No. ______

In the Supreme Court of the United States

CELLSPIN SOFT, INC.,

Petitioner,

v.

FITBIT LLC, ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

Randall T. Garteiser
Counsel of Record
GARTEISER HONEA, PLLC
119 W Ferguson St.
Tyler, TX 75702
(888) 908-4400
rgarteiser@ghiplaw.com

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Counsel for Petitioner

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

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

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

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

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

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

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Cellspin Soft, Inc.

Respondent and Defendants-Appellees below

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

CORPORATE DISCLOSURE STATEMENT

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

LIST OF PROCEEDINGS

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

U.S. Court of Appeals, Federal Circuit

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

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

Opinion: November 1, 2024

U.S. Court of Appeals, Federal Circuit

Nos. 2023-1526

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

Opinion: November 1, 2024

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

No. 4:17-cv-05928

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

No. 4:17-cv-05931

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

No. 4:17-cv-05932

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

No. 4:17-cv-05933

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

No. 4:17-cv-05934

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

No. 4:17-cv-05936

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

Judgments: June 15, 2022

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

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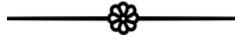
PETITION FOR A WRIT OF CERTIORARI

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



OPINIONS AND PROCEEDINGS BELOW

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

Specifically, Petitioner appeals and seeks review of the following:

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

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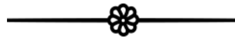

JURISDICTION

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

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 455

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

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

. . .

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

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

. . .

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

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

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

. . .

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

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

STATEMENT OF THE CASE

A. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Background

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

C. Proceedings Below

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

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

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

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

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

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

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

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

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

REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Quote from the Recusal decision:

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

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

Quotes from the Summary Judgment decision:

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

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

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

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

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

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

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

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

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

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

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

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

A. Legal Precedents

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

B. Compromised Fairness

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

C. Erosion of Public Trust

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(Audio Transcript)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8. “ATTACHING” “USER IDENTIFIER” TO “NEW DATA”[19]

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

Transcription:

8. “Attaching” User Identifier to “New Data”

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

Randall T. Garteiser
Counsel of Record
Garteiser Honea, PLLC
119 W Ferguson St.
Tyler, TX 75702
(888) 908-4400
rgarteiser@ghiplaw.com

Counsel for Petitioner

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