

No. 24A-

IN THE
Supreme Court of the United States

KOSS CORPORATION,

Petitioner,

vs.

BOSE CORPORATION,

Respondent.

*On Petition for a Writ of Certiorari to
the United States Court of Appeals for the Federal Circuit*

**APPLICATION TO THE HONORABLE JOHN G. ROBERTS, JR.,
FOR AN EXTENSION OF TIME TO FILE A PETITION FOR A
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

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CORPORATE DISCLOSURE

Pursuant to Supreme Court Rule 29.6, Petitioner Koss Corporation discloses that it has no parent corporation and that no publicly traded corporation owns 10 percent or more of the shares of its stock.

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

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30, Petitioner Koss Corporation (“Koss”) respectfully requests that the time for it to file a petition for a writ of certiorari in this case be extended 60 days to and including February 27, 2025.

The United States Court of Appeals for the Federal Circuit issued its judgment on July 19, 2024. See Appx. 010. Koss filed a timely petition for *en banc* rehearing. Appx. 007. The Federal Circuit denied that petition on September 30, 2024. Appx. 007. Absent an extension of time, Koss’s petition for writ of certiorari would be due on December 29, 2024. See SUP. CT. R. 13. Koss is filing this application more than 10 days before that date. See SUP. CT. R. 13.5. This Court has jurisdiction under 28 U.S.C. § 1257 to review this case.

BACKGROUND

This case involves principally two proceedings and the Federal Circuit’s mistaken application of issue preclusion in a manner inconsistent with the precedents of this Court and various federal courts of appeals.

The first lawsuit ultimately proceeded in the Northern District of California. See *Koss Corp. v. Plantronics, Inc.*, No. 4:21-cv-03854 (N.D. Cal.).¹ Koss alleged that Plantronics, Inc. (“Plantronics”) infringed a number of Koss’s patents, including the

¹ *Koss Corp. v. Bose Corp.*, No. 2022-2090 (Fed. Cir. July 19, 2024), at Typeset 4. (attached at Appx. 009)

three asserted against Bose Corporation.² After Koss filed a first amended complaint, Plantronics moved to dismiss the first amended complaint and alleged that the three patents were invalid because their subject matters were purportedly patent ineligible.³ The district court granted that motion but also granted Koss leave to file a second amended complaint.⁴ Koss filed the permitted second amended complaint, and Plantronics responded with a motion to dismiss claiming, again, that the patents were invalid.⁵ Before the district court resolved the second motion, Koss and Plantronics settled their dispute and stipulated that the “action, including all claims and counterclaims, be dismissed with prejudice.”

In parallel with the the case against Plantronics, Koss filed a patent-infringement suit against Bose Corporation (“Bose”) in the Western District of Texas.⁶ That suit related to three of the same patents as were at issue in the *Plantronics* case.⁷ Bose responded with a motion challenging venue and with petitions seeking *inter partes* review of the same three patents before the Patent Trial and Appeal Board (the “PTAB”).⁸ Bose also filed a separate declaratory-judgment action in the District of Massachusetts against Koss, seeking a declaration of non-infringement of

² *Id.*

³ *Id.*

⁴ *Id.* at 5. (Appx. 013)

⁵ *Id.*

⁶ *Id.* at 3. (Appx. 011)

⁷ *Id.* at 4. (Appx. 012)

⁸ *Id.* at 3. (Appx. 011)

those same three patents.⁹ The Texas-based federal court ultimately dismissed Koss’s suit for improper venue, and the Massachusetts-based federal court stayed the suit before its pending resolution of the matters before the PTAB.¹⁰ The PTAB concluded that some claims in the three patents were unpatentable and that others were not unpatentable, and both Koss and Bose appealed the PTAB’s findings to the Federal Circuit. While the appeals were pending, the parties to the *Plantronics* suit reached their resolution and filed their stipulation.¹¹ Bose then asked the Federal Circuit to dismiss the pending appeals from the PTAB as moot, and the Federal Circuit did so.¹²

The Federal Circuit reasoned that the Northern District of California’s decision in *Plantronics*—finding the patents invalid but granting leave to amend—merged into the with-prejudice stipulation of dismissal such that issue preclusion applied and the patents were preclusively invalid.¹³ Accordingly, the Federal Circuit concluded that the appeals from the PTAB were moot.¹⁴

Koss sought rehearing, which the Federal Circuit denied. Koss now intends to seek this Court’s review.

REASONS FOR GRANTING THE EXTENSION

⁹ *Id.*

¹⁰ *Id.* at 4. (Appx. 012)

¹¹ *Koss Corp. v. Bose Corp.*, No. 2022-2090 (Fed. Cir. July 19, 2024), at Typeset 6. (Appx. 014)

¹² *Id.*

¹³ *Id.* at 8. (Appx. 016)

¹⁴ *Id.* at 9. (Appx. 017)

The Court is likely to grant the petition for a writ of *certiorari*. The Federal Circuit followed a serpentine analysis that does not withstand scrutiny, that created an unwarranted procedural trap, and that ignores sound policy.

The district court's decision in *Plantronics* did not merge into any final judgment, and nothing in the *Plantronics* case gave rise to issue preclusion. The district court's decision with respect to the motion to dismiss the first amended complaint was not a decision on the merits; it was, instead, a decision based on the sufficiency of Koss's pleading, and it was entered without prejudice and with leave to amend. When Koss filed its permitted second amended complaint, that filing superseded the first amended complaint and, so, the first amended complaint could not merge into any later with-prejudice dismissal stipulation. By operation of law, the parties' with-prejudice dismissal stipulation acted only to dismiss the *second* amended complaint, which was by that time the governing pleading and the only iteration of the complaint that could be dismissed. The district court never considered or resolved the motion to dismiss the second amended complaint and, so, there was no determination available to merge into the with-prejudice dismissal stipulation.

The Federal Circuit's holding conflicts with holdings of this Court and of other federal courts of appeals regarding several issues: the effect of amendment on an earlier pleading, the requirement that issue preclusion only be applied to matters of fact or law that were "actually litigated," and when an order merges into a later with-prejudice dismissal stipulation so that the order's determinations give rise to issue preclusion.

The holding was also wrong as a matter of policy. The Federal Circuit suggested that Koss should either have included a reservation of the right to appeal in the dismissal stipulation or asked the district judge in the *Plantronics* case to vacate his decision on the motion to dismiss the first amended complaint.¹⁵ When parties settle, one of their common goals is to end the litigation and its expense and inconvenience. Requiring a reservation of appellate rights and, presumably, an actual appeal would defeat that goal. And nothing would require a district judge to vacate an earlier order at the parties' request. Thus, neither alternative path to avoiding the issue preclusion the Federal Circuit erroneously identified is meaningful.

The Federal Circuit's holding was not only mistaken, it was set forth in a precedential opinion such that the error will infect future cases as binding precedent in the Federal Circuit and as persuasive authority in other federal courts.

Thus, Koss believes that there is a reasonable likelihood the Court will grant its anticipated petition for a writ of certiorari.

As noted, barring an extension, Koss's petition would be due no later than December 29, 2024. After considerable review and analysis, Koss has only recently determined that it is both necessary and appropriate for it to seek this Court's review. Koss's undersigned counsel and his co-counsel have significant commitments—both professional and personal—that would make it particularly difficult to prepare and file a petition by the existing deadline. Koss is aware of no evidence that Bose would suffer any prejudice were the Court to grant the requested extension.

¹⁵ *Koss Corp. v. Bose Corp.*, No. 2022-2090 (Fed. Cir. July 19, 2024), at Typeset 7-9. (Appx. 015-017)

CONCLUSION

For these reasons, Koss Corporation respectfully requests that the Court grant this application and extend by 60 days—or until February 27, 2025—the time for Koss to file its anticipated petition for a writ of certiorari and accompanying appendix.

December 9, 2024

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that, on December 9, 2024, I served a copy of the attached application on the following by U.S. Mail (postage prepaid) and by electronic mail:

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22-2090, KOSS Corporation v. Bose Corporation

US Circuit Court of Appeals - Federal Circuit

This case was retrieved on **12/06/2024**

Header

Case Number: 22-2090

Date Filed: 08/02/2022

Date Full Case Retrieved: 12/06/2024

Status: Closed 07/19/2024

Misc: (0) 0 ; Appeal

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Associated Cases

Case Number	Relationship	Lead Case	Member Case	Additional Information
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Case Number	Relationship	Lead Case	Member Case	Additional Information
	Current Case: COMPANION	22-2090	22-2091	StartDate: 08/05/2022
	Current Case: COMPANION	22-2090	23-1173	StartDate: 12/20/2022
	Current Case: Consolidated	22-2091	22-2115	StartDate: 08/18/2022
	Current Case: Consolidated	23-1173	23-1179	StartDate: 12/05/2022
	Current Case: Cross-appeal	23-1173	23-1180	StartDate: 12/05/2022
	Current Case: Cross-appeal	23-1173	23-1191	StartDate: 11/29/2022
21-135	Prior cases:			Filed: 03/22/2021 Disposed: 04/09/2021 Disposition: Denied
21-147	Prior cases:			Filed: 05/18/2021 Disposed: 08/04/2021 Disposition: Denied
22-2089	Prior cases:			Filed: 08/02/2022 Disposed: 10/20/2022 Disposition: Dismissed (FRAP 42(b)) - Procedural

Additional Case

Additional Case Information

BCA or PTO - Patent Trial and Appeal Board
 Appeal from: United States Patent and Trademark Office
 District: PTO Division: 1 CaseNumber: IPR2021-00297 DateFiled: 12/07/2020
 Trial Judge: Gregg I. Anderson , Administrative Patent Judge
 Trial Judge: Norman H. Beamer , Administrative Patent Judge
 Trial Judge: David C. McKone , Administrative Patent Judge
 Date NOA Filed: 08/01/2022

Proceedings

Date	#	Proceeding Text	Details
08/02/2022		Appeal docketed. Received: 08/01/2022. [864285] Entry of Appearance due 08/16/2022. Certificate of Interest is due on 08/16/2022. Docketing Statement due 08/16/2022. Certified List due on 09/12/2022. [JCW]	
08/05/2022		Note to File: The following cases shall be considered companion cases and assigned to the same merits panel: 22-2089, 22-2090, and 22-2091. [865243] [22-2089, 22-2090, 22-2091] [ALK]	
08/12/2022		Docketing Statement for the Appellant KOSS Corporation. Service: 08/12/2022 by email. [866430] [22-2090] [Christopher Verdini]	
08/12/2022		Certificate of Interest for Appellant KOSS Corporation. Service: 08/12/2022 by email. [866431] [22-2090] [Christopher Verdini]	
08/12/2022		Entry of appearance for Mark G. Knedeisen; Christopher M. Verdini; Michelle Weaver;	

Date	#	Proceeding Text	Details
		Ragae Ghabrial; Brian P. Bozzo; Lauren Murray as counsel for Appellant KOSS Corporation. Service: 08/12/2022 by email. [866433] [22-2090] This document is non-compliant. See Doc No. . [Christopher Verdini]	
08/15/2022		NOTICE OF NON-COMPLIANCE: The submission of Appellant KOSS Corporation, Entry of Appearance , is not in compliance with the rules of this court (see attached). Compliant document due on 08/22/2022. Service as of this date by the Clerk of Court. [866487] [ALK]	
08/15/2022		Corrected Entry of Appearance for Mark G. Knedeisen; Christopher M. Verdini; Michelle Weaver; Ragae Ghabrial; Brian P. Bozzo; Lauren Murray as counsel for Appellant KOSS Corporation. Service: 08/15/2022 by email. [866561] [22-2090] [Christopher Verdini]	
08/16/2022		Entry of appearance for Michael N. Rader; Nathan R. Speed; Gregory S. Nieberg; Daniel M. Huttle as counsel for Appellee Bose Corporation. Service: 08/16/2022 by email. [866759] [22-2090] [Michael Rader]	
08/16/2022		Certificate of Interest for Appellee Bose Corporation. Service: 08/16/2022 by email. [866760] [22-2090] [Michael Rader]	
08/16/2022		Docketing Statement for the Appellee Bose Corporation. Service: 08/16/2022 by email. [866763] [22-2090] [Michael Rader]	
09/13/2022		Certified list received. Service: 09/12/2022 by email. Refer to Fed. Cir. R. 31 for calculating brief deadlines from service of the certified list. [871404] [ALK]	
11/14/2022		MODIFIED ENTRY: OPENING BRIEF FILED by Appellant KOSS Corporation. Service: 11/14/2022 by email. Unless ordered otherwise, any responsive deadline runs from the date of service of this brief. See Fed. Cir. R. 31. [883669] --[Edited 11/28/2022 by ALK - compliance review complete] [Mark Knedeisen]	
12/02/2022		MOTION of Appellee Bose Corporation to extend the time to 02/10/2023 to file brief. Service: 12/02/2022 by email. [887865] [22-2090] [Michael Rader]	
12/06/2022		**TEXT ONLY** ORDER granting motion to extend time to file brief filed by Appellee Bose Corporation. The response brief is due 02/10/2023. Service as of this date by the Clerk of Court. This order has been issued without an attached document and is official and binding. [888480] [ALK]	

Date	#	Proceeding Text	Details
12/20/2022		ORDER filed. The captioned appeals in the order shall be treated as companion cases and assigned to the same merits panel. Service as of this date by the Clerk of Court. [891782] [22-2090, 22-2091, 23-1173] [NL]	
02/10/2023		MODIFIED ENTRY: RESPONSE BRIEF FILED by Appellee Bose Corporation. Service: 02/10/2023 by email. Unless ordered otherwise, any responsive deadline runs from the date of service of this brief. See Fed. Cir. R. 31. [903543] --[Edited 02/16/2023 by ALK - compliance review complete] [Michael Rader]	
02/21/2023		MOTION of Appellant KOSS Corporation to extend the time to 03/17/2023 to file brief. Service: 02/21/2023 by email. [905028] [22-2090] [Mark Knedeisen]	
02/27/2023		**TEXT ONLY** ORDER granting motion to extend time to file brief filed by Appellant KOSS Corporation. The reply brief is due 03/17/2023. Service as of this date by the Clerk of Court. This order has been issued without an attached document and is official and binding. [906387] [ALK]	
03/17/2023		MODIFIED ENTRY: REPLY BRIEF FILED by Appellant KOSS Corporation. Service: 03/17/2023 by email. Unless ordered otherwise, any responsive deadline runs from the date of service of this brief. See Fed. Cir. R. 31. [910604] --[Edited 03/22/2023 by ALK - compliance review complete] [Mark Knedeisen]	
03/24/2023		MODIFIED ENTRY: APPENDIX FILED by Appellant KOSS Corporation. Service: 03/24/2023 by email. [912112] --[Edited 03/29/2023 by ALK - compliance review complete] [Mark Knedeisen]	
03/29/2023		Notice from Appellee Bose Corporation Notice of Withdrawal of Counsel. Service: 03/29/2023 by email. [913026] [22-2090] [Nathan Speed]	
09/12/2023		Notice to Advise of Scheduling Conflicts. Arguing counsel must advise of, and show good cause for, any scheduling conflicts during the upcoming court session months listed in the attached notice. The Response to Notice to Advise of Scheduling Conflicts can be found here. The Oral Argument Guide can be found here. [949495] [ALK]	
09/12/2023		Outstanding paper copies of all briefs and appendices must be submitted within five business days from the date of issuance of this notice. See Fed. Cir. R. 25(c)(3)(A). [949498] [ALK]	

Date	#	Proceeding Text	Details
09/14/2023		6 paper copies of Doc. No. received from Appellee Bose Corporation. [950208] [VDW]	
09/15/2023		Notice from Appellant KOSS Corporation regarding conflicts with oral argument. Service: 09/15/2023 by email. [950233] [Mark Knedeisen]	
09/15/2023		6 paper copies of Doc. No. , , received from Appellant KOSS Corporation. [950344] [VDW]	
09/19/2023		Notice from Appellee Bose Corporation regarding conflicts with oral argument. Service: 09/19/2023 by email. [951002] [22-2090] [Nathan Speed]	
09/19/2023		The following conflict dates submitted by Nathan R. Speed for Bose Corporation have been accepted by the court: 01/08/2024, 01/09/2024, 01/10/2024, 01/11/2024, 01/12/2024. [951039] [MJL]	
09/20/2023		MODIFIED ENTRY: MOTION of Appellee Bose Corporation to dismiss the appeal as moot. Cases to be terminated: 22-2090. (Briefing suspended pursuant to FCR 31 pending resolution of the motion). Service: 09/20/2023 by email. [951339]--[Edited 09/21/2023 by ALK - to correct relief] [Michael Rader]	
09/22/2023		MOTION of Appellant KOSS Corporation to extend time. Service: 09/22/2023 by email. [951860] [22-2090] [Mark Knedeisen]	
10/02/2023		RESPONSE of Appellant KOSS Corporation to Doc No. . Service: 10/02/2023 by email. [953685] [22-2090] [Mark Knedeisen]	
10/06/2023		ORDER denying as moot motions to extend time filed by Appellant KOSS Corporation. Service as of this date by the Clerk of Court. [955018] [22-2090, 23-1173] [LMS]	
10/10/2023		REPLY of Appellee Bose Corporation to response . Service: 10/10/2023 by email. [955392] [22-2090] [Michael Rader]	
11/06/2023		ORDER filed deferring motion to terminate appeal to merits panel assigned to this appeal in 22-2090, deferring motion to terminate appeal to merits panel assigned to this appeal in 23-1173. The Clerk of Court shall transmit a copy of the motion papers and this order to the merits panel assigned to these appeals. Service as of this date by the Clerk of Court. [961494] [22-2090, 23-1173] [NL]	
12/15/2023		NOTICE OF ORAL ARGUMENT. Panel: 2402B. Case scheduled February 6, 2024. Response to Notice of Oral Argument due:	

Date	#	Proceeding Text	Details
		12/29/2023. Please review the attached Notice. The response to notice of oral argument form can be found here. The Oral Argument Guide can be found here. Service as of this date by the Clerk of Court. [970677] [MJL]	
12/20/2023		Response to notice of oral argument from Appellant KOSS Corporation. Service: 12/20/2023 by email. [971837] [22-2090] [Mark Knedeisen]	
12/28/2023		Response to notice of oral argument from Appellee Bose Corporation. Service: 12/28/2023 by email. [973318] [22-2090] [Nathan Speed]	
02/06/2024		Submitted after ORAL ARGUMENT to Panel: Hughes, Circuit Judge; Stoll, Circuit Judge and Cunningham, Circuit Judge. Arguing counsel: Mark G. Knedeisen for KOSS Corporation and Nathan R. Speed for Bose Corporation. Oral Argument Audio available here. [981896] [MJL]	
07/19/2024		OPINION filed for the court by Hughes, Circuit Judge; Stoll, Circuit Judge and Cunningham, Circuit Judge. Precedential Opinion. Service as of this date by the Clerk of Court. [1019014] [22-2090, 23-1173, 23-1179, 23-1180, 23-1191]--[Edited 07/19/2024 by MVH to correct PDF] [MVH]	
07/19/2024		JUDGMENT. DISMISSED. Terminated on the merits after oral argument. COSTS: Costs taxed against Appellant(s). Mandate to issue in due course. For information regarding costs, petitions for rehearing, and petitions for writs of certiorari click here. Service as of this date by the Clerk of Court. [1019022] [22-2090, 23-1173, 23-1179, 23-1180, 23-1191] [MVH]	
07/30/2024		Bill of Costs for Appellee Bose Corporation. Service: 07/30/2024 by email. [1021494] [22-2090] [Michael Rader]	
08/19/2024		Notice of Related Case Information for Appellant KOSS Corporation. Service: 08/19/2024 by email. [1026035] [22-2090] [Mark Knedeisen]	
08/19/2024		Petition for panel rehearing, for en banc rehearing filed by Appellant KOSS Corporation. Service: 08/19/2024 by email. [1026042] [22-2090] [Mark Knedeisen]	
08/21/2024		13 paper copies of Doc. No. received from Appellant KOSS Corporation. [1027292] [VDW]	
09/30/2024		ORDER filed denying petition for panel rehearing; rehearing en banc filed by KOSS Corporation. By: Per Curiam. Service as of	

Date	#	Proceeding Text	Details
		this date by the Clerk of Court. [1035927] [MVH]	
10/07/2024		Mandate issued to the United States Patent and Trademark Office. Service as of this date by the Clerk of Court. [1037665] [MVH]	

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End of Document

**United States Court of Appeals
for the Federal Circuit**

KOSS CORPORATION,
Appellant

v.

BOSE CORPORATION,
Appellee

2022-2090

Appeal from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in No. IPR2021-
00297.

KOSS CORPORATION,
Appellant

v.

BOSE CORPORATION,
Cross-Appellant

2023-1173, 2023-1179, 2023-1180, 2023-1191

Appeals from the United States Patent and Trademark Office, Patent Trial and Appeal Board in Nos. IPR2021-00612, IPR2021-00680.

Decided: July 19, 2024

MARK G. KNEDEISEN, K&L Gates LLP, Pittsburgh, PA, argued for appellant. Also represented by BRIAN PAUL BOZZO, RAGAE GHABRIAL, CHRISTOPHER MICHAEL VERDINI, MICHELLE WEAVER. Also represented by LAUREN S. MURRAY in Appeal No. 2022-2090.

NATHAN R. SPEED, Wolf Greenfield & Sacks, PC, Boston, MA, argued for appellee in Appeal No. 22-2090. Also represented by GREGORY S. NIEBERG, MICHAEL N. RADER, New York, NY.

MICHAEL N. RADER, Wolf Greenfield & Sacks, PC, New York, NY, argued for cross-appellant in Appeal Nos. 2023-1173, 2023-1179, 2023-1180, 2023-1191. Also represented by GREGORY S. NIEBERG; NATHAN R. SPEED, Boston, MA.

Before HUGHES, STOLL, and CUNNINGHAM, *Circuit Judges*.
HUGHES, *Circuit Judge*.

Koss Corp. appeals, and Bose Corp. cross-appeals, the Patent Trial and Appeal Board's decisions in IPR2021-00297, IPR2021-00612, and IPR2021-00680, involving Koss Corp.'s wireless earphone patents. Because all the claims in the patents at issue were invalidated in prior district court litigation, we find the appeals moot and dismiss.

I

A

Koss Corp. (Koss) is the assignee of U.S. Patent No. 10,368,155 (the '155 patent), U.S. Patent No. 10,469,934 (the '934 patent), and U.S. Patent No. 10,206,025 (the '025 patent). *Koss I* J.A. 135; *Koss II* J.A. 226, 258.¹ The patents' common specification discloses a wireless earphone that communicates with a digital-audio source, such as an iPod, over an ad hoc wireless network like Bluetooth. *Koss I* J.A. 154–55; *Koss II* J.A. 245–46, 277–78.

B

On July 22, 2020, Koss filed a patent infringement suit in the District Court for the Western District of Texas against Bose Corp. (Bose), alleging that Bose infringed three Koss patents: the '155 patent, the '025 patent, and the '934 patent. *Koss I* J.A. 3655. On the same day, Koss also filed an infringement action concerning the '155, '934, '025, along with other patents against Plantronics, Inc. (Plantronics). *Koss I* J.A. 7909. In response, Bose filed a motion challenging venue in the Western District of Texas. Def.'s Motion to Dismiss at 1, *Koss Corp. v. Bose Corp.*, Case No. 6:20-cv-00661, ECF No. 20 (W.D. Tex. Dec. 17, 2020). Separately, Bose petitioned for inter partes review (IPR) of all three patents before the Patent Trial and Appeal Board. *Koss I* J.A.167–278; *Koss I* J.A. 4–5.

Then, on December 10, 2020, Bose filed a declaratory judgment action in the District Court for the District of Massachusetts seeking a declaration of noninfringement of the three Koss patents asserted against Bose in the

¹ For simplicity, citations to the briefs, joint appendix, and record in Appeal No. 22-2090 are prefaced by *Koss I*, while citations to the briefs, joint appendix, and record in Appeal No. 23-1173 are prefaced by *Koss II*.

Western District of Texas. Complaint at 1, *Koss Corp. v. Bose Corp.*, Civ. Action No. 1:20-cv-12193, ECF No. 1 (D. Mass. Dec. 10, 2020). The case was stayed pending resolution of Bose's improper-venue motion in the Western District of Texas. *Koss Corp. v. Bose Corp.*, Civ. Action No. 1:20-cv-12193, ECF No. 8 (D. Mass. Feb. 5, 2021).

In June 2021, the District Court for the Western District of Texas dismissed Koss's complaint against Bose for improper venue. Order, *Koss Corp. v. Bose Corp.*, Case No. 6-20-cv-00661, 2021 WL 7541417 (W.D. Tex. June 22, 2021). Upon dismissal, Koss filed a counterclaim against Bose in the District Court for the District of Massachusetts asserting infringement of the same three Koss patents. Answer and Counterclaims at 9–27, *Koss Corp. v. Bose Corp.*, Civ. Action No. 1:20-cv-12193, ECF No. 14 (D. Mass. July 29, 2021).

In September 2021, the Massachusetts district court stayed the case pending resolution of the IPRs, Order, *id.*, ECF No. 30 (D. Mass. Sept. 3, 2021), which the Board instituted, *Koss I* J.A. 408–60, *Koss II* J.A. 1046–89, 11959–12012, and continued the stay until their completion, Order, *Koss Corp. v. Bose Corp.*, Civ. Action No. 1:20-cv-12193, ECF No. 33 (D. Mass. Oct. 15, 2021). The Massachusetts case remains stayed pending Bose's IPRs of the Koss patents, including the appeals of those IPRs now before us.

During this same period, Koss's district court infringement action against Plantronics—involving, among other patents, the same three patents asserted against Bose—was transferred to the Northern District of California. Order, *Koss Corp. v. Plantronics, Inc.*, Case No. 6:20-cv-00663, ECF No. 45 (W.D. Tex. May 20, 2021). Plantronics moved to dismiss Koss's First Amended Complaint on the ground that all claims of the asserted patents, including all claims of the '155, '934, and '025 patents, are invalid under 35 U.S.C. § 101 for claiming patent-ineligible subject

matter. Defs.' Motion to Dismiss First Amended Complaint at 8–17, 22–25, *Koss Corp. v. Plantronics, Inc.*, Case No. 4:21-cv-03854, ECF No. 80 (N.D. Cal. Nov. 1, 2021). The motion to dismiss was fully briefed. Response, *id.*, ECF No. 82 (N.D. Cal. Nov. 15, 2021), Reply, *id.* ECF No. 83 (N.D. Cal. Nov. 22, 2021). The district court granted Plantronics's motion, finding all claims of the asserted patents—including the '155, '934, and '025 patents at issue here—invalid under 35 U.S.C. § 101.² Order at 16, *id.*, ECF No. 88 (N.D. Cal. Nov. 16, 2022).

Following the district court's invalidation of all of the patents' claims, it granted Koss leave to amend. *Id.* Koss then filed a Second Amended Complaint in which it re-asserted the '934 and '025 patents against Plantronics, but limited its infringement allegations to certain claims that involved signal strength technology in the patents. Second Amended Complaint at 16–34, *id.*, ECF No. 91 (N.D. Cal. Dec. 7, 2022) (First and Second Causes of Action). Plantronics moved to dismiss the Second Amended Complaint on the ground that the asserted patents' claims are unpatentable under 35 U.S.C. § 101. Defs.' Motion to Dismiss Second Amended Complaint at 8–14, 20–25, *id.*, ECF No. 93 (N.D. Cal. Dec. 21, 2022). Again, the motion was fully briefed. Response, *id.*, ECF No. 96 (N.D. Cal. Jan. 11, 2023); Reply, *id.*, ECF No. 98 (N.D. Cal. Jan. 25, 2023).

Rather than wait for the district court to decide Plantronics's second Motion to Dismiss, Koss voluntarily stipulated to dismiss the litigation with prejudice. Stipulation at 2, *id.*, ECF No. 101 (N.D. Cal. Aug. 4, 2023). When doing so, Koss did not ask the district court to vacate its earlier order finding all claims of the asserted patents invalid. The district court subsequently entered an order formally

² The Dismissal Order also invalidated all claims of three other Koss patents not at issue in these appeals: U.S. Patent Nos. 10,506,325; 10,757,498; and 10,848,852.

dismissing Koss’s suit against Plantronics with prejudice. Order, *id.*, ECF No. 102 (N.D. Cal. Aug. 4, 2023). The deadline for Koss to appeal the district court’s final judgment was September 5, 2023. *See* Fed. R. App. P. 4(a)(1)(A). Koss did not appeal.

On September 20, 2023, after the *Plantronics* dismissal, Bose moved to dismiss the appeals of the IPRs before us as moot (Appellee’s Mot.), arguing that *Plantronics* invalidated the claims at issue in the appeals. *Koss I* ECF No. 30; *Koss II* ECF No. 35. Koss opposed the motions (Appellant’s Opp.) and Bose replied (Appellee’s Reply). *Koss I* ECF Nos. 32, 34; *Koss II* ECF Nos. 37, 39. Oral arguments in both *Koss I* and *II* occurred on February 6, 2024, addressing both the substance of the appeals and the issue preclusion issue. *Koss I* ECF No. 36; *Koss II* ECF No. 41. We have statutory jurisdiction under 28 U.S.C. § 1295(a)(1).

II

Issue preclusion is “a purely procedural issue” as presented here, therefore we apply the law of the regional circuit—in this case, the Ninth Circuit—with respect to the effect of a previous judgment. *RF Del., Inc. v. Pac. Keystone Techs., Inc.*, 326 F.3d 1255, 1261 (Fed. Cir. 2003).³

³ Our “court has developed its own law with respect to res judicata (including collateral estoppel) in non-patent cases But in patent cases, despite our exclusive jurisdiction, we have generally stated that we look to regional circuit law for general principles of res judicata.” *Uniloc USA, Inc. v. Motorola Mobility LLC*, 52 F.4th 1340, 1346 n.3 (Fed. Cir. 2022). Despite this ambiguity, we need not resolve which circuit’s law should govern here because our law and Ninth Circuit law are, in relevant respects, the same. *See, e.g., Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 477 n.7 (Fed. Cir. 1991) (applying Ninth Circuit law to an issue of res judicata).

III

The Constitution limits the “judicial power” vested in the courts to “[c]ases” or “[c]ontroversies.” U.S. CONST. art. III, § 2. “It is well settled that the case-or-controversy requirement, including mootness, subsists through all stages of federal judicial proceedings, trial and appellate.” *Synopsys, Inc. v. Lee*, 812 F.3d 1076, 1078 (Fed. Cir. 2016) (quotation marks omitted). “[A]n appeal should . . . be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant any effectual relief whatever in favor of the appellant.” *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (quotation marks omitted). Thus, if the patent claims at issue in these appeals are invalid due to the “intervening” dismissal in *Plantronics*, Koss is precluded from asserting its patents’ claims—now and in the future—and these appeals are moot.

The question before us is whether the *Plantronics* district court’s invalidation of all claims of the ’155, ’025, and ’934 patents is final, as Bose contends, or was superseded by Koss’s Second Amended Complaint, as Koss contends. See *Koss I* Appellee’s Mot. 4; *Koss I* Appellant’s Opp. 5. Typically, when a district court issues a final judgment, any interlocutory orders merge with that final judgment. For instance, in *Hartley v. Mentor Corp.*, 869 F.2d 1469, 1472 (Fed. Cir. 1989) (applying Ninth Circuit law), we held that an interlocutory summary judgment of invalidity merged with the final stipulation of dismissal with prejudice. In that case, the district court granted summary judgment that an asserted patent was invalid. *Id.* at 1471. When that summary judgment order issued, it was interlocutory, or non-final, as litigation was ongoing. Subsequently, the order became final and appealable when it merged with a stipulated dismissal with prejudice, which concluded litigation. *Id.* at 1472 (“[I]ssue preclusion is likely to be based on what was *at the time* an ‘interlocutory’ ruling, and generally such orders become finalized upon entry of the judgment in the case.”). Because the patentee neither appealed

the summary judgment order, nor sought to have it vacated by the district court, our court held that the order had preclusive effect in later litigation against a different defendant. *Id.* at 1472–74.

Koss attempts to distinguish this precedent by arguing that the district court’s ineligibility ruling became a nullity on the filing of the Second Amended Complaint. Not so. The Ninth Circuit has made it clear that claims in prior dismissed complaints need not be raised in amended complaints for them to be appealable. *Lacey v. Maricopa Cnty.*, 693 F.3d 896, 927 (9th Cir. 2012) (“[C]ourts have concluded that the plaintiff does not forfeit the right to challenge [a] dismissal on appeal simply by filing an amended complaint that does not re-allege the dismissed claim.” (quotation marks omitted)). As the Ninth Circuit explained, a rule requiring repleading is unfair to the parties and the district court. *Id.* at 927–28. Consequently, if claims need not be repleaded to be appealable, then the order dismissing those claims is not rendered a nullity and merges into the final judgment. Contrary to Koss’s understanding, its decision not to reallege all of the dismissed claims in district court did not alter its ability to appeal the district court’s order regarding ineligibility as to the claims not realleged (i.e., did not render the order an unappealable nullity as to those claims). What altered Koss’s right to appeal was its own voluntary decision to dismiss the case with prejudice without reserving a right of appeal.

The same facts that triggered preclusion in *Hartley* are present here. The district court’s invalidity order, which was interlocutory when issued, merged with the final judgment dismissing the case with prejudice. *See Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1052 (9th Cir. 2005) (A “stipulated dismissal of an action with prejudice in a federal district court generally constitutes a final judgment on the merits.”). In other words, while the invalidity order may not have been final and appealable when it issued in November 2022, it became final and appealable in

KOSS CORPORATION v. BOSE CORPORATION

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August 2023 when Koss stipulated to the dismissal of its suit. And as in *Hartley*, Koss neither appealed the invalidation nor had it vacated. *Cf.* 869 F.2d at 1473 (“Under Ninth Circuit law, to be assured that the judgment here would have no collateral estoppel effect, *Hartley* would have had to have the *3M* court vacate its order, which he failed to do . . .”).

Koss’s patent claims are thus invalid, removing any case or controversy and rendering these appeals moot. *See Blonder-Tongue Lab’ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 339–40 (1971). We, therefore, dismiss.

DISMISSED

COSTS

Costs to Bose.

NOTE: This order is nonprecedential.

**United States Court of Appeals
for the Federal Circuit**

KOSS CORPORATION,
Appellant

v.

BOSE CORPORATION,
Cross-Appellant

2023-1173, 2023-1179, 2023-1180, 2023-1191

Appeals from the United States Patent and Trademark
Office, Patent Trial and Appeal Board in Nos. IPR2021-
00612, IPR2021-00680.

**ON PETITION FOR PANEL REHEARING AND
REHEARING EN BANC**

Before MOORE, *Chief Judge*, LOURIE, DYK, PROST, REYNA,
TARANTO, CHEN, HUGHES, STOLL, CUNNINGHAM, and
STARK, *Circuit Judges*.¹

PER CURIAM.

ORDER

¹ Circuit Judge Newman did not participate.

Koss Corporation filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue October 7, 2024.

FOR THE COURT



Jarrett B. Perlow
Clerk of Court

September 30, 2024
Date