party to the proceeding[.]" 28 U.S.C. § 455(b)(4). However, the same statutory scheme expressly provides that "[o]wnership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund." 28 U.S.C. § 455(d)(4)(i). Similarly, Canon 3C(1)(c) of the Judicial Code of Conduct applicable to judges requires disqualification when the judge knowingly "has a financial interest in the subject matter in controversy or in a party to the proceeding," or when the judge has "any other interest that could be affected substantially by the outcome of the proceeding." Again, pursuant to Canon 3C(3)(c)(i), "ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund." What qualifies as a "mutual or common investment fund" is not defined. While not binding, the Committee on Codes of Conduct Advisory Opinion No. 106 is instructive.[15] That opinion lists six factors for consideration: "(1) the number of participants in the fund; (2) the size and diversity of fund investments; (3) the ability of participants to direct their investments; (4) the ease of access to and frequency of information provided about the fund portfolio; (5) the pace of turnover in fund investments; and (6) any ownership interest investors have in the individual assets of the fund." Moreover, "most mutual funds that are registered with

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[15] *See* Guide to Judiciary Policy, Vol. 2, Pt. B, Sec. 106, https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02_0.pdf.

the Securities and Exchange Commission and sold to the public as mutual funds will likely meet the criteria above." (*Id.*)

Based upon undisputed facts,[16] the Vanguard investments at issue are prototypical examples falling into the safe harbors for mutual or common investment funds. Both are registered with the SEC and are sold as mutual funds. Each has separate portfolio managers. Both funds are also diversified and extremely large. For instance, the Vanguard 500 Index Fund investments in over 500 stocks across different sectors of the economy. The reach of the Vanguard Total International Stock Index Fund is global, with almost 8,000 stocks across myriad markets and sectors. Investors in both funds do not obtain any ownership interests in the funds' underlying assets, including by directly holding the stocks. Furthermore, despite plaintiff's bald and self-serving suggestion, the undersigned does not manage, direct, or control the funds' investments. Both funds clearly fall within the safe harbor exemption.

Plaintiff has not proffered any legal authority to support its illusory assertion that the investments at issue here are somehow not exempt, especially considering that the undersigned has no control over the management of the large and extremely diversified portfolios. Instead, plaintiff places substantial reliance on the Federal Circuit's recent decision in *Centripetal Networks, Inc. v. Cisco Systems, Inc.*, 38 F.4th 1025

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[16] To the extent the parties' papers ask for the Court to take judicial notice of public information concerning the funds at issue, those requests are granted. The documents are given their appropriate weight.

(2022), which is far removed from the circumstances here. In *Centripetal Networks*, a spouse of the judge *directly* held stock in one of the parties to the case and the judge continued to preside over the case once it became known that the spouse had a *direct* interest. *Id.* at 1028-30. Disclosing that interest and placing the stocks in a blind trust *after the fact* did not spare the judge from recusal. *Id.* The Federal Circuit had no issue finding that the direct stock ownership was a financial interest that required disqualification or divestment, and that the district court ran afoul of is statutory obligations by continuing to hold that known interest during the proceedings. Here, there is no "financial interest" within the meaning of section 255 because the investments are exempt funds precluding the undersigned from directly holding stocks of any party to these proceedings.[17] Notably, plaintiff's papers ignore that courts have been in accord in reaching the same finding with respect to Vanguard funds.[18] There is no reason to reach a contrary result now.

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[17] Plaintiff argues that the Court must hold stocks in its investments because the Court recused itself without explanation in *Geographic Location Innovations, LLC v. Health Mart Systems, Inc.*, No. 21-cv-05155-YGR, Dkt. No. 21 (N.D. Cal. 2021). According to the plaintiff, the Court must have recused because a defendant disclosed that it was owned by McKesson Corporation and McKesson is listed in the funds. The prior recusal did not concern any financial interest.

[18] *See, e.g.*, *David v. GMAC Mortg.*, *LLC*, No. C11-2914 PJH, 2011 WL 6078272, at *1 (N.D. Cal. Dec. 6, 2011) (concerning Vanguard 500 Index Fund); *Arunachalam v. Pazuniak*, No. 14-cv-05051-JST, Dkt. Nos. 57 at 6 and 57-2 (N.D. Cal. Jan. 08, 2015) (identifying Vanguard investments in motion papers); *Arunachalam v. Pazuniak*, No. 14-cv-05051-JST, 2015 WL 12839126, at *1-2 (N.D. Cal. Feb. 9, 2015) (finding funds within safe harbor); *Pi-*

Echoing prior findings, the undersigned has no material financial stake in the outcome of this case because of the Vanguard investments and there is no other reason why her impartiality might reasonably be questioned. The motion for recusal is denied on this basis.

b. Special Situations Fund

Finally, plaintiff notes that the undersigned's 2020 Financial Disclosure identifies the Special Situations Fund as an investment. In short, plaintiff asserts that the Special Situations Fund is opaque and that "[a] huge portion of this opaque investment could be in Big Tech stocks like the defendants in this case." (Dkt. No. 366 at 23.) Because of this investment, plaintiff argues that the Court should be recused from

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Net Int'l, Inc. v. Citizens Fin. Grp., Inc., No. 12-cv-355-RGA, 2015 WL 1283196, at *4 (D. Del. Mar. 18, 2015) (concerning Vanguard Institutional Index); *Bank of Am., N.A. v. Martinson*, No. 10-cv-10-WMC, 2013 WL 12234207, at *1 (W.D. Wis. Jan. 3, 2013) (concerning Vanguard Institutional Index); *Huebner v. Midland Credit Mgmt.*, No. 14-6046, 2015 WL 1966280, at *3 (E.D.N.Y. May 1, 2015) (concerning Vanguard Group, Inc. portfolios).

In order to create an impression that judicial ethics have been substantially over-hauled to cast doubt on this line of authority, plaintiff relies upon the passage of the Courthouse Ethics and Transparency Act, Pub. L. No. 117-125, 136 Stat. 1205 (2022), which generally modified the accessibility and timeliness of financial disclosures and potential conflicts of interest. The backdrop to this law was the failure of certain judges to disclose direct stock holdings in cases where they presided. However, the law did not change section 455. The undersigned holds no such interests that would have required further disclosure in these proceedings and has timely filed financial disclosures consistent with the undersigned's obligations.

this case and all other "Big Tech" cases. Again, this argument fails.

To begin, the Court sets aside the obvious point that plaintiff does not have standing to challenge the undersigned's ability to preside over other cases. While plaintiff has no actual evidence and proffers only speculation, the Court notes for transparency purposes that the Special Situations Fund is managed by the McKinsey Investment Office ("MIO") and functions in essence like a mutual fund where the undersigned has no knowledge or control of the investments being made. The only choice is deciding how much to invest.

Pursuant to MIO's public website, it is "a subsidiary of McKinsey & Company and a registered investment adviser regulated by the Securities and Exchange Commission in the US," and it "invest[s] the retirement assets for the global McKinsey pension plans."[19] Of note, "MIO's investment operations are intentionally separated from McKinsey's consulting operations. *MIO does not trade individual stocks or bonds of any public or private company anywhere in the world*, except in the specific case of credit-default swaps for counterparty hedging. Our macro trading strategies involve trading in major asset classes such as sovereign debt, commodities, foreign exchange, equity indices, and credit indices." (Emphasis supplied.) Thus, investors such as the undersigned do not directly own stocks, however, like the Vanguard funds discussed above, individual unknown funds within the Special Situations Fund may separately hold securities. Investors do not directly hold public stocks, do not have knowledge of the particular assets that the fund

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[19] *See* https://miopartners.com/.

invests in, are denied access to that information when requested, and have no influence on the assets that are pursued. The undersigned and her husband have no control over the fund, have no reason to question the public representations made by MIO on its website, and have no knowledge of any underlying assets directly being held in our names. Thus, plaintiff's suggestion that the fund lacks any public transparency and is comprised of the defendants' stock is misplaced.[20] The examples outlined in Advisory Opinion No. 106 further demonstrate that investments into a mutual fund such as this is appropriate where there is no information available to investors about the assets and there is no direct control in the investments.

Again, the undersigned has no material financial stake in the outcome of this case because of the Special Situations Fund and there is no other reason why her impartiality might reasonably be questioned. The motion for recusal is denied on this basis.

IV. Conclusion

As is demonstrated by this Order, the pending motion lacks any substantive basis tethered to law or fact to support recusal or vacatur. Thus, one can only surmise that plaintiff and its lawyers brought the

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[20] Plaintiff suggests that holding this investment is improper because a nominee agreed to divest her interest in the fund in connection with her confirmation to the Office of Management and Budget ("OMB"). The relevance for plaintiff's theory is attenuated. OMB personnel are not governed by section 455 or the Judicial Code of Conduct, a point plaintiff concedes in reply. In fact, the evidence relied upon confirms that the nominee was not provided with information concerning assets when requested.

motion for tactical advantage. The Court will not reward such conduct. The motion is denied.

This Order terminates Docket Number 366.

IT IS SO ORDERED.

/s/ Yvonne Gonzalez Rogers
U.S. District Judge

Dated: February 15, 2023

OPENING BRIEF OF PLAINTIFF-APPELLANT (APRIL 24, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CELLSPIN SOFT, INC.,

Plaintiff-Appellant,

v.

FITBIT LLC; NIKON AMERICAS, INC.;
and NIKON, INC.,

Defendants-Appellees.

No. 2023-1526

Appeal from the United States District Court
for the Northern District of California in case nos.
4:17-cv-05928-YGR and 4:17-cv-05936-YGR
Judge Yvonne Gonzalez Rogers

OPENING BRIEF OF PLAINTIFF-APPELLANT

April 24, 2023

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CERTIFICATE OF INTEREST

The undersigned counsel for the Plaintiff-Appellant certifies the following, pursuant to Federal Circuit Rule 47.4:

(i) The full name of every entity represented by me in this case is:

Cellspin Soft, Inc.

(ii) The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

(iii) All parent corporations and any publicly held companies that own 10 percent or more of the stock of the entity represented by me are:

N/A

(iv) The names of all law firms, partners, and associates that have not entered an appearance in the appeal, and (A) appeared for the entity in the lower tribunal; or (B) are

expected to appear for the entity in this court, are:

Collins Edmonds & Schlather, PLLC
John J. Edmonds
Shea N. Palavan
Brandon G. Moore

(v) Other than the originating case number(s), the title and number of any cases 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.

Cellspin Soft, Inc. v. Fitbit, Inc.
Federal Circuit Appeal 2022-2025

Cellspin Soft, Inc. v. Nike Inc.
Federal Circuit Appeal 2022-2028

Cellspin Soft, Inc. v. Under Armour, Inc.
Federal Circuit Appeal 2022-2029

Cellspin Soft, Inc. v. Fossil Group, Inc.
Federal Circuit Appeal 2022-2030

Cellspin Soft, Inc. v. Nikon Americas, Inc. Federal Circuit Appeal 2022-2032

Cellspin Soft, Inc. v. Garmin, Int'l, Inc.
Federal Circuit Appeal 2022-2037

Date: April 24, 2023 /s/ Randall Garteiser
Randall Garteiser

[TOC & TOA Omitted]

I. Statement of Related Cases

Pursuant to Federal Circuit Rule 47.5(a), counsel for Plaintiff-Appellant, Cellspin Soft, Inc. ("Cellspin"), hereby states that the civil cases underlying these consolidated appeals were previously appealed to this Court, as follows:

(i) The title and number of the earlier appeals were: *Cellspin Soft, Inc. v. Fitbit, Inc.; Moov, Inc. d/b/a Moov Fitness, Inc.; Nike, Inc.; Fossil Group, Inc.; Misfit, Inc.; Garmin International, Inc.; Garmin USA, Inc.; Canon USA, Inc.; GoPro, Inc.; Panasonic Corporation of North America; and JK Imaging Ltd.*, Appeals Nos. 2018-1817, 2018-1819, 2018-1820, 2018-1821, 2018-1822, 2018-1823, 2018-1824, 2018-1825, and 2018-1826.

(ii) The date of the earlier decision was: June 25, 2019.

(iii) The composition of the earlier panel was: Lourie, O'Malley, and Taranto.

(iv) The citation of the earlier opinion in the Federal Reporter is:

927 F.3d 1306 (Fed. Cir. 2019).

Pursuant to Federal Circuit Rule 47.5(b), counsel for Cellspin further states that it is aware of the following cases 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:

Cellspin Soft, Inc. v. Fitbit, Inc.
Federal Circuit Appeal 2022-2025

Cellspin Soft, Inc. v. Nike Inc.
Federal Circuit Appeal 2022-2028

Cellspin Soft, Inc. v. Under Armour, Inc.
Federal Circuit Appeal 2022-2029

Cellspin Soft, Inc. v. Fossil Group, Inc.
Federal Circuit Appeal 2022-2030

Cellspin Soft, Inc. v. Nikon Americas, Inc. Federal Circuit Appeal 2022-2032

Cellspin Soft, Inc. v. Garmin, Int'l, Inc.
Federal Circuit Appeal 2022-2037

II. Statement of Jurisdiction

Cellspin brings this Appeal from the District Court, including in accordance with Title 28 U.S.C. § 1295(a)(1). Fed.R.App.P. 4(a)(1)(A). This action arose under the United States Patent Laws and jurisdiction, including in accordance with, and pursuant to, 28 U.S.C. §§ 1331, 1338(a) and 1400(b).

The appealed order is final because appealable orders amounting to final judgment were entered on June 15, 2022, and the specific appealed order was entered February 15, 2023. Cellspin timely filed Notices of Appeal on February 17, 2023, within thirty days of entry of the denial of recusal motion in accordance with 28 U.S.C. § 2107(a), Fed.R.App.P. 4(a)(1)(A), and Fed. Cir.R. 4.

III. Statement of the Issues

1. Whether pursuant to 28 U.S.C. § 455, District Court Judge Gonzalez Rogers failed to recuse herself based on the objective appearance that "a reasonable person with knowledge of all the facts would conclude

that the judge's impartiality might reasonably be questioned"?

2. Whether the District Court improperly shifted the burden of recusal to the moving party?

3. Whether the District Court erred in failing to find that an objective person would conclude that the District Court Judge's impartiality might reasonably be questioned in view of the role of the Judge's spouse as operating partner with Ajax Strategies?

4. Whether the District Court erred in failing to find that an objective person would conclude that the District Court Judge's impartiality might reasonably be questioned in view of the role of the Judge's spouse as technology partner with McKinsey and Google?

5. Whether the District Court erred in finding that index funds as owned by the District Court Judge are exempt under 28 U.S.C. § 455(d)?

6. Whether the District Court erred in failing to find that the mis-identification of funds in an annual disclosure by the District Court Judge warrants recusal because it thwarts the ability of the public to assess potential judicial conflicts?

7. Whether the District Court erred in finding that hedge fund as owned by the District Court Judge are exempt under 28 U.S.C. § 455) (d)?

8. Whether the District Court Judge erred in failing to recuse herself when defendant Fitbit was publicly purchased by Google/Alphabet at a time when the District Court Judge owned a substantial stake in an index fund that publicly disclosed ownership in Google stock?

9. Whether the District Court Judge erred in failing to recuse herself when the spouse of the District Court Judge was on the board of directors of a startup funded by Google?

IV. Statement of the Case and Facts.

A. The Prior Appeal, Remand, and Subsequent District Court Proceedings.

This case was previously consolidated for appeal to this Court following the District Court's earlier erroneous Orders invalidating all Asserted Claims under 35 U.S.C. § 101 at the pleading stage. At that time, Judge Gonzalez Rogers also granted Section 285 against Cellspin in all of those cases consolidated on appeal. This Court reversed and remanded the District Court's Orders at *Cellspin Soft, Inc. v. Fitbit, Inc.,* 927 F.3d 1306 (Fed. Cir. 2019).

Upon remand and fact discovery, the District Court denied Defendants' Motion for Summary Judgment again seeking to invalidate the Asserted Claims under 35 U.S.C. § 101, and construed the claims as a matter of law. The parties then proceeded through full discovery, including expert discovery and expert reports.

At the close of all discovery, the District Court allowed Defendants to file new and independent summary judgment motions (in addition to Defendants' earlier collective § 101 Motion for Summary Judgment). Notably, none of the Defendants moved for summary judgment attacking the validity of the Asserted Claims under either 35 U.S.C. §§ 102 or 103; instead, each Defendant moved for summary judgment based on independent individualized arguments of alleged non-infringement. The District Court granted Defendants'

Motions in an omnibus Order dated June 7, 2022. That omnibus Order is the subject of pending consolidated appeals to this Court at: 2022-2025; 2022-2028; 2022-2029; 2022-2030; 2022-2032; and 2022-2037.

Subsequent to the docketing of the co-pending consolidated appeals, Cellspin became aware of numerous facts which reasonably call into question the impartiality of the District Court Judge in the underlying matters. Those facts were promptly presented to the District Court via Cellspin's Motion for Recusal under 28 U.S.C. § 455(a)–(d), which was filed in the District Court on January 20, 2023. The District Court denied Cellspin's Motion by way of its written opinion dated February 15, 2023. That Opinion, as will be shown herein, is clearly erroneous. Cellspin immediately filed its Notice of Appeal on February 17, 2023.

B. Facts in the District Court.

Below are the publicly available facts as offered by Cellspin in its Motion for Recusal, the purported facts as offered (often without any evidentiary support whatsoever) by the District Court in its erroneous Order, and facts not denied by Defendants:

1. District Court Judge Gonzalez Rogers' husband (Matt Rogers) is an *operating partner* at Ajax Strategies, which is a Venture Capital Firm in San Francisco. (Appx0030-0031, Appx0100-0101, Appx0892-0893, Appx0935).

2. Google has invested with others combined total of *$700 Million* dollars in Matt Rogers' Ajax Strategies Portfolio companies. (Appx2141).

3. Matt Rogers' portfolio company "Planet" is funded by Google and is completely reliant upon

Google's platform for its existence. (Appx0031-0032, Appx0140-0141). Google has NOT denied this fact. (Appx1101-1117).

CNBC **Satellite imagery company Planet goes public, with $300 million 'war chest' aft...**

Closing its merger nets Planet more than $590 million in gross proceeds, with capital from dMY as well as a PIPE round – or private investment in public equity – led by BlackRock and joined by Google, Koch, and Marc Benioff's TIME Ventures. After SPAC transaction fees and paying off debt, Johnson said Planet will have more than $500 million on its balance sheet.

Figure 1 – Excerpt from Exhibit 8 (Appx0140-0141) as cited at Appx0031-0032.

Transcription

CNBC – Satellite Imagery company Planet goes public, with $300 million "war chest"…

Closing its merger nets Planet more than $590 million in gross proceeds, with capital from dMY as well as a PIPE round – or private investment in public equity – led by BlackRock and joined by Google, Koch, and Marc Benioff's TIME Ventures, After SPAC transaction fees and paying off debt, Johnson said Planet will have more than $500 million on its balance sheet.

4. Matt Rogers' portfolio company hydropower startup "Natel Energy" is funded by Google. (Appx0032, Appx0172-0174, Appx2140-2141). Google has NOT denied this fact. (Appx1101-1117).

5. Matt Rogers' portfolio company start-up "Ripple Food" is funded by Google. (Appx0032, Appx0178, Appx2140). Google has NOT denied this fact. (Appx 1101-1117).

Figure 2 – Excerpt from Exhibit 11 (Appx0178).

Transcription

Fundings-in-Brief: Ripple Foods Raises $30m from Google, Khosla, S2G, Tao, Soil Disease Testing Kit Raises $4m, more

July 14, 2016 Lauren Manning

Ripple Foods Raises $30m from Google Ventures, Khosla, S2G, Tao Capital

Ripple Foods, which makes non-dairy milk products with eight times the protein as almond milk and half the sugar of dairy milk, has closed a $30 million Series B round led by GV, Google's venture investment arm.

6. Matt Rogers' portfolio company "Lime" has an ongoing strategic partnership with Google. (Appx0033, Appx1010-1012, Appx2140). Google has NOT denied this fact. (Appx1101-1117).

7. Matt Rogers' portfolio company "Voltus" has an ongoing business partnership with Google. (Appx 0033, Appx0197-0199, Appx2140). Google has NOT denied this fact. (Appx1101-1117).

8. Matt Rogers' portfolio company "StreetLight Data" has an ongoing business partnership with Google.

(Appx0033-0034, Appx1023, Appx2140). Google has NOT denied this fact. (Appx1101-1117).

9. Matt Rogers' portfolio company "Descartes Labs" has an ongoing customer partnership with Google. (Appx0034, Appx1031-1035, Appx2140). Google has NOT denied this fact. (Appx1101-1117).

10. Matt Rogers' portfolio company "Regrow" has an ongoing business partnership with Google. (Appx 0034-0035, Appx1051-1055, Appx2140). Google has NOT denied this fact. (Appx1101-1117).

11. Google failed to provide a declaration that it does not have any financial interest/relationship with any of the eight Matt Rogers Ajax Strategies companies. (Appx2140).

12. District Court Judge Gonzalez Rogers' husband (Matt Rogers) was a senior partner at McKinsey for more than ten (10) years for its Oil and Gas clients. (Appx0100-0101).

13. Matt Rogers' company "McKinsey" has an ongoing business partnership and alliance with Google. (Appx0026–0028, Appx0910-0911, Appx0919, Appx0930 –0932, Appx2140). Google has NOT denied this fact. (Appx1101-1117).

14. As an oil, gas, and energy senior partner at McKinsey, Matt Rogers sells Google services to his oil gas and energy clients. (Appx0107-0108, Appx0112-0113). Google has NOT denied this fact. (Appx1101-1117).

15. District Court Judge Gonzalez Rogers has at least a $9.4 Million and as much as a $43 Million investment in the Vanguard 500 Index Fund and

Vanguard Total International Stock Index Fund. (Appx0036, Appx0238, Appx1641).

16. District Court Judge Gonzalez Rogers has at least a $5 Million and as much as a $25 Million opaque investment in the "McKinsey & Company Special Situations Aggressive Long-Term" fund. (Appx0044, Appx2160, Appx1642).

C. The District Court Has Admitted These Facts.

In its erroneous Order, the District Court ignored the well-established §) 455 standard and, applying a burden under § 144 to Cellspin, the District Court Judge made at least the following admissions:

1. "[I]t is true that the undersigned's husband [Matt Rogers] has been an Operations Partner at Ajax since April 2022." (Appx0012 at 12:12-13).

2. The "[U]ndersigned's husband [Matt Rogers] is a contractor for Ajax." (Appx0012 at 12:15).

3. "[H]e [Matt Rogers] represents Ajax's interests." (Appx0012 at 12:16).

4. He [Matt Rogers] is "serving on the board of Natel," an Ajax Strategies company. (Appx0012 at 12:16-17).

5. He [Matt Rogers] is "a board advisor to another company" Ojjo, another Ajax Strategies portfolio company. (Appx0012 at 12:17).

6. "Planet Labs . . . is one of . . . customers of Natel." (Appx0012 at 12:20).

7. Natel, Ojjo and Planet Labs are Ajax portfolio companies. (Appx0012).

8. Matt Rogers was a senior partner at McKinsey until August 2021; and the "Court clarifies that the undersigned's husband [Matt Rogers] has not been a Senior Partner at McKinsey since July 31, 2021." (Appx0011 at 11:2-3).

9. District Court Judge Gonzalez Rogers has substantial investments in the Vanguard 500 Index Fund and the Vanguard Total International Stock Index Fund. (Appx0014).

10. District Court Judge Gonzalez Rogers' $5-25 Million dollar investment holding by the name of "McKinsey & Company Special Situations Aggressive Long-Term" in her financial disclosures forms for 2020 is not the actual name of the investment. Instead, the actual name is the McKinsey Investment Officers ("MIO"), and the MIO hedge fund is named *"Special Situation Fund."* (Appx0017-0018).

V. Summary of the Argument.

The District Court's denial of Cellspin's Motion for Recusal is an abuse of discretion and, as such, the Order must be reversed. Pursuant to 28 U.S.C. §§ 455(a), (b), (c), and (d), Plaintiff Cellspin moved for an Order Recusing the Honorable Yvonne Gonzalez Rogers from the Fitbit (Google) litigation, as well as each of the related cases. As a result of § 455 violations, Plaintiff Cellspin moved to vacate entry of the joint Summary Judgement Order in favor of all Defendants and all subsequent orders thereto. In February 2021, it was reported to the District Court in a Rule 7.1 disclosure that Google had acquired all of Fitbit, Inc., a defendant in this litigation. At that time, the District Court failed to recuse, despite its first-hand and full

knowledge of the numerous apparent conflicts of interest.

In its briefing to the District Court, Cellspin presented four specific reasons, each with substantial publicly available evidence, in support of Recusal. Those four specific reasons were:

1. District Court Judge Gonzalez Rogers' husband has a financial interest in his employment as "Operating Partner" at Ajax Strategies Venture Capital firm and has substantial business ties with Google, given the facts that Ajax Strategies has taken substantial Google funding to operate three start-ups and has strategic partnerships with Google for five of their other startups.

2. District Court Judge Gonzalez Rogers has investments of anywhere between $9.4 Million–$43 Million in S&P Index funds via Vanguard, and it is commonly known that Google (Alphabet), Apple, Microsoft, Amazon and Facebook make up 17.5% of the S&P. So, just as the placement of Cisco stock in a blind trust was not divestiture under Section 455(f) in *Centripetal Networks v. Cisco,* 38 F.4th 1025, 1030-33 (Fed. Cir. 2022), the placement of substantial money here into an Index Fund literally ensures a direct and *known* financial interest in Big Tech, including Defendant Alphabet (Google) (not to mention Nike and its Apple Watch, and Garmin).

3. Judge Gonzalez Rogers' <u>opaque</u> investment holding of "McKinsey & Company Special Situations Aggressive Long-Term" of anywhere between $5 Million–$25 Million is not a mutual fund or a common investment fund, and the public does not know any details about this investment. Nor could the public, as

Judge Gonzalez Rogers provided the wrong name of the investment in her disclosures. Neither Cellspin nor the public could know anything about the non-disclosed investment. Only in the District Court's Order is the actual name of the hedge fund disclosed, and that alone is reason for recusal.

4. District Court Judge Gonzalez Rogers' husband has a financial interest in Google through his employment at McKinsey. Matt Rogers sold Google Cloud services to his oil, gas, and energy clients and part of his pay and bonus is dependent on his client's satisfaction and success through the use of Google services.

The evidence Cellspin relied on comprised of, *inter alia*, Judge Rogers' own financial disclosures, Judge Rogers' husband Matt Rogers' LinkedIn profile, corporate press releases, news articles, corporate blog posts, McKinsey website web-pages, Ajax Strategies website web-pages, industry articles, and more. Under these facts, recusal is warranted and required under §§ 455(a)-(d). Again, the statute provides, in relevant part: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

VI. Argument

A. Legal Principles and Standard of Review

This Court applies the law of the regional circuit when reviewing a district court's denial of a motion for recusal. The Ninth Circuit reviews district court's denial of a motion for recusal for abuse of discretion. *United States v. McTiernan*, 695 F.3d 882, 891 (9th Cir. 2012); *see also Shell Oil Co. v. United States*, 672

F.3d 1283, 1288 (Fed. Cir. 2012). The statute governing recusal of federal judges is 28 U.S.C. § 455, which provides, in relevant part:

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which *his impartiality might reasonably be questioned*.

(b) He shall also disqualify himself in the following circumstances:

(4) *He knows that he*, individually or as a fiduciary, or his spouse or minor child residing in his household, *has a financial interest* in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) *Ownership in a mutual or common investment fund* that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned *would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance* or discovery, after the matter was assigned to him or her, that he or *she individually or as a fiduciary, or his or her spouse.*

See 28 U.S.C. § 455 (emphasis added).

Again, a district court judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (emphasis added). "To determine under Section 455(a) whether a district judge should be removed for possible bias or prejudice, the court should 'ask whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008). Further, "federal judges must maintain the appearance of impartiality" because "[d]eference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." *United States v. Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001) (quoting Code of Conduct Canon 1 cmt.). Under § 455(a), impartiality must be "evaluated on an *objective* basis, so that

what matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994); *see also In re Murchison*, 349 U.S. 133, 136 (1955) ("Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'" (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954))). Of course, "disqualification under §) 455(a) is necessarily fact-driven and may turn on subtleties in the particular case." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008).

There exists a very clear and obvious "bright-line rule that a federal judge is disqualified based on a known financial interest in a party." *Chase Manhattan Bank v. Affiliated FM Ins. Co.*, 343 F.3d 120, 127 (2d Cir. 2003). "Section 455(f) stands as the only exception." *Centripetal Networks, Inc. Cisco Sys., Inc.*, 38 F.4th 1025, 1030 (Fed. Cir. 2022). "What must be 'divested' under § 455(f) is the financial interest giving rise to the disqualification." *Id.* at 1032. "The statute defines 'financial interest' as 'ownership of a legal or equitable interest, however small.'" *Id.* (citing § 455(d)(4)). "Thus, it logically follows that to 'divest' oneself of 'ownership' of a legal or equitable interest is possible only if one is 'deprived or dispossesse[d]' of ownership—something that is possible <u>only if the interest is sold or given away."</u> *Centripetal,* 38 F.4th at 1032 (emphasis added). "Also telling is Congress's use of the present tense in § 455(b)(4), providing that a <u>judge should not sit when he or she 'has a financial interest' in a party.</u> That verb usage suggests that selling or donating the stock is the

only cure envisioned under § 455(f)." *Centripetal,* 38 F.4th at 1032 (emphasis added).

Title 28 U.S.C. § 455(b) requires that a judge disqualify herself in certain circumstances in which her impartiality might be reasonably questioned. The provision is self-enforcing on the part of the judge. *See United States v. Pearson*, 203 F.3d 1243, 1276 (10th Cir. 2000). Simply put, "[w]hat matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994) (explaining perception is reality when judicial ethics are at issue).

B. The Motion for Recusal.

An Article III Judge is appointed for life. It is prestigious position. Any perception of bias is not allowed. The United States Supreme Court has said that: "What matters is not the reality of bias or prejudice but its appearance." *Liteky v. United States*, 510 U.S. 540, 548 (1994) (emphasis added). Recently, Congress and Chief Judge Roberts have emphasized the need for transparency in the financial holdings of the judiciary in order to avoid any perceptions of bias. In these circumstances, of course, "perception is reality." When Congress enacted § 455, its purpose was to avoid the perception of bias so that citizens do not lose respect and trust in the judiciary as a system. We simply cannot allow the judiciary to be partial, which is why § 455 is so important; public faith must be preserved at all costs, and even the perception of bias must be eliminated.

Cellspin filed its Motion for Recusal, asking District Court Judge Gonzalez Rogers recuse herself under § 455, and more specifically under §§ 455(a), (b)(4), (c), and (d)(4). Cellspin directed the District

Court to the publicly available facts related to Judge Gonzalez Rogers' and her husband's financial interests in Google. The evidence of record showed that "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008).

This court reviews a district court's denial of a motion for recusal for abuse of discretion. *See United States v. Mitchell*, 886 F.2d 667, 671 (4th Cir. 1989); *Shell Oil Co. v. United States*, 672 F.3d 1283, 1288 (Fed. Cir. 2012).

C. The Background and Timing.

District Court Judge Gonzalez Rogers did not deny Cellspin's Motion for Recusal based on timing. (Appx0009 at 9:20). The motion presented facts proving beyond a reasonable doubt that there is a public perception of bias requiring the recusal of District Court Judge Gonzalez Rogers under § 455 and, more specifically, under §§ 455 (a), (b)(4), (c), and (d)(4). Moreover, unlike Section 144, timing is not dispositive of a Section 455 motion.

Before Cellspin filed its Recusal Motion, it did not have access to all the factual information on which the motion was based. For example, Cellspin had no way of knowing in February of 2021 (the approximate timeframe of Google's acquisition of Fitbit) that Matt Rogers would be an <u>*operating partner*</u> at Ajax Strategies Venture Capital firm in April 2022 and would be operating three (3) Google funded startups and operating five (5) companies that have partnerships with Google. Similarly, Cellspin would have no way of knowing in February of 2021 or in February of 2022 if

Judge Gonzalez Rogers had sold or still held her substantial 2020 Vanguard Index Fund investments, and Judge Gonzalez Rogers has not filed any financial disclosures for 2021 or 2022.

Instead of having a panel of her peers rule on the Recusal Motion, Judge Gonzalez Rogers ruled on her own recusal, which yielded the predictable result of a purported lack of bias. But in the process, Judge Gonzalez Rogers actually laid out the problem – her bias – against Cellspin and in favor of Google.

Under the circumstances, Judge Gonzalez Rogers should have informed *all parties* when her husband joined Venture Capital firm Ajax Strategies in April 2022. The fact that Cellspin discovered this in November 2022 simply illustrates Cellspin's diligence in this regard and does not absolve the District Court of its own obligations. It is squarely each individual judge's responsibility to be abreast of the business dealings of their spouse and immediate family, including all potential conflicts of interest; it is not the duty of each and every party to independently perform extensive background research. Section 455(c) provides that "[a] judge should inform himself about his personal and fiduciary financial interests and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household." This was exactly the Judicial Conference Committee's concern in Advisory Opinion 110. Finally, Cellspin had no way of knowing in 2021 or early 2022 that the Court of Appeals for the Federal Circuit would decide the *Centripetal Networks* case regarding blind trusts the way it did.

In this case, and under these specific facts, the District Court abused its discretion in rejecting Cellspin's Motion for Recusal.

D. Google Funding of Ajax Strategies Start-ups and Partnerships Requires Recusal and Vacatur.

In her Order regarding her husband's Ajax-Google affiliation, Judge Gonzalez Rogers claims that Cellspin is "relying on nothing but speculation." (Appx0013 at 13:12-13). Yet Cellspin has not relied on any such "speculation," and in any event the standard literally requires an objective assessment of the *perception* of bias to the public. Moreover, all evidence and documents regarding the Ajax-Google funding, the Ajax-Google partnerships, and Matt Rogers' Ajax affiliations, are publicly available. Examples of those non-speculative public documents are Matt Rogers' LinkedIn profile, Ajax portfolio company's corporate press releases, news articles about Ajax portfolio companies, corporate blog posts, Ajax Strategies own website webpages, well known industry articles including CNBC, and more. And all that publicly available evidence show that "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (citations and internal quotation marks omitted). This is not speculation.

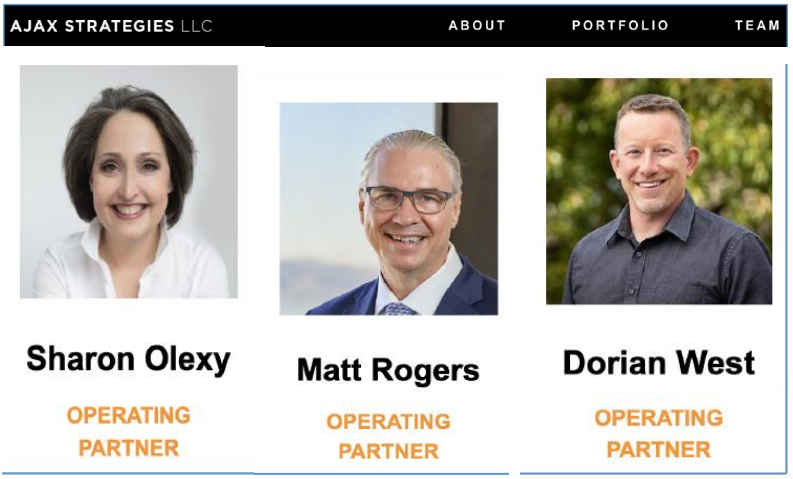

Figure 3 – Ajax Strategies LLC Website Shows Judge Gonzalez Rogers' Husband, Matt Rogers is an Operating Partner at Ajax Strategies LLC. (Excerpt from Exhibit 6 at Appx0030, Appx0935).

The facts relevant to the Matt Rogers Ajax-Google affiliation are:

- Matt Rogers is an *operating partner* at Ajax Strategies, a Venture Capital Firm in San Francisco. (Appx0030-0031, Appx0100–0101, Appx0892–0893, Appx0935).
- Google has invested with others combined total of *$700 Million* dollar in Matt Rogers' Ajax Strategies Portfolio companies. (Appx2141).
- Matt Rogers' portfolio company "Planet" is funded by Google. (Appx0031– 0032 (quote from CNBC article), Appx0140–0141. Google has not denied this fact. Google has NOT denied this fact. (Appx1101–1117).
- Matt Rogers' portfolio company hydropower startup "Natel Energy" is funded by Google.

(Appx0034, Appx0172–0174, Appx2140–2141). Google has not denied this fact. (Appx1101–1117).

- Matt Rogers' portfolio company start-up "Ripple Food" is funded by Google. (Appx 0032, Appx0178, Appx2140). Google has not denied this fact. (Appx1101–1117).
- Matt Rogers' portfolio company "Lime" has strategic partnership with Google. (Appx0034, Appx1010–1012, Appx2140). Google has not denied this fact. (Appx1101–1117).
- Matt Rogers' portfolio company "Voltus" has partnership with Google. (Appx0033, Appx 0197–0199, Appx2140). Google has not denied this fact. (Appx1101–1117).
- Matt Rogers' portfolio company "StreetLight Data" has partnership with Google. (Appx 0033–0034, Appx1023, Appx2140). Google has not denied this fact. (Appx1101–1117).
- Matt Rogers' portfolio company "Descartes Labs" has customer partnership with Google. (Appx0034, Appx1031–1035, Appx2140). Google has not denied this fact. (Appx1101–1117).
- Matt Rogers' portfolio company "Regrow" has partnership with Google. (Appx0034, Appx 1051–1055, Appx2140). Google has not denied this fact. (Appx1101–1117).
- Google failed to provide a declaration that it does not have any financial interest/relationship with any of the eight Matt Rogers Ajax Strategies companies.

(Appx2140).

Still further, Judge Gonzalez Rogers has admitted the following facts in her erroneous Order denying Recusal:

- Matt Rogers "has been an Operations Partner at Ajax since April 2022." (Appx0012 at 12: 12–13).
- Matt Rogers "is a contractor for Ajax." (Appx0012 at 12:15).
- Matt Rogers "represents Ajax's interests." (Appx0012 at 12:16).
- Matt Rogers is "serving on the board of Natel" an Ajax Strategies company. (Appx0012 at 12:16–17).
- Matt Rogers is "a board advisor to another company" Ojjo, another Ajax Strategies portfolio company. (Appx0012 at 12:17).
- "Planet Labs, . . . is one of . . . customers of Natel" (Appx0012 at 12:20).
- Natel, Ojjo and Planet Labs are Ajax portfolio companies. (Appx0012).

Google Ajax Funding

Like the public, Cellspin is aware of the fact that the $700 Million in Google with others funding in Ajax predates the tenure of Matt Rogers at the company (as stated in the Order). (Appx0013, Appx2141).

Plainly, Cellspin is not contending that Matt Rogers drove a truck with all the investment money from Google to Ajax headquarters after he was employed in 2022. What plaintiff is contending, however, is that

because of the hundreds of millions of dollars in Google funding in the Ajax Strategies companies, an objective person would safely conclude that Matt Rogers has financial interest in maintaining Google as an investor in Ajax.

Regardless, the timely is irrelevant as Ajax and Google each have a financial interest in the other, some even require Google to even have a business platform, such as Planet. District Court Judge Gonzalez Rogers is either not aware of or is misrepresenting the VC funding timeline structure. Most VC funding are tranche investments, that lets investors split investments into parts over time and sometimes years. This way investors (Google) can give money to businesses over time instead of all at once.

Usually, a business getting a tranche investment will get pre-negotiated payments every year as long as it achieves financial milestones decided by the investor. Just because the funding agreement predates the employment of Matt Rogers does not mean all the money is in the company's bank account before he joined Ajax. It is expected that the Google money will be distributed over years. Matt Rogers' Ajax would have to maintain Google as an investor in Ajax companies over these years to get tranche payments. The relationship does not stop the day of the signing of the funding agreement, as alluded by Judge Gonzalez Rogers, which she states without a declaration from her husband.

Google Ajax Partnerships

Plaintiff is aware that partnerships with "Streetlight Data" portfolio company predates Matt Rogers' Ajax affiliation as asserted by Judge Gonzalez Rogers.

(Appx0013 at 13:6–7). But the Judge conveniently fails to address the "Voltus" Google partnership press release exhibit that is from 6th of April 2022 (Appx0033, Appx0197–0199) after Matt Roger joined Ajax Strategies and that does not pre date Matt Rogers' Ajax affiliation. The Judge also fails to address the dates and details of Google Partnership with "Descartes Lab" (Appx0034, Appx0212) and June 2022 "Regrow" partnership blog post (Appx0034–35, Appx0228) and the importance of Google highlighting these two Ajax companies on Google's own website.

What Plaintiff is contending is that because of these (5) five strategic Google partnerships with operating partner Matt Rogers' Ajax Strategies companies, an objective person would reasonably conclude that Matt Rogers has a financial interest in maintaining Google as a Partner. There is, at minimum, the appearance of such an interest.

Further, Judge Gonzalez Rogers states as hearsay that "the undersigned's husband has no interest or relationship with Lime, Voltus, Streetlight Data, Descartes Lab, Regrow, and Ripple Foods." (Appx0012 at 12:18–19). It is impossible for an objective person to believe that Ajax Strategies operating partner Matt Rogers is not helping or working with any of the other Ajax partners in meetings and in general and has no working or business relations or interest the overall growth of the Ajax Strategies Venture Capital Firm, especially when he is a board member on two of their portfolio companies and even an appointed SEC director for one. Judge Gonzalez Rogers' Order states: "No evidence supports any personal affiliation because none exists." (Appx0013 at 13:7–8). This completely misses the point Plaintiff is making. Plaintiff has estab-

lished that a clear personal affiliation exists between Matt Rogers and Ajax Strategies. Because Google has invested hundreds of millions of dollars in (3) three Ajax Strategies companies and five (5) Ajax Strategies companies have strategic partnerships with Google, it appears as though Ajax and Matt Rogers have financial interest in maintaining Google both as an investor and as a strategic partner.

With respect to Matt Rogers' Natel Energy company.

For the first time in her Order, Judge Gonzalez Rogers disclosed that Matt Rogers serves on the Board of Natel Energy. (Appx0012 at 12:16–17). This new information prompted Cellspin to look for SEC filing for Natel Energy and Cellspin discovered that the Judge conveniently forgot to mention that Matt Rogers not only servers on the Board of Natel Energy as asserted by the Judge herself, *he is also a "Director"* of Natel Energy according to SEC filings. To clarify, not all company board members are company directors registered with SEC, but Matt Rogers is.

Last Name	First Name	Middle Name
Rogers	Matt	
Street Address 1	Street Address 2	
2401 Monarch Street		
City	State/Province/Country	ZIP/Postal Code
Alameda	CALIFORNIA	94501

Relationship: ☐ Executive Officer ☒ Director ☐ Promoter

Clarification of Response (if Necessary)

Figure 4 – Excerpt from http://edgar.secdatabase.com/1905/147010122000001/filing-main.htm as last visited on March 20, 2023.

Transcription		
Last Name	**First Name**	**Middle Name**
Rogers	Malt	
Street Address 1	**Street Address 2**	
2401 Monarch Street		
City	**State/Province/Country**	**ZIP/Postal Code**
Alameda	CALIFORNIA	94501
Relationship	☒ Director	
Clarification of Response (if Necessary):		

Judge Gonzalez Rogers' Order further states that her husband has "no equity in any Ajax portfolio." (Appx0012 at 12:15). It is well known in Silicon Valley that Startup board members and Directors get awarded equity in the startups. It is hard for an objective person to believe that Matt Rogers, who is not only Board Member of Natel Energy but also an SEC publicly named Director of Natel Energy would have zero equity shares in Ajax portfolio company's Natel Energy. Similarly, since Matt Rogers is also "a board advisor to [Ojjo] company," another Ajax portfolio company, it seems implausible that he does not have any equity in Ajax portfolio company. (Appx0012 12:16–17, 27).

For the first time in her Order, Judge Gonzalez Rogers also states that Matt Rogers is purportedly just a "contractor" for Ajax and a board advisor to Ojjo. (Appx0012, 12:15). Matt Rogers, however, has NOT disclosed his role as a contractor for Ajax, serving on the board of Natel Energy, being Director at Natel Energy at SEC, and a board advisor to Ojjo, on his LinkedIn profile.

Simply put, Matt Rogers is much more than a contractor for Ajax. Again, Matt Rogers is an SEC disclosed Director on Natel Energy's Board representing the interests of Ajax Strategies. Judge Gonzalez Rogers takes issue with the language of "Power Technology" article from 2019 and says that "According to the article, Natel secured funding from two venture funds" (Appx0013 at 13:27– 28) and that "The undersigned and her husband have no knowledge of any investment by Google into Natel." (Appx0013 at 13:28).

But according to Natel Energy August 21, 2019, SEC FORM D there were four (4) investors in that funding round, *not just two* as alluded by Judge when critiquing the language of "Power Technology" article from 2019. *See* https://www.sec.gov/Archives/edgar/data/1470101/000147010119000001/xslFormDX01/primary_doc.xml (excerpt from this SEC link shown in figure below).

13. Offering and Sales Amounts

Total Offering Amount	$23,966,700 USD	or ☐ Indefinite
Total Amount Sold	$15,624,374 USD	
Total Remaining to be Sold	$8,342,326 USD	or ☐ Indefinite

Clarification of Response (if Necessary):

Figure 5 – Excerpt from SEC website as last visited on March 20, 2023, at https://www.sec.gov/Archives/edgar/data/1470101/000147010119000001/xslFormDX01/ primary_doc.xml.

Transcription

13. Offering Sales Amounts

Total Offering Amount $23,966,700 USD
or []Indefinite

Total Amount Sold $15,624,374 USD

Total Remaining to be Sold $8,342,326 USD
or []Indefinite

Clarification of Response (if Necessary):

And in concurrently filed Natel Energy SEC Form D filing dated August 8, 2019, there were nine (9) investors in that funding round, not just two as alluded by Judge when critiquing the language of "Power Technology" article from 2019. *See* SEC website as last visited on March 20, 2023, at https://www.sec.gov/Archives/edgar/data/1470101/000147010122000001/xslForm_DX01/primary_doc.xml (excerpt from this SEC link shown in figure below).

13. Offering and Sales Amounts

Total Offering Amount	$47,976,701 USD	or ☐ Indefinite
Total Amount Sold	$30,589,009 USD	
Total Remaining to be Sold	$17,387,692 USD	or ☐ Indefinite

Clarification of Response (if Necessary):

Figure 6 – Excerpt from SEC website as last visited on March 20, 2023, at https://www.sec.gov/Archives/edgar/data/1470101/000147010122000001/xslFormDX01/primary_doc.xml.

Transcription

13. Offering Sales Amounts

Total Offering Amount $47,976,701 USD
or []Indefinite

Total Amount Sold $30,589,009 USD

Total Remaining to be Sold $17,387,692 USD
or []Indefinite

Clarification of Response (if Necessary):

Again, Google has failed to provide a declaration that it does not have any financial interest or relationship with Natel Energy, as has Matt Rogers. Assuming *arguendo* that Ajax company Natel Energy is not funded by Google, that brings the total funding by Google and others in Ajax companies to $620 Million, which is still very substantial amount for an objective person.

Stull further, Judge Gonzalez Rogers' Order states that "undersigned's husband is a contractor for Ajax with no equity in any Ajax portfolio [] in Planet Labs, at most his affiliation is attenuated." (Appx0012 at 12:12-21). The District Court had an opportunity to produced financial evidence about Matt Rogers' Ajax involvements but:

- Failed to produce Matt Rogers' *Director Compensation Plan* for Natel Energy (SEC) an Ajax portfolio company.
- Failed to produce Matt Rogers' *Board Advisor Compensation Plan* for Natel Energy an Ajax portfolio company.

- Failed to produce Matt Rogers' *Board Member Compensation Plan* for Ojjo an Ajax portfolio company.
- Failed to produce Matt Rogers' Ajax Operating Partner Compensation Plan.
- Failed to produce Matt Rogers' *Ajax 1099 as a Contractor*.

Assuming *arguendo* every fact the District Court asserted in its Order about Matt Rogers is true without any evidence or declaration, an objective person who is told about the details of Matt Rogers' Ajax Google funding and Ajax partnerships with Google *"would conclude that the judge's impartiality might reasonably be questioned." United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008).

Presently in the publicly charged concern over government ties to business interests and possibly even foreign governments, the strict adherence to the principals and plain text of Section 455(a) must be maintained and adhered to preserve public confidence in our judicial institutions outlined under Article III of the U.S. Constitution. Here, Cellspin as the moving party has met its 'heavy burden' to bring up the public perception of bias. Respectfully, Judge Gonzalez Rogers pulling back an arm's length review of her perceived bias by her peers created more of a cloud of suspicion than less.

E. Federal Judges Have No 28 U.S.C. § 455(d) Exception for Investing $5–$25 Million in a Hedge Fund.

Judge Gonzalez Rogers' 2020 and earlier financial disclosures includes a $5–$25 Million dollar investment

holding by the name of *"McKinsey & Company Special Situations Aggressive Long-Term". Cellspin pointed this out in its Motion for recusal.* (Appx0043–0045).

When Cellspin did the research on *"McKinsey & Company Special Situations Aggressive Long-Term"* last year, there was hardly anything that came up. This is the reason Cellspin's Motion called it out as "opaque" holding. The only thing that did come up was the Beth F. Cobert "Ethics Agreement" with the US "Office of Management and Budget" during her confirmation. In that instance, Ms. Cobert had to agree to recuse herself and divest from her "McKinsey & Company Special Situations Aggressive Long-Term" investment holdings. (Appx0043–0045).

Akin to Section 455(c) governing Article III of the Judiciary, ignorance of financial interests is not allowed by appointees to positions within the Executive Branch, either. That is the analogy Cellspin made with respect to Ms. Beth F. Cobert. There, ethics is covered in relevant part by Title 18 U.S.C. Section 208. (Appx2136–2137).

I have disclosed in my financial disclosure report financial interests in the following funds:

1. Compass Special Situations Fund, LLC;
2. Compass Global Private Equity Capital Fund;
3. Compass European Private Equity Capital Plan;
4. Special Situations Investment Fund, L.P.; and
5. Special Situations Aggressive Long-Term Portfolio.

However, the funds' managers declined to provide me with sufficient information to enable me to disclose the funds' underlying assets in my financial disclosure report. Therefore, I will divest my financial interests in these funds within 90 days of my confirmation. With regard to each of these funds, until I have divested the fund, I will not participate personally and substantially in any particular matter in which to my knowledge I have a financial interest, if the particular matter has a direct and predictable effect on the financial interests of that fund, or its underlying assets, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption pursuant to 18 U.S.C. § 208(b)(2).

Upon confirmation, I will resign from all of my positions with McKinsey & Company ("McKinsey" or the Firm"), including my positions as a McKinsey Director, as Co-leader of the Firm's

Figure 7 – Excerpt from Exhibit 34 (Appx0847).

Transcription

I have disclosed in my financial disclosure report financial interests in the following funds:

1. Compass Special Situations Fund, LLC;

2. Compass Global Private Equity Capital Fund;

3. Compass European Private Equity Capital Plan;

4. Special Situations Investment Fund, L.P.; and

5. Special Situations Aggressive Long-Term Portfolio

However, the funds' managers declined to provide me with sufficient information to enable me to disclose the funds' underlying asset in my financial disclosure report. Therefore, I will divest my financial interest in these funds within 90 days of my confirmation. With

> regard to each of these funds until I have divested the fund. I will not participate personally and substantially in any particular matter in which to my knowledge I have a financial interest, if the particular matter has a direct and predictable effect on the financial interests of that fund, or its underlying assets, unless I first obtain a written waiver pursuant to 18 U.S.C. § 208(b)(1), or qualify for a regulatory exemption pursuant to 18 U.S.C. § 208(b)(2)
>
> Upon confirmation, I will resign from all of my positions with McKinsey & Company ("McKinsey" or the Firm"), including my position as a McKinsey Director, as Co-leader of the Firm's . . .

Ms. Cobert was not able to obtain the transparency required to disclose her financial interests in McKinsey & Company "Special Situations Aggressive Long-Term Portfolio." Although she made an inquiry of the manager, she still did not get details to allow her to avoid conflicts of interests with the position she was to be appointed to. As such, she made plans to completely divest herself from any financial interest holdings in McKinsey & Company Special Situations Aggressive Long-Term Portfolio. There is no meaningful difference between the situation involving Ms. Cobert and the District Court Judge in this case; both are required to fully divest.

For the first time in her Order, Judge Gonzalez Rogers gave additional detail about this opaque holding, and changed the name of the fund in her Order to a MIO "Special Situation Fund." (Appx0017–0018, citing https://www.miopartners.com/). But the MIO Website has no mention of Judge holding called in her financial disclosure form by the name *"McKinsey & Company*

Special Situations Aggressive Long-Term." The misidentification of funds in an annual disclosure for years by the district court judge warrants recusal because it thwarts the ability of the public to assess potential judicial conflicts and it is not approved under Section 455(4)(i), which recites, in pertinent part, that "(4) 'financial interest' means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that: (i) Ownership in a mutual or common investment fund that holds securities is not a 'financial interest' in such securities unless the judge participates in the management of the fund; . . . " Section 455(4)(i).

A judge is allowed to own a mutual or common investment fund. The SEC explains mutual funds and investment funds are considered open-end companies. *See* https://www.sec.gov/answers/mfinvco.htm as last visited on March 22, 2023. While Judge Gonzalez Rogers provides an updated name, it is still not accurate. The actual name of her investment is the *Compass* Special Situation Fund, LLC, managed by MIO. *It is not a mutual fund*. It is a closed-end investment company. Again, MIO even files every year to exempt it from the Investment Company

Judge Gonzalez Rogers takes the mistaken position that the "Special Situation Fund [] functions in essence like a mutual fund." (Appx0017 at 17:13– 14). This is incorrect. A mutual fund is regulated by the SEC under the authority of Investment Company Act of 1940. In stark contrast, MIO's Special Situation Fund, which has the full name of "Compass Special Situation Fund, LLC") is not regulated by the SEC and each year MIO files an exemption under Section D to avoid being

regulated by the SEC like open-end funds.[1] Judge Gonzalez Rogers is investing in a closed-end fund.[2] According to the SEC, Compass Special Situation Fund is not a Mutual fund or a Pension Fund. According to MIO partners own website under "What We Do" it says: "The majority of MIO's active assets under management are managed with full discretion by third-party managers (*i.e.*, hedge funds, private equity, and other alternative investment managers)." (Figure 8).

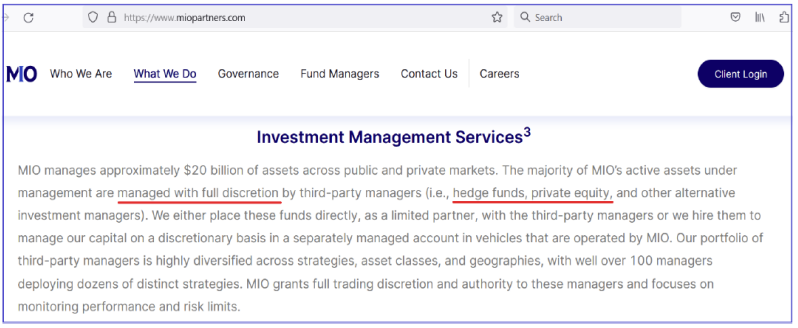

Figure 8 – Excerpt from https://www.miopartners.com/.

Transcription

Investment Management Services[3]

MIO manages approximately $20 billion of assets across public and private markets. The majority of MIO's active assets under management are managed with full discretion by third-party managers (i.e., hedge funds, private equity, and other alternative

[1] As last visited on March 21, 2023, at https://www.sec.gov/Archives/edgar/data/1457542/000145754220000001/xslForm DX01/primary_doc.xml.

[2] *See* https://www.sec.gov/answers/mfinvco.htm as lasted visited on March 21, 2023.

Investment managers). We either place these funds directly, as a limited partner, with the third-party managers or we hire them to manage our capital on a discretionary basis in a separately managed account in vehicles that are operated by MIO. Our portfolio pf third-party managers is highly diversified across strategies, asset classes, and geographies, with well over 100 managers deploying dozens of distinct strategies. MIO grants full trading discretion and authority to these managers and focuses on monitoring performance and risk limits.

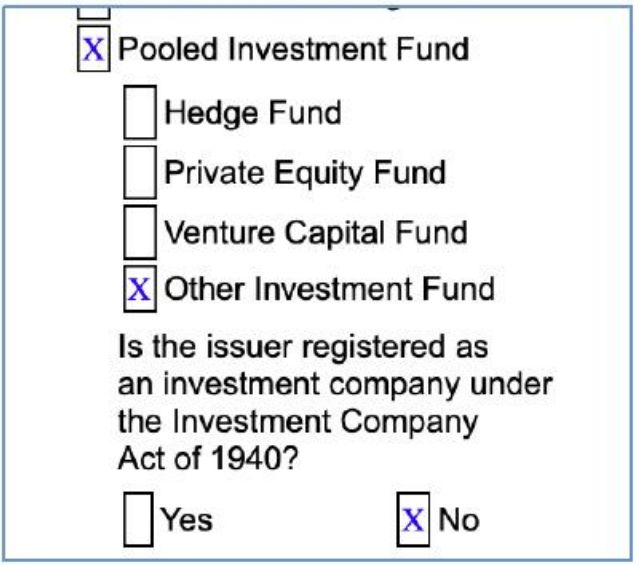

Figure 9 – MIO's Compass Special Situations Fund, LLC (2020 SEC Filing of Exempt Status).[3]

Judge Gonzalez Rogers' Order recites that "MIO does not trade individual stocks or bonds of any public

[3] As last visited on March 21, 2023, at https://www.sec.gov/Archives/edgar/data/1457542/000145754220000001/xslFormDX01/primary_doc.xml.

or private company anywhere in the world." (Appx0017 at 17:19–20). But this statement is contradicted by the SEC's 2021 investigation into MIO. There, the SEC explained that "MIO invested approximately 90% of MIO client assets indirectly, through third-party managers who exercise their own investment discretion (*i.e.*, a so-called 'fund-of-funds' strategy), and the remaining approximately 10% directly, by purchasing and selling securities." *See* SEC Lawsuit Against MIO page 3, ¶¶ 8 and 9 available at SEC website as last visited on March 21, 2023. https://www.sec.gov/litigation/admin/2021/ia-5912.pdf.

Background

A. The Business, Operational Structure, and Oversight of MIO

8. MIO provides investment options exclusively to current and former partners and employees of McKinsey. During the Relevant Period, MIO invested approximately 90% of MIO client assets indirectly, through third-party managers who exercise their own investment discretion (i.e., a so-called "fund-of-funds" strategy), and the remaining approximately 10% directly, by purchasing and selling securities.

9. For MIO's direct investments, MIO had investment discretion (i.e., MIO made the decision regarding whether to buy or sell each security subject to a direct trading policy which prohibited, except in specified circumstances, direct investment in the debt or equity of corporations) and had full knowledge of all securities held, including the number of shares of each security.

Figure 10 – Excerpt from SEC Order regarding MIO as last viewed on the SEC Website on March 21, 2023 at https://www.sec.gov/litigation/admin/2021/ia-5912.pdf.

Transcription

Background

A. The Business, Operational Structure, and Oversight of MIO

8. MIO provides investment options exclusively to current and former partners and employees of McKinsey.

During the Relevant Period, MIO invested approximately 90% of MIO client assets indirectly, through third-party managers who exercise their own investment discretion (i.e., a so-called "fund-of-funds" strategy), and the remaining approximately 10% directly, by purchasing and selling securities.

9. For MIO's direct investments, MIO had investment discretion (i.e., MIO made the decision regarding whether to buy or sell each security subject to a direct trading policy which prohibited, except in specified circumstances, direct investment in the debt or equity of corporations) and had full knowledge of all securities held, including the number of shares of each security.

The MIO's Compass Special Situations Fund is not a proper investment under Section 455(d)(4)(i). This investment company sells securities that are not regulated by the SEC pursuant to MIO's filed exemption.[4]

In contrast, mutual funds are regulated investment products offered to the public and available for daily trading. Thus, it is mischaracterization of the Investment Company Act of 1940 to equate MIO's Compass Special Situation Fund, LLC with an allowed investment under Section 455(d)(4)(i), as no such exemption exists. Judge Gonzalez Rogers' substantial financial investments in the millions into a closed-end fund named Compass Special Situation Fund, LLC was never a proper investment under Section 455(d)(4)(i), as the

[4] As last visited on March 21, 2023, at https://www.sec.gov/Archives/edgar/data/1457542/000145754220000001/xslFormDX01/primary_doc.xml.

public and she herself does not have the transparency required under Section 455(c) to avoid obtaining a financial interest in a party to litigation proceeding in her courtroom.[5] As early as Nov 19, 2021, MIO partners were involved in SEC Violations for insider trading. *"McKinsey Affiliate to Pay $18 Million for Compliance Failures in Handling of Nonpublic Information."* (https://www.sec.gov/news/press-release/2021-241). MIO's "Special Situation Fund" is a Hedge Fund. It is not Mutual fund as asserted by the Judge in her order. For example, in the July 08, 2019 Article "The Story McKinsey Didn't Want Written," recites, "the secretive hedge funds that MIO manages for McKinsey partners," "It's alarming they have a hedge fund," and that MIO's Special Situation Fund is a "unique internal hedge fund." (Figure 11, as last visited on April 21, 2023, https://www.institutionalinvestor.com/article/b1g5zjdcr97k2y/The-Story-McKinsey-Didn-t-Want-Written).

[5] Even when Judge Gonzalez Rogers acknowledged that her financial disclosures for years 2021 and 2022 were not available to Plaintiff, she still did not provide them to Plaintiff to allow Plaintiff to challenge her Order denying Recusal to a panel of her peers.

Institutional Investor

CORNER OFFICE

The Story McKinsey Didn't Want Written

Illustrations by Laura Lam

Tied to the global consulting giant is a massive investment fund. Based on its reaction to this story, McKinsey likely doesn't want you reading much about it.

The same cannot be said for one of its more prominent defrauded investors: MIO Partners, a wholly owned subsidiary and unique internal hedge fund of funds of powerful global consultancy McKinsey & Co. Only the money of McKinsey employees, partners, former partners, and family is allowed in.

"It's alarming they have a hedge fund," says Matthew Stewart, a former consultant at a firm that was started by ex-McKinsey consultants, which he detailed in his book *The Management Myth*.

The 401(k) lawsuit alleges that those fee waivers go to partners, not lower-level employees. "In addition to taking advantage of bankruptcy creditors and misleading the federal courts, McKinsey has also taken advantage of its employees by using its company retirement plans as a piggybank to subsidize its MIO investment unit and the secretive hedge funds that MIO manages for McKinsey partners outside of the [pension] plans for free," Kai Richter, partner at Minneapolis law firm Nichols Kaster, wrote in a recent pleading in New York federal court. The lawsuit cites one MIO investment contract that did not charge fees to the partners, whereas pension plan participants paid fees on the same investment.

hedge funds — MIO's Compass Special Situations Fund averaged an annual return above 9 percent, while the S&P 500 index averaged an annual loss of 1.6 percent.

Figure 11 – Excerpts from website as last visited on March 20, 2023, at https://www.institutionalinvestor.com/article/b1g5zjdcr97k2y/The-Story-McKinsey-Didn-t-Want-Written.

Transcription

Institutional Investor

CORNER OFFICE

The Story McKinsey Didn't Want Written

{image}

Tied to the global consulting giant is a massive investment fund. Based on its reaction to this story, McKinsey likely doesn't want you reading much about it.

The same cannot be said for one of its more prominent defrauded investors: MIO Partners, a wholly owned subsidiary and unique internal hedge fund of funds of powerful global consultancy McKinsey & Co. Only the money of McKinsey employees, partners, former partners, and family is allowed in.

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partners, whereas pension plan participants paid fees on the same investment.

Hedge funds — MIO's Compass Special Situations Fund averaged an annual return above 9 percent, while the S&P 500 index averaged an annual loss of 1.6 percent.

An objective person who is told about the details of Judge Gonzalez Rogers' misrepresentation of funds in her financial disclosure for at least 2015 through 2020 by listing it under the wrong name, and the details about her $5–$25 million dollar private closed-end fund that has been accused by SEC in 2021 for insider trading, *"a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (citations and internal quotation marks omitted).

F. No 28 U.S.C. § 455(D) Exception for Investing $10–$43 Million in an Index Fund.

Financial investments allowed by judges appointed for life are limited by § 455(d). While the amount of the financial investment is not determinant, it is nonetheless illuminating to help ascertain if Cellspin has met its burden in proving that recusal is appropriate in this case to avoid the perception of bias in this litigation.

Facts about Judge Gonzalez Rogers Index Fund Holdings

1. Judge Gonzalez Rogers has anywhere between $9.4 to $43.5 million dollars invested in Vanguard 500

Index Fund and Vanguard Total International Stock Index Fund. (Appx0036, Appx0238, Appx1641).

2. Google makes up approximately 4% of Vanguard 500 Index Fund. (Appx0037, Appx0239, Appx0844)

3. It is public knowledge that Google stock has been in the Top 10 holding of Vanguard Index Fund for *years*. Defendant Google does NOT deny this fact.

4. Judge Gonzalez Rogers does not deny knowing that Google is in the Top 10 stock holding of her Vanguard Index Fund.

5. Congress and the intent of Advisory Opinions is that a Judge should not have stock holdings in a party when she is ruling on that case.

6. Section 455(c) instills a duty to be informed of investments.

To avoid doubt, Cellspin's contention is not directed at regular Mutual Funds. In regular Mutual funds, stocks are bought and sold every day, week, and month. For example, a regular Mutual fund manager buys stocks A, B, and C one week and may sell those stocks the next week, and then buy stocks X, Y, and Z. Then, next month sell those stocks and buys stocks L, M, and N and so on and so forth. Mutual funds invest in a changing list of securities chosen by an investment manager. (Appx0817, Appx0829–0831). This ever-changing nature of regular Mutual Funds makes it acceptable for a Judge to own $1,000 or $10,000,000 worth of a regular Mutual Fund. But unlike mutual funds, "Index Funds" invest in a specific list of securities. Index Funds employ *"Passive Management"* and "holding each stock in approximately the same proportion as the weighting of the index." (Appx0843).

Index funds merely "Hold" the securities that make up that specific Index. Whereas, for regular mutual funds, managers rely on research to "buy and sell" to outperform the average returns of a market. Index funds just "hold" the stocks. Thus, owning Judge Gonzalez Rogers' Index funds was just another way to HOLD/Own Google Stock, by another name.

Investment objective

Vanguard 500 Index Fund seeks to track the performance of a benchmark index that measures the investment return of large-capitalization stocks.

Investment strategy

The fund employs a "passive management"—or indexing—investment approach designed to track the performance of the Standard & Poor's 500 Index, a widely recognized benchmark of U.S. stock market performance that is dominated by the stocks of large U.S. companies. The fund attempts to replicate the target index by investing all, or substantially all, of its assets in the stocks that make up the index, holding each stock in approximately the same proportion as its weighting in the index.

Vanguard 500 Index Fund (VFINX)

Top 10 Holdings (27.43% of Total Assets) Get Quotes for Top Holdings

Name	Symbol	% Assets
Apple Inc	AAPL	5.92%
Microsoft Corp	MSFT	5.62%
Amazon.com Inc	AMZN	4.06%
Facebook Inc Class A	FB	2.29%
Alphabet Inc Class A	GOOGL	2.02%
Alphabet Inc Class C	GOOG	1.97%
Berkshire Hathaway Inc Class B	BRK.B	1.44%
Tesla Inc	TSLA	1.44%
NVIDIA Corp	NVDA	1.37%
JPMorgan Chase & Co	JPM	1.30%

Strategies

Management style

What's a management style?

Active

Index

Asset class

What's a management style?

Management style is the method used to select a fund's investments. Indexing seeks to match, rather than outperform, the return and risk characteristics of an index, by holding all, or a representative sample of, the securities that make up the index. Active management seeks to outperform the average returns of the financial market. Active managers rely on research, market forecasts, and their own judgment and experience in selecting securities to buy and sell.

Fund International 5

Figure 12 – Excerpts from Exhibit 32, 33 to Motion for Recusal. (Appx0037, Appx0040, Appx0843, Appx0845).

Transcription

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Investment strategy

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[***]

Vanguard 500 Index Fund (VFINX)

Top 10 Holdings (27.43% of Total Assets)
Get Quotes for Top, Holding

Name	**Symbol**	**%Asset**
Apple Inc	AAPL	5.92%
Microsoft Corp	MSFT	5.62%
Amazon.com.inc	AMZN	4.06%
Facebook Inc Class A	FB	2.29&
Alphabet Inc Class A	GOOGL	2.02%
Alphabet Inc Class C	GOOGL	1.97%
Berkshire Hathaway Inc Claas C	BRK.B	1.44%

Tesla Inc	TSLA	1.44%
NVIDIA Corp	NVDA	1.37%
JPMorgan Chase & Co	JPM	1.30%

[***]

Strategies

Management style

What's a management style?

☐ Active

☐ Index

Asset class

What's a management style?

Management style is the method used to select a fund's investments. Indexing seeks to match, rather then outperform, the return and risk characteristics of on index, by holding all, or a representative sample of, the securities that make up the index. Active management seeks to outperform the overage returns of the financial market. Active managers rely on research, market forecasts, and their own judgment and experience in selecting securities to buy and sell.

As the Vanguard Index 500 fact sheet says: it employs "Passive Management" (Appx0843, Appx0845) which means that NO ONE is actively managing the Index fund. If nobody is managing the fund, then everybody is managing it (including Judge Gonzalez Rogers), because everyone knows what stocks are part of the Index fund (and especially the top ten holdings of the index fund). (Appx0844). That means index funds belong to the exception and fall under the restrictions of § 455 (d)(4)(i): "unless the judge

participates in the management of the fund." Importantly, in the case of Vanguard 500 Index Fund, there is NO active buying and selling of the stocks. Because Judge Gonzalez Rogers knows what the "Stock Holdings" of the Index fund are, at all times, it must track the Index, she has not divested herself from owning stocks in Google. *This is akin knowingly putting Cisco stock into a blind trust, which does not amount to the required divestment because the government employee (here an Article III Judge) still knows of the specific stock ownership.* Thus, investing in an Index funds in the millions of dollars provides a foreseeable investment in Google. If someone invests extraordinary amount of money $10 Million or $40 Million in Index fund, it is objectively reasonable to conclude that they know what the stock holding of those funds are every day. Google makes up approximately 4% of the S&P Index (Appx 0037, Appx 0239, Appx 0844), and *the Judge knows and she has not denied in her ruling that she knows* that she has anywhere between $400,000 or $1,600,000 in Google Stock through her Index funds. It is the certainty of knowing the stock investment that Cellspin is bringing to light with Index Fund investing. Both the Vanguard website and Vanguard Fact Sheet say that Vanguard Index funds *are not actively managed*. *See* Appx0843, Appx0845.

The Section 455(d)(4)(i) exception only applies to ownership in a mutual fund or common investment fund, unless the judge participates in the management of the fund. Moreover, an index fund is not a "common investment fund." A common investment fund ("CIF") is a means of pooling the investments of a number of pension schemes to centralize management of those

investments and provide economies of scale in running costs. The participating schemes must all be registered pension schemes of the same employer or associated employers. *See* Appx 0840. Judge Gonzalez Rogers' investments in "Vanguard 500 Index Fund" and "Vanguard Total International Stock Index" should NOT qualify under the mutual fund or common investment fund exceptions for judges.

The Order entered by Judge Gonzalez Rogers states that "Investors in both funds do not obtain any ownership interests in the funds' underlying assets, including by directly holding the stocks." (Appx0015 at 15:17–18). Cellspin contends that holding stocks in an Index Fund which plainly and openly includes specific companies, like Google/Alphabet, is no different than holding the same stocks in a blind trust. This is so, because the awareness by Judge Gonzalez Rogers of her ownership of the Google stock contained within the Index Fund is the same. *Centripetal*, 38 F.4th at 1033. As akin to putting Cisco stock in a blind trust, which was not divestiture under Section 455(f) in *Centripetal*, here, placing money into the particular Index fund selected by Judge Gonzalez Rogers, ensured a direct and known financial interest in Defendant Alphabet (Google).

This Court has instructive precedent on this issue. "While placing the stock in a blind trust removed her control over the stock, it did not eliminate her beneficial interest in Cisco." *Centripetal*, 38 F.4th at 1032. This Court explained the obvious public perception that "the interested party knows what assets he or she placed in the trust" and therefore, "the possibility still exists that the interested party could be influenced in the performance of official duties by those interests."

Centripetal, 38 F.4th at 1033. The District Court contends that Cellspin failed to meet its burden, but it absolutely has. Further, and again, it is the perception of the public which is the overriding concern; not the back-end realities. And this was made clear by Chief Judge Roberts, Congress and the plain text of Section 455(a). Respectfully, Judge Gonzalez Rogers ignored this mandate, forcing attorneys practicing for over 20 years to reluctantly bring their first Section 455 motion.

The Judicial Conference's Committee on Codes of Conduct have not opined on Index Funds. But judicial financial disclosures, like a privilege log, are designed to identify investments to encourage transparency and allow for challenge and full disclosure where appropriate. And as much as Defendants and the District Court would like to rely on Committee on Codes of Conduct Advisory Opinions, the words "Index Fund" are not even mentioned. Judge Gonzalez Rogers states that "While not binding, the Committee on Codes of Conduct Advisory Opinion No. 106 is instructive. That opinion lists six factors for consideration: (1) the number of participants in the fund; (2) the size and diversity of fund investments; (3) the ability of participants to direct their investments; (4) the ease of access to and frequency of information provided about the fund portfolio; (5) the pace of turnover in fund investments; and (6) any ownership interest investors have in the individual assets of the fund." (Appx0015 at 15:3–10). But Cellspin's requested recusal is not about the size of the fund, number of participants, ease of access, pace of turnover, or the ownership interest in the fund; rather, it is about the <u>Judge knowing and being fully aware that she has Google stocks in her more</u>

than $10 Million Dollar Index Fund. Index Funds brochures and public websites make Judge Gonzalez Rogers fully aware of her stock holdings in Google. Cellspin's contention is that someone, who has anywhere between $9.4 Million to $43.5 Million in Index Funds is a sophisticated investor that knows (or, at minimum, is reasonably perceived as knowing) what the top ten holdings of that Index Fund are. So while it may seem onerous for an Article III judge, it is the obligation of all Article III Judges to maintain the perception of not being biased and not have a financial interest in a party. Here, Judge Gonzalez Rogers admits she did – Google.

So even if the exemplar financial disclosure referenced the Vanguard Index Fund, the obligation to not have any ownership of stock of a party to the litigation still applies and the post 2022 Congress enacted new laws to avoid bias and conflicts of interest. And investing in an index fund when a party is Google does not work to circumvent the bright line rule to not own stock in a party. Here, Judge Gonzalez Rogers knows full well that both Google and Apple are in the top ten holdings of the Vanguard Index Fund. Unlike the normal cloudiness of Mutual Funds where stocks are bought and sold every so often, in an Index fund it is very transparent with its holdings of stocks in the Index. As this Court has explained, "we are entitled to give some weight to the committee's views because Congress enacted § 455(b) to match Canon 3C of the Code of Judicial Conduct, which provides in relevant part that a judge 'shall disqualify himself in a proceeding' where he 'knows that he . . . or his spouse . . . has a financial interest . . . in a party to the proceeding, . . . '" *Centripetal,* 38 F.4th at 1030. It is

impossible to believe that a Judge sophisticated enough to acquire anywhere between $9.4 Million and $43 Million dollars through investments does not know that Google is included in the Vanguard Index Fund and, in any event, the perception of bias arising from such ownership is clear and unmistakable.

While that is not a problem for 99.9% of judges, it mandates recusal under Section 455(a) and Section 455(b)(4) for Judge Gonzalez Rogers. And if she did not know Google was included in the Vanguard Index Fund then she should have known under her obligations to stay informed of her and her husband's stock holdings as required under Section 455(c).

This appeal is proceeding because Judge Gonzalez Rogers misconstrued the application of the "heavy burden" on a party to recuse a judge under § 455. Cellspin met its heavy burden by showing the perception of bias by the Court not recusing herself when one of the biggest companies in the world, Google, bought 100% of Defendant Fitbit, during an ongoing patent infringement lawsuit. At that point, Judge Gonzalez Rogers had the option to divest herself from Index Funds that track the market, including Google (now Alphabet) but she did not do so. Instead, Judge Gonzalez Rogers improperly shifted the burden to Cellspin to purportedly prove whether she did or did not know that her Vanguard Index Funds contained any holdings in Google or any other defendant in the related cases. Again, and to reiterate, this Court has previously explained that "we are entitled to give some weight to the [legislative] committee's views because Congress enacted § 455(b) to match Canon 3C of the Code of Judicial Conduct, which provides in relevant part that a judge '<u>shall disqualify himself</u> in

a proceeding' where he 'knows that he . . . or his spouse . . . has a financial interest . . . in a party to the proceeding, . . . '". *Centripetal*, 38 F.4th at 1030.

Thus, it was objectively obvious that once Judge Gonzalez Rogers got alerted by the public, media, and Fitbit's own supplemental notice of interested parties that it got bought by Google, she should have *sua sponte* recused herself or fully divested all interests. Unfortunately, for all the parties involved and for the District Court, she did not. Now, she takes issue with the timing of Cellspin's § 455 motion, yet she knows that none of her financial disclosures for the tax years 2021 and 2022 have been made available to the public, much less Cellspin. In 2021, when Google indicated it purchased Fitbit, the Court should have then told the parties, "Yes, I own Google through an Index Fund, but I'm divesting myself from that fund." She did not. And instead of accepting responsibility for either knowing about her investment and not disclosing it, or just simply not being aware of her investment in Google, a violation of her obligations under § 455(c), the result remains the same – it was an ethical violation of Canon 3 of the Code of Judicial Conduct codified as § 455(b) by Congress for her to continue to own Google stock directly or through an Index fund the moment Google disclosed in a court filing as well as publicly before, that it had acquired 100% ownership of Fitbit. It caused Fitbit to be delisted from all stock exchanges. It was national news, especially in Silicon Valley, where this District Court sits.

A reasonably objective person who is told about the details of Judge Gonzalez Rogers' $9.4 Million and $43.6 Million Index Fund Stock Holdings, and is told that Google makes up approximately 4% of Vanguard

500 Index Fund, which in turn means that she has anywhere between $400,000 or $1,600,000 in Google Stock through her Index funds, *"would conclude that the judge's impartiality might reasonably be questioned." United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008).

There is no overriding concern over the freedom of judges to invest by precluding judges from owning certain Index Funds that openly include parties to the litigation the public has entrusted them to rule upon impartially. Impartiality is the sole purpose for their life tenure. There are more than seven thousand regular Mutual Funds in US that are available for Judges to invest in. *See e.g.* https://www.statista.com/statistics/255590/number-of-mutual-fund-companies-in-the-united-states/, last visited on April 21, 2023.

The question is if tomorrow an investment company starts a new Index Fund that <u>just holds stock</u> of Top 5 US companies: Google, Apple, Facebook, Amazon and Tesla and calls and markets it as a "Top 5 Index Fund" should Judges who rule on those five companies be allowed to own that "Top 5 Index Fund"? Would the intent of the Congress for § 455 be violated by a federal judge owning this "Top 5 Index Fund" <u>that just holds those 5 stocks, just like a blind trust that just holds Cisco Stock?</u> The answer is plainly "yes," which is why recusal is required here.

G. Google Was Matt Rogers' Primary Technology Partner at McKinsey.

Facts about Matt Rogers' McKinsey and Google Affiliation include the following:

1. Matt Rogers was a senior partner at McKinsey for more than ten (10) years for its Oil and Gas clients. (Appx0100–0101).

2. Matt Rogers' company "McKinsey" has partnership and alliance with Google. (Appx0026–0028, Appx 0910–0911, Appx0919, Appx0930–0932, Appx2140). Google has not denied this fact. (Appx1101–1117).

3. The Judge in her Order does not deny that Matt Rogers worked with Google at McKinsey. The Judge's only contention in her Order is that Google was not Matt Rogers' *primary* partner. (Appx0011).

4. The Judge in her order has not denied that Matt Rogers sold Google services to its Oil and Gas Clients.

5. The Judge in her order has not denied that Matt Rogers compensation was based on Google partnership and its client satisfaction.

6. Google has not itself denied that as an oil gas & energy senior partner at McKinsey, Matt Rogers sold Google services to his oil gas and energy clients. (Appx1101–1117).

Cellspin's allegations is <u>not</u> about the "mere fact that McKinsey uses Google Cloud." Rather, senior partner Matt Rogers marketed and sold Google services to his oil & gas clients and that part of his pay and bonus was dependent on his client's satisfaction and success through the use Google services. This is how partners and senior partners at consulting firms like McKinsey traditionally get compensated.

This scenario is not the same as envisioned by Advisory Opinion No. 107 at 209 of businesses that offer services to a judge's spouse, like a bank provider

(Bank of America) or wireless provider (AT&T). Here, direct and consequential spousal business relationships existed between Google and Matt Rogers. Thus, recusal is appropriate under at least § 455(b)(4).

Judge Gonzalez Rogers states that the May 2011 disclosure provided in full: "[m]y husband is a senior partner at McKinsey. Matters relating to McKinsey and, more broadly, to *my husband's primary clients* would also likely require recusal." (App0011 at 11:5–7) (emphasis added). Per the District Court, this disclosure differs significantly from Cellspin's statement of same in its Motion, which claims Judge Gonzalez Rogers "disclosed that if a 'primary' client of her husband's consulting firm, McKinsey, became a party before her, she would have to recuse herself." (Appx0011, citing Dkt. No. 366 at 4). Cellspin did not "reconstruct" any statement. Simply put, if Matt Rogers is working full time as a Senior Partner at McKinsey for ten (10) years with McKinsey oil & gas clients, the normal reading and assumption of May 2011 statement would mean primary McKinsey clients he regularly works with, especially since Judge Gonzalez Rogers did not give any other example of *primary clients* in the 2011 statement.

Cellspin alleges that for McKinsey oil & gas clients, Google was and is the primary partner for cloud technology according to publicly available information, as will be shown below. Judge Gonzalez Rogers states that "the plaintiff did not, and cannot, point to a single instance tying the undersigned's husband to a Google project or partnership." (Appx0011 at 11:12–13). She explains "Nor has plaintiff proffered any admissible evidence that Google was a client, let alone

a primary client or partner, of the undersigned's husband." (Appx0011 at 11:14–16).

But Cellspin in its motion and reply brief has proffered publicly available evidence of McKinsey own webpage saying that it has a partnership with Google and it sells Google services to its oil & gas clients. (Appx0919, Appx0930). Cellspin in its motion also highlighted that Matt Rogers' LinkedIn profile expressly states that he has been a Senior Partner at McKinsey for oil & gas clients for over 10 years. (Appx0902). The important point to note in Judge Gonzalez Rogers' statement is that she admits that Matt Rogers did work with Google, but apparently Cellspin has not "proffered any admissible evidence." (Appx0011 at 11:14–15). Yet, none of the evidence submitted by Cellspin was objected to, rejected for any reason, or ruled inadmissible. And it would have been easy for Matt Rogers or Google to put forth a sworn declaration that "Matt Roger has not worked with Google." But neither did.

Judge Gonzalez Rogers states that "it appears that Google was one of several cloud-based service providers for McKinsey." (Appx0011 at 11:26–27). It is true that on its alliance partnership webpage McKinsey touts technology cloud partnership with Google, Microsoft, Amazon AWS, SAP and Salesforce. (Appx0919). But Cellspin's contention is that according to McKinsey's own webpages, Google is the ONLY cloud provider for Matt Rogers' Oil & Gas clients. The only partnership page that had Matt Rogers' <u>Oil and Gas</u> clients were on, was the McKinsey – Google partnership page that mentioned Google's Cloud Services. (Appx0930, *see also* https://www.mckinsey.

com/about-us/overview/alliances-and-acquisitions/Google-Cloud-and-McKinsey).

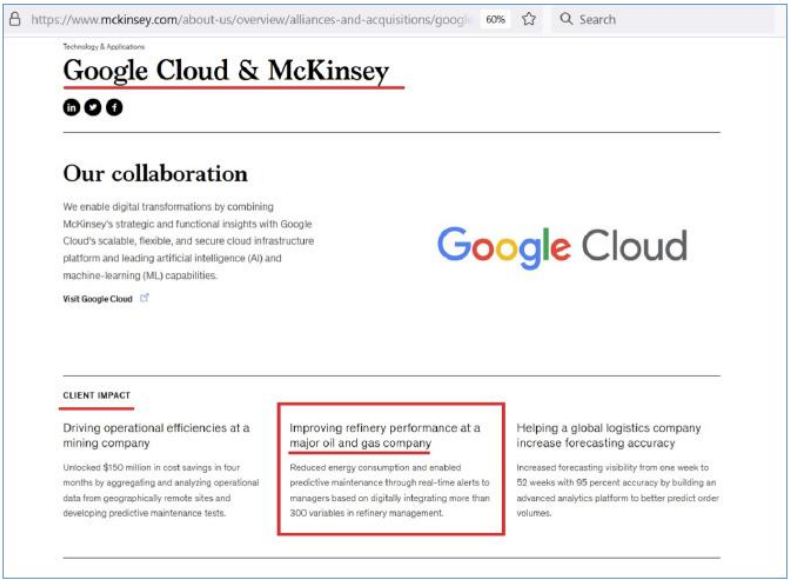

Figure 13 – Excerpt from Exhibit 5 to Motion for Recusal. (Appx0930).

Transcription

Google Cloud & McKinsey

Our collaboration

We enable digital transformations by combining McKinsey's strategic and functional insights with Google Cloud's scalable, flexible, and secure cloud infrastructure platform and leading artificial intelligence (AI) and machine-learning (ML) capabilities.

Google Cloud

Client Impact

Driving operational efficiencies at a mining company

Unlocked $150 million in cost savings in four months by aggregating and analyzing operational data from geographically remote sites and developing predictive maintenance tests.

Improving refinery performance at a major oil and gas company

Reduced energy consumption and enabled predictive maintenance through real-time alerts to managers based on digitally integrating more than 300 variables in refinery management.

Helping a global logistics company increase forecasting accuracy

Increased forecasting visibility from one week to 52 weeks with 95 percent accuracy by building an advanced analytics platform to better predict order volumes.

There is NO mention of one Oil & Gas client on McKinsey's webpage for Amazon AWS Cloud services as last visited on March 21, 2023, at https://www.mckinsey.com/about-us/overview/alliances-and-acquisitions/AWS-and-McKinsey. There is NO mention of one Oil & Gas client on McKinsey's webpage for Microsoft's Cloud page services as last visited on March 21, 2023, https://www.mckinsey.com/about-us/overview/alliances-and-acquisitions/Microsoft-and-McKinsey. There is NO mention of one Oil & Gas client on page for McKinsey's webpage about SAP as last visited on March 21, 2023, https://www.mckinsey.com/about-us/overview/alliances-and-acquisitions/SAP-and-McKinsey. Similarly, there is NO mention of a single Oil & Gas client on McKinsey's webpage about its relationship with Salesforce or its cloud as last visited on March 21, 2023, at https://www.mckinsey.

com/about-us/overview/alliances-and-acquisitions/salesforce-and-mckinsey.

Judge Gonzalez Rogers had the opportunity to produce evidence such as a declaration from Matt Rogers himself stating who were his *primary* Oil & Gas Clients, he worked with at McKinsey for 10+ years and that all those primary clients were not sold Google products/services by him or his team. But she did not. Instead, the Court has misconstrued case law about a "heavy burden" to apply it to proving her allege financial interest in a defendant with the improper perception of it existing, which is not allowed under § 455(a).

Judge Gonzalez Rogers has not produced any evidence that Matt Rogers did not work with Google, or that Matt Rogers worked with only non-Google cloud partners for his Oil and Gas Clients. The circumstantial public evidence Cellspin had put forth is that as an Oil & Gas Senior Partner, Matt Rogers was selling Google products for profit to his McKinsey Clients. Certainly, a reasonable perception of bias exists under the facts as presented by Cellspin.

Senior Partner at McKinsey, Matt Rogers, who with Judge Gonzalez Rogers has anywhere between $5 million to $25 Million in McKinsey "Special Situation Fund," is not some low-level McKinsey Employee. A reasonable assumption can be made that since Google is the <u>only</u> Cloud partner mentioned on McKinsey website for their Oil and Gas clients. Senior Partner Matt Rogers had to work with <u>*primary partner*</u> Google for his Oil and Gas Clients.

If an objective person is informed that Matt Rogers sold Google products/services to his McKinsey oil & gas clients, "a reasonable person with knowledge

of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (citations and internal quotation marks omitted).

VII. Judge Gonzalez Rogers' Violation of Section 455(a), (b) and (c) Was Not Harmless Error.

Judge Gonzalez Rogers' violations of Section 455 were not harmless error; thus the proper remedy is vacatur of her summary judgment order. *See Liljeberg v. Health Servs. Acquisition Corp.,* 486 U.S. 847, 862 (1988) ("If we conclude that the requirements of § 455(f) were not satisfied, the second question is the proper remedy, which turns in large part on whether Judge Morgan's failure to disqualify himself was harmless error."). "As we explained in *Shell*, to determine whether vacatur is the appropriate remedy for a violation of § 455(b), we apply the harmless error analysis set forth by the Supreme Court in *Liljeberg*.

Under that test, "mandatory recusal does not require mandatory vacatur." *Shell*, 672 F.3d at 1293; *see also Williamson v. Ind. Univ.,* 345 F.3d 459, 464–65 (7th Cir. 2003) (finding vacatur "is not automatically justified" for a violation of § 455 "if [the] error was harmless"). Although *Liljeberg* involved a violation of § 455(a), it is now well-recognized that the harmless error analysis applies equally to violations of § 455(b). *See Centripetal,* 38 F.4th at 1034 (citations omitted).

"Under *Liljeberg*, there are three factors courts should consider when deciding whether to vacate a judgment: (1) 'the risk of injustice to the parties in the particular case'; (2) 'the risk that the denial of relief will produce injustice in other cases'; and (3) 'the risk of undermining the public's confidence in the judicial

process.'" *Centripetal,* 38 F.4th at 1034 (*citing* 486 U.S. at 864, 108).

Here, each of these factors weighs against a finding of harmless error in this case. Plainly, injustice has been done to Cellspin in the form of the District Court's clearly erroneous summary judgment orders. The denial of recusal and vacatur in these cases will allow an erroneous decision to stand, even in the face of bias.

Equally important is the fact that the public's confidence in the judicial process will be severely undermined if these facts are allowed to stand: a Silicon Valley Judge issuing favorable rulings to tech companies with whom the Judge has substantial financial interests cannot possibly result in anything less than public distrust in the process. This ruling cannot stand.

VIII. Recusal Is Appropriate For All Defendants And Vacatur Should Properly Follow.

Judge Gonzalez Rogers and Defendants Fossil Group, Nike, Nikon, Under Armour, and Garmin completely fail to address the fact that Judge Gonzalez Rogers <u>used the same rationale and reasoning for granting</u> MSJ for all defendants as documented in the <u>twenty plus</u> footnotes Cellspin cited directly from her dispositive Order that applied to all Defendants. (Appx0048). As such, recusal is appropriate and vacatur should properly follow. *See* 28 U.S.C. § 455(c); *Shell Oil Co. v. U.S.*, 672 F.3d 1283, 1289 (Fed. Cir. 2012); *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859 (1988*)*; *Centripetal*, 38 F.4th at 1033–34. Contrary to Defendants' argument, divesture applies

to the "financial interest" and not the related defendants.

In *Shell Oil*, the Federal Circuit addressed Defendants' argument. "Because the divestment exception set forth in § 455(f) applies only to divesting a financial interest in a party, and there is no indication that Congress intended to create an exception whereby a judge can sever or 'divest' certain parties from the case to resolve a conflict, we find Plaintiffs' argument is not well-taken. This is particularly true where, as here, there is substantial overlap with respect to the issues involved in the remaining parties' claims, and the matters had been considered jointly throughout the proceedings." *Id.*

Indeed, recusal for just Fitbit, without recusal in the other related patent infringement litigation would create undue harm to Cellspin and be seen as prejudicial by the public. These six (6) cases all involve the same patents, the same dispositive Summary Judgment Order of Non-Infringement that addressed all 6 (six) Defendants with a single order. This Court even consolidated the six (6) appeals on its own accord. And this Court denied Cellspin's motion to deconsolidate due to the "overlap" of issues that the Court itself identified.

If Judge Gonzalez Rogers is allowed to maintain jurisdiction over the other five (5) defendants, then like the district court in *Shell,* she would still not satisfy her statutory requirement to recuse herself under § 455(b). *See Shell Oil,* 672 F.3d at 1291 ("The judge's decision to *sua sponte* sever Texaco and Union Oil did not satisfy the statutory requirement of disqualifying himself from the entire proceeding.").

IX. Conclusion and Prayer for Relief

Cellspin has met its high burden of proving "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned," with any one of the four reasons stated and definitely in the collective. *See United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008) (citations and internal quotation marks omitted).

The District Court's erroneous Order Denying Recusal and Summary Judgment Order of Non-Infringement should both be reversed. These matters should be remanded to be assigned to a new judge for further proceedings and individual trials on the merits.

April 24, 2023

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REPLY BRIEF OF PLAINTIFF-APPELLANT (AUGUST 7, 2023)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CELLSPIN SOFT, INC.,

Plaintiff-Appellant,

v.

FITBIT LLC; NIKON AMERICAS, INC.;
and NIKON, INC.,

Defendants-Appellees.

No. 2023-1526

Appeal from the United States District Court
for the Northern District of California in case nos.
4:17-cv-05928-YGR and 4:17-cv-05936-YGR
Judge Yvonne Gonzalez Rogers

REPLY BRIEF OF PLAINTIFF-APPELLANT

August 7, 2023

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CERTIFICATE OF INTEREST

The undersigned counsel for the Plaintiff-Appellant certifies the following, pursuant to Federal Circuit Rule 47.4:

(i) The full name of every entity represented by me in this case is:

Cellspin Soft, Inc.

(ii) The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

(iii) All parent corporations and any publicly held companies that own 10 percent or more of the stock of the entity represented by me are:

N/A

(iv) The names of all law firms, partners, and associates that have not entered an appearance in the appeal, and (A) appeared for the

entity in the lower tribunal; or (B) are expected to appear for the entity in this court, are:

Collins Edmonds & Schlather, PLLC
John J. Edmonds
Shea N. Palavan
Brandon G. Moore

(v) Other than the originating case number(s), the title and number of any cases 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.

Cellspin Soft, Inc. v. Fitbit, Inc.
Federal Circuit Appeal 2022-2025

Cellspin Soft, Inc. v. Nike Inc.
Federal Circuit Appeal 2022-2028

Cellspin Soft, Inc. v. Under Armour, Inc.
Federal Circuit Appeal 2022-2029

Cellspin Soft, Inc. v. Fossil Group, Inc.
Federal Circuit Appeal 2022-2030

Cellspin Soft, Inc. v. Nikon Americas, Inc. Federal Circuit Appeal 2022-2032

Cellspin Soft, Inc. v. Garmin, Int'l, Inc.
Federal Circuit Appeal 2022-2037

Date: August 7, 2023 /s/ Randall Garteiser
Randall Garteiser

[TOC & TOA Omitted]

I. Brief Introductory Response

By way of its Red Opposition Brief, Fitbit goes to great lengths, and devotes a great number of pages, cheerleading the self-serving effort on the part of the District Court to explain away and justify its own failure to recuse itself in light of the unambiguous objective language of 28 U.S.C. § 455(a). Indeed, Fitbit's Red Brief spends virtually zero time discussing § 455(a), choosing instead to focus its energies on the subjective standards of § 455(b) and the technical maze through which plain and obvious substantial financial interests in Google (and Fitbit) are swept under the rug.

Nevertheless, and notwithstanding the fact that Cellspin offers substantial evidence establishing actual material financial conflicts among both Judge Gonzalez Rogers and her husband under § 455(b), the threshold facts giving rise to the reasonable doubt of impartiality under § 455(a) are not in dispute. As such, this Court must ensure that the fundamental purpose of § 455 is preserved and, as stated by the Supreme Court of the United States: "Justice must satisfy the appearance of justice." *Liljeberg v. Health Services Acquisition Corp.,* 486 U.S. 847, 864 (1988). Further to this point, Chief Justice Roberts has spoken on the need for the judiciary to self-regulate itself as a means of preserving its reputation of impartiality. In short, and absent effective internal checks and balances, it is foreseeable that Congress may enact strict limitations which will operate to undermine the independence of the judiciary. As such, the instant appeal is far bigger than just Cellspin being unhappy with a ruling.

From an objective standpoint, at the time Google filed notice with the District Court of the change in ownership of Fitbit, Judge Gonzalez Rogers should

have *sua sponte* recused herself or at the very least recused herself when her husband joined venture capital firm Ajax as an operating partner. She obviously failed to do so; now, Cellspin asks this Court on appeal to preserve public trust and deliver a clear message to the judiciary that if it looks this bad, recusal is the only proper response. Instead, the District Court went out of its way to label Matt Rogers as a mere independent contractor of Ajax. Of course, the only information available to the interested public shows otherwise; Matt Rogers was identified as a Director on the Board of Directors, a role important enough to the Ajax start-up that he is listed with Securities and Exchange Commission.

Being appointed for life is a privilege, not a right to never be questioned. Here, the District Court has literally and figuratively "moved the goal post" away from the objective to the subjective. In any event, the objective standard under § 455(a) is practically conceded by Fitbit and, as a result, there is no need to establish actual bias via discovery into the finances of Judge Gonzalez Rogers. The Court chose not to provide an updated financial disclosure as a means of obtaining a waiver from Cellspin. What is telling is that Google has had the opportunity to deny the substantial facts twice but it has not done so. No document of record includes any denial of any of the identified Ajax investments. Fitbit (Google) has not denied any of the five ongoing strategic partnerships with Ajax companies. Google has not denied that its investment are not tranche investments. Google has not denied McKinsey "sells" Google cloud services to McKinsey Oil and Gas clients. Google has not confirmed that the MIO Special Situation Fund does not hold any Google Stock. There

has been no declaration from Matt Rogers or from Google, and Judge Gonzalez Rogers has simply declared as fact the idea that Ajax has received no money from Google (a conclusion which is unsupported by the evidence of record).

The facts of this case, taken objectively, require recusal under § 455(a). Once established, this Court needs not further evaluate whether an actual financial interest exists in the Gonzalez Rogers household under Section 455(b).

II. Fitbit Cannot Overcome 28 USC § 455(a)

There is no serious effort on the part of Fitbit to argue that a "reasonable appearance of partiality" on the part of Judge Gonzales Rogers does not exist. This is the fundamental and overarching point of Cellspin's Recusal Motion, yet the District Court (and now Fitbit) redirects all attention and argument to a subjective standard which does not exist in § 455(a). Although obvious on its face, the Supreme Court has itself made clear that "[s]cienter is not an element of a violation of § 455(a)." *Liljeberg,* 486 U.S. at 859. As such, the details and technicalities which might otherwise escape the parameters of § 455(b) are immaterial to recusal in light of the "objective test based on public perception" of § 455(a). *U.S. v. Holland,* 519 F.3d 909, 913 (9th Cir. 2008) (describing the goal of § 455(a) as: "[T]o avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists") (*citing Liljeberg,* 486 U.S. at 860).

As to this point, Fitbit argues that satisfaction of the subjective bounds of § 455(b) precludes an objective question of impartiality under § 455(a). *See* Red Br. at 36-37 (discussing *Perry v. Schwarzenegger*, 630 F.3d 909 (9th Cir. 2011)). According to Fitbit, the Ninth Circuit has purportedly rejected the notion that recusal under § 455(a) can be proper if the technicalities of § 455(b) are otherwise satisfied. But such an application of *Perry* is incorrect, inasmuch as *Perry* itself relies on *Liteky v. U.S.,* 510 U.S. 540 (1994) and its discussion of the "extrajudicial source doctrine." In sum, both *Perry* and *Liteky* simply stand for the proposition that one cannot read § 455(a) to prohibit that which is otherwise expressly permitted under § 455(b). Of course, §§ 455(a) and (b) have different purposes and provisions, with § 455(a) mandating disqualification "in any proceeding in which impartiality might reasonably be questioned, and § 455(b) setting forth *additional circumstances* in which disqualification is mandatory, including personal bias or prejudice toward a party or personal knowledge of disputed evidentiary facts concerning the proceeding." *Ashley v. Moore,* 2023 WL 4247201 at * (C.D. Cal. June 15, 2023) (emphasis added). Stated differently, § 455(a) "covers circumstances that *appear* to create a conflict of interest, whether or not there is actual bias; § 455(b) covers situations in which an *actual* conflict of interest exists, even if there is no appearance of one." *Herrington v. Sonoma County,* 834 F.2d 1488, 1502 (9th Cir. 1987) (emphasis in original). Still further, § 455(b) "describes situations that create an *apparent* conflict, because it provides examples of situations in which a judge's 'impartiality might reasonably be questioned' pursuant to § 455(a)." *Id.* Yet still further, as the Ninth Circuit has recognized, a proper analysis under § 455(a)

requires an assessment of the *cumulative* effects of the known facts, even if *individually* not dispositive. *Sundby v. Marquee Funding Group,* 2023 WL 4281729 at *8 (S.D. Cal. June 29, 2023) (citing *United States v. Carey,* 929 F.3d 1092, 1104 (9th Cir. 2019)). The approach suggested by Fitbit turns § 455 on its head and effectively eliminates § 455(a) as superfluous.

Here, however, Cellspin makes no such impermissible argument. Again, and as set forth in Cellspin's Blue Brief, the publicly available known facts upon which an objectively reasonable person might question the impartiality of Judge Gonzalez Rogers under § 455(a) include at least the following: (i) Judge Gonzalez Rogers has at least a $9.4 Million, and as much as a $43 Million, investment in the Vanguard 500 Index Fund and Vanguard Total International Stock Index Fund; (ii) Judge Gonzalez Rogers has at least a $5 Million, and as much as a $25 Million, opaque investment in the MIO Special Situations Fund; (iii) Matt Rogers is an operating partner at Ajax Strategies; (iv) Google is part of a $700 Million investment in Ajax Strategies' portfolio companies; (v) multiple Ajax portfolio companies are directly funded by Google and/or have ongoing partnerships with Google; (vi) Matt Rogers was a senior partner at McKinsey for more than ten (10) years for its Oil and Gas clients, and sells Google services to such clients; and (vii) McKinsey has an ongoing business partnership and alliance with Google. *See* Blue Br. at 6-9.

First, *all* of these facts are established in the record, and *all* such facts are extrajudicial in nature. Indeed, Cellspin has not argued that Judge Gonzalez Rogers' adverse rulings alone warrant recusal, as such arguments (while relevant and illustrate the resulting

harm to Cellspin) are properly resolved on appeal rather than as a foundation for recusal. The fact that Cellspin relies upon publicly available information provides a proper source from which the "reasonable person with knowledge of all the facts would conclude that the Judge's impartiality might reasonably be questioned." *United States v. Holland*, 519 F.3d 909, 913 (9th Cir. 2008); *Preston v. United States*, 923 F.2d 731, 734 (9th Cir. 1991). Of course, the "reasonable person" is not someone who is "hypersensitive or unduly suspicious," but rather is a "well-informed, thoughtful observer." *Holland,* at 913. Moreover, and as the Supreme court recognized in *Liljeberg,* "The problem . . . is that people who have not served on the bench are often all too willing to indulge suspicions and doubts concerning the integrity of judges. The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the appearance of impropriety whenever possible. Thus, it is critically important in a case of this kind to identify the facts that might reasonably cause an objective observer to question [the Judge's] impartiality." *Liljeberg,* 486 U.S. at 864-65.

Second, Fitbit cites to no authority for the proposition that the District Court can supplement the factual record with its own personal subjective understandings and thereby substitute the knowledge of the "reasonable observer" with its own. In effect, the District Court erroneously applied a subjective standard to the objective rule set forth by § 455(a), thereby removing the "reasonable observer" from the equation entirely. Indeed, if the sitting Judge is herself the hypothetical "reasonable observer" upon whom the decision concerning perceived impartiality is placed,

then the public policy objectives of § 455 cannot be satisfied and the intentional distinctions as between § 455(a) and § 455(b) are erased. *United States v. Sierra Pacific Industries, Inc.,* 862 F.3d 1157, 1174 (9th Cir. 2017) ("The test for recusal under these provisions is an objective test based on public perception"); *see also* Advisory Opinion 82 (affirming application of the rule which is based solely on public perceptions and facts as known to the public at large, rather than non-public facts as may be known by the Judge: "The judge should not join an organization if the judge perceives there is any other ethical obligation that would preclude such membership. For example, if the organization takes public positions on controversial topics, association with the group might raise a reasonable question regarding the judge's impartiality. The judge should bear in mind that the public will normally be uninformed of any restriction or qualification that the judge may have placed on affiliation with the organization").

Third, and as noted *supra*, a proper analysis under § 455(a) requires an assessment of the *cumulative* effects of the known facts, even if *individually* not dispositive. *Sundby v. Marquee Funding Group,* 2023 WL 4281729 at *8 (S.D. Cal. June 29, 2023) (citing *United States v. Carey,* 929 F.3d 1092, 1104 (9th Cir. 2019)). Indeed, the oft-cited Advisory Opinions expressly affirm this view, inasmuch as they are premised on the principle that a totality of circumstances may require recusal, even if they might not do so if taken individually. *See, e.g.,* Advisory Opinion 58 ("although recusal may not be prescribed for participation by a relative who is an associate or non-equity partner, other circumstances may arise that in combination

with the relative's status at the firm could raise a question about the judge's impartiality and thereby warrant recusal"); *see also* Advisory Opinion 63 ("In the event that a decision in a pending case will not substantially affect a judge's interest in an amicus, the judge still must consider whether recusal is required because 'the judge's impartiality might reasonably be questioned'"); *see also* Advisory Opinion 67 ("A judge's determination whether to attend the seminar should be made considering the totality of the circumstances. If, in light of all the relevant factors, the judge concludes that there is a reasonable question concerning the propriety of attendance, the judge should not attend the seminar"). In sum, facts are not considered in a vacuum. Taken as a collective, and taken from the proper perspective of an ordinarily reasonable person, the facts as laid out by Cellspin are of the variety which result in a reasonable question of partiality on the part of Judge Gonzalez Rogers.

III. Fitbit Cannot Overcome 28 USC § 455(b)

Notwithstanding the foregoing, which establishes an abuse of discretion on the part of Judge Gonzalez Rogers in failing to recuse herself under § 455(a), the facts of record likewise require recusal under § 455(b).

A. The Vanguard Index Fund Is Not A Safe Harbor

In the District Court's view, which Fitbit very much applauds in its Red Brief, the status of the Vanguard Index Fund, in which Judge Gonzalez Rogers has invested upwards of $43 Million, is nothing more than a blind mutual fund. As such, according to the District Court and Fitbit, the so-called "safe harbor"

discussed in Advisory Opinion 106 applies and recusal is not strictly required. *See* Red Br. at 39-40. Of course, Fitbit reads Opinion 106 such that literally *any* self-titled "mutual fund" is fair game for a Silicon Valley Judge, notwithstanding the obvious fact that Opinion 106 is not black-and-white on this topic. Indeed, while "most" registered mutual funds nominally qualify as investment vehicles for most judges, Opinion 106 plainly contemplates a variety of exemplary scenarios in which recusal would be required.

Here, and as shown by Cellspin, the fund in question most resembles the exemplary "sector fund" discussed in Advisory Opinion 106 as requiring recusal. The facts here, which Fitbit overlooks, plainly reflect the fact that (notwithstanding its "diversified" title) the Vanguard Index Fund proudly promotes its massive, specific investments in certain leading tech companies. Of course, it is no surprise that the top 10 holdings of the Vanguard Index Fund comprise household names, as the public can readily see for itself:

Ticker	Holdings	Shares	Market value
AAPL	Apple Inc.	345,657,708	$44,911,306,000
MSFT	Microsoft Corp.	172,312,316	$41,323,939,623
AMZN	Amazon.com Inc.	205,158,250	$17,233,293,000
BRK.B	Berkshire Hathaway Inc. Class B	41,647,296	$12,864,849,734
GOOGL	Alphabet Inc. Class A	138,059,335	$12,180,975,127
UNH	UnitedHealth Group Inc.	21,597,731	$11,450,685,022
GOOG	Alphabet Inc. Class C	122,399,733	$10,860,528,309
JNJ	Johnson & Johnson	60,434,637	$10,675,778,626
XOM	Exxon Mobil Corp.	95,195,592	$10,500,073,798
JPM	JPMorgan Chase & Co.	67,801,810	$9,092,222,721

See Appx1295.

Transcription
Ticker – Holdings – Shares – Market Value
AAPL – Apple Inc. – 345,657,708 – $44,911,306,000
MSFT – Microsoft Corp. – 172,312,316 – $41,323,939,623
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In view of the forgoing, the notion that Judge Gonzalez Rogers' investment in Google (not to mention Apple) was anything other than known, substantial, and direct, is simply not credible. The Vanguard Index Fund is a glorified "sector fund" which holds, by its own admission, tens of millions of shares, worth billions of

dollars, in Apple, Google (Alphabet), Microsoft, and Amazon. While Fitbit assigns great weight to the purported diversification of the Fund, which is technically true, it is beyond dispute that more than 25% of the Fund is invested in the Information Technology sector (*see* Appx1294), with $23 Billion of that specifically earmarked for Alphabet (Google) stock alone (*see* Appx1295). These facts are certainly known by the "well informed, thoughtful observer," and an adverse judgment of the magnitude sought by Cellspin in the underlying District Court case would have a substantial adverse impact on the value of Judge Gonzalez Rogers' holding of those stocks via the Vanguard Index Fund. In light of these facts, the substantial investment of Judge Gonzalez Rogers in the Vanguard Index Fund is squarely within the improper bounds of § 455(b)(4) and/or § 455(b)(5)(iii). On this basis alone, recusal was the only proper result and, even if not technically required, such facts provide the basis for a reasonable question concerning Judge Gonzalez Rogers' partiality under § 455(a).

B. The Compass Special Situations Hedge Fund Is Not A Safe Harbor

In Fitbit's view, the tardy revelations and admissions offered by the District Court concerning its investment in the Compass Special Situations Fund exonerate Judge Gonzalez Rogers from any repercussions of the public disclosures of her substantial (as much as $25 Million) holding in the "McKinsey & Company Special Situations Aggressive Long-Term" fund. Assuming the proper name of the fund is the MIO Compass Special Situations Fund, the evidence of record nevertheless belies Fitbit's contention that the fund acceptably operates as a retirement mutual

fund. It plainly does not; rather, it is a hedge fund with unknown true holdings. *See* Blue Br. at 36-38.

As shown by Cellspin in its Blue Brief, the MIO Compass Special Situations Fund has been deemed by the Securities and Exchange Commission as neither a mutual fund nor a pension fund or a 401k fund. *See* Blue Br. at 35. Moreover, Fitbit's argument that no component of the MIO Compass Special Situations Fund is traded in individual stocks is directly contradicted by the evidence cited by Cellspin in its Blue Brief. More specifically, Cellspin points out that approximately ten percent of the Fund is, in fact, unregulated securities. *See* Blue Br. at 36-38.

The result of this factual mess is simply the following:

(i) Judge Gonzalez Rogers owns a substantial (as much as $25 Million) holding in an opaque hedge fund, of which approximately ten percent is in the form of unknown securities;

(ii) The public has zero idea what Judge Gonzalez Rogers actually owns;

(iii) The hedge fund purportedly owned by Judge Gonzalez Rogers does not fall under any of the "Safe Harbor" provisions of § 455(d)(4) as discussed in Advisory Opinion 106;

(iv) Rather than properly identifying the MIO Compass Special Situations Fund in her required financial disclosures, Judge Gonzalez Rogers instead (incorrectly) identified the "McKinsey & Company Special Situations Aggressive Long-Term" fund; and

(v) To this day, the only persons with knowledge of the securities owned by the MIO Compass Special Situations Fund are the investors themselves via performance statements and the like.

The foregoing facts give rise, in Cellspin's view, to recusal under § 455(b)(4). Nevertheless, and contrary to the positions taken by Fitbit in its Red Brief, the focus of Cellspin's argument here is not on § 455(b), but rather on § 455(a). *See* Blue Br. at 40. Again, it is the cumulative effect of the foregoing facts which must properly be weighed. The well-informed and thoughtful objective observer, armed with the facts of record, would reasonably call into question the impartiality of Judge Gonzalez Rogers. Because "justice must satisfy the appearance of justice," recusal here was the proper and correct result.

IV. The Google Business Relationship Is Dispositive

The District Court, and now Fitbit, each refuse to appreciate the facts surrounding the unmistakable business ties between Matt Rogers (via Ajax) and Google, the parent company of Defendant Fitbit. Under any reasonable standard, the Rogers/Google relationship satisfies the "financial interest" element of § 455(b), and recusal was required on the part of Judge Gonzalez Rogers under at least § 455(b)(4). Moreover, even if there is no technical "business relationship" within the scope of § 455(d)(4), the preclusive reach of § 455(b)(4) is not so limited. Of course, the same facts plainly establish a basis to reasonably question the impartiality of Judge Gonzalez Rogers, such that

recusal should have alternatively been issued in accordance with § 455(a).

A. The Ajax Relationship With Google Requires Recusal

In its Red Brief, Fitbit argues that there is no statutory "financial interest" because there is no "direct relationship" between Fitbit (or Google) and Matt Rogers. *See* Red Br. at 27-29. Of course, there is no denial of the fact that Google, with others, has invested a tremendous sum of money ($700 Million) specifically in the Ajax Strategies Portfolio companies. There is likewise no denial of the facts establishing the ongoing strategic relationship among various Ajax companies and Google specifically. *See* Blue Br. at 21-23 (summarizing evidence). There is further no denial of the fact that Cellspin's recusal argument relies on § 455(b)(4) and/or § 455(a) – not merely just § 455(b)(5)(iii) alone. *See* Blue Br. at 24 (focusing argument on the fact that Matt Rogers "has a financial interest in maintaining Google as an investor in Ajax") and *id.* at 20 (focusing argument on reasonable question of judge's impartiality). Nevertheless, Fitbit relies almost exclusively on Advisory Opinion 107 which, by its own terms, has *nothing* to do with either § 455(b)(4) or § 455(a). Indeed, Opinion 107 cautions: "This opinion does not address situations described in Canon 3C(1)(c) [*e.g.,* § 455(b)(4)]." Rather, Opinion 107 is limited to specific client and service provider scenarios. *See* Advisory Opinion 107 ("This opinion addresses two particular forms of business relationships: (1) client relationships . . . , and (2) service provider relationships").

Properly viewed, the facts here require recusal under § 455(b)(4), given the following: (i) Matt Rogers obviously qualifies as the spouse of Judge Gonzalez Rogers; (ii) the Ajax-Google business relationship is longstanding and substantial (in both financial and technological terms); and (iii) an adverse judgment of the magnitude sought by Cellspin in the underlying District Court case would have a substantial affect on such business relationship.

Still further, and in the alternative, Advisory Opinion 106 itself recognizes the fact that spousal business relationships, even if outside the strict parameters of § 455(b), nevertheless may force recusal whenever the totality of the circumstances allow the judge's impartiality to be reasonably questioned. *See* Advisory Opinion 106. Such is the case here.

The tangential arguments offered by Fitbit in its Red Brief do not avoid recusal under the proper statutory sections as discussed above. In any event, Fitbit's main argument – a purported absence of any "direct business relationship" – is itself incorrect. Distilled to its core point, Fitbit characterizes the Google/Ajax relationship as merely "attenuated," an argument repeated by Fitbit throughout its Red Brief. By way of reply, Cellspin points out the obvious fact that there is nothing "attenuated" about a $700 Million investment (which stands unrebutted), nor are the multiple strategic partnerships between Google and the Ajax companies subject to whitewashing as Fitbit seeks to do. Rather, and as illustrated by Cellspin, each partnership was announced in press releases and/or blog posts by the Ajax companies themselves; this fact illustrates how *non-attenuated* the Google relationships were (and are) *from the perspective of*

Ajax. It is of no moment how important the relationships might be to Google for purposes of assessing disqualification. Of course, the fact that Google is large enough to casually invest hundreds of millions of dollars and enter into multiple strategic partnerships with tech start-ups is precisely what makes the relationship so critically important to Ajax and Matt Rogers. Stated differently, the fact that Google might have a lot of money to invest in many different companies (*see* Red Br. at 30-31) has *nothing* whatsoever to do with recusal, inasmuch as § 455(b)(4) is concerned with the impact on Matt Rogers' interests – not those of Google.

B. The McKinsey Relationship With Google Requires Recusal

The facts of record establish a clear financial relationship between McKinsey and Google and, more specifically, between Matt Rogers and Google. The District Court, and now Fitbit, each attempt to explain away this relationship by mischaracterizing it as a mere low-level use of off-the-shelf technology. Of course, the evidence illustrates otherwise, and such a relationship requires automatic recusal under these facts.

Here, the facts are not at all analogous to that of a traditional bank/customer relationship. Rather, and as explained by Cellspin in its Blue Brief, Matt Rogers uses his position to sell Google services to his own oil and gas clients. Similarly, the facts here are plainly not limited to a situation in which Matt Rogers simply uses off-the-shelf Google email. Again, the unrebutted facts as laid out by Cellspin in its Blue Brief plainly illustrate that Matt Rogers sells Google Cloud Services for profit to his own oil and gas clients. Moreover, one

aspect of his ongoing employment is founded upon such sales, and Advisory Opinion 107 does not address such a scenario. To the extent Fitbit argues that Cellspin is somehow shifting the burden on the district court judge, a plain reading of Cellspin's allegations proves otherwise. In its Recusal Motion, and again in its Blue Brief, Cellspin simply points out the known facts. To the extent Judge Gonzalez Rogers must consider the implications of those facts, it is not because of a burden shifting maneuver on the part of Cellspin.

V. The District Court's Jurisdiction

The District Court discussed jurisdiction before ultimately authoring and entering its Order as an indicative ruling pursuant to FRCP 62.1. *See* Order at Appx0006. In the process, the District Court deemed itself procedurally unable to vacate the Summary Judgment Order, given the prior filing of Cellspin's Notice of Appeal to this Court (now docketed as Appeal Numbers: 22-2025, 22-2028, 22-2029, 22-2030, 22-2032, and 22-2037). Nevertheless, the District Court's Order stands as both an outright denial of recusal and an indicative ruling concerning vacatur. For its part, Fitbit now urges this Court to affirm the District Court's indicative conclusions as to its procedural inability to vacate the summary Judgment Orders. *See* Fitbit Red Br. at 20-21.

Cellspin's Motion to the District Court sought recusal under § 455, which was not impacted by the status of the Summary Judgment Appeals. *See e.g. Williams v. Woodford,* 384 F.3d 567, 586 (9th Cir. 2004) (*citing Scott v. Younger*, 739 F.2d 1464, 1466 (9th Cir.1984). As such, the District Court maintained

jurisdiction from which to rule on Cellspin's Motion, and this fact is uncontested. To the extent Fitbit seeks to preclude a finding of an abuse of discretion based upon the District Court's failure to vacate its erroneous Summary Judgment Orders, Cellspin has not raised that issue in this appeal. Rather, and as set forth in Cellspin's Blue Brief (*see* Statement of the Issues at 3-4), Cellspin only appeals the District Court's failure to grant recusal. Upon reversal of the District Court's erroneous denial of recusal, Cellspin seeks remediation in the form of vacatur of the Summary Judgment Orders. *See* Blue Br. at 56-59.

VI. Cellspin's Recusal Motion Was Timely

The District Court, and now Fitbit, offers up the extreme theory that Cellspin somehow intentionally waited to unleash the Recusal Motion on the Court as part of an elaborate "strategy" of "gamesmanship" to escape from under Judge Gonzalez Rogers' foreseeable grant of summary judgment in favor of Defendants, and thereby gain for itself a "second bite at the apple." *See* Red Br. at 22-24; *see also* Order at Appx0008-Appx0009. Of course, such allegations are rejected by Cellspin and do not merit extended discussion. Suffice to say that there is *zero* logical strategic basis for a patentee to "sit on its hands" while a conflicted judge destroys a case it has spent the better part of six years litigating, and certainly Cellspin did not do that here.

As to the actual merits, Fitbit argues that Cellspin should have filed its Recusal Motion in 2021. *See* Fitbit Red Br. at 22. Otherwise, Fitbit argues that the six-month period following the *Centripetal* opinion and the filing of the Recusal Motion is unreasonable (again, because of Cellspin's purported "strategic

decision" to delay filing). *See id.* at 23-24. For its part, Fitbit takes the position that all pertinent facts were (or should have been) known to Cellspin prior to the date of the summary Judgment Motion; as such, Cellspin's Recusal Motion is necessarily untimely. *See id.* at 24-26.

By way of reply, Cellspin redirects the Court to Cellspin's Blue Brief, which discusses this issue in detail. *See* Blue Br. at 18-19. As a threshold matter, the District Court *did not* deny Plaintiff's Motion as untimely; rather, the District Court expressed its frustrations with the timing, declared that Cellspin's Motion "can be denied" on that basis, yet proceeded to rule on the merits. *See* Order at Appx0009 and Appx0018. As such, there is nothing for this Court to affirm in relation to purported untimeliness, and the language cited by Fitbit is mere dicta.

In any event, Cellspin did not unreasonably delay in filing its Recusal Motion. As noted in Cellspin's Blue Brief, the facts pertaining to Matt Rogers' status as an Ajax Operating Partner were not known until at least November 2022, and Fitbit makes no showing that such information was publicly available at an earlier date. Further, and as even Fitbit's own caselaw citations illustrate, there is no *per se* timeframe in which a § 455 Motion must be brought; rather, reasonable filings can potentially be made up to 18 months after initial knowledge. *See United States v. Rogers,* 119 F.3d 1377, 1380-82 (9th Cir. 1997). With respect to the *Certripetal* decision, which Fitbit erroneously characterizes as irrelevant (*see* Red Br. at FN. 6), Cellspin has pointed out that the discussion concerning blind trusts in that case was pertinent to its investigation. *See* Blue Br. at 19. Of course, even if not

directly on point, the concepts relating to blind trusts was plainly analogous to the facts discovered concerning Judge Gonzalez Rogers, and the *Centripetal* opinion was cited repeatedly by Cellspin in its Recusal Motion. *See* Appx0023-Appx0024, Appx0042, and Appx0046. Only in November 2022 were the pertinent facts concerning Matt Rogers' relationship with Google, together with the news concerning Google investments in Ajax companies, known to Cellspin. Of course, Cellspin collected evidence and prepared the moving papers for filing over the holiday season for eventual submission in early January 2023. Accordingly, even if the District Court had actually denied Cellspin's Motion as untimely, this Court would be correct in reversing such a holding.

VII. Failure to Vacate Is Plainly Not Harmless Error

Fitbit argues that the failure on the part of the District Court to vacate its erroneous Summary Judgment Order is a mere harmless error. *See* Fitbit Red Br. at 52. Of course, Cellspin vehemently disagrees with this suggestion, and the pertinent facts make it abundantly clear that the error was harmful to Cellspin.

First, "the risk of injustice to the parties in the particular case" weighs in favor of vacatur. As a threshold matter, Fitbit is incorrect in its assertion that everything in the Order will be reviewed *de novo* on appeal by this Court. *See* Fitbit Red Br. at 52. As argued by Cellspin in its Opening Brief in the Summary Judgment Appeal, the error on the part of Judge Gonzalez Rogers in finding that Cellspin offered "a different infringement theory" involving "OAuth" tokens was an error amounting to an abuse of discretion. This

same issue applies with respect to multiple Defendants in the underlying litigation, and to all such Defendants on appeal. *See, e.g.,* Dkt. No. 38 (Cellspin Opening Brief) in CAFC-22-2025, excerpted below:

> **5. "USER IDENTIFIER" OR "USER INFORMATION"[9]**
>
> With respect to the claimed "user identifier" and "user information" limitations, the District Court erred in finding that Cellspin offered "a different infringement theory" involving "OAuth" tokens, which it found to be a so-called "improper new theory" in violation of Local Patent Rule 3-1(c). Appx0047-49 at 17:7-19:3]. Because the District Court's error amounted to an abuse of discretion, the Order should be reversed. *Hinton v. Pacific Enters.*, 5 F.3d 391, 395 (9th Cir. 1993).
>
> [9] This error impacts all Asserted Claims of the '794 and '752 Patents.

Transcription

5. USER IDENTIFIER" OR "USER INFORMATION"9

With respect to the claimed "user identifier" and "user information" limitations, the District Court erred in finding that Cellspin offered "a different infringement theory" involving "OAuth" tokens, which it found to be a so-called "improper new theory" in violation of Local Patent Rule 3-1(c). Appx0047-49 at 17:7-19:3]. Because the District Court's error amounted to an abuse of discretion, the Order should be reversed. *Hinton v. Pacific Enters.*, 5 F.3d 391, 395 (9th Cir. 1993).

9 This error impacts all Asserted Claims of the '794 and '752 Patents.

Of course, the existence of certain issues to be heard on an abuse of discretion standard on appeal across all cases, as opposed to *de novo,* weighs heavily in favor of vacatur. Likewise, Fitbit suffers no injustice, and fails to identify any in its Red Brief.

Second, the "risk that the denial of relief will produce injustice in other cases" also weights in favor of vacatur. For its part, Fitbit focuses on the other Defendants to the District Court action, but none of those parties is a patent plaintiff with an expiring asset (namely, the Asserted Patents) in the same manner as Cellspin. In any event, the Summary Judgment Order relies upon essentially identical reasoning throughout, and this Court rejected Cellspin's Motion to Deconsolidate the pending appeals. *See* Dkt. No. 33 (Order Denying Motion to Deconsolidate) in CAFC-22-2025.

Third, "the risk of undermining the public's confidence in the judicial process" also requires vacatur. Plainly, the public can only be confident in rulings which are not tainted by bias, or by the question of partiality. To the extent Fitbit argues of a "chilling effect on judges and their spouses," such dire prediction is not fixed in reality. There are scarce numbers of judges (if any) with tens of millions of dollars available to invest in improper funds, and even fewer who are married to a venture capitalist having substantial business dealings with patent-infringing leading tech companies. Rarer still is the District Court Judge who meets these criteria *and* sits in Silicon Valley where these facts actually matter and these defendants are commonly hailed into Court. In any event, there is nothing wrong with "chilling" judges from investing in funds which are widely known to comprise substantial

holdings in specific tech sector stocks, such as Apple and Google. If these three risk factors justify recusal, and they do, then the simple act of voluntary recusal in the first instance is all that is required to maintain the public's confidence while preserving scarce judicial resources.

VIII. Defendant Nikon Is a Proper Appellee

Separately, Defendant-Appellee Nikon has filed its own Response in which it seeks to altogether avoid appellate review of the erroneous Recusal Order. *See* Nikon Red Brief [Dkt. No. 32]. Nikon's argument elevates form over substance, given the fact that the Notice of Docketing as filed in the Nikon District Court case plainly identifies *both* the Fitbit Cause Number (4:17-cv-05928) *and* the Nikon Cause Number (4:17-cv-05936) as the Originating Cases. *See* Dkt. No. 387 in 4:17-cv-05928, excerpted below:

February 22, 2023

NOTICE OF DOCKETING

Federal Circuit Docket No.: 2023-1526

Federal Circuit Short Caption: Cellspin Soft, Inc. v. Fitbit LLC

Date of Docketing: February 22, 2023

Originating Tribunal: United States District Court for the Northern District of California

Originating Case No.: 4:17-cv-05928-YGR, 4:17-CV-05936-YGR

Appellant: Cellspin Soft, Inc.

Transcription

February 22, 2023

NOTICE OF DOCKETING

Federal Circuit Docket No.: 2023-1526

Federal Circuit Short Caption: Cellspin Soft, Inc. v. Fitbit LLC

Date of Docketing: February 22, 2023

Originating Tribunal: United States District Court for the Northern District of California

Originating Case No.: 4:17-cv-05928-YGR, 4:17-CV-05936-YGR

Appellant: Cellspin Soft, Inc.

Of course, the above referenced Notice of Docketing appears in *both* dockets below, including as Docket No. 261 in the Nikon action (4:17-cv-05936).

The Notice of Appeal as filed by Cellspin plainly identified the subject of the instant appeal as: "[T]he order entered on February 15, 2023 (Docket No. 376) for recusal under Section 455 and vacatur of the district court's Summary Judgment Order (Docket No. 331/332)." *See* Dkt. No. 377 in the Fitbit action (4:17-cv-05928), excerpted below:

1 Pursuant to Rules 3 and 4 of Federal Rules of Appellate Procedure and Title 28 U.S.C. §
2 1295(a)(1), notice is given that Plaintiff Cellspin Soft, Inc. ("Cellspin"), appeals to the United States Court
3 of Appeals for the Federal Circuit the following:
4 (1) the order entered on February 15, 2023 (Docket No. 376) for recusal under Section 455 and vacatur of
5 the district court's Summary Judgment Order (Docket No. 331/332).
6 This is a separate and secondary appeal in this case. The initial appeal pertained to the district
7 court's Summary Judgment Order, *et al.* filed on July 13, 2022 (Docket No. 346).
8 This Notice of Appeal is related to consolidated case 22-2025 currently pending before the United
9 States Court of Appeals for the Federal Circuit entitled *Cellspin Soft, Inc. v. Fitbit, LLC.*

Transcription

Pursuant to Rules 3 and 4 of federal Rules of Appellate Procedure and Title 28 U.S.C. § 1295(a)(1). notice is given that Plaintiff Cellspin Soft, Inc. ("Cell spin"), appeals lo the United States Court of Appeals for the Federal Circuit the following:

(1) the order entered on February 15, 2023 (Dock.et No. 376) for recusal under Section 455 and vacatur of the district court's Summary Judgment Order (Docket No. 331/332).

This is a separate and secondary appeal in this case. The initial appeal pertained to the district court's Summary Judgment Order, et al. filed on July 13, 2022 (Docket No. 346).

This Notice of Appeal is related to consolidated case 22-2025 currently pending before the United States Court of Appeals for the Federal Circuit entitled *Cellspin Soft. Inc. v. Fitbit, LLC.*

The Order itself was attached to the Notice, and its heading unequivocally includes *all* District court case numbers, and specifically including that of Nikon (4:17-cv-05936), as excerpted below (*see* Appx0001):

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA	
CELLSPIN SOFT, INC., Plaintiff, vs. FITBIT, INC.,	ORDER DENYING MOTION FOR RECUSAL PURSUANT TO SECTION 455 Case No. 4:17-CV-05928-YGR
NIKE, INC.,	Case No. 4:17-CV-05931-YGR
UNDER ARMOUR, INC.,	Case No. 4:17-CV-05932-YGR
FOSSIL GROUP, ET AL.,	Case No. 4:17-CV-05933-YGR
GARMIN INTERNATIONAL, INC.,	Case No. 4:17-CV-05934-YGR
NIKON AMERICAS, INC., ET AL., Defendants.	Case No. 4:17-CV-05936-YGR

Transcription

Order Denying Motion for Recusal Pursuant to Section 455

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CELLSPIN SOFT, INC.,

Plaintiff,

v.

FITBIT, INC.,

NIKE, INC.,

UNDER ARMOUR, INC.,

FOSSIL GROUP, ET AL.,

GARMIN INTERNATIONAL, INC.,

NIKON AMERICAS, INC., ET AL.,

Defendants.

Case No. 4:17-CV-05928-YGR

Case No. 4:17-CV-05931-YGR

Case No. 4:17-CV-05932-YGR

Case No. 4:17-CV-05933-YGR

Case No. 4:17-CV-05934-YGR

Case No. 4:17-CV-05936-YGR

Still further, *both* the originating Motion for Recusal and the Order Denying Recusal each clearly concerned *all* Defendants, and the Order was filed in the dockets of *all* cases, notwithstanding the fact that the Motion was only filed in the lead Fitbit case. As if there were any doubt, the Motion itself expressly requested recusal "from the Google (Fitbit, Inc.) litigation, *and its related cases*." *See* Appx0019 and Appx0022.

There is zero argument from Nikon that it was not fully aware of the fact that Cellspin was appealing the Order as to both Fitbit and Nikon, and it has suffered zero prejudice from the technical failure to file the identical Notice of Appeal in both dockets. Because the original Motion for Recusal was filed only in the Fitbit docket to be applied across all related cases (including Nikon), and further because the District Court's Order was filed across all related cases (even though the Motion was only filed in Fitbit), the parties

were all on notice of the fact that the omnibus Motion and Order were tendered as to each individual Defendant in each individual cause.

Here, of course, Nikon's awareness of the appeal and of the underlying facts is illustrated and confirmed by the following: (i) Nikon filed a timely Red Brief; (ii) Nikon has not moved to dismiss this appeal; (iii) Nikon has expressed its agreement with the arguments as set forth by Fitbit in its Response Brief. *See* Nikon Red Br. at 1. Nikon's argument should be rejected.

August 7, 2023

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