

NOTE: This order is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

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**In re: 3RD EYE SURVEILLANCE, LLC,  
DISCOVERY PATENTS, LLC,**  
*Petitioners*

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2019-119

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On Petition for Writ of Mandamus to the United States Court of Federal Claims in No. 1:15-cv-00501-CFL, Senior Judge Charles F. Lettow.

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**ON PETITION**

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Before LOURIE, DYK, and WALLACH, *Circuit Judges*.  
DYK, *Circuit Judge*.

**O R D E R**

3<sup>rd</sup> Eye Surveillance, LLC et al. (collectively, “3<sup>rd</sup> Eye Surveillance”) petition for a writ of mandamus directing the United States Court of Federal Claims to compel discovery of Vidsys, Inc.’s source code.

3<sup>rd</sup> Eye Surveillance sued the United States in the Claims Court, alleging that its patents are being infringed by security systems in use at secured locations owned, operated, or managed by or for the United States. Several suppliers of various hardware, software, or information

technology services, including Vidsys, were granted leave to intervene.

3<sup>rd</sup> Eye Surveillance sought to compel the production of all source code operating the government's security systems. In support of its request, 3<sup>rd</sup> Eye Surveillance submitted the declaration of an expert witness, Mr. Joseph McAlexander, who stated that he "can best form verifiable opinions concerning infringement of the claims of the patent by being permitted the opportunity to inspect the computer systems and associated software, source code and firmware used by each of the" accused systems.

The Claims Court denied the motion. It found that the declaration from 3<sup>rd</sup> Eye Surveillance's expert witness was insufficient because it did not explain how access to the source code was actually needed to form an infringement opinion. The Claims Court further noted that the patents themselves do not address source code in express terms and that 3<sup>rd</sup> Eye Surveillance had other means available to determine the functionality of the claim terms before demanding source code. The Claims Court therefore concluded that 3<sup>rd</sup> Eye Surveillance had failed to show a particularized and good faith basis for the source code discovery sought.

"The remedy of mandamus is available only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power." *In re MSTG, Inc.*, 675 F.3d 1337, 1341 (Fed. Cir. 2012). A party seeking a writ must demonstrate that it has no "adequate alternative means" to obtain the desired relief, *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989), and that the right to issuance of the writ is "clear and indisputable," *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 666 (1978) (internal quotation marks omitted). 3<sup>rd</sup> Eye Surveillance has failed to satisfy that demanding burden here.

Discovery of source code is not permitted without first establishing the relevance and need for such information.

IN RE: 3RD EYE SURVEILLANCE, LLC

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*See Drone Techs., Inc. v. Parrot S.A.*, 838 F.3d 1283, 1300 (Fed Cir. 2016). At bottom, 3<sup>rd</sup> Eye Surveillance’s petition primarily seeks to attack the Claims Court’s case-specific findings regarding the sufficiency of the materials presented to establish such need and relevance, which this court is not prepared on mandamus to disturb.

Moreover, 3<sup>rd</sup> Eye Surveillance has failed to demonstrate that they satisfy the no alternative means requirement. The Claims Court itself here suggested that after witness depositions and document production, 3<sup>rd</sup> Eye Surveillance may be able to “hone [its] allegations to specific security systems or locations” and then could perhaps show “a particularized and good faith basis for the source code discovery [it] seek[s].” Additionally, 3<sup>rd</sup> Eye Surveillance can always raise a challenge that the Claims Court abused its discretion in denying discovery of source code in an appeal after entry of final judgment in the case.

Accordingly,

IT IS ORDERED THAT:

The petition for writ of mandamus is denied.

FOR THE COURT

April 30, 2019  
Date

/s/ Peter R. Marksteiner  
Peter R. Marksteiner  
Clerk of Court

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