No. _____

In The

Supreme Court of the United States

DAVID NETZER, CONSULTING ENGINEER,

Petitioner,

v.

SHELL OIL COMPANY, SHELL CHEMICAL LP AND SHELL OIL PRODUCTS COMPANY LLC,

Respondents.

On Petition For A Writ Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **Premise of the Question:** A Federal Judge is a Board member and Board advisor of a major social organization. The defendant in a case being heard by the Federal Judge is a sponsor of and donor to the social organization. Further, the legal firm and one of its principals representing the defendant also sits on the Board with the Federal Judge. None of these relationships are disclosed to the plaintiff. **Question:** Does the above scenario represent a violation of Rule 455(a), an appearance of impropriety and/or conflict of interests? (See table of authorities No-2 & 3).

2. Does violation of Rule 455(a) call for retroactive recusal and vacating prior orders and Summary Judgments by the Judge of District Court? (See table of authorities No-2, 3 & 4).

3. Is vacating Summary Judgments of District Courts by default vacate or de-publish succeeding affirmations by Appellate Courts?

4. Does the doctrine of *res judicata* override multiple errors by CAFC in their prior affirmation of a District Court's flawed summary judgment as well as justify ignoring new evidence?

5. Can testimony under Rule 702 by a recognized expert engineer, a former employee of the defendant, who was not available during litigation, be construed as testimony by **fact witness** and accepted as new evidence and under Rules 60(b)(2)(6). See table of authority reference No-6.

QUESTIONS PRESENTED – Continued

6. Is bringing new evidence, "out of time" as claimed by District Judge based on newly discovered public disclosure of defendant (or defendant's subsidiary) that was archived by defendant, amount to failing in performing a "reasonable due diligence" by the plaintiff?

7. **The premise of the question is:** Although Appellate Court affirmed Summary Judgment of District Court, Appellate Court also removed a **restriction** (not harmless error) from Summary Judgment. The removal of the said restriction has changed the intellectual property rights of the plaintiff. **Question:** Does the removal of the "restriction" amount to **substantive** change under Rule 60(b)(1)(5)?

8. **The premise of the question:** Rule 60(c) stipulates tolling of time for new evidence as one year from "entry of final judgment", order or "legal proceeding". **Question:** Can tolling of time by **legal proceeding** prevail over tolling by "entry of final judgment"? And more so if substantive change was imposed during legal proceeding? (See table of authorities No-5).

PARTIES TO THE PROCEEDINGS

Plaintiffs: David Netzer Consulting Engineer of Houston, **prior** to March 12, 2018 David Netzer Consulting Engineer LLC

Defendant No-1: Shell Chemical LP, a Delaware Corp. and principal places of business in Houston, Texas; Deer Park, Texas, and Norco, Louisiana

Defendant No-2: Shell Oil Company, a Delaware Corp and a principal place of business in Houston, Texas, and nationwide

Defendant No-3: Shell Oil Products Company, a Delaware Corp. and principal place of business Houston, Texas, and nationwide

RULE 29.6 STATEMENT

All parties are identified in the caption of this petition. No publicly held corporation owns 10% or more ownership of US Patent 6,677,496. David Netzer is the sole owner

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INTRODUCTION

This Petition for Writ of Certiorari is an attempt by David Netzer, Consulting Engineer (acting *Pro Se*), to gain a hearing and to be followed by a favorable ruling from the United States Supreme Court. This is a patent infringement case, US Patent 6,677,496, Netzer vs. Shell.

Two sets of independent new evidences were presented to Southern Texas District Court. The first one on April 27, 2017 case 4:14-cv-166 and second one on March 13, 2018 case 3:18-cv-75 and both were dismissed by District Court of Southern Texas. These dismissals were affirmed by the Court of Appeals for the Federal Circuit (CAFC) on September 25, 2018 (See Appendix No-1) and the subject of this present Petition for Writ of Certiorari.

The petition for a Writ of Certiorari presents the following issues:

1. See table of authorities No-10, 11. The bedrock principle of claim construction is that patents are written for one skilled in the art. It is an established principle that courts may not import limitations from the written description into the claims *See Electro Med Sys V Cooper Life Scis., Inc.*, 34 F.3rd 1048, 1054 (Fed.Cir.1994). Claims **are not** to be interpreted by adding limitations appearing only in the 3rd 1367, 2014 WL 2898495, at *2 (Fed. Cir. June 27, 2014). Clearly, CAFC (case 2015-2086) did not follow this principle, imported limitations to the claim and on top of it, made technical errors. New evidence strongly suggests that CAFC did not understand the patent.

2. Was David Netzer, Consulting Engineer, a victim of abuse of discretion as well as having his legal rights of "due process" (see table of authorities No-7 & 8) violated by the District Court which refuses to entertain new evidences as presented by a very reputable source and supported by three top technical experts. See Doc. 1 case 3:18-cv-75 Appendices D, E, & F Doc. 25, Doc. 34.

3. Should Judge Hughes be retroactively recused and vacated under modified Rule 455(a) for having improper relationships with Shell and Norton Rose-Fulbright, a law firm that represented Shell during litigation with Netzer.

4. Was district Judge Lynn Hughes qualified to sit in judgment of the case based on his **total lack** of technical knowledge, as demonstrated in 3:18-cv-75 Doc. 1 **Appendix J** and without resorting to expert assistance who is qualified to assess the merit of the new evidences (see table of authorities No-9). Further, Judge Hughes made demeaning remarks about Mr. James Storm the source of new evidence denigrating his expertise by calling him a technician, without ever meeting or communicating with him (see pages 7-8 below). Judge Hughes also summarily dismissed the expert opinions of Mr. Chris Wallsgrove, Mr. John Hardy and Gerhard Ohlhaver the experts supporting the testimony of Mr. Storm.

5. Aside of issue of importing limitations to the claim, affirmation of Summary Judgment by CAFC, case 2015-2086 was based on faulty engineering analysis of the specification; the affirmation was reached by incorporating **six errors** (as shown below) in CAFC's interpretation of technical

specifications (not legal specification). As with Judge Hughes, CAFC reached their conclusions without the benefit of technical expertise. Does technical (not legal) interpretation of intrinsic evidence by judges without resorting to expert advice meet appropriate legal standards? (See table of authorities No-6 & 9).

6. Can Federal Circuit review *de novo* a factually disputed technical patent claim when the district court record was summarily judged and, consequently, is devoid of factual underpinnings and in violation of Rule 52(a)(1)?

7. Have new evidences of April 27, 2017 and March 13, 2018 were timely brought before district court meeting Rule 60(b) and (c)?

8. Would these combined court failings (especially item (6) above) constitute a violation of Netzer's "**due process**" under both the Fourteenth and Fifth Amendments (see table of authorities No-8).

PETITION FOR WRIT OF CERTIORARI

DAVID NETZER, CONSULTING ENGINEER, respectfully petitions for a writ of certiorari to review the judgment below.

OPINIONS BELOW

The court of appeal of the federal circuit affirmed the district court's judgment and is reported as *David Netzer v Shell Oil Company, et al.*, Case 18-2129 The district court's opinions is reported as *David Netzer v. Shell Oil Co.*, No. 3:18-cv-75 (S.D. Tex. June 21 and 26, 2018).

JURISDICTION

The judgments of the District Court were entered May 16, 2017 for first set of new evidence and on June 20 and June 26, 2018 respectively for second set of new evidence. A notice of appeal consolidating the above 2018 judgments was timely filed July 2, 2018 with the United States Court of Appeals for the Federal Circuit (CAFC). The federal circuit entered Judgment on September 25, 2018. This Court has jurisdiction under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

This patent case presents several issues wherein the Federal Circuit has adopted jurisprudence that conflicts with the United States Supreme Court precedence.

The first issue involves the district court's role in **not accepting new evidences** by an engineer former top technical expert with Shell that retired in year

2016. In the present case, the Federal Circuit found that the District Court did not abuse (see table of authorities No-9) its discretion by not accepting new evidences and as claimed by Netzer has been timely brought before the District Court and supported by declaration of three technical experts, two chemical engineers and one mechanical engineer, skilled in the art and with relevant engineering experience. The Petitioner, David Netzer, is claiming that had these new evidences been in front of CAFC during *de novo* review of case 2015-2086 (May 27, 2016), then interpretation of CAFC of intrinsic evidences would call for reversal of summary judgment by District Court of August 2015. CAFC (case 18-2129 App-1) has **acknowledged** the issue of the claimed violation of Rule 455(a) but did not respond to pleading of plaintiff as a legal basis for **vacating/recusal and relied on affirmation of prior case 2015-2086**. Further, CAFC has failed to address the six mistakes (as noted below) in affirmation opinion of May 27, 2016 and as presented to CAFC in appeal of case 18-2129 July 24, 2018 and shown below.

ARGUMENTS

Issue No-1

Federal Judge Lynn Hughes has made a cardinal error (not harmless error) in his Summary Judgment of August 26, 2015 (see App-29). Although summary judgment was affirmed for other reasons that being **contradicted** by new evidence, nevertheless CAFC

has acknowledged the mistakes by district court (see App-22 Paragraph No-1). One could argue that avoiding discovery, avoiding claim construction hearing (Markman hearing) by district court amounted to nothing but **violation** of Netzer's "due process".

Issue No-2

Judge Lynn Hughes has arbitrarily dismissed new evidences including expert's testimony to that effect. All this is demonstrated in **Transcript** of June 20, 2018 hearing with Judge Hughes shown in communication No-25 August 6, 2018 to CAFC.

Issue No-3

Judge Hughes is sitting on the Board of WAC including being advisor to the Board (see Transcript communication N-25 case 18-2129). Shell Oil Comp being a DONOR, a Sponsor and Board member of WAC. Further Norton Rose Fulbright was a Board member of WAC, a Sponsor who represented Shell during litigation Netzer V Shell.

The following paragraph was taken from website of World Affairs Council and discussed in details in Case 3:18-cv-75 Doc. 1 appendices G, H & I and Doc. 25. Case laws as relevant to Rule 455 (a) are shown in table of authorities No-2 & 3.

Council Cabinet Membership

The Council Cabinet is composed of individuals, corporations, and foundations that share a commitment to furthering education in international affairs. They stand ready to lead and support the goals of the Council. Members of the Council Cabinet meet regularly with distinguished leaders from the United States and abroad. They enjoy private dinners as well as have access to exclusive receptions and off-the-record briefings.

Issue No-4

Judge Hughes resorting to doctrine of *Res Judicata* and dismissing (without expert advice) of new evidence as "re-hash" of old arguments (see App-5 & 7) is a total absurdity. The technical "knowledge" of Judge Hughes is well demonstrated in old court Transcript 3:18-cv-75 Doc. 1 **Appendix J**. March 13, 2018.

The first set of new evidences case 4:14-cv-166 and 3:18-cv-75 Doc. 1 Appendix D, Doc. 25 and Doc. 34, James Storm former senior technical expert with Shell who retired in 2016 has testified the following on **March 3, 2017**:

"I am a semi-retired chemical engineer (MS in Chemical Engineer and B.S. in Chemistry) that retired as Vice President from Saudi Refining, Inc. (SRI) in 2016. SRI is a joint venture partner with Shell in Motiva Enterprises, LLC (a Gulf Coast refining and marketing company) Shell and SRI each own 50% of the joint venture. . . . Prior to employment with SRI I

was employed by Shell Global Solution in Houston. I was considered ***a top technical expert by both Shell and Motiva*** *refining operations. As a JV partner with Shell and while employed by Shell, I was under secrecy obligations".*

Mr. James Storm as a new evidence is adhering to Rules 702 (see table of authorities No-6) said the following: *"The claim by Shell that Netzer* ***disclaimed extraction has no holding*** *anywhere in the claims not in the* ***specifications*** *or the patent prosecution history.* ***It is totally misleading*** *and ignores the other ethylene steam cracking process benefits that his patent affords".*

Should this Certiorari petition lead to a trial, then in addition of being cross examined by Shell, it is reasonable to expect Mr. James Storm to testify under protective order by Rule 705, thus not violating secrecy obligation.

The expert opinions of Mr. Chris Wallsgrove and Mr. John Hardy Doc. 1 Appendices E & F of 3:18-cv-75 and Doc. 25 totally endorse the new evidences as brought by James Storm were arbitrarily rejected (see table of authorities No-9) by Judge Hughes (see June 20, 2018 Transcript communication No-25 in case 18-2129 to CAFC). Further, just for the record is worth noting that in year 2016, Mr. Storm appeared as a technical expert witness in behalf of Shell and Motiva during litigation with an engineering contractor. Therefore, again (see

transcript June 20, 2018 hearing) the claim of Judge Hughes that most experts "are not experts" shades less than a positive light on Judge's qualifications and further illustrates his **bias**.

Issue No-5

Below are the **mistakes** of the ***de novo* review** (case 2015-2086) by CAFC (**see App-15-28**). These mistakes were the basis of imposing the limitations on the claims of US 6,677,496 (see S App-No-1) and never been addressed by CAFC in the September 25, 2018 opinion on appeal case 18-2129. (App-1).

Netzer is arguing that correcting these mistakes and reversal of May 27, 2016 affirmation by CAFC is **not in conflict** with doctrine of *Res Judicata*, therefore it was appealed to CAFC, case 18-2129. Nevertheless Netzer was relying totally on new evidences as shown in case 4:14-cv-166, 3:18-cv-75 Doc. 1 Appendix D and Doc. 34 surmising that had these evidences been in front of CAFC during the *de novo* review, the summary judgment of District Court in case 4:14-cv-166 Netzer Vs. Shell would have been reversed.

Saying the above, the position of Netzer is that even based on **old evidences** the CAFC made some errors during the *de novo* review as shown below. Although these errors were not part of recent legal challenge to District Court, Netzer was pleading CAFC to review the below errors and per the discretion of CAFC to retroactively correct and hopefully

reverse prior affirmation of case 2015-2086. See App-55. The pleading for correcting and reversing prior affirmation by CAFC May 27, 2016, of case Netzer Vs. Shell (2015-2086) is appropriate, and the reason: Judge Hughes on his dismissal order of present case 3:18-cv-75 (Doc. 38) (Appendix 2) **has relied on a Prior affirmation** of CAFC. As shown below, the prior affirmation by CAFC is rooted in no less than six (6) errors of interpreting the intrinsic evidences of the patent and let alone importation of **limits** on the claim by incorporating these 6 errors as shown below to the limitations/exclusions of the 496 patent. The following statements are cited from the opinion of CAFC case 2015-2086.

a. **See App-15 Paragraph-3** "*We (means CAFC) determine whether, after resolving in favor of the patentee the district court correctly concluded that* ***no reasonable jury*** *could find infringement.*" Based on the above the question is: The opinion of District Court of Summary Judgment August 26, 2015 (Appendix No-6) made **no reference** to "reasonable Jury". Further if such a reference would have been made, then the question could be: What is the **factual** basis of this conclusion about "reasonable Jury"

b. **See App-17 Paragraph-3** "the present invention is. . . ." And "**all** embodiment of the present invention are. . . . *Pacing Techs, LLC v. Garmin Int'*." This reference is misleading. It reads that CAFC implies that Netzer has restricted his invention to the preferred

embodiment of the patent that avoids extraction. **This is simply not correct**. Please refer to Appendix No-8 the patent 6,677, 496 column 4 line 38-40 DESCRIPTION OF THE DRAWING: *"FIG 1 is a flowchart illustrating **ONE** embodiment of the method of the invention where ethylbenzene and cumene are coproduced with olefins"*. For the record, Shell is producing olefins and cumene, thereby practicing and infringing independent claim No-1, dependent claim No-9 and several other dependent claims. Netzer's patent did not **restrict** the embodiment of the patent to the **ONE** embodiment as shown in the flow chart.

C. **See App-19 Paragraph-2** The CAFC stipulated that in the 496 patent; column 2 lines 57-58 and line 63 was evidence that Netzer had limited the term fractionation to separation by boiling points. This claim and conclusion by CAFC are completely **incorrect**. Line 57 reads: *Typically straight run full range naphtha resulting from crude oil fractionation has a **boiling range of 100 to 350 degrees F**. Line 63 reads further fractionation to separate cut point of below 200 degrees F.* First of all, the patent language use of the word TYPICALLY which is **not** an expression of exclusivity. However, the key point is as follows: The word "fractionation" refers to a method of producing the product and the term "**boiling range**" refers to the product's specifications. These two terms, the method and specifications are **mutually exclusive**. Thus any attempt to use this logic and impose it as a limitation on the claim is not correct and is

in total conflict with pre-existing case laws by CAFC as cited in table of authorities item No-10 & 11.

d. **App-18 Paragraph-3** *"the 496 patent describes an "azeotrope" problem. The specification explains that certain C6-C7 non aromatic hydrocarbons form an azeotrope with benzene making it "impossible" to separate benzene from that mixture by "conventional fractionation"* This reference, demonstrates that **CAFC simply did not understand** the patent. As be discussed under **new evidences**. The ingenuity of the patent is that the "azeotrope problem" by Netzer's method is solved by using the steam cracker, step 3 of the first claim and not by extraction or extractive distillation as commonly practiced. The concept of feeding hydrocarbon, rich in benzene, 28.5 weight percent as shown in the material balance, was **totally opposed** to the conventional wisdom during the time of the invention.

e. **See App-20 Paragraph-2** *"The patentee clearly disclaimed conventional extraction characterizing it as **expensive** and not required due to shift in market demand. And distinguishing it from the "present invention"* Again, this is another **incorrect** statement. First of all, the word "expensive" is not a manifest of exclusion or disclaiming. Further, as shown in new evidence, Mr. James Storm is informing through his new evidence (3:18-cv-75, Doc. 1 Appendix D and CAFC 18-2129) that the particular Sulfolane benzene

extraction unit in dispute has been operated by Shell for **over 30 years**, well prior to the infringement which commenced in the year 2009. Use of extraction by Shell was **not expensive** to Shell and this fact as emerged, defeats the interpretation of the word "expensive" as manifest of exclusion or intention of exclusion.

f. **See App 21-Paragraph No-1** The patentee twice stated during prosecution that the claimed process is "*particularly useful*" to produce benzene product that *need not* have purity over 99wt%, *much less* over 99.9wt% as previously required. This interpretation is **grammatically incorrect**. The term "*need not*" or "*much less*" are expression of being superfluous and not expressions of exclusion or disclaiming. Put in layman language: if benzene producer wants to produce 99.9wt% purity benzene, then in most cases, but **not in all** cases it may not be necessary. However, if benzene producer wants to do it and pay the extra cost, then the producer is free to do so, **but still infringing the patent**. As said Shell already operates the benzene extraction for producing 99.9wt% benzene purity, so there is no additional cost.

Issue No-6

David Netzer, Consulting Engineer, presents the question to Supreme Court. Has Rule 52(a)(1) been violated by District Court. (See table of authorities No-8).

Issue No-7

The argument of presenting new evidence "out of time" is legally wrong violating Rule 60(c) and also present abuse of discretion. See **App-49** where the issue of tolling is discussed in details.

Issue No-8

All the above suggests that "due process" of David Netzer was grossly violated by a biased Federal Judge and CAFC is wrong in affirming the judgment.

REASONS FOR GRANTING THE PETITION

We all understand that one of the most important roles of the Judiciary is to protect individual stakeholder in society and to prevent dominance from large and powerful entities. In this particular case, based on documented legal history it appears that Shell has willfully chose to infringe the patent based on preconceived idea that large multi-national company with huge resources would prevail in any litigation because of friends in Judiciary, contributions to social causes, donations to World Affairs Council is an example, and a reputation as large international entity.

The overall prevailing issue making the case **very exceptional** and very **compelling is**: David Netzer, a small entity inventor is claiming of being a victim of theft of intellectual property by Shell. David Netzer

never got his Days in Court where discovery been allowed and expert witnesses invoked.

Further, as discussed and based on **Rule 10** granting the petition is justified since CAFC has violated an established principle prohibiting importation of limits to the claim and let alone all the multiple errors of CAFC as cited above that led to this violation.

As far as recusal issue of Federal Judge, then **Rule 10** applies here as well. Judge Lynn Hughes and under modified Rule 455(a), violated the below ruling by US Supreme Court.

Caperton v AT Massey Coal Comp 556 US 868 (2009) is a case in which the *United States Supreme Court* held that a Due Process clause of *the FOURTEENTH AMENDMENT* requires a judge to **recuse** himself **not only** when actual bias has been demonstrated or when the judge has an economic interest in the outcome of the case but also when "extreme facts" create a probability of **bias**. Any reasonable neutral observer can conclude that in this case, statements of bias, economic interests and personal ideology of Judge Hughes were factors in denying a Motion for recusal (June 20, 2018) and let alone "extreme facts" (see table of authorities No-13) creating probability of bias including clause under the **Fifth** Amendment.

As far as general public interest, it is worth noting that per U.S. EPA ruling, one of the positive outcomes of this invention is: Removing benzene from gasoline results in reducing **blood cancer** while raising the octane of the gasoline.

CONCLUSION

David Netzer, is pleading the United States Supreme Court to grant the petition for Writ of Certiorari, hold a hearing and goal in mind that the granted hearing will lead to a **new trial with a new judge** based on new evidences including correcting prior errors of CAFC. The ultimate result be reversing prior affirmations of CAFC May 27, 2016 case 2015-2086 and September 25, 2018 case 18-2129.

Respectfully submitted,

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