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FRCP 45 Does Not Apply to the Court's Lit-Funding Orders That Were Reasonable and Within the Court's Inherent Authority

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On July 16, 2024, the Federal Circuit affirmed both the *sua sponte* order issued by the District of Delaware requiring Lori LaPray, the purported owner of all of the plaintiff LLCs created by the patent monetization firm, IP Edge, and affiliated consulting firm, Mavexar, to appear in-person for testimony and the subsequent order of monetary sanctions for her failure to appear, on the grounds that these orders were not an abuse of discretion and within Chief Judge Connolly's inherent authority under Fed. R. Civ. P. 83(b). *See Backertop Licensing v. Canary Connect*, No. 23-2367 (Fed. Cir. July 16, 2024).

Shortly after issuing his controversial standing order requiring parties receiving non-recourse-based litigation funding to identify the third-party funders, Judge Connolly began investigating potential attorney and party misconduct in connection with twelve patent cases filed in Delaware by Backertop Licensing LLC in 2022. Concerned that the real parties in interest were being concealed from the court by virtue of arrangements in which limited liability shell companies were created and assigned patents for litigation with outside individuals recruited to serve as sole owners while undisclosed third-party funders directed the litigations and retained rights to the majority of royalties and settlement proceeds, Judge Connolly held evidentiary hearings and ordered the plaintiff LLCs and their counsel to provide documents underlying these transactions. The Federal Circuit denied the petition for mandamus challenging these inquiries filed by one of the plaintiff shell entities. *See In re Nimitz Techs. LLC*, 2022 WL 17494845, at *2-3 (Fed. Cir. Dec. 8, 2022) (confirming the district court's inherent

authority to seek information related to conduct of the parties or to aspects of proper practice before the court).

In addition to acting as the sole owner of Backertop, Ms. LaPray was also the managing member of six other LLCs that have filed ninety-seven patent infringement cases in various federal district courts. Following the denial of the mandamus petition, Backertop moved to set aside Judge Connolly's document production order, arguing that it sought privileged information and exceeded the court's jurisdiction, and also filed a joint stipulation of dismissal of the underlying patent litigation. Backertop's local counsel thereafter filed a motion to withdraw, which Backertop opposed. Judge Connolly denied Backertop's motion to set aside the production order and set a hearing at which Ms. LaPray and counsel of record for Backertop were ordered to attend in person. Despite having attended a previous hearing in Delaware a few months earlier, Ms. LaPray notified the court that she was unable to attend the scheduled hearing in person as ordered and generally unavailable "through the entire summer" and could not travel to Delaware "in the foreseeable future." The court denied Ms. LaPray's request to appear remotely, and after her failure to appear at a show cause hearing on why she should not be held in civil contempt, Judge Connolly imposed a fine of $200 per day until Ms. LaPray appeared in person in court. Since the original opposing parties had been dismissed from the case, the Federal Circuit appointed amicus curiae counsel to represent the district court's position in the appeal of the district court's orders filed by Backertop and Ms. LaPray.

Applying the law of the Third Circuit as a procedural matter not unique to patent issues, the Federal Circuit determined that even though Ms. LaPray qualified as a non-party witness for purposes of this appeal, the requirements of Fed. R. Civ. P. 45, including the 100-mile geographical limit, did not apply here. Despite rejecting the district court's finding that Backertop waived its FRCP 45 argument, the Federal Circuit held, on the merits, that none of the restrictions of Fed. R. Civ. P. 45 applied to the court's own orders to appear, issued without a request from a party or attorney. With respect to the contempt order, the Federal Circuit noted that Backertop and Ms. LaPray did not argue that the district court's order to appear was otherwise unreasonable or an abuse of discretion, but even if they had, the order "was a reasonable response to the problems and needs confronting the court's fair administration of justice."

> **"Reading FRCP 45 as a whole, we conclude that none of these requirements apply to a court's own order compelling a witness to appear. As a result, neither do the geographic limitations in FRCP 45(c)(1), contrary to Appellant's arguments. We hold that FRCP 45 governs party- and attorney-initiated subpoenas only.... Because the District Court was within its inherent authority to order Ms. LaPray to appear before it to investigate fraud on the court, and the order imposing monetary sanctions when she did not appear was not an abuse of discretion, we affirm."**

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