No. 08-43

IN THE

Supreme Court of the United States

INTERNATIONAL RECTIFIER CORPORATION,

Petitioner,

v.

IXYS CORPORATION,

Respondent.

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

REPLY BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, International Rectifier Corporation has no parent corporation, and no publicly listed company holds more than 10% of IR's stock.

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I. Introduction

The Petition of International Rectifier Corporation ("IR") presents an issue of significant national importance affecting all appeals and currently dividing the Circuit Courts of Appeals – whether there is any constraint on the power of an appellate court to disregard the lack of a timely notice of appeal and instead to base its jurisdiction on a post-judgment motion filed in the district court. In this case, the Court of Appeals for the Federal Circuit decided that there is no such constraint and based its appellate jurisdiction on a routine motion to stay filed in the district court, which the Federal Circuit construed as the functional equivalent of a notice of appeal.

Such constraints do exist, however – in statutes, in statutorily authorized rules and in this Court's decisions. Misconstruing language in the Court's opinion in *Smith v. Barry*, 502 U.S. 244 (1992), the Federal Circuit overrode those constraints and circumvented the jurisdictional requirement of a timely notice of appeal by misusing a narrow exception: the so-called functional-equivalent doctrine which is typically reserved for *pro se* litigants or those whose life or liberty is at stake. Respondent IXYS Corporation ("Ixys") argues in opposition to the present Petition that the Federal Circuit was right to override those constraints, because whether or not to recognize appellate jurisdiction in the absence of a notice of appeal ought to be an *ad hoc* question best left to the discretion of the appellate court itself.

The Federal Circuit's rationale misconstrues this Court's precedents and is in conflict with that of the Fifth, Ninth and Tenth Circuits, each of which recognizes the limitations on the functional-equivalent doctrine. By granting *certiorari*, this Court can resolve this fundamental issue, restore uniformity among the courts of appeals and re-establish the boundaries of appellate jurisdiction.

II. Review Is Needed To Clarify Whether "Notice" Under *Smith v. Barry* Is Of A Present Appeal

At the heart of this dispute is one sentence from *Smith*: "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." 502 U.S. at 248-49. Citing *Smith*, the Federal Circuit found Rule 3 satisfied, even though Ixys's motion in the district court did not purport to initiate or relate to a pending appeal, because that motion mentioned the district court's judgment, Ixys and the Federal Circuit. (App. A at 6a-7a.) The Federal Circuit's reductive analysis is inconsistent with the plain language of Rule 3, which requires that a notice of appeal actually give notice of a *present* appeal and reflect that the jurisdiction of a specific court of appeals is *then* being invoked. (*See* Pet. at 11-13.) Ixys's response is that the Federal Circuit ruled correctly because Rule 3 and *Smith* merely require a document suggesting that an appellant intends to appeal at some point in the future. (Opp. at 14-15.)

Review is required because only this Court can re-establish that *Smith* did not eliminate the statutory- and rule-based requirement that a notice of appeal reflect a present invocation of appellate jurisdiction and not merely contain precatory language about a possible future appeal.

III. Review Is Needed Because The Federal Circuit's Misuse Of The Functional-Equivalent Doctrine Is In Conflict With Other Circuits

As noted above, the Federal Circuit construed *Smith* to permit appellate jurisdiction based on any document that mentions the appellant, the judgment and the appellate court. The Petition demonstrates that no other circuit has done this, and that three circuits – the Fifth, Ninth and Tenth – have directly rejected such a rule. (Pet. at 22-28.) While Ixys assures the Court that this "is untrue" (Opp. at 19), Ixys fails to address the cases from those circuits in any meaningful way. Instead, Ixys distorts IR's arguments and distinguishes other cases cited in the Petition for other principles.

A. The Federal Circuit Is In Direct Conflict With The Fifth Circuit

The Fifth Circuit has held that a broad application of the functional-equivalent doctrine (*i.e.*, to a counseled party who simply forgets to file its notice) would eviscerate the jurisdictional mandate of Rules 3 and 4. *Williams v. Chater*, 87 F.3d 702, 705 n.1 (5th Cir. 1996). Rather than address this holding, Ixys misrepresents that the functional-equivalent doctrine did not apply in *Williams* because the proffered document was supposedly untimely. (Opp. at 19.) But because the government was a party in the *Williams* case, the time for noticing an appeal was 60 and not 30 days. Fed. R. App. P. 4(a)(1)(B). Williams in fact filed his notice of appeal of the judgment on the 57th day, and the district court therefore deemed his notice to be timely. *Williams*, 87 F.3d at 704. The functional-equivalent issue

arose because Williams failed to file a second notice of appeal from an order denying his post-judgment motion and instead asked the Fifth Circuit to consider his opening brief on appeal (filed 54 days after the order in question) as the functional equivalent of a notice of appeal with respect to that order. *Id.* at 705, n.1. The Fifth Circuit refused, even though the brief contained the three pieces of information required by Rule 3, because "[e]ven when construed liberally, to conclude on these facts that the requirements of Rule 3(c) have been met would be to essentially eviscerate the rule." *Id.* The court expressly observed that *Smith* did not require a different result.

The Fifth Circuit's holding in *Williams* cannot be reconciled with the Federal Circuit's decision in this case. A plain conflict exists that only this Court can resolve.

B. The Federal Circuit Is In Conflict With The Ninth And Tenth Circuits

The Ninth (the regional circuit in this case) and Tenth Circuits have held that a motion in the district court to stay a judgment is not the functional equivalent of a notice of appeal. *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1232-33 (9th Cir. 1989); *Century Laminating, Ltd. v. Montgomery*, 595 F.2d 563, 568-69 (10th Cir. 1979). Ixys seeks to diffuse this direct conflict by arguing that these cases are of "dubious continuing validity" in light of *Smith*. (Opp. at 10.) *Smith* does not affect the independent rationales underlying the *Hollywood* and *Century* decisions, however, and those cases remain good law. The Federal Circuit's contrary holding creates a clear split with these circuits.

The law in the Ninth Circuit is that a document filed by a counseled party may not be construed as the functional equivalent of a notice of appeal absent extraordinary circumstances, *i.e.*, where life or liberty is at stake. *See S.M. v. J.K.*, 262 F.3d 914, 922 (9th Cir. 2001). That was also the rationale in *Hollywood*, and the Ninth Circuit has concluded that its pre-*Smith* decisions such as *Hollywood* continue to represent the law in the Ninth Circuit. *Id.* at 923. Although Ixys makes much of the Ninth Circuit's observation in *S.M.* that it had no "reason" to depart from this rule (Opp. at 11-12), the Ninth Circuit did not hold or suggest that the result would have been different if a "reason" had been advanced for the failure to timely notice the cross-appeal in that case. Indeed, the Ninth Circuit noted that the cross-appellant (like Ixys here) "knew within the time period for filing her notice of cross-appeal that she intended to appeal" and "could have filed her appeal on time." *Id.* at 922.[1] The Ninth Circuit's practice is consistent with other circuit courts which typically take into account whether the litigant is *pro se* or whether life or liberty is stake. (Pet. at 26-27.)[2]

Ixys seeks to avoid this clear conflict by ignoring the distinction between counseled appellants whose life

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[1] The reason for the failure to timely notice an appeal as referenced by Ixys is a factor that a district court considers when evaluating a request for a time extension. Ixys's lengthy exegesis on its proffered reason for being late with its notice of appeal is also fully discussed in the district court's December 8, 2006 order denying the request. (App. C at 18a-35a.)

[2] Citing decisions from the First, Second, Fourth, Sixth, Ninth, Tenth, Eleventh and D.C. Circuits. This non-exclusive list references both pre- and post-*Smith* cases.

or liberty is at stake (*i.e.*, counseled *habeas* petitioners) and counseled appellants such as Ixys who are unhappy with an adverse money judgment. Indeed, Ixys assiduously mischaracterizes the Petition on this point. (Opp. at 5, 8.) As demonstrated in the Petition, however, the functional-equivalent doctrine began as a limited exception for incarcerated *pro se* litigants (Pet. at 14-15) and is usually applied for the benefit of *pro se* and other litigants (including counseled litigants) whose liberty interests are at stake. (Pet. at 26-27.) Although there are some isolated exceptions, they are usually confined to cases where a defective but timely notice of appeal has been filed. (Pet. at 29.)

Like the Ninth Circuit, the Tenth Circuit has relied on *Smith* to extend leniency in *habeas* cases, even for counseled prisoners. *Rodgers v. Wyo. Attorney Gen.*, 205 F. 3d 1201, 1205 (10th Cir. 2000), *citing Ortberg v. Moody*, 961 F.2d 135, 137 (9th Cir. 1992). While Ixys contends that the Tenth Circuit's holding in *Rodgers* nullifies its prior decision in *Century Laminating*, (Opp. at 10), nothing in *Rodgers* suggests that the Tenth Circuit would now reject its earlier holding in *Century Laminating*, a decision relying on the same fundamental jurisdictional principles later emphasized by this Court in *Bowles v. Russell*, 551 U.S. __, 127 S. Ct. 2360, 2364 (2007). While the *Century Laminating* court noted that the appellant did not intend his motion to stay to be a notice of appeal, 595 F.2d at 569, that observation was not the only or even a principal reason for the court's ruling. Instead, the Tenth Circuit first noted that the requirement of a timely notice of appeal "is based on important substantive policies regarding the finality of judgments and affects the very jurisdiction of this court," and then emphasized the right of appellees to expect

"conformity by their adversaries with applicable statutes and rules, especially when compliance with the rule is a jurisdictional prerequisiste." *Century Laminating*, 595 F.2d at 568. These principles are wholly consistent with this Court's holdings, and there is no reason to believe the Tenth Circuit would now abandon them.

Like the aforementioned courts, this Court has long recognized the significance of statutory time limits on appellate jurisdiction and important policies served by exacting compliance therewith (*e.g.*, *Bowles*, 127 S.Ct. at 2363-67) as well as the propriety of extending leniency to *pro se* appellants or those where life or liberty is at stake. (Pet. at 14-16.) In contrast, the Federal Circuit has now extended such leniency to a counseled patent litigant who was disappointed in a money judgment yet failed to file a timely notice of appeal. The Federal Circuit has created conflicts with other circuits by doing so. Review is required to resolve that conflict.

IV. Ixys Raises An Issue About the Continued Viability Of *Foman v. Davis* In Light Of *Torres v. Scavenger*

In its opposition, Ixys relies heavily on *Foman v. Davis*, 371 U.S. 178 (1962), where this Court found that a counseled appellant who had filed two notices of appeal (one after the judgment and a second after the denial of its post-trial motion) as well as interim appellate papers had adequately provided notice invoking the jurisdiction of the court of appeals. Under the 1993 amendments to Rule 3, however, such notices are given effect by rule, thus rendering much of *Foman* now inapplicable.

Moreover, this Court's subsequent decision in *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), made clear that *Foman* does not reach as far as Ixys would stretch it: "*Foman* did not address whether the requirement of Rule 3(c) at issue was jurisdictional in nature; rather, the Court simply concluded that in light of all the circumstances, the Rule had been complied with." 487 U.S. at 316. After acknowledging the continued significance of "the important principle for which *Foman* stands – that the requirements of the rules of procedure should be liberally construed and that 'mere technicalities' should not stand in the way of consideration of a case on its merits," the Court reinforced the jurisdictional nature of a notice of appeal, not considered by *Foman*, and admonished that liberal construction of Rules 3 and 4 could not be so broad as to permit appeals in the absence of compliance. *Id.* at 316-17.

Ixys nevertheless argues that *Torres* is irrelevant (Opp. at 18) and that *Foman* governs this case because IR was not prejudiced by Ixys's untimely notice. (Opp. at 2, 6, 10.[3]) Had prejudice been the standard, the *Torres* court would have applied it. Indeed, some commentators have expressed a view that *Torres* "wholly repudiated the principles upon which Foman rested," and "that the spirit animating Foman's concluding rhetoric [cannot] be reconciled with a

[3] The district court considered this argument in its December 8, 2006 order denying Ixys's motion to extend the deadline for filing its notice of appeal. (App. C at 18a-35a.) That order, which found IR had been subjected to a "modest risk of prejudice" by the failure to file a timely notice of appeal (App. C at 24a), went unchallenged on appeal. (Pet. at 3.)

jurisdictional conception of Rule 3(c)'s requirements." *See* Philip A. Pucillo, *Rescuing Rule 3(c) From the 800-Pound Gorilla: The Case For a No-Nonsense Approach To Defective Notices of Appeal*, 59 OKLA. L. REV. 271, 286-87 (2006) (recommending a "no-nonsense approach" to defective notices of appeal). "[I]t is entirely appropriate for a court to give a litigant the benefit of the doubt when a good-faith effort at compliance is less than exact. It is entirely inappropriate, however, for a court to distort the meaning of a requirement in order to transform an outright violation into an act of compliance." *Id.* at 317. If this Court agrees with Ixys that *Foman*'s prejudice standard is controlling, then this case presents an ideal forum for the Court to make that pronunciation and resolve any tension with *Torres*.

V. Conclusion

Rules 3 and 4 define the requirements for an exercise of appellate jurisdiction. As this Court stated in *Bowles*, if the jurisdictional rules are inequitable "Congress may authorize courts to promulgate rules that excuse compliance with the statutory time limits." 127 S. Ct. at 2367. The Federal Circuit has rejected those constraints and has announced a rule that, as a practical matter, will expand a narrow exception into a catch-all for any tardy appellant. This unprecedented ruling has created conflicts with the decisions of this Court and of other circuit courts. Review by this Court is therefore necessary, and IR respectfully urges that the present Petition be granted.

Respectfully submitted,

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