

**In the
Supreme Court of the United States**

MICHAEL H. PONDER,

Petitioner,

v.

HANS-PETER WILD,

Respondent.

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

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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QUESTION PRESENTED

Whether this Court may, as requested by Petitioner, ignore Kentucky Supreme Court precedent requiring a plaintiff to prove the existence of an enforceable oral contract by clear and convincing evidence, including “definite and certain terms setting forth promises of performance to be rendered by each party,” and instead hold that an allegation of a general understanding, sealed with a handshake, is sufficient to support a claim for breach of oral contract under Kentucky law?

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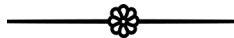
AUTHORITIES AT ISSUE

Corbin's Ex'rs v. Corbin, 194 S.W.2d 65, 68 (Ky. 1946) (“where the alleged expressed contract is oral the evidence to support it must be clear and convincing”).

Warren v. Cary-Glendon Coal Co., 230 S.W.2d 638, 640 (Ky. 1950) (“it is essential that the contract [] be specific and the certainty required must extend to all particulars essential to the enforcement of the contract,” including what a party must do to receive payment).

Brooks v. Smith, 269 S.W.2d 259, 260 (Ky. 1954) (if any “essential term” is indefinite or “yet to be agreed on, there is no contract”).

Kovacs v. Freeman, 957 S.W.2d 251, 254 (Ky. 1997) (citing *Fisher v. Long*, 172 S.W.2d 545 (Ky. 1943)) (“an enforceable contract must contain definite and certain terms setting forth promises of performance to be rendered by each party”).



STATEMENT OF FACTS

Petitioner Michael H. Ponder (“Ponder”) is the former President and Chief Executive Officer of WILD Flavors GmbH (“WILD Flavors”). Since October of 2016, Ponder has filed three actions against Respondent Dr. Hans-Peter Wild (“Dr. Wild”), former majority shareholder and Chairman of the Board of Directors for WILD Flavors, claiming that Ponder, who received a \$9 million bonus in connection with the sale of WILD Flavors in 2014 (“Stock Sale”), is entitled to an

additional \$3 million based on an alleged “oral promise” by Dr. Wild (“Alleged Oral Promise”).¹ See Pet.App.3a.

Ponder’s Nevada actions were both dismissed for lack of personal jurisdiction (Dr. Wild is a citizen and resident of Switzerland). While the district court in Kentucky found that it could exercise personal jurisdiction over Dr. Wild as to Ponder’s claim for breach of oral contract, it granted summary judgment in favor of Dr. Wild, finding that Ponder failed to demonstrate the existence of a legally enforceable contract with clear and convincing evidence as required by Kentucky law because: (a) the terms of the Alleged Oral Promise were too indefinite and uncertain to indicate mutual assent by the parties; and, (b) independently, Ponder failed to show that he provided any consideration for the Alleged Oral Promise, as Ponder was already obligated under his employment contract to perform any tasks assigned to him by Dr. Wild related to the Stock Sale. See Pet.App.18a-48a.

The Sixth Circuit Court of Appeals affirmed the district court’s decision, finding Ponder’s allegations regarding the Alleged Oral Promise too indefinite and uncertain to indicate mutual assent by the parties.

¹ See *Michael H. Ponder v. Dr. Hans-Peter Wild*, filed October 1, 2016, in United States District Court for the District of Nevada (Case No. 2:16-cv-02305-JCM-PAL); *Michael H. Ponder v. Hans-Peter Wild*, filed August 24, 2018, in United States District Court for the District of Nevada (Case No. 2:18-cv-01604-APG-PAL); and *Michael H. Ponder v. Hans-Peter Wild*, filed September 24, 2019, in the Commonwealth of Kentucky, Kenton County Circuit Court – Northern Division (Case No. 19-CI-01724), removed November 19, 2019, to United States District Court for the Eastern District of Kentucky – Northern Division, (Case No. 2:19-cv-00166-WOB-CJS), affirmed by the Sixth Circuit Court of Appeals on January 29, 2024 (Case No. 23-5620).

Because the Court of Appeals found Ponder's allegations regarding the Alleged Oral Promise to be deficient under Kentucky law, it did not consider whether Ponder's claim for breach of the Alleged Oral Promise also failed for lack of consideration. *See* Pet.App.1a-6a.

The Petition urges this Court to ignore longstanding Kentucky Supreme Court precedent requiring a plaintiff to prove the existence of an enforceable oral contract by clear and convincing evidence, including "definite and certain terms setting forth promises of performance to be rendered by each party," and instead hold that an allegation of a general understanding, sealed with a handshake, is sufficient to support a claim for breach of oral contract under Kentucky law. In taking such a position, Ponder asks this Court to disregard more than 200 years of Supreme Court precedent and substitute its judgment for that of Kentucky's highest court.

I. Kentucky Has a Well-Developed Body of Law Detailing What a Plaintiff Must Show to Prevail on a Claim for Breach of Oral Contract.

Kentucky law is clear: "[W]here the alleged expressed contract is oral the evidence to support it must be clear and convincing." *Corbin's Ex'rs v. Corbin*, 194 S.W.2d 65, 68 (Ky. 1946). "[I]t is essential that the contract . . . be specific and the certainty required must extend to all particulars essential to the enforcement of the contract," including what a party must do to receive payment. *Warren v. Cary-Glendon Coal Co.*, 230 S.W.2d 638, 640 (Ky. 1950). "[A]n enforceable contract must contain definite and certain terms setting forth promises of performance to be rendered by each

party.” *Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997) (citing *Fisher v. Long*, 172 S.W.2d 545 (Ky. 1943)). If any “essential term” is indefinite or “yet to be agreed on, there is no contract.” *Brooks v. Smith*, 269 S.W.2d 259, 260 (Ky. 1954).

While Ponder may disagree with the Kentucky Supreme Court regarding what a plaintiff must show to prevail on a claim for breach of oral contract, Kentucky authority on this point is neither novel nor controversial. In fact, Kentucky is one of many states that utilize a heightened burden of proof for claims involving alleged oral agreements. *See, e.g., Webb v. Webb*, 498 S.W.2d 757, 758 (Mo. 1973) (“clear, convincing and satisfactory evidence” is required to prove the existence and terms of an oral contract); *Lumley v. Kapusta*, 878 N.W.2d 65, 67 (N.D. 2016) (“A mere preponderance of the evidence is insufficient to establish the terms and existence of a claimed oral contract; rather, the claimed oral contract must be established by clear and unequivocal evidence that unmistakably points to the existence of the claimed agreement” (citing *Kost v. Kraft*, 795 N.W.2d 712, 714 (N.D. 2011))); *Dean v. Morris*, 756 S.E.2d 430, 433 (Va. 2014) (to determine whether an oral contract exists, “we review the record for clear and convincing evidence, *i.e.*, proof that is more than a mere preponderance” (citing *Fred C. Walker Agency, Inc. v. Lucas*, 211 S.E.2d 88, 92 (Va. 1975))). Kentucky is also one of many states requiring definite and certain terms setting forth the promises of performance to be rendered by each party to form an enforceable contract. *See, e.g., Bagwell-Hughes, Inc. v. McConnell*, 164 S.E.2d 229, 231 (Ga. 1968) (holding an oral contract could not be enforced where “its terms are incomplete or incomprehensible”

or “vague, indefinite and uncertain”); *Thorn Springs Ranch, Inc. v. Smith*, 50 P.3d 975, 979 (Idaho 2002) (material terms of an oral contract must be “complete, definite, and certain”); *Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 515 N.E.2d 61, 65 (Ill. 1987) (oral contract terms “must be definite and certain in order for a contract to be enforceable”).

II. Ponder Failed to Show the Existence of a Genuine Issue of Material Fact in Dispute to Avoid Summary Judgment on His Claim for Breach of Oral Contract.

Dr. Wild moved for summary judgment, arguing that Ponder could not show with clear and convincing evidence that a valid contract exists because: (1) even if the Alleged Oral Promise was made (which Dr. Wild denies), the terms of the Alleged Oral Promise are, according to Ponder’s own testimony, too indefinite and uncertain to indicate mutual assent by the parties; and (2) Ponder cannot show that he provided any consideration for the Alleged Oral Promise.

As a result, Ponder was required to produce clear and convincing evidence demonstrating that the parties agreed to a legally enforceable contract. *Auto Channel Inc. v. Speedvision Network, LLC*, 144 F. Supp. 2d 784, 790 (W.D. Ky. 2001) (citing *Industrial Equip. Co. v. Emerson Elec. Co.*, 554 F.2d 276, 288 (6th Cir. 1977)). Ponder failed to do so, admitting that the only evidence he had to support his claim was his own testimony. This was fatal to Ponder’s claim because Ponder admitted that he and Dr. Wild never discussed the “parameters” of the Alleged Oral Promise – including: (1) what specific tasks Dr. Wild asked Ponder to perform to “lead” the Stock Sale; and (2) what “premium price” Dr. Wild required Ponder to

secure for WILD Flavors to entitle Ponder to the \$3 million.

The district court granted Dr. Wild's motion for summary judgment, finding that Ponder failed to produce clear and convincing evidence upon which a reasonable jury could find that the purported terms (as Ponder claimed them to be) were sufficiently certain and definite or that Ponder provided any consideration in exchange for the Alleged Oral Promise. *See* Pet.App.40a-47a. As the district court explained when denying Ponder's Motion to Alter or Amend Judgment: "[E]ven if the facts were as Ponder had argued them to be and the alleged oral promise had been made, no enforceable contract existed." *See* Pet.App.15a.

The Sixth Circuit, recognizing that whether Ponder and Dr. Wild formed a legally binding contract is a question of law for the court to resolve (*see Univ. of Ky. v. Regard*, 670 S.W.3d 903, 911 (Ky. 2023)), agreed with the district court, finding the purported terms of the Alleged Oral Promise "too indefinite to form a contract." *See* Pet.App.6a.

III. The Sixth Circuit and the District Court Properly Relied on Ponder's Own Testimony to Find That the Purported Terms of the Alleged Oral Promise Were Not Definite and Certain as Required by Kentucky Law.

Both the district court and the Sixth Circuit found that, even if Ponder's testimony was true, Ponder failed to establish the existence of a legally enforceable contract.

The district court explained:

[E]ven if the Court could find that “the what” and “the how” are established by the parties’ purported agreement, “upon the sale of WILD Flavors for a premium price” is not a certain and definite “when” term on these facts. There is nothing in the record that would enable a jury to find that the sale of WILD Flavors in 2014 triggered Wild’s duty to pay Ponder \$3 million because there is no evidence that specifically establishes the parameters of Ponder’s Performance, which is an essential term of any contract.

Pet.App.41a-42a.

The Sixth Circuit agreed with the district court’s analysis. As explained by the Sixth Circuit:

Viewing the evidence in the light most favorable to Ponder, as we must, Wild promised to pay \$3 million to Ponder if Ponder secured a “premium price” for the sale of Wild Flavors. Ponder believed that Wild expected to sell Wild Flavors for \$1.5 billion to \$2 billion.

No one disputes that “premium price” is an essential term of Ponder and Wild’s agreement. Nonetheless, “premium price” is not a “definite and certain” term in these circumstances. *Kovacs*, 957 S.W.2d at 254. Nothing in the record shows that the parties agreed on how to quantify “premium price,” making it unclear exactly what sales price Ponder had to obtain for Wild Flavors to receive his bonus. Ponder suggests that a “premium

price” was any amount over \$2 billion, Wild’s expected sales price. But there is no evidence in the record that Wild expected this price other than Ponder’s personal speculation. And no record evidence indicates that Wild considered a “premium price” to be any price above his expectations. Moreover, the dictionary definition of “premium” is “a sum over and above a regular price.” *Premium*, MERRIAM-WEBSTER DICTIONARY, www.merriam-webster.com/dictionary/premium (last visited Dec. 8, 2023). Ponder never specifies the regular price of Wild Flavors, nor does he argue that there was an understood method for determining that price. Without record evidence suggesting that the parties had a mutual understanding of the regular price or the expected price, there is no way to ascertain the premium price. This lack of specificity on what Ponder had to do to trigger Wild’s performance dooms his claim. *See Warren*, 230 S.W.2d at 640.

Pet.App.4a-5a.

IV. The District Court Correctly Found That Ponder Failed to Show He Provided Any Consideration in Exchange for the Alleged Oral Promise.

Ponder’s employment contract with WILD Flavors provided that Ponder would, as the Chief Executive Officer (“CEO”), “be responsible for all Business Activities of [WILD Flavors] and its affiliated companies the ‘Business’.” *See* Pet.App.44a. Ponder’s employment contract provided: “The Employer’s Chairman shall be the direct superior of Employee” and “Employee shall

be obliged to carry out the tasks assigned to him with due care and to safeguard the legitimate interests of Employer in good faith.” *Id.*

Dr. Wild, as Chairman of WILD Flavors, was Ponder’s “direct superior.” *Id.* At deposition, Ponder testified that, as CEO of WILD Flavors, he had to do “whatever [Dr.] Wild wanted” at all hours of the day. *See* Pet.App.45a-46a. In fact, Ponder was unable to identify a single task requested of him by Dr. Wild that Ponder considered outside the scope of his role as CEO of WILD Flavors. *See* Pet.App.45a.

The district court found that Ponder, as CEO of WILD Flavors, was obligated under his employment contract to perform all of the tasks Ponder claims formed the consideration for the Alleged Oral Promise. *See* Pet.App.43a-47a. For this reason, the district court found that Ponder failed to show that he provided any consideration for the Alleged Oral Promise. *See Sara v. Saint Joseph Healthcare Sys.*, 480 S.W.3d 286, 290 (Ky. Ct. App. 2015) (“a promise to perform something that the promisor was already bound to do cannot constitute new and valuable consideration necessary to form a contract”); *see also Fidelity-Phenix Fire Ins. Co. v. Duvall*, 106 S.W.2d 991, 997 (Ky. 1937) (“the performance of, or promise to perform, an existing legal obligation is not a valid consideration”). *See* Pet.App.44a.



REASONS FOR DENYING THE PETITION

The Petition fails to present a compelling reason why this Court should grant the Petition. The Sixth Circuit's affirmance of the district court's decision is not in conflict with the decision of another United States court of appeals on the same important matter, does not involve an important federal question in a way that conflicts with a decision by a state court of last resort, and has not departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court as to call for an exercise of this Court's supervisory power. SUP. CT. R. 10(a). Moreover, the Sixth Circuit did not decide an important question of federal law that has not been, but should be, settled by this Court, and has not decided an important federal question in a way that conflicts with relevant decisions of this Court. SUP. CT. R. 10(c). The Sixth Circuit simply affirmed the district court's application of Kentucky law to the facts of the case as alleged by Ponder.

I. THERE IS NO CONFLICT AMONGST THE CIRCUITS.

This case is not a case where a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals. Sup. Ct. R. 10(b). This is an appeal from the Sixth Circuit's affirmance of the district court's application of Kentucky state contract law. Ponder's Complaint asserted one cause of action against Dr. Wild – for breach of oral contract. The case was removed to federal court on diversity grounds. Under

Erie R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), federal courts exercising diversity jurisdiction apply state law to substantive issues and federal law to procedural issues.

There is no conflict among the Circuits when it comes to application of the *Erie* doctrine to breach of contract claims in diversity cases: all Circuits agree that claims involving the breach of a private contract are governed by state law.² Thus, under the *Erie* doctrine as agreed by all federal Circuits, Kentucky state law governed Ponder’s claim for breach of oral contract. The Sixth Circuit affirmed the district court’s application of binding precedent from Kentucky’s highest court.

II. THE KENTUCKY SUPREME COURT HAS ALREADY ADDRESSED THE ISSUE

Kentucky has a well-developed body of law detailing what a plaintiff must show to prevail on a claim for breach of oral contract. “[W]here the alleged expressed contract is oral the evidence to support it

² See, e.g., *Gattineri v. Wynn MA, LLC*, 63 F.4th 71, 85 (1st Cir. 2023); *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 895 (2d Cir. 1976); *Collins on behalf of herself v. Mary Kay, Inc.*, 874 F.3d 176, 182 (3rd Cir. 2017); *Parkway 1046, LLC v. U. S. Home Corp.*, 961 F.3d 301, 306-307 (4th Cir. 2020); *Hensley v. E. R. Carpenter Co., Inc.*, 633 F.2d 1106, 1109 (5th Cir. 1980); *Corrigan v. U.S. Steel Corp.*, 478 F.3d 718, 723 (6th Cir. 2007); *Assaf v. Trinity Medical Center*, 696 F.3d 681, 685 (7th Cir. 2012); *J. C. Carlile Corp. v. Farmers Liquid Fertilizer, Inc.*, 346 F.2d 91, 93 (8th Cir. 1965); *Compania Engraw Com’l E. Ind. v. Schenley Dist. Corp.*, 181 F.2d 876, 877 (9th Cir. 1950); *McIlravy v. Kerr-McGee Corp.*, 119 F.3d 876, 880 (10th Cir. 1997); *Escarra v. Regions Bank*, 353 Fed. App’x. 401, 402 (11th Cir. 2009); *Material Supply Intern., Inc. v. Sunmatch Indus. Co., Ltd.*, 146 F.3d 983, 992 (D.C. Cir. 1998);

must be clear and convincing.” *Corbin’s Ex’rs*, 194 S.W.2d at 68. “[I]t is essential that the contract [] be specific and the certainty required must extend to all particulars essential to the enforcement of the contract,” including what a party must do to receive payment. *Warren*, 230 S.W.2d at 640. “[A]n enforceable contract must contain definite and certain terms setting forth promises of performance to be rendered by each party.” *Kovacs*, 957 S.W.2d at 254 (citing *Fisher*, 172 S.W.2d at 545). If any “essential term” is indefinite or “yet to be agreed on, there is no contract.” *Brooks*, 269 S.W.2d at 260. The Petition cites to no authority indicating that the Kentucky Supreme Court may be inclined to reconsider its precedent on these points.

III. GRANTING THE PETITION WOULD NOT SAVE PONDER’S CLAIM AGAINST DR. WILD.

The Petition urges this Court to ignore longstanding Kentucky Supreme Court precedent requiring a plaintiff to prove the existence of an enforceable oral contract by clear and convincing evidence, including “definite and certain terms setting forth promises of performance to be rendered by each party” (*Kovacs v. Freeman*, 957 S.W.2d 251, 254 (Ky. 1997) (citing *Fisher v. Long*, 172 S.W.2d 545 (Ky. 1943))), and instead hold that an allegation of a general understanding, sealed with a handshake, is sufficient to support a claim for breach of oral contract under Kentucky law. The problem is Ponder never testified that he and Dr. Wild shook hands to signify their acceptance of the terms of the Alleged Oral Promise. In this regard, the Petition asks this Court to ignore longstanding Kentucky Supreme Court precedent, even though doing so would in no way save Ponder’s claim against Dr. Wild.

Additionally, even if this Court were to ignore Kentucky Supreme Court precedent and hold that an allegation of a general understanding, sealed with a handshake, is sufficient to support a claim for breach of oral contract under Kentucky law, it would not change the fact that Ponder's claim for breach of oral contract would fail for lack of consideration. *See Fidelity-Phenix Fire Ins. Co. v. Duvall*, 106 S.W.2d 991, 997 (Ky. 1937) ("the performance of, or promise to perform, an existing legal obligation is not a valid consideration"). On this basis alone, the Petition should be denied.



CONCLUSION

The Petition should be denied. The Sixth Circuit affirmed the district court's application of Kentucky law in determining that a valid oral contract between the parties had not been formed. As the case involves the application of Kentucky law as interpreted by Kentucky's highest court, there is no compelling reason for this Court to grant certiorari.

Respectfully submitted,

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