No. 22-929

In the

Supreme Court of the United States

BYD MOTORS INC.,

Petitioner,

v.

SODERHOLM SALES AND LEASING, INC.,

Respondent.

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

BRIEF IN OPPOSITION

JEFFREY P. MILLER
Counsel of Record
MILLER SHEA
A Limited Liability Law Company
American Savings Bank Tower
1001 Bishop Street, Suite 2925
Honolulu, Hawaii 96813
(808) 536-2442
jeff@millershealaw.com

Counsel for Respondent

April 24, 2023

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Did the Ninth Circuit conduct a *de novo* review of the district court's conclusion of law when applying Hawaii Revised Statutes §437-58(g) to the facts of this case.

CORPORATE DISCLOSURE STATEMENT

Respondent Soderholm Sales and Leasing, Inc. is a privately owned Hawaii domestic corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

This case involves the district court's determination that that Petitioner BYD MOTERS LLC ("BYD") acted in bad faith toward Respondent SODERHOLM SALES AND LEASING, INC. ("Soderholm") and awarded state law statutory damages to Soderholm pursuant to Hawaii Revised Statutes §437-58(g) and (h) and prejudgment interest. Petitioner never contested the district court's finding of bad faith conduct by Petitioner or the award of prejudgment interest. On appeal Petitioner only contested the award of Hawaii state law statutory damages.

The Petition's primary argument is that the appellate panel failed to review the district court's alleged failure to assess damages on the date of termination of the Agreement or one day prior to the notice of termination. The appellate panel in fact did not review this theory of calculating statutory damages because this argument by Petitioner was not pressed to or passed upon by the appellate panel. Petitioner did not raise this interpretation of Hawaii Revised Statutes §437-58(g) in its Appellant's Opening Brief or its Appellant's Response and Reply Brief. Instead, Petitioner's argument was only first presented in Petitioner's Petition for Panel Rehearing. This Court should therefore decline to exercise its appellate jurisdiction in this case on this ground alone.

The appellate panel in its Memorandum disposition correctly affirmed the district court's award of damages after conducting a *de novo* review

of the lower court's application of Hawaii Revised Statutes §437-58(g). Petitioner relies exclusively on *Salve Regina College v. Russell*, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991) for its contention that the appellate panel failed to conduct a *de novo* review of the district court's decision. Contrary to Petitioner's assertion, the appellate panel did not apply, let alone even mention, the customary deference accorded interpretations of state law made by federal judges as addressed in *Salve Regina*. The *Salve Regina* decision is inapplicable to the instant case and offers no support to Petitioner's argument.

The Petition should be denied.

STATEMENT OF FACTS

Petitioner BYD is a wholly owned subsidiary of BYD Co. Ltd. headquartered in Shenzhen, China. BYD is a Chinese multinational corporation that manufactures electric motor vehicles and other products for worldwide sale. It is the world's largest electric vehicle manufacturer for both consumer and commercial/industrial vehicles.

Soderholm is a Hawaii corporation that has been in the business of selling buses, handi-vans, tour vans and trolleys to customers in Hawaii and the Pacific Islands for over 32 years. Its customers include, among others, state and county governmental entities, tour companies, resorts, schools, and church groups.

On December 11, 2016, Soderholm's President, Denise Soderholm, and BYD's Vice President for Sales, Macy Neshati, entered into a Sales and Service

Agreement effective January 1, 2016 ("Agreement") for the purpose of sales of BYD electric vehicles in Hawaii.

Soderholm and BYD entered into the Agreement to comply with the Hawaii Motor Vehicle Industry Licensing Act, H.R.S. Chapter 437 ("MVILA"), which requires a written franchise agreement between a manufacturer and a dealer. H.R.S. §437-3.

Erik Soderholm, Soderholm's Vice President, introduced BYD's West Coast Regional Sales Manager, Justin Scalzi, to nearly all of Soderholm's Hawaii customers. Soderholm took Mr. Scalzi to meet with Soderholm's clients and contacts in each county in Hawaii and to solicit BYD bus and car sales to them. Soderholm undertook substantial marketing and sales efforts for BYD's products, including demonstrations, shipping demonstration buses to Hawaii and the counties after negotiating reduced shipping rates with Matson, splitting the shipping costs with BYD, organizing a BYD Electric Vehicle Exposition at The Pacific Club, attending trade shows, and marketing BYD's products to Soderholm's clients throughout Hawaii.

Macy Neshati left his position at BYD in May 2018 and BYD's communications with Soderholm plummeted. On August 22, 2018, Soderholm inquired about BYD's current pricing so Soderholm could purchase BYD vehicles to sell, and noted that they had not spoken in a "couple of months" and Erik Soderholm had "[l]eft numerous messages to no avail [.]"

On September 20, 2018, BYD sent Soderholm a letter attempting to terminate the Agreement. On October 2, 2018, Soderholm sent BYD a letter responding to the September 20, 2018 termination letter. Soderholm pointed out that BYD's termination letter failed to comply with statutory requirements. On October 18, 2018, BYD's counsel sent an email to Soderholm's counsel which only stated: "We are rescinding our previously issued notice. We will reissue a new notice in the near future. Thank you."

After rescinding the September 20, 2018 termination letter, BYD refused to communicate with Soderholm, refused to provide Soderholm with updated pricing requested by Soderholm, ignored requests for quotes on BYD products, and refused to communicate or interact with Soderholm on further marketing efforts.

It was not until November 17, 2020 that BYD sent Soderholm another termination letter. The district court found the September 20, 2018 termination letter was rescinded so the Agreement remained in effect until January 20, 2021, the effective date of the November 17, 2020 termination letter.

On February 28, 2019, Soderholm filed the instant action against BYD. A bench trial was conducted on January 19, 2021. On September 22, 2021, the district court issued its Findings of Fact and Conclusions of Law and Order. The district court found that even though the Agreement remained in effect until January 20, 2021, BYD made

the decision to end its relationship with Soderholm shortly after Neshati left the company. The district court found that no later than August 22, 2018, BYD stopped providing Soderholm with the information and resources necessary for Soderholm to sell BYD products.

The district court found that under the Agreement Soderholm had the right to buy new BYD Products, but that beginning August 22, 2018, BYD deprived Soderholm that right. The district court therefore concluded that BYD failed to fully comply with the Agreement, and to act in a fair and equitable manner towards Soderholm because BYD deprived Soderholm of its rights under the Agreement. The district court concluded that BYD's bad faith conduct concluded on February 28, 2019 when Soderholm filed its Complaint because at that time Soderholm stopped attempting to exercise its right to buy BYD products for resale, even though BYD continued to deprive Soderholm the right to buy BYD products after the Complaint was filed up until the January 20, 2021 effective date of the termination of the Agreement.

The district court found that Soderholm carried its burden of proof and established, by a preponderance of the evidence, that BYD failed to act in good faith in relation to its attempt to terminate the Agreement during the period from August 22, 2018 to February 28, 2019 so that Soderholm is entitled to judgment as to Count II.

On September 22, 2021, the district court filed its Judgment in favor of Soderholm on Count II of the

First Amended Complaint awarding Soderholm $1,559,285.25 in statutory damages pursuant to H.R.S. §437-58(g), and awarded Soderholm prejudgment interest in the amount of $311,857.05 for the period from May 31, 2019 to May 31, 2021, and $421.01 per day from June 1, 2021 until the date the judgment is entered. The district court also entered judgment in favor of Soderholm on all counts of Petitioner's counterclaims.

On October 21, 2021, Petitioner filed its Notice of Appeal. On October 22, 2021, Respondent filed its protective Notice of Cross-Appeal.

On January 31, 2022, Petitioner filed its Appellant's Opening Brief with the Ninth Circuit Court of Appeals. Supplemental Appendix at 1a. In its Appellant's Opening Brief, Petitioner did not contest the district court's Findings of Fact and Conclusions of Law and Order's findings on Petitioner's liability for violations of the Hawaii Motor Vehicle Industry Licensing Act. Instead, Petitioner only contended on appeal that the district court erred in awarding statutory damages to Respondent under H.R.S. §437-58(g). Significantly, Petitioner did not argue in its Appellant's Opening Brief that the district court erred by not determining the fair market value of the franchise as of the date of termination or one day before the notice of termination.

On April 1, 2022, Petitioner filed its Appellant's Response and Reply Brief. Supplemental Appendix at 43a. Like its Appellant's Opening Brief, the Appellants' Response and Reply Brief did not

argue that the district court erred by not determining the fair market value of the franchise as of the date of termination or one day before the notice of termination.

On November 10, 2022, the Ninth Circuit Court of Appeals filed its Memorandum disposition affirming the Judgment against Petitioner.

On November 22, 2022, Petitioner filed its Petition for Panel Rehearing and Petition for Rehearing En Banc. For the first time Petitioner asserted a new alleged error by arguing that district court erred by not determining the fair market value of the franchise as of the date of termination or one day before the notice of termination.

On December 22, 2022, the Ninth Circuit Court of Appeals issued its Order denying the Petition for Rehearing and Petition for Rehearing En Banc.

On March 22, 2023, Petitioner filed the instant Petition for a Writ of Certiorari. Petitioner's primary contention is that the appellate panel failed to conduct a *de novo* review of whether the district court erred by not determining the fair market value of the franchise as of the date of termination or one day before the notice of termination. This argument was only first raised in Petitioner's Petition for Panel Rehearing and not in its Appellant's Opening Brief or Appellant's Response and Reply Brief to the appellate panel.

REASONS TO DENY THE PETITION

I. Petitioner Raises New Alleged Error Not Pressed Or Passed Upon In The Court Below

It is the well settled practice of the Court, in the exercise of its jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *McGoldrick v. Compagnie Generale Transatlantique,* 309 U.S. 430, 434, 60 S. Ct. 670, 672, 84 L. Ed. 849, 851 (1940) (citing *Blair v. Oesterlien Co.,* 275 U.S. 220, 225 (1927); *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

Although in some instances the Court has allowed a respondent to defend a judgment on grounds other than those pressed or passed upon below, it is quite a different matter to allow a petitioner to assert new substantive arguments attacking, rather than defending, the judgment when those arguments were not pressed in the court whose opinion the Court is reviewing, or at least passed upon it. *United States v. United Foods,* 533 U.S. 405, 417, 121 S. Ct. 2334, 2341, 150 L. Ed. 438, 449 (2001).

Generally, an argument not raised in an appellate brief or at oral argument may not be raised for the first time in a petition for rehearing. *Costo v. United States*, 922 F. 2d 302, 302-303 (9th Cir. 1990) (citing *United States v. Lewis*, 798 F. 2d1250 (9th Cir. 1986)). Indeed, even Courts of Appeals will ordinarily not consider for the first time on rehearing

issues not presented by the parties in their briefs on appeal. *United States v. Patzer*, 284 F.3d 1043, 1045 (9th Cir. 2002).

Here, the Petitioner states:

> "On its appeal, BYD argued, *inter alia*, that:
>
> (1) HRS § 437-58(g) provides expressly that the manufacturer "shall compensate the dealer at the fair market value for the dealer's capital investment, which shall include the going business value of the business, goodwill, property, and improvement owned or leased by the dealer for the purpose of the franchise **as of the effective date of the termination or one day prior to the notice, whichever is greater**. However, the district court never conducted valuation on either of the statutory dates, and never made any finding as to the date of valuation."

Petition at 6-7. (Emphasis in original.)

Petitioner 's citation for the above passage is "BYD Opening Brief on Appeal at 32."[1] Page 32 of

[1] Curiously, despite citing to it Petitioner did not include either the Appellant's Opening Brief nor Appellant's Response and Reply Brief in the Appendix so Respondent has provided a supplemental appendix to include them.

Appellant's Opening Brief only contains a discussion that HRS § 437-58(g) doesn't apply because there was no bad faith termination. Supplemental Appendix at 32a-33a. Page 32 does reference section VI.A of Appellant's Opening Brief, but section VI.A likewise argues that HRS § 437-58(g) doesn't apply because there was no termination. Supplemental Appendix at 21a-23a. Nowhere in either of Petitioner's briefs before the appellate panel raised the argument that the district court erred by not valuing the business on the date of termination or one day prior to the notice.

Unfortunately for Petitioner, its Appellant's Opening Brief nor Appellant's Response and Reply Brief never asserted this argument. This argument, which Petitioner asserts as the ground for issuing a writ of certiorari, was only first raised in Petitioner's Petition for Panel Rehearing wherein Petitioner asserted a new substantive argument attacking, rather than defending, the judgment. *United States v. United Foods, supra*, 533 U.S. 405, 417, 121 S. Ct. 2334, 2341, 150 L. Ed. 438, 449 (2001).

The Petition states in the Reasons For Granting The Petition section:

> "The panel majority disregarded, without any explanation, the same key statutory language that the district court had disregarded, namely that a valuation for the purpose of statutory damages must be done '**as of the effective date of the termination or**

> **one day prior to the date of the notice**'"

Petition at p. 9-10 (emphasis in original).

The reason the appellate panel "disregarded" this argument was because Petitioner failed to raise it before the appellate panel in either its Appellant's Opening Brief or Appellant's Response and Reply Brief. Accordingly, this Court should decline to assert its jurisdiction to consider Petitioner's new and novel argument.

II. The Decision Below Properly Applied The Correct Standard Of Review

The appellate panel correctly applied the proper standard of review. The appellate panel stated in its Memorandum disposition:

> "'After a bench trial, we review the district court's conclusions of law and mixed questions of law and fact de novo.' *Bax v. Doctors Med. Ctr. Of Modesto, Inc.*, No. 21-16532, __ F.4th ___, 2022 WL 10227441, at *4 (9th Cir. Oct. 18, 2022) (citation omitted). 'The district court's factual findings are reviewed for clear error. We will affirm a district court's factual finding unless that finding is illogical, implausible, or without support in inferences that may be drawn from the record.' *Id.* (citations, alteration, and internal quotation marks omitted.) 'A monetary award following a bench trial is a

> finding of fact we review for clear error….' *Crockett & Myers, Ltd. v. Napier, Fitzgerald & Kirby, LLP*, 664 F.3d 282, 285 (9th Cir. 2011) (citation omitted)."

App. 2-3.

Petitioner relies exclusively on *Salve Regina College v. Russell*, 499 U.S. 225, 111 S. Ct. 1217, 113 L. Ed. 2d 190 (1991) for its contention that the appellate panel failed to conduct a *de novo* review of the district court's decision. Petitioner's reliance on *Salve Regina* is misplaced because that decision is readily distinguishable from the instant case.

In *Salve Regina*, plaintiff, a student, sued a college for breach of contract in the United States District Court, District of Rhode Island, based on diversity jurisdiction. At the close of evidence at trial, the trial court denied defendant's motion for directed verdict. *Id*. at p. 229. In so doing the district court acknowledged that the Supreme Court of Rhode Island, at that point, had limited the application of the substantial performance doctrine to construction contracts. However, the district court concluded as a matter of law that the Supreme Court of Rhode Island would apply that doctrine to the facts therein. *Id.* The jury returned a verdict for plaintiff and judgment was entered. Both parties appealed.

The Court of Appeals for the First Circuit in *Salve Regina* recognized that it was a case of first impression to apply the substantial performance standard to the contract in question. *Id*. at p. 230. The Court of Appeals then held that in view of the

customary appellate deference accorded to interpretations of state law made by federal judges of that state, "we hold that the district court's determination that the Rhode Island Supreme Court would apply standard contract principles is not reversible error." *Id.*

The Supreme Court in *Salve Regina* stated that in the case before it "we must decide specifically whether a federal court of appeals may review a district court's determination of state law under a standard less probing than that applied to a determination of federal law." *Id*. at p. 227. Upon application of the *Erie* doctrine, the Supreme Court in *Salve Regina* reversed the court of appeals, holding:

> "The obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that courts of appeals review the state-law determinations of district courts *de novo*. The Court of Appeals in this case erred in deferring to the local expertise of the District Court."

Id. at p. 239-240.

The holding by the Supreme Court in *Salve Regina* provides no support for granting the instant Petition. Contrary to *Salve Regina*, here the appellate panel did not apply, let alone even mention, the customary deference accorded interpretations of state law made by federal judges sitting in that state. Instead, the appellate panel properly applied *de novo*

review to the district court's application of H.R.S. §437-58(g). The *Salve Regina* decision is inapplicable to the facts herein and provides no support to Petitioner's claim that the appellate panel applied the incorrect standard of review of the district court's decision. Accordingly, the Petition should be denied.

III. There Is No Conflict In Authority To Warrant The Court's Review

The Petition herein does not raise a federal law question on which a conflict of an important matter has developed among the federal circuits or a state Supreme Court. The appellate panel has not so far departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by the lower court, requiring the Supreme Court's exercise of its supervisory power. The Petition does not involve a state court of last resort deciding an important federal question. Finally, the Petition does not address an important question of federal law that should be settled by this Court. Accordingly, the Petition should be denied.

CONCLUSION

The Court should deny the petition for certiorari.

Respectfully submitted,

JEFFREY P. MILLER
Counsel of Record
MILLER SHEA
A Limited Liability Law Company
American Savings Bank Tower
1001 Bishop Street, Suite 2925
Honolulu, Hawaii 96813
(808) 536-2442
jeff@millershealaw.com

April 24, 2023 *Counsel for Respondent*