No. 15-328

In The
Supreme Court of the United States

DAVID LAWSON,

Petitioner,

v.

SUN MICROSYSTEMS, INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The brief in opposition confirms the need for review. Respondent acknowledges that eight circuits are split regarding the question presented. Opp. 31-32, 35-36. As discussed in the petition (Pet. 13-18) and below, the circuit split involves all thirteen circuits. Respondent does not deny that the question is a very important one that arises with great frequency. Nor does Respondent contend that any potential statutory or rule change, or additional percolation of this issue will resolve the entrenched divide over whether a court of appeals may review a "purely legal" challenge rejected on summary judgment but not later raised in a Rule 50 motion.

Instead, Respondent opposes certiorari primarily on two grounds: i) this case does not present the question presented because the Seventh Circuit "did not review the denial of summary judgment"; and ii) Respondent preserved its legal argument regarding contract interpretation in its Rule 50 motions. Opp. 20, 24. Respondent is wrong on both counts, and has reversed its own position on the decision reached by the Seventh Circuit and what purported district court error the Seventh Circuit reversed.

After prevailing on appeal, Respondent reported to the district court that "the Seventh Circuit reversed and remanded the District Court's denial of Sun's Motion for Summary Judgment regarding the

breach of contract claim". Reply App. 2.[1] On remand, Respondent never mentioned its JMOL motion, much less contend that the Seventh Circuit had reversed the district court's denial of JMOL. *See* Reply App. 1-3. Respondent now asserts a new, contrary position to this Court.

Regardless, the Seventh Circuit opinion itself indicates that denial of summary judgment was the sole purported district court error warranting reversal. Likewise, the opinion leaves little room for doubt that the Seventh Circuit would affirm the district court's judgment if this Court were to reaffirm that denials of summary judgment are *never* appealable after a full trial on the merits.

A. Respondent Acknowledges The Entrenched Divide Among The Circuits Concerning The Question Presented.

Respondent concedes that the question presented directly conflicts six circuits. The parties agree that the Second, Third, Ninth and D.C. Circuits have taken a clear and consistent position that they have the power to review orders denying summary judgment after a full trial on the merits where the circumscribed error concerns a question of law. Opp. 31. Respondent acknowledges that the First and Fourth

[1] Defendant's Local Rule 16-2 Statement of Position on Remand is reprinted in full in the appendix (Reply App.) to this reply brief.

Circuits hold to the contrary. Opp. 35. Respondent's contention that the First and Fourth Circuits "have expressed prudential concerns that . . . are misplaced" goes to the merits of the question presented, not to whether it divides the circuits. Opp. 35.

Respondent superfluously observes that "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." Opp. 35 (emphasis in original). But there is no cause to predict, nor does Respondent forecast, that the First or Fourth Circuits will sit *en banc* to overrule their precedents on the question presented.

In response to Petitioner's contention that the Eighth Circuit is internally conflicted on the question presented, Respondent expresses no disagreement. Instead, it merely observes that the Eighth Circuit has not resolved its internal conflict since *Ortiz v. Jordan*, 562 U.S. 180 (2011). Opp. 34. Nor does Respondent address or contest that the regional circuit conflict on the question presented renders the Federal Circuit internally conflicted. *See* Pet. 15.

As the D.C. Circuit observed, the Fifth Circuit's answers to the question presented are not, as Respondent suggests (Opp. 33), in harmony.[2] In *Black v. J.I. Case Co.*, the Fifth Circuit expressly rejected a proposed

[2] *Feld v. Feld*, 688 F.3d 779, 782 n.3 (D.C. Cir. 2012).

"dual system for evaluating denied motions for summary judgment in such circumstances" based on whether they were denied on "factual" or "legal" grounds. 22 F.3d 568, 571 n.5 (5th Cir. 1994). *Black* cannot be harmonized with later Fifth Circuit cases that adopt that very "dual system" for evaluating the appealability of orders denying summary judgment. *See, e.g.*, *Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 n.4 (5th Cir. 2009).

According to Respondent, the Sixth Circuit's statement in *Doherty v. City of Maryville*,[3] that appeal of "a denial of summary judgment . . . following a full trial on the merits when the question is a purely legal one . . . is now clearly foreclosed in light of the Supreme Court's recent decision in *Ortiz*" is mere *dicta*. Opp. 33. Even if that were so, the Sixth Circuit would still be internally conflicted based on the holding in *Kay v. United of Omaha Life Ins. Co.*, that under *Ortiz*, the "neat abstract issues of law" exception for appealability of orders denying summary judgment is limited to questions that "can be asked and answered without reference to the facts of the case." 562 Fed. Appx. 380, 385 (6th Cir. 2014). Petitioner cited *Kay* in his petition on this point (Pet. 16); Respondent ignores *Kay* in its opposition.

Respondent misreads the Seventh Circuit's decision in *Elusta v. Rubio*, 418 Fed. Appx. 552 (7th Cir. 2011), and thus fails to see that it conflicts with the

[3] 431 Fed. Appx. 381, 384 (6th Cir. 2011).

decision in this case. Opp. 32. The order denying summary judgment that the *Elusta* court refused to review did not concern a "fact-dependent issue of whether the evidence was sufficient to support defendant's liability for intentional infliction of emotional distress." Opp. 32. It was instead exactly the sort of question the Sixth Circuit contemplated in *Kay* that can be asked and answered without reference to the facts of the case:

> Rubio essentially argues that the Illinois tort of IIED can never be based on a mere complaint to a police officer. Since, stripped to its essentials, that is all that Elusta alleged, he argues that the district court erred when it denied his summary judgment motion.

418 Fed. Appx. at 554.

The Tenth Circuit questioned the soundness of its precedents on the question presented in *Copar Pumice Co. v. Morris*, 639 F.3d 1025, 1031 (10th Cir. 2011) ("Some language in *Ortiz* appears to undermine *Haberman*."). Respondent counters (Opp. 35) that a later decision noted that the *Copar Pumice* court "considered whether *Ortiz* undermined *Haberman*'s rule and concluded that it did not." *Stewart v. Beach*, 701 F.3d 1322, 1329 n.7 (10th Cir. 2012). But the *Stewart* court's reading of *Copar Pumice* is strained. The court in *Copar Pumice* ultimately decided that it had no need to reconsider *Haberman v. Hartford Ins. Group*, 443 F.3d 1257 (10th Cir. 2006), in light of *Ortiz*. 639 F.3d at 1032.

Respondent erroneously omits the Eleventh Circuit from the list of circuits split over the question presented. Opp. 36. As this Court did in *Ortiz*, the Eleventh Circuit has held unequivocally that it "will not review the pretrial denial of a motion for summary judgment after a full trial and judgment on the merits." *In re Carlson*, 464 Fed. Appx. 845, 849 (11th Cir. 2012) (citation omitted). The Eleventh Circuit stated no exception for jury trials or "purely legal" issues in denials of summary judgment.

In sum, all thirteen circuits are in conflict over the question presented. The need for this Court's intervention to resolve this entrenched divide could not be more pressing.

B. Respondent Now Contradicts Its Previous Acknowledgement That This Case Presents The Question Presented.

On July 14, 2015, Respondent accurately reported the following to the district court after the Seventh Circuit's reversal of the judgment:

> On June 30, 2015, the United States Court of Appeals for the Seventh Circuit ordered as follows: "The judgment of the District Court is REVERSED, with costs, and the case is REMANDED with instructions to enter judgment for Sun." . . . More specifically, *the Seventh Circuit reversed and remanded the District Court's denial of Sun's Motion for Summary Judgment regarding the breach of contract claim* filed by Plaintiff, David R.

> Lawson ("Lawson"), and directed the District Court to enter judgment for Sun as a matter of law.

Reply App. 1-2 (emphasis added).

Before this Court, Respondent contradicts itself. Now Respondent contends that the Seventh Circuit "reviewed the district court's Rule 50 order, assigned error to it, and did not review the denial of summary judgment." Opp. 24. The Seventh Circuit opinion reveals that Respondent had it right the first time.

Recall that on appeal, Respondent's sole contention of district court error was the denial of JMOL on Petitioner's contract claim, and that Respondent's rebuttal to Petitioner's waiver argument focused entirely on its Rule 50(b) motion. *See* Pet. 9-10, 20-21.[4] As Petitioner explained – and Respondent does not dispute – the sole reference to Respondent's motion for summary judgment in the parties' appellate briefing was a single, passing reference in the "Background" section of Respondent's principal brief. Pet. 10.

Nonetheless, the Seventh Circuit *twice* expressly assigned error to the district court's denial of summary judgment on the contract claim:

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[4] Respondent inaccurately states that Petitioner "did not put the adequacy of Sun's Rule 50 motions at issue in the Seventh Circuit." Opp. 21. Petitioner's waiver position necessarily did exactly that, since denial of JMOL was Respondent's sole contention of district court error.

> The district court agreed, denied summary judgment, and allowed Lawson to present extrinsic evidence at trial bearing on Sun's intent that the plan continue beyond the termination date. That was a mistake. . . .
>
> Because the plan language is not ambiguous, this extrinsic evidence simply drops out of the case. The trial was unnecessary.

App. 18, 22.

Significantly, the Seventh Circuit held that Respondent "did not need to raise [the contract interpretation issue] again in its Rule 50(a) and (b) motions." App. 16-17. If the answer to the question presented is no, then Respondent most certainly *did* need to raise the issue again in its Rule 50 motions, and it *did not* preserve the issue by raising it only at the summary-judgment stage. Thus, it is indisputable that this case presents the question presented of whether a party may appeal an order denying summary judgment after a full trial on the merits when the party bases its challenge on a circumscribed legal error.

Respondent's contentions that it preserved the contract interpretation issue at JMOL, and that the Seventh Circuit assigned error to the district court's denial of JMOL, go to the outcome-determinative aspect of certworthiness. Those positions, rebutted below, are separate from the issue of whether this case raises the question presented.

C. Affirmance On Remand Would Be The Outcome Were This Court To Grant Review And Answer The Question Presented In The Negative.

In response to Petitioner's waiver argument, the Seventh Circuit held that Respondent's "principal argument on appeal raises a purely legal question of contract interpretation" which it preserved "at the summary-judgment stage." App. 16. "[B]ecause it has no bearing on the sufficiency of the trial evidence," the Seventh Circuit reasoned, Respondent "did not need to raise it again in its Rule 50(a) and (b) motions." App. 16-17. Thus, the panel concluded, "[t]he argument was not waived." App. 17.

Respondent dismisses this *sua sponte* discussion of the summary judgment stage as the panel "simply marshalling one of many reasons why Sun's various appellate arguments were properly presented in the district court." Opp. 3. But Respondent never explains why any marshalling of reasons was necessary if the panel thought that the district court had erroneously denied JMOL. Nor does Respondent explain why the Seventh Circuit would unnecessarily put itself in acknowledged conflict with other circuits. *See* Pet. 21.[5]

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[5] Respondent erroneously concludes that the omission of the footnote specified in Seventh Circuit Rule 40(e) indicates the absence of a circuit conflict. *See* Opp. 26-27. The Seventh Circuit does not restate this notice every time it follows its own precedent that created a conflict with other circuits. For example, and

(Continued on following page)

Respondent contends that the panel "reviewed the district court's Rule 50 order [and] assigned error to it. . . ." Opp. 24. As the opinion itself shows, that is not so. The panel recognized that Respondent appealed from the denial of JMOL, and it set forth the standard of review for JMOL denial. App. 14-15. At the outset, however, the panel held that the preservation of the contract interpretation issue occurred at the summary-judgment stage, not JMOL. App. 15-17. The panel reversed "the district court's judgment" (App. 23), but it never assigned error to the order denying JMOL. As discussed above, the only district court order to which the Seventh Circuit expressly assigned error was the order denying summary judgment, which the panel faulted twice. App. 18, 22.

The panel's stated reason for pondering preservation at the summary-judgment stage is apparent from Respondent's Rule 50(a) motion, which Petitioner

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quite relevant to this petition, in *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 718-19 (7th Cir. 2003), the Seventh Circuit sided with circuits that answered the question presented in the affirmative. The panel in *Houskins v. Sheahan*, 549 F.3d 480, 489 (7th Cir. 2008), followed *Chemetall* and issued a decision then in conflict with other circuits on the question presented. Still, the *Houskins* court did not cite, much less quote, Rule 40(e). Petitioner is unable to determine precisely when Rule 40(e) required Seventh Circuit panels to declare that their decision creates a conflict with one or more other circuits, but that requirement predates *Houskins* by at least two decades. *See United States v. Hernandez*, 79 F.3d 584, 585 (7th Cir. 1996).

reprinted in full. App. 51-60.[6] In resistance to this Court's potential review, Respondent quotes only two sentences, stripped from context, of its Rule 50(a) motion. Opp. 10-11. In context, this Court can see, as the Seventh Circuit apparently saw, that Respondent's Rule 50(a) motion challenged only the sufficiency of the trial evidence to resolve a contractual ambiguity in favor of Petitioner – not whether there was any contractual linguistic ambiguity in the first place.

Respondent's first Rule 50(a) quote ("Clearly . . . .") (Opp. 10) omits the following three sentences:

> Clearly, the 2005 agreement or plan documents had terminated as of December 25, 2006 [sic]. At that point in time there was no agreement between the parties until the new document had been issued. *He refused to accept the new document*, which essentially meant he had no incentive plan in 2006. *For that reason*, his efforts to collect on a contract basis fail as a matter of law.

App. 54 (emphasis added). This was not an argument about unambiguous contractual language in the 2005 STK Plan. If the "reason" Petitioner's contract claim fails involves the 2006 Sun Plan and Petitioner's

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[6] "Because the Rule 50(b) motion is only a renewal of the preverdict motion, it can be granted only on grounds advanced in the preverdict motion. Fed. R. Civ. P. 50(b), comm. note (2006 amend.)." *Passananti v. Cook County*, 689 F.3d 655, 660 (7th Cir. 2012) (citation omitted).

refusal to sign it, then it must be that the 2005 STK Plan is ambiguous, making the extrinsic evidence involving the 2006 Sun Plan relevant.

Likewise, Respondent's second quote of its oral Rule 50(a) motion (Opp. 10-11) isolates its trial counsel's language from the trial evidence-based argument he was making. Below is that same quote, but in context:

> Even if there were a contract, Your Honor, we believe *the evidence presented by the plaintiff fails to establish a breach of that contract*. As you know, the *evidence presented* required him to establish that he had closed the deal, invoiced the deal, or had the deal treated as a renewal assigned to him on his quota document. The *evidence establishes* unequivocally that as of December 26th, the new plan year, he had not accomplished any of those requirements. *The 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 issued and Mr. Lawson had reviewed it.

App. 53 (emphasis added). Here again, Respondent based its Rule 50(a) JMOL argument on evidence related to the 2006 Plan, which is extrinsic and irrelevant to any "purely legal" argument that the 2005 STK plan is unambiguous.

As Petitioner emphasized, Respondent's trial counsel had no response when Petitioner's counsel

recounted the summary judgment order on contractual ambiguity, and argued that it is for the jury to resolve that ambiguity. Pet. 7. It is thus no surprise that in its Rule 50 order, the district court faulted Respondent for "ignor[ing how] the 2005 STK Plan explicitly stated that it remained in place until a subsequent plan became effective." App. 32.

The Seventh Circuit opinion and the patent defects of Respondent's Rule 50(a) motion leave little room to doubt that answering the question presented in the negative would change the outcome of this case on remand. Regardless, this Court has reviewed unsettled standard-of-review issues even where the answer ultimately did not affect the outcome of the particular case.[7] Resolving the question of whether a court of appeals *has the power* to review a summary judgment denial after a full trial on the merits is no less important than establishing a correct standard-of-review. The need for resolution of this threshold question of federal appellate jurisdiction is all the more pressing, given that it conflicts all thirteen circuit courts.

[7] *See, e.g.*, *Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 789 F.3d 1335, 1345 (Fed. Cir. 2015), and *Russell v. Salve Regina Coll.*, 938 F.3d 315, 315-16 (1st Cir. 1991) (reaching same result after this Court reversed on standard-of-review issues).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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December 11, 2015

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID R. LAWSON, Plaintiff, v. SUN MICROSYSTEMS, INC., Defendant.	)	Civil Case No. 1:07-cv-00196-RLY-MJD

DEFENDANT'S LOCAL RULE 16-2 STATEMENT OF POSITION ON REMAND

(Filed Jul. 14, 2015)

Defendant, Sun Microsystems, Inc. ("Sun"), by counsel, respectfully submits its statement under United States District Court for the Southern District of Indiana Local Rule 16-2 regarding the actions the District Court should take on remand. For the reasons stated below, the District Court should enter judgment in favor of Sun and should award Sun its costs.

1. On June 30, 2015, the United States Court of Appeals for the Seventh Circuit ordered as follows: "The judgment of the District Court is REVERSED, with costs, and the case is REMANDED with instructions to enter judgment for Sun." [7th Cir. Case No 13-1502, Doc. 37]

2. This order is consistent with the decision of the Seventh Circuit, also entered or June 30, 2015:

Lawson v. Sun Microsytems, Inc., Case No. 13-1502, ___ F.3d ___, 2015 WL 3954224 (7th Cir. June 30, 2015). [7th Cir. Case No 13-1502, Doc. 36]

3. More specifically, the Seventh Circuit reversed and remanded the District Court's denial of Sun's Motion for Summary Judgment regarding the breach of contract claim filed by Plaintiff, David R. Lawson ("Lawson"), and directed the District Court to enter judgment for Sun as a matter of law. *Lawson*, 2015 WL 3954224 at pp. *1, *5-6, *10.

4. In so holding, the Seventh Circuit found that the JPMorgan Chase sale unambiguously did not qualify for a comission [sic] under the 2005 plan. *Id.* at pp. *7-* 10.

5. Further, the Seventh Circuit rejected Lawson's appeal of the District Court's award of Sun's Federal Rule of Civil Procedure 50(a) motion on Lawson's claim under the Indiana Wage Claims Statute, and the District Court's entry of judgment to Sun as a matter of law on the Indiana Wage Claims Statute claim.

6. Specifically, the Seventh Circuit held because "Lawson was not entitled to a commission under the 2005 plan, his claim for unpaid wages under the Indiana Wage Claims Statute necessarily fails." *Id.* at *10.

WHEREFORE, based on the above decision and instructions from the Seventh Circuit, the District Court must enter judgment to Sun as a matter of law

on the entire case, and award costs to Sun as the prevailing party.

Respectfully submitted,

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