

Judge Wright focused on whether each deposition “appeared reasonably necessary to the parties at the time it was taken.” *Nagel v. United Food & Comm. Workers Union, Local 653*, 2022 WL 2801179 (D. Minn. 7/18/2022).

■ **Diversity jurisdiction; no requirement to allege addresses of parties.** Denying the defendant’s motion to dismiss for lack of diversity jurisdiction, Judge Brasel rejected the defendant’s argument that the plaintiff was required to allege a specific address—rather than merely the citizenship—for each member of the defendant limited liability company. *R.L. Mlaggar Assocs., Inc. v. Focal Point, LLC*, 2022 WL 3685388 (D. Minn. 8/25/2022).

■ **Fed. R. Civ. P. 37; failure to attend multiple depositions; sanctions imposed.** Where the corporate plaintiff’s Fed. R. Civ. P. 30(b)(6) representative and another witness failed to appear at the noticed location for their remote depositions on multiple occasions, even after they were warned that their failure to appear would result in the exclusion of evidence, Magistrate Judge Leung prohibited them from “offering any evidence by way of testimony or affidavit for any purpose” pursuant to Fed. R. Civ. P. 37, and awarded the defendants the costs associated with arranging the latter depositions. *Great Gulf Corp. v. Graham*, 2022 WL 2712880 (D. Minn. 7/13/2022).



Josh Jacobson
Law Office of Josh Jacobson
joshjacobsonlaw@gmail.com

Immigration Law JUDICIAL LAW

■ **Ineligible for asylum and withholding of removal on account of “particularly serious crime” conviction.** On 8/1/2022, the 8th Circuit Court of Appeals held the Board of Immigration Appeals and the immigration judge did not commit error when they concluded that the petitioner’s Illinois conviction—dismembering a human body after the victim was already deceased—was a “particularly serious crime” rendering him ineligible for asylum and withholding of removal. “We conclude that the IJ and the BIA applied the correct legal framework in determining that Gutierrez-Vargas’s conviction constituted a particularly serious crime.” The court also held the petitioner failed to show it was more likely than not that he would be subject to torture were members of the Zetas gang upon his return to Mexico, thus making him ineligible for Convention Against Torture (CAT) relief. *Gutierrez-Vargas v. Garland*, No. 21-3520, slip op. (8th Circuit, 8/1/2022). <https://ecf.ca8.uscourts.gov/opndir/22/08/213520P.pdf>

■ **Migrant protection protocols (MPP) (“Remain in Mexico”): An update.** As last noted in the August 2022 edition of *Bench & Bar of Minnesota*, the U.S. Supreme Court ruled 5-4 in *Biden, et al. v. Texas, et al.*, that the Biden administration’s rescission of Remain in Mexico was a valid action. Consequently, the Biden administration filed an unopposed motion to vacate the U.S. District Court’s (Northern District of Texas) 8/13/2021 permanent injunction to reimplement the Migrant Protection Protocols (MPP). On 8/8/2022, U.S. District Court Judge Matthew J. Kacsmaryk granted the motion and accordingly vacated the permanent injunction.

State of Texas, et al. v. Biden, et al., No. 2:21-CV-067-Z (N.D. Tex. 8/8/2022). <https://litigationtracker.justiceaction-center.org/cases/texas-v-biden-tx-rmx-district-court/order-vacating-injunction-pdf>

■ **Public health and immigration: Update on Title 42 expulsions at the border.** As last noted in the May/June 2022 edition of *Bench & Bar of Minnesota*, the Biden administration was sued by several states in the Western District of Louisiana seeking to halt its plan to terminate the covid-related restrictions on immigration enacted by the Centers for Disease Control pursuant to its authority under Title 42, Section 265 of the U.S. Code. On 5/20/2022, U.S. District Court Judge Robert Summerhays issued a nationwide preliminary injunction enjoining enforcement of Biden administration’s 4/1/2022 order anywhere within the United States. *State of Louisiana, et al. v. Centers for Disease Control, et al.*, No. 6:22-cv-00885-RRS-CBW (W.D. La. 5/20/2022). <https://www.courthousenews.com/wp-content/uploads/2022/05/order-granting-injunction-against-ending-use-of-title-42.pdf>

On 5/23/2020, the Biden administration appealed Judge Summerhays’s decision.

ADMINISTRATIVE ACTION

■ **USCIS issues its final rule on public charge ground of inadmissibility.** On 9/9/2022, U.S. Citizenship and Immigration Services (USCIS) issued its final rule providing guidance on assessing noncitizens’ admissibility to the United States based on their likelihood of becoming a public charge. The rule goes into effect on 12/23/2022. **87 Fed. Reg. 55472-639** (2022). <https://www.govinfo.gov/content/pkg/FR-2022-09-09/pdf/2022-18867.pdf>

■ **Extension of TPS for Venezuela.** On 9/8/2022, the Department of Homeland Security (DHS) announced that Secretary Alejandro Mayorkas had extended the designation of Venezuela for temporary protected status (TPS) for 18 months from 9/10/2022 through 3/10/2024. The 60-day re-registration period for existing TPS beneficiaries will run from 9/8/2022 through 11/7/2022. **87 Fed. Reg. 55024-32** (2022). <https://www.govinfo.gov/content/pkg/FR-2022-09-08/pdf/2022-19527.pdf>

■ **More details about Liberian DED and the application process for employment authorization and travel authorization.** On 6/27/2022, President Biden announced in his “Memorandum on Extending and Expanding Eligibility for Deferred Enforced Departure for Liberians” the extension of Deferred Enforced Departure (DED) through 6/30/2024 for those Liberians with DED (as of 6/30/2022) as well as expansion of DED for Liberians who have been continuously present in the United States since 5/20/2017. On 9/6/2022, USCIS published a notice with further information about DED and the application process for DED-based employment authorization and travel authorization. **87 Fed. Reg. 54515-20** (2022). <https://www.govinfo.gov/content/pkg/FR-2022-09-06/pdf/2022-19207.pdf>

■ **DHS issues its final rule on Deferred Action for Childhood Arrivals (DACA).** On 8/30/2022, the Department of Homeland Security (DHS) published a final rule implementing its 9/28/2021 proposed rule (with some amendments) seeking to establish regulations to “preserve and fortify” the Deferred Action for Childhood Arrivals (DACA) program. The rule will go into effect on 10/31/2022. **87 Fed. Reg.**

53152-300 (2022). <https://www.govinfo.gov/content/pkg/FR-2022-08-30/pdf/2022-18401.pdf>

■ **Extension and redesignation of Syria for TPS.** On 8/1/2022, the Department of Homeland Security (DHS) announced that Secretary Alejandro Mayorkas had extended the designation of Syria for temporary protected status (TPS) for 18 months from 10/1/2022 through 3/31/2024. The 60-day re-registration period for existing TPS beneficiaries will run from 8/1/2022 through 9/30/2022. DHS also announced that the registration period for new applicants under TPS redesignation will run from 8/1/2022 through 3/31/2024. **87 Fed. Reg. 46982-91** (2022). <https://www.govinfo.gov/content/pkg/FR-2022-08-01/pdf/2022-16508.pdf>



R. Mark Frey
Frey Law Office
rmfrey@cs.com

Intellectual Property JUDICIAL LAW

■ **Patent: Local counsel not subject to sanctions under §1927.** Judge Wright recently granted in part Niazi Licensing Corporation's motion to vacate the court's prior order awarding attorneys' fees and costs under 35 U.S.C. §285 and 28 U.S.C. §1927. Niazi sued St. Jude Medical S.C., Inc. in November 2017 for patent infringement. The court later granted summary judgment of noninfringement. The court then rejected a claim for sanctions under Federal Rule of Civil Procedure 11 but awarded sanctions under §285 of the Patent Act and §1927 based on the court's inherent authority. On the record before it, the court found Niazi's attorneys were jointly and severally liable to satisfy the sanctions award

because Niazi's local counsel's names appeared in the signature bloc of all of Niazi's submissions to the court, including the submissions that led the court to conclude that Niazi's local counsel had either participated in the preparation and presentation of the sanctionable conduct or reflected an intentional or reckless disregard of local counsel's duties to the court under Local Rule 83.5(d)(2) (A). The court then ordered St. Jude to file supplemental briefing as to the reasonable amount of attorneys' fees and costs that should be awarded.

Niazi moved to vacate the sanctions award, arguing in part that its local counsel should not be held liable in light of the narrow scope of their responsibilities as local counsel in this case. Based on the supplemented record, the court now finds the record undisputedly demonstrates that Niazi's local counsel did not actively participate in the vexatious conduct that the court has found to be sanctionable under Section 1927. The court further found the reputational consequences of the court's prior orders provided adequate sanction and deterrence as to Niazi's local counsel. Accordingly, Niazi's local counsel is not liable for the sanction imposed by this order pursuant to 28 U.S.C. §1927. *Niazi Licensing Corp. v. St. Jude Med. S.C., Inc.*, No. 17-cv-5096 (WMW/BRT), 2022 U.S. Dist. LEXIS 153734, (D. Minn. 8/26/2022).

■ **Trademark: Noninfringement of unregistered trade dress.** Following a six-day bench trial, Judge Nelson recently found defendant U.S. Merchants Financial Group, Inc. did not infringe plaintiff National Presto Industries, Inc.'s unregistered trade dress. Presto sold a parabolic electric heater under the brand name "HeatDish" to Costco Wholesale Corporation. At Costco's

request, U.S. Merchants developed a parabolic electric heater under the brand name "The Heat Machine" and sold it at certain Costco locations in 2018-2019. Presto sued U.S. Merchants for various federal and state law claims, including infringement of an unregistered trade dress under the Lanham Act. To succeed on a claim for unregistered trade dress infringement under the Lanham Act, a plaintiff must demonstrate, by a preponderance of the evidence, that the claimed trade dress is distinctive or has secondary meaning and is nonfunctional, and that its imitation would likely cause confusion for consumers as to the source of the product. Based on the evidence presented, which did not include consumer surveys or customer testimony, the court found Presto had not proved its heater had established secondary meaning. Based on the evidence presented, the court found the HeatDish design was primarily functional. The court rejected the argument that the overall appearance was not functional because third-party heaters look different. The court's analysis looked at whether the shape and design, although serving useful purposes, are primarily adopted to distinguish it from competitors. The court found no evidence was presented to show the shape and the design were developed to distinguish it from competitors. Finally, the court found Presto had not presented evidence to establish a likelihood of confusion. Accordingly, the court concluded that Presto's trade dress infringement claim failed as a matter of law. *Nat'l Presto Indus. v. U.S. Merchs. Fin. Grp., Inc.*, No. 18-cv-03321 (SRN/BRT), 2022 U.S. Dist. LEXIS 147797 (D. Minn. 8/18/2022).



Joe Dubis
Merchant & Gould
jdubis@merchantgould.com

Tax Law JUDICIAL LAW

■ **Property tax: Matter of first impression.** In a matter of first impression, the Supreme Court held that the tax-code provision of section 278.05, subdivision 3, governs and permits the county to use nonpublic data in "assessor's records" at trial, including its expert appraisal report. This dispute arose in the context of a property owner's challenge to the county's valuation of the Oracle building. The property owner moved pretrial to exclude the county's use of nonpublic data in its expert opinion assessing the value of comparable properties owned by third parties and the market value of the Oracle building. Applying *de novo* review to a "question [that] is an issue of statutory interpretation," the Court explained that the "answer turns on how statutes under two separate statutory schemes interact: (1) the Data Practices Act, Minnesota Statutes sections 13.01-.90 (2020); and (2) the statutes in the tax code governing property tax litigation, particularly Minnesota Statutes section 278.05 (2020)."

Finding that the tax code provision at issue was ambiguous, the Court used relevant statutory factors to discern the Legislature's intent. The Court reasoned that of "four persuasive indicia of legislative intent most support the County's interpretation that section 278.05, subd. 3 permits the County to use nonpublic data in assessor's records at trial." In a concurring opinion joined by Justice Anderson, Justice Thissen identified the central issue as "figuring out the proper balance between... the conflict of interest created by a county's dual roles as (1) the custodians of sensitive information of property owners necessitated by its duty to fairly assess taxes and (2)