

No. 18-A____

IN THE SUPREME COURT OF THE UNITED STATES

CORNING OPTICAL COMMUNICATIONS RF LLC

Petitioner,

v.

PPC BROADBAND, INC.

Respondent.

**Application of Petitioner for Extension of Time
To File Petition for a Writ of Certiorari to the
United States Court of Appeals for the Federal Circuit**

**APPLICATION TO THE HONORABLE
CHIEF JUSTICE JOHN G. ROBERTS, JR.
AS CIRCUIT JUSTICE**

GEOFFREY P. EATON
STEFFEN N. JOHNSON
WINSTON & STRAWN LLP
1700 K STREET NW
WASHINGTON, DC 20006
(202) 282-5000

KIMBALL R. ANDERSON
Counsel of Record
WINSTON & STRAWN LLP
35 W. WACKER DR.
CHICAGO, IL 60601
(312) 558-5858
kanderso@winston.com

Counsel for Petitioner

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner Corning Optical Communications RF LLC states as follows:

Corning Optical Communications RF LLC is a wholly-owned subsidiary of Corning Oak Holding LLC, which is a wholly subsidiary of Corning Incorporated. Corning Incorporated is a publicly traded company

APPLICATION FOR EXTENSION OF TIME

Pursuant to Supreme Court Rules 13.5 and 22, Petitioner Corning Optical Communications RF LLC ("Corning") respectfully seeks a 45-day extension of time, to and including September 27, 2018, within which to file a petition for certiorari.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which Corning seeks this Court's review is the decision of the U.S. Court of Appeals for the Federal Circuit in *PPC Broadband, Inc. v. Corning Optical Communications RF LLC*, No. 2017-1347 (Fed. Cir. March 13, 2018) (attached as Appendix A).

JURISDICTION

The Federal Circuit entered its judgment on March 13, 2018. It denied Corning's petitions for panel rehearing and rehearing en banc on May 14, 2018 (attached as Appendix B). Pursuant to this Court's Rules 13.1, 13.3, and 30.1, a petition for a writ of certiorari would be due on August 12, 2018, but because August 12 falls on a Sunday, the petition would be considered timely if filed on Monday, August 13, 2018. This application is timely because it has been filed more than ten days prior to the date on which the time for filing the petition is to expire. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REASONS JUSTIFYING AN EXTENSION OF TIME

Corning respectfully requests a 45-day extension of time, to and including September 27, 2018, within which to file a petition for a writ of certiorari seeking review of the decision of the Federal Circuit in this case.

1. Corning’s petition, which challenges a multi-million-dollar patent infringement verdict, will present important issues regarding the role that enhanced damages play in maintaining the “careful balance” between patent protection and the economic benefits of “refinement through imitation that are necessary to invention itself.” *Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1935 (2016) (internal quotations omitted).

The first issue is whether this Court’s decision in *Halo*, which held that the objective reasonableness of an infringer’s conduct does not *preclude* the award of enhanced damages, also rendered reasonableness *irrelevant* to the award of enhanced damages. *Halo* itself says nothing of the sort, and this Court’s recent decisions in the related context of attorney’s fee awards confirm that the objective reasonableness of the defendant’s conduct is a relevant consideration in determining enhancement. *See Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014); *Kirtsaeng v. John Wiley & Sons, Inc.*, 136 S. Ct. 1979 (2016). Nevertheless, a growing number of inferior courts have concluded that objective reasonableness has no place in the enhancement calculation. That trend threatens to normalize the award of enhanced damages against defendants whose conduct is not culpable—undermining the very “careful balance” that this Court’s patent jurisprudence seeks to achieve.

The second issue relates to the state of mind required to justify enhancement. The jury instructions in this case allowed enhancement upon a finding that Corning “should have known” that its actions constituted infringement—a negligence standard.

This Court in *Halo* specified that infringement warranting enhanced damages must be “intentional or knowing.” 136 S.Ct. at 1933. Allowing the district courts to award enhanced—which is to say, punitive—damages against defendants guilty of mere negligence is flatly inconsistent with both the letter and the spirit of *Halo*, which emphasized that enhanced damages are available only in cases involving “the wanton and malicious pirate who intentionally infringes another’s patent—with no doubts about its validity or any notion of a defense—for no purpose other than to steal the patentee’s business.” *Id.* at 1932. Awarding enhanced damages for negligent conduct similarly betrays the established principle that “[s]omething more than mere commission of a tort is *always* required for punitive damages.” Keeton et al, *The Law of Torts* 9 (5th ed. 1984) (emphasis added).

2. Motions practice in the district court following remand from the Federal Circuit was not finally resolved until July 16, 2018. That motions practice, which included multiple rounds of letter briefs, multiple motions, a referral to the Magistrate Judge, and objections to the Magistrate Judge’s report and recommendation, prevented Corning’s counsel from devoting their full attention and resources to drafting the petition for certiorari until mid-July, less than a month before the due date for seeking certiorari.

3. All three of the undersigned counsel have also been heavily engaged on other litigation and transactional matters in June and July, and have previously

scheduled personal and professional travel plans that have not permitted them to devote adequate time and resources to the preparation of the petition for certiorari.

4. Following the Federal Circuit’s decision, Corning sought vigorously to stay enforcement of the judgment pending review by this Court. That effort was ultimately unsuccessful, and on July 16, 2018, the district court granted PPC Broadband’s motion to enforce the judgment. In compliance with that order, Corning satisfied the approximately \$62 million judgment on July 26, 2018. Because that payment “was merely obedience to the judgment now here for review,” it does not render the case moot. *Bakery Drivers Union v. Wagshal*, 333 U.S. 437 (1948).

5. Because Respondent PPC Broadband has been paid in full, it will suffer no prejudice from any delay in the certiorari proceedings.

6. On July 31, 2018, the undersigned contacted counsel for Respondent PPC Broadband to seek his client’s consent to the requested extension. On August 1, 2018, counsel for Respondent advised that his client takes no position on Corning’s request.

CONCLUSION

For the foregoing reasons, Corning respectfully requests that this Court grant a 45-day extension of time, up to and including September 27, 2018, within which to file a petition for a writ of certiorari.

August 2, 2018

Respectfully submitted,

KIMBALL R. ANDERSON
Counsel of Record

WINSTON & STRAWN LLP
35 W. WACKER DR.
CHICAGO, IL 60601
KANDERSO@WINSTON.COM

GEOFFREY P. EATON
STEFFEN N. JOHNSON
WINSTON & STRAWN LLP
1700 K STREET NW
WASHINGTON, DC 20006
(202) 282-5000

Counsel for Petitioner