No. 18A1109

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IN THE SUPREME COURT OF THE UNITED STATES

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B&B HARDWARE, INC.,

*Applicant*,

v.

HARGIS INDUSTRIES, INC.,

*Respondent*.

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APPLICATION FOR A FURTHER EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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## RULE 29.6 STATEMENT

Applicant has no parent company, and no publicly traded company owns 10% or more of its stock.

To the Honorable Neil M. Gorsuch, Circuit Justice for the Eighth Circuit:

In accordance with Rule 13.5 of the Rules of this Court, B&B Hardware, Inc. respectfully requests that the time within which to file a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit be further extended by 27 days, to and including July 3, 2019.

The Eighth Circuit issued its opinion on December 21, 2018 (Appendix 1). The Eighth Circuit denied rehearing on February 6, 2019 (Appendix 2). On April 26, 2019, the Circuit Justice extended the time to file a petition for a writ of certiorari through June 6, 2017. The Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

1. This action for trademark infringement was previously before this Court on the merits. This Court set aside the Eighth Circuit's refusal to apply issue preclusion to a decision of the Trademark Trial and Appeal Board (TTAB). *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293 (2015). In accordance with this Court's opinion, the Eighth Circuit remanded for a new trial on trademark infringement. *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 800 F.3d 427 (2015). The appeal under review arises from the judgment entered after that remand.

As this Court observed, "the twists and turns in [this] controversy are labyrinthine," and "[t]he full story could fill a long, unhappy book." 135 S. Ct. at 1301. At this point, the pertinent facts are as follows: A jury found that Hargis's use of the mark SEALTITE infringed B&B's mark SEALTIGHT, but the decision whether to award B&B disgorgement of Hargis's profits was up to the district court. Op. 5. The district court awarded no relief, invoking collateral estoppel based on a 2000 jury verdict against B&B. *Ibid.* The Eighth Circuit had previously explained that the

2000 verdict did not have preclusive effect on B&B's ability to enforce its trademark once the mark became incontestable in 2006. *See* 15 U.S.C. § 1065; *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 569 F.3d 383, 389-90 (8th Cir. 2009). The district court concluded (relying on a special interrogatory submitted to the jury) that B&B had obtained incontestable status for its trademark fraudulently, because it did not disclose the adverse jury verdict from 2000 to the U.S. Patent and Trademark Office. Op. 5. The court therefore applied preclusion notwithstanding the Eighth Circuit's prior ruling. B&B filed a Rule 59 motion asking the district court to order a new trial or to alter or amend the judgment, which the district court denied.

2. The Eighth Circuit affirmed. The court first concluded that its review was limited to "plain error" because B&B had not filed a Rule 50(b) motion for judgment as a matter of law on Hargis's defense of fraud; it did not mention the Rule 59 motion. Op. 6. It then held that the jury was entitled to rule against B&B on that defense, notwithstanding the lack of any affirmative evidence by Hargis to support its fraud claim, and B&B's evidence that it had relied on the advice of counsel and lacked any fraudulent intent, Op. 7-8, because "the jury was entitled to disbelieve [that testimony] if it chose." Op. 8. Finally, the court held that the finding of fraud justified disregarding the incontestability of B&B's trademark and applying preclusion as if the mark had never become incontestable. Op. 9-12. The court did not reach any of B&B's other challenges to the district court's decision because of its preclusion ruling.

3. B&B intends to file a petition for certiorari. The court of appeals' decision appears to conflict with the precedents of this Court and other courts. First, a Rule 59 motion is a proper vehicle to ask the trial court to decide whether a jury's verdict is against the weight of the evidence. *See, e.g.*, *Weisgram v. Marley Co.*, 528 U.S. 440, 453 n.9 (2000) (citing *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)). And this Court has held that Rule 50(b) imposes no bar to asking for new-trial relief on appeal "when [the appellant] has complied with the Rule's filing requirements by requesting that particular relief below." *Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 402 (2006); *see also id.* at 403-404 (explaining this Court's cases in which parties "secured a new trial" on appeal "because in each of those cases the appellants moved for a new trial post-verdict in the District Court"). That rule is readily applied in other circuits. *See, e.g.*, *CFE Racing Prods., Inc. v. BMF Wheels, Inc.*, 793 F.3d 571, 582-84 (6th Cir. 2015). Yet the Eighth Circuit nonetheless applied only plain-error review.

Second, while reversing the Eighth Circuit's application of the plain-error standard of review would be enough to require that court to reconsider, the Eighth Circuit's underlying review of the fraud question appears to present a conflict as well. B&B's witness testified that his submission to the PTO was based on the advice of counsel, and that the PTO was aware of the jury verdict in any event. The court's only rationale for why the jury could find fraud *by clear and convincing evidence* was the speculative possibility that the jury *dis*believed B&B's witness. Op. 8. That appears to conflict with precedent of the Federal Circuit—the court with nationwide,

though not exclusive, jurisdiction to review decisions of the TTAB, 15 U.S.C. § 1071(a), including on questions of fraud on the agency. That court has emphasized that intent to deceive is an indispensable element of fraud in the trademark context; that "[t]here is no fraud if a false misrepresentation is occasioned by an honest misunderstanding or inadvertence without a willful intent to deceive"; and that unless the proponent of a fraud argument "can point to evidence to support an inference of deceptive intent, it has failed to satisfy the clear and convincing evidence standard required to establish a fraud claim." *In re Bose Corp.*, 580 F.3d 1240, 1246 (Fed. Cir. 2009).

4. Although B&B previously obtained one 30-day extension, a further extension is necessary in light of subsequent developments. B&B is a small company with limited resources and, despite diligent efforts over many weeks, was not able to raise funds to hire specialized Supreme Court counsel. These efforts consumed much of the period for seeking certiorari and a portion of the extension granted by the Circuit Justice. On May 14, 2019, B&B retained the undersigned counsel to file a petition for certiorari. While familiar with the case (having served as counsel below), the undersigned counsel has a significant professional conflict—preparing for and conducting an 8-day trial in the Eastern District of Arkansas that is scheduled to begin June 10, 2019 (with pretrial conference May 29, 2019). In addition, the undersigned counsel has limited experience in this Court and requires the additional time to research, prepare, and print a compliant petition.

For the foregoing reasons, this Court should extend the time for the filing of a

petition for a writ of certiorari by 27 days, to and including July 3, 2019.

Respectfully submitted.

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May 21, 2019