No. 20-773

In the Supreme Court of the United States

NAZIR KHAN, IFTIKHAR KHAN,
Petitioners,
v.

MERIT MEDICAL SYSTEMS INC. ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

JONATHAN A. HERSTOFF
Counsel of Record
CAMILLE Y. TURNER
KAITLIN M. ABRAMS
HAUG PARTNERS LLP
745 Fifth Avenue
New York, NY 10151
(212) 588-0800
jherstoff@haugpartners.com

Counsel for Petitioners

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Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

RULE 29.6 STATEMENT

The Rule 29.6 statement in the petition for writ of certiorari remains accurate.

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INTRODUCTION

Merit Medical Systems Inc.'s ("Merit") brief in opposition ("Opp.") does not dispute that there is an acknowledged circuit split on the Question Presented. This split has existed since 2003, and the Seventh Circuit (now joined by the Federal Circuit in this case) has shown no signs of retreating from its atextual interpretation of Federal Rule of Civil Procedure 11(c)(2). Indeed, the Seventh Circuit recently refused a request to reconsider whether its "substantial compliance" interpretation of Rule 11(c)(2) should be overruled in view of its irreconcilable inconsistency with the text of the Rule. In sum, the Seventh Circuit has had ample opportunity to consider the better-reasoned authority from other circuits, and nevertheless has declined to revisit its "substantial compliance" interpretation. Further "percolation" is unwarranted.

Failing to seriously dispute the square split of authority on the Question Presented, Merit devotes a majority of its brief to detailing its view of the factual record. Although Petitioners Nazir Khan and Iftikhar Khan (collectively "Khan") strongly disagree with Merit's characterization of Khan's conduct, Khan forgoes a point-by-point rebuttal because it has no relevance to the question before the Court: whether a movant's noncompliance with the safe-harbor provision of Rule 11(c)(2) bars a district court from granting a motion for Rule 11 sanctions.

Moreover, contrary to Merit's argument, this case is a clean vehicle for addressing the Question Presented. *First*, there was no forfeiture of the Question Presented

because the issue was presented to, and decided by, both the district court and the Federal Circuit. *Second*, the error below cannot be deemed harmless. As a mandatory claim-processing rule, Rule 11(c)(2) is not subject to harmless-error analysis. Moreover, had the district court followed Rule 11(c)(2), it would have denied the motion for sanctions. Likewise, had the Federal Circuit followed Rule 11(c)(2), it would have reversed the imposition of sanctions. *Third*, contrary to Merit's argument, the $95,966.90 award of attorney fees cannot be justified under 35 U.S.C. § 285. Under the plain language of § 285 and this Court's precedent, § 285 permits an award of attorney fees only "in exceptional cases." The district court found—and the Federal Circuit affirmed—that the case as a whole was not "exceptional," and therefore denied Merit's motion for attorney fees under § 285. Merit does not challenge that finding here, let alone establish that the conclusion was an abuse of discretion, as this Court's precedents require in order to disturb a district court's exceptional-case finding.

In sum, the circuit split is deeply entrenched, and Merit provides no sound reason for denying certiorari. Khan's petition should be granted.

ARGUMENT

I. The Circuit Split Is Deep and Shows No Sign of Being Resolved Without This Court's Intervention

Merit acknowledges the circuit split on the Question Presented (Opp. 4, 35-37), but nevertheless: (i) argues that a minority of the cases are factually

distinguishable; and (ii) suggests that "further percolation" is warranted. Opp. 35-37. Both suggestions are mistaken.

First, Merit incorrectly suggests that Khan's cited cases from the Third, Fourth, and Eighth Circuits are irrelevant because they "do not decide whether warning letters satisfy Rule 11(c)(2) but instead involve situations not involving warning letters." Opp. 35-36. But the Question Presented is whether a motion for Rule 11 sanctions may be granted when the movant fails to comply with the procedure required by Rule 11(c)(2). As detailed in the Petition (Pet. 4-10), eight circuits—unlike the Federal Circuit here—have concluded that a motion for Rule 11 sanctions is barred when the movant fails to comply with Rule 11(c)(2).

Contrary to Merit's suggestion, the Federal Circuit's approach is directly contrary to that of the Third, Fourth, and Eighth Circuits. Specifically, the Third Circuit found that a motion for sanctions was barred because it was filed before the safe-harbor period expired. *In re Miller*, 730 F.3d 198, 205 (3d Cir. 2013). Moreover, the Fourth Circuit reversed the imposition of Rule 11 sanctions where "the defendants did not serve their Rule 11 motion on Brickwood before filing it with the district court." *Brickwood Contractors, Inc. v. Datanet Eng'g, Inc.*, 369 F.3d 385, 390 (4th Cir. 2004) (en banc). It further explained that "the safe-harbor provisions of Rule 11 are inflexible claim-processing rules and that a district court exceeds its authority by imposing sanctions requested through a procedurally-deficient Rule 11 motion." *Id.* at 396. Finally, the Eighth Circuit reversed the grant of Rule 11 sanctions

where the movant did not comply with the Rule 11 procedural requirements, even though the movant—prior to requesting sanctions—had sent the nonmovant: (i) an e-mail threatening to move for Rule 11 sanctions if the allegedly frivolous filing was not withdrawn; and (ii) a letter demanding that the filing be withdrawn. *Gordon v. Unifund CCR Partners*, 345 F.3d 1028, 1029-30 (8th Cir. 2003).[1]

Merit incorrectly suggests that this case can be distinguished from those of the eight circuits that require compliance with the safe-harbor provision because the district court noted during a status conference—after issuing its written opinion granting Rule 11 sanctions (Pet. App. 40-45)—that Khan had "not listen[ed]" to court orders. Opp. 36. But that was not a basis for the district court's opinion granting sanctions or the Federal Circuit's affirmance thereof, and for good reason: noncompliance with court orders is not a basis for Rule 11 sanctions. *See* Fed. R. Civ. P. 11(b) (providing for certain requirements of "pleading[s], written motion[s], [and] other paper[s]"); Fed. R. Civ. P. 11(c)(1) (providing for sanctions where "Rule 11(b) has been violated").[2] Moreover, the

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[1] Merit's suggestion that the Eighth Circuit's decision "involve[s] [a] situation[] not involving warning letters" (Opp. 35-36) is therefore incorrect.

[2] Noncompliance with court orders can subject a party to sanctions under other Rules and principles of law. *See, e.g.*, Fed. R. Civ. P. 16(f)(1)(C) (providing for sanctions when a party disobeys a scheduling order); Fed. R. Civ. P. 37(b)(2)(A) (providing for sanctions when a party disobeys a discovery order); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45 (1991) (providing that under certain

sanctions here were imposed on motion, rather than on the district court's initiative. This distinction is critical, because the sanction imposed here was an award of attorney fees, which Rule 11 specifies can be imposed only on motion. Fed. R. Civ. P. 11(c)(4) (providing that the sanction of attorney fees can be "imposed on motion" only). Therefore, granting the motion is permissible only if the movant complies with the Rule 11 safe-harbor provision. *Compare* Fed. R. Civ. P. 11(c)(2) (providing for a safe-harbor period before filing a motion for Rule 11 sanctions) *with* Fed. R. Civ. P. 11(c)(3) (providing for sanctions on a court's own initiative, which does not have a 21-day safe-harbor period). In sum, Merit fails in its attempt to distinguish this case from those of the Second, Third, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth Circuits.

Second, the circuit split shows no sign of abating. In suggesting otherwise, Merit (Opp. 36) points to the Seventh Circuit's acknowledgment that its interpretation of Rule 11 "stands alone and is difficult to reconcile with the explicit requirements of the Rule and the clear explanation from the Advisory Committee." *N. Ill. Telecom, Inc. v. PNC Bank, N.A.*, 850 F.3d 880, 887 (7th Cir. 2017). But more recently, the Seventh Circuit used the substantial-compliance standard to affirm the grant of Rule 11 sanctions, and

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circumstances, a court has an inherent power to impose sanctions for "willful disobedience of a court order") (internal quotation marks omitted). But it is indisputable that none of these other Rules nor the court's inherent powers were relied upon—or could have been relied upon—as a basis for awarding the sanctions imposed here.

subsequently denied panel rehearing and rehearing en banc. *McGreal v. Vill. of Orland Park*, 928 F.3d 556 (7th Cir. 2019). Simply put, there is no basis to assume that the Seventh Circuit will revisit its longstanding interpretation of Rule 11, absent this Court's intervention.

Third, Merit argues that the Federal Circuit did not "adopt[] the Seventh Circuit's current position" on Rule 11, but merely "appl[ied] Seventh Circuit law to a non-patent issue in a case originating from that circuit." Opp. 36. This is a distinction without a difference, because it is undisputed that the Federal Circuit could affirm the district court's grant of Rule 11 sanctions only by concluding that the Seventh Circuit's "substantial compliance" standard was met. Had the Federal Circuit required actual compliance with Rule 11(c)(2), as eight other circuits do, it would have reversed the district court's sanctions award. Certiorari is warranted to resolve this circuit split.

II. 35 U.S.C. § 285 Provides No Reason to Deny Certiorari

Merit suggests that certiorari should be denied because a reversal of the Rule 11 sanctions award could lead to the district court awarding attorney fees under 35 U.S.C. § 285 instead. Opp. 34-35. Merit is incorrect.

"The court *in exceptional cases* may award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285 (emphasis added); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 553 (2014) ("The power [to award attorney fees under 35 U.S.C.

§ 285] is reserved for 'exceptional' cases."); *Intellectual Ventures I LLC v. Trend Micro Inc.*, 944 F.3d 1380, 1384 (Fed. Cir. 2019) (vacating an award of attorney fees under § 285 where "the district court did not find that the case overall was exceptional"). Here, the district court found that "the extraordinary step of deeming the case 'exceptional' is not warranted." Dist. Ct. Rec. 213 at 1. Moreover, the Federal Circuit was "not persuaded that the district court abused its discretion in determining that this case is not exceptional." Pet. App. 21-22. In this Court, Merit has not challenged the district court's finding—affirmed by the Federal Circuit—that this case is not "exceptional," let alone shown any abuse of discretion in this finding. *See Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 564 (2014) (holding that "an appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's § 285 determination"). Nor has Merit challenged the district court's conclusion that Merit's motion for fees under § 285 was untimely filed, an independent basis for the denial of fees. Dist. Ct. Rec. 213 at 1. Because Merit provides no argument for upsetting the determination that this case is not "exceptional" and that Merit's motion was untimely, there is no basis for the imposition of attorney fees under § 285. Simply put, § 285 provides no reason to deny certiorari.

III. There Are No Vehicle Problems

Merit further argues that certiorari should be denied under the doctrine of forfeiture and/or under the harmless-error rule. Opp. 27-34. Merit is incorrect.

A. There Was No Forfeiture by Khan

Contrary to Merit's argument (Opp. 27-31), there was no forfeiture, as the Rule 11(c)(2) safe-harbor issue was raised both in the district court and in the Federal Circuit. As this Court has explained, the "traditional rule . . . precludes a grant of certiorari only when the question presented was not pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted). That principle "operates . . . in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon[.]" *Id.*; *accord Hardy v. Berryhill*, 908 F.3d 309, 313 (7th Cir. 2018) (recognizing that an issue is preserved for appeal when the district court addresses the issue); *Sullivan v. McDonald*, 815 F.3d 786, 789 (Fed. Cir. 2016) (finding an issue properly preserved where it had been passed upon below, and collecting cases); *Lifestyle Enter., Inc. v. United States*, 751 F.3d 1371, 1377 (Fed. Cir. 2014) (recognizing "the many decisions that recite the general rule that a party may raise on appeal any issue that was raised or actually decided below") (citing *Williams*, 504 U.S. at 41).

It is undisputed that Khan pressed the Rule 11(c)(2) safe-harbor issue before the Federal Circuit, and that the Federal Circuit decided that issue on the merits.[3]

[3] Merit also suggests (Opp. 29 n.3) that this case is a poor vehicle because the Federal Circuit did not directly address the timeliness of Khan's appeal. In so suggesting, Merit does not dispute that the appeal was timely. And for good reason. A mere six days after the district court's order awarding attorney fees under Rule 11, Khan: (i) filed a notice of appeal with the district court (albeit mistakenly

Pet. App. 16-17. In deciding the issue on the merits, the Federal Circuit implicitly rejected Merit's argument that the safe-harbor question had not been properly raised in the district court. But even assuming *arguendo* that the issue had not been squarely presented to or passed upon by the district court (which it was, as explained in further detail below), Merit offers no sound basis for disturbing the Federal Circuit's decision to adjudicate the issue on the merits. *See Singleton v. Wulff*, 428 U.S. 106, 121 (1976) ("The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.").

Here, the safe-harbor issue was expressly presented to, and adjudicated by, the district court. Specifically, Merit—without being prompted—argued to the district court that it had complied with the Rule 11(c) safe-harbor provision. Dist. Ct. Rec. 114 at 18-19. In response to that argument, the district court decided

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designating the Seventh Circuit rather than the Federal Circuit) (Dist Ct. Rec. 186); and (ii) filed a brief with the Federal Circuit challenging, *inter alia*, the award of Rule 11 sanctions (Fed. Cir. Rec. 38). As both documents were filed well within the 30-day time to appeal (*see* 28 U.S.C. § 2107(a)), Khan's appeal was timely. Indeed, even Merit recognized this. Fed. Cir. Rec. 85 at 22-23 (recognizing that an appeal brief can serve as a notice of appeal); *Smith v. Barry*, 502 U.S. 244, 248-49 (1992) ("If a document filed within the time specified by Rule 4 gives the notice required by Rule 3, it is effective as a notice of appeal."). Simply put, it is indisputable that Khan, within 30 days of the grant of attorney fees under Rule 11, provided the notice required by Rule 3. Accordingly, the Federal Circuit properly found that it had jurisdiction. Pet. App. 9.

that Merit had complied with the Rule 11(c)(2) safe-harbor provision. Pet. App. 43 (concluding that Merit's letters "no doubt satisf[y]" the Rule 11(c)(2) safe-harbor requirement). Contrary to Merit's suggestion (Opp. 30) that the district court was deciding a different issue, the Federal Circuit recognized that the district court had found that Merit's letters were sufficient to satisfy Rule 11(c)(2). Pet. App. 16-17. And the Federal Circuit—relying on Seventh Circuit case law for the proposition that a warning letter can take the place of the "motion" required by Rule 11(c)(2)—concluded that the district court had correctly found the safe-harbor requirement to be satisfied. Pet. App. 17. Merit cites no authority—and Khan is aware of none—that finds forfeiture of an issue that was both pressed *and* decided by both the district court and the court of appeals. Nor has Merit provided any authority to support its view (Opp. 31) that Nazir Khan and Iftikhar Khan—two *pro se* litigants—were obligated to give Merit's sophisticated counsel another opportunity to file a motion for sanctions against them. Regardless, there is no evidence that Merit would have acted any differently had Khan (in addition to Merit) raised the safe-harbor issue with the district court. *Cf. Callaway Golf Co. v. Acushnet Co.*, 576 F.3d 1331, 1343-44 (Fed. Cir. 2009) (finding that an issue had been preserved for appeal where the adverse party—but not the party seeking review of the issue—had raised the issue with the district court). Indeed, the fact that Merit expressly recognized the requirements of Rule 11(c) before the district court demonstrates that Merit was fairly on notice of the Rule 11 safe-harbor provision during district-court proceedings.

Finally, Merit has provided no authority to suggest that review is unwarranted merely because "the Federal Circuit did not present any justification or explanation for the rule it applied on appeal." Opp. 30. Under Merit's theory, a court could misinterpret an unambiguous statute or Federal Rule, and evade this Court's review merely by providing conclusory reasoning. To state Merit's argument is to reject it. If anything, the Federal Circuit's cursory analysis—which is in line with the Seventh Circuit's analysis adopting the "substantial compliance" standard—highlights the need for this Court's review.

In sum, Khan has not forfeited the Question Presented.

B. The Harmless-Error Rule Is No Obstacle to Review

Finally, Merit argues that certiorari should be denied under the harmless-error rule. Opp. 31-34. Merit is mistaken. As an initial matter, mandatory claim-processing rules such as Rule 11(c)(2) "are not subject to harmless-error analysis." *Manrique v. United States*, 137 S. Ct. 1266, 1274 (2017). Regardless, an error is not harmless if it affected the judgment under review. *See Shinseki v. Sanders*, 556 U.S. 396, 407-08 (2009) (recognizing that the harmless-error rule requires a court to determine whether the error affected the judgment). Here, the error was not harmless because had the district court properly interpreted the Rule 11(c)(2) safe-harbor provision, it would have denied the motion for sanctions. Moreover, had the Federal Circuit properly interpreted the provision, it would have reversed the imposition of Rule

11 sanctions. *See, e.g.*, *Roth v. Green*, 466 F.3d 1179, 1192 (10th Cir. 2006) (reversing the imposition of Rule 11 sanctions due to the movant's failure to comply with the safe-harbor provision); *Barber v. Miller*, 146 F.3d 707, 710-11 (9th Cir. 1998) (same). Instead, relying on an erroneous interpretation of Rule 11(c)(2), the district court awarded—and the Federal Circuit affirmed—an award of $95,966.90 against two *pro se* litigants.

In sum, the harmless-error rule provides no basis for denying certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HAUG PARTNERS LLP

JONATHAN A. HERSTOFF
Counsel of Record
CAMILLE Y. TURNER
KAITLIN M. ABRAMS
HAUG PARTNERS LLP
745 Fifth Avenue
New York, NY 10151
(212) 588-0800
jherstoff@haugpartners.com

Counsel for Petitioners
Nazir Khan and Iftikhar Khan