

No. 19-48

IN THE
Supreme Court of the United States

B&B HARDWARE, INC.,
Petitioner,
v.

HARGIS INDUSTRIES, INC.,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Following a five-day jury trial, the District Court entered judgment against Petitioner B&B Hardware, Inc. on its claim for trademark infringement because the jury found that Respondent Hargis Industries, Inc. had demonstrated by clear and convincing evidence that B&B committed fraud on the U.S. Patent & Trademark Office. The District Court also held that, even absent the fraud, the balance of the equities weighed against the disgorgement of any of Hargis's profits, and the jury found that *none* of Hargis's profits were attributable to infringement. The Eighth Circuit affirmed, reviewing B&B's challenge to the jury's fraud finding for plain error because B&B had not challenged the evidence supporting the fraud in its pre-verdict motion.

The questions presented are:

Whether there is any conflict between the Federal Circuit's standard for showing fraud on the PTO as set forth in *In re Bose Corp.*, 580 F.3d 1240 (Fed. Cir. 2009), and the standards set forth by other circuits in decisions that quote *In re Bose Corp.*

Whether the Eighth Circuit correctly reviewed the denial of B&B's post-trial motion for judgment notwithstanding the verdict under the plain error standard that B&B previously conceded should apply.

Whether the decision in *Romag Fasteners, Inc. v. Fossil, Inc.* (No. 18-1233) could have any impact on the outcome of this case, where the Eighth Circuit declined to reach the willfulness issue because it had decided the case on other dispositive grounds.

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BRIEF IN OPPOSITION

INTRODUCTION

Petitioner B&B Hardware, Inc. emphasizes this case's long history, but it offers no reason to prolong it, much less with review in this Court. The petition does not present a circuit split, or even an outcome determinative issue, given the numerous independent grounds for upholding the fact-bound decision.

In an attempt to evade an obvious denial on these grounds, B&B highlights this case's prior trip to the Supreme Court. But, if anything, B&B's conduct during that prior trip counsels further against review. It litigated a key trademark question before

this Court without divulging that it had allowed its trademark to lapse. Respondent Hargis Industries, Inc. was forced to independently uncover that potentially dispositive fact on remand, creating yet another implacable obstacle to review.

B&B also attempts to avoid a denial by citing to the Court’s recent grant in *Romag Fasteners, Inc. v. Fossil, Inc.* (No. 18-1233). But—by B&B’s own admission—the Eighth Circuit did not reach the issue presented in *Romag Fasteners* and instead decided the case on another dispositive basis.

The petition for certiorari should be denied.

STATEMENT

B&B Hardware and Hargis Industries manufacture entirely distinct metal fasteners for entirely distinct markets. Pet. App. 3. B&B manufactures fasteners for the aerospace industry, while Hargis manufactures them for building construction. *Id.*

In 1993, B&B registered the trademark “SEALTIGHT” with the U.S. Patent and Trademark Office (“PTO”) for “threaded or unthreaded metal fasteners * * * for use in the aerospace industry.” *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1301 (2015). In 1996, Hargis sought to register “SEALTITE” for “self-piercing and self-drilling metal screws for use in the manufacture of metal and post-frame buildings.” *Id.* The PTO denied Hargis’s application because of its similarity to B&B’s existing mark. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 252 F.3d 1010, 1011 (8th Cir. 2001). Believing that B&B had abandoned its mark, Hargis filed a petition with the Trademark Trial and

Appeal Board (“TTAB”), a body within the PTO, to cancel B&B’s mark. *Id.*

1. B&B’s First Infringement Lawsuit

In response, B&B filed a trademark infringement suit in federal district court. *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 569 F.3d 383, 385 (8th Cir. 2009). After a four-day trial in 2000, a jury issued a verdict against B&B, finding that its mark had no secondary meaning and was merely descriptive, and thus, not entitled to trademark protection. *Id.* at 385-386. The Eighth Circuit affirmed. *Id.*

Following the jury verdict, proceedings in front of the TTAB continued. While the TTAB did not question the jury’s determination that B&B’s mark was merely descriptive and not protectable, it declined to cancel B&B’s registration due to a statutory time bar. *Id.* at 386. The TTAB also decided that Hargis could not register its own mark because of a likelihood of confusion between Hargis’s and B&B’s marks. *B&B Hardware*, 135 S. Ct. at 1301-02.

2. B&B’s Incontestability Application

In 2006, B&B filed for incontestability status for its mark. Pet. App. 4; *see id.* at 23. When a mark has been acknowledged as incontestable by the PTO, it is automatically deemed valid and protectable in any trademark infringement suit, whether or not that mark might otherwise be deemed descriptive or unprotectable. *See* 15 U.S.C. § 1115(b). As such, a mark may not be granted incontestability status until it has been registered for at least five years, and—even after five years has passed—a mark may not be deemed incontestable if there has been an

adverse judgment against it during that time. *Id.* § 1065.

To ensure that these statutory requirements are met, the PTO requires those filing for incontestability to submit an affidavit declaring that the mark in question has been registered for five years and has not had an adverse judgment against it. *Id.* The PTO does not review the merits of these affidavits, but instead assumes that they are true and grants the mark incontestability status as long as the affidavit contains the relevant statutory requirements. Pet. App. 9.

Despite his knowledge of the 2000 adverse jury verdict holding that the SEALTIGHT mark was descriptive and thus not protectable, Larry Bogatz, B&B's owner, submitted an incontestability affidavit to the PTO, stating that there was "no final decision adverse to [his] claim." CA8 J.A. 770; *see also* 15 U.S.C. § 1065. Based on that affidavit, the PTO granted B&B's mark incontestability status. Pet. App. 4.

3. B&B's Second Infringement Lawsuit

a. "[M]ere weeks" after filing for incontestability, B&B filed a second infringement suit against Hargis. *Id.* at 25. The District Court initially dismissed the suit on collateral estoppel grounds in light of the 2000 jury verdict, but the Eighth Circuit reversed, concluding that B&B's newly acquired incontestability status constituted a significant change in circumstances. *Id.* at 4-5. It reasoned that the mark's new incontestability status meant that Hargis could no longer use the mark's descriptiveness to defeat the infringement claim. The 2000 jury verdict was

therefore irrelevant, and the case was remanded for a new trial.

In 2010, a unanimous jury again found against B&B, agreeing with Hargis that there was no likelihood of confusion between its mark and B&B's. *Id.* The District Court also awarded attorney's fees to Hargis because it found that—in its attempt to obtain a verdict against Hargis—B&B had “creat[ed] a false website developed with images from Hargis's website, contact[ed] long-time Hargis customers to create confusion with those customers, and ma[de] misrepresentations at trial and in B&B owner Larry Bogatz's deposition testimony.” *B&B Hardware v. Hargis Indus., Inc.*, 716 F.3d 1020, 1027 (8th Cir. 2013). On appeal, the Eighth Circuit affirmed on all claims and with respect to the award of most of the attorney's fees. *Id.* But in 2015, this Court reversed and remanded, finding that the District Court improperly failed to give preclusive effect to the TTAB decision that the similarity between the two marks was “likely to cause confusion.” *See B&B Hardware*, 135 S. Ct. at 1299, 1301.

b. Back in the trial court on remand, Hargis discovered that B&B had allowed its trademark registration to lapse—in 2013. Pet. App. 5. B&B had not disclosed that fact at any prior point. In fact, in 2014, B&B misrepresented to this Court that it presently “owns the registered mark ‘SEALTIGHT.’” *See Petitioner's Br. at i, B&B Hardware*, 135 S. Ct. 1293 (No. 13-352). Hargis accordingly moved for judgment on the pleadings and for summary judgment based on B&B's lack of a valid, registered mark, among other things. *See D. Ct. Dkt. 341, 363.* The District Court denied those motions, and the

case proceeded to yet another jury trial. *See* CA8 J.A. 1180.

At trial, Hargis asserted the affirmative defense created by Section 33 of the Lanham Act, which provides that a defendant accused of infringing on an incontestable trademark may raise an affirmative defense that “the incontestable right to use the mark was obtained fraudulently.” 15 U.S.C. § 1115(b)(1); *see* Pet. App. 6, 9-10. Hargis presented evidence that B&B’s 2006 incontestability affidavit failed to disclose the 2000 jury verdict, and that B&B’s failure was no accident. That evidence included the questioning of Mr. Bogatz himself. When asked whether he understood the 2000 jury verdict was “adverse to the Sealtight mark itself,” Mr. Bogatz answered: “Yes.” June 8, 2016 Trial Tr. (Vol. 3) 508:3-4 (D. Ct. Dkt. 477).

Hargis also offered evidence that none of its profits were attributable to any infringement, and that Hargis did not intend to trade on B&B’s goodwill or to pass its products off as B&B’s. And Hargis asserted counterclaims for false advertising and false designation of origin. *See* Pet. App. 6, 19-20.

At the close of evidence, B&B filed a Rule 50(a) motion for judgment as a matter of law on Hargis’s counterclaims, but it did *not* move for judgment as a matter of law on Hargis’s affirmative defense of fraud, or on the question of whether any of Hargis’s profits were attributable to infringement, or on whether any infringement by Hargis was willful. Pet. App. 6; *see* D. Ct. Dkt. 479.

With regard to Hargis’s affirmative defense, the District Court instructed the jury that: “Hargis

claims that B&B obtained its trademark registration and/or incontestable status through fraud on the Patent and Trademark Office ('PTO'). * * * Hargis must prove by clear and convincing evidence that B&B made a material misrepresentation or failed to disclose material information to the PTO, with the intent to deceive the PTO." CA8 J.A. 1232 (Instruction No. 19).

c. The jury yet again delivered a verdict against B&B on the infringement claim, and it found for Hargis on its counterclaims. In compliance with the District Court's instructions, the jury found that B&B had satisfied the two main elements of its infringement claim due to B&B's incontestability status and the TTAB's likelihood of confusion ruling. But these findings did not lead to a verdict in B&B's favor because the jury also found that any infringement by Hargis was not willful, that *none* of Hargis's profits were attributable to infringement, and, most importantly, that Hargis established its affirmative defense: The jury concluded that B&B had committed fraud on the PTO by submitting a false affidavit in order to obtain incontestability status. *See* Pet. App. 6-7.

Because the jury found that B&B's incontestability status was fraudulently obtained, and because that status was the only change in circumstances that had allowed B&B to avoid the preclusive effect of the 2000 infringement verdict, the District Court entered judgment for Hargis. *Id.*

The District Court also ruled for Hargis on another dispositive ground. The judge found that even if any of Hargis's profits were attributable to infringement,

the balance of the equities weighed against disgorgement. Applying the six factors used by the Third, Fourth, and Fifth Circuits in assessing the propriety of disgorgement, the court held that it would be “unjust” to disgorge Hargis’s profits because Hargis did not divert sales from B&B, Hargis was in a different market, Hargis’ infringement was not willful, and “Hargis did not palm off its products as B&B’s.” CA8 J.A. 1309-12.

B&B then filed a post-verdict Rule 50(b) motion, which the District Court denied. It first noted that B&B had waived most of the arguments it raised in the motion, but it then went on to explain why the arguments also failed on the merits. *See* Pet. App. 20. Notably, the court rejected B&B’s argument that the evidence was insufficient to support the jury’s finding of fraud. First, B&B had failed to disclose a prior adverse jury verdict of which it was well aware. *Id.* at 25. Second, the timing was telling: “mere weeks” after its mark received incontestability status, B&B filed its second infringement action against Hargis. *Id.* Finally, the jury was permitted to reject Bogatz’s testimony as not credible. *Id.*

The Eighth Circuit affirmed. The court emphasized that B&B had failed to include in its pre-verdict motion for judgment as a matter of law the argument that the evidence was insufficient to support a finding of fraud. *Id.* at 8. Consequently, the Eighth Circuit reviewed for plain error and found none. *Id.* at 11. The court thus did not need to reach

the other grounds for entering judgment against B&B.¹

REASONS FOR DENYING THE PETITION

I. THERE IS NO REASON TO GRANT THIS PETITION.

A. There Is No Circuit Split Regarding Claims Of Fraud On The PTO.

B&B’s central contention appears to be that there is a split between the Eighth Circuit and the Federal Circuit on the standard for fraud on the PTO, specifically, that the Federal Circuit requires intent while the Eighth Circuit does not. *See* Pet. 12-13. That is not the case.

B&B’s own descriptions of the law reveal no difference between the Federal Circuit and Eighth Circuit standards. As explained in *In re Bose Corp.*, on which B&B relies, the Federal Circuit asks whether a registrant “knowingly ma[de] a false, *material* representation with the *intent* to deceive the PTO.” 580 F.3d 1240, 1245 (Fed. Cir. 2009) (emphases added); *see* Pet. 10. The Eighth Circuit explained below that fraud on the PTO occurs where a registrant “*willfully* withhold[s] *material* information.” Pet. App. 10 (emphases added); *see* Pet. 12. Both standards require intent and materiality. Lest there be any doubt as to whether “[t]he Eighth Circuit

¹ The Eighth Circuit also agreed with the District Court’s conclusion that in light of the jury’s fraud finding, the preclusive effect of the 2000 jury verdict prevented B&B from succeeding on its claims for infringement. Pet. App. 11-16. B&B does not challenge that conclusion in its petition.

[s]tandard [c]onflicts [w]ith *Bose*,” Pet. 12, the Eighth Circuit has quoted *Bose* in affirming findings of fraud on the PTO. *See Fair Isaac Corp. v. Experian Info. Sols., Inc.*, 650 F.3d 1139, 1148 (8th Cir. 2011) (quoting *Bose*, 580 F.3d at 1243, 1245).

Nor are the other circuits divided. B&B claims (at 14) that “the Second Circuit departs markedly from the Federal Circuit standard.” It does not. The decision B&B criticizes, *Patsy’s Italian Restaurant v. Banas*, 658 F.3d 254 (2d Cir. 2011), itself relies on *Bose*, *id.* at 271, and the Second Circuit has subsequently confirmed that “this Circuit’s case law is consistent with *Bose*.” *MPC Franchise, LLC v. Tarntino*, 826 F.3d 653, 659 (2d Cir. 2016). B&B otherwise claims only that other circuits “[l]ack [cl]osistency.” Pet. 14. But the circuits dubbed inconsistent in the petition also expressly follow *Bose*. *See OTR Wheel Eng’g, Inc. v. W. Worldwide Servs., Inc.*, 897 F.3d 1008, 1020 (9th Cir. 2018) (discussing *Bose* and “join[ing] the Federal Circuit”); *Sovereign Military Hospitaller Order v. Fla. Priory of Knights Hospitallers*, 702 F.3d 1279, 1289, 1290, 1292 & n.12 (11th Cir. 2012) (citing *Bose* five times).²

² The First Circuit decision that B&B claims “noted inconsistency on whether to apply a heightened standard of proof to fraud and willfulness *in trademark litigation*,” Pet. 14 (emphasis added), did not involve a claim of fraud on the PTO at all; that decision analyzed when a showing of willfulness is required in Lanham Act cases, and “noted” decisions regarding “the intent to confuse or deceive in trade dress infringement cases” and “the bad faith requirement in the Lanham Act’s cyberpiracy provision.” *Fishman Transducers, Inc. v. Paul*, 684 F.3d 187, 193 n.7 (1st Cir. 2012). Any division on those issues is not relevant here.

B&B ultimately fails to show *any* inconsistency, let alone that the Eighth or any other circuit “has entered a decision in conflict with the decision of another United States court of appeals on the same important matter.” Sup. Ct. R. 10(a).

What is more, even if there were a split of authority, it could not affect the outcome here. B&B’s favored phrasing of the intent requirement for fraud on the PTO—that of the Federal Circuit—is identical to that used in the jury instructions in this case. The District Court instructed the jury that: “Hargis must prove by clear and convincing evidence that B&B made a material misrepresentation or failed to disclose material information to the PTO, with the intent to deceive the PTO.” CA8 J.A. 1232. That is precisely the standard B&B is now advocating.³

³ B&B also briefly challenges the jury’s finding regarding the “materiality of the alleged fraud,” asserting that “[t]o invoke cancellation of a registration, the alleged misrepresentation must go to the registration itself,” and not an incontestability affidavit. Pet. 13. This assertion is confusing, as the courts below did not cancel B&B’s registration, nor did Hargis ask them to. In any event, there can be no dispute that false statements in an incontestability affidavit that mislead the PTO into accepting an incontestability application are “material,” and thus provide a defense to an infringement action. *See* 15 U.S.C. § 1115(b)(1) (incontestability is “subject to” the “defense[]” that “the registration or the incontestable right to use the mark was obtained fraudulently”); 6 McCarthy on Trademarks and Unfair Competition § 32:149 (5th ed. 2019 update) (listing the nine “affirmative defenses” to incontestability including “[f]raud in obtaining the registration or the status of incontestability”); *see also, e.g.*, *Robi v. Five Platters, Inc.*, 918 F.2d 1439, 1444 (9th Cir. 1990) (“Any false statements made in an incontestability affidavit may jeopardize not only the

B. The Petition Identifies No Circuit Split Or Error Regarding The Eighth Circuit’s Standard Of Review.

B&B next challenges the Eighth Circuit’s application of plain error review to B&B’s challenge to the jury’s fraud finding, but it does not allege a split on the issue; nor does it suggest any other reason the Court might wish to consider this alleged error. Perhaps even more to the point, B&B does not point to an error at all.

B&B has even admitted as much. It did not argue for any other standard of review in its briefing in the Eighth Circuit, and counsel for B&B *conceded* at oral argument that plain error review applied to its challenge to the jury’s fraud finding.⁴

Nonetheless, B&B now attempts to argue that a different standard should apply. Pet. 19. But none of its cites support that point, and for good reason. It

incontestability claim, but also the underlying registration.”); *Skippy, Inc. v. CPC Int’l, Inc.*, 674 F.2d 209, 216 (4th Cir. 1982) (false statement in incontestability affidavit prevented mark from becoming incontestable). Indeed, B&B admits in the petition (at i) that “[f]iling of a fraudulent declaration of incontestability under Section 15 is an affirmative defense to the ‘conclusive evidence’ of a mark’s validity.”

⁴ “Q. Counsel I thought that . . . the fraud was definitely [reviewed] for plain error because you did not have that argument in your motion for judgment as a matter of law. Right? I thought that that’s crystal clear. A. Okay, then we’ll go with plain error, Your Honor.” Oral Argument at 5:55, *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 912 F.3d 445 (8th Cir. 2018) (No. 17-1570), available at <http://media-oa.ca8.uscourts.gov/OAaudio/2018/9/171570.MP3>.

is well-settled that where a litigant fails to raise an issue in a pre-verdict motion for judgment as a matter of law, a denial of its post-verdict motion for judgment for a matter of law (i.e., a motion for judgment notwithstanding the verdict) is reviewed for plain error. *See Pet. App. 8* (citing *Karjala v. Johns-Manville Prods. Corp.*, 523 F.2d 155, 157 (8th Cir. 1975); *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 (8th Cir. 1995)); *accord, e.g., Francisco v. Foti*, 157 F.3d 903 (5th Cir. 1998) (citing *McCann v. Texas City Ref., Inc.*, 984 F.2d 667 (5th Cir. 1993)); *Bryan Co. v. U.S. Surgical, a div. of Tyco Healthcare Grp. LP*, 150 F. App'x 616, 617-618 (9th Cir. 2005) (citing *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 786 F.2d 1342, 1345 (9th Cir. 1985)).⁵

Even if there were some doubt on that, B&B has not made any showing that it could have prevailed under a more generous standard of review. To the contrary, the admissions by Mr. Bogatz and the other evidence demonstrating B&B's fraudulent intent mean that the jury verdict undoubtedly would have survived under any level of review. *See supra* pp. 5-6, 8.

⁵ Notwithstanding B&B's misleading references (at 16, 18, 19) to motions for a new trial, B&B did *not* move for a new trial in the District Court. It filed a "Motion For Judgment Notwithstanding The Verdict Of The Jury And/Or Motion To Alter Or Amend The Judgment," CA8 J.A. 1321, and challenges here the Eighth Circuit's review of "whether Hargis introduced adequate evidence" to support the jury's finding in Hargis's favor, i.e., the denial of its Rule 50(b) motion. Pet. 20. As such, the authorities B&B cites dealing with different kinds of Rule 59 motions are irrelevant.

II. THERE IS NO REASON TO HOLD FOR *ROMAG FASTENERS*.

B&B's only remaining contention (at 20) is that this Court's grant in *Romag Fasteners, Inc. v. Fossil, Inc.* (No. 18-1233) might ultimately require reversal. But regardless of which way *Romag Fasteners* comes out, it could not possibly affect the result here.

The issue in *Romag Fasteners* is whether a finding of willfulness is required to order disgorgement of an infringer's profits. See Petition for Writ of Certiorari at i, *Romag Fasteners*, No. 18-1233 (Mar. 22, 2019) ("*Romag Fasteners* Pet."). As B&B itself acknowledges, Pet. 20, the Eighth Circuit did not reach that issue in this case because it upheld the judgment in Hargis's favor, obviating the need to give any attention to an appropriate remedy for the alleged infringement. And the District Court already adopted the approach most favorable to B&B: It did *not* treat willfulness as a prerequisite for finding disgorgement; rather, it considered Hargis's lack of willfulness as one of several factors in its equitable analysis. See CA8 J.A. 1309-12. That is the approach the petitioners (who, like B&B, asserted infringement claims) urge in *Romag Fasteners*. See *Romag Fasteners* Pet. 13, 20.

Moreover, even if this Court did somehow find fault in the willfulness analysis below, it would not make *Romag Fasteners* relevant because—among other things—the jury found that *none* of Hargis's profits were attributable to infringement. Thus, whether or not willfulness is a prerequisite to disgorgement, B&B would not be entitled to any of Hargis's profits.

III. THE PETITION SHOULD BE SWIFTLY DENIED.

Not only is there no reason to grant or hold the petition, there are multiple reasons to deny it. As noted, B&B has repeatedly engaged in litigation behavior that is, at a minimum, questionable—including affirmatively misrepresenting the status of its trademark when it was last before this Court. *See supra* pp. 5-6. Moreover, the decision below may be sustained on at least *four* independent grounds—including B&B’s fraud on the PTO, the lack of profits attributable to infringement, the fact that the equities weigh against disgorgement, and the lapse in B&B’s registration. That makes it virtually impossible for this Court to issue an outcome determinative decision on any of the questions presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

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