2020-1812

United States Court of Appeals for the Federal Circuit

MONDIS TECHNOLOGY LTD., HITACHI MAXELL, LTD., NKA MAXELL HOLDINGS, LTD., MAXELL, LTD.,

Plaintiffs-Appellees,

– v. –

LG ELECTRONICS INC., LG ELECTRONICS U.S.A., INC.,

Defendants-Appellants.

On Appeal from the United States District Court for the District of New Jersey in Case No. 2:15-cv-04431-SRC-CLW Judge Stanley R. Chesler

APPELLEES' RESPONSE TO APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number	20-1812
Short Case Caption	MONDIS TECHNOLOGY LTD. et al. v. LG ELECTRONICS INC. et al.
Filing Party/Entity	Appellee/Mondis Technology Ltd.

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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/01/2021

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Name: Martin J. Black

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
☐ None/Not Applicable	☐ None/Not Applicable	☐ None/Not Applicable
Mondis Technology Ltd.	Mondis Technology Ltd.	Inpro Ltd.
Hitachi Maxell, Ltd., n/k/a Maxell Holdings, Ltd.	Hitachi Maxell, Ltd., n/k/a Maxell Holdings, Ltd.	None
Maxell, Ltd.	Maxell, Ltd.	Maxell Holdings, Ltd.

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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Dechert LLP	Robert D. Rhoad	Nisha N. Patel
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Teri-Lynn A. Evans (no longer with firm)	Vincent A. Gallo (no longer with firm)	

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Mondis Technology Ltd., et al. v. LG Electronics Inc. et al., No. 15-cv-00431 (SRC/CLW) (D.N.J.)		

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

En banc review is reserved for two narrow categories of cases: "to secure or maintain uniformity of the court's decisions" and where "the proceeding involves a question of exceptional importance." FRAP 35(a). LG has failed to identify any conflict with another Federal Circuit decision, and the question at issue hardly concerns a matter of "exceptional importance." Section 1292(c)(2) appeals are rare enough, and the Panel decision affects only those parties who ignore the statutory thirty-day deadline to appeal from a liability judgment while an unrelated damages motion is pending. Moreover, the decision only impacts the timing of a liability appeal, not a substantive right, as missing the interlocutory appeal deadline merely pushes off review until after the damages trial.

The Panel's decision was sound. On September 24, 2019, the district court issued an order (the "September Order") denying LG's JMOL and new trial motions on infringement, invalidity, and willfulness, thus ending the liability phase of the case. Appx328-329. The district court also ordered additional briefing on LG's pending motion for a new damages trial. *Id.* At that point, as the Panel found, judgment in this case became "final except for an accounting" under 28 U.S.C. §1292(c)(2), and LG was required to file any interlocutory appeal within thirty days. Panel Op. 3-4. LG waited seven months until the court resolved its pending damages motion, and there is nothing surprising in the Panel's decision

that the appeal was untimely. *Id*. at 4. Supreme Court authority supports the Panel's conclusion. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988).

LG's claim that the Panel's decision conflicts with the decisions of several sister circuits is wrong. None of the sister circuit decisions cited by LG address §1292(c)(2), and none support LG's suggestion that motions unrelated to the merits of the judgment being appealed can toll the deadline for appealing that judgment.

Contrary to LG's policy objections, the Panel's decision is well rooted in statutory language and intent. All the Panel decision asks is that an appellant seeking to take advantage of the extraordinary right of interlocutory appeal file the appeal as soon as possible. LG's approach, which is a prescription for delay, cuts directly against the Congressional mandate to expedite such appeals under §1292(c)(2). If a party wants to exercise an immediate right to appeal, it should do so immediately.

ARGUMENT

A. The Panel Correctly Applied the Law

1. LG Was Required To Appeal The September Order Within Thirty Days

As the Panel found, the time to appeal from interlocutory liability judgments in patent cases is governed by 28 U.S.C. §1292(c)(2) and 28 U.S.C. §2107(a). Panel Op. 4-5. Under §1292(c)(2), the time to "appeal from a judgment in a civil action for patent infringement" begins when that judgment is "final except for an accounting." 28 U.S.C. §1292(c)(2). And under §2107(a), the time to file the appeal ends "thirty days after the entry of such judgment." 28 U.S.C. §2107(a). When read together, these statutes require parties to appeal an interlocutory judgment that is "final except for an accounting" within thirty days of its issuance.

The September Order, in which the district court denied LG's motions on infringement, liability, and willfulness, was a judgment that was "final except for an accounting." Although the district court had not decided LG's post-trial motion for a damages retrial or Mondis' motions for enhanced damages, attorney's fees, and interest, the judgment was appealable at that point under well-settled law. *Robert Bosch, LLC v. Pylon Mfg. Corp.,* 719 F.3d 1305, 1313 (Fed. Cir. 2013) (en banc). Thus, under the governing statutes, LG had thirty days from September 24, 2019 to appeal. LG waited over seven months—until May 8, 2020—to do so.

Panel Op. at 3. The Panel correctly found that LG's appeal was untimely and that the Court lacked jurisdiction to hear it.

LG insists that §1292(c)(2) "says nothing about the *time* to appeal," but admits in the very next paragraph that "Section 1292(c)(2) [] specifies *when* a judgment becomes appealable," and then notes that "[s]ection 2107(a) specifies the time limit" for bringing a §1292(c)(2) appeal. Pet. 8-9 (second emphasis added). Under §1292(c)(2), the trigger for filing an interlocutory appeal is entry of a judgment that is "final except for an accounting." The statute provides an unambiguous timeliness rule defining when the appeal period begins to run.

2. The Panel's Interpretation of FRAP 4 Is Correct

LG argues that FRAP 4 provides for tolling of §1292(c)(2) appeals, but the Panel was right to reject the argument.[1] Under FRAP 4, a pending motion relating to damages does not toll the deadline for appealing a liability judgment under §1292(c)(2). Rather, only motions that prevent a judgment from being "final except for an accounting" can toll this deadline. As the Panel correctly put it, only motions that "relate to the interlocutory judgment such that the judgment is not final except for an accounting until the court disposes of the motions" can toll the

[1] While there is no conflict between statute and rule, had the Panel found a conflict, it is the statute that would have prevailed. *See Bowles v. Russell*, 551 U.S. 205, 213-14 (2007).

deadline. Panel Op. 7. Because damages motions do not prevent a judgment from being "final except for an accounting," a pending damages motion cannot toll this deadline. *See Robert Bosch*, 719 F.3d at 1313.

LG's interpretation of FRAP 4—that it permits any pending post-trial motion to toll the deadline for appealing a §1292(c)(2) merits judgment—is irreconcilable with §1292(c)(2). If any pending motion, even those unrelated to a merits judgment, can toll the deadline for appeal, then even post-trial motions that involve *only* an "accounting" could toll the deadline. That would be so even though the right to appeal under §1292(c)(2) is triggered as soon as judgment is, in fact, "final *except* for an accounting." Interpreting FRAP 4 to toll the deadline for a §1292(c)(2) appeal until after the court resolves even accounting related post-trial motions would nullify the provision.

LG argues nonetheless that FRAP 4 includes "certain motions unrelated to the appealed judgment among its enumerated tolling motions." Pet. 5. The observation says nothing about §1292(c)(2) appeals. FRAP 4 was promulgated, in part, to create certainty as to when a district court judgment following trial in the ordinary course is "final," the trigger for appellate jurisdiction under §1291. D.I. 36 at 16-18. With numerous potential permutations of post-trial motions following a typical trial, FRAP 4 provides gap-filling provisions to define when a judgment is truly "final." The rule also provides for tolling when the district court, in effect,

says a judgment is not final due to the pendency of an attorneys' fee motion. FRAP 4(A)(iii). But there is no corresponding tolling provision for §1292(c)(2) appeals, nor could there be, because the timing of such appeals is defined in the statute itself – when the case is "final except for an accounting." FRAP 4 cannot be read to amend §1292(c)(2) to mean "final except for an accounting, but not when unrelated post-trial motions are pending."

3. *Budinich* Supports the Panel's Decision

LG cites to various decisions relating to attorneys' fee motions, arguing that the decisions support LG's position by analogy. But as the Panel's opinion showed, the Supreme Court's *Budinich* decision confirms its interpretation of the timeliness rules. Panel Op. 6.

In *Budinich,* the petitioner failed to appeal a merits judgment within thirty days of its entry, and argued—as LG does here—that a pending motion on an issue that did not "prevent judgment on the merits from being final" (attorney's fees) tolled the deadline for appealing the merits judgment. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199-202 (1988). The Supreme Court rejected this argument. Noting that "[i]t is common ground [] that if the District Court's decision on the merits was appealable before its determination of attorney's fees, then the merits appeal was untimely," the Court held that petitioner was required to appeal the merits judgments within thirty days of its issuance and that petitioner's

failure to do so made its appeal untimely. *Id*. at 198, 201-03. As a result, the appellate court lacked jurisdiction to review the petitioner's appeal. *Id*. at 203.

The holding of *Budinich* is that matters collateral to a judgment, like a request for fees, do not prevent finality. LG does not and cannot dispute that only damages issues remain and the subject judgment is "final except for an accounting" under §1292(c)(2). There is no room for debate about the date on which the appeal period began to run. *Robert Bosch*, 719 F.3d at 1313.

LG claims, nevertheless, that *Budinich* "shows" that motions that are unrelated to a merits judgment can toll an appeal deadline. Pet. 11-12. Because a later version of FRAP 4—added years after *Budinich* was decided—allows attorney's fees to toll the appellate deadline if the district court extends the deadline, LG submits that *Budinich* shows that an "unrelated" motion can toll an appellate deadline. Pet. 12. But the specific procedure for handling fee motions in FRAP 4 post-*Budinich* does not disturb "the general practice of treating fees and costs as collateral for finality purposes." *Ray Haluch Gravel Co. v. Central Pension Fund of Int'l Union of Operating Eng'rs & Participating Employers*, 571 U.S. 177, 187 (2014). Rather, FRAP 4 gives discretion to a district court to reserve its position and designate its judgment as non-final, but *only if* the "court [] act[s] before a notice of appeal has been filed and become effective to order that the motion have the same effect as a timely motion under Rule 59." *Id.* If the court

does not do so, there is no tolling. The procedure is specific to fee motions. There is no analog for §1292(c)(2) appeals, nor could there be, as the finality of such an appeal is defined by statute.[2]

In this case, the pendency of motions on damages issues did not prevent the September Order from becoming final for purposes of a §1292(c)(2) appeal. The case law on fee petitions hardly supports the conclusion that LG was entitled to ignore the statutory deadline to file an appeal. The Panel correctly found that LG failed to file a timely appeal and that this Court consequently lacked jurisdiction.

B. The Panel's Decision Does Not Conflict With Other Circuit Decisions

LG is also wrong that rehearing is necessary to resolve some supposed "conflict" between the Panel's decision and other circuit courts' decisions. Pet. 3-4. There is no sister circuit conflict with the Panel's decision.

LG asserted no such conflicts to the Panel, and there is none now. Not one of the decisions cited by LG addresses §1292(c)(2). And not one suggests that a

[2] Like LG, the respondents in *Ray Haluch* failed to appeal a merits decision within thirty days and waited to file their appeal until after the court had decided their motion on a non-merits issue (fees and costs) nearly two months later. *Ray Haluch*, 571 U.S. at 181-82. Respondents argued that the court's decision on the motion for fees was the "final decision" because it addressed contractual provisions for attorney's fees and thus overlapped with the merits. *Id* at 181-84. The Supreme Court flatly rejected this argument. Noting that "the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal," the Court affirmed the dismissal of petitioners' appeal. *Id*. at 179, 190.

motion unrelated to the merits tolls the deadline for appealing a merits judgment in any context. These decisions thus do not conflict with, much less undermine, the Panel's decision.

In particular, LG suggests that *Martin v. Campbell* "rejected [] a relatedness requirement in construing Rule 4(a)(4)." Pet. 3. The *Martin* court rejected a "relatedness requirement" for a provision of FRAP 4 that is not at issue in this case: the since-deleted provision that "a notice of appeal filed before the disposition of any of the above motions shall have no effect." *Martin v. Campbell*, 692 F.2d 112, 114-16 (11th Cir. 1982); *see also* Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3950 (5th ed. 2021) (noting that the 1993 amendment to FRAP 4 deleted this provision). It was that now-obsolete provision that the Eleventh Circuit said was "no less applicable" when the "motion did not relate to the judgment sought to be appealed," not, as LG wrongly argues, "Rule 4(a)(4)'s tolling provisions" as a whole. *Martin*, 692 F.2d at 114. *Martin* says nothing about whether a pending non-merits motion tolls the deadline for appealing a judgment that is "final except for an accounting."

The same is true for *F.E.L. Publications*, which addressed the now-obsolete provision of FRAP 4. There, the Seventh Circuit dismissed an appeal when the appellant failed to refile the notice of appeal after the district court decided a pending Rule 59(e) motion, even though the appeal and the Rule 59(e) motion

addressed different parts of the court's merits judgment. *F.E.L. Pubs., Ltd. v. Catholic Bishop of Chi.*, 739 F.2d 284, 284 (7th Cir. 1984). While the Seventh Circuit noted that it "makes no difference at all" under FRAP 4 that the Rule 59 motion and the appeal addressed different parts of the merits judgment, it was referring specifically to the now-obsolete provision of FRAP 4 that required refiling, and nothing else in FRAP 4. *F.E.L.*, 739 F.2d at 284. The Seventh Circuit did not hold that a motion unrelated to the merits of the judgment tolled the appeal deadline for the merits judgment—least of all because the two motions at issue addressed different parts of the same judgment. *Id*.

LG claims that the Ninth Circuit's *U.S. for Use of Pippin* decision found that "under *F.E.L.*, an enumerated motion tolls the appeal deadline 'even if the motion concerns issues *unrelated* to the issues appealed.'" Pet. 6. But *U.S. for Use of Pippin* also addressed the now-obsolete provision of FRAP 4 that required refiling the notice of appeal. Contrary to what LG's misleading quotation suggests, the Ninth Circuit summarized the holding of *F.E.L.* as that a "*notice of appeal filed before the disposition of a Rule 59(e) motion has no effect* even if the motion concerns issues unrelated to the issues appealed"—not that *any* motion unrelated to the merits of the judgment tolls the deadline for appealing the merits judgment. *U.S. for Use of Pippin v. J.R. Youngdale Const. Co., Inc.*, 923 F.2d 146, 148-49 (9th Cir. 1991) (emphasis added).

Finally, LG rattles off a list of decisions that LG says "reject any relatedness requirement for purposes of tolling the appeal deadline." Pet. 6. These decisions do no such thing—not in the context of §1292(c)(2), which these cases do not address, and not in any other context. *Davidson v. Sun Exploration* simply reaffirmed the now-obsolete provision of FRAP 4 discussed in *Martin* and *F.E.L. See Davidson v. Sun Exploration & Production Co.*, 857 F.2d 988, 988-89 & n.2 (5th Cir. 1988). The other decisions provide only that a post-trial motion filed by one party tolls the appeal deadline for all parties, but say nothing about whether a post-trial motion unrelated to the merits of the judgment tolls the deadline for appealing the merits judgment. *See Marrical v. Detroit News, Inc.*, 805 F.2d 169, 171 (6th Cir. 1986); *Walker v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 268 F.2d 16, 19-20 (9th Cir. 1959); *Phinney v. Houston Oil Field Material Co.*, 252 F.2d 357, 358-361 (5th Cir. 1958).

C. LG's Policy Arguments Miss the Mark

LG wrongly submits that the Panel's decision is unclear and inconsistent with the purpose of §1292(c)(2).

1. The Panel's "Relatedness" Standard Is Clear

There is no lack of clarity in the Panel's decision, and indeed, it is LG who seeks to muddy the waters by arguing against a "relatedness" standard. Pet. 14. The Panel's decision follows directly from the statutory text. Under §1292(c)(2),

parties can appeal an interlocutory judgment that is "final except for an accounting." As a result, the only motions that can toll the deadline for these appeals are motions that, if still pending, prevent the judgment from being "final except for an accounting"—that is, motions that "relate to the interlocutory judgment such that the judgment is not final except for an accounting until the court disposes the motions." Panel Op. at 7. This Court has addressed in detail which matters prevent finality for purposes of a §1292(c)(2) appeal. *See Robert Bosch*, 719 F.3d at 1313. The Panel's ruling, in conjunction with *Robert Bosch*, provide a clear roadmap to any potential appellant.

LG ignores all of that. Instead, LG suggests that the damages issues are "related" to the liability determination because (1) a finding of no damages would be case dispositive and (2) liability and damages issues involve overlapping facts. Pet. 14-15. The Panel did not suggest that damages and liability issues are not "related" in every conceivable sense of the word. Rather, it held that damages determinations are not "related" to merits judgments in the specific context of filing §1292(c)(2) appeals because these determinations are part of the "accounting" and do not prevent finality. LG's position would both render the

time to appeal unclear and potentially undermine the considered en banc judgment in *Robert Bosch*.[3]

LG suggests that the Panel's relatedness requirement is "challenging" because it excludes attorney's fees motions, even though "certain motions for attorneys' fees can toll the appeal deadline." Pet. 14-15. But as discussed above, allowing an attorney's fee motion to toll the deadline for a §1292(c)(2) appeal would be inconsistent with the plain text of the statute and this Court's precedent, and LG has not shown otherwise.

LG speculates that the Panel's decision would require parties to "routinely file protective appeals at each stage of post-trial litigation" to preserve their appellate rights. Pet. 16. Not so. The Panel's decision states simply that parties must do what §1292(c)(2) and §2017(a) already require them to do—file a notice of appeal from any interlocutory judgment that is "final except for an accounting" within 30 days of the entry of judgment. Nothing in the Panel's opinion requires anything more.

[3] LG repeatedly faults the Panel for purportedly creating a "patent-specific" rule for interlocutory appeals. Pet. 3-4, 9-10. But Congress created a patent-specific rule for interlocutory appeals by enacting §1292(c)(2). The interpretation of that statute necessarily involves a matter unique to patent law.

2. The Panel's "Relatedness" Rule Is Consistent With The Purpose Of §1292(c)(2)

Finally, LG misconstrues the purpose of interlocutory appeals in patent cases. *See* Pet. 16. The Congressional policy underlying such appeals is discussed in detail in *Robert Bosch*, and the Panel's decision is fully consistent with the purpose of §1292(c). There, this Court was clear that Congress wanted to "obviate the cost of an accounting in the event the case is reversed on appeal" and so enacted §1292(c)(2)'s predecessor, which allowed parties to take an interlocutory appeal before the court had made a "full accounting." *Bosch*, 719 F.3d at 1316. Congress created the opportunity to dispose of patent cases before requiring parties and courts to expend resources on potentially otiose damages issues.

In short, the purpose of the statute is expedition. Allowing parties to sit on their hands while awaiting decisions on unrelated matters would frustrate the Congressional purpose. The Panel's decision is fully consistent with Congress's concerns. In contrast, under LG's interpretation of §1292(c)(2) and FRAP 4, parties could avoid seeking an appellate ruling on the merits judgment until after the district court has performed expensive and potentially wasteful damages determinations. That would undercut the efficiency Congress sought to provide by enacting a special right to interlocutory appeal in §1292(c)(2).

LG worries that the Panel's decision might encourage "piecemeal appellate litigation" that "wastes the resources of both litigants and the courts." Pet. 16. But

Congress decided that requiring courts to perform unnecessary damages determinations would be *more* wasteful. *See Ray Haluch*, 571 U.S. at 187 ("[Respondents'] concern over piecemeal litigation, though starting from a legitimate principle, is counterbalanced by the interest in determining with promptness and clarity whether the ruling on the merits will be appealed."). The Panel's reasoned decision is fully consistent with this policy.

CONCLUSION

For the foregoing reasons, LG's combined petition for rehearing and rehearing *en banc* should be denied.

Dated: October 1, 2021

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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