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Federal Judge Issues Scathing Rebuke Of Patent Trolls

By **Rob Maier**
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A recent order from Chief Judge Colm Connolly in the U.S. District Court for the District of Delaware may serve as a warning for "patent trolls"—the derogatory term used to describe companies whose sole function is to acquire and then assert patents, often in cases that are questionable on the merits—against filing cases in Delaware going forward.

On Nov. 27, 2023, Connolly issued a scathing 105-page order detailing his inquiry into plaintiffs Nimitz Technologies LLC (Nimitz), Mellaconic IP LLC (Mellaconic) and Lamplight Licensing LLC (Lamplight), three limited liability companies (LLCs) set up as shell companies in a scheme orchestrated by IP Edge LLC (IP Edge), a self-proclaimed patent monetization firm, to purportedly skirt legal liabilities.

Ultimately, in Connolly's opinion, he referred the attorneys of record for each of the plaintiffs in the cases to their respective bar association's disciplinary counsel, and also referred the individuals associated with IP Edge and its affiliate Mavexar LLC (Mavexar) to the Texas Supreme Court's Unauthorized Practice of Law Committee. *Nimitz Technologies v. CNET Media*, No. CV 21-1247-CFC, 2023 WL 8187441, at *1 (D. Del. Nov. 27, 2023).

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What Is a Patent Troll?

Patent trolls, otherwise sometimes referred to as patent assertion entities (PAEs) or non-practicing entities (NPEs), have become a fact of life in modern U.S. patent litigation. Whether individuals or entities, they essentially have the sole function of acquiring patents for the purpose of weaponizing them against alleged infringers with legal action, in an effort to collect licensing fees.

Patent trolls are not involved in research, developing, manufacturing or even supply of any products that use the underlying patents. Instead, their business hinges on litigation or the threat of litigation, often times using as a lever the high cost of patent litigation defense, such that even a company with the most meritorious defenses against the patent infringement charges may as a pragmatic business decision opt to pay a smaller amount to settle the dispute, rather than paying a larger amount in legal fees to prevail.

The derogatory "patent troll" nomenclature is most often used in cases where the patent holder files suit

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even though it has no reasonable case on the merits, but has filed the case knowing that, as a practical matter, it will never reach trial, and will be resolved long before that given the comparatively small amount demanded in settlement. The business model has frequently drawn fire as being nothing more than a typical "shakedown." *See, e.g.,* "CEOs tell Congress: Patent trolls are giving us the shakedown," Fortune, March 26, 2015.

Connolly's Revelations

In a memorandum order in *Nimitz Technologies v. CNET Media*, dated Nov. 10, 2022, Connolly required all three LLC plaintiffs to provide the court with further information detailing each of their communications with well-known patent monetization entities IP Edge and Mavexar. *Nimitz Technologies v. CNET Media*, No. CV 21-1247-CFC, 2023 WL 8187441 (D. Del. Nov. 27, 2023). Concerned that the LLCs were fraudulently shielding their association and financial relationships with IP Edge and its related entities, the court demanded and reviewed in detail information regarding each of the plaintiffs, including the authenticity of their formation, assets held, sophistication of associated individuals and their "fictitious" patent assignments with the U.S. Patent and Trademark Office (PTO).

The derogatory "patent troll" nomenclature is most often used in cases where the patent holder files suit even though it has no reasonable case on the merits, but has filed the case knowing that it will never reach trial.

Through a number of evidentiary hearings, the court came to learn that Nimitz filed a total of 11 cases in which it claimed to have an office address in Texas, which turned out to be a Federal Express drop box. One of the LLCs, Mellaconic, filed a whopping 44 patent infringement cases claiming an address in Texas, which similarly turned out to be an iPostal drop box. Similarly, Lamplight filed six cases with the address on file also being an iPostal drop box. Through discovery it was revealed that the same individual, Linh Deitz, an employee of IP Edge, filed certificates of formation with the Texas Secretary of State on behalf of all three entities.

When Nimitz's sole owner and member, Mark Hall, was asked routine questions regarding the patent Nimitz owned, he was unable to describe the title or the underlying technology, and could not explain how he came to own it despite not making any payment in exchange. Similarly, when Mellaconic's sole owner and member, Hau Bui, was questioned regarding the assets of Mellaconic, he replied that he "[hadn't] really looked over them" and struggled to answer any questions regarding the subject matter.

Lamplight's counsel appeared to never have been in contact with Sally Pugal, Lamplight's sole owner and member, until *after* Connolly ordered both to appear in person for an evidentiary hearing; nor did Lamplight's counsel inform Pugal prior to filing cases on Lamplight's behalf. Notably, despite repeated requests through a series of text messages and emails from individuals from IP Edge to attend the hearings in person, Pugal was not in attendance, citing health-related issues.

The court concluded that "IP Edge strove to maintain a separation between the nominal owners of the plaintiff LLCs and the lawyers who filed cases on behalf of those LLCs." It thus shed light on the relationship between these plaintiff LLCs and the individuals designated as their proxies, apparently to shield their identities from the court.

Model Rules of Professional Conduct

The American Bar Association's Model Rules of Professional Conduct (Model Rules) codify lawyers' moral and fiduciary duties to their clients. In addition to the court's finding that the plaintiffs here made fraudulent misrepresentations, it also identified multiple of the Model Rules that each of the respective plaintiffs' counsel had violated during the course of

their representations. Particularly, Rule 1.2(a) provides that a "lawyer should abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued." Model Rules of Professional Conduct r. 1.2 (American Bar Association, 1983).

Further, Rule 1.4 provides that a lawyer shall "promptly inform the client of any decision or circumstance with respect to which the client's informed consent…is required by these Rules" and a lawyer shall "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Model Rules of Professional Conduct r. 1.4 (American Bar Association, 1983).

The court found that "counsel violated both Rule 1.2(a) and Rule 1.4 by failing to have any communication with their clients before filing, settling and dismissing the clients' cases." *Nimitz Technologies v. CNET Media*, 2023 WL 8187441, at *30. All counsel were found to have filed and subsequently moved to dismiss cases without having communicated with any of the sole owners of the LLCs.

Connolly noted that "[counsel's] relationship with IP Edge and Mavexar and their failure to fulfill their fiduciary duties is especially concerning because of the obvious disparity in the sophistication of the LLC plaintiffs as opposed to Mavexar and IP Edge. That disparity was readily apparent from Mr. Bui's testimony at the Nov. 4, 2022, hearing. It can also be seen in the text message exchanges between Ms. Pugal and Ms. Deitz."

Unauthorized Practice Of Law and Potential Violations of Federal Law

The court also highlighted that, as Texas entities, IP Edge and Mavexar are subject to the Texas Penal Code, under which individuals can be criminally prosecuted for the unauthorized practice of law. It identified multiple individuals employed by IP Edge that engaged in such practice, and referred them to the Texas Supreme Court's Unauthorized Practice of Law Committee.

The court also explained that federal law requires any assignments with the PTO to be true and accurate, and that a violation of that law constitutes a misrepresentation to the federal government. Although the court did not opine on whether IP Edge's filing of assignments with the PTO violated the PTO's rules, it expressed that it was "appropriate to bring these matters to the attention of the PTO and the Department of Justice to allow them to conduct further inquiry into whether the PTO's rules or §1001 were violated. The Department may also deem it appropriate to investigate whether the strategy employed by IP Edge to hide from the defendants in these cases and the court real parties in interest…violated any federal laws."

Ultimately, Connolly concluded that "[the plaintiff's attorneys] loyalty was not to their clients, but rather to IP Edge."

Conclusion

The court's investigation and analysis in this case stands as maybe the most in depth and detailed publication of what have become all-too-common practices in modern patent litigation. In the end, the court's opinion presents a cautionary tale to those patent plaintiffs engaged in such conduct—and will assuredly result in certain patent plaintiffs thinking twice about filing cases in Delaware.

And, to the extent Connolly's approach becomes more widely adopted, the same concerns may ultimately be raised by filing in other courts as well. That proliferation of this approach could threaten the patent troll business model more broadly—which would be music to the ears of companies that often find themselves in the crosshairs in these cases.