No. 15-328

In The
Supreme Court of the United States

DAVID LAWSON,

Petitioner,

v.

SUN MICROSYSTEMS, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether arguments presented at summary judgment that establish the legal insufficiency of plaintiff's case are preserved for appellate review when they are also incorporated into Federal Rule of Civil Procedure 50(a) and (b) motions and the petitioner recognizes that any review of the adequacy of those Rule 50 motions would be an "everyday" matter "hardly worthy of a precedential opinion." Pet.-21.

CORPORATE DISCLOSURE STATEMENT

Oracle USA, Inc. merged with and into Sun Microsystems, Inc. ("SMI") effective February 15, 2010. SMI is the surviving entity of the merger, and SMI has been renamed Oracle America, Inc. Oracle Corporation is a publicly traded company and owns 100% of Oracle America, Inc.'s common stock. No publicly held entity owns more than 10% of the stock of Oracle Corporation.

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BRIEF IN OPPOSITION

Respondent Sun Microsystems, Inc. ("Sun") respectfully submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT

1. Petitioner asks the Court to resolve what he describes as an "entrenched divide" among circuit courts as to whether denial of a summary judgment motion presenting purely legal issues may be reviewed on appeal following a jury trial when those legal issues are not the subject of the defendant's

Federal Rule of Civil Procedure 50(a) and (b) motions. Pet.-2. This case presents no such issue.

The Seventh Circuit's decision on the merits is based on issues of Indiana contract law that were explicitly presented and preserved in Sun's Rule 50(a) and (b) motions, as well as in defendant's summary judgment motion. Petitioner does not ask the Court to review the adequacy of defendant's Rule 50 motions. He acknowledges that, if such a review is necessary, then this is "an unexceptional contract case—an everyday disposition hardly worthy of a precedential opinion." Pet.-20-21. Certiorari should be denied because the question petitioner posits is not presented on this record. *Rogers* v. *United States*, 522 U.S. 252, 259 (1998) (certiorari improvidently granted: "the record does not fairly present the question that we granted certiorari to address"). Resolution of any conflict among the circuits would also be irrelevant to the outcome of this case. Certiorari should also be denied for that reason. *Piccirillo* v. *New York*, 400 U.S. 548, 549 (1971) (certiorari improvidently granted: resolution of question presented would not change outcome).

2. Petitioner claims the Seventh Circuit "implicitly rejected [Sun's] position that it presented its contract interpretation argument at trial," Pet.-20, via Rule 50 motions. Not so. The Seventh Circuit's decision belies petitioner's characterization that the court "implicitly" decided that Sun's "appeal sank or swam based on whether the Seventh Circuit had the power to review the legal arguments [Sun] made at

the summary judgment stage but did not renew in its JMOL motion." Pet.-21. The Seventh Circuit affirmatively stated that it was "review[ing] the district court's Rule 50(b) rulings de novo." App.-14. If the Seventh Circuit was reviewing the denial of summary judgment, as petitioner claims, it surely would have said so.

3. Petitioner never argued in the court of appeals, as it does here, that Sun's Rule 50 motions were so inadequate that only Sun's unsuccessful summary judgment motion disclosed the grounds on which Sun successfully secured appellate reversal. Certiorari should be denied because petitioner did not present his argument in the court of appeals and that court did not endorse petitioner's crucial, assumed premise that Sun's Rule 50 motions were inadequate.

4. In acknowledging Seventh Circuit precedent providing that purely legal arguments made at summary judgment need not be renewed via Rule 50 motions, the court below was simply marshalling one of many reasons why Sun's various appellate arguments were properly presented in the district court. The court was responding to petitioner's submission that Sun was presenting some arguments on appeal that it had never presented before. In disagreeing with petitioner as to that, the Seventh Circuit was not finding Sun's Rule 50 motions inadequate as to the arguments that led the Seventh Circuit to rule for Sun. Indeed, petitioner himself acknowledged in the Seventh Circuit that many of Sun's arguments on appeal, including those that caused the Seventh

Circuit to reverse, had been raised in the district court.

5. This Court's decision in *Ortiz* v. *Jordan*, 562 U.S. 180 (2011), provides no basis for review. Petitioner misdescribes *Ortiz* in two respects:

(a) *Ortiz* declined to address the question of whether an issue of a purely legal nature is "preserved for appeal by an unsuccessful motion for summary judgment, and need not be brought up again under Rule 50(b) * * * * * " *Id.* at 190. Given that clear statement, it is quite inexplicable how petitioner finds in *Ortiz*, and presses in this Court, the position that "the rule permitting appeal from some denials of summary judgment after a full trial on the merits is incorrect, as *Ortiz* held without exception." Pet.-21. As *Ortiz* does not contain the holding petitioner claims, no circuit court could fairly be accused of failing to follow *Ortiz*.

(b) The issue of whether denial of summary judgment on a purely legal issue is reviewable following a jury trial, when the issue was not raised via Rule 50(a) and (b) motions, is *not* "the question the Court meant to settle in *Ortiz,*" Pet.-12, as the three concurring justices in *Ortiz* made clear. 562 U.S. at 192. Their views comport with the question presented in *Ortiz*, which was whether a defendant who did not pursue interlocutory appeal of an adverse summary judgment ruling could nevertheless try and vindicate his immunity defense in a 42 U.S.C. Section

1983 civil rights case by appealing later, following an adverse judgment.

6. Building on his dual misperceptions about *Ortiz*, petitioner misdescribes the state of the law in various circuits since *Ortiz* was decided. In those circuits (a clear minority) that have articulated, since *Ortiz*, a prohibition on post-jury-trial review of the denial of summary judgment, the decisions do *not* rest on the defendants' failure to renew in Rule 50 motions arguments about the legal insufficiency of the plaintiffs' claims. The circuit split petitioner posits has not since *Ortiz* led to cases being decided differently under different rules prevailing in different circuits. It is prudent for this Court to await a situation where case outcomes differ because different circuits applied different rules of law. It is also prudent to await a case where the defendant failed to file sufficient Rule 50 motions after unsuccessfully seeking summary judgment. This is not such a case.

7. The express purpose of Rule 50—to determine whether "a reasonable jury would not have a legally sufficient evidentiary basis" for its decision—does not support the minority rule petitioner advocates. The purpose of Rule 50 is not served by requiring renewal of purely legal challenges to the plaintiff's case that were presented at summary judgment. A Rule 50(a) motion serves to notify the non-moving party that it has failed to prove an essential element of its case; Rule 50(b) allows the district court to address the insufficiency of the evidence supporting a verdict. When the defendant has been denied

summary judgment, sought on the basis that the plaintiff's claims have inherent legal defects, the plaintiff obtains notice of the defendant's position and the district court's view of the law, expressed in the summary judgment ruling. A rule requiring that the defendant restate its arguments via Rule 50 motions does not advance Rule 50's purposes. Such a rule would require that defendant give the plaintiff repetitious notice of arguments already presented. It would require that the defendant burden the district court with a reprise of legal arguments already rejected. A rule that does not advance Rule 50's purposes has little to commend it.

Certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

I. The Parties and the History of the Dispute

Petitioner David Lawson was a regional salesman for StorageTek, Inc., selling computer equipment and maintenance services to corporate customers. App.-2. In August 2005, StorageTek was acquired by Sun. *Ibid*. Lawson's compensation was governed by compensation plans issued, consecutively, by StorageTek and Sun. This case arose from a dispute as to whether Lawson's commission on a sales contract between Sun and JPMorgan Chase & Co. was properly calculated under StorageTek's 2005 compensation plan (the "2005 STK Plan") or Sun's 2006 plan (the "2006 Sun Plan"). *Ibid*.

It is undisputed that both Plans require that a sales contract be fully executed and the initial invoice issued, i.e., that the sale "close," during the term of the applicable Plan in order for the sale to be eligible for commission under that Plan. It is also undisputed that the sales contract with JPMorgan Chase was not invoiced, and therefore did not close, until March 2006. App.-2.

Sun offered Lawson a $54,000 commission under the 2006 Sun Plan. Lawson rejected this, arguing that his commission was governed by the 2005 STK Plan; he claimed to be owed a $1.8 million commission under the 2005 STK Plan. *Ibid*.

Sun's fiscal year ended on June 30, rather than the end of the calendar year, as StorageTek's had done. Therefore, after Sun acquired StorageTek, Sun established a two-part transition of former StorageTek sales employees from participation in the 2005 STK Plan to participation in the 2006 Sun Plan. App.-8-9. In the first stage of this transition, Sun amended the 2005 STK Plan to apply during Sun's second fiscal quarter (September 1, 2005, to December 25, 2005). *Ibid*. This amendment stated that "StorageTek has adopted Sun's fiscal calendar for incentive compensation purposes. Sun's * * * second fiscal quarter (Q2) ends December 25, 2005. *Therefore, the current*

incentive plan year for StorageTek will end December 25, 2005."[1]

For the second stage of the transition, effective December 26, 2005, Lawson received a letter issued by Sun to participants in the 2005 STK Plan informing them that, as of December 26, 2005, they were transitioning to the 2006 Sun Plan, which would govern commissions in Sun's third and fourth fiscal quarters (i.e., from December 26, 2005, to June 30, 2006). App.-10. The Sun 2006 Plan was released in March 2006, dated March 13, 2006, but effective as of December 26, 2005. App.-12. The 2005 STK Plan and the 2006 Sun Plan both included generally applicable terms and individualized provisions laying out for each employee the sales they were expected to achieve and the commissions they could earn on eligible sales. Lawson received and reviewed the 2006 Sun Plan no later than March 17, 2006. The sale to JPMorgan Chase was invoiced on March 23, 2006. *Ibid*.

The parties dispute the legal effect of various terms in the 2005 STK Plan, as amended, and the 2006 Sun Plan.

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[1] *Ibid*.; Appellant's Br. 40, ECF 13-1502, Dkt. 15 (7th Cir. filed Oct. 24, 2013). Emphasis in quoted material is added unless otherwise noted.

II. District Court Proceedings

A. Petitioner's Suit and Sun's Summary Judgment Motion.

Lawson sued Sun in Indiana State Court for breach of the 2005 STK Plan and violation of Indiana's Wage Claim Statute.[2] Sun removed to federal court. App.-13. Lawson did not claim any breach of the 2006 Sun Plan. Thus, in order to recover, Lawson had to establish that his commission on the JPMorgan Chase sale was governed by the 2005 STK Plan.[3]

Sun moved for summary judgment on the basis that the contract terms at issue were unambiguous and, under Indiana law, Lawson was ineligible to recover a commission under the 2005 STK Plan. Specifically, Sun claimed that the 2005 STK Plan terminated as of December 25, 2005, such that Lawson could not prevail as a matter of law on a claim for commission based on the March 2006 sale to JPMorgan Chase.[4] Lawson countered that various other contract terms supposedly rendered the 2005 STK Plan and the 2006 Sun Plan ambiguous as to the effective date of the 2006 Sun Plan. Lawson claimed triable issues of fact were presented as to which Plan

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[2] ECF 1:07-cv-196, Dkt. 1-1, pp. 1-13 (S.D. Ind. filed Feb. 15, 2007).

[3] ECF 1:07-cv-196, Dkt. 304, p. 5 (S.D. Ind. filed Sept. 20, 2012).

[4] ECF 1:07-cv-196, Dkt. 188, pp. 19-21 (S.D. Ind. filed March 18, 2011).

was in effect when the JPMorgan Chase sale was invoiced.[5]

The district court rejected Sun's interpretation of the contracts, ruling that ambiguities in the respective Plan documents created "a genuine issue of material fact as to whether the 2005 STK Plan Documents or the 2006 Sun Plan controlled" Lawson's commission on the sale invoiced in March 2006.[6]

B. Trial and Sun's Rule 50(a) and (b) Motions

The matter proceeded to jury trial. When Lawson rested, Sun moved orally under Rule 50(a), explicitly restating its contract interpretation arguments, including that the 2005 STK Plan terminated on December 25, 2005:

> Clearly, the 2005 agreement or plan documents had terminated as of December 25, 2005.

App.-54.

Sun also argued that "[t]he 2006 plan by its terms was retroactively effective to December 26, and there's no question that the invoicing that took place in this case took place after the 2006 plan had been

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[5] ECF 1:07-cv-196, Dkt. 214, pp. 18-21 (S.D. Ind. filed April 29, 2011).

[6] ECF 1:07-cv-196, Dkt. 230, pp. 25-26 (S.D. Ind. filed Nov. 7, 2011).

issued and Mr. Lawson had reviewed it." App.-53. And Sun argued that Lawson's refusal to sign his individualized "Goal Sheet" under the 2006 Sun Plan could not have the legal effect of keeping the 2005 STK Plan in place for Lawson alone as among Sun's employees. App.-54.

These Sun arguments posited its right to prevail as a matter of law based on the terms of the contract documents. Under Indiana law, the interpretation of an unambiguous contract presents an issue of law for the court to decide without resort to extrinsic evidence. *Whitaker* v. *Brunner*, 814 N.E.2d 288, 293 (Ind. Ct. App. 2004).

Lawson responded, arguing orally that language in the 2005 STK Plan required it to remain in effect until a succeeding plan was effective and the "black-and-white, plain English" terms of the 2006 Sun Plan provided that it was not effective as of December 26, 2005. App.-59.

Lawson's attorney drew attention to denial of Sun's summary judgment motion, on the basis that, in the district court's view, contract terms were ambiguous. He invoked that denial as a basis to deny Sun's Rule 50(a) motion: "That was the basis of the Court's summary judgment entry. That's why we are here." App.-59. Lawson's attorney maintained that "[t]here's an ambiguity there, and the jury's going to have to decide how to resolve that ambiguity." *Ibid*.

The district court took Sun's Rule 50(a) motion under advisement. App.-60.

At the close of all evidence, Sun renewed its motion, and the district court continued to hold the motion under advisement: "All arguments previously had are now incorporated, and it's continued under advisement." R.App.-2.

After a verdict in Lawson's favor, Sun filed its written Rule 50(b) motion. Sun argued that a legally correct interpretation of the 2005 STK Plan could lead only to the conclusion that it terminated by its unambiguous terms on December 25, 2005. Per Sun's argument, that meant Lawson had failed to fulfill the requirements for earning a commission under the 2005 STK Plan: the JPMorgan Chase deal did not close before the 2005 STK Plan ended. As Sun wrote in its Rule 50(b) briefing:

> Although Plaintiff contends that an ambiguity exists as to when the 2005 STK Plan ended, the evidence at trial demonstrates that *no reasonable jury could construe the date by which all conditions had to be filled as ambiguous. Specifically, the Plan itself states that both contract execution and initial invoicing had to occur prior to the end of the 2005 STK Fiscal Year*. The undisputed evidence presented at trial shows that the last day of the fiscal year was December 25, 2005, and the parties stipulated that neither contract execution nor initial invoicing occurred until 2006.

App.-66.

Once again, Sun's arguments for relief included its entitlement to prevail based on the unambiguous terms of the contract documents. The "undisputed evidence" Sun relied on in its Rule 50(b) motion included the September 1, 2005 amendment to the 2005 STK Plan by which the 2005 STK Plan termination date was accelerated and made to coincide with the end of Sun's second quarter.[7] These are the same arguments Sun presented in its Rule 50(a) motion:

> Clearly, the 2015 agreement or plan documents had terminated as of December 25, 2005.
>
> * * *
>
> The 2006 plan by its terms was retroactively effective to December 26* * * *

App.-53-54.

In response to Sun's Rule 50(b) motion, Lawson again controverted Sun's contract interpretation arguments, disputing the significance of the "effective date" language in both Plans, the December 26, 2005 letter transitioning StorageTek employees to the 2006 Sun Plan, and other 2006 Sun Plan terms. R.App.-11-18. Lawson did not address the impact of the unambiguous amendment of the 2005 STK Plan, dated September 1, 2005, by which Sun announced

[7] Sun also reiterated in its Rule 50(b) opening brief its argument that Lawson could not unilaterally perpetuate the 2005 STK Plan by withholding his signature from his Goal Sheet under the 2006 Sun Plan. App.-69-70.

termination of the 2005 STK Plan as of December 25, 2005. But that was Lawson's oversight. Sun's Rule 50(b) motion clearly invoked the significance of that amendment and the termination date it imposed on the 2005 STK Plan. App.-66.

In its Rule 50(b) reply brief, Sun again argued that amendments to the 2005 STK Plan unambiguously caused "the end date of the 2005 STK fiscal year" to be "moved up to December 25, 2005." App.-92. Sun also pointed out that Lawson "himself admits that he was informed via letter that he was being transitioned to the 2006 Sun DMG Plan effective December 26, 2005." App.-89.

C. The District Court Ruling on Sun's Rule 50 Motions Acknowledges That Sun Included Arguments Presented in Sun's Summary Judgment Motion.

The district court's order denying Sun's Rule 50 motion explicitly acknowledged Sun arguments, also made at summary judgment, that the 2006 Sun Plan was, under the language of the contract documents, effective as of December 26, 2005: "Sun contends that Plaintiff was 'informed and knew' that he was being placed on the 2006 Sun Plan effective December 26, 2005" by virtue of the December 26, 2005 letter, and "Sun argues that the evidence unequivocally showed that the 2006 Sun Plan, released on March 13, 2006 * * * , was retroactive to December 26, 2005. For example, the 2006 Sun Plan stated that it was effective as of December 26, 2005* * * *" App.-33-34.

While acknowledging Sun's contract interpretation arguments, the district court perceived contractual ambiguities and therefore upheld the verdict for Lawson. App.-35-36.

III. Proceedings in the Seventh Circuit and Its Opinion

Sun appealed the district court's denial of its Rule 50(b) motion, arguing (among other things) that the Plan documents are unambiguous and the 2005 STK Plan terminated on December 25, 2005.

Lawson acknowledged in his Seventh Circuit response brief that many of Sun's contract interpretation arguments on appeal had been raised in the district court: "*Sun's arguments before the district court are similar to those it raised on appeal* in pages 41-48 of its brief." On pages 40-48 of its appellant's opening brief, Sun argued (among other things) that the 2005 STK Plan terminated on December 25, 2005.[8]

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[8] Appellant's Br. 40-48, ECF 13-1503, Dkt. 15 (7th Cir. filed Oct. 24, 2013).

On those pages of Appellant's Opening Brief, Sun quoted the September 1, 2005 notification, amending the 2005 STK Plan to fix its termination date as December 25, 2005. Sun also argued:

> That the 2005 STK Plan terminated by its own terms as of December 25, 2005, and would have no further force or effect for determining future commissions, was reinforced by the timing and contents of the December 26, 2005 letter * * * Sun's 2006 Plan was

(Continued on following page)

In the Seventh Circuit, Lawson did not claim that Sun failed to argue in its Rule 50 briefing that the 2005 STK Plan terminated by its terms on December 25, 2005. Lawson did assert that Sun had presented certain arguments on appeal that had never been presented in the district court. But Lawson's list of those allegedly "new" arguments does *not* include that the 2005 STK Plan terminated on December 25, 2005, based on the unambiguous terms of the Plan documents.[9]

In its Seventh Circuit reply brief, Sun addressed why it had, in fact, raised in the district court arguments it was making on appeal and noted that, in its

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> "effective December 26, 2005," * * * the day after the 2005 STK Plan terminated.

Id. at 41.

[9] Lawson argued:

> Many of the arguments Sun raises in section B(1) of [Sun's] brief were not made to the district court, specifically how it contends the 2005 STK incentive plan's "will remain in effect" language should be interpreted and why the quota document's and IPAD's various references to "annual" and other similar terms indicate the 2005 plan could not carry over into a subsequent year.

Appellee's Resp. Br. 20, ECF 13-1503, Dkt. 16-1 (7th Cir. filed Nov. 4, 2013). Lawson also objected to Sun's argument (at Appellant's Br. 48-51, ECF 13-1502, Dkt. 15 (7th Cir. Filed Oct. 24, 2013)) that Lawson's status under Indiana law as an at-will employee coupled with his continued performance after receiving the December 26, 2005 letter transitioning him to the 2006 Sun Plan meant that any commission earned after that date could only be secured under the 2006 Sun Plan. *Ibid.*

Rule 50 motions, "Sun argued that the initial invoicing of the [JPMorgan Chase] deal occurred after the 2005 STK Plan ended on December 25, 2005, and that the 2006 Sun Plan governed."[10]

The Seventh Circuit rejected Lawson's argument that Sun had waived certain contract interpretation arguments by failing to adequately present them *at all* in the district court. The court rejected Lawson's effort to limit Sun to precisely what it argued in the district court:

> Sun's argument about the proper interpretation of the plan is more elaborate on appeal than it was in the district court, but no rule prohibits appellate amplification of a properly preserved issue. *See Yee* v. *Escondido*, 503 U.S. 519, 534 (1992) ("Once a * * * claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.").

App.-15.

The Seventh Circuit also addressed Sun's Rule 50 motions. But the court's analysis was framed by Lawson's recognition that Sun had largely preserved issues of contract interpretation that Sun presented on appeal, including that the 2005 STK Plan terminated on December 25, 2005, before the JPMorgan Chase

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[10] Appellant's Reply Br. 32-33, ECF 13-1502, Dkt. 21 (7th Cir. filed Dec. 4, 2013).

sale closed. It was in that context that the Seventh Circuit stated *not* that Sun's Rule 50 arguments were inadequate, but that Sun was not "required to renew ***all*** the legal arguments it made at the summary judgment phase when challenging the sufficiency of the trial evidence under Rule 50(a) and Rule 50(b)." App.-15.

Those contract interpretation arguments "involve pure questions of law unrelated to the sufficiency of the trial evidence" that were presented at the summary judgment stage. Under Seventh Circuit precedent, Sun was not obligated to "relitigate purely legal issues of contract interpretation under Rule 50(a) or (b)." App.-16, citing *Chemetall GMBH* v. *ZR Energy, Inc.*, 320 F.3d 714, 719 (7th Cir. 2003).

The Seventh Circuit did not decide—"implicitly" or otherwise—that Sun's Rule 50 motions failed to preserve the arguments that formed the basis for the Seventh Circuit's ruling.

Nor did the Seventh Circuit review denial of Sun's motion for summary judgment. The court's opinion clearly states:

> We review the district court's Rule 50(b) rulings de novo. *Rapold* v. *Baxter Int'l Inc.*, 718 F.3d 602, 613 (7th Cir. 2013). Judgment as a matter of law is proper if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1); *see also May* v. *Chrysler*

> *Grp., LLC*, 716 F.3d 963, 970 (7th Cir. 2012). The parties agree that Indiana law applies.

App.-14-15.

With respect to the proper interpretation of the Plans under Indiana law, the Seventh Circuit held:

> The relevant language in the 2005 incentive plan is not ambiguous. As amended on September 1, 2005, the plan fixed a clear and definite expiration date for the plan year: December 25, 2005. More specifically, the September 1 amendment stated that "StorageTek has adopted Sun's fiscal calendar for incentive compensation purposes. Sun's * * * second fiscal quarter (Q2) ends December 25, 2005. Therefore, the current incentive plan year for StorageTek will end December 25, 2005."

App.-17-18. The Seventh Circuit quotes the same parts of the September 1, 2005 amendment to the 2005 STK Plan that Sun addressed in pp. 40-48 of appellant's opening brief.[11] That is the part of Sun's brief where, according to Lawson's Seventh Circuit response brief, "Sun's arguments before the district court are similar to those it raised on appeal* * * *"[12]

[11] Appellant's Br. 40-42, ECF 13-1502, Dkt. 15 (7th Cir. filed Oct. 24, 2013).

[12] Appellee's Resp. Br. 21, ECF 13-1503, Dkt. 16-1 (7th Cir. filed Nov. 4, 2013).

REASONS TO DENY THE WRIT

I. The Question Identified By Petitioner Is Not Presented By This Case.

The question petitioner presents for review assumes that Sun's successful appellate argument was presented as an inherent legal defect in plaintiff's claims via Sun's summary judgment motion but not adequately argued thereafter as part of Sun's Rule 50 motions. Petitioner's assumption is false and clearly controverted by the record. Certiorari should be denied because the legal issue sought to be decided is not in fact presented by this case. *Rogers*, 522 U.S. at 259.

A. Sun Preserved in Its Rule 50 Motions the Contract Interpretation Arguments That Form the Basis of the Seventh Circuit's Decision in Sun's Favor.

The contract interpretation issues resolved by the Seventh Circuit in Sun's favor—that the 2005 STK Plan terminated before the JPMorgan Chase sale closed in 2006—were presented to the district court not only in Sun's motion for summary judgment but also in Sun's Rule 50(a) and (b) motions. The record is described in detail in Sun's Counterstatement of the Case, *ante*. It shows that the proper interpretation of the Plan contracts was always at issue, was argued at each stage, and Lawson was well aware that Sun continued to advance its contract interpretation arguments—including that the Plan

provisions were unambiguous—in its Rule 50 motions.

That should be the end of the matter. But there is more. Petitioner did not put the adequacy of Sun's Rule 50 motions at issue in the Seventh Circuit. He conceded that Sun's arguments about the unambiguous termination date of the 2015 STK Plan were presented to the district court.[13] While petitioner disputed whether Sun raised in the district court certain arguments, these are not the arguments on which Sun prevailed.

Notably, petitioner does not suggest that this Court should review the adequacy of Sun's Rule 50 motions. He concedes that, if this case turns on the adequacy of those motions, it is "an unexceptional contract case—an everyday disposition hardly worthy of a precedential opinion." Pet.-20-21. But as the record shows, Rule 50 motions were made. App.-52, App.-66-70, App.-88-89. This Court could not resolve the question petitioner presents unless it conducted the very fact-bound review of the Rule 50 record that petitioner recognizes as unworthy of this Court's attention.

The adequacy of Sun's motions is apparent. Rule 50 does not require any fixed form or specific level of detail; it is sufficient if a motion alerts the opposing

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[13] Appellee's Resp. Br. 21, ECF 13-1503, Dkt. 16-1 (7th Cir. filed Nov. 4, 2013).

party that the legal or factual adequacy of his case is contested. *Wolfgang* v. *Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1521-1522 (10th Cir. 1997) (argument briefed at summary judgment was preserved by inference from oral argument on Rule 50 motion).[14] Rule 50 "does not require technical precision in stating the grounds of the motion * * * * however, it does require that the grounds be stated with sufficient certainty to inform the court and opposing counsel of the movant's position with respect to the motion." 9B Wright and Miller, Federal Practice and Procedure: Civil 3d § 2533, at 499-501 (3d ed. 2008); *Jordan* v. *City of Cleveland*, 464 F.3d 584, 595 (6th Cir. 2006) (defendant moving under Rule 50 preserved all of its arguments that plaintiff had failed as a matter of law to prove an adverse action in a race discrimination case when its Rule 50 argument before the district court "expressly focused" on a different aspect from those primarily argued on appeal but the totality of its arguments reflected the contours of its theory on appeal).

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[14] "'Technical precision is not necessary in stating grounds for [a Rule 50(b)] motion so long as the trial court is aware of the movant's position,' *Rockport Pharmacy, Inc.* v. *Digital Simplistics, Inc.*, 53 F.3d 195, 197 (8th Cir. 1995) (internal quotation omitted), and 'captions do not control' if the body of the motion or memorandum presents a claim. *Cosgrove* v. *Bartolotta*, 150 F.3d 729, 732 (7th Cir. 1998); *see Elm Ridge Exploration Co.* v. *Engle*, 721 F.3d 1199, 1220 (10th Cir. 2013)." *Estate of Snyder* v. *Julian*, 789 F.3d 883, 886 (8th Cir. 2015).

Sun more than adequately complied, arguing that Lawson's breach of contract claim failed as a matter of law because the 2005 STK Plan terminated on December 25, 2005, meaning Lawson failed to meet the contractual preconditions for a commission under the 2005 STK Plan. App.-52, App.-66-70, App.-88-89.

Indeed, the district court effectively acknowledged that Sun's Rule 50 motions renewed Sun's arguments that it was entitled to prevail as a matter of law based on unambiguous Plan document language. Lawson describes the district court's Rule 50 ruling as "fault[ing] [Sun] for not adequately addressing the contractual language ambiguity that required a jury trial in the first place." Pet.-8. In other words, according to Lawson, the district court faulted Sun's Rule 50 motions because they continued to pursue Sun's arguments, unsuccessful in its summary judgment submission, that Plan terms were unambiguous.[15]

Petitioner contrasts Sun's Rule 50 arguments regarding his Indiana Wage Claims Statute cause of action, suggesting that Sun's Rule 50 presentation as

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[15] Sun also argued that it was entitled to judgment based on the trial record. App.-67-70, App.-88-89.

While the district court's Rule 50 order does not address the piece of Sun's Rule 50 argument explaining that Sun's amendment to the 2005 STK Plan unambiguously caused "the end date of the 2005 STK fiscal year" to be "moved up to December 25, 2005," App.-92, Sun made that argument in both its Rule 50(a) and (b) motions. App.-54, App.-66-70, App.-92.

to these arguments has some bearing on whether Sun renewed at the Rule 50 stage its argument that the Plan contracts provided an unambiguous termination date for the 2005 STK Plan. Pet.-8.

Petitioner's argument invites precisely the kind of "everyday" inquiry into "an unexceptional contract case" that is not what this Court sits to do. Pet.-20-21. Moreover, no meaningful insight will be gained by comparing different features of Sun's Rule 50 motions. Sun's argument as to the Indiana Wage Claims Statute was primarily one of statutory interpretation. App.-74-82, App.-100-111. Sun's argument as to petitioner's contract-based commission claim was two-fold: the Plan contracts are unambiguous, meaning their proper interpretation is an issue of law; no evidence was adduced that would permit a jury to find for petitioner. App.-66-71, App.-88-93. The former argument—more than adequately made under the standards of Rule 50—is the one the Seventh Circuit adopted.

B. The Seventh Circuit Reviewed the District Court's Rule 50 Order, Assigned Error To It, and Did Not Review the Denial of Summary Judgment.

Petitioner characterizes the Seventh Circuit's opinion as "implicitly reject[ing]" the adequacy of Sun's Rule 50 motions in renewing Sun's summary judgment argument that the 2005 STK Plan was inapplicable as a matter of law to Lawson's commission

entitlement. Pet.-20. The Seventh Circuit made no such determination.

The Seventh Circuit certainly agreed with Sun that the trial was unnecessary. App.-22. But the court of appeals' decision expressly states that it reviewed de novo "the district court's Rule 50(b) rulings" not the denial of summary judgment. App.-14. The Seventh Circuit assigns error to the district court's conclusion, stated in its Rule 50 order, that ambiguities in Plan documents necessitated trial. App.-17-23. If the Seventh Circuit had reviewed the denial of summary judgment it surely would have said that is what it did.

The Seventh Circuit's decision invokes the legal effect of Sun's September 1, 2005 amendment to the 2005 STK Plan causing "*the end date of the 2005 STK fiscal year*" *to be* "*moved up to December 25, 2005.*" App.-92, App.-17-19. That argument was fully presented in Sun's Rule 50(a) and (b) motions. App.-54, App.-66-70, App.-92.

The Seventh Circuit also stressed the importance of the retroactive effective date of the 2006 Sun Plan. App.-20. Sun argued this point too in its Rule 50 motions. App.-67, 89. As the district court's Rule 50 order—not its order denying summary judgment—states: "*Sun argues* that the evidence unequivocally showed that the 2006 Sun Plan, released on March 13, 2006 (Plaintiff received it via email on March 17, 2006), was retroactive to December 26, 2005." App.-34. The district court disagreed, finding ambiguity

requiring trial. App.-35. And the Seventh Circuit then disagreed with the district court. App.-22.

On this record, there is simply no basis for Lawson's assertions that the Seventh Circuit "implicitly" decided that Sun's Rule 50 motions were inadequate or that the court only had authority to rule as it did if it could review the denial of Sun's summary judgment motion. Pet.-20-21.

While the Seventh Circuit invoked its precedent allowing appellate review of the denial of summary judgment on appeal following a trial, the court was responding to Lawson's argument that Sun had failed to raise various arguments in the district court *at all*, including in its Rule 50 motions. App.-15-16. By invoking that precedent, the Seventh Circuit was not determining that Sun's Rule 50 arguments were insufficient. It was not necessary for the court of appeals to dwell on that issue, and especially given that Sun's district court preservation of the arguments on which it prevailed was not something Lawson had disputed.

In trying to create something that does not exist, i.e., a Seventh Circuit ruling finding Sun's Rule 50 motions deficient, Lawson asserts that the Seventh Circuit judges gave *en banc* endorsement to a circuit split created by the panel decision here, pursuant to Seventh Circuit Rule 40(e). Pet.-21. That assertion is also wrong. Rule 40(e) envisions circulation of a draft opinion that creates a circuit split to all active judges of the Seventh Circuit before the decision is

filed. No circulation under Rule 40(e) was required here because the panel decision created no conflict. Moreover, when Rule 40(e) is invoked, the Seventh Circuit discloses that fact. Rule 40(e) provides that:

> [w]hen the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:
>
> "This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or, A majority did not favor) a rehearing en banc on the question of (e.g., overruling *Doe* v. *Roe*.)"

There is no such language in the opinion here. When the Seventh Circuit invokes Rule 40(e), based on a circuit split, its opinions contain Rule 40(e)'s required recital.[16]

The question petitioner raises is not presented on this record. It is certainly not "outcome-determinative." Pet.-12; *see Jones* v. *State Bd. of Ed. of State of Tenn.*, 397 U.S. 31, 32 (1970) (certiorari improvidently

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[16] *Compare* App.-16 *with e.g.*, *Listecki* v. *Official Comm. of Unsecured Creditors*, 780 F.3d 731, 748 n.2 (7th Cir. 2015) ("Because our decision creates a circuit split, this opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing en banc * * * * "); *Titan Tire Corp. of Freeport* v. *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union*, 734 F.3d 708, 712 n.4 (7th Cir. 2013) (same); *United States* v. *Miller*, 721 F.3d 435, 444 n.7 (7th Cir. 2013) (same).

granted where lower court decision was based on a finding "cloud[ing] the record" and rendering the case "an inappropriate vehicle" for review of question presented).

Given Sun's entirely sufficient Rule 50 motions, the writ should be denied.

II. This Court's *Ortiz* Decision Furnishes No Reason for Certiorari.

Petitioner tries to invoke this Court's *Ortiz* decision as supporting issuance of the writ. He casts his petition as presenting "an ideal vehicle to resolve the question the Court meant to settle in *Ortiz*." Pet.-12. He also claims, quite inconsistently, that certiorari should be granted "because the rule permitting appeal from some denials of summary judgment after a full trial on the merits is incorrect, as *Ortiz* ruled without exception." Pet.-21-22.

Neither statement is accurate. Taking petitioner's assertions in reverse order, *Ortiz* held that appellate review of a summary judgment denial was not available when the basis of the appeal was the sufficiency of evidence to support a qualified immunity defense in a civil rights case, brought under 42 U.S.C. Section 1983. 562 U.S. at 191-192. Defendants in *Ortiz* were denied summary judgment after asserting their qualified immunity. *Id.* at 188. They did not appeal at that time. Following jury trial on the merits, defendants prosecuted a Rule 50(a) motion but did not move to contest the jury's finding of liability

under Rule 50(b). *Id*. at 187. The Sixth Circuit held it could review the denial of summary judgment under an exception allowing such review after judgment when a qualified immunity defense is asserted. *Id*. at 183. This Court disagreed, explaining the relevant framework under Section 1983:

> immediate appeal from the denial of summary judgment on a qualified immunity plea is available when the appeal presents a "purely legal issue," illustratively, the determination of "what law was 'clearly established'" at the time the defendant acted. However, instant appeal is not available * * * when the district court determines that factual issues genuinely in dispute preclude summary adjudication.

Id. at 188, quoting *Johnson* v. *Jones*, 515 U.S. 304, 313 (1995). Applying this framework to the appeal at issue in *Ortiz*, the Court stated:

> the qualified immunity defenses asserted by [the defendants] do not present "neat abstract issues of law." * * * To the extent the officials urge Ortiz has not proved her case, they were, by their own account, obliged to raise that sufficiency-of-the-evidence issue by postverdict motion for judgment as a matter of law under Rule 50(b).

Id. at 191-192, quoting *Johnson*, 515 U.S. at 317.

However, in *Ortiz* the Court expressly declined to address whether an issue of a purely legal nature is "preserved for appeal by an unsuccessful motion for summary judgment, and need not be brought up again under Rule 50(b)* * * * We need not address this argument, for the officials' claims of qualified immunity hardly present 'purely legal' issues capable of resolution 'with reference only to undisputed facts.'" *Id*. at 190. Lawson errs in suggesting that *Ortiz* foreshadows the proper resolution of an issue the Court expressly declined to decide.

Turning to petitioner's other misdescription of *Ortiz*, the issue of whether denial of summary judgment on a purely legal issue is reviewable following a full trial on the merits, where sufficient Rule 50 motions were *not* filed, is *not* "the question the Court meant to settle in *Ortiz*." Pet.-12. The question presented by the *Ortiz* petition was this:

> "May a party appeal an order denying summary judgment after a full trial on the merits if the party chose not to appeal the order before trial?"

That question implicated the right of interlocutory appeal that is sometimes available when summary judgment is denied as to a qualified immunity defense interposed by a defendant in a 42 U.S.C. Section 1983 case. While the Court's analysis in *Ortiz* ventures beyond the confines of the interlocutory appeal sometimes available under Section 1983, Justice Thomas, joined by Justices Scalia and Kennedy, favored "limit[ing]

our decision to the question presented and remand for consideration of any additional issues." 562 U.S. at 192 (Thomas, J., concurring in the judgment). The writ was surely not issued in *Ortiz* to address the question petitioner now raises.

For the many reasons discussed here, this case is not a suitable vehicle by which to decide the issue reserved in *Ortiz*.

III. There Is No Post-*Ortiz* Conflict Among the Circuits That Has Actually Produced Different Outcomes in Similarly-Situated Cases.

The circuit conflict petitioner posits has not, since *Ortiz*, produced disparate outcomes in similarly-situated cases. That is another reason to deny the writ and await a case where different rules of law in different circuits have actually caused similarly situated cases to be decided in different ways.

Since *Ortiz*, the Second, Third, Ninth and D.C. Circuits have reviewed denials of summary judgment raising purely legal issues following trials on the merits. *See Munn* v. *Hotchkiss Sch.*, 795 F.3d 324, 331 (2d Cir. 2015) ("where the trial court's denial of a summary judgment motion is not based on the sufficiency of the evidence, but on a question of law, the rationale behind Rule 50 does not apply, and the need for such an objection [through a Rule 50 motion] is absent," citing *Rothstein* v. *Carriere*, 373 F.3d 275, 284 (2d Cir. 2004); *Escriba* v. *Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014) ("As a

threshold matter, we generally do 'not review a denial of a summary judgment motion after a full trial on the merits* * * * This general rule, however, does not apply to those denials of summary judgment motions where the district court made an error of law that, if not made, would have required the district court to grant the motion,'" quoting *Banuelos* v. *Constr. Laborers' Trust Fund for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004)); *Mincy* v. *McConnell*, 523 F. App'x 898, 900 (3d Cir. 2013) (denial of summary judgment allowed following full trial on the merits "when 'dispositive legal question[s]' are presented," quoting *Tuohey* v. *Chicago Park Dist.*, 148 F.3d 735, 739 n.5 (7th Cir. 1998)); *Feld* v. *Feld*, 688 F.3d 779, 781-782 (D.C. Cir. 2012).

The Seventh Circuit has the pre-*Ortiz* precedent relied on by the court below. *Chemetall GMBH* v. *ZR Energy, Inc.*, 320 F.3d 714, 718-719 (7th Cir. 2003) and *Housinks* v. *Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008). The non-precedential decision in *Elusta* v. *Rubio*, 418 F. App'x 552, 553-554 (7th Cir. 2011), Pet.-17, is not to the contrary. *Elusta* involved a challenge to the denial of summary judgment following trial of the fact-dependent issue of whether the evidence was sufficient to support defendant's liability for intentional infliction of emotional distress. The Seventh Circuit viewed the case as presenting factual issues. Moreover, defendant-appellant in *Elusta* had made Rule 50(a) and (b) motions but had failed to present to the Seventh Circuit a record adequate to review those Rule 50 motions in the light of the trial evidence. It was in this unusual context that the

Seventh Circuit refused to review the denial of summary judgment.

The Sixth Circuit has not read *Ortiz* to bar review of summary judgment rulings based on purely legal issues. *Nolfi* v. *Ohio Kentucky Oil Corp.*, 675 F.3d 538, 545 (6th Cir. 2012); *In re Amtrust Fin. Corp.*, 694 F.3d 741, 750 (6th Cir. 2012) ("[T]he opinion in *Ortiz* was actually limited to cases where summary judgment is denied because of factual disputes," and distinguishing, at 750 n.4, *Doherty* v. *City of Maryville*, 431 F. App'x 381, 384 (6th Cir. 2011) as *dicta* "as the court ultimately held that the issue was indeed reviewable in the context of a Rule 50(a) motion.").

The Fifth Circuit has not yet reported a case considering *Ortiz* in the context of an appeal challenging the denial of summary judgment on a purely legal issue. Lawson cites the pre-*Ortiz* decision in *Black* v. *J.I. Case Co.*, 22 F.3d 568, 571 n.5 (5th Cir. 1994), where the court declined to consider an appeal on the basis that it involved disputed facts, not a purely legal issue. *Becker* v. *Tidewater, Inc.*, 586 F.3d 358, 365 n.4 (5th Cir. 2009), concerned an appeal following a bench trial—to which Rule 50 does not apply. *McLendon* v. *Big Lots Stores, Inc.*, 749 F.3d 373, 374-375 (5th Cir. 2014), indicates that the Fifth Circuit understands *Ortiz* to be limited to barring post-trial review of summary judgment denials involving disputed issues of fact when no Rule 50 motion challenges the sufficiency of the evidence.

Lawson admits that the Eighth Circuit has not had an opportunity, post-*Ortiz*, to address its prior precedent regarding the appellate review of summary judgment denials raising purely legal issues following a full trial on the merits, in part because the Eighth Circuit has clearly understood that "[t]his very issue was recently raised in *Ortiz*, 131 S.Ct. at 892-93, but the [Supreme] Court decided that it need not address it." *Owatonna Clinic-Mayo Health Sys.* v. *Med. Protective Co. of Fort Wayne, Ind.*, 639 F.3d 806, 810 (8th Cir. 2011).

The Tenth Circuit has achieved a greater degree of consensus on the scope of *Ortiz* than Lawson depicts:

> [T]he *Ortiz* Court left open the possibility that a "qualified immunity plea raising an issue of a purely legal nature" may be "preserved for appeal by an unsuccessful motion for summary judgment, and need not be brought up again under Rule 50(b)." *Id.* at 892 (quotation omitted). Our circuit recognized this exception prior to *Ortiz*. *See Haberman* v. *Hartford Ins. Grp.*, 443 F.3d 1257, 1264 (10th Cir. 2006). And we have stated that the exception remains valid following the *Ortiz* decision. *See Stewart* v. *Beach*, 701 F.3d 1322, 1329 n. 7 (10th Cir. 2012); *see also Feld* v. *Feld*, 688 F.3d 779, 782 (D.C.Cir. 2012) (noting that a majority of circuits recognize this exception for purely legal issues).

Plascencia v. *Taylor*, 514 F. App'x 711, 719 (10th Cir. 2013); *see also Stewart* v. *Beach*, 701 F.3d 1322, 1329 n.7 (10th Cir. 2012) ("In *Copar Pumice Co.* v. *Morris*, 639 F.3d 1025, 1031 (10th Cir. 2011), we considered whether *Ortiz* undermined *Haberman*'s rule and concluded that it did not.").

Lawson asserts that the First, Fourth and Eleventh Circuits continue to hold, post-*Ortiz*, that they will not review the denial of summary judgment on a purely legal issue following a trial. While those circuits have cited *Ortiz* for that proposition, the cases have expressed prudential concerns that, as explained *post* in Section IV, are misplaced.

More importantly for present purposes, the post-*Ortiz* cases in these minority circuits that have declined appellate review *do not* turn on whether purely legal issues raised at summary judgment were inadequately presented via Rule 50 motions. *See, e.g.*, *Jones ex rel.* v. *Massachusetts Gen. Hosp.*, 780 F.3d 479, 488 (1st Cir. 2015) (no Rule 50(a) motion, "[a]fter trial, a party may not invoke any *sufficiency challenges* included only in a summary judgment motion."); *Johnson* v. *Sunshine House, Inc.*, 546 F. App'x 167, 168 (4th Cir. 2013) ("Turning to Johnson's challenge *to the sufficiency of the evidence* supporting the jury's verdict, we note that Johnson never filed a post-verdict motion under Fed.R.Civ.P. 50(b) in the district court. As a result, we are foreclosed from considering her challenge to the *sufficiency of the evidence*."); *Turner* v. *Ramo, LLC*, 458 F. App'x 845, 846 n.1 (11th Cir. 2012) ("We need not address the Ramo Company's

argument that a pretrial denial of summary judgment that raises purely legal questions is appealable. The issue the district court resolved at summary judgment * * * did not present a pure question of law."); *Warfield* v. *Stewart*, 434 F. App'x 777, 780 (11th Cir. 2011) (denial of summary judgment on fact-bound breach of contract claim based on alleged failure to disclose not reviewable on appeal where no Rule 50(a) motion made and Rule 50(b) motion deficient).[17]

In the absence of well-developed, post-*Ortiz* circuit authority applying differing rules in case-dispositive circumstances, i.e., where conflicting circuit court rules of law produce different case outcomes, discretionary review by this Court is unwarranted:

> While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution here of the [question presented] can await a day when the issue is posed less abstractly.

The Monrosa v. *Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959).

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[17] The same is true of *In re Carlson*, 464 F. App'x 845, 849 (11th Cir. 2012), a bench trial case, where Rule 50 was inapplicable. Additionally, the Eleventh Circuit in *Carlson* refused to disturb the denial of summary judgment on a reliance theory where the district court subsequently made factual findings on that same subject based on the trial record.

IV. Although Sun Adequately Preserved Its Legal Theories for Appeal Under Rule 50, the Rationale for Requiring Rule 50 Motions Does Not Apply To Purely Legal Questions Raised in a Summary Judgment Motion.

Reviewing the case law post-*Ortiz*, the D.C. Circuit succinctly articulated the justification for allowing review of summary judgment denials based on purely legal issues, even following a jury trial at which adequate Rule 50 motions were not made:

> The rationale for requiring a Rule 50 motion does not apply to purely legal questions. A Rule 50 motion preserves for appeal a challenge to the legal sufficiency of the evidence because the denial of summary judgment is not the final word on that question, *Ortiz*, 131 S.Ct. at 891, but merely "a prediction that the evidence will be sufficient to support a verdict in favor of the nonmovant," *Chemetall GMBH* v. *ZR Energy, Inc.*, 320 F.3d 714, 718 (7th Cir. 2003). The accuracy of that prediction becomes irrelevant once trial has occurred because "the full record developed in court supersedes the record existing at the time of the summary judgment motion." *Ortiz*, 131 S.Ct. at 889. In other words, once evidence is presented at a trial, any challenge to evidentiary sufficiency at summary judgment becomes moot. *See Rekhi* v. *Wildwood Indus., Inc.*, 61 F.3d 1313, 1318 (7th Cir. 1995) ("[T]he principle that an order denying summary judgment is rendered moot by trial and subsequent

> judgment on the merits is intended for cases in which the basis for the denial was that the party opposing the motion had presented enough evidence to go to trial."). On appeal, there would be no reason to "step back in time" to determine whether the evidence was sufficient for summary judgment. *Chemetall*, 320 F.3d at 719. That question has been overtaken by events —the trial.
>
> But this justification does not apply when the district court rejects a purely legal argument at summary judgment. Had [the plaintiff] raised her legal argument again in a Rule 50 motion, the district court would have been faced with precisely the same question she raised before trial. No changed facts or credibility determinations at trial could alter whether D.C. law permits a condominium owner to use force to exclude another from the building's common areas. *See Wilson* v. *Union Pac. R.R. Co.*, 56 F.3d 1226, 1229 (10th Cir. 1995) ("A critical distinction exists between summary judgment motions raising the sufficiency of the evidence to create a fact question for the jury and those raising a question of law that the court must decide. Where a motion for summary judgment based on an issue of law is denied, appellate review of the motion is proper even if the case proceeds to trial and the moving party fails to make a subsequent Rule 50 motion." (Citation omitted)).

Feld, 688 F.3d at 782.

The reasoning in *Feld* is sound. Moreover, courts routinely distinguish between fact and legal issue-based motions for summary judgment in the context of qualified immunity, as they are required to by *Johnson*, 515 U.S. at 317-318, which clarified this Court's holding in *Mitchell* v. *Forsyth*, 472 U.S. 511 (1985) (a district court's order denying a defendant's motion for summary judgment is an immediately appealable collateral order where the issue is limited to whether or not certain given facts showed a violation of "clearly established" law).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 30, 2015

APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID R. LAWSON, Plaintiff, vs. SUN MICROSYSTEMS, INC., Defendant.	)	1: 07-CV-0196-RLY-MJD Indianapolis, Indiana August 29, 2012

TRANSCRIPT OF JURY TRIAL

VOLUME III

BEFORE THE HONORABLE
RICHARD L. YOUNG, CHIEF JUDGE,
UNITED STATES DISTRICT COURT

Court Reporter: Judy Farris Mason, CSR
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Proceedings reported by stenotype.
Transcript produced by computer-aided transcription.

* * *

[Vol. III-593] may now go back to the jury room. Philip will come back shortly and give you further instructions and answer questions you may have.

Thank you.

THE CLERK: All rise.

(Jury excused)

THE COURT: Please be seated.

Okay. We've got to go over the final instructions, and why don't we take just a few minutes before we do that. Just take five minutes or so. If you need to go down the hall or whatever and refresh, we can do that. And then well come back out and we'll finalize these instructions, and then you'll have a time to prepare and organize, final organization of your arguments.

Okay. So let's just take a few minutes.

I should say any further record? Do you wish to incorporate any arguments you previously made, Mr. Ebert, at the close of all the evidence?

MR. EBERT: Yes, I'd like to renew –

THE COURT: Okay. All right. We'll show that renewed. All arguments previously had are now incorporated, and it's continued under advisement.

THE CLERK: All rise.

(Recess taken from 11:36 p.m. to 1:45 p.m.)

* * *

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID R. LAWSON Plaintiff, vs. SUN MICROSYSTEMS, INC., Defendant.	)	CAUSE NO. 1:07-cv-00196-RLY-MJD

PLAINTIFF'S RESPONSE TO DEFENDANT'S RENEWED RULE 50 MOTION

(Filed Oct. 26, 2012)

On August 29, 2012, the jury awarded Lawson $1.5 Million on his contract claim. Sun's Renewed Rule 50 Motion, however, is argued as if the jury's verdict does not exist. Sun argues its motion as if it were a final argument to the finder of fact and asks the Court to weigh the evidence to find that Lawson did not prevail on his contract claim. Sun's strategy is highlighted by its reliance on evidence offered in its case in chief – evidence offered *after* Sun initially moved for judgment under Rule 50. But the time for final arguments and pleas to reweigh the evidence has passed. The inquiry at this stage, rather, is whether Lawson presented any credible evidence supporting his claim. The weight, if any, of Sun's evidence is now, of course, immaterial; the jury

weighed the evidence when it reached its verdict, and as demonstrated below, that verdict was supported by credible evidence and reasonable inferences therefrom.

As to Lawson's wage claim, Sun ignores the Indiana Wage Claims Statute's definition of "wages." Instead, Sun argues for a narrow definition of "wages" which some courts have used to decide Wage *Payment* Statute claims, and which is not found in the Wage *Claims* Statute. But as discussed below, Lawson's commission *both* (a) meets the broad definition of "wages" found in I.C. § 22-2-9-1(b) *and* (b) qualifies as a wage under the various factors Indiana courts use when deciding Wage Payment Statute claims.

ARGUMENT

I. Standard of Review

Sun's articulation of the Standard of Review for a post-verdict Rule 50 motion is true enough for what it does say. (Doc. 308 at 3). It is more revealing for what it fails to say. Sun omits that "[i]n deciding a Rule 50 motion, the court construes the evidence strictly in favor of the party who prevailed before the jury and examines the evidence only to determine whether the jury's verdict could reasonably be based on that evidence." *Passananti v. Cook County*, 689 F.3d 655, 659 (7th Cir. 2012). In conducting this review, the court does not make credibility determinations or weigh the evidence. *Id.*; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (U.S. 1986). The court reviews the entire record, but "must disregard all evidence

favorable to the moving party that the jury [was] not required to believe." *Passanti* [sic], 689 F.3d at 659 (quoting *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 151 (2000)). The court "must draw all reasonable inferences in favor of the nonmoving party." *Reeves*, 530 U.S. at 150. While the Court should "give credence" to evidence supporting the moving party, that is only if the evidence was uncontradicted, unimpeached, and from disinterested witnesses. *Reeves*, 530 U.S. at 151. Sun fails to state or appreciate these aspects of the standard of review but relies on evidence favorable to its positions and which it introduced in its case in chief – the same evidence that failed to persuade the jury. Simply stated, the standard of review for purposes of Sun's Motion is whether Lawson presented any credible evidence on the essential elements of his claim. *Cf* Fed. R. Civ. P. 50(a) (stating the court may grant a Rule 50 motion when a reasonable jury would not have a legally sufficient evidentiary basis to find for the nonmoving party).

II. Breach of Contract Claim

A. *Lawson Presented Evidence Supporting his Breach of Contract Claim*

1. Lawson proved the existence of a contract.

"The existence of a contract is a question of law." *Batchelor v. Batchelor*, 853 N.E.2d 162, 165 (Ind. Ct. App. 2006). Sun has acknowledged this. (Doc. 188 at

16) ("The first element, existence of a contract, is a question of law."). The Court has determined, as a matter of law, that the 2005 STK Plan documents constituted an enforceable contract. (Doc. 230 at 23). As a result, the Court need not revisit this issue on a Rule 50 motion.

Lawson offered credible evidence that there was an enforceable contract. The requirements of a contract are "offer, acceptance, consideration, and a meeting of the minds." *Mueller v. Karns*, 873 N.E.2d 652, 657 (Ind. Ct. App. 2007); *see also Orr v. Westminster Village North, Inc.*, 689 N.E.2d 712, 720 (Ind. 1997) (stating in analyzing an employee handbook that the document must contain a clear promise and the employee must be aware of its contents and accept the offer by commencing or continuing work).

Lawson presented to the jury the 2005 STK Plan documents. (Exhibits 1, 2, and 3). Those documents evince an intention to be bound. For example:

- The 2005 STK Plan ("Plan") assumed compensation would occur and did not use speculative or contingent language: "Comp Revenue *will* be credited toward your Revenue Quota when you execute a binding contract . . . " (Ex. 1, p. 1) (emphasis added); "Your Target Incentive *is the amount you receive* when you achieve a target level of performance." (Id.) (emphasis added)
- Sun suggests the Plan was illusory and could be rescinded at any time. However,

by its express terms, the Plan was to "remain in effect until a subsequent plan, or amendment to the Plan, becomes effective." (Ex. 1, p. 6)

- The 2005 STK IPAD stated that the Plan constituted "the complete, final and exclusive embodiment of the *entire agreement* between you and StorageTek with regard to the subject matter." (Ex. 2, p. 3, ¶1) (emphasis added)
- The 2005 IPAD expressly assumed its terms amounted to promises and representations: "This IPAD, the Plan, and the Quota Document are entered into without reliance on any promise or representation, written or oral, other than those expressly contained [herein] and they supersede any other such promise, warranties, or representations." (Id.)
- Sun used the IPAD to impose obligations on Lawson: "You must not engage in any conduct which violates . . . StorageTek's ethical standards, policies, or practices . . . Any infraction of these policies . . . will subject you to disciplinary action up to and including termination . . . " (Id., p. 4, ¶ 8)
- The IPAD assumed the 2005 Plan would entitle Lawson to incentive compensation because it warned Lawson that certain infractions would subject Lawson to the "revocation of any incentive under

this Plan to which you would otherwise be entitled." (Id.)

- The IPAD assumed the 2005 STK Plan was valid and enforceable: "If any provision of this IPAD, the Plan, and the Quota Document is determined to be invalid or unenforceable, in whole or in part, this determination will not affect any other provision of this IPAD, the Plan, and the Quota Document and the *provision in question shall be modified by the court so as to be enforceable."* (Id., p. 4, ¶ 9) (emphasis added)
- The 2005 Quota Document stated the employee "*will* receive incentives as described in the Plan and IPAD, if [the employee] qualifies for them." (Ex. 3, p. 1, ¶ 2) (emphasis added)
- The Quota Document further assumed incentives may be "earned" and may constitute "wages." (Id., ¶¶ 5-6)
- The Quota Document specifically provided that STK "may pursue all legal remedies available to *enforce the obligations* outlined in this Quota Document, the Plan, and the IPAD." (Id., ¶ 7) (emphasis added)
- The 2005 STK Plan documents do not contain the classic "contractual disclaimer" that Indiana courts rely upon when finding that a document is not a binding contract. *See, e.g.*, *Uhlman v.*

> *Panares*, 908 N.E.2d 650, 655 (Ind. Ct. App. 2009) (citing *Orr* and holding that an employee handbook bearing a contractual disclaimer does not create a contract); *Hayes v. Trs. of Ind. Univ.*, 902 N.E.2d 303, 312-313 (Ind. Ct. App. 2009) (relying on *Orr* to state that a H.R. manual containing a disclaimer did not create a contract); *Farr v. St. Francis Hosp. & Health Ctrs.*, 570 F.3d 829, 834 (7th Cir. 2009) (relying on *Orr* to say that there could be no contract if the handbook itself stated it was not a contract).

Lawson accepted the offer conveyed in the 2005 STK Plan documents by remaining a STK employee and pursuing an opportunity on STK's and subsequently Sun's behalf. Regardless of what liberties Sun now claims it had to unilaterally modify or terminate the 2005 Plan, Sun never actually did so. *Cf Carroll v. Stryker*, 658 F.3d 675, 683 (7th Cir. 2011) (holding that even though employer reserved right to change compensation plan at any time, the parties manifested their intention to be bound by the plan when employee continued to work after receiving it); *accord Jensen v. Int'l Bus. Machs. Corp.*, 454 F.3d 382, 387 (4th Cir. 2006) ("[A]n employer can modify its offer until the offer's conditions are satisfied. At that point, the employee's right under the unilateral contract is deemed to have accrued or become vested . . . ").

The 2005 STK Plan documents constituted an enforceable contract.

2. Lawson fulfilled his contractual obligations.

Sun claims "no reasonable jury" could find the 2005 STK Plan ambiguous as to when it ended and when the 2006 Sun Plan replaced it. But even the Court has found the 2005 STK Plan to be ambiguous because it did not explain how incentive compensation would be treated if contract execution and initial invoicing occurred *after* the end of the fiscal year but *before* the subsequent plan became effective. (Doc. 230, pp. 24-25).

Sun ignores two critical pieces of evidence presented to the jury. First, the 2005 STK Plan explicitly stated it was effective until replaced. (Ex. 1, p. 6). Notably, Sun does not address or acknowledge this language. Second, Sun fails to acknowledge that the 2006 Sun Plan Goal Sheet stated within its signature block that the 2006 Plan was "*not effective* until this form has been completed and approved at all levels (including Finance)." (Doc. 287-1, Stipulation of Fact # 56; Ex. 80, p. 2 (of exhibit)) (emphasis added). Sun's suggestion that Lawson's ambiguity argument was based solely on the fact that Sun waited until March 2006 to publish the 2006 Sun Plan is untrue.

The jury was presented with the following undisputed evidence:

- Lawson did not receive the 2006 Sun Plan Goal Sheet until April 4, 2006. (Doc. 287-1, Stipulation of Fact #64; Doc. 301, pp. 199:22-200:4)

- When Sun provided Lawson the 2006 Sun Plan Goal Sheet it was not signed and Sun never provided Lawson a signed copy. (Doc. 301, p. 201:9-15)
- The JPMC opportunity was initially invoiced on March 23, 2006. (Doc. 287-1, Stipulation of Fact # 62)
- IBM and JPMC entered into a Letter of Authorization on December 30, 2005. (Doc. 287-1, Stipulation of Fact #46; Ex. 47, pp. 5-9 (of exhibit))
- IBM issued to Sun a "Letter of Intent" on January 11, 2006. (Doc. 287-1, Stipulation of Fact #49; Ex. 54)
- Sun completed on March 16, 2006, its Data Management Tool entries, which placed the JPMC opportunity "'on the books" and "indicate[d] that a deal [had] occurred." (Doc. 287-1, Stipulation of Facts # 58-59)
- Sun attorney Lori Middlehurst, in Sun's first opportunity to address Lawson's claim and at a time roughly contemporaneous with the critical events, stated in a May 12, 2006, email to Lawson that the JPMC deal closed in January 2006. (Ex. 83, p. 2 (of exhibit))
- The Plan Administrator, Phil Auble, was not aware of any evidence showing that as of December 26, 2005, the 2006 Sun Plan Goal Document was "completed

> and approved at all levels." (Doc. 302, p. 496:13-17)

On this undisputed evidence, the jury reasonably found that the 2005 STK Plan was not replaced and did not terminate until April 4, 2006, and that before April 4, 2006, Lawson met the conditions of the 2005 STK Plan – "contract execution" and "initial invoicing", (Ex. 1, p.1) – and therefore fulfilled his contractual obligations.

In the face of this undisputed evidence, Sun lobs several arguments, which all go to the weight of the evidence, not to whether Lawson failed to present any evidence on whether he met the 2005 STK Plan's requirements. Therefore, these arguments are inapt for a Rule 50 motion. Nevertheless, Lawson responds to these points below.

Sun contends Lawson "was informed and knew" he was being placed on the 2006 Sun Plan effective December 26, 2005. Sun bases this contention on Lawson's testimony about Sun's December 26, 2005, letter. Lawson simply acknowledged he received and read the letter. (Doc. 31, pp. 287:8-290:14). His testimony does not indicate he agreed to what the letter stated regarding a transition to the 2006 Sun Plan; in fact, he couldn't agree because as of that date Sun had not provided him the 2006 Sun Plan and neither Sun nor Lawson knew what the terms of the 2006 Sun Plan would be. (Doc. 31, pp. 348:19-349:15). Lawson signed the letter, but his signature only acknowledged that he received and understood the

letter. (Ex. 37, p. 3 (of exhibit)). The letter did not state whether it superseded the 2005 STK Plan documents, a point the Court previously made. (Doc. 230, p. 25) ("It is not clear, based upon the plain language of this document, whether the 2005 STK Documents are superseded by the provision of the letter.")

With respect to the draw Lawson received in February 2006, evidence contradicted Sun's argument that it was a draw under the 2006 Plan. Exhibit 105, entitled "Draw Payment Schedule," was the commissions accounting form Sun used to summarize the $17,000 draw Lawson received. (Doc. 301, p. 305:2-6; Ex. 51). This Schedule identified Lawson's "Plan Title" as "Service Sales Executive," which was Lawson's job title under the 2005 STK Plan. (Ex. 51; Doc. 301, p. 319:3-13; Ex. 1; Ex. 3). For the 2006 Sun Plan, Sun purportedly changed Lawson's job title to "Sales Specialist I." (Doc. 301, p. 319:14-20; Doc. 287-1, Stipulated Fact #43; Ex. 37, p. 1 (of exhibit)). Sun's Draw Payment Schedule did not reflect this change. Additionally, the Draw Payment Schedule directed Lawson to "the IPAD" for further information. (Ex. 105). "The IPAD" referred to the Incentive Plan Administration Document, a 2005 STK Plan document. (Doc. 301, p. 319:21-25). There was no evidence of a 2006 Sun Plan IPAD.

Sun next points to evidence suggesting the 2004 and 2005 STK Plans were retroactive to January 1 as proof that no reasonable jury could determine that the 2006 Sun Plan was not made retroactive to

December 26, 2005. Sun fails to address conflicting evidence favoring Lawson. One, the 2006 Sun Plan Goal Document stated the Plan was "not effective" until it was approved at all levels; the 2004 and 2005 STK Quota Documents did not contain similar language. Two, the 2004 and 2005 STK Plan roughly maintained Lawson's prior quota. The 2006 Sun Plan, however, increased his goal from $1,910,576 (2005) to $21,229,000 (2006). (Ex. 3; Ex. 83, p. 3 (of exhibit)). Three, the 2006 Sun Plan was with a different employer (Sun) than the 2004 and 2005 Plans (STK). Four, the 2004 and 2005 Plans covered a 12 month period and Lawson received his 2004 and 2005 quota sheets relatively early in the year: January 30 and April 25. (Doc. 300, p. 95:3-11; Ex. 3). However, the 2006 Sun Plan ostensibly covered a six month period and Lawson received it more than half way through that time period. (Doc. 301, pp. 193:14-17, 199:22-200:4).

Auble did testify that it was his "opinion" and "interpretation" that the 2005 STK Plan terminated on December 26, 2005, and that the 2006 Sun Plan was retroactively effective to December 26, 2005. However, he conceded the 2005 STK Plan was open to interpretation and there could be conflicting interpretations that were both reasonable. (Doc. 301, pp. 343:21-344:15). He agreed the plan administrator could be mistaken in how he or she interpreted the incentive plans. (Doc. 301, p. 351:2-5). Auble testified that he believed the 2006 Plan became effective on December 26, 2005, even though it was not published

until March 13, 2006 (Doc. 301, pp. 348:17-349:7). Despite that concession, he still maintained the 2006 Sun Plan was effective on December 26, 2005, even though at that time there was no way for Lawson or Sun to know its terms. (Doc. 301, p. 349:10-20). In fact, Auble agreed to the astonishing proposition that the 2006 plan "was effective before anyone knew what it said." (Doc. 301, p. 349:21-23). Moreover, during Sun's case in chief, Auble was shown on cross examination to be unaware of many critical facts. (Doc. 302, pp. 483-498). He offered interpretations that directly conflicted with the plain language of the 2005 and 2006 plan documents. (Doc. 302, pp. 491:23-494:5, pp. 495:20-496:17). The jury – instructed it was the judge of witnesses' credibility and free to consider a witness's manner on the stand, lack of knowledge about facts testified about, and the extent to which the testimony was supported or contradicted by other evidence (Doc. 304, Final Instruction No. 10) – could disregard Auble's "opinions" and find that Sun did not effectively make the 2006 Sun Plan retroactive to December 26, 2005, and did not effectively replace and terminate the 2005 STK Plan as of that date.

Finally, Sun points to evidence indicating Lawson did not submit a commission request for the JPMC transaction within 30 days of the end of the 2005 fiscal year. Sun does not acknowledge that a reasonable inference that is if the 2005 STK Plan did not end at the end of the fiscal year, then the deadline to submit a commission request would concomitantly extend to 30 days after the subsequent Plan became

effective. Lawson submitted his commission request on February 22, 2006. (Ex. 62). That is obviously no later than 30 days after April 4, 2006, which is the date he received his 2006 Goal document, which effectively terminated the 2005 Plan. (Doc. 302, p. 495:11-19).

3. Sun Breached the Contract.

Sun wrongly asserts the jury could not find Auble's interpretations of the 2005 STK Plan documents unreasonable, arbitrary, or capricious. Auble's testimony had numerous problems, including how he interpreted the Plan documents. To cite one example: He asserted that after Sun acquired STK, the 2005 STK Plan's definition of "ESS" changed to exclude Sun as a manufacturer, and he maintained this even after acknowledging that the 2005 STK IPAD – which he drafted and released contemporaneously with Sun's acquisition of STK – said no such thing. (Doc. 302, pp. 492:5-494:5). In light of this incredulous testimony, the jury, entitled to weigh a witness's credibility, could reasonably have determined that all of Auble's opinions and interpretations should be discounted at best or disregarded entirely. The Court may as well under Rule 50. *Reeves*, 530 U.S. at 151 (stating the reviewing court may only give credence to unimpeached and uncontradicted evidence from disinterested witnesses).

Sun's representation that Lawson's argument at trial was that his *consent* to his 2006 Sun Plan Goal

document was required before the 2005 Plan was superseded is inaccurate. Lawson argued he had to at least *receive* the 2006 Sun Plan Goal document before the 2005 Plan terminated. Lawson's position is supported by common sense and the explicit language in the 2005 STK Plan (Ex. 1) ("[The 2005 STK Plan] will remain in effect until a subsequent plan, or amendment to the Plan, becomes effective") and the 2006 Sun Plan Goal document (Ex. 80) ("[The 2006 Sun] Plan is not effective until this form has been completed and approved at all levels (including Finance)"). Lawson has not confused the concepts of offer and termination: rather, his argument is based on the Plan documents Sun drafted and provided him. These documents intrinsically linked the concepts of the termination of the 2005 STK Plan with the offer of the 2006 Sun Plan. It is Sun that has rendered the concepts of offer and acceptance meaningless by arguing that a contract, the 2006 Sun Plan, was entered into before Sun offered it, before Lawson could possibly have accepted it, and before its goal document was "approved at all levels."

4. Lawson's damages were reasonably anticipated.

In the Rule 50 motion it made at trial, Sun failed to argue that Lawson did not present evidence on whether his alleged damages were reasonably anticipated. (Doc. 302, pp. 474:20-476:16). Therefore, for its renewed Rule 50 motion, Sun has waived that argument. *See* Fed. R. Civ. P. 50, *Notes of Advisory Committee*

on 2006 Amendments ("Because the Rule 50(b) motion is only a renewal of the pre-verdict motion, it can be granted only on grounds advanced in the pre-verdict motion."); *McCarty v. Pheasant Run, Inc.*, 826 F.2d 1554, 1555-1556 (7th Cir. 1987) (holding an issue raised in post-trial motion for judgment notwithstanding verdict is waived if not specifically raised at trial); *Thompson v. Memorial Hosp. of Carbondale*, 625 F.3d 394, 407 (7th Cir. 2010) (stating because Rule 50(b) motion is only renewal of pre-verdict Rule 50(a) motion, it can be granted only on grounds advanced in a pre-verdict motion and moving party could not obtain a judgment on grounds not raised in motion for directed verdict).

Despite Sun waiving this argument, Lawson presented evidence showing his damages could be reasonably anticipated. Before marshaling that evidence, we should define what it means that contract damages be "reasonably anticipated." That is, the damages must be reasonably within the contemplation of the parties. *See Strong v. Commercial Carpet Co.*, 322 N.E.2d 387, 392 (Ind. Ct. App. 1975) *(citing Hadley v. Baxendale* (1854), 9 Ex. 341, 156 Eng. Rep. 145). This rule often limits a plaintiff's ability to recover consequential or reliance damages. *See, e.g.*, *Johnson v. Scandia Assocs.*, 717 N.E.2d 24, 31 (Ind. 1999); *Puller Mortgage Assocs. v. Keegan*, 829 F. Supp. 1507, 1518 (S.D. Ind. 1993). Lawson did not attempt at trial to recover consequential damages. To analogize to the renowned *Hadley v. Baxendale* case (where a plaintiff/miller sought lost profits because the

defendant/common carrier failed to timely deliver a crankshaft), Lawson did not seek damages incurred because he imprudently purchased a multimillion dollar house in anticipation of receiving his unpaid commission. He merely sought the damages contemplated by the formulas Sun provided him in the 2005 STK Plan documents.

Moreover, Lawson presented evidence showing the $1.5 Million verdict was reasonably contemplated by the parties:

- The 2005 STK Plan stated Lawson had the potential to earn more than his target incentive through overachievement. (Ex. 1, p. 1)
- Auble testified the 2005 STK Plan set no cap on what a Service Sales Executive could earn. (Doc. 301, p. 344:16-19)
- The 2005 STK Plan contained a basic formula to calculate the commission earned on a sales opportunity. (Ex. 1, p. 3). That formula consists of addition and multiplication. Nothing in the formula suggests there was a cap to potential commissions.
- Auble agreed that if the conditions of the 2005 Plan Documents were met, a commission as high as $2 Million could be reasonable and deserved. (Doc. 302, pp. 496:18-497:2)
- Lawson notified Auble by email on December 8, 2005, of the possibility of him

earning a commission as high as nearly $3 Million. (Doc. 301, p. 347:3-13; Ex. 26). Auble believed this email to be an inquiry concerning an interpretation of the 2005 STK Plan. (Doc. 301, p. 347:14-17). If Auble, as the plan administrator, thought this was an unreasonable amount which the 2005 STK Plan could not anticipate or countenance, a reasonable inference is that he would have notified Lawson of that interpretation or otherwise voiced that concern. Auble, however, did not respond at all to Lawson's email. (Doc. 301, p. 347:23-25)

- When Sun sales management considered various methods to compensate Lawson, no one stated that the commission Lawson sought was *per se* unreasonable due to the amount or that no one anticipated a Service Sales Executive ever earning that much. (Ex. 81)
- The JPMC opportunity and its size and scope was foreseen and known by STK and Sun management, and at times, Lawson himself took action to make Sun management aware of it. (Doc. 300, pp. 115:17-121:9, 159:21-163:19; Doc. 301, pp. 378:25-379:3, pp. 381:14-383:8; Exhibits 7, 17, 26, 28, 137, 179).

Sun merely cites evidence it considers favorable to its argument that the damages were not reasonably anticipated. The jury was entitled to weigh *all* the

evidence presented and find Sun's arguments unavailing.

In addition, Sun offers three arguments why the damages were not reasonably anticipated. One, Sun asserts Auble could not have known that Sun was going to acquire STK. However, when Sun *did* acquire STK on August 31, 2005, Auble issued on September 1, 2005, a revised IPAD that preserved the definition of "ESS" (thus maintaining the definition of what Lawson could sell to receive incentive compensation). (Ex. 2, p. 5). The revised IPAD even contained a section dedicated to the "Sun Merger," where, given Sun's and Auble's position at trial that Lawson could not sell a maintenance contract on Sun equipment under the 2005 STK Plan, one would expect a statement to that effect. That section says no such thing. (Ex. 2, p. 7). While Auble testified he did not understand that a STK SSE might sell services on Sun paper, he acknowledged he failed to revise the 2005 STK Plan documents to reflect that, and what's more, it was obvious that Auble had no understanding of the JPMC transaction or its status either at the time of the acquisition or following it. (Doc. 302, pp. 485:1-487:14, 488:10-22).

Two, Sun argues Lawson failed to meet the 2005 STK Plan's conditions because the JPMC opportunity was allegedly a "renewal." However, the evidence established that the JPMC transaction met the 2005 STK Plan's definition of "new business" because it was a service contract almost entirely on equipment not previously under maintenance with STK. (Ex. 1,

p. 2; Ex. 2, p. 5; Doc. 287-1, Stipulated Fact # 74; Doc. 301, p. 182:1-9). Other evidence supported a finding that the JPMC transaction did not meet the 2005 STK Plan's definition of "renewal." For example, Sun's "data management tool," which was used to "[tell] a story of how the deal was constructed" marked the transaction as "New Business." (Doc., 301, pp. 277:21-278:5, 279:20-280:11; Ex. 89, p. 13). Sun also received cancellation notices on December 1, 2005, even though the Statement of Work between IBM and Sun was allegedly going to extend into 2006. (Doc. 301, pp. 177:6-178:7, 275:5-13; Ex. 23).

Three, Sun argues that Lawson's damages were unforeseen because the JPMC transaction was allegedly a "low-margin deal." However, Sun's evidence on this issue was generalized at best. Besides Tracey O'Toole's statement that it was in the "single digits" (Doc. 302, p. 578:4-6), Sun offered no actual figures or percentages regarding what the profit margin was.[1] If Sun could overcome Lawson's commission rights based on an allegedly low profit margin, Sun had the burden of proof on the issue, and the jury was free to find that it failed to meet it.

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[1] The closest Sun came to presenting cold figures on this issue was Caldara's testimony that Sun reduced her $21,000 commission by $750, a decrease of merely 3.6%, because of the pricing concessions Sun gave IBM. (Doc. 301, p. 273:17-274:5). A logical and reasonable inference is that Sun's pricing concessions were less and its profit margin was greater than Caldara's and O'Toole's generalizations suggested.

B. *The Jury's Verdict Was Supported by the Evidence*

Sun's argument that the jury's verdict is not supported by the evidence omits evidence presented to the jury and inaccurately states applicable case law.

Lawson testified in detail how the 2005 STK Plan calculated commissions and presented demonstrative exhibits summarizing his testimony. (Doc. 300, pp. 89:9-22; Doc. 301, pp. 208:18-216:23; Ex. 1, p. 3). Lawson testified that based on an annual contract value of $19,830,451, the JPMC transaction would, without factoring in the multi-year incentive, produce a commission of $1,449,994. (Doc. 301, pp. 216:7-23). Sun ignores this evidence and inaccurately asserts that Lawson only presented evidence justifying a verdict of either $1,953,112 or $2,486,086.21. Lawson had the burden to prove that the multi-year incentive should be applied, and it can be understood that the jury, finding that he did not meet that burden, rationally awarded Lawson $1.5 Million.

Even assuming *arguendo* that the jury's award is not rationally related to the evidence, *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544 (7th Cir. 1990), hardly stands for the proposition that the Court should overturn the award. Instead, *Pincus* instructs that the jury's award must be "irrationally disproportionate," which is not the case here. 893 F.2d at 1554 ("Because fixing a damage award is an exercise in fact-finding, only those awards that are monstrously

excessive, born of passion and prejudice, or not rationally connected to the evidence may be altered."). And when the jury's award is found to be "irrationally disproportionate," the appropriate remedy is not to throw the award out entirely, but to impose a court-ordered remittitur, or if the plaintiff will not accept the remittitur order, order a new limited trial on damages only. *Id.* at 1556. *Cf Int'l Fin. Servs. Corp. v. Chromas Techs. Can., Inc.*, 356 F.3d 731, 739 (7th Cir. 2004) (ordering a remittitur of a $1,099,277.28 jury award on a breach of contract claim where the only claim made by nonbreaching party was that he had suffered damages in the amount of $949,649.60).

The Court should uphold the jury's verdict on the breach of contract claim.

III. Wage Claim

A. *The Court Previously Determined that Lawson's Commission is a "Wage"*

In its Summary Judgment Entry, the Court stated: "Thus, to the extent Plaintiff is entitled to incentive compensation under the 2005 STK Plan Documents, the court finds that Plaintiff's incentive compensation is a 'wage' for the purposes of the Wage Claims Statute." (Doc. 230 at 30). The condition precedent in the Court's holding ("*to the extent Plaintiff is entitled to incentive compensation under the 2005 STK Plan Document*") was satisfied when the jury rendered its verdict. *See* Doc. 295 (showing that jury found that Lawson fulfilled all requirements

under the 2005 STK Plan). Based on the Court's Summary Judgment Entry, then, the logical conclusion is that Lawson's incentive compensation is a "wage" for purposes of the Indiana Wage Claims Statute.

That this is the logical conclusion is shown by the fact that the evidence the Court relied upon in its Entry was also produced at trial. The Court pointed to the plain language in the 2005 STK Plan documents, that Lawson's commission was not difficult to calculate, and that it was to be paid as soon as administratively practicable. Evidence of these things was presented at trial. Therefore, Lawson requests that the Court apply its prior ruling on this issue and determine that Lawson is entitled to liquidated damages and reasonable attorney fees under the Wage Claims Statute.

If, however, the Court believes it is appropriate to renew its consideration of this issue, the result reached should be the same. Lawson explains why below.

B. *Whether the Commission is a "Wage" Should Be Decided by the Court*

Sun fails to argue it explicitly, but implies the jury should have decided whether Lawson's commission was a "wage" under Indiana's Wage Claims Statute. However, both the status of the record and Indiana case law directs the Court to decide the question as a matter of law.

1. The status of the record places the issue within the Court's consideration.

The Court's preliminary issue instruction stated the jury "may" be asked to decide whether Lawson's commission was a wage within the meaning of the Wage Claims Statute. (Doc. 305, Preliminary Jury Instruction #3). This wording was based on the jointly proposed issue instruction the parties tendered on August 23, 2012. (Doc. 288-1). When the parties tendered their proposed issue instruction, they stated that it was their "understanding . . . that it remains an open question whether or not the jury will be asked at the conclusion of the trial to find whether the potential commission is a 'wage' and that the Court's decision on this question may depend on the evidence the parties present." (Doc. 288). At the conclusion of the trial, the Court removed the reference to the wage claim from its final jury instructions. (Doc. 304, Final Instruction #4).[2] Sun did not object to this instruction or to the Court's verdict form, which did not reference the wage claim. (Doc. 295). *Cf* FED. R. CIV. P. 51(c) and (d); *Haley v. Gross*, 86 F.3d 630, 644 (7th Cir. 1996) ("[F]ailure to challenge a jury instruction in a civil case constitutes

[2] To the extent any juror remembered (which Lawson submits is highly unlikely) during deliberations that the preliminary instruction stated the jury "may" be asked to determine whether the commission is a "wage," the removal of the reference would logically suggest to the juror that he or she was *not* being asked to decide the issue during deliberations.

waiver of that challenge and precludes appellate review."). Therefore, the issue was not given to the jury, Sun failed to object to this procedure and has waived any objection to it, and the issue remains before the Court.

2. Courts have consistently resolved whether compensation is a "wage."

Indiana's courts determine through summary judgment motions the issue of whether a form of compensation is a "wage" under either Indiana's Wage Payment or Claims Statute. The list of cases is so lengthy we have put it in the footnote below.[3] We

[3] *See, e.g.*, *Highhouse v. Midwest Orthopedic Institute*, 807 N.E.2d 737, 740-741 (Ind. 2004) (affirming summary judgment order concluding commissions were not wages within meaning of Wage Payment Statute); *Quezare v. Byrider Fin., Inc.*, 941 N.E.2d 510, 515 (Ind. Ct. App. 2011) (affirming summary judgment order finding a bonus was not a wage); *Rodts v. Heart City Auto., Inc.*, 933 N.E.2d 548, 555 (Ind. Ct. App. 2010) (affirming summary judgment regarding whether deferred compensation was a "wage"); *McCausland v. Walter USA, Inc.*, 918 N.E.2d 420, 422 (Ind. Ct. App. 2009) (affirming summary judgment order concluding employee's commissions, bonuses, and vacation pay were not wages under Wage Payment Statute); *Davis v. All Am. Siding & Windows, Inc.*, 897 N.E.2d 936, 944 (Ind. Ct. App. 2008) (concluding on appeal from summary judgment order that a commission was not a wage under Wage Payment Statute); *Prime Mortgage USA, Inc., v. Nichols*, 885 N.E.2d 628, 672 (Ind. Ct. App. 2008) (concluding that a commission met the definition of "wage" under Wage Payment Statute); *Swift v. Speedway Superamerica LLC*, 861 N.E.2d 1212, 1213 (Ind. Ct. App. 2007) (affirming summary judgment order holding that deferred compensation was not a wage under Wage Payment

(Continued on following page)

were unable to locate an Indiana case where it appears a jury resolved the issue.

Other jurisdictions determine as questions of law whether compensation is a "wage" under a particular

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Statute); *Gress v. Fabcon*, 826 N.E.2d 1, 4 (Ind. Ct. App. 2005) (affirming summary judgment order concluding that employee's commissions were not wages under Wage Payment Statute); *J. Squared v. Herndon*, 822 N.E.2d 633 (Ind. Ct. App. 2005) (addressing whether a commission was a wage under *de novo* review); *Wank v. St. Francis College*, 740 N.E.2d 908, 909 (Ind. Ct. App. 2000) (affirming order on parties' cross summary judgment motions concluding that severance pay was not a "wage" under Wage Payment Statute); *Pyle v. National Wine & Spirits Corp.*, 637 N.E.2d 1298 (Ind. Ct. App. 1994) (affirming summary judgment order concluding a bonus was not a "wage" under Wage Claims Statute); *cf. Naugle v. Beech Grove City Schools*, 864 N.E.2d 1058 (Ind. 2007) (addressing interpretative issues under the Wage Payment Statute as questions of law); *accord Thomas v. H&R Block*, 630 F.3d 659, 661 (7th Cir. 2011) (affirming summary judgment order concluding that "end of season" compensation was not a "wage" under Wage Payment Statute); *Harney v. Speedway SuperAmerica, LLC*, 526 F.3d 1099, 1100 (7th Cir. 2008) (affirming summary judgment order concluding a bonus was not a wage under Wage Payment and Wage Claim Statutes); *Herremans v. Carrera Designs*, 157 F.3d 1118, 1120 (7th Cir. 1998) (affirming summary judgment order concluding a bonus was not a wage under Wage Payment Statute); *Miller v. Zimmer, Inc.*, 2012 U.S. Dist. LEXIS 115044 (N.D. Ind. Aug. 14, 2012) (holding as a matter of law that bonus was not a wage under Wage Payment Statute); *Rumler v. Gen. Revenue Corp.*, 2007 U.S. Dist. LEXIS 32308 (S.D. Ind. May 1, 2007) (summary judgment order that bonus was not a wage under Wage Payment Statute); *Whitsell v. Bradshaw Ins. Group, Inc.*, 321 F. Supp. 2d 983, 986 (N.D. Ind. 2004) (summary judgment order that a bonus did not meet the definition of "wage").

statute. *See, e.g.*, *Tabor v. Levi Strauss & Co.*, 801 S.W.2d 311, 313 (Ark. Ct. App. 1990) (stating it was a question of law whether fringe benefits met a statutory definition of "wages"); *Kerin v. Unemployment Ins. App. Bd.*, 87 Cal. App. 3d 146, 147 (Cal. App. 3d Dist. 1978) (stating it was a question of law whether back pay was a "wage" under unemployment insurance statute); *Ass'n Res. v. Wall*, 2 A.3d 873, 888 (Conn. 2010) (stating whether bonus was a "wage" under Connecticut wage statute was a question of statutory construction and of law); *Betsy Ross Pizza v. Singleton*, 2001 Del. Super. LEXIS 29, at *4 (Del. Super. Ct. Jan. 18, 2001) (stating it was a question of law whether "under the table" wages were "wages" under Delaware's Worker's Compensation Act); *Paolini v. Albertson's, Inc.*, 149 P.3d 822, 824 (Idaho 2006) (stating it was a question of law whether stock options were a "wage" under Idaho's wage statue); *Gabelmann v. NFO, Inc.*, 571 N.W.2d 476, 483 (Iowa 1997) ("Whether the housing allowance constitutes 'wages' for purposes of [Iowa wage statute] involves statutory interpretation which is a question of law for the court to decide."); *Dennis v. Jager, Smith & Stetler, P.C.*, 2000 Mass. Super. LEXIS 114, at *24 (Mass. Super. Ct. 2000) (treating a claim under Massachusetts wage act as a question of law); *Hens v. Employment Div.*, 653 P.2d 1301, 1303 (Or. Ct. App. 1982) (stating that meaning of "guaranteed wage" under Oregon's unemployment insurance statute was a question of law); *Scott v. Workers' Comp. App. Bd. (Crown Cork & Seal Co.)*, 895 A.2d 68, 70, 71-72 (Pa. Commw. Ct. 2003) (stating it was a question of law

whether stock options were wages for purposes of Pennsylvania's Worker's Compensation statute); *Erdman v. Jovoco, Inc.*, 512 N.W.2d 487, 488 (Wis. 1994) (stating whether commissions were "wages" within meaning of Wisconsin's payroll withholding statute was a question of statutory interpretation and of law).

Sun argues the issue may be a mixed one of law and fact and obliquely argues the Court "could have" submitted the wage claim to the jury. But Sun fails to cite one case that treated the issue as a mixed one of law and fact or where the jury decided the issue. Sun's attempt to analogize this case to others involving mixed questions of fact and law should fail. The issue in *Anderson v. First American Group of Cos.*, 818 N.E.2d 743 (Ill. Ct. App. 2004) was not the definition of wages; it was whether an individual was an employee. Sun's citation to *Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633 (Ind. 2012) and *Estate of Short v. Brookville Crossing 4060 LLC*, 972 N.E.2d 897 (Ind. Ct. App. 2012) adds nothing to its claim that this issue is a mixed question of law and fact. Sun offers no common thread between this case and *Gill* and *Short* except to imply that because cases bearing little resemblance to this one involved mixed questions of law and fact, then the jury should have decided the wage claim in this case. This is hardly a convincing reason to endorse Sun's argument. Moreover, to the extent there are any mixed questions of fact and law, the jury resolved the fact question when it determined that Lawson met the conditions of the

2005 STK Plan. What remains is the legal inquiry of whether Lawson's commission met the statutory definition of "wage." Sun agrees that the Court is empowered to rule as a matter of law when no fact questions remain. (Doc. 308 at 15) ("Thus, even with a mixed question of law and fact, the Court is empowered to rule as a matter of law when no fact question exists.").[4]

[4] During the September 20, 2012, status conference, the Court contemplated whether the Wage Claims Statute should be analogized to punitive damages, which are usually awarded by a jury. *McGarrity v. Berlin Metals*, 774 N.E.2d 71, 77 (Ind. Ct. App. 2002). Lawson respectfully submits this is an improper analogy. Juries decide whether to award punitive damages because it is a discretionary decision. *Stroud v. Lints*, 790 N.E.2d 440, 444 (Ind. 2003). The *amount* to award is also within the jury's discretion. *Bangert v. Hubbard*, 126 N.E.2d 778, 782-783 (Ind. Ct. App. 1955). But the Wage Claims Statute leaves no room for discretion. It states that the claimant "shall" be awarded treble damages and attorneys' fees as "liquidated damages" if the former employer fails to pay the wages the claimant are [sic] owed upon termination. I.C. § 222-5-2; *see also* I.C. 22-2-9-4 (provision of the Wage Claims Statute incorporating I.C. § 22-2-5-2). Relatedly, an award of punitive damages requires clear and convincing evidence that the defendant acted with malice, fraud, or with willful and wanton misconduct. *Wohlwend v. Edwards*, 796 N.E.2d 781, 784-785 (Ind. Ct. App. 2003). The Wage Claims Statute does not contain a "clear and convincing" burden of proof and imposes damages without any *mens rea* requirement.

C. *Lawson's Incentive Compensation Meets the Wage Claims Statute's Definition of "Wage."*

1. The Wage Claims Statute defines "wage" broadly.

Because the Indiana General Assembly defined "wages" in the Wage Claims Statute, the Court's inquiry is primarily one of statutory construction. The words and phrases in Indiana's statutes "shall be taken in their plain, or ordinary and usual, sense." I.C. § 1-1-4-1(1). If a statute is clear, it should not be interpreted by a court. *Indiana Alcoholic Bev. Comm. v. Osco Drug, Inc.*, 431 N.E.2d 823, 833 (Ind. Ct. App. 1982); *cf. Conn. Nat'l Bank v. Germain*, 530 U.S. 249, 253-254 (U.S. 1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 597 (U.S. 1995) (Ginsburg, J., dissenting) ("To construe a legislatively defined term, courts usually start with the defining section.").

The Wage Claims Statute broadly defines "wages" as "*all amounts* at which the labor or service rendered is recompensed, whether the amount is fixed or ascertained on a time, task, piece, or *commission basis*, or in any other method of calculating such amount." I.C. § 22-2-9-1(b) (emphasis added). Lawson's incentive compensation meets this broad definition for several reasons. However, before articulating

these reasons, we must address Sun's argument that the Court should adopt a narrow definition of "wages" not found in I.C. § 22-2-9-1(b).

2. Sun argues for a narrow and improper definition of "wages."

Remarkably, Sun does not cite or refer to the Wage Claims Statute's broad definition of "wages." Instead, Sun argues for a narrow definition of wages by relying on the multi-factor test the Seventh Circuit used in *Thomas*. By so arguing, Sun conflates Indiana's Wage Payment Statute with Indiana's Wage Claim Statutes. But they are different statutes with different purposes.

The Wage Payment Statute was passed in 1933 and is "designed to insure the regularity and frequency of wage payments." *Miller v. Zimmer, Inc.*, 2012 U.S. Dist. LEXIS 115044, *7-8 (N.D. Ind. Aug. 14, 2012); *see also Wilson v. Montgomery Ward & Co.*, 610 F. Supp. 1035, 1038 (N.D. Ind. 1985) ("Its thrust is to create a statutory requirement that wages be paid semi-monthly or bi-weekly . . . [and is] designed to insure the regularity and frequency of wage payments."); *Pope v. Wabash Valley Human Services, Inc.*, 500 N.E.2d 209, 212 (Ind. Ct. App. 1986) (same). The Wage Payment Statute does not define "wage" and Indiana's courts use a narrow definition. "Wages are 'something akin to the wages paid on a regular, periodic basis for regular work done by the employee." *Wank*, 740 N.E.2d at 912 (*citing Wilson*, 610 F. Supp.

at 1038). *Wank*'s quotation of *Wilson* must be read in its entirety: "Rather, the 'wages' *contemplated by I.C. 22-2-5-1* are something akin to the wages paid on a regular, periodic basis for regular work done by the employee – the paycheck which compensates for the work done in the previous two weeks." *Id.* (emphasis added). The italicized language refers to the Wage Payment Statute and the *Wank/Wilson* definition applies only to that statute. *Cf id.; see also Jackson v. ArvinMeritor, Inc.*, 2008 U.S. Dist. LEXIS 514, at *13-16 (S.D. Ind. Jan. 3, 2008) (discussing *Wank, Wilson*, and the differences between the two statutes).

For the Wage Claims Statute, passed in 1939, Indiana courts have rejected the narrow definition of "wages" used under the Wage Payment Statute. *Jackson*, 2008 U.S. Dist. LEXIS 514 at *15 (*citing Johnson v. Wiley*, 613 N.E.2d 446, 449-450 (Ind. Ct. App. 1993). *Johnson* paraphrased the Wage Claims Statute's broad definition of "wages" as that which included "not only periodic monetary earnings, but all compensation for services rendered without regard to the manner in which such compensation is computed." *Johnson*, 613 N.E.2d at 450, n. 3. The Wage Claims Statute's broader definition is logical because its purpose is different (and broader) than the Wage Payment Statute's. Unlike the Wage Payment Statute, which is concerned with ensuring regular, periodic payments, the Wage Claims Statute's concern is that a discharged employee is timely paid all he is owed. *Cf. Pyle v. National Wine & Spirits Corp.*, 637 N.E.2d 1298, 1299 (Ind. Ct. App. 1994) (stating the

Wage Claim Statute requires employers to pay an employee who has been terminated the unpaid wages or compensation to which the employee is entitled); *St. Vincent Hosp. & Health Care Ctr., Inc. v. Steele*, 766 N.E.2d 699, 706 (Ind. 2002) (Boehm, J., concurring) (stating that the Wage Payment Statute's requirement of regular, periodic payments "is perfectly understandable as applied to the vast majority of workers who are dependent on their paychecks for their day-to-day expenses.").

Despite the statutory differences, Sun's argument insists that the Court should analyze this case as if he were proceeding under the Wage Payment Statute. This would be mistaken analysis. *Cf. Miller*, 2012 U.S. Dist. LEXIS at *9-10 *(citing Wilson*, 610 F. Supp. at 1038) ("[Plaintiff's] counsel mistakenly believes that [the Wage Payment Statue and Wage Claims Statute] are somehow related simply because they appear together in the statute book."). Sun attempts to apply a narrow definition of "wages" to Lawson's claim by urging the Court to rely solely on the multi-factor test in *Thomas.* But *Thomas* decided a lawsuit brought under the Wage Payment Statute, not the Wage Claims Statute. 630 F.3d at 661. The *Thomas* court initially referred to the Wage Claim Statute's definition of "wages", *id.* at 664, but then surveyed a series of Indiana cases and assembled four factors Indiana courts have used to evaluate whether

compensation is a wage.[5] *Cf. Miller*, 2012 U.S. Dist. LEXIS at *10. ("[I]n *Thomas*, the Seventh Circuit cursorily referenced the definition of wages in the Wage Claims Act, but then essentially ignored it in favor of the various factors used by Indiana courts to figure out what 'wages' means under the Wage Payment Statute."). With one partial exception, *all* the cases the *Thomas* court reviewed concerned the Wage Payment Statute not the Wage Claims Statute.[6]

Some courts, including *Thomas*, have referenced the Wage Claims Statute's definition of wages to adjudicate Wage Payment Statute claims. *See, e.g.*, *Highhouse*, 807 N.E.2d at 739. This is not a reason to reverse that practice: the principles governing the Wage Payment Statute, which has a narrower scope and purpose, should not be thrust upon litigants bringing claims under the Wage Claims Statute, especially when the latter specifically defines "wages" and the former does not. That this is so is illustrated by contrasting the *Thomas* factors with the broad

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[5] These cases were *Naugle, Highhouse, Kopka, Landau & Pinkus v. Hansen*, 874 N.E.2d 1065 (Ind. Ct. App. 2007), *McCausland, Gress*, and *Prime Mortgage USA, Inc.*

[6] *See Naugle*, 864 N.E.2d at 1060, *Highhouse*, 807 N.E.2d at 738, *Hansen*, 841 N.E.2d at 1072, *Gress*, 826 N.E.2d at 4-5, and *Nichols*, 885 N.E.2d at 663-665. The one partial exception is *McCausland*, where a plaintiff brought claims under both Statutes, but the portions *Thomas* relied on only concerned the Wage Payment Statute. *See Thomas*, 630 F.3d at 665 (citing *McCausland*, 918 N.E.2d 420, 425-426); *see also infra* at 30-31, 32.

definition in I.C. 22-2-9-1(b). One of the *Thomas* factors was whether the payment could be calculated and paid within ten days. 630 F.3d at 666. But the "10-Day Rule" does not appear in the Wage Claims Statute, and the statute's definition of "wages" includes all amounts paid for labor regardless of how or when that amount is calculated. I.C. § 22-2-9-1(b). Another *Thomas* factor is whether the payment is paid on a "regular periodic basis for regular work done by the employee." *Id.* at 665. But this factor is essentially the *Wank* definition of wages, *see Wank*, 740 N.E.2d at 912 (defining "wages" as "something akin to the wages paid on a regular, periodic basis for regular work done by the employee"), and as discussed above, this is the *narrow* definition that should only apply to the Wage Payment Statute.

3. Lawson's commission meets *both* the Wage Claims Statute's broad definition of "wages" *and* the multi-factor test used in *Thomas*.

Regardless of whether one focuses solely on the plain meaning of I.C. § 22-2-9-1(b) or also considers the various *Thomas* factors, the result is the same: Lawson's incentive compensation is a "wage" under the Wage Claims Statute.

a. Statutory Definition

The Wage Claims Statute defines "wages" as "*all amounts* at which the labor or service rendered is

recompensed, whether the amount is fixed or ascertained on a time, task, piece, or *commission basis*, or in any other method of calculating such amount." I.C. § 22-2-9-1(b) (emphasis added). Under the plain and ordinary meanings of these words and phrases, Lawson's incentive compensation is a wage. The 2005 STK Plan documents state that Lawson's incentive compensation would be part of his regular compensation. It was to be paid to Lawson as part of his "total cash compensation package." (Ex. 1, p. 1). Auble confirmed this. (Doc. 301, p. 335:2:6). Incentive compensation was paid to Lawson for reaching a "target level of performance." (Ex. 1, p. 1). STK and Sun paid Lawson incentive compensation to compensate him for the portion of his job not compensated through a base salary. (Ex. 1, p. 1). In fact, STK designed Lawson's 2005 compensation so that more than 50% of his total target income would be based on incentive compensation – $80,000 of a total cash compensation of $155,000. (Ex. 3). The work for which Lawson earned incentive compensation was not incidental to his employment; he received incentive compensation for closing an ESS transaction, which was the *raison d'être* of Lawson's job. In other words, Lawson's incentive compensation was the amount "at which [his rendered] labor or service . . . is recompensed." I.C. § 22-2-9-1(b). Additionally, the amount of the incentive compensation was an amount "fixed or ascertained on a . . . piece or commission basis, or in any other method of calculating such amount." I.C. § 22-2-9-1(b). In all these aspects, Lawson's incentive compensation falls squarely

within plain meaning of the Wage Claims Statute's definition of "wages."

b. Other factors

When analyzed with considerations outside the Wage Claims Statute's definition, Lawson's incentive compensation is still a "wage." First, Lawson's incentive compensation was not related to the overall success of Sun and it was not based on Sun's profits. *Cf. Herremans*, 157 F.3d at 1121 ("Profits are not wages, and neither is a fraction of profits wages; and so a bonus that is based on the performance of a plant rather than on the time or determinable output of the employee is not wages either.") Rather, it was based on his efforts with respect to pursuing and closing an eligible transaction.

Second, Lawson's incentive compensation was to be paid on a regular basis and as soon as administratively possible. (Ex. 1, p. 3) ("For the achievement of your Revenue Quota you will earn incentive payments. These payments *will be paid* on a *regular* biweekly payday *as soon as administratively practicable*, after you have Earned [sic] the incentive as that term is described in the IPAD.") (emphasis added); *see also* Doc. 301, p. 335:10-13 (Plan Administrator testifying that Lawson was to be paid earned incentives as soon as administratively practicable). This corresponds to the intention of the Wage Claims Statute: "the purpose of the statute is to impose a penalty upon an employer for his failure to pay an

employee wages earned, *when due*, after a proper demand has been made therefor." *Herndon*, 822 N.E.2d at 641. (emphasis added) (internal citations omitted). Moreover, to the extent the definition of "wages" depends on whether the compensation is paid on a regular basis (and to be clear, the statutory definition does *not* contemplate that to be a factor), the 2005 STK Plan language indicates that Lawson's incentive compensation *was* in fact to be paid on a regular basis.

Third, Lawson's commission was not difficult to calculate. The commission was earned when the contract was executed and initially invoiced. (Ex. 1, p. 1). Therefore, the commission was ripe on March 23, 2006, when Sun issued its initial invoices. (Doc. 287-1, Stipulation of Fact # 62). The calculation itself was not difficult. It was based on the value of the underlying contract, Lawson's quota, and Lawson's prior attainment toward his quota. (Ex. 1, p. 3). Sun, in fact, provided Lawson the formula to calculate it. (Id.) Because it was easy to calculate, due as soon as administratively possible, and not based on Sun's overall profitability, Lawson's incentive compensation was not a "bonus" that courts often find not to be a wage. *See, e.g.*, *Herremans*, 157 F.3d at 1121. ("Ordinarily it would take weeks to determine a plant's profit for the year just ended. To impose punitive damages on the employer for failing to pay an amount of compensation that could not be computed in time to avoid the penalty would be absurd.")

Fourth, the 2005 STK Plan indicates that Lawson was *entitled* to all earned incentives upon his termination.

> In the event that your employment is terminated . . . you shall be entitled to all your Earned incentives, as defined in the IPAD, the specific Plan applicable to you and your Quota Document, provided the sales transaction is not subject to a Charge Back, or draws that are recoverable affecting the final incentive payment. The final incentive payment, if any, will be made as soon as practicable . . .

(Ex. 2, p. 19). This, again, conforms to the purpose of the Wage Claims Statute: ensuring that a discharged employee is timely paid all he is owed.

Fifth, determining that Lawson's incentive compensation is a wage would achieve the purpose of the statute. Sun terminated Lawson in October 2006. (Doc. 287-1, Stipulation of Fact # 78). By that time, Sun had paid every other employee who earned incentive compensation for the JPMC transaction. (Ex. 361; Doc. 302 p. 523:15-19). But for six years, Sun has wrongly withheld from Lawson his earned compensation for the JPMC deal. After Lawson earned his commission, Sun attempted to bargain itself out from under its obligation to pay Lawson more than $1.4 Million by unilaterally imposing upon Lawson a new pay plan that increased Lawson's goal by more than 1,000% and offering Lawson $54,300. (Doc. 301, p. 314:21-25). Lawson refused to accept

this and the jury's verdict confirms that his refusal was justified.

Lawson acknowledges that some Indiana courts have held that, despite the broad language of I.C. § 22-2-9-1(b), not all commissions meet the Wage Claims Statute's definition of "wages." The most illustrative case is *McCausland*. Its plaintiff was a district sales manager (McCausland) who brought a Wage Claims Statute claim against his former employer. The court said the commissions were not wages for three reasons. One, the sales were neither directly attributable to McCausland nor linked to his efforts. Instead, his commissions were based on his salespeople's sales. Two, McCausland's commissions were calculated on the sales' net profits. Three, the commissions could not always be calculated within the "statutorily mandated ten-days." 918 N.E.2d at 425-426.

These reasons do not apply to Lawson. Lawson was not the manager; he was the salesperson, and even though others were involved in the JPMC opportunity, Lawson's commission rights were directly linked to his own efforts: he had to be assigned to the transaction and execute a binding ESS contract within the life of the incentive plan. (Ex. 1, p. 1). Two, Lawson's commission [sic] were not calculated on the net profit of the transaction. They were calculated on the revenue produced by the transaction – i.e., the "contract value." (Ex. 1, pp. 1, 3; Ex. 3, p. 1). Three, Lawson's commission was not subject to the "10-Day rule." The Wage Claims Statute has no "10-Days"

mandate. Instead, it requires the employer to pay the employee at the "regular pay day for pay period" in which the employment relationship ended. I.C. § 22-2-9-2(a); *see also Herndon*, 822 N.E.2d at 640 (distinguishing between two types of regular paydays – the biweekly draw date and the date commissions are received – and stating that the purpose of the Wage Claims Statute is to ensure payment of all wages "*when due*") (emphasis added).

4. Sun's remaining arguments are unpersuasive.

Sun raises other arguments as to why Lawson's incentive compensation is not a wage. First, Sun argues that *Herndon* is inapplicable. Sun's argument expressly assumes that Lawson failed to meet all the requirements for a commission under the 2005 STK Plan. But the jury's verdict took this argument away. The jury specifically found that Lawson fulfilled the necessary requirements under the 2005 STK Plan. (Doc. 295, ¶ 1).

Second, Sun argues that there were contingencies that *could* affect the amount and timing of the payment. These variables do not make a difference to the analysis. (Doc. 308, pp. 11, 13). There was no evidence of an actual commission split; there was no specific testimony regarding the profit margin on the transaction; the evidence showed that the transaction was not a renewal (the jury's verdict also demonstrates that the jury found that the transaction was

not a renewal because if it had, it would not have found Lawson to have met the requirements of the Plan. *Cf.* Doc. 295, ¶ 1); Sun never amended or terminated the plan or altered Lawson's quota to take into account the looming JPMC transaction; and Sun did not present any evidence as to how the transaction was inconsistent with the intent of the plan or Sun's business objectives. In reality, Lawson's incentive compensation was not subject to or affected by any such variables. Regardless, at some point in time, Lawson's commission was earned and calculable; at that point, Sun should have been [sic] paid the commission as soon as administratively practicable, and Sun's failure to do so makes it subject to the Wage Claims Statute.

Three, Sun relies on the *Thomas* factors. Lawson demonstrated above why the *Thomas* factors should not apply to the Wage Claims Statute and Lawson's claim. But, as also demonstrated above, the *Thomas* factors weigh in favor of Lawson. Lawson's commission was not difficult to calculate, it was to be paid on a regular basis (on the regular bi-weekly payday as soon as administratively practicable), it was paid for Lawson's regular work (selling service plans), it was not linked to any contingencies like the overall profitability of the company, and while Lawson did earn a salary, the Plan documents explicitly state that Lawson's salary and commissions were "designed" to "work together" as Lawson's "total cash compensation." (Ex. 1, p. 1).

Four, in a footnote (Doc. 308 at fn. 3), Sun relies on *McCausland* to imply that the Wage Claim Statute's definition is coextensive with that of the Wage Payment Statute's. Putting aside Sun's failure to mention that the former statute defines wages and the latter does not, there are extensive reasons why Sun's implication is without merit, *see supra* at 22-31, not the least of which is that the reasons the *McCausland* court articulated do not apply to Lawson and his incentive compensation. *See supra at* 30-31.

Five, Sun argues that Lawson was unclear how he would be compensated during late 2005. It is not apparent why this even matters. Lawson was responsible for selling service plans, not for understanding his incentive plan. That the JPMC opportunity went through many iterations does not mean the transaction itself, once it occurred, did not qualify under the 2005 STK Plan and that Lawson's commission was not a wage. Additionally, Lawson's uncertainty was partially due to the effects of the acquisition. There is an unpleasant irony to Sun's argument: the confusion, to the extent it existed, was because Sun failed to clarify how its acquisition of STK would affect Lawson and SSE's incentive rights.

Lastly, Sun asserts that the Wage Claims Statute is penal in nature and must be strictly construed. Several points arise from this assertion. First, we have found no Indiana case stating the Wage Claims Statute should be strictly construed. A few Indiana cases state the Wage *Payment* Statute should be strictly construed. *E & L Rental Equip. v. Bresland*,

782 N.E.2d 1068, 1070 (Ind. Ct. App. 2003). But the issue here is the definition of "wage" – and as detailed above, the Wage Claims Statute defines "wage," the Wage Payment Statute does not, and courts should interpret the statutes differently. Second, Indiana's courts typically strictly construe statutes that involve a type of activity not alleged here. *See, e.g.*, *ABN Amro Mortg. Group, Inc. v. Maximum Mortg., Inc.*, 429 F. Supp. 2d 1031, 1042-1043 (N.D. Ind. 2006) (criminal mischief, deception, and bank fraud statutes); *Hook v. State*, 775 N.E.2d 1125, 1127 (Ind. Ct. App. 2002) (Class D felony statute); *Cherry v. State*, 772 N.E.2d 433, 439 (Ind. Ct. App. 2002) (criminal restitution statute); *Marshall v. State*, 493 N.E.2d 1317, 1319 (Ind. Ct. App. 1986) (habitual offender statute). Third, if the Wage Claims Statute is to be strictly construed, Sun offers no reason why that would mean that Lawson's commission is not a wage. Even statutes that are penal in nature "must not be construed so narrowly as to exclude cases fairly covered thereby." *Smith v. State*, 459 N.E.2d 401, 406 (Ind. Ct. App. 1984). If anything, strictly construing the statute leads to the conclusion that Lawson's commission is a "wage" because the statute's definition expressly includes commissions. I.C. § 22-2-9-1(b). Finally, there is good reason to think the Wage Claims Statute should be construed broadly to effectuate its purpose of ensuring a discharged employee is timely paid all his [sic] owed. *See supra* at 24. As such, the Wage Claims Statute bears striking similarity to at least one other Indiana statute that courts have construed broadly in favor of the employee.

See, e.g., *Walker v. State*, 694 N.E.2d 258, 266 (Ind. 1998) ("[I]n interpreting the provisions of the Worker's Compensation Act, we construe the Act and resolve doubts in the application of terms in favor of the employee so as to effectuate the Act's humanitarian purpose to provide injured workers with an expeditious and adequate remedy.").

D. *The Jury's Verdict Supports a Wage Claim*

Lawson did offer alternative calculations of his commissions. The only difference in these calculations was their starting points (the annual contract values). Everything else was the same including Lawson's prior attainment, his 2005 quota, and the formula used to arrive at the commission figure. (Doc. 301, pp. 208:18-217:8). Other than the different starting points, everything about the calculations was the same.

Additionally, Sun ignores Lawson's evidence that his commission, before adding the multi-year incentive, was $1,449,994. (Doc. 301, pp. 216:7-23). Therefore, Sun's assertion that the jury's award is not the same as that calculated by Lawson is misleading because it fails to account for the fact that the jury's $1.5 million verdict was merely 3.5% more than Lawson's calculation. Furthermore, Sun offers no support for its assertion that the jury verdict cannot be the basis for a wage claim when the jury did not award Lawson the exact amount he calculated.

Most importantly, the jury was not instructed about the Indiana Wage Claims Statute. There is no basis in the record to think they considered whether the commission was a "wage" during deliberations. It would be manifestly illogical (and unjust) to deny Lawson's [sic] his rightful damages under the Indiana Wage Claims Statute on a decision the jury was not asked to make and was not aware was up for their consideration.[7]

CONCLUSION

Lawson respectfully requests that the Court deny Sun's Renewed Rule 50 Motion and enter an order determining that Lawson's commission is a "wage" as defined by the Indiana Wage Claims Statute, applying as liquidated damages the treble damages required by I.C. §§ 22-2-5-2 and 22-2-9-4, and scheduling this matter for a hearing regarding Lawson's attorneys' fees.

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[7] If the Court is concerned the jury's round $1,500,000 verdict could not be the basis for treble damages, the Court has the power to impose a remittitur to $1,449,994, the amount calculated by Lawson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing on October 26, 2012. Notice will be sent to the following parties by operation of the Court's electronic filing system:

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