

■ Removal; remand; jurisdictional discovery denied. Where actions were removed on the basis of diversity jurisdiction, Judge Schiltz “discovered that he lacked sufficient information” to ascertain whether the parties were diverse and ordered the parties to file affidavits identifying their citizenship, one party admitted that it was unable to determine its own citizenship, and Judge Schiltz ordered one defendant to show cause why the cases should not be remanded, that defendant’s motion for leave to conduct jurisdictional discovery was denied where the defendant could only offer “speculation” that discovery might alter the result. *In Re Trust Established Under the Pooling & Serv. Agreement Relating to the Wachovia Bank Com. Mortgage Trust Com. Mortgage Pass-Through Certs., Series 2007-C30*, 2021 WL 4551598 (D. Minn. 10/5/2021).

■ Sanctions; Fed. R. Civ. P. 11; 28 U.S.C. §1927. Despite finding that the defendant’s Rule 11 motion was “both procedurally and substantively deficient,” Judge Wright found that plaintiff counsel had engaged in “bad faith efforts to prolong this litigation” and engaged in a litany of improper conduct; imposed sanctions in an amount to be determined pursuant to 28 U.S.C. §1927; and ordered that the plaintiff’s counsel were to be “jointly and severally liable for any award of attorneys’ fees.” *Niazi Licensing Corp. v. St. Jude Med. S.C.*, 2021 WL 4947712 (D. Minn. 10/25/2021).



IMMIGRATION LAW

JUDICIAL LAW

■ Migrant protection protocols (MPP) (“Remain in Mexico”): The saga continues. As previously reported in the October issue of *Bench & Bar*, U.S. District Court Judge Matthew Kacsmaryk, Northern District of Texas, issued a nationwide injunction on 8/13/2021 (staying implementation of Department of Homeland Security Secretary Alejandro Mayorkas’ 6/1/2021 Memorandum terminating migrant protection protocols), ordering the Biden administration to reinstate the preceding administration’s MPP program in good faith. According to Judge Kacsmaryk, the Biden administration’s termination of MPP violated the Administrative Procedure Act (APA) (5 U.S.C. §706(2)(A)) because DHS

ignored certain key factors while providing arbitrary reasons for rescinding MPP and, at the same time, failing to consider the effect of its termination on compliance with 8 U.S.C. §1225. The decision was stayed for seven days, allowing the Biden administration to seek emergency relief at the appellate level. *Texas, et al. v. Biden, et al.*, No. 2:21-cv-00067-Z (N.D. Tex. 8/13/2021). https://www.govinfo.gov/content/pkg/USCOURTS-txnd-2_21-cv-00067/pdf/USCOURTS-txnd-2_21-cv-00067-0.pdf

On 8/19/2021, the 5th Circuit Court of Appeals declined to grant the government’s request for a stay of Judge Kacsmaryk’s order pending appeal. *Texas, et al. v. Biden, et al.*, No. 21-10806 (5th Circuit, 8/19/2021). <https://www.ca5.uscourts.gov/opinions/pub/21/21-10806-CV0.pdf>

On 8/24/2021, the U.S. Supreme Court denied the Biden administration’s request for a stay of Judge Kacsmaryk’s order pending completion of appellate proceedings on the matter. *Biden, et al. v. Texas, et al.*, 594 U.S. ___ (2021). https://www.supremecourt.gov/orders/courtorders/082421zr_2d9g.pdf

On 9/15/2021, the Biden administration filed its first MPP compliance report with the district court, outlining steps it was taking to re-implement the protocols: discussions with the government of Mexico to accept individuals returned from the United States, given the latter’s “sovereign right to admit or reject the entry of foreigners into its territory”; rebuilding infrastructure and reorganizing resources and personnel along the southwest border (under the eye of an interagency task force); developing immigration court dockets to schedule hearings for individuals in MPP; planning to operationalize MPP given changed conditions, including ongoing risks presented by covid-19 and the Biden administration’s “obligation to implement the Center for Disease Control and Prevention’s (CDC) Title 42 Order, which temporarily prohibits the introduction into the United States of certain noncitizens traveling from Canada or Mexico into the United States.” https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.105.0_2.pdf



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On 10/14/2021, the Biden administration filed its first supplemental MPP compliance report with the district court, describing substantial progress in re-implementing MPP: discussions with the government of Mexico; work toward finalizing the operational plans required to re-implement MPP; work with the Department of Justice and other inter-agency partners to ensure the immigration courts were prepared to hear the cases of those subject to MPP; and work on contracts to rebuild the Immigration Hearing Facilities in Laredo and Brownsville, Texas. The October report also disclosed that the administration was prepared to re-implement MPP by mid-November, contingent on Mexico's agreement to accept returns under MPP at that time. As the report noted, however, "As a sovereign nation, Mexico can deny the entry of all individuals who do not have status in Mexico... Mexico has made clear that it has concerns about aspects of how MPP was previously implemented, and that without certain improvements to the program, it will not decide to accept MPP enrollees." https://storage.courtlistener.com/recap/gov.uscourts.txnd.346680/gov.uscourts.txnd.346680.111.0_5.pdf

On 10/29/2021, the Department of Homeland Security (DHS) issued a memorandum announcing its termination of MPP after finding the costs of MPP outweighed the benefits of continuing the program. DHS also noted it would continue to comply with the district court's order until such time as is practicable, after a final judicial decision to vacate the injunction has been made. According to DHS Secretary Alejandro Mayorkas, "MPP is neither the best, nor the preferred, strategy for achieving either of these goals [securing our borders and offering protection to those fleeing persecution and torture]... Importantly,

the effective management of migratory flows requires that we work with our regional partners to address the root causes that drive migrants to leave their countries and to tackle this challenge before it arrives at our border." https://www.dhs.gov/sites/default/files/publications/21_1029_mpp-termination-memo.pdf

On 11/2/2021, in view of DHS Secretary Mayorkas's 10/29/2021 memorandum terminating MPP (while addressing, at the same time, Judge Kacsmaryk's issues with his initial 6/1/2021 memorandum), the administration asked the 5th Circuit Court of Appeals (where the case is currently pending) to vacate the injunction. A decision is imminent. <https://www.courthousenews.com/biden-administration-makes-case-for-end-of-trump-immigration-program/>

ADMINISTRATIVE ACTION

■ **Travel ban lifted and vaccination requirement for noncitizen nonimmigrants.** On 10/25/2021, President Biden issued a proclamation (Proclamation 10294: Advancing the Safe Resumption of Global Travel During the COVID-19 Pandemic) stating that, as of 11/8/2021, the United States will move away from country-by-country restrictions and adopt an air travel policy that relies primarily on vaccination to advance the safe resumption of international air travel to the United States. The proclamation governs the entry of noncitizen nonimmigrants into the United States, suspending the entry of unvaccinated noncitizen nonimmigrants except in limited circumstances. **86 Fed. Register, 59603-08** (10/28/2021). <https://www.govinfo.gov/content/pkg/FR-2021-10-28/pdf/2021-23645.pdf>



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INTELLECTUAL PROPERTY

JUDICIAL LAW

■ **Copyright: Statutory damages claim entitled to right to jury trial while claims for disgorgement are equitable and not entitled to right to jury trial.**

Judge Nelson recently limited plaintiff National Presto Industries, Inc.'s claims for a jury trial to its copyright infringement claim seeking statutory damages. Presto sued U.S. Merchants Financial Group, Inc., alleging 11 counts and seeking declaratory and injunctive relief. Presto sought statutory damages under the Copyright Act and disgorgement of profits under all other claims. The court previously granted U.S. Merchants' motion for summary judgment on Presto's trade dress, copyright infringement of instruction manuals, tortious inference, and unfair trade practices claims. The court then ordered the parties to submit briefing on whether Presto held a right to a jury trial for the surviving claims. Presto contended that it had a right to trial by jury on all remaining claims, arguing that the demands for U.S. Merchants' profits were a "proxy" for damages. U.S. Merchants conceded that Presto had a right to trial by jury for the copyright infringement claim that sought statutory damages but argued that Presto was not entitled to a jury trial on all other claims.

A right to trial by jury flows either from a statute or from the 7th Amendment to the United States Constitution. Neither party alleged that the Copyright Act, the Lanham Act, or the various state statutes invoked in the complaint created a jury-trial right. Thus, the question before the court was whether the 7th Amendment entitled Presto to a right to a jury trial on the remaining claims. The court found Presto was entitled to a right to trial by jury for the copyright infringement claim seeking statutory damages under controlling Supreme Court precedent. The court further found that Presto was not entitled to a jury trial on the remaining claims because disgorgement of profits was an equitable remedy, and that Presto's claim for disgorgement was not a "proxy" for damages. *Nat'l Presto Indus., Inc., v. U.S. Merchants Fin. Grp., Inc., d/b/a Greenmade*, No. 18-cv-03321, 2021 WL 5083934 (D. Minn. 11/2/2021).



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