No. 20-1363

IN THE

Supreme Court of the United States

MERIT MEDICAL SYSTEMS, INC.,

Cross-Petitioner,

v.

NAZIR KHAN, IFTIKHAR KHAN,

Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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April 26, 2021

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement in the cross-petition for a writ of certiorari remains accurate.

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INTRODUCTION

The Khans argue that a decision by this Court in Case No. 20-773 reversing the district court's award of Rule 11 sanctions cannot have any impact on the court's denial of fees under 35 U.S.C. § 285 as a matter of law. The Khans argue this is because (1) the court made a finding that the case was not exceptional—which the Khans characterize as a "stand-alone" finding that is "unchallenged by Merit"—and because (2) Merit's § 285 motion was "properly denied as untimely." (Opp. 1, 5, 6, 10.) Those arguments are based on false factual mischaracterizations and erroneous legal argument.

The first argument mischaracterizes both the district court's reasoning and Merit's cross-petition. The district court did make a finding that the case was not exceptional, but the court's reasoning shows that this finding ***depended*** on the court's grant of Rule 11 sanctions. If those sanctions are reversed, they can no longer support the no-exceptionality finding, and it falls. The Khans' characterization of the no-exceptionality finding as a "stand-alone" finding, *i.e.*, a finding that is independent of the sanctions, ignores what the court's order actually says.

The Khans have also mischaracterized Merit's cross-petition. They repeatedly assert that "Merit does not challenge" the no-exceptionality finding "before this Court." (Opp. 5; *accord id.* at i, 1, 6, 10.) However, the entire *raison d'être* for Merit's cross-petition is to challenge that finding—if the Rule 11 sanctions are reversed. Merit's cross-petition repeatedly points out that, in that scenario, the

denial of Merit's § 285 motion—based on the court's no-exceptionality finding—must be vacated because the premises on which that finding were based will no longer be valid. (Cross-Petition i, 29-30, 30-31, 32, 32-33.)

The Khans also argue that even if the Rule 11 sanctions are reversed, the denial of Merit's § 285 motion must stand because it was untimely under Fed.R.Civ.P. 54(d). The Khans also argue that the district court so found. (Opp. 1, 6, 10-14.) But the court did not so find. A simple reading of the court's order exposes the Khans' mischaracterization on this point.

Merit's motion was not untimely either. The rule cited by the Khans, Rule 54(d)(2)(B), requires an attorney-fee motion to be filed "no later than 14 days after the entry of judgment" "*[u]nless a statute* ***or court order*** *provides otherwise*." Merit's motion was filed in accordance with the time limit specified in the district court's local rule, and every one of the courts of appeals to address the issue has held that a local rule extending the time to file an attorney-fee motion qualifies as a "court order" for purposes of Rule 54(d)(2)(B). Because Merit's motion was timely under the local rule, it was also timely under Rule 54(d)(2)(B). The Khans' arguments to the contrary are based on inapplicable cases, a single judge's dissenting opinion, and inconsistent treatise commentary.

Based on the foregoing, this Court can easily reject the Khans' arguments on their merits. But the Court need not even go that far. Merit's cross-petition merely asks this Court, in the nature of a GVR, to vacate and remand on the § 285 issue if this

Court reverses in Case No. 20-773 on the Rule 11 issue. (Cross-Petition 29.) In that scenario, this Court need not address the Khans' arguments on the merits but can simply instruct the Federal Circuit on remand to address them. Indeed, that should be this Court's preferred course since the Federal Circuit did not reach Merit's argument on this point in the first instance.

On remand, the Federal Circuit will also be able to address the Khans' forfeiture of *all* of the arguments they now make in opposition to the cross-petition, including their arguments on the no-exceptionality finding and the timeliness of Merit's motion. The Khans did not present *any* of those arguments in their brief in response to Merit's cross appeal. (Fed. Cir. Appeal No. 19-1952, ECF No. 91, pp. 21-28.)

ARGUMENT

I. The District Court's No-Exceptionality Finding Does Not Bar Merit's Cross-Petition

A. *Merit's Cross-Petition <u>Does</u> Challenge the No-Exceptionality Finding*

The Khans repeatedly assert that "Merit does not challenge" the district court's no-exceptionality finding. (Opp. 5; *accord id.* at i, 1, 6, 10.) That assertion is false. Indeed, challenging that finding is the *raison d'être* for Merit's cross-petition. It is true that Merit, at this point in the case, has chosen not to challenge the no-exceptionality finding if the Rule 11 sanctions *stand*. But Merit's cross-petition ***has***

challenged the no-exceptionality finding if the Rule 11 sanctions are *reversed*. That challenge is justified because the court's reasoning shows that its no-exceptionality finding was inextricably intertwined with its grant of the sanctions.

Merit's challenge to the no-exceptionality finding is apparent from Merit's cross-petition. The cross-petition repeatedly points out that, if the sanctions are reversed, the Federal Circuit's judgment affirming the denial of Merit's § 285 motion—which everyone agrees was based on the court's no-exceptionality finding—must be vacated because the premises on which that finding were based will no longer be valid. (Cross-Petition i, 29-30, 30-31, 32, 32-33.) Simply stating that Merit is not challenging a finding that Merit ***has*** clearly challenged does not make it so.

B. *The District Court's No-Exceptionality Finding Depends on Its Grant of Rule 11 Sanctions*

The Khans also argue that the district court's no-exceptionality finding precludes Merit from prevailing on its § 285 motion as a matter of law because it is a "stand-alone" finding that does not depend on the grant of Rule 11 sanctions. (Opp. 5.) The court's order shows otherwise.

The court's order first explains that "[t]he ability to declare a case exceptional is left to this Court[']s discretion based on a case-by-case analysis." (Pet. Appx. 53b.) The order then focuses on the court's grant of sanctions. It states the court's view that Merit's § 285 motion was based on "largely identical conduct that was previously before the

Court on the initial motion for sanctions" and observes that the court "has already extensively considered this conduct in determining whether sanctions were appropriate." (Pet. Appx. 54a.) The order then reasons that "no conduct has occurred ***since the Court granted sanctions*** that could be considered 'exceptional' and justify a more than three-fold increase in the fees awarded." (*Id.* (emphasis added).) With this reasoning, the district court clearly implies that the conduct for which the court ***had*** granted sanctions ***was*** "exceptional." The order then concludes by contrasting the appropriateness of the grant of sanctions with the appropriateness of a finding of exceptionality and an award of additional fees under § 285, stating: "The previous sanctions amount of $95,966.90 is appropriate and reasonable given Plaintiffs conduct in the case, but the extraordinary step of deeming the case 'exceptional' is not warranted." (*Id.*)

Thus, the district court's no-exceptionality finding ***depended*** on the fact that the court had already granted Rule 11 sanctions and had already awarded $95,966.90 for the Khans' sanctionable behavior. The entire thrust of the court's analysis was that there should be no finding of exceptionality—and no award of additional attorney fees—***because*** the sanctions had been granted. The court's reasoning strongly implies that if there were no sanctions, the no-exceptionality finding would have come out differently.

This implication is confirmed by another portion of the order. When deciding whether to conditionally award under § 285 the $95,966.90 already awarded under Rule 11 "in the event the Rule 11 sanctions

already awarded are vacated or reversed on appeal" (Pet. Appx. 53a), the district court's reasons for denying such an award are telling. If the Khans were correct that the court made a "stand-alone" no-exceptionality finding, *i.e.*, a finding that was independent of the grant of the sanctions, the court would have denied the request on grounds that the case was not exceptional. Instead, it denied that request on other grounds: because it did not want "to prognosticate on what the Court of Appeals might do and rule under a set of hypothetical circumstances." (Pet. Appx. 53a.) Thus, the Khans' argument that the district court made a "stand-alone" no-exceptionality finding does not withstand scrutiny.

Under this Court's GVR case law, this Court need not decide whether the district court ***would*** have decided differently if there had been no sanctions, although the court's reasoning clearly points that direction. Instead, this Court need only conclude there are "intervening developments…that [there is] reason to believe the court below did not fully consider," that those developments "reveal a ***reasonable probability*** that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and that "it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). As explained in Merit's cross-petition, the district court's reasoning demonstrates that those criteria are met. (Cross-Petition 29-32.) Therefore, if this Court reverses the Rule 11 sanctions in Case No. 20-773, it should also vacate and remand on the § 285 issue.

The Khans argue that Merit has not "shown any abuse of discretion" in the district court's finding. (Opp. 7.) But Merit does not need to show any abuse of discretion, only that the GVR criteria specified in *Lawrence* are met. As explained above, those criteria will be met if the sanctions are reversed in Case No. 20-773.

In any event, if the award of sanctions is reversed, then the no-exceptionality finding clearly ***is*** an abuse of discretion. "A district court would necessarily abuse its discretion if it based its ruling on…a clearly erroneous assessment of the evidence." *Highmark, Inc. v. Allcare Health Mgmt. System, Inc.,* 572 U.S. 559, 563 n.2 (2014) (internal quotation marks omitted). If the sanctions are reversed, the court's no-exceptionality finding will be based on subsidiary findings that will have become "clearly erroneous," such as the subsidiary finding that "[t]he previous sanctions amount of $95,966.90 is appropriate and reasonable given Plaintiffs conduct in the case." (Pet. Appx. 54a.)

The Khans also argue that the district court's no-exceptionality finding is somehow not intertwined with its grant of sanctions because "the district court…could have declined to award attorney fees [even] had it deemed the case 'exceptional.'" (Opp. 7; *accord id.* at 5, 7-10.) That argument is a *non sequitur*. What matters is what the court did, not what it could have done. The court's reasoning shows that it made its no-exceptionality finding—and declined to award attorney fees—based on the premise that it had previously granted sanctions.

The Khans also make much of the fact that the Federal Circuit affirmed the district court's no-

exceptionality finding. (Opp. 4, 5, 7, 10, 14.) But the Federal Circuit's affirmance has no bearing on the question presented here. The question presented here is whether the district court's no-exceptionality finding should stand if the sanctions are *reversed*, but the Federal Circuit addressed whether the no-exceptionality finding should stand if the sanctions were *affirmed*. The Federal Circuit did not reach Merit's argument that *if* the sanctions were disturbed, the denial of the § 285 motion should be vacated. The cross-petition merely asks this Court to remand for the Federal Circuit to consider that argument if this Court reverses the Rule 11 sanctions in Case No. 20-773.

II. The Timing of Merit's § 285 Motion Does Not Bar Merit's Cross-Petition

The Khans also argue that Merit's § 285 motion was untimely under Rule 54(d) and that the district court so held. (Opp. 10-14.) Both arguments are wrong.

A. *Merit's § 285 Motion Was Not Untimely*

The Khans argue that under Rule 54(d)(2)(B)(i), Merit's attorney-fee motion must have been filed "no later than 14 days after the entry of judgment." However, that rule does not apply if "a statute or ***a court order*** provides otherwise." Fed.R.Civ.P. 54(d)(2)(B).

Every court of appeals to consider the issue has concluded that a local rule extending the time for filing an attorney-fee motion qualifies as a "court order" for purposes of Rule 54(d)(2)(B), including the Seventh Circuit in which the district court sits:

- *Johnson v. Lafayette Fire Fighters Association*, 51 F.3d 726, 729 (7th Cir. 1995) ("We agree with plaintiffs that a local rule is an order of the court, at least for the purposes of Fed.R.Civ.P. 54(d)(2)(B). Local rules are adopted by the majority of the judges in a district to govern the practice and procedure of litigation in that district. As such, local rules are, in effect, 'standing orders,' such that [a local rule] should be viewed as an order of the court.")
- *Eastwood v. National Enquirer, Inc.*, 123 F.3d 1249, 1257 (9th Cir. 1997) ("[L]ocal rules are standing court orders for purposes of Rule 54(d).")
- *Jones v. Central Bank*, 161 F.3d 311, 313 (5th Cir. 1998) ("[T]he local rule is a court order satisfying the 'unless' clause of Federal Rule 54(d)(2)(B).")
- *Tire Kingdom, Inc. v. Morgan Tire & Auto, Inc.*, 253 F.3d 1332, 1335 (11th Cir. 2001) ("[T]he time limit set out in [the local rule] is an 'order of the court' that governs this case. Thus, Defendants timely filed their motions for fees.")
- *Planned Parenthood of Central New Jersey v. Attorney General of New Jersey*, 297 F.3d 253, 260-61 (3d Cir. 2002) ("Every Court of Appeals to have addressed the issue has decided that a local rule extending the time to file a motion for fees is a 'standing order,' and, therefore, not inconsistent with the federal rules.... We agree....")
- *Hayes v. Commissioner of Social Security*, 895 F.3d 449, 453 (6th Cir. 2018) ("The local rule

servs as a court order modifying the generally applicable, 14-day limitation in Rule 54.")

Here, Merit followed N.D.Ill. Local Rule 54.3(b), which states that an attorney-fee motion "shall be filed and served no later than 91 days after the entry of the judgment." Merit filed its § 285 motion within the time allowed by that rule. Because Merit's motion was timely under the local rule, it was also timely under Rule 54(d)(2)(B).

In attempting to demonstrate otherwise, the Khans cite *IPXL Holdings, LLC v. Amazon.com, Inc.*, 430 F.3d 1377 (Fed. Cir. 2005). (Opp. 11.) But *IPXL* was a case in a district without a local rule. The case did not address whether a local rule extending the time to file an attorney-fee motion qualifies as a "court order" for purposes of Rule 54(d)(2)(B).

The Khans argue that the district court's local rule "is inconsistent with" Rule 54(d)(2)(B). (Opp. 11.) They cite Fed.R.Civ.P. 83 for the proposition that local rules must be consistent with the Federal Rules and *In re Ricoh Co. Patent Litigation*, 661 F.3d 1361 (Fed. Cir. 2011) for the proposition that "[w]hen a local rule is inconsistent with the Federal Rules of Civil Procedure, the local rule is invalid." (Opp. 12, 13.) But those arguments simply beg the question of whether a local rule extending the time to file an attorney-fee motion qualifies as a "court order" for purposes of Rule 54(d)(2)(B). As explained above, every court of appeals to address the issue has concluded that it does, and therefore there is no inconsistency.

The Khans also cite *CX Reinsurance Co. v. Johnson*, 977 F.3d 306 (4th Cir. 2000) and the

dissenting opinion in *Jones v. Central Bank*, 161 F.3d 311 (5th Cir. 1998) for the proposition that "court orders are not the same thing as local rules." (Opp. 13.) But the majority in the *Jones* case concluded otherwise for purposes of Rule 54(d)(2)(B). *Jones*, 161 F.3d at 313. And the *CX Reinsurance* case did not involve a local rule extending the time to file an attorney-fee motion. It involved a local rule that the district court had interpreted as constricting the time to file an attorney-fee motion even though it was worded identically to the federal rule. 977 F.3d at 314-15.

Finally, the Khans point to commentary from treatises. (Opp. 12-13.) Obviously, those commentaries do not have the force of law, and they are contradicted by the decisions of the courts of appeals. Indeed, the first treatise acknowledges, as it must, the appellate authority. 10 MOORE'S FEDERAL PRACTICE § 54.151[2][b] (3d ed. Dec. 2018). And the second treatise is internally inconsistent, teaching elsewhere that local rules do control. In a section not cited by the Khans, the treatise acknowledges that "[s]everal courts have adopted local rules governing the procedure for seeking attorney fees" and teaches that "those thus will control when applicable." 10 FEDERAL PRACTICE & PROCEDURE § 2680 & n.8 (4th ed. Apr. 2021).

Merit's § 285 motion was not untimely.

B. *The District Court Did Not Deny Merit's § 285 Motion as Being Untimely*

The Khans not only assert that Merit's § 285 motion was untimely but that the district court found that it was. (Opp. 1; *accord id.* at 10.) That assertion is false.

The district court merely commented on the amount of time ("three months") that had elapsed between its granting of the sanctions motion and Merit's filing of its § 285 motion and then asserted that Merit "had the ability to seek relief under § 285 previously, but instead chose to file and litigate a motion for sanctions." (Pet. Appx. 53a, 54a.) The court did not find that the § 285 motion was untimely as a result and certainly not untimely under Rule 54(d). There is no mention of Rule 54(d) in the court's order. (Pet. Appx 53a-54a.)

The district court would have been well aware of its own local rule extending the time to file an attorney-fee motion until 91 days after judgment. N.D.Ill. Local Rule 54.3(b). And it would have been well aware of the Seventh Circuit's ruling in *Johnson v. Lafayette Fire Fighters Association*, 51 F.3d 726 (7th Cir. 1995) holding that such a local rule qualifies as a "court order" for purposes of Rule 54(d). The Khans' assertion that the district court held contrary to those authorities is baseless.

CONCLUSION

If this Court grants certiorari in Case No. 20-773, it should also grant certiorari on Merit's cross-

petition. If the petition in Case No. 20-773 is denied, the cross-petition should also be denied.

Respectfully submitted,

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