

No. _____

IN THE
Supreme Court of the United States

BRIGHAM AND WOMEN'S HOSPITAL, INC. AND INVESTORS BIO-TECH, L.P.,
Applicants,

v.

PERRIGO COMPANY AND L. PERRIGO COMPANY,
Respondents.

**APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

To the Honorable John G. Roberts, Jr., Chief Justice and Circuit Justice for the
Federal Circuit:

Applicants Brigham and Women's Hospital, Inc. and Investors Bio-Tech.,
L.P.¹ respectfully request that the time to file a petition for a writ of certiorari in
this case be extended for sixty (60) days, to and including September 29, 2019. The
United States Court of Appeals for the Federal Circuit issued its opinion on
February 28, 2019. (Appendix A, *infra*) (hereinafter, "App."). Applicants' petitions
for panel rehearing and rehearing *en banc* were denied on May 2, 2019. (App. B.,
infra). Without an extension of time, the petition for a writ of certiorari would be

¹ Applicant Brigham and Woman's Hospital, Inc. is wholly owned by Partners Healthcare System, Inc. Partners Healthcare System, Inc. has no parent corporations and no publicly held company owns 10 percent or more of its stock. Applicant Investors Bio-Tech, L.P. has no parent corporations and no publicly held company owns 10 percent or more of its stock.

due on July 31, 2019. Applicants file this application more than 10 days before that date. S. Ct. R. 13.5. This Court will have jurisdiction pursuant to 28 U.S.C. § 1254(1).

Background

A. In July 2013, Applicants Brigham and Women’s Hospital, Inc. and Investors Bio-Tech, L.P. (hereinafter, “Applicants”) filed an action for infringement of U.S. Patent No. 5,229,137 (“the ’137 Patent”) against Respondents Perrigo Company and L. Perrigo Company (hereinafter, “Respondents”).

B. In December 2016, following an eight day trial on all liability and damage issues, a jury reached its verdict on this action in Applicants’ favor, including willful infringement, patent validity, and damages in the amount of \$10,210,071. All of Respondents’ defenses were rejected.

At Respondents’ request, the district court issued a separate Final Judgment on December 19, 2016. The thirty (30) day time period for filing a Notice of Appeal from the Judgment passed without a Notice of Appeal or appeal-tolling motion. Respondents filed an untimely Notice of Appeal on February 17, 2017 – nearly two months after the Judgment – with a request for a thirty (30) day extension of time to file a Notice of Appeal. On April 24, 2017, the district court denied the extension of Respondents’ time to appeal and denied Respondents’ post-trial motions as untimely.

C. Applicants moved to dismiss the Respondents’ appeal as the Federal Circuit lacked jurisdiction. The motions panel for the Court of Appeals for the Federal Circuit, however, denied Applicants’ motion to dismiss Respondents’

untimely appeal for lack of jurisdiction, finding that the December 19, 2016 judgment was not “final.” Order, *Brigham & Women’s Hosp., Inc. v. Perrigo Co.*, No. 17-1950, (Fed. Cir. Aug. 2, 2017), ECF No. 38 (App. C). The merits panel for the Court of Appeals for the Federal Circuit declined to depart from the motion panel’s ruling. (App. A).

The motions panel ruled that the Judgment was not final because it did not apply a “multiplier” to “enhance” the jury’s damages verdict. App. C; *see also* 35 U.S.C. § 284. The appeal was deactivated, and the district court *granted* Respondents’ motion for judgment as a matter of law regarding non-infringement of the ’137 patent.

D. The appeal reinstated, the Court of Appeals found that it had jurisdiction, affirmed the district court’s judgment as a matter of law decision on substantial evidence grounds, and denied Applicants’ petitions for panel rehearing and rehearing *en banc*. Opinion, *Brigham*, (Fed. Cir. Feb. 28, 2019), ECF No. 112 (App. A); *see also*, Order, *Brigham*, (Fed. Cir. May 2, 2019), ECF No. 116 (App. B).

E. The Federal Circuit ultimately made two rulings one or both of which will be challenged in Applicants’ forthcoming petition:

First, the Federal Circuit’s motions panel concluded that Respondents’ appeal was timely because the damage multiplier had not been addressed by the district court until later, when it resolved Applicants’ exceptional case and enhancement motions that stemmed from the jury’s willful infringement verdict. The motions panel ruling lacked authority and was contrary to this Court’s rulings in *Budinich*

v. Becton Dickinson & Co., 108 S. Ct. 1717 (1988); *Ray Haluch Gravel Co. v. Central Pension Fund*, 134 S. Ct. 2205 (2014); *Halo Elecs, Inc. v. Pulse Elecs., Inc.*, 136 S.Ct. 1923 (2016); and *Octane Fitness, LLC v. Icon Health & Fitness, Inc.*, 134 S.Ct. 1749 (2014).

Second, the Federal Circuit in rendering judgment as a matter of law of noninfringement, failed to acknowledge Respondents' invalidity evidence before the jury supporting infringement; independently weighed infringement test data; and made credibility determinations that are in the sole province of the jury under this Court's precedent and the 7th amendment. *See Reeves v. Sanderson Plumbing Prods. Inc.*, 120 S. Ct. 2097 (2000); *White v Dunbar*, 7 S. Ct. 72 (1886); *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).

Reasons for Granting an Extension of Time

The time to file a petition for a writ of certiorari should be extended for an additional sixty (60) days for the following reasons:

1. Undersigned counsel has worked diligently to prepare the petition in this case. Nonetheless, the petition will raise complex issues, so additional time is necessary to study the record below, the legal issues in the case, and to prepare a petition. Moreover, counsel has had time-sensitive filings and appearances in other cases during this period, including in appellate courts and multiple matters in federal district court.

2. No prejudice would arise from the requested extension. The Court of Appeals' decision requires that the district court dismiss the underlying proceeding.

Respondents will not be harmed, in the event that this Court denies the petition, if this dismissal of the district court case is delayed by sixty (60) days.

3. There is a reasonable prospect that this Court will grant the petition. The Federal Circuit below made two legal determinations: (1) that final judgment under 28 U.S.C. § 1295 is not satisfied in a patent dispute when the trial court has not resolved the multiplier (“up to three times”) for enhanced damages under 35 U.S.C. § 284, an important issue that this Court has not had a chance to address and where the Federal Circuit’s decision is not consistent with this Court’s decisions on related issues in *Budinich*, *Ray Haluch Gravel Co.*, *Halo* and *Octane Fitness*, *supra*; and (2) improper evaluation of witness credibility in reversal of a jury verdict, a path that the Federal Circuit has taken in several recent cases, contrary to this Court’s precedent including *Reeves*, *White* and *Anderson*, *supra*. In light of the practical importance of the issues, it is certainly possible that this Court will grant the petition.

Conclusion

For these reasons, the time to file a petition for a writ of certiorari should be extended an additional sixty (60) days to and including September 29, 2019.

Dated: July 16, 2019

Respectfully submitted,

/s/ James M. Bollinger

James M. Bollinger
Timothy P. Heaton
TROUTMAN SANDERS LLP
875 Third Avenue
New York, New York 10022
(212) 704-6000
james.bollinger@troutman.com

Counsel for Applicants