Who's Suing You?

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"Don't you want to know who's suing you?"[1]

That question, asked from the bench by Chief Judge Colm Connolly of the District of Delaware, is at the heart of a recent flurry of orders, hearings, and appellate petitions concerning the economics and governance structure of certain companies in the patent assertion business. The question related to disclosure rules and was directed to counsel for the defendant, Amazon, who answered: "I think that would be helpful, yes, Your Honor."[2]

As this exchange illustrates, the defendant itself did not push for such disclosure. It was driven by the district court, with results both remarkable and suggestive. Some patent assertion plaintiffs are dismissing claims filed in Delaware in an apparent effort to avoid disclosing who pays for patent assertion and who calls the shots in litigation.[3] One entity that filed in Delaware before the rules took effect indicated that it would have filed elsewhere had the rules been in place when it filed.[4] The managing member of one patent assertion entity, who works as a paralegal in Texas, has accused the Court of "textbook harassment and discrimination" and "mansplaining" for ordering her to appear in person to testify regarding the structure of the entity she owns, and for sending a copy of the order to the law firm that employs her.[5] She ultimately decided not to appear, filing a document captioned "Notice of Objection to and Non-Participation in Judicial Inquisition,"[6] which led to a contempt hearing.[7] For his part, Judge Connolly has asserted the power to investigate disclosures made while a case was pending even if the case has been dismissed,[8] and he has raised ethical questions regarding the conduct of counsel in certain cases. The issue has led to three Federal Circuit orders,[9] and numerous amicus briefs from companies such as Red Hat and Intel, and advocacy groups such as the Electronic Frontier Foundation.

That such a simple question can create such a flurry of activity is evidence of how at least a certain segment of the patent assertion business works. This simple question also raises interesting questions of judicial power. Under current law, how far may courts go in requiring entity litigants to disclose their ownership or governance structures? Some answers are easy—the

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[1] Nimitz Techs. LLC v. CNET Media, Inc., No. 1:21-cv-01247-CFC, 2022 WL 17338396, at *5 (D. Del. Nov. 30, 2022).
[2] *Id*.
[3] *See* Michael Shapiro, *Delaware Judge Won't Drop Funding Probe of IP Edge Entities*, BLOOMBERG LAW (May 5, 2023, 2:02 PM), https://news.bloomberglaw.com/ip-law/delaware-judge-wont-drop-funding-probe-of-ip-edge-entities [https://perma.cc/LM5V-VDVF].
[4] *See* Ryan Davis, *VLSI Drops $4B Intel Patent Suit Amid Del. Ownership Row*, LAW360 (Jan. 3, 2023), https://www.law360.com/articles/1561845/vlsi-drops-4b-intel-patent-suit-amid-del-ownership-row [https://perma.cc/DB37-T2GH].
[5] Sworn Declaration of Lori Lapray at ¶ 12, Backertop Licensing LLC v. Canary Connect, Inc., No. 1:22-cv-00572-CFC (D. Del. Apr. 28, 2023), ECF No. 40-3.
[6] Backertop Licensing LLC v. Canary Connect, Inc., No. 1:22-cv-00572-CFC (D. Del. July 12, 2023), ECF No. 48.
[7] Jeff Montgomery, *Del. Judge Asks Why Patent Biz Owners Won't Show In Court*, LAW360 (July 20, 2023), https://www.law360.com/articles/1687332/del-judge-asks-why-patent-biz-owners-won-t-show-in-court .
[8] Backertop Licensing LLC v. Canary Connect, Inc., No. 1:22-cv-00572-CFC, 2023 WL 3182084, at *3 (D. Del. May 1, 2023).
[9] *In re* Nimitz Techs. LLC, No. 2023-103, 2022 WL 17494845, at *2 (Fed. Cir. Dec. 8, 2022) (denying motion for writ of mandate reversing district court disclosure order). In *Nimitz* the Federal Circuit also issued an order staying the district court's disclosure order pending review of the writ petition and, following the order denying the petition, an order denying petitions for rehearing and rehearing *en banc*, and an order denying a petition to stay the district court's order pending resolution of a *cert* petition. Backertop Licensing LLC, 2023 WL 3182084, at *3.

power extends at least to disclosure necessary for judges to clear conflicts—but others are not. Do courts have a legitimate interest in knowing the identity of passive investors in the patent assertion business, or in probing whether nominal owners have power to call shots in litigation? May courts require transparency for its own sake on the theory that the public has a right to know who is using the judicial system?

This Article proposes answers these questions. It identifies six rationales justifying rules compelling disclosure in litigation: conflicts clearance, shot caller identification, rule compliance, PTO fraud, statutory standing, and sunlight—transparency for its own sake.

These different rationales support different scopes of disclosure. By analogy to mutual funds, the first two rationales would not compel disclosure of the identities of passive investors in funds that in turn invest in patent assertion entities. The third rationale, compliance, justifies any amount of investigation necessary to determine whether parties or counsel have complied with court orders and, if not, why not. The fourth rationale, avoiding PTO fraud, does not support disclosure beyond the minimal requirements of the PTO's registration system. The fifth—assessing the contractual validity of an assignment, and thus whether the plaintiff has statutory standing to maintain an infringement action—may justify disclosure of facts sufficient to determine whether the assignment was a sham under relevant contract principles. The sixth rationale, a general interest in transparency, is too broad to sustain disclosure requirements that are meant to facilitate case management. Rules aiming to achieve transparency as such are best left to Congress or to the Judicial Conference.

The net of all this is that disclosure rules such as Judge Connolly adopted are justified under current law, though some clarifying amendments would be helpful. Existing law supports application of those rules for any purpose other than transparency for its own sake. The hearings he has held also identify room for improvement in the Patent Act.

Part I identifies the rules at stake, relates them to a growing trend to compel disclosure of litigation funding, and discusses the status of litigation over those rules. Part II discusses the status of investigations into certain patent assertion entities. Part III explains the rationales and their limitations. Part IV offers recommendations to clarify disclosure obligations and to make it easier for courts to hold accountable persons or entities who call the shots in litigation.

I

Two rules of procedure frame current disclosure disputes. Federal Rule of Civil Procedure 7.1 requires non-governmental corporate parties to disclose the identity of any parent corporation and any publicly held corporation owning 10% or more of the party's stock.[10] Federal Rule of Civil Procedure 83(b) provides that individual judges may adopt rules consistent with federal law, the FRCP, and the local rules of the judge's district.[11]

Rule 7.1 aims to allow judges to identify conflicts of interest that might warrant recusal. That rule works in conjunction with 28 U.S.C. Section 455, which generally requires judges to recuse themselves from proceedings in which their impartiality might reasonably be questioned, and which specifically requires judges to recuse from cases involving matters or parties in which the judge has a financial interest, a term defined to include "ownership of a legal or equitable

[10] FED. R. CIV. P. 7.1.
[11] FED. R. CIV. P. 83(b).

interest, however small," but a term which does not include ownership in a mutual or common investment fund unless the judge plays a management role in the fund.[12]

The requirements of Section 455 are paralleled in Canon 3(c) of the Code of Conduct for United States Judges.[13] An interpretation of that Canon by the Advisory Committee on Codes of Conduct reached common-sense conclusions: a judge who owns stock in a parent company has a financial interest in a subsidiary entity controlled by the parent and should recuse from cases involving the subsidiary, whether one company controls another may depend on facts, but control is presumptively lacking for any company owning less than 10% of the stock of a party—tracking the 10% threshold for disclosure in Rule 7.1.[14]

The Federal Rules also require limited disclosure of facts relevant to funding litigation or settlement. Rule 26, for example, requires disclosure of any insurance policy that might be available to satisfy a judgment.[15] Several district courts also require disclosure of third-party litigation funding agreements.[16] Some appellate rules require disclosure of public company interests in litigation,[17] while other appellate rules are not so limited.[18]

Funding disclosure rules serve two purposes. They are relevant to judicial conflicts to the extent a judge might have an interest in an entity that funds a case before the judge's court. They are also relevant to case management—and particularly to the extent funders may exert influence over settlement. Such interests could take several forms. Insurance is often a key component of settlement talks, which is one reason why Rule 26 requires disclosure of insurance.[19] But non-

[12] 28 U.S.C. § 455(d)(4).
[13] *Code of Conduct for United States Judges*, U.S. COURTS, https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges [https://perma.cc/RN3R-7JSE].
[14] If a judge owns stock in a subsidiary the judge need not recuse from cases involving the parent unless the case might substantially affect the value of the judge's investment in the subsidiary. *See Published Advisory Opinions*, 2B GUIDE TO JUDICIARY POLICY ch. 2 (2022), https://www.uscourts.gov/sites/default/files/guide-vol02b-ch02_0.pdf [https://perma.cc/6LW2-E6J6].
[15] FED. R. CIV. P. 26(a)(1)(A)(iv).
[16] N.D. CAL. R. 3-15(b)(2) requires disclosure of the identity of "any persons, associations of persons, firms, partnerships, corporations (including, but not limited to, parent corporations), or any other entities, other than the parties themselves, known by the party to have either: (i) a financial interest of any kind in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding." There is some variation within these rules. C.D. CAL. R. 7.1 ties disclosure to recusal: "To enable the Court to evaluate possible disqualification or recusal, counsel for all non-governmental parties must file with their first appearance a Notice of Interested Parties, which must list all persons, associations of persons, firms, partnerships, and corporations (including parent corporations, clearly identified as such) that may have a pecuniary interest in the outcome of the case, including any insurance carrier that may be liable in whole or in part (directly or indirectly) for a judgment in the action or for the cost of defense."
[17] *E.g.*, 3D CIR. R. 26.1.1 ("each corporation that is a party to an appeal, whether in a civil, bankruptcy, or criminal case, must file a corporate affiliate/financial interest disclosure statement on a form provided by the clerk that identifies every publicly owned corporation with which it is affiliated but which is not named in the appeal").
[18] 5TH CIR. R. 28.2.1 ("Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees, which must be incorporated on the first page of each brief before the table of contents or index, and which must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation").
[19] Insurance is unlikely to present judicial conflicts issues because most cases will not threaten an insurer's solvency and ordinary commercial relationships (such as holding a policy issued by an insurer) are not a basis for recusal. *E.g.*, 2B GUIDE TO JUDICIARY POLICY, *supra* note 14 ("when an insurance company is a party, the judge ordinarily need not recuse unless the judge has a financial interest in the company. The judge has a financial interest in the

insurer litigation funders might also exert influence to push a case to trial rather than accept a settlement that might not make the funder whole. Clients ultimately retain power to settle, of course, but clients who might be repeat consumers of litigation funding might be reluctant to disappoint a funder who preferred to roll the dice on a significant win rather than settle for an amount that left the funder with a loss.[20] The same could be true of repeat-player lawyers. Judges trying to induce settlement will often order parties to settlement conferences or mediation and may insist that all persons with a say in settlement attend such a conference. Judges can only do that if they know who those people are.

II

Current disclosure controversies arise from Judge Connolly's disclosure rules and his subsequent investigation into compliance with those rules. Two rules have been at issue. The first, a standing order regarding disclosure statements, requires a business entity to "include in its disclosure statement" filed under FRCP 7.1 "the name of every owner, member, and partner of the party, proceeding up the chain of ownership until the name of every individual and corporation with a direct or indirect interest in the party has been identified."[21] The second rule, a standing order regarding third party litigation funding agreements, requires a party who receives nonrecourse funding in return for a share of any financial award or a non-monetary result (such as an injunction) to identify the funder, state whether the funder has approval rights relating to the litigation and, if so, to state the terms and conditions of such rights, and state the nature of the funder's financial interest.[22]

Judge Connolly adopted each rule in April 2022, with no fanfare. The rules apply to all cases before him, not just patent cases, but Delaware is a favored forum for patent plaintiffs and some unique features of patent assertion entities soon generated controversy concerning these rules.

A. Hearings Regarding Compliance with the Rules.

Several cases filed by Nimitz Technologies, LLC., lit the fuse. Between August 2021 and March 30, 2022, Nimitz filed eleven patent cases in the District of Delaware asserting the same patent against different defendants.[23] Seven cases were dismissed between December 2021 and April 2022.[24] In May 2022 the court heard argument on motions to dismiss in three of the

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company only if the outcome of the proceeding could substantially affect the value of the judge's interest in the company.").

[20] There have been reports of funders allegedly lobbying lawyers regarding settlement, and one filed case in which a client alleges that a funder attempted to gain effective control of litigation. Hannah Albarazi, *When A Litigation Funder Is Accused of Taking Over the Case*, LAW360 (Mar. 15, 2023), https://www.law360.com/articles/1584860/when-a-litigation-funder-is-accused-of-taking-over-the-case [https://perma.cc/23FU-PH4Z].

[21] Standing Order Regarding Disclosure Statements, https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Disclosure%20Statements.pdf [https://perma.cc/Y4MP-F72K].

[22] Standing Order Regarding Third-Party Litigation Funding Arrangements, https://www.ded.uscourts.gov/sites/ded/files/Standing%20Order%20Regarding%20Third-Party%20Litigation%20Funding.pdf [https://perma.cc/JUX4-N889].

[23] Nimitz Techs. LLC v. CNET Media, Inc., No. 1:21-cv-01247-CFC, 2022 WL 17338396, at *3–4 (D. Del. Nov. 30, 2022).

[24] *Id.*

remaining four cases. In connection with that motion the court noted that the parties had not complied with the standing orders which, in fairness, issued after the cases were filed and after the parties would have submitted their statements under Rule 7.1.[25] The court ordered the parties to comply. Nimitz filed disclosure statements in its four pending cases. In each it stated that its sole owner was an individual named Mark Hall. Nimitz also filed statements representing that it had not "entered into any arrangement with a Third-Party Funder, as defined in the Court's Standing Order Regarding Third Party Litigation Funding Arrangements."[26]

In July 2022, in a patent case involving a plaintiff called Longbeam Technologies LLC, Judge Connolly told counsel that Longbeam's supplemental disclosure (which the court characterized as stating that Longbeam owned Longbeam) was deficient. The court then asked:

> [The COURT] . . . . Who is Longbeam? Who are the members of Longbeam Technologies, LLC?
> [Longbeam's Counsel]: I do not know.
> THE COURT: The defendants have no reaction to this statement[?]
> [Amazon's Counsel]: No, Your Honor. We're not sure either.
> THE COURT: Didn't raise any objections to it?
> [Amazon's Counsel]: No. We did not, Your Honor.
> THE COURT: Don't you want to know who's suing you?
> [Amazon's Counsel]: I think that would be helpful, yes, Your Honor.[27]

Longbeam then amended its disclosure to state that its sole owner was an individual named Sharon Bullion, and that it had no third-party funding other than its engagement agreement with counsel.[28] The defendant then suggested that Longbeam's disclosure could be deficient because public records suggested that Longbeam had a business relationship with what the court referred to as "a well-known patent monetization firm" called IP Edge, whose e-mail address appeared on an assignment to Longbeam of the patent it asserted in the case.[29] In addition, a report published by RPX, a patent-related business, stated that IP Edge had assigned patents to an entity owned by Mark Hall, who Nimitz had named as its owner. The defendant then suggested that Longbeam's disclosure was not sufficient to allow it to determine whether the assignment was valid, and whether Longbeam therefore had standing to assert the patent. In August 2022 the court granted a motion to stay the case and allow discovery into Longbeam's standing.[30]

Judge Connolly next addressed a motion to withdraw filed by an attorney who had filed over 770 patent cases in the District of Delaware since 2019. The patentee client relevant to the motion was an entity named Missed Call LLC. In a hearing on September 1, 2022, the trial court asked who owned Missed Call, and counsel named an individual. The same lawyer filed amended disclosures in several other pending cases in which he represented different plaintiffs

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[25] *Id.* That fact did not excuse compliance, but a lawyer might be forgiven for checking the standing orders when a case was assigned and then not keeping up with subsequent amendments. As it turned out, Nimitz had not filed Rule 7.1 statements in any of the 11 cases filed between August 2021 and March 2022.
[26] *Id*. at *4.
[27] *Id*. at *5.
[28] *Id*.
[29] *Id.* at *10–11.
[30] *Id.* at *6. Longbeam subsequently dismissed the case, in October 2022.

asserting patent infringement. In each case an individual was identified as the owner of the named plaintiff: Sally Pugal was identified as owning an entity called Lamplight and Lori LaPray was identified as owning an entity called Backertop.[31]

The article cited by the defendant in the *Longbeam* case had identified Mark Hall, Sally Pugal, and Lori LaPray as being connected to IP Edge. Mr. Hall was identified as owning Nimitz, as noted above, and Ms. Pugal and Ms. LaPray were named as owners of entities in cases brought by Missed Call's counsel, yet IP Edge did not appear in any disclosure filed in these cases.[32] The court set a further hearing to inquire whether IP Edge had a relationship with any plaintiff that fell within the scope of the court's third-party funding order.

At this later hearing, counsel identified a consulting company called Mavexar as Ms. Pugal's representative with respect to her interest in Lamplight. The lawyer had not spoken to Ms. Pugal before filing the Lamplight case; he communicated with Mavexar regarding his engagement letter with Lamplight. The court asked:

> THE COURT: All right. Do you know what the rules of ethics are about having a relationship with a client that is initiated by a third party? I'm trying to think of any other context, so help me out. I'm just trying to think what rules would be applicable. I'm not judging. I'm asking questions here.
>
> But I'm trying to understand how you end up in an attorney-client relationship with an LLC that is exclusively owned by an individual that you have never met and you've had no conversations with an employee of the LLC, and yet you end up in an attorney-client relationship with the LLC. Do you know what rules would be implicated by that?
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> MR. CHONG: So Your Honor, I have to stop and think.
>
> THE COURT: How did you run conflicts? I mean, I'm just trying to think how you would run conflicts when you're dealing with a third party that's negotiating with you to set up an attorney-client relationship with somebody else, another entity. I'm trying to figure out how you run conflicts. Did you run conflicts?
>
> MR. CHONG: Yes, Your Honor.
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> THE COURT: And it's all based on representations from a third party, not from the client, correct?
>
> MR. CHONG: That is correct, Your Honor.
>
> THE COURT: All right.[33]

Similar answers were provided by counsel for Nimitz with respect to Nimitz's ownership. Counsel was contacted by a person they understood to act as an agent for Nimitz. Nimitz also had an agreement with Mavexar, which was the principal client contact for the Nimitz matters.

[31] Nimitz Techs. LLC v. CNET Media, Inc., No. 1:21-cv-01247-CFC, 2022 WL 17338396, at *3–4 (D. Del. Nov. 30, 2022).
[32] *Id*.
[33] *Id.* at *12.

The Court then called Mr. Hall, who owned Nimitz. Mr. Hall testified he had been approached by a person named Linh Dietz, on behalf of Mavexar.[34] In substance, he testified that he executed an agreement with Mavexar in which a patent was assigned to Nimitz, Mr. Hall accepted liability with respect to that patent, and he (through Nimitz) would receive 10 percent of proceeds generated through patent assertion.[35] He analogized the deal to his ownership of rental properties, which were managed on his behalf by a management company. Mr. Hall testified that he did not involve himself with litigation decisions but effectively delegated those decisions to Mavexar. He was not consulted before complaints were filed and was told of settlements after the fact. He agreed that, from his perspective, Nimitz was purely an investment opportunity. Similar testimony was given by the owner of another plaintiff entity, called Mellaconic.[36]

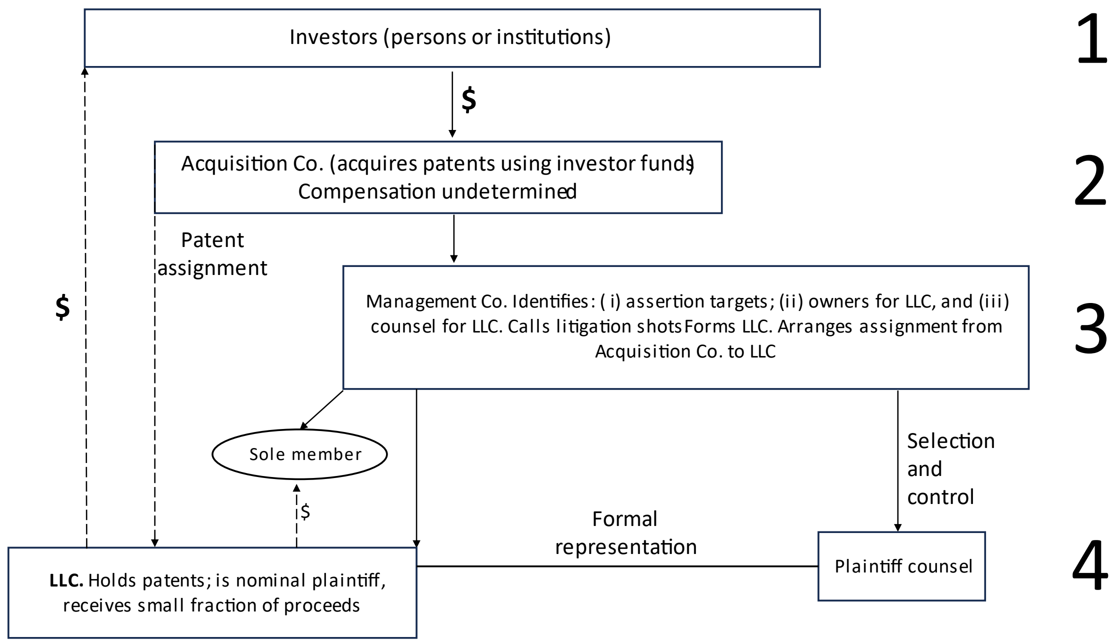
B. The Patent Assertion Structures Described In the Hearings.

"I have to stop and think" is not an ideal answer to the question regarding ethics rules. Apart from that practical lawyering tip, however, the Court's questions raised several issues, which can best be understood by following an exemplary chain of assignments and diagramming the structure described in these hearings.

The *Nimitz* case involved assertion of U.S. Patent 7848328. That patent issued in 2008 and was assigned by three inventors to Nokia Corporation. In 2013 Nokia assigned it to France Brevets, whose website says it "is dedicated to monetization and protecting French technological innovations."[37] In 2013 France Brevets assigned it to Burley Licensing LLC, an entity with an address in Plano, Texas. In 2021 Burley Licensing assigned it to Nimitz Technologies, whose address was listed as Frisco, Texas. Mark Hall, who testified at one of Judge Connolly's hearings, was listed on the assignment on behalf of Nimitz, but the correspondence address for Nimitz listed, as Judge Connolly noted, an IP Edge e-mail address. IP Edge does not appear in the chain of title.

To date the hearings before Judge Connolly have not produced findings regarding the structure of the patent-holder plaintiffs under investigation. There is no reason to expect each patent assertion entity to have an identical structure, but it is reasonable to assume for purposes of discussion that, in general, money invested in patent assertion will be funneled to an entity separate from the nominal patent-holder plaintiff. Presumably returns from assertion will be funneled more to the investors or managers than to the nominal plaintiff. The basic structure disclosed at the hearing also entails a manager, such as Mavexar. A diagram of a possible structure (not one disclosed precisely at the hearings) might look like this:

[34] *Id.* at *16.
[35] *Id.* at *17–18.
[36] *Id.* at *20.
[37] FRANCE BREVETS, https://francebrevets.com/en/ [https://perma.cc/P9DQ-VX7G].



This diagram is stylized to facilitate discussion of disclosure. It may not precisely describe any specific patent assertion entity, but it captures certain functions disclosed in Judge Connolly's hearings. The numbers on the right reflect different functional levels. In brief, level four describes the entity plaintiff and counsel, disclosure of whom is necessary and uncontroversial as a matter of positive law. Level three describes a management function, disclosure of which has not historically been required and which may not be required by orders requiring disclosure either of equity owners of a party or of the sources of nonrecourse litigation funding. The functions described at level three were attributed to Mavexar in certain hearings Judge Connolly held. Level two hypothesizes an acquisition company that buys and sells patents, and level one describes investors. Level one might need to be expanded several tiers before being exhausted. For example, if an investor was a fund that received investments of other funds, the funding chain could ultimately require backward tracing through multiple aggregators to reach single persons or entities.

In this diagram level one investors are passive. They are assumed to put their money into an entity which they expect to invest in patent acquisition and assertion, but the investors take no hand in assertion. Level two may or may not exist in any given case; this diagram assumes that investment funds do not intend to hold patents and thus create holding companies to do so (they might also invest in preexisting holding companies). Levels two and three may collapse in some cases, meaning that the entity that buys and sells patents may also manage assertion. It is also possible that levels one and three collapse, meaning that a management company funds both patent acquisition and assertion but does not accept outside investment.

"Follow the money" was the investigative advice given during Watergate, and it is to some extent the thesis pursued in the hearings discussed above. The PTO's recordation system does not allow the money to be followed; that is not its purpose. Who funds Burley Licensing LLC or Nimitz is not disclosed, nor required to be disclosed, as part of the recordation system. Nor is Mavexar's role as a management entity disclosed or required to be disclosed. Still, working backwards from the fact that Mr. Hall testified that he is a passive investor who paid nothing for the patents, the fact remains that the patents changed hands and money presumably changed hands, too. Where the money came from is one question relevant to Judge Connolly's inquiry.

The diagram assumes that most returns to patent assertion flow eventually to investors. Presumably levels two and three take a cut of those returns, though in principle nothing prevents either level from operating on a fee-for-service basis. The different size of the dollar symbols as between investors and the LLC owner reflect the presumably smaller fraction of returns payable to the owner. Potential liabilities are not shown but, at least in the first instance, would accrue to the LLC.

In this model, two delegations of authority seem key. The investor will choose a manager, which in turn will search for patents and facilitate the creation of an entity to hold patents selected by the manager and paid for with investor money. The nominal owner will delegate to the manager effective control of patent assertion, including choosing targets, retaining counsel, and making litigation decisions. Either management companies or investors finance litigation expenses, such as filing fees, transcripts, and expert witness fees. The owner has the nominal legal power to control the manager's decisions but, in the model described in the hearings discussed above, no one involved expects that they will do so.

None of the individual components of this structure is suspicious on its own. Patents may be bought and sold as an investment, with a view to assertion, and patent owners need not be experts in patent assertion. An inventor may hire a lawyer who advises her to form an entity to hold the patent. The inventor/owner may rely on a lawyer or a non-lawyer manager to license the patent or litigate, just as an owner of real property may rely on a management company to rent it out. The owner may or may not have the expertise or the inclination to make such decisions on their own. To continue the real property analogy, an owner's equity may be at risk if someone is injured on the property. If the owner is an entity too poor to satisfy a judgment corporate law veil-piercing doctrines may become relevant, but that would not be the modal case of passive investment in property.

It is common for lawyers or other litigation professionals to call important shots in litigation. Lots of plaintiff-side representation works that way. And, at a high level of abstraction, entity clients always delegate the retention and instruction of lawyers. Entities cannot act directly, so they hire agents (employees or otherwise) who may hire more agents, such as outside counsel, who may effectively control the entity's litigation. A company's chief legal officer is an agent, and typically no question of authority would arise if they hired outside counsel, who would generally discharge any obligation to notify and seek consent from the (entity) client by dealing with such an agent. There is no reason in principle that this situation should change if the entity agent retaining counsel is not a lawyer. More directly, in principle there is nothing inherently suspicious in having a management company (Level 3 in the diagram) hire counsel for a company whose litigation the management company manages. The use of agents may produce efficiencies at each step, and the entire structure may be analyzed using transaction-cost economics familiar from Coase's *Theory of the Firm.* The so-called "separation of ownership and control" was considered the principal problem of corporate law in the mid-20th century, until transaction-cost thinking replaced the idea of "separation" with the idea of "specialization,"[38] at which point no one expected investors to specialize in management or vice versa and the "problem" was recast as a natural division of labor.

Nevertheless, in the patent context this structure feels shadier than these abstract academic descriptions suggest. The main difference is that this model uses the judicial system as its primary means for generating revenue, either by filing cases or threatening to do so. That is not the case when real property is rented out by a management company acting on behalf of a property owner. The large number of filings disclosed in Judge Connolly's hearings illustrates the point. Real property management companies don't file over 770 patent cases in three years. Patent assertion imposes costs on the court system. Courts are subsidized with public money, and part of Judge Connolly's reasoning is that the public has a legitimate interest in knowing how its courts are being used.

More practically, questions so simple as those Judge Connolly has posed do not normally produce such complicated maneuvering to avoid what, one may reasonably suspect, is an equally simple answer. Some patent holders are actively resisting investigation into their operations. One wonders why.

III

There are six different reasons why a trial court might require disclosure of ownership or management information, and each reason implies a different scope of disclosure. This Part assesses the strength of arguments for disclosure based on each rationale.

A. The judicial conflict rationale.

The first and strongest rationale for disclosure is recusal, and the need for judges to determine whether a conflict or a reasonable basis for questioning impartiality precludes them from hearing a case. As noted above, Federal Rule of Civil Procedure 7.1 provides a positive-law basis for disclosure of any person or entity owning 10% or more of a party, and there is no serious question about the propriety of such disclosure. The related provisions of 28 U.S.C. Section 455 and Canon 3 provide an equally sound basis for disclosure.

Though a strong justification, the scope of disclosure dictated by the recusal rationale is comparatively limited. Judges will know if they hold any equity in a party, and the single-member LLC model disclosed by Judge Connolly's investigation effectively ensures that judges will not have an equity interest in the named plaintiff. Indirect interests count as well, which is why Rule 7.1 requires disclosure of persons owning 10% or more of a party, but the single-member LLC structure also means that this threshold will not be met. Current rules do not contemplate the importance of non-party, non-owner management companies described as Level 3 in the diagram and thus do not address them directly.

Both Section 455 and Canon 3 require disqualification when a judge's impartiality might reasonably be questioned, and this standard might be met even if a judge did not own equity in a

[38] *See, e.g.*, Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 36 J. L. & ECON. 301 (1983); Jason Scott Johnston, *The Influence of the Nature of the Firm on the Theory of Corporate Law*, 18 J. CORP. L. 213, 230–31 (1993).

party, its parent, or a major equity holder.[39] For example, apropos of the model described above, if a judge held equity in a Level 3 management company that had a contingent interest in a case then the judge's impartiality could reasonably be questioned with respect to that case and the judge would be well-advised to recuse. But the record to date suggests that the management companies are not publicly held, so this possibility presents a weak justification for disclosure. To the extent the management company in turn funnels money to investors, the recusal question shifts to the fund level. As noted above, the mutual fund exception to the rule requiring recusal where a judge owns equity in a party or significant shareholder suggests that Level 1 investors are unlikely to present recusal issues.[40]

On balance, the facts recounted in part II suggest that it would be wise to require disclosure of any entity with a financial stake in the result of a case, regardless whether that stake took the form of equity ownership or, in the case of funding, regardless whether the entity advanced nonrecourse funding. Persons or entities who receive a cut from a case should be disclosed so courts can assess (for example) whether relatives or close friends work for them and whether they are probable shot-callers (a separate rationale for disclosure discussed below). I would, however, limit the rule to entities and not extend it to individual investors. In other words, this rationale would extend to the identities of funds that might invest in patent acquisition (Level 1) but not individual investors in such funds. To the extent that either holding companies or management companies (Levels 2 and 3) had a contingent interest in the proceeds of assertion, that rationale would extend to the identity of such companies as well. Because judges would know whether they were invested in a disclosed fund, holding company, or management company, the recusal rationale would not justify disclosure of the identity of investors in the fund so long as they were passive investors and did not exert effective influence relevant to litigation.

Judge Connolly's disclosure rules come close to achieving this result, though it is possible that a fund, holding company, or management company that did not have a direct ownership interest in the named plaintiff, and which did not provide nonrecourse funding to the named plaintiff, might escape disclosure under the current rule. A modest amendment in the scope of the rules could and should close this gap.

B. The shot-caller rationale.

Level 3 in the above diagram shows a possible gap in current disclosure rules, which should be closed. Though not grounded in the text of Rule 7.1, Section 455, or Canon 3, some local rules and sound practice justify disclosure of any person or entity who has the power to influence important case decisions such as settlement. The test is simple: if at any point in the case counsel can imagine making a call to clear an important decision with someone, that person (and any entity they represent) should be disclosed so they can be brought to the table if needed.

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[39] Some precedent, however, holds that the more general standard of 28 U.S.C. § 455(a) does not apply when the more specific disclosure requirements of Section 455(b) do not compel disclosure or recusal. *E.g.*, *In re* Hawsawi, 955 F.3d 152, 159–60 (D.C. Cir. 2020).

[40] Strictly speaking, there would be a question whether an investor was sufficiently analogous to a mutual fund for this safe harbor to apply. *See* Order Denying Motion for Relief from Nondispositive Pretrial Order of Magistrate Judge at 5, VLSI Tech. LLC v. Intel Corp., No. 5:17-cv-05671-BLF (N.D. Cal. May 8, 2023), ECF No. 471 (citing MDCM Holdings, Inc. v. Credit Suisse First Boston Corp., 205 F. Supp. 2d 158 (S.D.N.Y. 2002) (enumerating factors relevant to application of the safe harbor)).

This is the practice regarding insurers,[41] and in some cases litigation funders, and it should extend to anyone in a position to influence litigation decisions.

Relevant to the structure identified in Part II, the shot-caller rationale would extend to management companies, regardless whether they extend financing or receive a fraction of litigation proceeds and to investors who are not merely passive but who might exert influence over litigation decisions. In this respect the shot-caller rationale might extend farther than the recusal rationale.[42] Current disclosure rules aim at this end, and only a slight modification would be needed to close any gap the bar might previously have perceived. Put slightly differently, Judge Connolly was right that the Court had an interest in knowing about Mavexar, regardless whether the text of the rule might be read formally not to require such disclosure. (Part IV argues for changes to the law that would allow judges to require shot callers to submit to the jurisdiction of a court in which they are calling shots.)

C. The compliance rationale.

Courts have an interest in ensuring compliance with their rules, including professional conduct rules they have adopted to regulate practice. Judge Connolly has raised the question whether counsel in certain cases failed to comply with his rules, and perhaps with rules of professional responsibility, which (as is typical) are part of the district's local rules.[43] A judge who learns of a rule violation has discretion to investigate why the violation occurred to determine whether a sanction should issue, and, if so, what it should be.[44] At a minimum a court is entitled to determine whether noncompliance was inadvertent or deliberate. There is no logical boundary to the scope of this power other than that inquiry should relate to the violation. Within that parameter the extent of investigation is a matter for the judgment and discretion of the Court. No rule needs amending to clarify or reinforce this power.

Whether the compliance rationale extends to disclosure of, for example, bank statements or other documents that might show that the nominal owner of a patent was undercapitalized, is a separate question. Failure to comply with a rule would be subject to investigation and potential

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[41] *E.g.* Daniel J. Meador, *Inherent Judicial Authority in the Conduct of Civil Litigation*, 73 Tex. L. Rev. 1805, 1809–10 (1995)("It is generally accepted that, even in the absence of a specific rule, a court has the inherent authority to require a party to attend a pretrial conference, and it has been held that a court can require a representative of a defendant's insurance company to attend with full authority to settle.").

[42] If, for example, a person was an investor in a fund but independently exercised influence over case decision-making then the person's status as an investor might not justify disclosure of their name but their status as a shot-caller would.

[43] As is the case in the District of Delaware. D. Del. Local Rule 83.6(b).

[44] *E.g.*, Chambers v. NASCO, Inc., 501 U.S. 32, 44 (1991) ("a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud."). *Chambers* confirms that "a court may assess attorney's fees as a sanction for the "'willful disobedience of a court order.'"). *Id.* For a case affirming the exercise of a court's inherent authority to sanction violations of rules of conduct, rather than a court order, *see* In re Deepwater Horizon, 824 F.3d 571, 578 (5th Cir. 2016). In that case the district court appointed a special master (Louis Freeh) to investigate improper payments by counsel representing clients seeking compensation from a court-supervised settlement fund to lawyers working as administrators for the fund. The district court disqualified the lawyers from representing clients claiming from the settlement fund. The lawyers appealed, arguing that they violated no court order and that the district court's inherent authority did not extend to conduct outside of court relating to a settlement fund over which the court exercised supervisory authority. The Fifth Circuit affirmed the sanctions, agreeing with the special master that "`the sanctions here addressed misconduct that threatened the integrity of a court function under the district court's direct supervision' as well as `misconduct during the district court's investigation of the matter.'" *Id*.

sanction even if a nominal owner was adequately capitalized, so there is no necessary connection between such issues. Investigation into capitalization, and whether formal transfers lacked economic substance, may be a proper subject of investigation for some purposes, such as the statutory standing issue discussed below, but not for others. For example, whether counsel who deals only with a management company has adequately discharged their obligation to inform a client or to obtain client consent may depend on the factual basis for believing that notice to a management company agent was sufficient notice to a principal; capitalization might be relevant to that question but would likely be less probative than other facts.[45] Investigation of such facts is likely better justified by the sham transaction rationale discussed below.

Lawyers for parties who wish to test the validity of a rule they question may do so but must do so openly.[46] The price for noncompliance may be that investigation leads to greater disclosure than might otherwise have been compelled if an appellate court found a rule wholly or partly invalid. The court's power of investigating noncompliance of the appearing lawyer would extend both to the fact of noncompliance and the reason for it, even relevant evidence might otherwise not be subject to disclosure.

D. The fraud on the PTO rationale

Compliance with a disclosure rule is related to but distinct from a claim that a party has attempted to defraud the PTO or a court through a patent assignment that transfers the form but not the substance of ownership.[47] Judge Connolly has raised this prospect in connection with the hearings and orders discussed in Part II. He summarizes the record:

> [T]he evidence adduced and the representations made by counsel at the November 4, 2022 hearing raised serious concerns that the parties may have made inaccurate statements in filings with the Court; that . . . real parties in interest, such as IP Edge and a related entity called Mavexar, may have been hidden from the Court and the defendants; and that those real parties in interest may have perpetrated a fraud on the court by fraudulently conveying the patents asserted in this Court to a shell LLC and filing fictious patent assignments with the United States Patent and Trademark Office (PTO), all designed to shield the real parties in interest from the potential liability they would otherwise face by asserting in litigation the patents in question.[48]

This quotation identifies several distinct issues. The first is whether assignments are fraudulent with respect to the PTO if the assignee is inadequately capitalized or lacks effective control over patent assertion. The answer to that question turns on whether recordation of an assignment is concerned with form or substance—whether, in other words, the purpose of

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[45] There is in principle no reason a client could not empower an agent to act on their behalf with respect to another agent. A client could give litigation counsel authority to hire experts, for example.

[46] ABA Rule 3.4(c) provides that a lawyer shall not "knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." MODEL RULES OF PRO. CONDUCT r. 3.4(c) (AM. BAR ASS'N 1983). The District of Delaware has adopted the ABA rules as the District's rules of conduct.

[47] 37 C.F.R. § 3.1 (defining "assignment" to include "a transfer by a party of all or part of its right, title and interest in a patent . . . .").

[48] Lamplight Licensing LLC v. ABB Inc., No. CV 1:22-cv-00418-CFC, 2023 WL 3582778, at *1 (D. Del. May 22, 2023).

recordation is to establish a publicly accessible chain of title or to identify parties who are financially responsible for patent assertion or who control patent assertion. The answer is that recordation is concerned with form.

The Patent Act defines "patentee" to include "successors in title."[49] PTO rules define assignment as "a transfer by a party of all or part of its right, title and interest in a patent, patent application, registered mark or a mark for which an application to register has been filed."[50] Section 261 of the Patent Act requires "an instrument in writing" to effect an assignment, and provides that an instrument claiming to be an assignment is void as against a subsequent transfer without notice unless the instrument is recorded.[51] Recordation confers a rebuttable presumption that an assignment is valid but is not conclusive with respect to validity.[52] Together these provisions focus on establishing a consistent and publicly accessible chain of title and formal means to resolve disputes between competing instruments. Both purposes are consistent with the idea that the purpose of recording assignments is more concerned with form (who prevails in an ownership dispute, who should be contacted regarding title) than substance (who calls the shots on patent assertion, who receives the money from assertion).

More generally, it is common for one party to own a patent and for another party to exercise the right to exclude. A patent owner may license the patent exclusively, retaining no right to practice or assert it (such that the licensee has statutory standing to sue for infringement),[53] yet remain the formal owner of the patent.[54] Title to the patent may be transferred validly even if the patent is encumbered by contractual obligations that give a non-owner effective control.[55] Historically the existence of such agreements has not been thought to imply fraud on the patent office, and there are sound reasons not to alter this understanding.

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[49] 35 U.S.C.A. § 100(d) (West).

[50] 37 C.F.R. § 3.1

[51] "An interest that constitutes an assignment, grant or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the Patent and Trademark Office within three months from its date or prior to the date of such subsequent purchase or mortgage." 35 U.S.C.A. § 261 (West).

[52] SiRF Tech., Inc. v. Int'l Trade Comm'n, 601 F.3d 1319, 1327–28 (Fed. Cir. 2010) ("The recording of an assignment with the PTO is not a determination as to the validity of the assignment. *See* 37 C.F.R. § 3.54. However, we think that it creates a presumption of validity as to the assignment and places the burden to rebut such a showing on one challenging the assignment.").

[53] *E.g.* Prima Tek II, L.L.C. v. A-Roo Co., 222 F.3d 1372, 1377 (Fed. Cir. 2000) ("where the patentee makes an assignment of all substantial rights under the patent, the assignee may be deemed the effective "patentee" under 35 U.S.C. § 281 and thus may have standing to maintain an infringement suit in its own name.").

[54] Enhanced Sec. Rsch., LLC v. Juniper Networks, Inc., No. 1:09-cv-00871-JJF, 2010 WL 2898298, at *5 (D. Del. July 20, 2010) ("Although Plaintiff appears to have retained legal title to the patents-in-suit, as well as the ability to exploit the patents-in-suit, the Court concludes that the Purchase Agreement nevertheless transferred "all substantial rights" to Security Research Holdings. Under the Purchase Agreement, Plaintiff lacks authority to make decisions concerning licensing and assignments, whether to initiate enforcement proceedings and/or settlement discussions, how to conduct litigation, and the approval of any settlements. Because Plaintiff lacked the requisite legal interest in the patents-in-suit at the time it brought this action, it has not suffered any cognizable injury and does not have Article III standing."). The reference to "statutory" standing distinguishes a statutory requirement to allege a claim from the power of a court to hear the dispute. Lone Star Silicon Innovations LLC v. Nanya Tech. Corp., 925 F.3d 1225, 1235 (Fed. Cir. 2019) (drawing this distinction).

[55] *E.g.*, Au New Haven LLC v. YKK Corp., 210 F.Supp.3d 549 (S.D.N.Y 2016) (assignment of patent did not violate anti-assignment term in license).

Assignment within the model depicted in Part II therefore does not, in and of itself, entail fraud on the PTO.[56]

E. The statutory standing rationale.

Things are somewhat different with respect to a second issue implicated by the court's statement, statutory standing to sue for infringement. Section 281 of the Patent Act states that a "patentee" may sue for infringement. As noted above, under Section 100(d) an assignee is a patentee, and recordation of an assignment is presumptive evidence of the validity of the assignment. For these reasons assignees generally do not face statutory standing challenges though, as discussed below, such challenges are common when licensees sue.[57] After Longbeam amended its Rule 7.1 disclosure, for example, the defendant objected on the grounds that the disclosure was insufficient to allow it to test statutory standing.[58] Longbeam countered that "recordation at the PTO of the assignment to Longbeam of the patents it had asserted against Amazon 'provide[d] conclusive evidence that Plaintiff Longbeam has standing to bring this action.'"[59] In other words, Longbeam said, for purposes of statutory standing the terms of the statute should govern and if the statute says an assignee is the patentee, then it is. QED.

But this statutory plan leaves open the possibility that a defendant might succeed in challenging the validity of an assignment, and thus might succeed in showing that a plaintiff lacked statutory standing. Judge Connolly seemed to have this possibility in mind when he rejected Longbeam's argument:

> Notably, nowhere in its response did Longbeam deny Amazon's assertions that Longbeam was simply "an extension of IP Edge," that IP Edge finals [sic] entities like and including Longbeam as part of a litigation campaign, and that IP Edge engages in a practice of naming individuals with no prior connection to patent monetization as managers or members of its various LLCs to avoid disclosure of its real interests in defiance of the purpose of the Disclosure and Third-Party Funding Orders.[60]

The court's rejection of Longbeam's argument echoed factors sometimes employed to challenge assignments meant to create or defeat diversity jurisdiction. 28 U.S.C. Section 1359 provides that district courts do not have jurisdiction over cases in which parties are joined collusively "by assignment or otherwise." Federal courts have found collusive assignments insufficient to establish jurisdiction in cases analogous to the model described in Part II. For example, *Kramer v. Caribbean Mills, Inc.*, rejected a claim of diversity jurisdiction based on an

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[56] Misstatements or misleading half-truths concerning the disclosures made might constitute fraud on the PTO of course. But failure to answer questions the PTO does not ask would not.

[57] Indeed, courts sometimes use assignment as the legal baseline for standing and judge licenses by whether they are equivalent to assignments. Alfred E. Mann Found. for Sci. Rsch. v. Cochlear Corp., 604 F.3d 1354, 1358–59 (Fed. Cir. 2010) ("In circumstances where a patent owner transfers "all substantial rights" to the patents-in-suit, however, "the transfer is tantamount to an assignment of those patents to the exclusive licensee, conferring standing to sue solely on the licensee."); Flow Devices & Sys., Inc. v. Pivotal Sys. Corp., No. 3:22-cv-02453-JST, 2023 WL 3559745, at *2 (N.D. Cal. Mar. 31, 2023) ("a licensee only qualifies as the patentee if their license amounts to an effective assignment of the patent.").

[58] Nimitz Techs. LLC v. CNET Media, Inc., No. 1:21-cv-01247-CFC, 2022 WL 17338396, at *6 (D. Del. Nov. 30, 2022).

[59] *Id.*

[60] *Id.*

assignment of a contract to a Texas attorney who paid $1 for the assignment plus a promise of 95% of any return from a cause of action relating to the contract.[61] (An admitted purpose of the assignment was to create diversity jurisdiction.) Courts following *Kramer* have developed federal common law relating to assignments that seek to manipulate jurisdictional rules. In *Attorneys Trust v. Videotape Computer Products, Inc.*, the Ninth Circuit recited a series of factors relevant in diversity cases:

> Since *Kramer*, courts have set out a number of factors which are to be considered in deciding whether an assignment is improper or collusive. Among them are: were there good business reasons for the assignment; did the assignee have a prior interest in the item or was the assignment timed to coincide with commencement of litigation; was any consideration given by the assignee; was the assignment partial or complete; and was there an admission that the motive was to create jurisdiction.[62]

Current patent practice does not typically apply such analysis to assignments. Statutory standing issues almost aways arise with respect to licensees, not assignees. The default rule in that context is that even an exclusive licensee must join the patent owner unless the license transfers all substantial rights in the patent.[63] A license that qualifies the licensee's rights, for example by giving the licensee the right to sue for infringement but requiring it to consult with the record owner before doing so, or giving the record owner approval rights over settlement, or the right to sue an infringer if the licensee does not, may not be enough to give the licensee standing even if the agreement evinces an intent that the licensee file patent cases.[64]

Statutory standing questions are typically resolved through textual interpretation of licenses or other transaction documents.[65] The analysis tends to be formal. It focuses on the scope of rights granted, and not on any delegation of power by a licensee or assignee.[66] Such analysis typically would not include inquiry into whether the assignee was undercapitalized or whether the assignee remitted patent assertion proceeds to the assignor or some other party. (Payment to a licensor does not defeat licensee standing where a licensee obtained all substantial rights,[67] and there would be no reason payment to an assignor should be treated differently.)

[61] Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 829 (1969).
[62] Att'ys Trust v. Videotape Comput. Prods., Inc., 93 F.3d 593, 595–96 (9th Cir. 1996).
[63] Propat Int'l Corp. v. Rpost, Inc., 473 F.3d 1187, 1189 (Fed. Cir. 2007) ("Even if the patentee does not transfer formal legal title, the patentee may effect a transfer of ownership for standing purposes if it conveys all substantial rights in the patent to the transferee. In that event, the transferee is treated as the patentee and has standing to sue in its own name.").
[64] *Id.* at 1191 (license did not give licensee standing where owner "enjoys an equity interest in the proceeds of licensing and litigation activities, a right to notice of licensing and litigation decisions and the right to veto such decisions as long as the veto power was not exercised unreasonably, and the unrestricted power to bar Propat from transferring its interest in the patent to a third party.").
[65] In the case of licenses, such documents are routinely produced in discovery; they are not commonly part of a party's Rule 7 disclosure. The same is true for assignments, with the difference that a recorded assignment makes public the assignor's identity.
[66] *Id.* at 1189 ("we must look to the agreement between the parties and analyze the respective rights allocated to each party under that agreement.").
[67] *Id*. at 1191 ("that a patent owner has retained a right to a portion of the proceeds of the commercial exploitation of the patent, as Authentix has done in this case, does not necessarily defeat what would otherwise be a transfer of all substantial rights in the patent.").

In addition, some older precedent calls into question how far a court should be allowed to treat assignments as shams for purposes of statutory standing. An unpublished Federal Circuit opinion holds that an assignment is not invalid just because its purpose was to facilitate litigation.[68] The court said "an assignment that explicitly provides for possible transfer back to the assignor is nevertheless effective to give the assignee standing."[69] Circuit authority predating creation of the Federal Circuit held that an assignment motivated solely by a desire to avoid joinder was nonetheless valid.[70] The court held that absent a legal flaw in the assignment, "the purpose underlying their execution is of no concern to the defendants."[71] This approach is in tension with post-*Kramer* cases assessing the validity of assignments relative to diversity jurisdiction, in which courts have divided on whether or how much motive matters.[72]

Nevertheless, two considerations weigh in favor of allowing courts to scrutinize even assignments that formally (judged solely by text) transfer ownership of a patent. First, some precedent supports substantive analysis of transaction terms to determine whether ownership of a patent has transferred. "To determine whether a provision in an agreement constitutes an assignment or a license, one must ascertain the intention of the parties and *examine the substance of what was granted*."[73] Substantive analysis could include the sort of evidence courts consult in diversity jurisdiction cases, as Judge Connolly's comment suggests. Second, even if the text of an assignment document in fact conveys title to a patent, the force of that text may be attenuated by other agreements, as might happen if the assignee grants to the assignor or third parties a substantial fraction of patent rights. In the context of licenses rather than assignments, some district court authority supports analyzing rights granted back to a nominal assignor as if those rights qualified the grant.[74] Other authority does the opposite.[75]

The governance structure described above resembles situations in which courts have questioned licensee standing. Courts have held that a licensee lacked standing where under the license the patent owner:

> retains an economic interest in the patent and a substantial measure of control over decisions affecting the patent rights. It enjoys an equity interest in the proceeds of licensing and litigation activities, a right to notice of licensing and litigation decisions and the right to veto such decisions as long as the veto power was not exercised unreasonably, and the unrestricted power to bar [the licensee] from transferring its interest in the patent to a third party. In no case has this court

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68 SGS-Thomson Microelectronics, Inc. v. Int'l Rectifier Corp., 31 F.3d 1177 (Fed. Cir. 1994).
69 *Id*. at *6.
70 Rawlings v. Nat'l Molasses Co., 394 F.2d 645, 648 (9th Cir. 1968).
71 *Id*.
72 A point noted in Att'ys Trust v. Videotape Comput. Prods., Inc., 93 F.3d 593, 595–96 (9th Cir. 1996).
73 Vaupel Textilmaschinen KG v. Meccanica Euro Italia SPA, 944 F.2d 870, 874 (Fed. Cir. 1991) (emphasis added).
74 Acceleration Bay LLC v. Activision Blizzard, Inc., No. 1:15-cv-00228-RGA, 2016 WL 3186890, at *2 (D. Del. June 3, 2016) ("In this context, I do not think there is a material distinction between a right retained and a right granted back.").
75 Princeton Digit. Image Corp. v. Hewlett-Packard, No. 1:12-cv-00779-RJS, 2013 WL 1454945, at *4 (S.D.N.Y. Mar. 21, 2013) ("it is not clear why GE and PDIC LLC would even include language granting rights back to GE, much less engage in subsequent amendments carving out additional rights, if GE had retained them all along. Thus, the Court concludes that PDIC was the title holder at the time it filed suit").

> held that a patentee who retains such broad and wide-ranging powers with respect to a patent has nonetheless transferred "all substantial rights" in the patent.[76]

In the model described above, the assignment is formally unqualified. Looking just at the assignment, the assignee LLC owns the patent outright and thus holds all substantial rights. Yet the assignor may retain some economic interest in the patent and the management company may retain effective control over decisions affecting the patent rights. The LLC is formed to assert the patent, but it is not expected to participate substantively in assertion and, judging by the testimony in Judge Connolly's hearings, probably is not capable of doing so. If the assignment itself accurately depicted these facts, there would be a question whether the LLC held all substantial rights. It is at least not obvious that the result should change just because the practical effect of the (formally unqualified) assignment might be attenuated in separate agreements, such as between the LLC and a manager.

As noted above, recordation should be treated as a matter of form. The Patent Act treats assignees as patentees, recordation is a formal process, and one of the main purposes of the inquiry is to avoid duplicative litigation.[77] Formal, textual analysis is sufficient to serve this purpose.[78] But litigation raises additional concerns both for the court system and for targets of patent assertion. The law has not allowed "a patent owner to effectively grant a 'hunting license,' solely for the purpose of litigation, in the form of a pro forma exclusive license . . . ."[79] In the model described above the LLCs hold the right to exclude, but for all practical purposes the assignment is just a hunting license. That premise is too strong to question all assignments to non-practicing entities, for most such assignments are probably, in effect, hunting licenses. But the functional similarity between the model described above, and cases in which courts have found that licensees lack statutory standing, provides reason to view such assignments with a gimlet eye, particularly if the purpose of using the LLC is in tension with case management concerns.

Suppose for the sake of argument that a court concluded an LLC was structured to evade potential sanctions awards? Ergo what? Some state statutes treat as void contracts whose objects include facilitating unlawful conduct.[80] The common law does the same, in a somewhat more open-ended fashion.[81] The concern Judge Connolly identified in the passage quoted above raises public policy issues, in particular the risk that contracts will impose negative externalities on third parties (infringement defendants) in the form of fee awards an undercapitalized plaintiff

[76] Propat Int'l Corp. v. Rpost, Inc., 473 F.3d 1187, 1191 (Fed. Cir. 2007).
[77] Prima Tek II, L.L.C. v. A-Roo Co., 222 F.3d 1372, 1381 (Fed. Cir. 2000) ("one of the underlying policies of the rule of *Independent Wireless* [that "a patentee should be joined, either voluntarily or involuntarily, in any infringement suit brought by an exclusive licensee"] is to prevent duplicative litigation against a single accused infringer").
[78] When the LLC owns the patent and has not licensed it, no other entity can sue for infringement that occurs during the LLC's period of ownership.
[79] Prima Tek II, L.L.C. v. A-Roo Co., 222 F.3d 1372, 1381 (Fed. Cir. 2000).
[80] *E.g.*, CAL. CIV. CODE § 1668 ("All contracts which have for their object, directly or indirectly, to exempt any one from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."). As relevant here, statutes such as 28 U.S.C Section 1927 could be relevant to application of this principle.
[81] RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. L. INST. 1981) ("(1) A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.").

could not satisfy, transaction costs necessary to satisfy such awards from investors or management entities, and increased litigation costs that could arise from the fact that the named plaintiff does not call the shots in litigation.[82]

This concern is reasonable. It is reasonable to view the cumbersome model depicted in Part II as an effort to insulate investors and shot callers from the risk of fee awards. There is no better explanation for assigning patents to thinly capitalized nominal parties whose role in life is to take the fall if things go wrong in exchange for modest payments when they go right. Setting up the supposedly injured patentee plaintiff as the fall guy in patent assertion practice is enough to satisfy the darkest taste in humor. Such risks probably are not material in every case, but that does not mean that courts have no interest in exploring the substantive validity of assignments. If an assignment were held invalid as being in violation of public policy then, at least in the model identified in Part II, the assignee likely would lack statutory standing to assert infringement.

This prospect raises a choice of law question. Historically state law governed the validity of patent assignments. In 2008, the Federal Circuit called that rule into question with a decision holding that federal law would govern interpretation of a provision in an employment agreement assigning rights in future inventions.[83] A more recent case affirms the general rule that state law governs contractual aspects of assignment, such as reformation.[84] *Gunn v. Minton*, which holds that malpractice claims against patent practitioners do not arise under the Patent Act for purposes of jurisdiction, points in this direction as well.[85] Pointing the other way is *Kramer* and the statutory and case law concerning diversity jurisdiction. In *Kramer*, the assignee attorney argued that the assignment was valid under Texas law, but the Court was unmoved, holding "the existence of federal jurisdiction is a matter of federal, not state law."[86] This ruling is probably best interpreted as holding that validity under state law is a necessary but not sufficient condition for establishing federal jurisdiction.

Clarification on whether state or federal law governs questions relating to the validity of a patent assignment that seeks to evade responsibility for expected litigation costs would be useful. Ultimately, however, whether an assignment should be treated as a sham, and thus insufficient to confer statutory standing, should not turn on the choice of law. Patent policy cannot be divorced from sound judicial case management. A patent is no more valuable (and thus has no greater incentive effect) than the remedies it provides, which are provided largely through courts. The tranche of patent cases identified in Judge Connolly's hearings leans heavily on, and creates substantial costs for, courts. It would be reasonable to think that an undercapitalized plaintiff would be more willing than an adequately capitalized plaintiff[87] to engage in litigation conduct that ran up an opponent's fees and costs unnecessarily. Even if an opponent secured a fee award, they might rationally fear that to try to pierce entity veils to locate a solvent responsible party would be to throw good money after bad. Such a belief would tend to lower the risk (expected

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[82] Patent assertion imposes costs on the court system, as noted above, but this is true even for well-capitalized plaintiffs.
[83] DDB Techs., L.L.C. v. MLB Advanced Media, L.P., 517 F.3d 1284 (Fed. Cir. 2008).
[84] Schwendimann v. Arkwright Advanced Coating, Inc., 959 F.3d 1065, 1075 (Fed. Cir. 2020) ("our precedent does not suggest that in the context of agreements assigning existing patents, federal law governs the interpretation of these contracts.").
[85] Gunn v. Minton, 568 U.S. 251 (2013).
[86] Kramer v. Caribbean Mills, Inc., 394 U.S. 823, 829 (1969).
[87] One with enough assets to cover a potential fee award.

cost) that whoever is calling the shots in litigation would ultimately be called to account for the costs of litigation tactics.

The law should have little tolerance for daisy chains of contracts whose object is to disguise decision-making authority and to avoid liability for costs imposed on third parties in connection with patent assertion. Although assignment to an undercapitalized assignee is not inconsistent with the formal recordation requirements of the PTO, there is a fair policy concern if an assignment is tactically calculated to separate authority from responsibility. That may or may not be a common problem, but whether it is a problem in any given case cannot be determined without disclosure, and the concern is reasonable enough to justify disclosure of facts sufficient to determine whether an assignment has been made to an underfunded entity to obtain a tactical advantage in court if things go badly for the plaintiff.

Against this argument, a proponent of the model identified in Part II could fairly point out that fee awards are unusual, and veil-piercing investigations may be pursued in the small fraction of cases where an award is made against an undercapitalized plaintiff. It is true that capitalization could be investigated *ex post* in the relatively few cases where veil-piercing to satisfy a fee award was relevant. Some expense might be avoided by requiring disclosure only in those cases where the issue arises rather than in every case. But *ex ante* disclosure does not cost much either, particularly if courts require disclosure of managers who serve as shot-callers (Level 3) and of each entity with a contingent stake in the result of a case, as the discussion above recommends. To conclude that an assignment was a sham would not preclude assertion of the patent. If the assignee retained an interest sufficient to establish injury in fact, the more likely remedy would be to require joinder of the assignor,[88] which also is not expensive and is cheaper than an *ex post* veil piercing investigation. If the assignee did not retain such an interest the assignee would be dismissed and the assignor would have to sue in its own name, which is also not particularly expensive (though it might have implications for damages).[89] On balance, this cost of disclosure argument does not weigh strongly against disclosure.

A defender of this model might also argue, reasonably, that because fee awards are unusual, the expected cost of a fee award is probably not very high. That is true. Even if a filed patent case imposes substantial costs on a defendant, most of the time the patentee does not have to pay those costs. As with any other business, adequacy of capitalization should be assessed probabilistically, relative to the expected cost of the entity's operations. From a purely economic point of view, one would not want to make *over*capitalization (relative to the expected cost of a

[88] Briefly, a licensee who has some right to exclude (and thus suffers injury in fact for constitutional standing purposes) but which does not hold all substantial rights may still assert infringement so long as the patent owner is joined. *E.g.*, Lone Star Silicon Innovations LLC v. Nanya Tech. Corp., 925 F.3d 1225, 1237 (Fed. Cir. 2019) ("We have interpreted Rule 19 and Independent Wireless as directing courts to join patentees along with licensees who otherwise have standing.").

[89] Patentees may recover damages for infringement no more than six years before filing. 35 U.S.C. § 286, though as a practical matter this period is often truncated by the notice requirement of 35 U.S.C. § 287, typically referred to as the marking statute because it provides that sale of a product marked as practicing a patent provides constructive notice of the patent. The six-year period is counted backward from filing. If a plaintiff's complaint was dismissed for lack of standing, and the true owner then filed, the six-year period would run from the later filing, and some period of damages might be lost. *E.g.* Custer v. United States, 622 F.2d 554, 563 (Ct. Cl. 1980) (where plaintiff amended complaint to add assignee the six-year period ran from filing of the amendment). Patent assertion entities that do not practice a patent will likely not have marked products, so the six-year-limitation will not be relevant in many cases of the type Judge Connolly investigated.

fee award) a condition of filing a patent suit. To err too in that direction would be akin to requiring patentees to post a bond in every case; there is no legal basis for such a requirement at present. But this point relates more to the substantive question whether an assignment should be treated as a sham because the assignee was undercapitalized relative to the expected cost of assertion than to disclosure of facts needed to assess this question. Inquiry into capitalization is one thing, and a conclusion that capitalization is inadequate is another. The need to be practical in assessing capitalization, and whether an assignment is a sham, does not vitiate courts' interest in disclosure.

F. The sunlight rationale.

The broadest rationale for disclosure is the public interest in learning how its courts are being used. Judge Connolly referenced this rationale, quoting Justice Holmes:

> It is desirable that the trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.[90]

The sunlight rationale is the broadest justification for disclosure because under the sunlight rationale disclosure is the goal to be achieved rather than a means to achieving some other goal. There are no logical or instrumental bounds to disclosure rules that aim to achieve disclosure. The sunlight rationale supersedes, and thus cannot be justified by, any case management objective. For this reason, absent amendment to the Federal Rules of Civil Procedure or substantive law such as the Patent Act, the sunlight rationale offers weak support for disclosure rules such as Judge Connolly and some other courts have promulgated. Disclosure for its own sake may be rationally related to making policy, and could be desirable for that reason, but disclosure that is not tied to any action a court could take, or any decision a court would have to make, finds little support in existing law.

Put slightly differently, under current law a court has power to order disclosure of information the court could do something with—such as sanctioning a party or counsel, finding a lack of statutory standing, or ordering a party to attend a settlement conference. The foregoing rationales cover such information and provide sufficient legal foundation for the disclosure rules Judge Connolly promulgated, and for investigation into compliance with those rules, as well as investigation into issues such as those discussed above. But current law provides weak support for ordering disclosure of information a court could not act on if disclosed. The Federal Circuit acknowledged this point in its order denying Nimitz's motion for a stay. The court held that Judge Connolly "did not seek information simply in order to serve an interest in public awareness, independent of the adjudicatory and court-functioning interests reflected in" concerns Judge Connolly described in his November 22 order.[91]

The "party presentation" principle reinforces the conclusion that existing law does not support disclosure for its own sake. The principle essentially holds that courts resolve disputes as

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[90]Nimitz Techs. LLC v. CNET Media, Inc., No. 1:21-cv-01247-CFC, 2022 WL 17338396, at *2 (D. Del. Nov. 30, 2022) (quoting Cowley v. Pulsifer, 137 Mass. 392, 394 (1884) (Holmes, J.)).
[91] *In re* Nimitz Techs. LLC, No. 2023-103, 2022 WL 17494845, at *2 (Fed. Cir. Dec. 8, 2022).

framed and presented by parties and should not raise substantive issues (as opposed to jurisdictional issues) the parties do not present. The Court has characterized the principle as "supple, not ironclad" and stated that "[t]here are no doubt circumstances in which a modest initiating role for a court is appropriate."[92] But the principle at least casts doubt on the degree to which a court may serve as an investigator of issues relevant to policy but not tied to its adjudicative responsibilities.

The party presentation principle may temper application of disclosure rules to some extent. Most notably relevant to current disputes, it is difficult to see a case under current law for compelling disclosure of the identity of passive investors in entities that in turn invest in patent acquisition or assertion. (In other words, in the diagram in Part II current law supports disclosure of entities investing at level one but not of the identity of passive investors in such entities.) Such persons are analogous to stakeholders in mutual funds that may own stock in a party, whose identities traditionally have not been subject to disclosure. The identity of the funds themselves, or of management companies, should be subject to disclosure to the extent discussed above. (The same is true for investors who may be shot-callers, for whom their shot-caller status warrants disclosure.) At present, however, there is no adjudicative function to which further disclosure might relate.

Having said that, nothing in the principle of party presentation calls into question disclosure rules such as those Judge Connolly promulgated, and similar rules promulgated by other courts. Information responsive to such rules may have policy implications to the extent one views certain types of patent assertions as problematic, but the rules call for information relevant to sound case management and are justified for that reason.

Recent developments in which persons related to patent assertion entities have chosen to defy orders commanding their attendance—the "Notice of Objection to and Non-Participation in Judicial Inquisition"[93]—suggests that clarity regarding courts' inherent authority may useful. As noted above, courts traditionally have exercised the power to compel insurers or executives of entity parties to attend proceedings such as settlement conferences.[94] Settlement is a valid case management concern, and there is no reason to question the inherent authority of courts to order executives otherwise beyond a court's geographic jurisdiction to attend proceedings in their capacity as an owner or agent of a party. Similar considerations justify the exercise of such power to investigate whether a party has misused judicial processes or willfully defied a court's orders.

IV

Patent cases have played an important role in shaping modern ideas of inherent judicial power. The keystone modern case is *Chambers v. Nasco, Inc.*,[95] in which sham transactions related to radio broadcast facilities were used to try to defeat a court's jurisdiction. The trial court sanctioned counsel and the parties based on those transactions and litigation misconduct, which the trial court characterized as including "`acts which degrade the judicial system,' including

[92] United States v. Sineneng-Smith, 140 S. Ct. 1575, 1579 (2020).
[93] Backertop Licensing LLC v. Canary Connect, Inc., No. 1:22-cv-00572-CFC (D. Del. July 12, 2023), ECF No. 48.
[94] Meador, *supra* note 42.
[95] 501 U.S. 32 (1991).

`attempts to deprive the Court of jurisdiction, fraud, misleading and lying to the Court.'"[96] The trial court relied on its inherent authority to award fees and costs to the defendant, in part because no rule of positive law was coextensive with the misconduct in the case.

The Supreme Court affirmed. With respect to a trial court's power to detect fraud, it held "a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud."[97] For that proposition, it cited *Universal Oil Products Co. v. Root Refining Co.*,[98] a patent case in which Universal, a "patent holding and licensing company," prevailed in an infringement action; judgment was affirmed on appeal (and *certiorari* was denied) in 1935.[99] The defendant, Root, then settled with Universal. Universal then sought to assert that judgment as *res judicata* against other defendants on the ground that each defendant was a member of a patent defense organization, of which Root was a member, formed to defend against Universal's claims.

In 1941, while these latter cases were pending, evidence was uncovered suggesting a representative of Universal had bribed the Third Circuit judge who wrote the opinion affirming Universal's judgment against Root. The evidence was placed before the Third Circuit, which faced a dilemma. Root had settled and had no interest in further proceedings. The other defendants, against whom the judgment in the Root action was being asserted, had not been parties to the Root case and had no standing to seek to reopen it. The Third Circuit appointed counsel for those other defendants *amici* and, at their suggestion, appointed a special master to investigate the bribery allegation.[100] The special master concluded that the prior judgment was tainted and, in 1944, the Third Circuit vacated the judgment and set the case for reargument. The court taxed Universal with the special master's fees and with the attorneys' fees incurred by counsel acting as *amici.* The Supreme Court reversed the fee award but endorsed the power of courts to investigate fraudulent conduct occurring before them.[101]

For this proposition the Court in *Universal* cited *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*,[102] another patent case, which involved a 1941 petition to set aside a 1935 judgment on the ground that the judgment was tainted by the patentee's conduct in secretly drafting an article, published under the name of a seemingly disinterested third party, which was later asserted in support of validity. Like *Universal*, *Hazel-Atlas* confirmed the power of courts to protect the integrity of their processes regardless whether a party was in a position to do so: "it

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[96] *Id*. at 41-42.
[97] *Id*. at 43.
[98] 328 U.S. 575 (1946).
[99] *Id.* at 580.
[100] For its part, Universal wisely consented to have the Third Circuit appeal reargued, to be bound by the judgment on reargument, and to honor the settlement with Root regardless whether Universal prevailed.
[101] 328 U.S. at 580. Justice Frankfurter wrote:

> The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. Hazel-Atlas Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250. The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation.

[102] 322 U.S. 238 (1944).

cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants."[103]

Maybe it is the abstract nature of patent rights that leads to such things. Patents claim inventions that exist in a conceptual space independent from their embodiments, and patents may be the product of exceedingly fine distinctions that, to an outsider, might seem like wordplay and nothing more. Or maybe it is that some participants in the patent assertion world see courts as a kind of backboard that needs to be used if an easier shot is not available. On this view, perhaps, courts may be seen as part of the apparatus of the game, but nothing more, and certainly not as the game itself. That so many patent cases settle early, and so few try, would tend to reinforce this view. It is not, however, a view courts are likely to share.[104] Nor should they.

In the context of the model described in Part II, there is a gap between current rules and the needs of sound case management. Though current law supports Judge Connolly's inquiry to date, equity owners of LLCs created to assert patents may not be litigation shot-callers and thus may have exercised little if any control of in-court behavior and may know little about the reasons for such behavior. Calling them into court is justifiable but may not produce fulsome answers.

Looking through a nominal LLC plaintiff to investigate litigation conduct or satisfy a fee award is possible but relatively costly compared to reasonable alternatives. It also could be ineffective. As traditionally conceived, such veil-piercing would allow a court to disregard the LLC form to hold an individual LLC member accountable for actions taken in the LLC's name. In other words, the veil pierced is the LLC form and on the other side of the veil stands the LLC's owner. In the cases discussed in Part II, the owners were ordinary persons who accepted what was presented as a passive investment opportunity, who did not control litigation conduct, and who might have only modest means. Forcing such persons to take a fall for litigation conduct would be an unsatisfactory way of dealing with such conduct, even if one believed the LLC owners had assumed that risk. Veil-piercing to such persons would tend to vindicate and thus perpetuate such structures without addressing costs to the courts and other litigants.

It would be easier and cheaper to deal with such problems *ex ante*. Toward that end, it would be desirable to allow courts to order shot-callers (persons or entities at level 3 in the model) to submit to the jurisdiction of the court as a condition of allowing a party for whom shots are called to proceed with a case. Nothing precludes an entity that selects a forum to file a suit, retains counsel to file it, and then directs the conduct of the suit in that forum, from being compelled to submit itself to the court's jurisdiction,[105] though there is not a positive law basis for doing so at present, and the inherent authority cases discuss inherent authority to investigate suspected wrongdoing, not inherent authority to compel a non-party to submit to jurisdiction in

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[103] *Id*. at 247.
[104] One has some sympathy for the individual LLC members identified in Judge Connolly's hearings. They didn't think they were signing up for this. Probably they thought this is just how the game is played, and perhaps others in the patent assertion field reinforced this view. To the extent participants in patent assertion view it as a game, of which courts are a part, present proceedings can be viewed as a corrective: there are games outside the game.
[105] *Cf* Mallory v. Norfolk Southern, No. 21-1168 (June 27, 2023)(due process not violated by statute requiring consent to suit as a condition of doing business in a state).

the interests of prudent case management (and, one would hope, providing incentives to comply fully with court rules).

It is an interesting question whether current Rule of Procedure 83(b) could support a rule requiring such submission, or whether the Rules Enabling Act[106] would support a more specific new rule. My intuition is that an amendment to the Judiciary Act would provide a sounder footing for such a rule (and Section 1927 could be amended to allow imposition of fees against any person or entity subject to the jurisdiction of the court), but its desirability should not be in serious question.

Finally, Congress should consider limiting the definition of "patentee" to the original inventor and "bona fide" successors in interest, with that term being defined to exclude transactions designed to evade responsibility for costs associated with patent assertion. Recordation, and the presumption it confers, would continue to operate as it does at present, but a defendant could challenge a plaintiff's statutory standing by reference to facts such as (but not limited to) the kind of factors set forth in the diversity jurisdiction case law.[107] The amendment would allow discovery into such factors, and defendants can be trusted to pursue such discovery, and thus avoid misuse of courts, when the facts warrant. Requiring managers to submit to the jurisdiction of the court should help in this regard.

CONCLUSION

Current law supports disclosure rules such as Judge Connolly has adopted and application of those rules to compel disclosure of most facts sought to date in his investigation. Both as a matter of positive law and as a practical matter, disclosure should not extend to passive investors in patent assertion (Level 1 in the model diagram) so long as they truly are passive. Existing law is not well-suited to capture management entities (Level 3 in the diagram) that might neither have an equity interest in the patent holder nor advance nonrecourse funding. Such entities nevertheless may be shot callers; sound case management concerns support compelling their disclosure and subjecting them to the jurisdiction of the courts they use. It would be preferable to require disclosure in every case, to allow defendants to investigate potential standing issues, and it therefore would be preferable to amend the rules of procedure to require disclosure of any person or entity with who controls or has legal or practical power to control litigation decisions. Judges do not have to do anything with such disclosure if they do not want to, but that should be their call. The same is true with respect to requiring shot callers to submit to the jurisdiction of the court, with the difference that a statutory change may be preferable to a change in the rules. Finally, Congress should consider statutory changes to ensure that sham assignments do not create statutory standing.

[106] 28 U.S.C. § 2072.

[107] *See* 93 F.3d 593, 595–96.