No. ________

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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, as opposed to an error concerning the existence of factual issues.

PARTIES TO THE PROCEEDING

Petitioner David Lawson was the plaintiff in the district court and appellee and cross-appellant in the court of appeals.

Respondent Sun Microsystems, Inc. was the defendant in the district court and appellant and cross-appellee in the court of appeals.

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PETITION FOR WRIT OF CERTIORARI

In *Ortiz v. Jordan*, 562 U.S. 180 (2011), this Court resolved a division of authority on the appealability of orders denying summary judgment: "May a party, as the Sixth Circuit believed, appeal an order denying summary judgment after a full trial on the merits? Our answer is no." *Id.* at 183-84 (internal footnote omitted). Since *Ortiz*, several courts of appeals, including the Seventh Circuit in this case, have misinterpreted this Court's unequivocal no to mean maybe if the appellant bases its challenge on a circumscribed legal error, as opposed to an error concerning the existence of factual issues.

Despite this Court's clear and categorical holding in *Ortiz*, all thirteen circuit courts now stand divided on this threshold question of their appellate jurisdiction. Courts of appeals will deem the same argument fully preserved in four circuits and fatally forfeited in three. In five internally conflicted circuits, such as the Seventh Circuit, luck of the judicial draw determines which of the conflicting lines of authority controls. The Federal Circuit applies regional circuit law to this procedural question, so in patent cases the very same judge possesses or lacks the power to review an order denying summary judgment, depending on where the case arose.

This petition squarely presents the question of whether orders denying summary judgment on questions of law are appealable after a full trial on the merits. At the Seventh Circuit, Respondent obtained

a reversal of the district court's denial of summary judgment on Petitioner's breach of contract claim. Reasoning that since the district court's denial of summary judgment was a matter of contract interpretation (a legal question), the Seventh Circuit held that Respondent preserved this issue at the summary-judgment stage, and did not need to raise it again in its Federal Rule of Civil Procedure 50(a) and (b) motions.

The Court should grant certiorari to 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. The answer to this important and recurring issue of preservation should be uniform across the circuits. As in *Ortiz*, the answer should be no – orders denying summary judgment are *never* appealable after a full trial on the merits. A party must use the Rule 50 JMOL procedure if it wishes to preserve the issue for appellate review.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-23) is reported at 791 F.3d 754. The opinion of the district court granting in part and denying in part Respondent's motion for summary judgment is unreported and filed under seal at ECF 1:07-cv-196, Dkt. 230

(S.D. Ind. filed Nov. 7, 2011).[1] The opinion of the district court granting in part and denying in part Respondent's motion for judgment as a matter of law (App. 27-46) is unreported but available at 2012 U.S. Dist. LEXIS 177289 and 2012 WL 6553507.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION AND FEDERAL RULE INVOLVED

The statute involved is 28 U.S.C. § 1291. App. 47. The rule involved is Federal Rule of Civil Procedure 50. App. 48-50.

STATEMENT OF THE CASE

A. Factual Background

Petitioner David Lawson is a former employee of Respondent Sun Microsystems, Inc. and its corporate predecessor, StorageTek, Inc. He sold computer

[1] Petitioner would promptly file under seal a copy of the district court's summary judgment order if the Court so requests.

maintenance and support services, mostly to large corporations. Petitioner earned a base salary and commissions on his sales under an annual incentive plan promulgated by the company. Respondent acquired StorageTek in August 2005. At the time of this acquisition, Petitioner was working on a large sale to JPMorgan Chase & Co., but the deal did not close until March 2006.

After the execution of the JPMorgan Chase deal, the parties disputed the commission due to Petitioner. The crux of the disagreement concerned which sales incentive plan applied to Petitioner's sale: StorageTek's 2005 incentive plan ("2005 STK Plan") or Respondent's 2006 incentive plan ("2006 Sun Plan"). The difference in commissions due under the plans was stark. Petitioner contended that the 2005 STK Plan applied, and that his commission due was approximately $1.8 million. App. 2. Respondent asserted that the 2006 Sun Plan governed the JPMorgan Chase deal, and that Petitioner was due only about $54,000 in commission. App. 2.

In May 2006, Petitioner refused Respondent's offer to pay him a commission for the lesser amount under the 2006 Sun Plan. App. 2. Petitioner was laid off in October 2006 as part of a reduction in force. App. 13.

The Seventh Circuit opinion (App. 1-13) and the district court's JMOL order (App. 27-28) provide a more detailed factual background. Above are the

essential facts relevant for the Court's consideration of this petition.

B. District Court Proceedings

Petitioner brought suit against Respondent for breach of contract and violation of Indiana's Wage Claim Statute.[2] Relevant to the Court's consideration of this petition are the proceedings at the summary-judgment stage, the jury verdict in favor of Petitioner, and Respondent's JMOL motions, which the district court partially granted and partially denied. At all stages, the key dispute concerned whether Petitioner was entitled to incentive compensation under the 2005 STK Plan for a sales contract executed and initially invoiced in March 2006.

Respondent moved for summary judgment on, *inter alia*, Petitioner's breach of contract and statutory wage claims. App. 13-14. On the contract claim, Respondent asserted that under the unambiguous terms of the 2005 STK Plan, "both contract execution and initial invoicing had to occur during the 2005 STK fiscal year to qualify for incentive compensation

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[2] Respondent invoked the removal jurisdiction (28 U.S.C. § 1446(b)) of the district court under 28 U.S.C. § 1332 because of diversity of citizenship, the Petitioner being a resident of Indiana and Respondent being a Delaware corporation with a principal place of business in California. The amount in controversy exceeds $75,000. ECF 1:07-cv-196, Dkt. 1 (S.D. Ind. filed Feb. 15, 2007).

on a sale. It is undisputed that neither of those conditions were met."[3]

In opposition to summary judgment, Petitioner contended that the terms of the 2005 STK Plan are ambiguous because they do "not explain how Comp Revenue will be treated if contract execution and initial invoicing occurs after the end of the fiscal year but before a subsequent plan becomes 'effective.'"[4] As the Seventh Circuit recounted, the district court agreed with Petitioner on this issue of contract interpretation, "finding the plan documents ambiguous and a trial necessary to determine liability." App. 14. The district court also denied Respondent's motion for summary judgment on Petitioner's wage claim. App. 14.

The case was tried to a jury, which found Respondent liable for breach of contract and awarded $1.5 million in damages. App. 14. Before the case was submitted to the jury, Respondent moved under Rule 50(a) for JMOL on the sufficiency of the evidence to support the breach of contract claim. App. 52-54. Petitioner responded by recounting the district court's denial of summary judgment based on ambiguity in the terms of the 2005 STK Plan, and contended that

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[3] ECF 1:07-cv-196, Dkt. 188, p. 18 (S.D. Ind. filed Mar. 18, 2011).

[4] ECF 1:07-cv-196, Dkt. 214, p. 18 (S.D. Ind. filed Apr. 29, 2011).

there was sufficient evidence for the jury to resolve that ambiguity in favor of Petitioner:

> The 2005 STK plan contains a statement that this plan ends at the end of the fiscal year. The same document says, "This plan remains in effect" – it uses the very same word that the 2006 goal document uses – "until replaced." There's an ambiguity there, and the jury is going to have to decide how to resolve that ambiguity. That was the basis of the Court's summary judgment entry. That's why we're here. It's a question of fact for the jury to work through.

App. 59.

The district court then asked Respondent if it had any reply to Petitioner's Rule 50(a) opposition. Counsel for Respondent replied "No, Your Honor." App. 60.

In its Rule 50(a) motion, Respondent also asked the district court to reconsider its legal rationale for denying summary judgment on Respondent's statutory wage claim. App. 54-56. Respondent argued that the district court's earlier reliance on *J Squared, Inc. v. Herndon*, 822 N.E.2d 633 (Ind. Ct. App. 2005) was misplaced, and that *Thomas v. H&R Block Eastern Enterprises*, 630 F.3d 659 (7th Cir. 2011) controls. App. 54-55. The district court took Respondent's Rule 50(a) motion under advisement. App. 60.

After the jury returned its verdict, Respondent renewed its sufficiency of the evidence challenge to

the breach of contract claim under Rule 50(b). App. 61-111. Significantly, at no point in either of its Rule 50 motions did Respondent raise or ask the district court to revisit the contract interpretation issue of whether the terms of the 2005 STK Plan are ambiguous with regard to a sales contract executed and initially invoiced in March 2006. That issue was one of the bases for the district court's denial of summary judgment. App. 14.

Separately, in its Rule 50(b) motion, Respondent expressly asked the district court to reconsider its legal rationale in denying summary judgment on the wage claim. App. 74-75. According to Respondent, the district court should not have "relied heavily" on *J Squared*; instead it should have applied the multifactor test of *Thomas v. H&R Block Eastern Enterprises*. App. 74-75.

The district court denied Respondent's Rule 50 motions on the contract claim and granted JMOL on the wage claim. App. 45-46. On the contract claim, the district court faulted Respondent for not adequately addressing the contractual language ambiguity that required a jury trial in the first place:

> Sun's argument ignores two key pieces of evidence. . . . First, the 2005 STK Plan explicitly stated that it remained in place until a subsequent plan became effective. Second, the 2006 Sun Plan Goal Sheet, which Plaintiff received on April 4, 2006, and was part of the overall Sun Plan, stated within its signature block that the 2006 Sun Plan was "not

> effective until this form has been completed and approved at all levels (including Finance)."[5]

The district court then found that given this ambiguity in the language of the 2005 STK Plan, the evidence at trial was sufficient for a reasonable juror to resolve that ambiguity against Respondent. App. 33-46.

On the statutory wage claim, the district court agreed with Respondent that its legal basis for denying summary judgment was flawed. App. 45 ("The court's reliance on *J Squared* . . . in its summary judgment ruling was in error."). Accordingly, the district court granted Respondent's JMOL motion with respect to Petitioner's claim under the Indiana Wage Claim Statute. App. 45.

C. Proceedings in the Seventh Circuit

Respondent appealed the judgment in favor of Petitioner on his breach of contract claim. App. 2. Petitioner cross-appealed the district court's grant of Respondent's JMOL motion on the statutory wage claim. App. 2.

Respondent's sole issue presented for Seventh Circuit review was whether the district court erred by denying Respondent's motion for JMOL on Petitioner's

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[5] App. 32 (trial citations omitted).

breach of contract claim.[6] In its principal brief, Respondent alluded to its motion for summary judgment only once, with a citation to the district court's mention of the summary judgment proceedings in the "Background" section of its JMOL order.[7]

In its reply brief, Respondent addressed Petitioner's assertion that Respondent had waived the contract interpretation issue by citing to its Rule 50(b) motion and to trial testimony.[8] Respondent made no mention of its motion for summary judgment in its reply brief.[9]

Before turning to the merits of Respondent's appeal, the Seventh Circuit considered and rejected Petitioner's waiver argument:

> Sun's principal argument on appeal raises a purely legal question of contract interpretation: Based on the language of the plan documents, does StorageTek's 2005 incentive plan apply to the JPMorgan Chase sale? Sun preserved this issue at the summary-judgment stage. And because it has no bearing on the sufficiency of the trial evidence, Sun did not need to raise it again in

[6] Appellant's Br. 6-7, ECF 13-1502, Dkt. 15 (7th Cir. filed Oct. 24, 2013).

[7] *Id.* at 8.

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

[9] *See id.* at 1-33.

> its Rule 50(a) and (b) motions. The argument was not waived.

App. 16-17. The panel acknowledged that its holding on waiver conflicted with decisions of other circuits. App. 16, n.2 ("There's a split of authority on this point. . . . The Supreme Court did not resolve the question in *Ortiz v. Jordan*.").

On the merits, the Seventh Circuit agreed with Respondent's position that "[t]he relevant language in the 2005 incentive plan is not ambiguous." App. 17. According to the panel, the district court's interpretation of those contractual terms "was a mistake." App. 18. "Because the plan language is not ambiguous," the Seventh Circuit reasoned, "extrinsic evidence simply drops out of the case. The trial was unnecessary." App. 22. The panel thus reversed the district court's judgment, and deemed as moot Petitioner's cross-appeal. App. 22-23.[10]

[10] Petitioner respectfully submits that if this Court were to reverse the Seventh Circuit's decision and remand this case for further proceedings consistent with the Court's opinion, Petitioner would then be entitled to reassert his cross-appeal for enhanced damages and attorney fees under the Indiana Wage Claims Statute. *See Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430 (2012) ("[W]hen we reverse on a threshold question, we typically remand for resolution of any claims the lower courts' error prevented them from addressing.").

REASONS FOR GRANTING THE PETITION

The clear and unresolved split involving all thirteen circuits demands this Court's intervention. The question presented in this petition is of obvious importance: it concerns the very scope of federal appellate jurisdiction. For the benefit of bench and bar, the Court should reaffirm that orders denying motions for summary judgment are *never* appealable after a full trial on the merits. Litigants must use the JMOL procedure if they wish to trigger the reviewing power of a court of appeals on issues raised but not finally decided at the summary judgment stage.

This case is an ideal vehicle to resolve the question the Court meant to settle in *Ortiz*, because the waiver issue is outcome-determinative here. In response to Petitioner's assertion of waiver at the Seventh Circuit, Respondent cited only to two portions of the record: trial evidence and Respondent's Rule 50(b) JMOL motion. The Seventh Circuit did not agree with Respondent's position, and it declined to engage in an everyday review of a JMOL denial. Instead, the panel ruled that since Respondent raised a purely legal question of contract interpretation, it preserved this issue at the summary judgment stage and thus did not need to raise it again in its Rule 50 motions.

The Seventh Circuit's sole ground for reversal was erroneous denial of a motion for summary judgment. In reaching back to review the district court's denial of summary judgment, the panel cited *Ortiz* and acknowledged that it was putting the Seventh

Circuit in direct conflict with other circuits. The most plausible inference to draw from the Seventh Circuit's *sua sponte* review of the order denying summary judgment is that, had it treated the appeal as being from the order denying JMOL, it would not have reversed. In short, the resolution of the question presented determines the prevailing party in this case.

I. The Conflict Among the Courts of Appeals Regarding the Question Presented Involves All Thirteen Circuits.

All of the courts of appeals have addressed whether they have the power to review orders denying summary judgment entered on "purely legal" grounds, after a full trial on the merits. The Second, Third, Ninth and D.C. Circuits hold that such interlocutory orders are appealable. The First, Fourth and Eleventh Circuits firmly hold to the contrary. Uncertainty prevails in the Fifth, Sixth, Seventh, Eighth, Tenth and Federal Circuits, which are internally conflicted on the issue, or in the case of the Tenth Circuit, have expressed doubt about the soundness of their circuit's case law on the question after *Ortiz*.

A. The Second, Third, Ninth and D.C. Circuits Firmly Hold That an Appellate Court May Review a "Purely Legal" Issue Rejected on Summary Judgment After a Full Trial on the Merits.

Four 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. *See Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1243 (9th Cir. 2014); *Mincy v. McConnell*, 523 Fed. Appx. 898, 900 (3d Cir. 2013); *Feld v. Feld*, 688 F.3d 779, 781-82 (D.C. Cir. 2012); *Rothstein v. Carriere*, 373 F.3d 275, 283-84 (2d Cir. 2004).

B. The First, Fourth and Eleventh Circuits Have Firmly Held That They Lack the Power to Review *Any* Orders Denying Summary Judgment After a Full Trial on the Merits.

Three circuits have taken an equally clear and consistent position that they *lack* the power to review orders denying summary judgment after a full trial on the merits, even where the circumscribed error concerns a question of law. *See In re Carlson*, 464 Fed. Appx. 845, 849 (11th Cir. 2012); *Ji v. Bose Corp.*, 626 F.3d 116, 127-28 (1st Cir. 2010) ("We have not recognized an exception . . . as some circuits have done, when a party's challenge [to denial of a motion for summary judgment] is based on a circumscribed

legal error. . . . Instead, our rule is that even legal errors cannot be reviewed unless the challenging party restates its objection in a [Rule 50] motion for JMOL."); *Varghese v. Honeywell Int'l, Inc.*, 424 F.3d 411, 423 (4th Cir. 2005) ("We recognize that several other circuits have taken a different approach on this issue, allowing appeals from a denial of summary judgment after a trial where the summary judgment motion raised a legal issue. . . . [T]heir approach simply conflicts with our own.").

C. Uncertainty Prevails in the Fifth, Sixth, Seventh, Eighth, Tenth and Federal Circuits with Regard to the Question Presented.

In six circuits, if an appellant neglects to preserve an issue raised in a motion for summary judgment by not renewing it in JMOL motions via Rule 50, luck of the judicial draw and happenstance of venue determine whether that oversight is of any consequence.

The Federal Circuit applies regional circuit law to this procedural question, so in patent cases the very same judge possesses or lacks the power to review an order denying summary judgment, depending on where the case arose. *See Taurus IP, LLC v. DaimlerChrysler Corp.*, 726 F.3d 1306, 1340 (Fed. Cir. 2013) ("We review a denial of summary judgment under the law of the regional circuit.") (citation omitted).

In the Fifth, Sixth, Seventh, Eighth and Tenth Circuits, the appealability of an issue raised at the summary judgment stage, but not renewed via Rule 50, depends on which line of conflicting circuit case law the panel judges would prefer to follow.

In the Fifth Circuit, compare *Black v. J.I. Case Co.*, 22 F.3d 568, 571 n.5 (5th Cir. 1994) with *Becker v. Tidewater, Inc.*, 586 F.3d 358, 365 n.4 (5th Cir. 2009). Note that this Court cited *Black* in defining the boundary lines of the circuit split it sought to resolve in *Ortiz*. 562 U.S. at 184, n.1. In *Black*, the Fifth Circuit expressly rejected a suggested legal/factual distinction as the basis for appealability. 22 F.3d at 571 n.5.

Since *Ortiz*, the Sixth Circuit has given three conflicting answers to the question presented: yes, no and sometimes. **Yes:** *In re AmTrust Fin. Corp.*, 694 F.3d 741, 750-51 (6th Cir. 2012) ("The district court's ambiguity ruling was a pure question of law. Thus, under this circuit's longstanding precedent, the district court's decision may be appealed even in the absence of a post-judgment motion.") (citations omitted); **No:** *Doherty v. City of Maryville*, 431 Fed. Appx. 381, 384 (6th Cir. 2011) (City's argument that "a denial of summary judgment is appealable 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 v. Jordan*."); **Sometimes:** *Kay v. United of Omaha Life Ins. Co.*, 562 Fed. Appx. 380, 385 (6th Cir. 2014) ("United conflates the term 'purely legal issues' as used in *Ortiz* with the

term 'question of law'. . . . Purely legal questions . . . can be asked and answered without reference to the facts of the case. . . . But a 'legal question' in the usual summary-judgment sense is something quite different.").

In this case, the Seventh Circuit did not acknowledge that reviewing the order denying Respondent's motion for summary judgment conflicts with *Elusta v. Rubio*, 418 Fed. Appx. 552, 554-55 (7th Cir. 2011) (*Ortiz* prohibits appellate review of denial of summary judgment on purely legal question of whether "the Illinois tort of [intentional infliction of emotional distress] can never be based on a mere complaint to a police officer."). To be sure, *Elusta* is a nonprecedential decision, but the same is true of the Sixth Circuit decision this Court reversed in *Ortiz*. *See* 316 Fed. Appx. 449 (6th Cir. 2009).

The Eighth Circuit has concededly issued conflicting decisions on the question. *See Owatonna Clinic – Mayo Health Sys. v. Med. Protective Co. of Fort Wayne, Ind.*, 639 F.3d 806, 809-10 (8th Cir. 2011) (acknowledging that its "cases related to this general question may not be in harmony" (citing *Metro. Life Ins. Co. v. Golden Triangle*, 121 F.3d 351 (8th Cir. 1997), and *White Consol. Indus., Inc. v. McGill Mfg. Co.*, 165 F.3d 1185 (8th Cir. 1999))).

Tenth Circuit precedent permits the appeal of orders denying summary judgment on "purely legal" issues. *Haberman v. Hartford Ins. Group*, 443 F.3d 1257, 1264 (10th Cir. 2006) ("[W]hen the material

facts are not in dispute and the denial of summary judgment is based on the interpretation of a purely legal question, such a decision is appealable after final judgment."). However, some Tenth Circuit judges have questioned whether *Haberman* remains good law after *Ortiz*. *See Copar Pumice Co. v. Morris*, 639 F.3d 1025, 1031 (10th Cir. 2011) ("Some language in *Ortiz* appears to undermine *Haberman*."). Although acknowledging uncertainty regarding the appealability of "purely legal" summary judgment denials, the Tenth Circuit considered it unnecessary to reconsider *Haberman* in light of *Ortiz* because the summary judgment denial under review in that decision concerned factual disputes, not purely legal questions. *Id.* at 1032. Nonetheless, it is reasonable to infer that at least the panel judges in *Copar Pumice* see in *Ortiz* a prohibition against reviewing any order denying summary judgment after a full trial on the merits.

II. The Question Presented Is Important and Recurring.

As the conduct of extensive litigation that has produced a conflict involving all thirteen circuits demonstrates, the question presented is important enough to warrant this Court's attention. Whatever this Court's ultimate resolution of the question, it is not a question whose answer should vary among the circuits. Such a basic question of appellate preservation demands a uniform rule. It offends justice and good sense for the exact same argument to be deemed

fully preserved in one circuit and fatally forfeited in another. Both attorneys and their clients need to know whether renewing a legal objection in a Rule 50 motion is simply a best practice or is absolutely required.

III. This Case Is an Ideal Vehicle to Resolve the Question Presented.

Which party prevails in this case hinges entirely on the appealability of the district court's order denying Respondent's motion for summary judgment. At the Seventh Circuit, Respondent did *not* appeal from the district court's denial of summary judgment. Indeed, Respondent made only a single, passing mention of its summary judgment motion on the contract claim in its appellate briefing.[11] Respondent's sole assertion of trial court error concerned the district court's JMOL order.[12] In response to Petitioner's waiver argument, Respondent grounded its issue preservation argument entirely on its Rule 50 motions.[13]

Neither the Seventh Circuit nor the district court read Respondent's JMOL motions as a renewal of the contract interpretation argument (the supposed

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[11] Appellant's Br. 8, ECF 13-1502, Dkt. 15 (7th Cir. filed Oct. 24, 2013).

[12] *Id.* at 6-7.

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

unambiguity of the 2005 STK Plan's terms) it raised at the summary judgment stage. The district court expressly stated that Respondent's JMOL argument "ignores" the key language of the 2005 STK Plan that the court considered ambiguous. App. 32. The district court understood Respondent's JMOL argument to be a challenge to the sufficiency of the evidence to resolve this contractual language ambiguity in favor of Petitioner – *not* a renewal of Respondent's summary judgment argument that there is no such ambiguity in the first place. App. 31-43.

Likewise, the Seventh Circuit implicitly rejected Respondent's position that it preserved its contract interpretation argument at trial. Reasoning that since the issue Respondent raised at the summary judgment stage was a "purely legal" question of contract interpretation, the panel held that Respondent "did not need to raise it again in its Rule 50(a) and (b) motions." App. 16-17. That would be an oddly superfluous position for the Seventh Circuit to take if it thought Respondent did in fact preserve this question of law in its JMOL motions.

The most plausible explanation for why the Seventh Circuit chose to review the order denying summary judgment is that Respondent had not established sufficient grounds to reverse the order denying JMOL. Respondent *never* suggested review of the order denying summary judgment – the Seventh Circuit did that *sua sponte*. Had the panel done what Respondent *did* request, it would have considered reversal of a JMOL denial in an unexceptional contract

case – an everyday disposition hardly worthy of a precedential opinion. Instead, the Seventh Circuit issued a precedential decision which it acknowledged was in conflict with other circuits. Doing so triggered the special opinion circulation and en banc voting provisions of Seventh Circuit Rule 40(e).[14] It is difficult to imagine why the panel would have gone to these great lengths when a much shorter path to resolution was available.

Respondent's appeal sank or swam based on whether the Seventh Circuit had the power to review the legal arguments Respondent made at the summary judgment stage but did not renew in its JMOL motions. Should this Court agree with Petitioner's answer to the question presented, affirmance on remand would be the very likely if not nearly-certain outcome.

IV. Orders Denying Summary Judgments Are Never Appealable after a Full Trial on the Merits.

This Court should grant review on the question presented not only because the circuits are badly split on this important issue, but also because the rule

[14] "A proposed opinion approved by a panel of this court adopting a position which would . . . create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted." Seventh Cir. R. 40(e).

permitting appeal from some denials of summary judgment after a full trial on the merits is incorrect, as *Ortiz* held without exception. The Seventh Circuit panel in this case was wrong to review the district court's denial of Respondent's motion for summary judgment. It was powerless to do so. After a full trial on the merits, Rule 50 motions are necessary to preserve *any* challenge rejected on summary judgment, whether purely legal or partly factual.

An exception for purely legal issues raised on summary judgment but not renewed through Rule 50 motions has little to recommend it as either a theoretical or practical matter. Manufacturing a dichotomy between "purely legal" and "not purely legal" would require courts "to engage in the dubious undertaking of determining the bases on which summary judgment is denied and whether those bases are 'legal' or 'factual,'" an inquiry complicated by the fact that "all summary judgment decisions are legal decisions in that they do not rest on disputed facts." *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1235 (4th Cir. 1995).

Moreover, nothing in the Federal Rules of Civil Procedure supports, let alone requires, such a dichotomy, and the prospect of creating "a new jurisprudence in which district courts would be obliged to anticipate parties' arguments on appeal by bifurcating the legal standards and factual conclusions supporting their decisions denying summary judgment" is not an attractive prospect. *Id.*; *see also Black*, 22 F.3d at 571, n.5. And "[e]ven when the pretrial record

and the trial testimony are identical," as would presumably be the case in "purely legal" situations, judgment following a Rule 50 motion "is superior to a pretrial decision because the factfinder's verdict depends on credibility assessments that a pretrial paper record simply cannot allow." *Varghese*, 424 F.3d at 421 (quoting *Chesapeake*, 51 F.3d at 1236) (quotation marks omitted).

There is no reason to go down this path when the rejection of purely legal issues on summary judgment "can be adequately vindicated by other means," namely, Rule 50 motions. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009); *see Black*, 22 F.3d at 571 n.5 (noting that exception for purely legal issues "would benefit only those summary judgment movants who failed to properly move for judgment as a matter of law at the trial on the merits"). Indeed, all of this effort to discern and maintain a tenuous distinction between "purely legal" issues and other bases for summary judgment would make little practical difference, as prudent counsel would always have an incentive to renew their purely legal arguments in Rule 50 motions. Even courts adopting the "purely legal" exception recognize that because "the basis for the court's denial of summary judgment may be difficult to discern," "prudent counsel would do well to preserve the issue in a Rule 50 motion." *Chemetall GMBH v. ZR Energy, Inc.*, 320 F.3d 714, 719 (7th Cir. 2003); *Wolfgang v. Mid-America Motorsports, Inc.*, 111 F.3d 1515, 1521-22 (10th Cir. 1997). But the concededly tenuous line between "purely

legal" and "not purely legal" issues is a reason to require, not simply recommend, that the former category be included in Rule 50 motions, lest both district courts and courts of appeals be put in the difficult position of discerning the nebulous distinctions between the two.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

NOS. 13-1502 & 13-1503

DAVID LAWSON,

Plaintiff-Appellee/
Cross-Appellant,

v.

SUN MICROSYSTEMS, INC.,

Defendant-Appellant/
Cross-Appellee.

Appeals from the United States District Court
for the Southern District of
Indiana, Indianapolis Division.
No. 1:07-cv-00196-RLY-MJD –
Richard L. Young, *Chief Judge.*

ARGUED JANUARY 9, 2014 – DECIDED JUNE 30, 2015

Before MANION and SYKES, Circuit Judges, and GRIESBACH, District Judge.*

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* Of the Eastern District of Wisconsin, sitting by designation.

SYKES, *Circuit Judge.* David Lawson sold computer maintenance and support services for StorageTek, Inc., mostly to large corporations. He was paid a base salary and commissions on his sales under an annual incentive plan promulgated by the company. Sun Microsystems, Inc., acquired StorageTek in August 2005. At the time Lawson was working on a large sale to JPMorgan Chase & Co., but the deal did not close until March 2006. If StorageTek's 2005 incentive plan applied, Lawson would earn a seven-figure commission, perhaps as high as $1.8 million. If instead the sale fell under Sun's 2006 incentive plan, his commission would be far less-about $54,000. Sun determined that the 2006 plan applied and tendered the lower commission. Lawson refused it and sued for breach of contract and violation of Indiana's Wage Claim Statute. He argued that the 2005 plan continued in effect through at least March 2006, when the JPMorgan Chase deal was finalized.

The district court rejected the statutory wage claim but submitted the contract claim to a jury, which found in favor of Lawson and awarded $1.5 million in damages. Sun appealed, and Lawson cross-appealed to challenge the district court's ruling on the statutory claim.

We reverse and remand with instructions to enter judgment for Sun. The sale did not qualify for a commission under the terms of the 2005 plan. Although the original plan documents said the plan would remain in effect until superseded by a new one, a September 2005 amendment set a definite termination

date for the plan year: December 25, 2005. To earn a commission under the 2005 plan, sales had to be final and invoiced by that date. Because Lawson's sale wasn't finalized and invoiced until March 2006, Sun is entitled to judgment as a matter of law. This conclusion necessarily defeats the cross-appeal.

I. Background

The parties' briefs are laden with inscrutable acronyms and sales jargon specific to StorageTek and Sun. We will simplify where possible, but some peculiar terms are unavoidable.

StorageTek was a technology company specializing in data storage. The company sold hardware and software used to back up and recover data stored on centralized servers. It also provided maintenance and support services for its products and similar products sold by third parties. Many of its customers were large corporations.

Lawson worked for StorageTek as a Services Sales Executive II. In that position he sold computer maintenance and support contracts to customers in a defined territory. At the time in question, he was paid a base salary of $75,000 plus commissions on his sales.

A. StorageTek's Incentive Plan

Every year StorageTek issued three documents that defined Lawson's compensation for that year.

The first, called a "Sales Executive Incentive Plan," explained the compensation plan's general terms and conditions, including the terms under which sales would qualify for commissions. The second document, the "Incentive Plan Administration Document" or "IPAD," explained how commissions would be calculated and also contained additional terms and conditions applicable to StorageTek's North America sales territory. Finally, the "Quota Document" detailed Lawson's individualized sales goals and expected commissions.

The first of these documents incorporated the other two by reference, so together the three documents constituted Lawson's entire compensation agreement. The documents specified that Lawson's employment was at will. We'll refer to the plan documents collectively as the "incentive plan" (or just the "plan") unless the context requires otherwise.

As a general matter, StorageTek's incentive plan imposed three basic requirements for a sale to qualify for a commission: (1) the sale must be for "Enterprise Support Services" or "Remote Managed Services"; (2) the contract must meet StorageTek's revenue recognition standards; and (3) the sale must be final and the customer invoiced for the transaction. The sale at issue here initially pertained to Enterprise Support Services, a term with its own technical meaning. With some exceptions, these were contracts to support third-party (not StorageTek's) software and equipment.

This litigation concerns the 2005 incentive plan. To receive commission credit for new business under the terms of that plan, a new contract had to be executed and invoiced during StorageTek's 2005 fiscal year, which was calendar year 2005. The plan also awarded commissions for contracts executed *before* calendar 2005 but invoiced on "January 1, or later in 2005."

Renewal business was treated differently under the plan. StorageTek did not compensate renewed contracts as generously as new contracts. The company parceled out its existing service contracts between its sales executives by territory. Sales executives could claim commissions for renewals of the contracts assigned to them in their annual incentive plans.

If a sales executive thought a certain sale deserved special treatment, the executive could file a written request with the company's North America Incentive Plan Committee, with copies to local management. The committee would review the request and notify the sales executive of its decision.

StorageTek's 2005 incentive plan closed with this section, the meaning of which is central to this case:

> This Plan is effective as of January 1, 2005, regardless of the specific date of publication or distribution, and supersedes all prior Plans, provisions, precedents, compensation arrangements, memoranda and incentive programs. *It will remain in effect until a subsequent plan, or amendment to the Plan,*

> *becomes effective*. All sales eligible for quota credit under this Plan, or any amendment, by the end of the fiscal year 2005 will be payable under this Plan. Sales not eligible will be payable under the Plan in effect at the time quota credit is earned. *Incentives are not earned and are not wages until all requirements under this Plan, the Quota Document, the IPAD* [*the Administrative Document*] *and any amendments to these documents have been met as determined solely by the Plan Administrator.*

(Emphases added.)

B. Pursuit of JPMorgan Chase; the Sun Acquisition

Lawson started pursuing JPMorgan Chase as a customer in 2004, and by 2005 he was dedicating a significant amount of time to closing a deal. In June 2005 JPMorgan Chase solicited a bid from StorageTek for computer maintenance services. Although the parties had a preexisting contractual relationship to service StorageTek products, the June 2005 Request for Proposal involved computer maintenance services for non-StorageTek products, so this was new business unrelated to the prior contract. In other words, in StorageTek's sales taxonomy, JPMorgan Chase's Request for Proposal sought "Enterprise Support Services." Lawson spearheaded StorageTek's response.

Importantly, however, a large percentage of the new services contained within the Request for Proposal

involved servicing Sun's products. Prior to Sun's acquisition of StorageTek in August 2005, IBM had subcontracted with Sun to provide JPMorgan Chase with global support for Sun products. This agreement, called a "Statement of Work," originally covered the period between February 1, 2003, and January 31, 2006. Sun and IBM extended the arrangement through December 31, 2009, pursuant to an amendment to the Statement of Work executed on March 15, 2005. Despite this extension, in June 2005 JPMorgan Chase issued a separate Request for Proposal inviting Sun to bid directly (not through IBM) for the business covered by the Statement of Work. Jim Whaley, a Sun sales executive, took the lead in coordinating the response and submitted a bid on Sun's behalf.

On June 2, 2005, Sun announced that it was acquiring StorageTek. This announcement prompted Lawson to e-mail his supervisor, Paul Heidkamp, to ask how the acquisition would affect his commission on the JPMorgan Chase deal. Heidkamp responded that he needed more information and would get back to him. On August 31 Sun acquired StorageTek.

After the acquisition JPMorgan Chase asked Sun to combine the StorageTek and Sun bids. From the standpoint of Lawson's commission, the takeover dramatically changed the significance of the deal. As we've noted, a substantial portion of the JPMorgan Chase work involved maintaining Sun products – business that would have been new to StorageTek. After the acquisition, however, it was classified as

renewal business because Sun was already providing the services under the IBM Statement of Work.

Sun's revised merged bid contained three components. First, Sun offered to combine and continue services it was already providing under the IBM Statement of Work and StorageTek's prior contract with JPMorgan Chase. Second, Sun offered to partner with UNISYS to service products made by other computer manufacturers, such as Hewlett Packard, Compaq, Dell, and IBM; this work would be new business for Sun. Third, Sun offered to provide maintenance services for JPMorgan Chase's mainframe computer systems.

Whaley (from Sun) and Lawson (from StorageTek) spearheaded the joint proposal, which Sun submitted to JPMorgan Chase on October 11, 2005. Whaley died shortly thereafter, and Martina Caldara, who had worked on Sun's pre-merger bid, filled his position.

In addition to changing the significance of the JPMorgan Chase deal, Sun's takeover of StorageTek altered the terms of Lawson's incentive plan. On September 1, 2005, Sun amended the plan to specifically address the effect of the acquisition. Whereas StorageTek used the calendar year as its fiscal year, Sun's fiscal year began on June 26. The September 1 amendment explained that StorageTek would convert to Sun's fiscal year, with the transition to take place on December 25, the end of Sun's second fiscal quarter. To effectuate the conversion, the amendment

specifically stated that "the current incentive plan year for StorageTek will end December 25, 2005."

Sun continued to pursue the JPMorgan Chase deal through the fall of 2005, and Lawson again tried to ascertain how the acquisition would affect his incentive compensation. In November 2005 he e-mailed Woody Wall, a Sun manager, asking about the split between his commission and Whaley's. Wall assured Lawson that the company would "do the right thing for this transaction" and asked him to explain his concerns.

The day after this exchange, Peter Orr, who had been Whaley's supervisor, e-mailed Tom Kelley, Sun's Vice President of North American sales, explaining that Lawson's situation was "unique" and attempting to determine how his commission on the JPMorgan Chase deal should be treated. Lawson received a copy of the e-mail but does not recall receiving any response.

On December 8 Lawson again e-mailed Heidkamp asking whether the 2005 compensation plan would extend beyond the new year or if a new plan would be forthcoming. Heidkamp responded that the "comp plan should stay the same." Heidkamp also e-mailed Phil Auble, Sun's Incentive Plan Administrator, asking for a special "exception" for Lawson's commission on the JPMorgan Chase sale. Additional exchanges between Lawson, Heidkamp, and other Sun supervisors throughout the month of December did not reach

a consensus on how Lawson would be compensated for his work on the deal.

Sun's second fiscal quarter ended on December 25. The next day Sun sent Lawson a letter informing him that "[a]s of December 26, 2005, you will transition to [Sun's] Data Management Group Global Storage Sales Compensation Plan." The December 26 letter stated that Lawson would receive a copy of the plan and an individual goal sheet "[o]n or about January 15, 2006." The letter also assigned Lawson a new title: "Sales Specialist 1, DMG Sales." Lawson countersigned the letter, indicating that he received and understood it. Sun did not send him a copy of the new incentive plan until March 17, 2006.

In the meantime, the JPMorgan Chase deal remained in limbo. JPMorgan Chase continued to study Sun's October 11 bid and asked for a $7 million price reduction for the Sun/IBM component. On December 15, 2005, Lawson sent a detailed e-mail to Sun management proposing a strategy for persuading JPMorgan Chase to accept the deal.

JPMorgan Chase ultimately accepted only the first part of Sun's October 11 bid – the component consisting of the joint Sun/IBM proposal and continuation of the services StorageTek had previously provided. JPMorgan Chase and IBM executed a "Letter of Authorization" – essentially an agreement to negotiate in good faith toward a final agreement or amendment of the Statement of Work by January 30, 2006. The final amendment wasn't issued until September 29,

2006, but in the interim the parties issued several letters of intent in which IBM agreed to continue to work under the amendment to the Statement of Work. Because JPMorgan Chase only accepted the first component of the bid, the deal did not result in new business to Sun or StorageTek. On March 16, 2006, Sun internally recorded the sale as final, and on March 23, 2006, issued the first invoices for the work.

C. The Dispute Over Lawson's Commission

As the JPMorgan Chase sale was being finalized, Lawson continued to pursue his commission. On February 22 he requested a "max-draw" on his compensation – a request that the company front his anticipated commission. For the next several weeks, Sun management tried to determine the appropriate commission for the sale. Lawson argued that the JPMorgan Chase work should be classified as Enterprise Support Services under the 2005 StorageTek plan because that's what it was when he started pursuing the deal more than a year earlier. New contracts for Enterprise Support Services received the highest percentage commission under the 2005 plan because they constitute new business to the company. With an agreed annual price of $21.2 million for the JPMorgan Chase's U.S. business and another $6.8

million for its worldwide business, Lawson's commission under the 2005 plan would exceed $1.8 million.[1]

While these discussions were ongoing, Sun paid Lawson $17,000 on his draw request, fully recoverable if the company later determined that the commission was not owed. Sun management ultimately rejected Lawson's request to treat the JPMorgan Chase deal as Enterprise Support Services under the 2005 plan. In light of the Sun/StorageTek merger, the sale was not new business, so the company concluded that the higher commission would be an improper windfall to Lawson. Sun said it would treat the sale as an assigned renewal contract under the 2006 plan, triggering a substantially lower commission.

On March 17 and again on March 23, Sun e-mailed Lawson a copy of the 2006 incentive plan (technically called the "Data Management Group Sales Compensation Plan"). The plan itself was dated March 13, 2006, and was retroactively effective to December 26, 2005. On April 4 Lawson received his goal sheet, which contained his individual sales targets for the year. Lawson refused to sign it, fearing that doing so would prejudice his claim to a larger commission for the JPMorgan Chase deal. On May 12 Sun e-mailed Lawson a revised goal sheet, which

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[1] This figure included a multiyear incentive, which could be awarded to a sales executive for securing contracts of two or more years. Without that incentive Lawson's commission would be about $1.5 million.

treated the JPMorgan Chase sale as an assigned renewal and awarded a commission of $54,300. Lawson declined it and refused to sign the goal sheet.

Lawson thereafter retained counsel and on June 2 made a final demand for a commission for the JPMorgan Chase sale under the terms of the 2005 StorageTek plan. Sun declined to pay the demand. In October 2006 Lawson was laid off in a reduction in force.

D. Litigation History

Lawson sued Sun in Indiana state court alleging claims for breach of contract, quantum meruit, and violation of the Indiana Wage Claims Statute, IND. CODE §§ 22-2-9-1 *et seq.* (authorizing recovery of penalty damages and attorney's fees). Sun removed the case to federal court, *see* 28 U.S.C. §§ 1332(a), 1441(a), and filed a counterclaim alleging that Lawson violated the Illinois and California eavesdropping statutes by secretly recording several telephone conversations with Sun employees during the dispute over the commission.

Sun moved for summary judgment, and the district court granted the motion in part. The judge held that relief under quantum meruit was barred because the parties had an express contract. The judge also held that the eavesdropping counterclaim could not proceed because Indiana law applied (not the law of Illinois or California). Neither side challenges these rulings, so we'll say no more about them.

The judge denied summary judgment on the contract and statutory wage claims, finding the plan documents ambiguous and a trial necessary to determine liability.

The case was tried to a jury, which found Sun liable for breach of contract and awarded $1.5 million in damages. On the statutory claim, however, the judge changed his mind and entered judgment for Sun as a matter of law, *see* FED. R. CIV. P. 50(a), holding that Lawson's commissions were not "wages" under the Indiana statute. The judge rejected Sun's Rule 50(b) motion for judgment as a matter of law on the contract claim and entered final judgment on the jury's verdict. Both sides appealed.

II. Discussion

Sun argues that Lawson's contract claim fails as a matter of law because the 2005 incentive plan expired on December 25, 2005, and the JPMorgan Chase sale was not finalized and invoiced until March 2006. Lawson counters that the plan documents are ambiguous and the evidence at trial was sufficient for a reasonable jury to conclude that Sun intended the 2005 plan to remain in effect through at least March 2006. In his cross-appeal Lawson challenges the district court's ruling on his statutory claim for unpaid wages.

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.

A. Waiver

As a preliminary matter, Lawson argues that Sun waived its primary legal argument about the interpretation of the 2005 plan by failing to raise it at trial in a motion for judgment as a matter of law under Rule 50(a) or in a posttrial motion under Rule 50(b). We disagree.

At the summary-judgment stage, Sun specifically argued that the 2006 incentive plan – not the 2005 plan – controlled as a matter of law. The district court found the plan documents ambiguous and allowed the contract claim to proceed to trial. 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.").

Nor was Sun 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). As a general matter,

we do not review a decision denying summary judgment once the case has proceeded to trial; summary judgment relies on evidentiary predictions, which are unnecessary once a jury has found the actual facts. *Chemetall GmbH v. ZR Energy, Inc.*, 320 F.3d 714, 718 (7th Cir. 2003). And although a Rule 50 motion ordinarily is required to preserve a challenge to the sufficiency of the trial evidence, *id.* at 718-19, questions of contract interpretation are different. They involve pure questions of law unrelated to the sufficiency of the trial evidence, so it's not necessary for summary-judgment losers to relitigate purely legal issues of contract interpretation in a motion under Rule 50(a) or (b).[2] *Id.* at 718-20.

Sun's principal argument on appeal raises a purely legal question of contract interpretation: Based on the language of the plan documents, does StorageTek's 2005 incentive plan apply to the JPMorgan Chase sale? Sun preserved this issue at the summary-judgment stage. And because it has no bearing on the sufficiency of the trial evidence, Sun

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[2] There's a split of authority on this point, as we noted in *Chemetall GmbH v. ZR Energy, Inc.* 320 F.3d 714, 719 (7th Cir. 2003) (citing *Chesapeake Paper Prods. Co. v. Stone & Webster Eng'g Corp.*, 51 F.3d 1229, 1239 (4th Cir. 1995)); *see also Ji v. Bose Corp.*, 626 F.3d 116, 127-28 (1st Cir. 2010) (refusing to recognize an exception for purely legal claims). The Supreme Court did not resolve the question in *Ortiz v. Jordan*. 131 S. Ct. 884, 892 (2011) (refusing to address whether a qualified-immunity defense based purely on a legal question needed to be renewed in a posttrial Rule 50 motion).

did not need to raise it again in its Rule 50(a) and (b) motions. The argument was not waived.

B. The 2005 Incentive Plan Does Not Apply

Under Indiana law "[t]he unambiguous language of a contract is conclusive upon the parties to the contract and upon the courts." *Whitaker v. Brunner*, 814 N.E.2d 288, 293 (Ind. Ct. App. 2004) (quotation marks omitted). Extrinsic evidence of the parties' intent is permitted only when the contract is ambiguous or uncertain in its terms, in which case the question of the parties' intent is one for the fact finder. *Trustcorp Mortg. Co. v. Metro Mortg. Co.*, 867 N.E.2d 203, 212 (Ind. Ct. App. 2007). But "[i]f the contract language is clear and unambiguous, the document is interpreted as a matter of law without looking to extrinsic evidence." *BKCAP, LLC v. CAPTEC Franchise Trust 2000-1*, 572 F.3d 353, 359 (7th Cir. 2009) (Indiana law). "A contract is not ambiguous merely because the parties disagree as to its proper construction; rather, a contract will be found to be ambiguous only if reasonable persons would differ as to the meaning of its terms." *Allen Cnty. Pub. Library v. Shambaugh & Son, L.P.*, 997 N.E.2d 48, 52 (Ind. Ct. App. 2013) (quoting *Vincennes Univ. v. Sparks*, 988 N.E.2d 1160, 1165 (Ind. Ct. App. 2013)).

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."

Lawson resists the force of this explicit termination date by invoking the provision we have block-quoted above, which states (among other things) that the plan "will remain in effect until a subsequent plan, or amendment to the Plan, becomes effective." In Lawson's view this provision conflicts with the fixed expiration date specified in the September 1 amendment, creating an internal ambiguity. 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. Contractual phrases are not read in isolation; rather, the contract must be read as a whole. *Allen Cnty. Pub. Library*, 997 N.E.2d at 52. Moreover, Indiana courts prefer "an interpretation of the contract that harmonizes its provisions, as opposed to one that causes the provisions to conflict." *Four Seasons Mfg. v. 1001 Coliseum, LLC*, 870 N.E.2d 494, 501 (Ind. Ct. App. 2007). Read holistically and harmonized, these provisions are not in tension with each other.

As we've noted, Lawson's argument relies heavily on the concluding paragraph in the unamended 2005

plan, which we have quoted in full above. That paragraph contains the following key terms: (1) the 2005 incentive plan is exclusive, i.e., it's the only compensation plan in place for StorageTek's 2005 fiscal year; (2) the plan is effective January 1, 2005, even if published later; (3) the plan supersedes any previous plan and continues in effect until a subsequent plan or amendment becomes effective; and (4) the only sales eligible for commission credit under the 2005 plan are those meeting all plan requirements by the end of fiscal year 2005. The September 1 amendment substituted Sun's fiscal year for StorageTek's and fixed a definite termination date for StorageTek's then-current plan year: December 25, 2005.

Read together, these provisions unambiguously establish that to qualify for commission credit under StorageTek's 2005 plan, a sale must meet all eligibility requirements *by the end of the plan year*, that is, by December 25, 2005. The JPMorgan Chase sale plainly did not qualify.

Lawson proposes an alternative interpretation: Although the *plan year* ended on December 25, 2005 (by virtue of the language in the September 1 amendment), the *plan itself* continued in effect beyond that date until a new plan became effective. And because Sun did not transmit the 2006 plan to him until March 17 – the day *after* Sun internally recognized the JPMorgan Chase deal as final (on March 16) – he is entitled to a commission under the 2005 plan.

There are several problems with this interpretation. First, the 2005 plan unequivocally states that "[a]ll sales eligible for quota credit under this Plan, or any amendment, *by the end of fiscal year 2005* will be payable under this Plan." (Emphasis added.) Another provision makes it clear that new contracts *must* be invoiced during the 2005 fiscal year to receive commission credit:

> *Both contract execution and initial invoicing must occur during the StorageTek Fiscal Year to count as Comp Revenue*, unless determined otherwise in StorageTek's sole discretion. If a contract is fully executed prior to January 1, 2005 and not invoiced until January 1, or later in 2005, it will count as Comp Revenue under this Plan.

(Emphasis added.)

Moreover, the 2005 plan is explicit that "[s]ales not eligible [under this plan] will be payable under the Plan in effect at the time quota credit is earned." This provision contemplates the likelihood that sales may be in progress in 2005 but not finalized and invoiced until later, and specifically provides that quota credit for these sales is awarded under the terms of the plan in effect when credit is earned – i.e., under a successor plan, *not* the 2005 plan. In other words, sales in progress but not yet invoiced when the 2005 plan year expires are *not* grandfathered into the 2005 plan. Finally, Sun's 2006 incentive plan, though dated and delivered to Lawson on March 17, 2006, was made fully retroactive to December 26, 2005.

If more were needed to demonstrate the flaws in Lawson's interpretation, the 2005 plan specifically required that sales executives submit all payment requests for 2005 commissions no later than 30 days after the close of the 2005 fiscal year. That requirement would be impossible to fulfill for sales still in progress and not yet invoiced when the fiscal year expired.

In short, Lawson's proposed interpretation cannot be reconciled with key plan requirements for commission eligibility. To the contrary, accepting Lawson's interpretation would require us to rewrite the most important terms of the compensation plan to make the JPMorgan Chase deal qualify for commission credit without fulfilling any of the requirements necessary to earn a commission under the 2005 plan. That, by definition, makes Lawson's proposed interpretation an unreasonable one. *See Hepburn v. Tri-Cnty. Bank*, 842 N.E.2d 378, 384 (Ind. Ct. App. 2006) (explaining that Indiana courts do not "add provisions to a contract that were not placed there by the parties"); *Colonial Penn Ins. Co. v. Guzorek*, 690 N.E.2d 664, 669 (Ind. 1997) ("[T]he power to interpret contracts does not extend to changing their terms.").

In addition to these intratextual difficulties, the compensation plan as written is not readily amenable to judicial gap-filling. As we've explained, the plan treated new and renewal business differently. New business received the highest commission; renewal contracts received no commission unless specifically assigned to a sales executive as part of his revenue

quota, and these commission rates were lower than for new business. If the 2005 plan continued beyond fiscal year 2005 and covered sales finalized and invoiced in 2006, vexing questions would arise about how to calculate commissions. Business might be considered new in 2005 (and therefore compensable at the highest rate) but not new in 2006, when the commission is actually earned. Commissions based on 2005 assigned renewals likewise could have a different status in 2006 – including, for example, a reduced commission rate if the profitability of a deal declined over time. This interpretive difficulty bolsters our conclusion that Lawson's preferred reading of the plan is not a reasonable one.

The parties spill a lot of ink debating Lawson's status as an at-will employee; the meaning of Sun's December 26, 2005 letter; the effect of Lawson's refusal to sign his 2006 goal sheet (and revised goal sheet); and the parties' course of conduct in late 2005 and early 2006 as the negotiations over the disputed commission unfolded. Because the plan language is not ambiguous, this extrinsic evidence simply drops out of the case. The trial was unnecessary.

In sum, the JPMorgan Chase sale unambiguously did not qualify for a commission under the 2005 plan. And 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.

Accordingly, we REVERSE the district court's judgment and REMAND with instructions to enter judgment for Sun.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID R. LAWSON, Plaintiff,	))	
vs.	))	1:07-cv-196-RLY-MJD
SUN MICROSYSTEMS, INC., Defendant.	))	

FINAL JUDGMENT

(Filed Feb. 4, 2013)

On August 29, 2012, the jury returned a verdict in favor of the plaintiff, David R. Lawson ("Plaintiff"), and against the defendant, Sun Microsystems, Inc. ("Defendant"), on Plaintiff's claim for breach of contract. Defendant filed a renewed motion for judgment as a matter of law with respect to Plaintiff's claim for breach of contract and for unpaid wages under the Indiana Wage Claim Statute. On December 14, 2012, the court granted the motion with respect to Plaintiff's claim for unpaid wages, and denied the motion with respect to Plaintiff's claim for breach of contract.

All issues in this case have been resolved. **IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED** that:

1. Judgment is entered for Defendant and against Plaintiff on Plaintiff's claim for unpaid wages under the Indiana Wage Claim Statute.

2. Judgment is entered on the jury's verdict for Plaintiff and against Defendant on Plaintiff's breach of contract claim.

3. Plaintiff shall recover compensatory damages in the amount of $1,500,000.00.

4. Plaintiff shall recover from Defendant prejudgment interest at the rate of 8% per annum pursuant to Indiana Code Section 24-4.6-1-102, as of March 23, 2006, the date Defendant initially invoiced the JPMC deal and Plaintiff's commission rights accrued.

5. Plaintiff shall recover post-judgment interest, at the rate of 0.14% as provided by law.

6. Defendant did not pursue its counterclaim under the California and Illinois eavesdropping statutes. That claim is hereby dismissed.

7. Judgment is entered for Defendant and against Plaintiff on Plaintiff's claim for quantum meruit, as reflected in the court's summary judgment order, dated November 7, 2011.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all court costs are hereby taxed against Defendant and that Plaintiff shall recover court costs as provided by law.

SO ORDERED this 4th day of February 2013.

/s/ Richard L. Young
RICHARD L. YOUNG,
CHIEF JUDGE
United States District Court
Southern District of Indiana

Laura Briggs, Clerk
United States District Court

/s/ [Illegible]
By: Deputy Clerk

Distributed Electronically to Registered Counsel of Record.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DAVID R. LAWSON,	)	
Plaintiff,	)	
	)	
vs.	)	1:07-cv-196-RLY-MJD
	)	
SUN MICROSYSTEMS, INC.,	)	
Defendant.	)	

ENTRY ON DEFENDANT'S RENEWED RULE 50 MOTION

(Filed Dec. 14, 2012)

Defendant, Sun Microsystems, Inc. ("Sun"), renews its motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure. For the reasons set forth below, the motion is **GRANTED** in part, and **DENIED** in part.

I. Background

In 2005, Plaintiff worked on a commission basis as a Service Sales Executive ("SSE") for Storage Technology Corporation ("STK"). His compensation was governed by three documents, which were revised annually: (1) a Service Sales Executive Incentive Plan ("the "STK Plan"), (2) an Incentive Plan Administration Document ("IPAD"), and (3) a Quota Document (collectively, the "2005 STK Plan Documents"). The STK Plan provided that a sales representative like

Plaintiff was entitled to incentive compensation if: (1) the sales representative executed, *inter alia*, a binding Executive Sales Services ("ESS") contract or an assigned renewal and (2) the customer was initially invoiced in the same fiscal year. (Trial Ex. 1 at 1-3). The STK Plan "remained in effect until a subsequent plan, or amendment to the Plan, became effective." (*Id.* at 6).

In the Summer of 2005, while Plaintiff was pursuing a maintenance and support contract with JP Morgan Chase & Co. ("JPMC"), STK was acquired by Sun. Plaintiff continued to pursue the deal with other Sun employees. Plaintiff contends that, after securing the JPMC deal in the Spring of 2006, Sun denied him the substantial commission he believed he was entitled to under the 2005 STK Plan, by designating the JPMC deal as an "assigned renewal" under the 2006 Sun Plan rather than an ESS contract under the 2005 STK Plan. ESS contracts are defined as either: (1) third party software (software not made by STK, but sold by STK); or (2) equipment not manufactured or sold by STK, and not previously covered by STK maintenance. (*Id.* at 3). ESS contracts generated a much higher commission to an SSE than an assigned renewal contract. (Plaintiff Test. at 199). In the present case, the difference between a commission based on an ESS contract and a commission based on an assigned renewal amounted to well over $1,000,000.

In January 2007, Plaintiff filed the present lawsuit under the court's diversity jurisdiction for: (1) breach of contract, (2) unpaid wages under Indiana's Wage

Claims Statute, and (3) quantum meruit. On March 18, 2011, Sun moved for summary judgment on all of Plaintiff's claims, and on its counterclaim under the California and Illinois eavesdropping statutes. In pertinent part, the court found that: (1) the STK Plan Documents constituted an enforceable contract; (2) there was a material issue of fact as to whether the STK Plan Documents, or the 2006 Sun Plan, governed Plaintiff's incentive pay for the JPMC deal and unpaid wages; (3) Plaintiff's incentive pay was a "wage" under Indiana's Wage Claims Statute; and (4) Indiana's choice of law rules required the application of Indiana law to Sun's counterclaim, and, under the facts presented, Plaintiff was not liable under the Indiana Wiretap Act. The court also found that Plaintiff could not pursue a claim for quantum meruit, as that remedy may only be pursued in the absence of an enforceable contract. (*See* Docket # 230).

The court held a jury trial in this matter from August 27 to August 29, 2012, on Plaintiff's breach of contract and wage claims. Although Sun never formally moved to dismiss its counterclaim, it did not pursue the claim at trial. Sun moved for judgment as a matter of law on both claims. The court took the matter under advisement, and, without objection, submitted only the breach of contract claim to the jury. At the conclusion of the trial, the jury found that Sun breached the 2005 STK Plan by failing to pay Plaintiff incentive compensation with respect to the JPMC deal in accordance with the 2005 STK Plan, and awarded Plaintiff $1,500,000 in damages. Sun

renews its motion for judgment as a matter of law on Plaintiff's breach of contract and wage claims. For the reasons set forth below, the motion is **GRANTED** in part, and **DENIED** in part.

II. Standard of Review

Pursuant to Rule 50 of the Federal Rules of Civil Procedure, a district court may enter judgment against a party who has been fully heard on an issue during a jury trial 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) (motion for judgment as a matter of law), (b) (renewed motion for judgment as a matter of law). "'The standard governing a Rule 50 motion mirrors that employed in a motion for summary judgment.'" *Winters v. Fru-Con, Inc.*, 498 F.3d 734, 745-46 (7th Cir. 2007) (quoting *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 578 (7th Cir. 2003)). Thus, 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) (citing *Tart v. Illinois Power Co.*, 366 F.3d 461, 464 (7th Cir. 2004)). In conducting this review, the court does not make credibility determinations or weigh the evidence, and "'must disregard all evidence favorable to the moving party that the jury [was] not required to believe.'" *Id.* (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 151 (2000)).

III. Discussion

Sun contends that the court should overturn the jury verdict with respect to Plaintiff's breach of contract claim for five reasons: (1) the STK Plan Documents did not comprise an enforceable contract for incentive compensation; (2) Plaintiff failed to fulfill all of the requirements to qualify for incentive compensation under the 2005 STK Plan; (3) Sun did not breach the 2005 STK Plan; (4) Plaintiff presented no evidence from which a reasonable jury could find that Sun and Plaintiff reasonably anticipated the damages alleged by Plaintiff when the 2005 STK Plan became effective or when it was published; and (5) the jury's $1,500,000 verdict is not rationally related to the evidence. Sun also contends that Plaintiff's incentive compensation was not a "wage" within the meaning of Indiana's Wage Claim Statute. The court now turns to Sun's arguments with respect to Plaintiff's breach of contract claim.

A. Breach of Contract

1. The STK Plan Documents

Sun first argues that the STK Plan Documents were illusory because they did not obligate Sun to honor the STK Plan for purposes of determining Plaintiff's incentive pay. According to Sun, Plan Administrator Phil Auble ("Auble") had the authority to interpret the Plan and to unilaterally reduce Plaintiff's commission to zero. This same argument was raised and rejected by the court in its Entry on

Defendant's Motion for Summary Judgment and in its Entry on Defendant's Motion to Reconsider. (*See* Docket # 230 at 19-23; Docket # 246). The court has read and reviewed its Entry on Defendant's Motion for Summary Judgment, the Seventh Circuit's decision in *Carroll v. Stryker*, 658 F.3d 675 (7th Cir. 2011), and the parties' respective briefs supporting and opposing the present motion, and is not persuaded that it misapplied the law under the facts of this case.

2. Incentive Pay Under the 2005 STK Plan

Next, Sun argues that Plaintiff presented no evidence from which a reasonable jury could find that Plaintiff fulfilled all of the requirements to qualify for incentive compensation under the 2005 STK Plan. Sun's argument ignores two key pieces of evidence, one of which has already been alluded to. First, the 2005 STK Plan explicitly stated that it remained in place until a subsequent plan became effective. (Trial Ex. 1 at 6). Second, the 2006 Sun Plan Goal Sheet, which Plaintiff received on April 4, 2006, and was part of the overall Sun Plan, stated within its signature block that the 2006 Sun Plan was "not effective until this form has been completed and approved at all levels (including Finance)." (Trial Ex. 80 at 2). Plaintiff did not sign the Goal Sheet, and there was no evidence that the Goal Sheet was approved at all levels within Sun's management. Moreover, the JPMC deal was initially invoiced on March 23, 2006,

over a week before Sun provided Plaintiff with the Goal Sheet. Thus, a reasonable jury could have found that the 2005 STK Plan was still in effect as of the date the JPMC deal was initially invoiced.

Sun mounts a number of arguments in support of its theory that the jury, in essence, erred. First, Sun contends that Plaintiff was "informed and knew" that he was being placed on the 2006 Sun Plan effective December 26, 2005. At trial, Plaintiff testified that he received a letter from Sun dated December 26, 2005 (the "Sun Letter" or "Letter"), informing him that: (1) he will transition to the 2006 Sun Plan; (2) his salary will remain at $75,000 and his incentive compensation will remain at $80,000; (3) he will be provided with a goal sheet that sets forth his specific targets and compensation elements, and:

> the terms and conditions of this Confirmation Letter, in conjunction with the Sun Welcome Letter, supersede any prior written or oral communications to you concerning the terms of your employment with StorageTek, such as future promotions, salary increases, bonuses, stock grants, etc., which are not documented within StorageTek's HR records. Your employment is subject to the terms and conditions contained herein and all other relevant Sun policies and procedures.

(Plaintiff's Trial Testimony at 287-290; Trial Ex. 37).

Plaintiff signed the Sun Letter on January 5, 2006; however, the signature block specifically stated that Plaintiff's "signature acknowledges receipt and

understanding of the terms of th[e] letter." (Trial Ex. 37). It does not indicate that Plaintiff agreed to what the Letter stated regarding a transition to the 2006 Sun Plan. This makes sense, because at the time that Plaintiff signed the Letter, there was no Sun Plan or Goal Sheet in effect. Furthermore, the terms of the Letter, reflected in the block quote above, do not specifically state that the Letter supersedes the 2005 STK Plan. To this end, a reasonable jury could have found that the STK Plan Documents would be the type of documents within STK's human resources records, and that therefore, they were not the type of communications that were superseded by the Sun Letter. In sum, a reasonable jury could have found that Plaintiff was not subject to the 2006 Sun Plan, by virtue of the Letter, as of December 26, 2005.

Second, 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. For example, the 2006 Sun Plan stated that it was effective as of December 26, 2005; the 2004 and 2005 STK Plans contained similar language; and the testimony of former Sun saleswoman Tina Caldera ("Caldera"), former Sun financial analyst Mark Schlager ("Schlager"), and Auble, informed the jury that these types of incentive plans are always released after their effective date and are made retroactive to the effective date. (Trial Testimony of Tina Caldera ("Caldera Test.") at 257; Trial Testimony of Phil Auble ("Auble Test.") at 442, 445, 498; Trial

Testimony of Mark Schlager ("Schlager Test.") at 512-13, 517, 542). The jury could have disregarded this testimony in light of the fact that the 2006 Sun Goal Sheet contradicted the 2006 Sun Plan by stating that the Plan was "not effective" until it was approved at all levels, including Finance. Significantly, the 2004 and 2005 STK Plans contained no such language.

Third, Sun points to Schlager's testimony that the $17,000 draw Plaintiff received in February 2006 was a draw in anticipation of commissions to be paid in 2006 and recoverable under the 2006 Plan. (Schlager Test. at 516-20). Plaintiff submitted evidence at trial which contradicts Schlager's testimony. The first piece of evidence consisted of a "Draw Payment Schedule," which identified Plaintiff's Plan Title as "Service Sales Executive." Plaintiff's title under the 2005 STK Plan was "Service Sales Executive," whereas Plaintiff's job title under the 2006 Sun Plan was "Sales Specialist I." (Trial Testimony of David Lawson ("Plaintiff Test.") at 319; Trial Exs. 1, 3, 37). In addition, the Draw Payment Schedule directed Plaintiff to "the IPAD" for further information. (Trial Ex. 105). The "IPAD" referred to the Incentive Plan Administration Document, a 2005 STK Plan document. (Plaintiff's Trial Testimony at 319). There was no evidence of a 2006 Sun Plan IPAD.

Finally, Sun points to Auble's testimony indicating that Plaintiff did not submit a commission request within thirty days of the end of the 2005 fiscal year, as required by the 2005 STK Plan Documents. (Auble Test. at 437-38). Sun's argument ignores the

fact that the jury could have reasonably believed that the 2006 Sun Plan was not in effect until April 4, 2006 – the date Plaintiff received his Goal Sheet. The evidence showed that Plaintiff submitted his commission request on February 22, 2006, while the 2005 STK Plan was still in effect. Thus, a reasonable jury could have found that Plaintiff submitted a timely commission request under the 2005 STK Plan.

There is evidence in the record supporting the jury's determination that the 2005 STK Plan controlled Plaintiff's incentive compensation on the JPMC deal. Accordingly, the jury verdict finding that the STK Plan governed Plaintiff's incentive pay stands.

3. Sun's Breach

Sun asserts that Auble, who as Plan Administrator had the sole discretion and authority to interpret and administer the 2005 STK Plan, testified that Plaintiff did not meet the conditions necessary to qualify for incentive compensation on the JPMC deal under the 2005 STK Plan. Auble also testified that the only way Plaintiff could have been paid under the 2005 STK Plan would have been through the exception process, which falls outside the terms of the Plan. (*Id.* at 372-391). Sun contends that, in light of his testimony, no reasonable jury could have found that Sun breached the 2005 STK Plan.

The jury is entitled to weigh the credibility of a witness, and to believe or disbelieve his or her

testimony. *Kapelanski v. Johnson*, 390 F.3d 525, 532 (7th Cir. 2004); *see also* Final Instruction No. 10. Thus, the jury was not *required* to credit Auble's testimony. To cite one example, Auble admitted on cross-examination that his opinion that the 2005 STK IPAD's definition of "ESS" had changed after Sun acquired STK to exclude Sun Microsystems as a manufacturer and to exclude service contracts previously under maintenance with Sun, was in error. (*Id.* at 493) (testifying that the plain language of the IPAD directly conflicted with his opinion of "ESS"). Accordingly, the jury's determination that Sun breached the 2005 STK Plan is a reasonable conclusion based upon the evidence presented at trial.

4. Damages

Sun asserts that no reasonable jury could have concluded that the damages awarded to Plaintiff were reasonably anticipated by the parties when the 2005 STK Plan became effective or when it was published.

Under Indiana law, "the measure of damages for breach of contract is either such damages as may fairly and reasonably be considered as arising naturally, i.e., according to the usual course of things from the breach of contract itself, or as may be reasonably supposed to have been within the contemplation of the parties at the time they entered into the contract as a probable result of the breach." *Rogier v. American Testing and Eng'g Corp.*, 734 N.E.2d 606, 614 (Ind. Ct. App. 2000). The test for measuring damages

is an objective one, limited to what was reasonably foreseeable at the time the parties entered into the contract. *Id.* Damages which do not arise naturally from the breach of contract, or are not within the reasonable contemplation of the parties at the time the contract is entered into, are not recoverable. *Id.*

Plaintiff presented evidence that his damages were foreseeable. First, Plaintiff testified that he had been working on the deal prior to the issuance of the 2005 STK Plan. (Plaintiff Test. at 96-97) (testifying that he received a lead in July 2004). Second, Auble testified that the 2005 STK Plan set no cap on what a SSE could earn. (Auble Test. at 344). Third, the 2005 STK Plan provided that an SSE could earn more than the target incentive through overachievement. (Trial Ex. 1 at 1). Fourth, the 2005 STK Plan also provided a formula to calculate the commission earned on a sales opportunity. (*Id.* at 3). Fifth, Plaintiff's supervisor, Paul Heidcamp, emailed Auble on December 8, 2005, regarding Plaintiff's incentive compensation on the JPMC deal. (Plaintiff Test. at 184-85; Trial Ex. 26). Auble did not respond. (Auble Test. at 347). And despite Plaintiff's repeated emails asking "legacy" STK and Sun executives to inform him how he would be paid on the JPMC deal, and despite his emails notifying the executives of what he thought he was entitled to, Plaintiff was not notified that Sun was proposing to classify the JPMC deal as an assigned renewal until a March 17, 2006, telephone call with Schlager. (Plaintiff Test. at 115-121, 159-163, 199; Trial Testimony of Paul Heidcamp at 378-83; Trial

Exs 7, 17, 26, 28, 137, 179). A reasonable jury, faced with this evidence, could have found that legacy STK/Sun executives were aware of Plaintiff's request for incentive compensation on the JPMC deal under the 2005 STK Plan formula prior to and during the time STK SSEs were being "transitioned" from STK to Sun, and that, therefore, Plaintiff's damages were within the reasonable contemplation of the parties.

The evidence cited by Sun of the jury's unreasonable interpretation of the evidence consists of Plaintiff's testimony that: (1) he had never received a commission higher than $100,000; (2) Auble had the discretion to reduce commission amounts from what was contained in the commission formula and to adjust quotas; (3) Auble could not have known at the start of the fiscal year that STK would be merged with Sun; (4) the JPMC deal was a renewal; and (5) the JPMC deal was a "low margin deal."

The incentive compensation Plaintiff requested for invoicing the JPMC deal was based on the formula provided by the 2005 STK Plan. Thus, while it was staggeringly high compared to his prior commissions, it is worth noting that Plaintiff had never had a business opportunity like that presented by the JPMC deal, and dedicated an inordinate amount of his time on it. (*See* Trial Ex. 75). Plaintiff testified the JPMC deal consisted of a five-year contract worth approximately $140,000,000, or $28,000,000 a year. (Plaintiff Test. at 182). Had Auble or any other Sun or STK executive informed Plaintiff that his incentive compensation could never exceed a certain threshold for

ESS contracts, the outcome of this case would probably be different. But no one ever told him that. In fact, Sun/STK executives kept him in limbo for months, and gave him a draw "to buy time" because the posture of Plaintiff's compensation – whether it was under the 2005 STK Plan or the 2006 Sun Plan – was "unique." (Heidcamp Test. at 333; Trial Ex. 66). Thus, the fact that this anticipated commission was much higher than in prior years is easily explained. Indeed, Auble calculated Plaintiff's commission from the formula contained in the 2005 STK Plan to be $1,864,848. (Auble Test. at 354).

Next, Sun argues that Auble's discretionary authority was unfettered, and that he had the authority to reduce Plaintiff's commission and to adjust quotas, at any time. Sun is partly correct. The 2005 STK Plan did grant Auble the authority to reduce commissions and to adjust quotas; however, before he could exercise that authority, he had to give SSEs, like Plaintiff, notice. (Auble Test. at 350-51, 494) (testifying that before he could institute changes in the 2005 STK Plan, he had to give the salespeople notice of the change). There is no evidence that Auble gave Plaintiff notice of a significant change in his compensation structure specifically with respect to any commission to which he would be entitled under the JPMC deal.

Sun also contends that Auble could not have known that at the start of the 2005 fiscal year, STK would merge with Sun. As a practical matter, that could be said of almost any merger and with any

salesperson who works on commission, as commission-based sales are subject to variables outside of the control of the salesperson. Moreover, once the merger occurred on August 31, 2005, Auble issued a revised IPAD the following day that preserved the definition of "ESS," thereby maintaining the definition of what Plaintiff could sell to receive incentive compensation under the 2005 STK Plan. The IPAD also contained a section dedicated to the "Sun Merger" that said nothing about whether an SSE like Plaintiff could receive ESS credit on a maintenance contract on Sun equipment under the 2005 STK Plan. (Trial Ex. 2 at 7). In simple terms, the revised IPAD failed to address whether a STK SSE could receive ESS credit for obtaining a maintenance contract on Sun equipment.

In addition, Sun contends that the JPMC deal was a "renewal," and not "new business" (i.e., an ESS contract) under the 2005 STK Plan. Plaintiff presented evidence that the JPMC deal met the definition of "new business" under the 2005 STK Plan. For example, Plaintiff presented evidence that it was a service contract almost entirely on equipment not previously under maintenance with STK. (Trial Ex. 1 at 2; Trial Ex. 2 at 5; Plaintiff Test. at 229-30, 301; Heidcamp Test. at 379). Further, Sun's "data management tool," which was used to "[tell] a story of how the deal was constructed," marked the transaction as "new business." (Caldera Test. at 277-80; Trial Ex. 89 at 13). Lastly, Sun received a maintenance termination notice in early December 2005 from IBM (whose

customer was JPMC), even though the Statement of Work between IBM and Sun was allegedly going to extend into 2006. (Plaintiff Test. at 177-78, 275; Trial Ex. 23).

Sun's final argument is that Plaintiff's damages were unforeseen because the profitability of the JPMC deal was low. Sun's evidence on this point consisted of the testimony of Tracy O'Toole, whose account while at Sun included JPMC. (Trial Testimony of Tracy O'Toole at 577-78). She testified that the profitability of the JPMC account was "much below industry standard" and was "one that was referred to as in the single digits." (*Id.* at 578). Sun, however, did not introduce any figures or percentages regarding the JPMC account's actual profit margin with respect to the deal at issue, nor any evidence regarding the JPMC account's profit margins as compared to other Sun accounts. With more specific evidence before them, the jury was entitled to discount her testimony.

Viewing the evidence in the light most favorable to the Plaintiff, including all reasonable inferences based upon that evidence, the court finds that a reasonable jury could have concluded that the damages awarded to Plaintiff were within the reasonable contemplation of the parties at the time the 2005 STK Plan was effective, and certainly at the time the IPAD was amended in September 2005.

5. The Verdict

Lastly, Sun contends that the jury award was not rationally related to the evidence. Case law holds that only those damage awards that are "monstrously excessive," born of passion and prejudice, or not rationally related to the evidence, may be altered by a court. *American Nat'l Bank & Trust Co. of Chicago v. Regional Transp. Auth.*, 125 F.3d 420, 437 (7th Cir. 1997); *Pincus v. Pabst Brewing Co.*, 893 F.2d 1544, 1554 (7th Cir. 1990). Because the jury's assessment of damages is an exercise in fact-finding, the court gives deference to the jury's damages award. *American Nat'l Bank*, 125 F.3d at 437; *Pincus v. Pabst Brewing Co.*, 893 F.2d at 1554.

Plaintiff testified that based on an annual contract value of $19,830,451, the JPMC deal would, without factoring in the multi-year incentive, produce a commission of $1,449,994. (Plaintiff Test. at 216). Plaintiff also testified that, with the multi-year "kicker," his commission would have been as high as $2,486,086.21. (*Id.*). The jury rendered a verdict on damages of $1,500,000. The court finds, based upon this evidence, that the jury's damages award was rationally related to the evidence.

B. Wage Claim Statute

Plaintiff also contends that his incentive compensation falls under the definition of "wages" for purposes of the Indiana Wage Claim Statute. That statute provides, in pertinent part, "[w]henever any

employer separates any employee from the payroll, the unpaid wages or compensation of such employee shall become due and payable at [the] regular pay day for [the] pay period in which separation occurred." *See* Ind.Code § 22-2-9-2(a). "Wages" are defined 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." IND.CODE § 22-2-9-1(b) (emphasis added).

Courts consider the "substance of the compensation" in determining whether it is a wage, not the name given to the method of compensation. *Thomas v. H & R Block E. Enter., Inc.*, 630 F.3d 659, 664 (7th Cir. 2011) (citing *Kopka, Landau & Pinkus v. Hansen*, 874 N.E.2d 1065, 1072 (Ind. Ct. App. 2007)). A payment is more likely to be a "wage" if it: (1) is not linked to a contingency on factors outside the employee's control; (2) directly relates to the time an employee works; (3) is paid on a regular, periodic basis for regular work done by the employee, and (4) is not paid in addition to other wages. *Id.* at 664-65 (citations omitted). Indiana case law holds that compensation is a wage "'if it is compensation for time worked and is not linked to a contingency such as the financial success of the company.'" *Naugle v. Beech Grove City Sch.*, 864 N.E.2d 1058, 1067 (Ind. 2007) (quoting *Highhouse v. Midwest Orthopedic Inst.*, 807 N.E.2d 737, 740 (Ind. 2004)).

Plaintiff's incentive compensation was part of his overall compensation package. (Trial Ex. 1 at 1).

However, his incentive compensation was linked to contingencies outside of his control, such as the profit margin of a contract; it was paid in addition to his $75,000 base salary; it was not paid on a regular, periodic basis for regular work performed by him; and was not directly linked to the time he spent on any given account. (*Id*.; Plaintiff Test. at 236, 317; Auble Test. at 355, 439, 448-49). The court's reliance on *J Squared, Inc. v. Herndon*, 822 N.E.2d 633 (Ind. Ct. App. 2005) in its summary judgment ruling was in error. Unlike Plaintiff, the salesman in *J Squared* did not receive a base salary. His only compensation was through the commissions he earned through sales, and he received a regular, bi-weekly draw from the company. *See also Prime Mortgage USA, Inc. v. Nichols*, 885 N.E.2d 628, 664-65 (Ind. Ct. App. 2008) (holding that although the compensation owed to an employee was tied to the employer's financial success, where an employee's compensation was composed solely of commissions, could be immediately calculated, and was paid on a regular basis, employee's commission was a "wage"). Accordingly, the court finds Plaintiff's incentive compensation was not a "wage" within the meaning of the Wage Claim Statute.

IV. Conclusion

For the reasons set forth above, the court **GRANTS** in part and **DENIES** in part Defendant's Renewed Rule 50 Motion (Docket # 307). Specifically, the court **GRANTS** Defendant's Motion with respect

to Plaintiff's claim for unpaid wages under Indiana's Wage Claim Statute, and **DENIES** Defendants' Motion with respect to Plaintiff's claim for breach of contract.

SO ORDERED this 14th day of December 2012

/s/ Richard Young
RICHARD L. YOUNG,
CHIEF JUDGE
United States District Court
Southern District of Indiana

Distributed Electronically to Registered Counsel of Record.

§1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

Fed. R. Civ. P. 50

Judgment as a Matter of Law in a Jury Trial; Related Motion for a New Trial; Conditional Ruling

(a) *Judgment as a Matter of Law*.

(1) *In General*. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) *Motion*. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) *Renewing the Motion After Trial; Alternative Motion for a New Trial.* If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment – or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was

discharged – the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

(1) allow judgment on the verdict, if the jury returned a verdict;

(2) order a new trial; or

(3) direct the entry of judgment as a matter of law.

(c) *Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.*

(1) *In General.* If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial.

(2) *Effect of a Conditional Ruling.* Conditionally granting the motion for a new trial does not affect the judgment's finality; if the judgment is reversed, the new trial must proceed unless the appellate court orders otherwise. If the motion for a new trial is conditionally denied, the appellee may assert error in that denial; if the judgment is reversed, the case must proceed as the appellate court orders.

(d) *Time for a Losing Party's New-Trial Motion.* Any motion for a new trial under Rule 59 by a party

against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment.

(e) *Denying the Motion for Judgment as a Matter of Law; Reversal on Appeal.* If the court denies the motion for judgment as a matter of law, the prevailing party may, as appellee, assert grounds entitling it to a new trial should the appellate court conclude that the trial court erred in denying the motion. If the appellate court reverses the judgment, it may order a new trial, direct the trial court to determine whether a new trial should be granted, or direct the entry of judgment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

TRANSCRIPT OF JURY TRIAL

VOLUME III

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

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Proceedings reported by stenotype. Transcript produced by computer-aided transcription.

* * *

[Vol III-474] (Open court, no jury present, at 8:08 a.m.)

THE COURT: Please be seated.

Good morning.

MR. EBERT: Good morning, Your Honor.

THE COURT: We're back on the record in our jury trial, day three, Lawson versus Sun Microsystems, 1:07-cv-196, the parties as before. We're on the home stretch here, and after the plaintiff rested, Mr. Ebert, on behalf of Sun, wished to make a motion. In trying to keep the case moving along, I suggested to him that we have him make his argument at a later time, however, to insert the argument made this morning into the record after the plaintiff rests the case.

So, Mr. Ebert, are you ready to proceed?

MR. EBERT: I am, Your Honor. Thank you.

Your Honor, defendant moves under Rule 50 for judgment as a matter of law with respect to both of the claims being made by the plaintiff in this case on the basis that no reasonable jury could find a legally sufficient evidentiary basis to find for Mr. Lawson on those two claims.

With respect to Mr. Lawson's breach-of-contract claim, we believe the evidence presented in plaintiff's case-in-chief shows that the 2005 plan documents did not commit Sun to perform any particular requirements with respect to an incentive plan, in fact reserved to the plan administrator the sole discretion to interpret the plan. It gave Sun the [Vol. III-475] authority to reduce the commission to zero. As such, there was no consideration, and the plan documents

are not an enforceable contract. In the absence of a contract, there can be no breach.

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.

Moreover, with respect to the renewal issue, the evidence establishes that the JPMC transaction was essentially base business, which even the plaintiff concedes meant it was a renewal of an existing contractual relationship. As a renewal of an existing contractual relationship, if it was going to be a renewal, it had to be on his quota document; and even if the 2005 plan applied, it's beyond dispute that it was not a renewal on his quota document.

As such, there's no basis for finding that Sun has breached [Vol. III-476] the 2005 plan documents if they're deemed to be a contract. In that regard, I draw Your Honor's attention to the Seventh Circuit's decision, *Penn versus Ryan's Steak House,* where the

Court found that where a party has sole unilateral discretion to modify or amend the contract, the contract is unenforceable.

Now, Mr. Lawson in this case tries to extend the 2005 contract into 2006 by arguing that his consent to his quota document was required before that plan document was superseded. He's obviously confusing what is an offer with what is termination. Clearly, the 2005 agreement or plan documents had terminated as of December 25, 2006. 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.

With respect to the wage claim, Your Honor denied summary judgment in that case based upon the *J Squared* decision, and in that case we would say, now that the evidence has been presented, we're talking apples and oranges, quite frankly, in terms of the commission arrangement. In that case there was no question that the sales representative had established all of the requirements to be paid a commission on the sales that were made. The only issue was there were trailing commissions, and so the question was after his termination, was he entitled to [Vol. III-477] have it treated as a wage because the amounts that he was being paid trailed after his termination. No question as to whether he was entitled to the commissions but for the issue of the impact of his termination.

In this case there are all kinds of issues about what compensation, if any, Mr. Lawson is entitled to under the plan documents. With all those variables, the case law is clear that his commissions, if he's entitled to any, are not a wage for purposes of the Indiana wage statutes. And in that regard we would direct your attention, Your Honor, to the Seventh Circuit's decision, *Thomas versus H & R Block,* which is 630 F.3d 659 and in particular at pages 668 – I'm sorry – 664 and 666, where the Court lists a number of factors to be looked at under Indiana law to determine whether a particular form of compensation is a wage for the Indiana Wage Payment statute.

Included in those factors that the Court looked at is: Is it difficult to calculate the pay within ten days, and is the payment made on a regular basis for regular work? You heard testimony yesterday that the payment was actually made as soon as practicable, so there clearly was not a defined period for the payment of the commissions under the 2005 plan.

Does the payment directly relate to time an employee actually works? Actually, that was not established by plaintiff's case.

Is the payment linked to any contingencies or beyond the [Vol. III-478] control of the employer or employee? Any number of contingencies were presented to Your Honor, including the splitting of commissions, the amount of the margin, whether it's a renewal or not, all factors that the plan administrator had the vested authority to determine and all of

which made it clear that this is not a wage under the Indiana Wage Payment statute.

And then the final factor looked at by the *Thomas* Court was whether the payment is in addition to wages, such as a salary. Clearly again, we have a salary paid here, so this is something above and beyond a salary.

So for all those reasons, Your Honor, we think we are entitled to judgment as a matter of law with respect to the wage claim of the plaintiff.

Thank you.

THE COURT: Thank you, Mr. Ebert.

All right. Mr. Pinegar, response.

MR. PINEGAR: Yes, Your Honor.

Your Honor, I think I may, with your permission, work backwards, starting with the wage claim.

THE COURT: Sure.

MR. PINEGAR: We are essentially at the exact same place on the wage claim as we were during the summary judgment motion. In fact, yesterday I asked Mr. Auble some questions to get his perspective on whether this was or was not a wage. Sun [Vol. III-479] objected, said that calls for a legal conclusion. Your Honor sustained that objection. We are essentially then exactly where we were, and Your Honor is left with interpreting the documents themselves to determine whether or not this is or is not a wage. And

that determination is a question of law, and Your Honor has already made the determination as a matter of law that this is a wage.

And I would ask the Court to review the page 28 and 29 of its summary judgment entry dated November 7, 2011, where the Court sets out the language in the plan that shows that incentives are not earned but they are wages when requirements have been made, when the requirements of the plan have been met. And once they are met, they are to be paid as soon as administratively practicable and on the regular biweekly payday.

Sun continues to assert that it's only a wage under the wage claim statute if it must be paid on a regular ten-day basis, and despite these repeated assertions, the Court has repeatedly stated or stated that that is just not the case, that that rule which may apply to the wage payment statute does not apply to the wage claim statute. And I'd ask the Court again to refer to its own entry, specifically page 26 where it addresses this in footnote three.

All the reliance on the Seventh Circuit case of *Thomas versus HR Block* is interesting, but as was set forth in the [Vol. III-480] plaintiff's response to defendant's summary judgment motion, by and large that decision was based on looking at other decisions that were based on the wage payment statute, not the wage claim statute. They are not the same statutes; they have different purposes, different interpretations.

And for these reasons I would just simply ask the Court to rely on what it's already decided. This is a question of law. As the plaintiff – or as the defendant stated yesterday in the objection – and essentially I think they were estopped at this point from asserting it's anything but a question of law, so we're left with what the Court's decision was as a matter of law already in this case. It's already record.

Concerning the breach of contract, if I understand defendant's position, the 2005 STK plan didn't commit it to do anything. But as the Court again determined as a matter of law, once it was offered to Mr. Lawson and once Mr. Lawson set out to perform his obligations – and I do not see how there could be any question that there is at least a question of fact that he set out to meet his contractual obligations to STK – STK never actually revoked the plan, never actually made any changes to the plan that had any effect on what Mr. Lawson would be and would not be compensated for. It simply didn't do it. Had it done so, we would be having a different argument, but it did not do that.

The defendant also asserts that, Well, even if it is a [Vol. III-481] contract, that it requires two things – and we've talked about this – the two main conditions being the timing of the deal that Mr. Lawson pursued and then the type of opportunity it was. The timing, that deals with invoicing. No one disputes when the invoicing occurred; it was in March, I think 23rd, 2006. That's a stipulated fact. And no one disputes that it wasn't until April 4, 2006, that Mr. Lawson

received his goal document that says in black-and-white, plain English that this plan is not effective until this document has been completed and approved at all levels. And there hasn't been any evidence that that form was ever completed, certainly not completed on December 26th, 2005.

The 2005 STK plan contains a statement that this plan ends at the end of the fiscal year. The same document says, "This plan remains in effect" – it uses the very same word that the 2006 goal document uses – "until replaced." There's an ambiguity there, and the jury is going to have to decide how to resolve that ambiguity. That was the basis of the Court's summary judgment entry. That's why we're here. It's a question of fact for the jury to work through.

Turning to the second condition that the plan set out, that it had to be a new contract, the plan states – and it cannot be more clear – that a new contract is something that's not previously under maintenance with StorageTek, and there is no reasonable dispute that the opportunity that Mr. Lawson worked [Vol. III-482] on and that was eventually closed and invoiced was almost entirely, 90 percent not STK gear and not previously covered under maintenance contract with StorageTek.

For those reasons, Your Honor, I believe there's clearly issues of fact that would permit the jury to deliberate and render a verdict in this case.

Thank you.

THE COURT: Thank you.

Any reply, Mr. Ebert?

MR. EBERT: No, Your Honor.

THE COURT: All right. The Court will take defendant's Rule 50 motion under advisement.

* * *

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 BRIEF IN SUPPORT OF RULE 50 MOTIONS

(Filed Oct. 5, 2012)

I. Introduction

The Court conducted a jury trial in this case on August 27-29, 2012. On August 29, 2012, the jury reached a verdict in favor of Plaintiff, David R. Lawson ("Lawson" or "Plaintiff"), on his breach of contract claim under the 2005 STK Plan despite the lack of any evidence that could reasonably show that Lawson was entitled to contractual damages for incentive compensation under that 2005 plan. In addition, the amount of the jury's verdict was exactly $1,500,000, which is a figure that differs from any damage calculations presented during the trial and is not rationally connected to the evidence presented at trial. Lawson's claim for treble damages and attorney fees under the Indiana Wage Claims Statute, I.C. § 22-2-9-1 *et seq.*, was not submitted to or decided by the jury.

Defendant, Sun Microsystems, Inc. ("Sun" or "Defendant"), moved for dismissal of the breach of contract and wage claims under Rule 50 of the Federal Rules of Civil Procedure at the close of Plaintiff's case in chief, and Sun renewed its Rule 50 motion following the presentation of all evidence. [Doc. 303, pp. 357-366; Doc. 303, pp. 474-482]. The Court took the motions under advisement and, pursuant to its Entry dated September 20, 2012 [Doc. 306], established a briefing schedule. Accordingly, Sun now is filing a renewed Rule 50 motion and this Brief in support of its Rule 50 motion and renewed Rule 50 motions. For the reasons stated during the trial and in this Brief, Sun respectfully requests that the Rule 50 motions be granted as to both the breach of contract and wage claims.[1]

II. Summary of Argument

Plaintiff failed to present evidence at trial from which a reasonable jury could find that the 2005 STK Plan constituted a contract under which Plaintiff was entitled to any incentive compensation for his work on the IBM-JPMC renewal. Plaintiff also failed to present evidence at trial from which a reasonable jury could determine that Sun breached a contract with Plaintiff when it did not pay him incentive pay

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[1] Sun expressly reserves, and does not waive, its right to assert any and all arguments on appeal arising out of the Court's prior rulings in this case and at trial, whether or not presented in support of this Rule 50 motion.

under the 2005 STK Plan and later attempted to pay him incentive pay under the 2006 Sun Plan. Furthermore, the jury's verdict is not rationally related to the evidence. It could not have been based upon a breach of contract analysis, as it differs from either of the two calculations made by Plaintiff as to the measure of his damages.

Plaintiff's claim for treble damages and attorney fees under the Wage Claims Statute also must fail. Whether viewed as a question of law or a mixed question of fact and law, Plaintiff failed to present evidence from which the Court or a reasonable jury could find that the incentive compensation at issue constituted a wage under the Wage Claims Statute. Furthermore, because the jury's verdict differs from the Plaintiff's own calculations, it contradicts the Court's determination on summary judgment that the amount of incentive compensation owed, if any, would be simple to calculate. Thus, as a matter of law, the incentive compensation cannot be treated as a statutory wage, the jury's verdict cannot be trebled, and the Plaintiff cannot recover attorney fees under the Wage Claims Statute.

III. Argument

A. Standard of Review

"Under Rule 50, a court should render judgment as a matter of law when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party

on that issue.' Fed. R. Civ. P. 50(a)." *Murray v. Chi. Transit Auth.*, 252 F.3d 880, 886 (7th Cir. 2001) (citation omitted) (affirming district court's entry of judgment as a matter of law for defendant).

"'The standard governing a Rule 50 motion mirrors that employed in evaluating a summary judgment motion' except that the two motions are made at different times during the proceedings before the district court." *Winters v. Fru-Con Inc.*, 498 F.3d 734, 745-746 (7th Cir. 2007) (quoting *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 578 (7th Cir. 2003) (affirming trial court's entry of judgment as a matter of law). The standard governing motions for summary judgment provides that judgment must be entered against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Plaintiff did not meet his burden of proof at trial, and judgment should be entered in favor of Sun on both the contract and wage claims.

B. Breach of Contract Claim

1. Plaintiff Did Not Prove All of the Elements Necessary to Demonstrate a Breach of Contract Under the 2005 STK Plan

Plaintiff argued in this case that he was contractually entitled to incentive compensation for the IBM-JPMC transaction under the 2005 STK Plan. Based

on the evidence presented at trial, Sun's Rule 50 motion should be granted as to this claim. Although the Court already was familiar with many of the documents presented at trial from the parties' previous briefing on summary judgment, the testimony elicited during the trial, in combination with those documents, shows that Sun is entitled to judgment as a matter of law.

As was stated in the Court's final instructions to the jury, to succeed on his breach of contract claim, Lawson had the burden at trial of proving each of the following propositions by a preponderance of the evidence: (1) Lawson and Sun entered into a contract; (2) Lawson performed all of his obligations under the contract; (3) Sun failed to perform its part of the contract; (4) Sun's breach of contract resulted in damages to Lawson; (5) the parties reasonably anticipated those damages when they entered into the contract; and (6) Sun's breach of contract was a responsible cause for those damages. [Doc. 304, p. 21]. Lawson failed to meet this burden, and judgment should be entered in favor of Sun on this claim.

a. No Contract

The evidence presented at trial showed that the 2005 STK Plan documents did not commit Sun to perform any particular requirements with respect to an incentive plan, and in fact reserved to the Plan Administrator the sole discretion to interpret the plan. It gave Sun the authority to reduce the commission to

zero. [Doc. 301, 438:25-439:17; 449:20-450:10]. As such, there was no enforceable contract. *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 759 (7th Cir. 2001) (contract was illusory and unenforceable when one party retained the sole discretion to amend the rules and procedures). And in the absence of a contract, there can be no breach.

b. Plaintiff's Failure to Fulfill All Contractual Obligations

Even if the 2005 STK Plan constitutes a contract, Plaintiff presented no evidence from which a reasonable jury could find that Plaintiff fulfilled all of the requirements to qualify for incentive compensation under the 2005 STK Plan. 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. To the extent an ambiguity could be perceived based on the fact that the 2006 Sun Plan was published in March 2006, it remains undisputed that the 2006 Plan was published prior to initial invoicing. *See Borg-Warner v. Ostertag*, 118 N.W.2d 900, 902 (Wis. 1963) (once

released, new contract controlled amount of plaintiff's bonus, and plaintiff's failure to accept employer's unilateral designation of new terms was effectively a termination of the old plan terms as of the release date).

The evidence is undisputed that Lawson was informed and knew that he was being placed on the 2006 Sun Plan effective December 26, 2005. [Doc. 301, pp. 287:8-290:14]. Lawson did not testify that he did not know or understand this; rather, his counsel argued that it was not fair to release this plan at a later date and make it retroactive to December 26, 2005. However, that is immaterial, as a breach of contract claim is not a claim at equity. Regardless, the evidence at trial, both in the form of documents and testimony (including Plaintiff's own testimony), showed that these types of incentive plans always are released after their effective date and are made retroactive to the effective date. [Doc. 301, pp. 257:4-24, 442:14-443:8, 445:18-446:5; Doc. 302, pp. 498:16-500:19, 512:9-513:2, 517:15-18; 542:13-18].

As Mark Schlager and Paul Heidkamp both testified without contradiction, one reason why salespeople were offered draws against future commissions was because the retroactive plan documents had not yet been issued and no commissions were being paid. [Doc. 301, pp. 403:13-404:1, 423:8-21; Doc. 302, pp. 514:22-518:9]. Schlager also testified that when Lawson asked for a max draw in February 2006 under these exact circumstances, Schlager treated it as a draw in anticipation of commissions to be paid in

2006 and to be recoverable under the 2006 Plan, and he used the formula contained in the letter announcing that Lawson had been transitioned to the 2006 Plan to calculate the draw, as opposed to the using formula that existed under the 2005 STK Plan. [Doc. 302, pp. 516:21-520:15].

Moreover, all of the extrinsic evidence presented demonstrates that the common, accepted and well-established practice at STK, Sun and in the industry is to align these types of plans with fiscal years, to issue the plans after the start of the fiscal year, and to make them retroactive to the start of the fiscal year. [Doc. 301, pp. 257:4-24, 442:14-443:8, 445:18-446:5; Doc. 302, pp. 498:16-500:19, 512:9-513:2, 517:15-18; 542:13-18]. Lawson himself testified that this is the practice that occurred in early 2005, and he did not contest the retroactivity. Lawson testified that the 2005 Plan and IPAD were issued sometime around March 24, 2005, he signed his goal sheet on April 25, 2005, and he obtained commissions on deals that contracted and invoiced prior to those dates as a result of the 2005 STK Plan's retroactivity language. [Doc. 301, pp. 220:22-223:22]. As Lawson acknowledged, "I believe I accepted that they made it retroactive to January." [Doc. 301, p. 223:16-19]

Phil Auble, who was the drafter and Plan Administrator for both the 2005 STK Plan and the 2006 Sun Plan (and thus the person with ultimate authority for interpreting those plans), testified in detail regarding his intent with respect to the time periods that the Plans were intended to cover, and Mark Schlager (a

former plan administrator) testified that this was a consistent approach and interpretation throughout STK. [Doc. 301, pp. 257:4-24, 442:14-443:8, 445:18-446:5; Doc. 302, pp. 498:16-500:19, 512:9-513:2, 517:15-18; 542:13-18].

During his testimony, Auble discussed in detail the manner in which these plans always are distributed and interpreted. [Doc. 301, pp. 341:8-342:11, 351:2-5, 439:25-440:14, 440:22441:2, 442:14-443:8, 446:20-447:21, 451:15-454:4, 455:25-456:7, 461:1-462:9; Doc 302, pp. 498:16-500:19, 503:25-504:19]. This testimony was echoed by Schlager, Heidkamp and Caldara. [Doc. 301, 257:4-24, 405:11-15; Doc. 302, pp. 512:5-22, 542:13-543:4]. Lawson did not dispute any of this, but simply argued without any evidentiary support that the plan documents should be interpreted differently, essentially creating one interpretation applicable only to him and another applicable to everyone else.

Indeed, no evidence was presented that anyone had ever interpreted or applied an incentive compensation plan in the manner now advocated by Lawson in this lawsuit. Auble explained that, from an administrative standpoint, it was important to be able to close out a fiscal year by requiring the submission of all commission requests under that fiscal year's plan within 30 days after the end of the fiscal year, and there certainly is no ambiguity in the sentence he included in the 2005 Plan documents stating: "The request must be submitted no later than 30 days after the end of the 2005 fiscal year." [Doc. 301, pp. 437:16-438:23]. Furthermore, Auble's undisputed

testimony was that Lawson did not submit a commission request form for the IBM-JPMC transaction within 30 days of the end of the 2005 fiscal year, as was expressly required by the 2005 STK Plan. [Doc. 301, pp. 430:25-431:1, 437:16-438:24].

c. No Breach By Sun

Lawson also failed to present evidence from which a reasonable jury could determine that Sun failed to perform all of its contractual obligations under the Plan. As the testimony demonstrated, Auble had the sole discretion and authority to interpret and administer the Plan, and Auble testified that Lawson failed to meet the conditions necessary to qualify for incentive compensation on the IBM-JPMC transaction under the 2005 STK Plan. Auble also testified that the only way Lawson could have been paid under the 2005 STK Plan would have been through the exception process. By definition, however, an exception falls outside the terms of the Plan. [Doc. 301, pp. 372:11-14, 391:5-9]. Lawson also presented no evidence from which a jury could find that Auble's interpretations were unreasonable, arbitrary or capricious. To ignore Auble's interpretations based on this evidentiary record would render the Plan language meaningless.

Thus, whereas the Court had ruled on summary judgment that there could be a question of fact as to the breach of contract claim, the testimony and other

evidence at trial shows that no reasonable jury could have ruled in Plaintiff's favor on this claim.

Lawson's argument at trial was that his consent to his quota document was required before the 2005 plan document was superseded. In doing so, he obviously has confused the concepts of an offer and of termination. His refusal to ever sign a goal sheet in 2006 means that he could not qualify for any incentive compensation under the 2006 Sun Plan (despite having requested and accepted a draw against future commissions under that Plan).[2] It does not mean that the 2005 Plan was still in effect on and after December 26, 2005. Again, to accept Lawson's interpretation would mean that the 2005 STK Plan was in effect only for him in 2006, and not in effect for anyone else, as Auble treated everyone who had been under the 2005 STK Plan on December 25, 2005, as being on the 2006 Sun Plan on December 26, 2005.

d. No Reasonable Anticipation of Lawson's Alleged Damages at the Time of Contracting

In addition to the above, Lawson presented no evidence from which a reasonable jury could find that Sun and Lawson both reasonably anticipated the damages now alleged by Lawson when the 2005 STK Plan became effective or when it was published.

[2] *See* Doc. 301, pp. 195:20-23, 304:13-305:11, 456:18-457:8; Doc. 302, p. 496:1-9.

Auble testified that he could not remember anyone ever receiving a commission of $1 million at STK, and Lawson testified that the highest commission he ever received in his 30 years in the industry was approximately $100,000 while working for IBM. [Doc. 301, pp.316:8-12, 465:9-12]. Auble included language in the 2005 STK Plan documents allowing STK to reduce commission amounts from what was contained in the commission formula for a variety of reasons, expressly including but not limited to profit margins and business objectives. [Doc. 301, pp. 438:25-439:17, 449:20-450:4, 450:11-19]. He also included language stating quotas could be adjusted in STK's sole discretion at any time. [Doc. 301, pp. 439:2-13, 448:23-449:19].

As the drafter of the 2005 STK Plan, Auble obviously could not have known at the start of the fiscal year that STK was going to be merged into Sun. Moreover, Auble testified that at the time an amended IPAD was issued as a result of the merger on September 1, 2005, his understanding was that the possibility of an STK SSE selling services on Sun paper during the remainder of the fiscal year was remote. [Doc. 301, pp. 346-20-347:2, 350:10-22, 444:18-451:12, 458:19-459:11, 462:10-25].

Of course, Auble had no reason to view the deal as falling under the 2005 STK Plan because he knew that it had not closed by the end of FY 2005, and when he actually learned what the deal was, he considered it to be a renewal, not new business. [Doc. 301, pp. 440:2-14, 463:19, 463:14-20]. The stipulated

facts show that the deal resulted in the amendment of a preexisting Statement of Work between IBM and Sun. [Doc. 301, pp. 53:10-20, 54:1-8, 57:3-6, 1518, 60:12-16, 61:5-9; Doc. 302, pp. 569:4-22, 570:1-22, 572:25-576:6]. Lawson also stipulated that the IBM-JPMC transaction was a renewal. [Doc. 300, p. 59:7-:10 (Stip. Fact #62)]. In addition, the undisputed testimony of Tina Caldara and Tracey O'Toole was that the IBM-JPMC transaction was a low-margin deal [Doc. 301, pp. 267:24-268:4, 272:12-:14; 272:23-273:8; Doc. 302, 576:16-577:10, 577:24-578:10, 579:2-:11]. The end result was that Sun was providing increased services to JPMC through IBM for a lower price. O'Toole testified that the profitability of this work was definitely much below industry standard and had a profit margin in the single digits. [Doc. 302, pp. 575:21-578:21]. And Caldara even saw her own commission on the deal reduced because of additional price concessions that were made in 2006. [Doc. 301, pp. 273:24-274:8].

All of these undisputed facts make the conclusion inescapable that the damages claimed by Lawson at trial were not reasonably anticipated by the parties under the 2005 STK Plan.

2. The Jury's Verdict Is Not Supported by the Evidence

In addition to the above, the Court cannot enter the jury's $1.5 million verdict as a judgment in this case, as it is not rationally related to the evidence.

See Pincus v. Pabst Brewing Co., 893 F.2d 1544 (7th Cir. 1990). Specifically, Lawson testified that his damages for a breach of contract were either of two amounts: (1) $1,953,112 or (2) $2,486,086.21. [Doc. 301, pp. 215:17-:19, 216:3-5]. The jury's verdict, however, was not for either of those amounts, and it could not have been based on any evidence presented at trial. Thus, the verdict on the breach of contract claim cannot stand.

C. Wage Claim

1. As a Matter of Law, the Incentive Pay is Not a Wage

In its prior ruling denying summary judgment to Sun on Plaintiffs wage claim, the Court relied heavily on *J. Squared, Inc. v. Herndon*, 822 N.E.2d 633 (Ind. Ct. App. 2005). However, with the benefit of the evidence presented at trial, it is clear that the issue in *Herndon* and the issue here are entirely different. In *Herndon*, there was no dispute that the plaintiff had met all of the requirements to be paid a commission on the sales that were made, and the only issue was whether he was entitled to have those treated as a wage when they were paid after his termination. Here, in contrast, the evidence demonstrated that Plaintiff had not met all of the requirements for a commission under the 2005 STK Plan. Rather, at the time of contract execution and initial invoicing, the 2005 STK Plan had terminated, and Plaintiff refused to sign his Goal Sheet for 2006.

The evidence adduced at trial also produced a more detailed picture of all of the variables that could affect the amount and timing of the payment of incentive compensation on any transaction, and particularly the transaction at issue, which clearly takes this case out of the ambit of the Wage Claims Statute. This included testimony in Plaintiff's own case in chief regarding the splitting of commissions, the amount of the margin, and whether or not it is a renewal. [Doc. 301, p. 317:5-13]. Doc. 301, pp. 257:4-24, 442:14-443:8, 445:18-446:5; Doc. 302, pp. 498:16-500:19, 512:9-513:2, 517:15-18; 542:13-18].

In its decision on summary judgment, the Court cited approvingly to *Thomas v. H&R Block Eastern Enterprises*, 630 F.3d 659, 664-666 (7th Cir. 2011) with respect to the factors that Indiana courts examine to determine whether a form of compensation constitutes a "wage" for purposes of I.C. § 22-2-9-1. Those factors include whether it is difficult to calculate and pay within ten days; whether the payment is paid on a regular basis for regular work; whether the payment directly relates to the time than an employee actually works; whether the payment is linked to any contingencies, or is beyond the control of the employer or employee; and whether the payment is paid in addition to wages or a salary.[3]

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[3] As the Court is aware from Sun's prior Motion for Reconsideration, Sun believes that the question of whether a commission is difficult to calculate and pay within 10 days after an employee earns it is a factor that is to be considered in

(Continued on following page)

The evidence presented at trial shows, as a matter of law, that the incentive compensation at issue in this case is not a wage.

Lawson himself testified that he was unclear as to how he was to be compensated on the deal, and numerous individuals indicated to him that his work on the deal was not covered by his incentive pay plan, with no decisions having been made [Doc. 300, pp. 158:7-159:19, 165:1165:24, 167:2-:168:18; Doc. 301, pp. 236:7-:9, 238:5-:19, 244:2-:20, 245:2-246:5, 246:19-:23]. In fact, when asked whether it was true that he did not know in October 2005 how he would be compensated on the JPMC deal, Lawson responded, "There were always questions." [Doc. 301, p. 236:7:9].

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determining whether the commission is a "wage," regardless of whether the claim is brought under the Indiana Wage Payment Statute (which contains the so-called 10-Day Rule) or the Indiana Wage Claims Statute. *See McCausland v. Walter USA, Inc.*, 918 N.E.2d 420, 425-26, 428 (Ind. Ct. App. 2009) *reh'g denied, transfer denied*, 940 N.E.2d 821 (Ind. 2010), (making no distinction between the definition of "wages" under the two statutes and expressly concluding: "As we stated above, McCausland's commissions were not 'wages' within the meaning of the Wage Payment Statute, *and for those same reasons*, the commissions are not 'wages' under the Wage Claims Statute." (emphasis added)). However, even if one sets aside that issue, the evidence presented at trial demonstrates that the commission is not a wage based upon the combination of factors identified by the Seventh Circuit in *Thomas.* Indeed, as demonstrated by the evidence presented at trial, every one of those factors points to the incentive compensation not being a wage. And since the statute is penal in nature and must be strictly construed, judgment must be entered in favor of Sun and against Plaintiff on the wage claim.

Additional undisputed evidence presented at trial was that Lawson received a $75,000 base salary, regardless of whether he qualified for any incentive compensation; the incentive compensation was actually paid as soon as was practicable, so there clearly was no defined period for payment; and the amount of incentive pay was not directly related to time worked. [Doc. 301, pp. 51:1-:6, 355:2-355:13; Doc. 302, pp. 503:25-504:10].

Perhaps most significantly, a long litany of examples of contingencies that could affect whether anything was paid, the timing of the payment, the amount of payment and the possibility of repayment all were presented at trial. As Auble, the Plan Administrator, testified, there are numerous instances in which the amount payable to an employee under the plan would be less than what would be calculated if one were to use the formula contained in the plan, such as when margins on deals were considered insufficient, or if the plan were amended or terminated; or if the quota document were to change; or if a transaction was not consistent with the intent of the plan or STK's business objectives. [Doc. 301, pp. 439:2-:17, 448:23-451:3]. As Schlager noted, incentive payments could be subject to "clawbacks" or "chargebacks", they could vary based on goals, and the company always had the right to change goals. [Doc. 302, pp. 524:10-525:25, 528:4-10].

Lawson himself testified that, although he did not know what the profit margin was on the IBM transaction, he understood that the profit margin

could affect his compensation, and that if the profit margin wasn't large enough, his compensation could be adjusted downward. [Doc. 301-317:5-:13]. This testimony alone should eliminate any question that the incentive compensation at issue is not a wage. *See Gress v. Fabcon, Inc.*, 861 N.E2d 1, 4 (Ind. Ct. App. 2005) (commission program based on profitability of salesperson's projects not a wage).

Thus, as a matter of law, Plaintiffs wage claim is unsupported by the evidence, and neither the Court nor a reasonable jury could find that the incentive pay sought by the Plaintiff in this case constitutes a wage.

2. <u>The Court Should Rule in Favor of Sun on the Wage Claim Regardless of Whether It Presents a Question of Law Or a Mixed Question of Fact and Law</u>

In its telephonic status conference conducted with the parties on September 20, 2012, the Court asked counsel to address whether the determination as to whether the incentive compensation at issue in this case is a "wage" should be treated as a question of law to be decided by the Court or a question of fact that should have been submitted to the jury.

Indiana courts have not resolved the issue of whether compensation is a "wage" for purposes of the statute is a question of fact or law. However, analogous case law from Indiana, and from Illinois construing its Wage Payment and Collection Act,

demonstrates that the question is initially considered a mixed question of fact and law.

In 2004, the Illinois Court of Appeals was tasked with reviewing the bench trial judge's determination that an individual was an "employee" under the Illinois Wage Payment and Collection Act (the "Illinois Act"). *Anderson v. First American Group of Cos.*, 353 Ill. App. 3d 403, 407, 818 N.E.2d 743, 746-47 (Ill. Ct. App. 2004). In *Anderson*, the Court of Appeals held that whether an individual was an "employee" was a mixed question of law and fact, *i.e.* "one involving an examination of the legal effect of a given set of facts." *Id.* "Stated another way, a mixed question is one in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or whether the rule of law as applied to the established facts is or is not violated." *Id.* at 407, 818 N.E.2d 747.

Indiana courts have applied the same reasoning in other contexts. Earlier this year, in its analysis of whether personal property has become an "improvement to real property," the Indiana Supreme Court noted that the determination of whether a chattel has become a "fixture" under Indiana law was a mixed question of law and fact that depended upon the particular circumstances of each case. *Gill v. Evansville Sheet Metal Works, Inc.*, 970 N.E.2d 633, 641 (Ind. 2012).

Even the traditionally "legal" duty element of a negligence claim can be a mixed question of law and

fact when factual questions are interwoven. *Estate of Short v. Brookville Crossing 4060 LLC*, 972 N.E.2d 897 (Ind. Ct. App. 2012); *see also Douglass v. Irvin*, 549 N.E.2d 368, 369 n.1 (Ind. 1990) ("While it is clear that the trial court must determine if an existing relationship gives rise to a duty, it must also be noted that a factual question may be interwoven with the determination of the existence of a relationship, thus making the ultimate existence of a duty a mixed question of law and fact."). In *Estate of Short*, the trial court granted summary judgment on the duty question, which was affirmed by the Indiana Court of Appeals. *Id.* at 901, 907 (noting trial court's finding of no genuine issues of material fact). 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.

In summary, the Court could have submitted the wage claim to the jury because it presents a mixed question of law and fact. However, Plaintiff failed to present a legally sufficient evidentiary basis to demonstrate that the alleged compensation was a "wage," so the claim should have been dismissed pursuant to Sun's Rule 50 motion prior to being submitted to the jury. For this reason, the distinction should be immaterial, and the Court now should grant Sun's Rule 50 motion and dismiss Plaintiff's wage claim as a matter of law. Moreover, the Wage Claims Statute is penal in nature, and being in derogation of the common law, it must be strictly construed. *See E & L Rental Equip., Inc. v. Bresland*, 782 N.E.2d 1068, 1070 (Ind. Ct. App. 2003) (holding penalty provision of Wage Payment

Statute (which is incorporated into the Wage Claims Statute) is a penal statute to be strictly construed).

3. <u>The Jury's Verdict Cannot Support a Wage Claim</u>

In its ruling on summary judgment, the Court stated:

> Although Plaintiff 's incentive compensation was not directly tied to the number of hours he worked, Plaintiff was entitled to such compensation if he executed an eligible ESS or RMS contract and the company was invoiced during the STK . To this end, Plaintiff 's incentive compensation was not difficult to calculate – it was specified in his Goal Sheet – and he was entitled to the same as soon as administratively practicable.

[Doc. 230, p. 29].

As was discussed previously, Plaintiff offered two different options for calculating his commission. Plaintiff calculated that if his commission included "Rest of World" business, then it would be $2,486,086.21. He calculated that if his commission excluded "Rest of World" business, it would be $1,953,112.

The fact that Plaintiff himself offered two different calculations itself demonstrates that the alleged commission was not a wage. More significantly, however, neither of the two amounts calculated by Plaintiff was the same as that awarded by the jury. As a matter of law, then, the Court cannot utilize the amount of the jury's verdict as the basis for a wage

claim under the Indiana Wage Claims Statute. Accordingly, the wage claim must be dismissed.

IV. Conclusion

For the foregoing reasons, Defendant, Sun Microsystems, Inc., respectfully requests that the Court grant Sun's motions under Rule 50, that the Court enter judgment in favor of Sun and against Plaintiff, that Plaintiff take nothing by his Amended Complaint, and that the Court grant Sun all other just and proper relief.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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

DEFENDANT'S REPLY BRIEF IN SUPPORT OF RULE 50 MOTIONS

(Filed Nov. 9, 2012)

I. Introduction

In its Brief in Support of Rule 50 Motions [Doc. 308], Defendant, Sun Microsystems, Inc. ("Sun" or "Defendant"), demonstrated that it is entitled to judgment as a matter of law on Plaintiff's breach of contract and Indiana Wage Claims Act claims. Sun also demonstrated that the jury's $1.5 million verdict in this case was not rationally related to the evidence and cannot be used to support a claim for either breach of contract or for treble damages and attorney fees under the Wage Claims Act. In his Response [Doc. 309], Plaintiff, David R. Lawson ("Lawson" or "Plaintiff"), has failed to refute Sun's arguments. Accordingly, Sun respectfully requests that the Rule 50 motions be granted as to both the breach of contract and wage claims.

II. Argument

A. Standard of Review

In his Response, Plaintiff incorrectly contends that Sun is not entitled to make arguments under Rule 50 that rely, in whole or in part, on evidence that was presented following Plaintiff's case in chief at trial.

"'Under Rule 50, a court should grant judgment as a matter of law when a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Winters v. Fru-Con Inc.*, 498 F.3d 734, 745-746 (7th Cir. 2007) (quoting *Alexander v. Mount Sinai Hosp. Med. Ctr.*, 484 F.3d 889, 902 (7th Cir. 2007)) (affirming judgment as a matter of law). "'The standard governing a Rule 50 motion mirrors that employed in evaluating a summary judgment motion' except that the two motions are made at different times during the proceedings before the district court." *Winters*, 498 F.3d at 746 (quoting *Appelbaum v. Milwaukee Metro. Sewerage Dist.*, 340 F.3d 573, 578 (7th Cir. 2003)). "Even though the two motions bear different labels, the standard for granting summary judgment mirrors the standard for a directed verdict. Both motions serve the same purpose of disposing of cases which are so clear-cut and undeserving of a jury's attention that one party must prevail as a matter of law." *Partee v. Buch*, 1997 U.S. App. LEXIS 33190, *8-9 (7th Cir. Sept. 23, 1997).

In this case, the Court should have granted Sun's Motion for Summary Judgment, and it now should grant Sun's Motion for Judgment as a Matter of Law. As the Seventh Circuit has stated:

> Doctrines such as 'law of the case' do not prohibit the trial judge from revisiting an earlier ruling while there is still time to prevent error. *See, e.g.*, *Abel v. Dubberly*, 210 F.3d 1334, 1337-38 (11th Cir. 2000) (holding that the 'law of the case' does not bar the district court from granting judgment as a matter of law after having denied summary judgment earlier); *St. Louis Convention & Visitors Comm'n v. National Football League*, 154 F.3d 851, 860 (8th Cir. 1998) (same); *Sagendorf-Teal v. County of Rensselaer*, 100 F.3d 270, 277 (2d Cir. 1996) (same).

Runyon v. Applied Extrusion Techs., Inc., 619 F.3d 735, 739 (7th Cir. 2010) (affirming judgment as a matter of law).

Contrary to Lawson's position, the Court's review of the instant motion is not limited to evidence introduced by Lawson. The Court can also consider evidence that supports Sun's case. *See, e.g.*, *Tart v. Ill. Power Co.*, 366 F.3d 461, 478 (7th Cir. 2004) (in considering Rule 50 motion, "we review the record as a whole"). Indeed, the Seventh Circuit has explicitly rejected Lawson's argument that only the non-moving party's evidence can be considered. *Everett v. Cook County*, 655 F.3d 723, 730 n.2 (7th Cir. 2011); *Traylor v. Brown*, 295 F.3d 783, 791 (7th Cir. 2002). To the

extent that Sun introduced evidence that was uncontroverted, the Court can and should include that evidence in its consideration of Sun's motion. *See, e.g.*, *Pease v. Prod. Workers Union of Chi. & Vicinity Local 707*, 2004 U.S. Dist. LEXIS 4055, *8 (N.D. Ill. Mar. 12, 2004) ("the Seventh Circuit has held that the uncontroverted testimony of a company employee must be given credence") (citing *Traylor*, 295 F.3d at 791).

The Seventh Circuit has considered the moving party's evidence when evaluating Rule 50 motions in employment cases. "'[W]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and *any other evidence* that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.'" *Pandya v. Edward Hospital*, 1 Fed. Appx. 543, 545-546 (7th Cir. 2001) (emphasis added) (quoting *Reeves v. Sanderson Plumbing Prods.*, Inc., 120 S. Ct. 2097, 2109 (2000)); *see also Andree v. Siemens Energy & Automation, Inc.*, 90 Fed. Appx. 145, 150 (7th Cir. 2003) (affirming judgment as a matter of law; plaintiff's self-serving assertions were insufficient to refute employer's proffered reason for discharge).

In the case at bar, Sun presented evidence of facts that went unimpeached and undisputed. Those facts have been proven and cannot be excluded from the Court's Rule 50 decision. "Once a party presents evidence as to a fact under a preponderance of the

evidence standard, unless that evidence is impeached in some manner or evidence disputing that fact is presented, the fact has been proven. To find otherwise would be contrary to the Seventh Circuit's reasoning in *Traylor*, 295 F.3d at 791." *Pease*, 2004 U.S. Dist. LEXIS 4055, *17.

B. Breach of Contract Claim

1. Plaintiff Did Not Prove All Elements.

As Sun explained in its original brief, Plaintiff failed to present evidence from which a reasonable jury could have found that Plaintiff had proven all elements of his breach of contract claim under the 2005 STK Plan. Plaintiff's response fails to refute any of Sun's arguments.

a. No Contract

In his response, Plaintiff relies solely on language contained in the 2005 STK Plan documents to suggest that there was an "intention to be bound." This is incorrect. Although the documents may reflect an intent to follow the Plan, they do not reflect an intention to be "bound" by it. Sun reserved the sole discretion and authority to apply, interpret, modify, amend and eliminate the Plan, thus rendering it illusory and unenforceable as a contract. *Penn v. Ryan's Family Steak Houses, Inc.*, 269 F.3d 753, 759 (7th Cir. 2001) (contract was illusory and unenforceable when one party retained the sole discretion to amend the rules and procedures).

b. Plaintiff's Failure to Fulfill All Contractual Obligations

Even if the 2005 STK Plan documents constituted a contract, Plaintiff fails to address all of the arguments and evidence presented by Sun in demonstrating that no reasonable jury could find that Plaintiff fulfilled his contractual obligations under the terms of the Plan documents. Instead, Plaintiff cites to evidence that is irrelevant to this issue and then makes the bold assertion:

> 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.

(Response, p. 7). To the contrary, we do not know what the jury found with respect to a specific date on which the 2005 STK Plan was terminated and was replaced. What we do know is that no evidence was presented at trial showing that anyone ever interpreted or applied the contractual language in the manner argued by Plaintiff, and that the consistent practice at STK, Sun and Oracle – before, during and after Lawson's employment – has been to issue plan and quota documents after the start of a fiscal year and make them retroactive to the start of the fiscal year. *See Highhouse v. Midwest Orthopedic Inst., P.C.*, 807 N.E.2d 737, 739 (Ind. 2004) (undisputed course of

conduct is a reliable guide to interpret contract's meaning).

Furthermore, Plaintiff himself admits that he was informed via letter that he was being transitioned to the 2006 Sun DMG Plan effective December 26, 2005. His argument, however, is that although he acknowledged that he received and he understood the letter, he could not agree with the 2006 Sun Plan and could not have agreed to the terms of that Plan when he signed the letter because he did not know what the terms of the Plan would be. Sun has never contended that Plaintiff knew what the 2006 Plan terms were at the time he signed the letter, but that is not the relevant question. The relevant question is whether he knew and understood that the 2005 Plan no longer was in effect as of December 26, 2005. By signing that letter, Lawson acknowledged that understanding. [Doc. 301, pp. 287:8-290:14][1]

c. No Breach By Sun

Lawson seems to assume in his Response that Sun agrees with his argument that the 2005 STK Plan constituted a binding contract. However, the

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[1] Lawson's counsel describes it as an "astonishing proposition" that the 2006 plan was effective before anyone knew what it said. (Response, p. 9). Contrary to this hyperbole, no evidence was presented that any Sun employee other than Lawson disagrees with this proposition, and the uncontroverted testimony is that Lawson had accepted exactly the same proposition with respect to the 2005 and 2004 plans.

arguments that he makes with respect to Sun's contention that there was no contract underscore the fact that either: (1) there was no meeting of the minds as to the essential terms of the 2005 STK Plan; or (2) if there was a meeting of the minds, Lawson now is attempting to strike critical language from the Plan documents because it is fatal to his claim that there was a breach by Sun.

"Under Indiana law 'phrases [in a contract] cannot be read exclusive of other contractual provisions; rather, the parties' intentions must be determined by reading the contract in its entirety and attempting to construe contractual provisions so as to harmonize the agreement.'" *Quality Oil, Inc. v. Kelley Partners, Inc.*, 657 F.3d 609, 613 (7th Cir. 2011) (quoting *Johnson v. Dawson*, 856 N.E.2d 769, 773 (Ind. App. Ct. 2006)). "The clarity of a written contract is a property of the entire contract, not of isolated words, sentences, or paragraphs." *Heller Fin., Inc. v. Prudential Ins. Co. of Am.*, 371 F.3d 944, 946 (7th Cir. 2004) (citation omitted). "[T]he principle that a contract must be interpreted as a whole applies even where the language in the contested contract provision is unambiguous." *Quality Oil*, 657 F.3d at 613 (citation omitted).

Lawson's interpretation involves picking provisions he favors and ignoring those he does not, contrary to the requirement that a contract be read in its entirety. Interpreting the 2005 STK Plan in its entirety, the evidence is uncontroverted that the documents give STK and the Plan Administrator

unfettered discretion and authority to interpret and apply the plan.

Although this issue often arises in the context of ERISA fiduciaries, the Seventh Circuit has expressly stated that clauses conferring discretion must be honored in the context of contract actions that involve non-fiduciaries. In *Comrie v. IPSCO, Inc.*, 636 F.3d 839 (7th Cir. 2011), the Seventh Circuit acknowledged that "a contract conferring interpretive discretion must be respected, *even when* the decision is to be made by an ERISA fiduciary." *Id.* at 842 (emphasis in original). Thus, the Court reasoned: "It is easier, not harder . . . , to honor discretion-conferring clauses in contracts that govern the actions of non-fiduciaries." *Id.* Applying the deferential arbitrary and capricious standard to review the administrators' decision on how to interpret the meaning of the word "bonus" in a contract, the Court held that the administrators did not act arbitrarily or capriciously. *Id.* at 843. *See also Merryman Excavation, Inc. v. Int'l Union of Operating Eng'rs, Local 150*, 639 F.3d 286, 292 (7th Cir. 2011) (in labor context, joint grievance committee had plenary power to resolve disputes under collective bargaining agreement).

In the instant case, the Plan documents gave STK and the Plan Administrator the sole, unilateral and ultimate discretion and authority to apply and interpret the 2005 STK Plan documents. Plan Administrator Phil Auble's uncontroverted testimony was that he drafted the language in the 2005 STK Plan documents with the intent that the Plan only apply to

transactions for which both contract execution and initial invoicing occurred during the 2005 STK Fiscal Year, and he never considered the IBM-JPMC transaction as covered by the STK Plan documents because the execution and invoicing requirements were not met. Administrator Auble's undisputed testimony was that when he received an e-mail in December alerting him to a possible large deal involving JPMC, he simply waited to see whether it would close before the end of the 2005 fiscal year, which it did not. [Doc. 301, pp. 457:12-460:25]

In his Response, Lawson attempts to create a distraction by focusing on Auble's not having changed the definition of ESS in the September 2005 amendments to the IPAD (which has nothing to do with the timing requirement). Significantly, Auble did expressly state in those amendments that the end date of the 2005 STK fiscal year was being moved up to December 25, 2005. As a result, contract execution and initial invoicing needed to occur by that date.[2]

[2] Ex. 1 opens with the following sentence: "This is the Sales Service Executive Plan (the 'Plan') for 2005." It later states on page 1: "Both contract execution and initial invoicing must occur during the StorageTek Fiscal Year to count as Comp Revenue, unless determined otherwise in StorageTek's sole discretion." Ex. 2 states at page 7, numbered paragraph 1: "StorageTek has adopted Sun's fiscal calendar for incentive compensation purposes. Sun's fiscal quarter (Q1) ends September 25, 2005, and second fiscal quarter (Q2) ends December 25, 2005. Therefore, the current incentive plan year for StorageTek will end December 25, 2005."

Lawson also attempts to create a distraction by focusing on language contained in the 2006 quota document, which says that it will not be effective until it has been completed and approved at all levels. Lawson's refusal to sign either his original 2006 quota document or his revised 2006 quota document merely meant that he was disqualifying himself from receiving incentive compensation under the 2006 Sun DMG Plan; it does not create an ambiguity under the 2005 STK Plan documents, nor does it lead to the absurd result that every individual could keep the 2005 STK Plan in place for as long as he or she wanted simply by refusing to sign his or her 2006 quota document. While Lawson further contends that this language on the 2006 quota document is significant because it was not found on the 2005 goal sheet, it is uncontroverted that the requirement to sign a goal sheet or a quota document for a given plan year was always a condition precedent to receiving incentive compensation for that plan year. [Doc. 301, pp. 220:21-221:9, 222:3-15, 222:18-223:22]

d. No Reasonable Anticipation of Lawson's Alleged Damages at the Time of Contracting

As Sun noted in its initial brief, Lawson presented no evidence from which a reasonable jury could find that Sun and Lawson both reasonably anticipated the damages now alleged by Lawson when the 2005 STK Plan became effective or when it was published. Auble testified that he could not remember

anyone ever receiving a commission of $1 million at STK, and Lawson testified that the highest commission he ever received in his 30 years in the industry was approximately $100,000 while working for IBM. [Doc. 301, pp. 316:8-12, 465:9-12]. Auble included language in the 2005 STK Plan documents allowing STK to reduce commission amounts from what was contained in the commission formula for a variety of reasons, expressly including but not limited to profit margins and business objectives. [Doc. 301, pp. 438:25-439:17, 449:20-450:4, 450:11-19]. He also included language stating quotas could be adjusted in STK's sole discretion at any time. [Doc. 301, pp. 439:2-13, 448:23-449:19].

Instead of addressing these facts, Plaintiff contends that this argument is waived because it was not made during the oral Rule 50 motion at trial. To the contrary, Defendant argued that Plaintiff failed to prove a breach of contract. The fact that counsel did not walk through every element of the breach of contract claim at oral argument does not constitute a waiver. Furthermore, Defendant has renewed its motion and provided greater detail and specifics with respect to its arguments in its supporting brief.

Sun has consistently argued throughout this litigation that Lawson was not entitled to anything close to the money he sought. *See Laborers' Pension Fund v. A & C Envtl., Inc.*, 301 F.3d 768, 777 (7th Cir. 2002) (although the moving party did not support its Rule 50 motion with a specific argument, the function of Rule 50 was served because the other side was well

aware of the bases of the motion). Until the jury returned its verdict, Sun did not know what damages, if any, would be assessed by the jury and therefore could not know whether the damages would be outside the scope of what was reasonably anticipated. At the first post-verdict opportunity – *i.e.*, in its renewed Rule 50 motion – Sun articulated its argument that the damages were not reasonably anticipated. This is entirely consistent with Sun's position throughout this litigation, and this argument has not been waived. *See Fox v. Hayes*, 600 F.3d 819, 832 (7th Cir. 2010).

Plaintiff alternatively argues that the damages were reasonably anticipated because his damage calculations were based on a formula contained in the Plan documents, and thus did not constitute consequential or reliance damages such as those sought in the case of *Hadley v. Baxendale.* However, Plaintiff's attempts to identify citations in the record that support his argument that the $1.5 million verdict was reasonably contemplated by the parties are in error.

For example, Plaintiff states at page 13 of his Response: "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." In fact, Auble testified that although there "could be" a situation where a commission of $2 million is reasonable and deserved, he never suggested that he believed or reasonably anticipated that Lawson was or would ever be entitled to such a commission based upon the IBM-JPMC transaction. [Doc.

302, pp. 496:18-498:1]. Significantly, there is no evidence that Auble or anyone else at STK or Sun ever anticipated that commissions would be payable under the 2005 STK Plan for a deal that involved either contract execution or initial invoicing occurring after December 25, 2005. Indeed, no evidence was presented that anyone other than Lawson believed that he would be entitled to such a large incentive payment on the deal that actually was reached, and Lawson himself admitted that there were always questions about how he would be compensated.[3]

Furthermore, various provisions contained in the 2005 STK Plan documents expressly allowed STK to limit, reduce and even eliminate incentive compensation based on a variety of factors and variables. Auble explained that when he issued the September 2005 IPAD amendments, he had no belief that a Sun

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[3] Lawson may contend that he "anticipated" this level of compensation, and he may further argue that it was reasonable to expect this level of compensation based on his conversation with Mark Schlager in December 2005 which led to Lawson's shadowcrafting the December 8, 2005 e-mail from Heidkamp to Auble. However, there is no dispute that the deal as described by Lawson in December 2005 did not resemble the final deal that transpired, and there also is no dispute that Schlager believed that the entire transaction would constitute new business to Sun based on Lawson's self-serving characterization. Lawson cannot use his own misrepresentations and/or the misunderstandings of others regarding the specifics of the deal in December 2005 to create a jury issue as to what previously was reasonably anticipated by the other party at the time the STK Plan documents were issued.

SSE would be able to sell anything on Sun paper during the final three months of 2005 (which of course, turned out to be true, as the IBM-JPMC transaction did not actually invoice until March 2006). The undisputed evidence is that no one else received anything close to the amount of incentive compensation on the deal that Lawson claims to be owed, despite his being a last-minute addition to the large Sun team that already had been working on the deal. Indeed, the aggregate amount of incentive compensation paid to the entire team is a small fraction of what Lawson claims to be owed individually.

In addition, no evidence was presented that Auble or anyone else involved in the drafting and administration of the 2005 STK Plan documents (or, for that matter, the 2006 Sun DMG Plan documents), reasonably anticipated that the IBM-JPMC transaction – in light of the actual timing of contract execution and initial invoicing, as well based on its final form – would be treated by STK or by Sun as compensable, let alone compensable "new" ESS, for purposes of Lawson's incentive compensation under the 2005 STK Plan.[4]

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[4] Lawson places a heavy emphasis on the fact that someone entered the IBM-JPMC transaction as "new" instead of as a renewal on Sun's Deal Management Tool ("DMT"). This is yet another effort at distraction by Lawson, as this entry was not made until the 2006 calendar year; there is no evidence that anyone ever used the DMT for purposes of classifying something as new business or a renewal for incentive compensation purposes; and the uncontroverted evidence is that the transaction

(Continued on following page)

2. The Jury's Verdict Is Not Supported by the Evidence

As Sun stated in its original brief, the Court cannot enter the jury's $1.5 million verdict as a judgment in this case, as it is not rationally related to the evidence. *See Pincus v. Pabst Brewing Co.*, 893 F.2d 1544 (7th Cir. 1990). Specifically, Lawson testified that his damages for a breach of contract were either of two amounts: (1) $1,953,112 or (2) $2,486,086.21. [Doc. 301, pp. 215:17-:19, 216:3-5]. The jury's verdict, however, was not for either of those amounts.

In response, Plaintiff contends that the jury's verdict reasonably could be based on his own failure to prove that he was entitled to a multi-year incentive, and that he had calculated the commission on the transaction prior to including the multi-year incentive as $1,449,994. This, of course, is mere speculation on the part of Plaintiff's counsel. It assumes without any basis that the amount of the verdict is somehow related to a number that Plaintiff merely mentioned in passing, and it also assumes without any basis that the two numbers somehow are "close" to each other. Plaintiff even goes so far as to argue

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was treated as an assigned renewal under the 2006 Sun DMG Plan. Moreover, the parties stipulated that the transaction constituted a renewal of the 2003 IBM Statement of Work ("SOW"), and the contractual documents prove that fact. Lawson's efforts to muddy the issue and create such distractions are underscored by his introduction of letters of termination of *other* contracts by Bank One and then contending that these actually were letters of termination of the 2003 IBM SOW.

that $1.5 million is "merely 3.5 percent more" than $1,449,994 (Response, p. 34), as though that means something. All this does is underscore that there is no rational relationship between the evidence and the amount of the verdict. If the jurors actually made the determination described by counsel, then their verdict would have been $1,449,994. Furthermore, although the jury would have had no reason to engage in rounding based upon the specific numbers provided by Plaintiff, the fact is that if they had rounded $1,449,994 upward, then the rational number would have been $1,450,000.[5]

Plaintiff also states that a remittitur is the proper approach to address this issue with respect to the verdict amount. (Response, p. 16, p. 35 n.7). Plaintiff has not actually moved for a remittitur, but suggests in a footnote at the conclusion of his response brief that the amount of a remittitur should be $1,449,994. Defendant does not believe that a remittitur is necessary, as Plaintiff cannot prove his breach of contract claim. However, if the Court were to engage in a remittitur to some other amount, it would have to be $37,304, which is the remaining amount that Sun had been willing to pay Lawson under the

[5] Sun is not suggesting that Lawson did prove that he was entitled to a multi-year incentive. Sun agrees that Lawson did not prove that he was entitled to the multi-year incentive on the IBM-JPMC transaction under the 2005 STK Plan, or any incentive on the IBM-JPMC transaction under the 2005 STK Plan.

2006 Sun Plan after providing him with an advance against future commissions in the amount of $17,000. The offer of $54,304 minus the $17,000 constitutes the best and only evidence of what actually would have been paid.[6]

C. Wage Claim

As Sun demonstrated in its original brief, the incentive compensation sought by Plaintiff under the 2005 STK Plan is not a wage. Plaintiff contends that the Court already decided this issue in its ruling on summary judgment. To the contrary, although the Court denied Defendant's motion for summary judgment on the wage claim, the Court did not grant summary judgment to Plaintiff. Furthermore, the Court now has all of the evidence presented at trial, not just the evidence presented on summary judgment. Plaintiff himself argues at length that the question of whether this is a wage is one to be decided by the Court, which in turn means that the Court can and must consider all of the evidence presented at trial. In addition, the Court also should look to its own recent decision in *Green v. DCO Int'l Trading, Inc.*, Case No. 3:12-cv-00030-RLY-WGH, Order on

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[6] In no way should the amount of any remittitur exceed $110,471.32, which was the highest incentive amount paid to anyone on the IBM-JPMC transaction. And at the farthest extreme, the remittitur amount could not exceed $349,255.13, which was the aggregate amount paid to the entire team that worked on the deal.

Def.'s Mot. for Part. Dismiss. (Young, C.J., Oct. 9, 2012), as a basis for refuting Plaintiff's arguments under the Indiana Wage Claims Statute.

1. **The Wage Claims Statute Must Be Strictly Construed**

The reason it is important to determine whether the incentive pay at issue in this case constitutes a "wage" under the Wage Claims Statute is because that statute provides for treble damages and reasonable attorney fees. As such, the Wage Claims Statute is in derogation of the common law and must be strictly construed. Plaintiff's argument to the contrary is meritless, and it is part of a series of false distinctions that Plaintiff attempts to make in his Response between the Wage Claims Statute and the Wage Payment Statute.

Recognizing that liquidated damages are awarded to successful litigants under the Wage Payment Statute, Indiana courts have strictly construed the language of that statute, following the construction applicable to penal statutes. *See, e.g.*, *E&L Rental Equip. v. Bresland*, 782 N.E.2d 1068, 1070 (Ind. Ct. App. 2003) (cited by Lawson). The Wage Claims Statute, in turn, expressly incorporates the liquidated damages of the Wage Payment Statute. *See* I.C. 22-2-9-4(b) (Wage Payment Statute damages recoverable when action brought by attorney general or designee); *Wells Fargo Ins., Inc. v. Land*, 932 N.E.2d 195, 203 (Ind. Ct. App. 2010) (applying Wage Payment Statute penalties to Wage Claims Statute case); *Green*, p. 5

(Wage Payment Statute penalties are applicable to claims under the Wage Claims Statute). No cogent argument can be made that this exact same damage provision is penal in one context, but not another.

Lawson even acknowledges the penal nature of the Wage Claims Statute when he argues:

> 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."

Response, p. 28 (emphasis added by Plaintiff) (quoting *J. Squared, Inc. v. Herndon*, 822 N.E.2d 633, 641 (Ind. Ct. App. 2005) (internal citations omitted)). Therefore, the Court must strictly construe the Wage Claims Statute to determine whether the incentive compensation sought by Lawson is a "wage." Adhering to a strict construction, it is not.

2. Plaintiff Incorrectly Argues That the Incentive Compensation is a "Wage"

Plaintiff's primary argument in his Response appears to be that, although the incentive compensation would not be a wage for purposes of the Wage Payment Statute, it is a wage for purposes of the Wage Claims Statute. This is another faulty effort at distinguishing the two statutes. As Plaintiff admits, the definition of "wage" is found in the Wage Claims Statute, and courts for years have applied the

definition found in the Wage Claims Statute to the Wage Payment Statute. Plaintiff cannot reasonably argue that the numerous cases defining the meaning of "wage" do not apply to the very statute from which that definition is taken.[7]

This Court itself has not taken any such position. In its ruling on summary judgment, the Court stated that the factors identified in *Thomas v. H&R Block Enterprises, Inc.*, 603 F.3d 659 (7th Cir. 2011) are to be considered when determining whether compensation is a "wage" under the Wage Claims Statute. This Court recently re-affirmed that position in *Green*:

> The Indiana Wage Payment Statute also applies to civil actions initiated under the Indiana Wage Claim Statute. . . . Because the calculation of damages under the Indiana Wage Payment Statute applies to claims brought under the Indiana Wage Claim

[7] As explained by the Indiana Supreme Court, the Wage Payment and Wage Claims statutes address both the timing and the amount of wages to be paid, and the primary difference between them is the status of the claimant at the time the claim is brought. *See St. Vincent Hosp. & Health Care Center v. Steele*, 766 N.E.2d 699, 704-05 (Ind. 2002); *see also Gavin v. Calcars AB, Inc.*, 938 N.E.2d 1270, 1271 (Ind. Ct. App. 2010) (claimant's status at the time suit is filed determines which statute applies). Lawson began disputing his incentive pay while employed. If he had filed suit prior to his employment being terminated as part of a reduction in force, or if he had resigned his employment prior to the reduction, then his claim would have fallen under the Wage Payment Statute. It is illogical to suggest that the only reason the incentive pay now constitutes a "wage" is because Lawson waited to file his claim until after the RIF.

> Statute, courts utilize both statutes to determine what constitutes a "wage."

Green, pp. 5-6.[8]

3. Applying *Thomas*, The Incentive Pay at Issue Is Not a Wage

The Seventh Circuit's *Thomas* decision provides the controlling authority with respect to the factors that Indiana courts examine to determine whether a form of compensation constitutes a "wage" for purposes of I.C. § 22-2-9-1. Those factors include whether the payment is difficult to calculate and pay within ten days; whether the payment is paid on a regular basis for regular work; whether the payment directly relates to the time than an employee actually works; whether the payment is linked to any contingencies, or is beyond the control of the employer or employee; and whether the payment is paid in addition to wages or a salary.

In *Green*, this Court applied the *Thomas* factors and dismissed the plaintiff's Wage Claims Statute claims. Consistent with strict construction, the Court found that although two of the factors supported an

[8] In *Green*, this Court analyzed both the definition of "wage" in the Wage Claims Statute, I.C. 22-2-9-1(b), as well as federal and state case law defining a "wage" under the Wage Payment Statute. *Green*, p. 6 (citing *Thomas*, 630 F.3d at 664; *Prime Mortgage USA, Inc. v. Nichols*, 885 N.E.2d 628, 664-65 (Ind. Ct. App. 2008); *Herremans v. Carrerra Designs, Inc.*, 157 F.3d 1118, 1121-22 (7th Cir. 1998); *Highhouse*, 807 N.E.2d at 740).

argument that the commissions at issue were a "wage", the remaining factors tipped the scales toward the conclusion that they were not, thus resulting in dismissal.

Sun previously provided the Court with extensive examples of how the evidence presented at trial shows that, as a matter of law, the incentive compensation at issue in this case is not a wage under the *Thomas* factors. [*See* Doc. 308, pp. 11-13]. Applying those factors, this Court's decision in *Green* necessitates a finding that the incentive compensation is not a wage.

Like the plaintiff in *Green*, Lawson received a "significant" salary, in addition to his incentive compensation. Lawson testified that he did not reach his targets while employed by STK, which meant that his annual salary was regularly more than his annual incentive compensation Lawson's $75,000 annual salary was paid biweekly, which is more frequent than the monthly salary paid in *Green.* Lawson also received a true salary, and not just a guaranteed draw, which is a factor that the *Green* Court recognized as significant. *Green*, pp. 9-10 (distinguishing *J. Squared*, 822 N.E.2d at 640).[9]

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[9] *See also Thomas*, 630 F.3d at 662 (plaintiff received an hourly wage; additional compensation for which she was eligible was not a "wage"); *Gress v. Fabcon, Inc.*, 826 N.E.2d 1 (Ind. Ct. App. 2005) (plaintiff received annual base salary of $46,000; commissions paid in addition to salary were not "wages").

Lawson's incentive pay was based on an annual quota, and sales at both STK and Sun were geared toward making this annual quota. Although Lawson could receive commission payments more frequently than once per year, these facts make Lawson's case similar to *Green,* where the commissions were based also on an annual benchmark. *Green*, p. 9. Moreover, whereas the *Green* Court found that the plaintiff's commissions were based on factors solely within his control, which weighed in favor of a finding that those commissions were wages, Lawson's incentive compensation was based on a host of factors outside of his control, including initial invoicing, contract execution, profit margins, and business objectives. Similarly, the *Green* Court found that there was no evidence indicating that the plaintiff's commissions depended on anything other than his own work, and that if he earned no commissions, it would have been solely attributable to his work product and expenses, which favored a finding that the commissions were a wage. Here, in contrast, and particularly with respect to the IBM-JPMC transaction, Lawson's ability to qualify for incentive compensation depended upon the actions and efforts of a huge team of people.

Lawson's response to the *Thomas* factors mirrors his approach to addressing the language of the 2005 STK Plan documents. He attempts to isolate certain aspects of selected factors, which he argues are favorable to him, and he attempts to sidestep the arguments and ignore the evidence that prove him wrong. He incorrectly argues that the incentive

compensation was not related to the overall success of Sun, was not based on Sun's profits, and was easy to calculate. He focuses heavily on the fact that the Plan documents say that the incentive pay will be paid as soon as administratively practical and on the regular biweekly payday, and he wrongly argues that treating the incentive compensation as a "wage" would achieve the purpose of the statute. (Response, pp. 27-30). Contrary to his assertions, the weight of the *Thomas* factors show that the incentive compensation at issue in this case is not a wage.

Significantly, the 2005 STK Plan documents themselves identify a variety of contingencies related to business objectives and the profitability of the transaction when determining what the actual incentive compensation, if any, will be. Auble, the 2005 Plan administrator, testified without contradiction regarding these various factors and contingencies. Furthermore, no evidence was presented to contradict the testimony of both Tina Caldara and Tracy O'Toole concerning the poor profit margins on the JPMC account prior to the renewal, and the fact that the renewal resulted in even lower profit margins. Instead, Plaintiff speculates in a footnote that, based on the size of the September 2006 chargebacks against the commissions, perhaps the profit margins were not as poor as Sun made them out to be. As the testimony at trial demonstrated, however, those chargebacks were based on additional concessions that were made after the deal had booked in March 2006 and in order to secure the actual amendment of the SOW

in September 2006. Thus, far from providing support for Plaintiff's contention that treating this as a wage would be in furtherance of the purpose of the Wage Claims Statute, the multiple contingencies and post-booking chargebacks fly in the face of that argument.

Plaintiff admits that evidence was presented that contingencies or "variables" could affect the amount and timing of the payment. (Response, p. 31). This admission conclusively demonstrates that the amount is not a "wage." Plaintiff's later assertion on that same page of his Response that, "[i]n reality, Lawson's incentive compensation was not subject to or affected by any such variables" is irrelevant. The Court must consider any contingencies that are possible, not what actually happened with a particular payment. Otherwise, an amount might be a "wage" under some circumstances, for some employees, but not others.

Furthermore, this argument by Plaintiff begs the question, as it would exclude any situation in which no incentive payment was made. Sun had a good faith belief that the 2005 Plan terms had not been met, so it never paid any incentive to Plaintiff under the 2005 Plan. Instead, it paid an advance against anticipated commissions under the 2006 Sun Plan and attempted to pay Lawson additional incentive pay under the 2006 Sun Plan, but he refused to sign his goal sheet. To suggest that the payment to Lawson under the 2005 Plan would not have been subject to these variables is mere speculation on the part of Plaintiff.

Plaintiff's contention that the wage calculation itself was simple is contradicted by the evidence. Although the Court may have viewed it as potentially simple when it ruled on summary judgment, the evidence at trial identified multiple contingencies that could impact the commission amount, showed that the calculation was not set in stone, and showed that some legacy Sun employees saw their incentive compensation on the transaction subsequently reduced after it had been paid. Moreover, the fact that the jury's verdict did not equal any number offered by the Plaintiff, or even any number presented at trial, demonstrates that the verdict was not based on this so-called simple mathematical calculation.

Plaintiff argument that the "10-Day Rule" in the Indiana Wage Payment Statute has no bearing on the definition of a "wage" in his case is similarly unavailing. Whether or not an amount could be calculated and paid within ten (10) days is a factor to be considered. *Thomas*, 630 F.3d at 666. In *Green*, for example, this Court noted that "bonus payments that depend upon contingencies outside of the plaintiff's control and are difficult to calculate and pay within ten days after being earned, such as annual or biannual bonuses, are not 'wages' under the Indiana Wage Claim and Payment Statutes." *Green*, p. 6.

In addition, while the 2005 Plan documents say that incentive compensation will be paid as soon as administratively practicable and on the same day as the regular biweekly pay, that language does not by itself transform the incentive pay into wages. Timing

the payments to coincide with a regular payday is nothing more than an administrative convenience that reduces the number of paychecks that have to be issued. And merely providing a date certain on or by which an incentive payment or bonus will be paid does not convert the payment into a wage. *See, e.g.*, *Highhouse*, 807 N.E.2d at 738, 740 (bonuses that were paid at the end of each calendar quarter were not wages); *Gress*, 826 N.E.2d at 2, 4 (commissions paid on the 15th of each month, which represented unearned advances or final earned commissions, were not wages); *Luedike v. Sprint Nextel Corp.*, 2010 WL 299150 (S.D. Ind. Jan. 19, 2010) (although plaintiff received an incentive-based compensation payment each month and defendant's computer system allowed commissions to be determined the day after a sale was made, commissions were not wages because they were linked to a contingency and subject to reconciliation).

4. **The Jury's Verdict Cannot Support a Wage Claim**

As Sun explained in its original brief, the fact that Plaintiff himself offered two different potential calculations of his commission shows that the alleged commission is not a wage, and the fact that the jury's verdict differed from both those calculations also shows that his alleged commission is not a wage. As a matter of law, then, the Court cannot utilize the amount of the jury's verdict as the basis for a wage

claim under the Indiana Wage Claims Statute. Accordingly, the wage claim must be dismissed.

IV. Conclusion

For the foregoing reasons, Defendant, Sun Microsystems, Inc., respectfully requests that the Court grant Sun's motions under Rule 50, that the Court enter judgment in favor of Sun and against Plaintiff, that Plaintiff take nothing by his Amended Complaint, and that the Court grant Sun all other just and proper relief.

Respectfully submitted,

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