No.

IN THE
Supreme Court of the United States

SFA HOLDINGS, INC.,
Petitioner,

v.

4 STRATFORD SQUARE MALL HOLDINGS LLC,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit—in holding that Petitioner waived its right to assert affirmative defenses under the applicable lease and guaranty and pursuant to Illinois law—contravened this Court's precedent and fundamental principles of federalism, as well as generated a circuit conflict, by giving no regard to multiple rulings from the Illinois Circuit Court holding that Petitioner did not waive its right to assert affirmative defenses under the *exact same* lease and guaranty language in parallel state-court actions.

2. Whether the United States Court of Appeals for the Seventh Circuit disregarded this Court's firmly established precedent on Article III standing by holding that, upon a motion for summary judgment, a party may establish standing solely through its pleadings with no requirement of evidentiary support.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner SFA Holdings, Inc. f/k/a Saks Incorporated was the Defendant in the District Court and the Appellant before the Court of Appeals.

Respondent 4 Stratford Square Mall Holdings, LLC was the Plaintiff-Intervenor in the District Court and the Appellee before the Court of Appeals.

WEC 98C-3 LLC is the Plaintiff in the District Court, but is not a party to this Petition or to Petitioner's appeal to the Court of Appeals.

SFA Holdings, Inc. is a wholly-owned subsidiary of Saks Fifth Avenue Holdings Inc. SFA Holdings, Inc.'s ultimate corporate parent is HBC I L.P. SFA Holdings Inc. has no publicly held affiliates and no publicly held company owns 10% or more of SFA Holdings Inc.'s stock.

RELATED CASE STATEMENT

WEC 98C-3 LLC v. Saks Incorporated, No. 1:20-cv-04356, U.S. District Court for the Northern District of Illinois. Judgment entered Mar. 8, 2023.

WEC 98C-3 LLC v. SFA Holdings Inc., No. 23-1489, U.S. Court of Appeals for the Seventh Circuit. Judgment entered Apr. 24, 2024. Petition for Rehearing denied May 30, 2024.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, SFA Holdings, Inc. f/k/a Saks Incorporated ("Saks"), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

DECISIONS BELOW

The Seventh Circuit's 2024 opinion is reported at 99 F.4th 961 and is reproduced at Appendix ("App'x.") 1a–19a. The Seventh Circuit's order on Saks' Petition for Rehearing is reproduced at App'x 25a–26a.

The United States District Court for the Northern District of Illinois' order granting summary judgment against Saks is available at *WEC 98C-3 LLC v. Saks Incorporated*, No. 1:20-cv4356 (N.D. Ill. Sept. 30, 2022) (ECF 104), reproduced at App'x 20a–24a.

JURISDICTION

The judgment of the Court of Appeals was entered on April 24, 2024. Saks' petition for rehearing was denied on May 30, 2024. Saks timely invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

INVOLVED CONSTITUTIONAL PROVISIONS

U.S. Const. art. III, § 2, cl. 1 (reproduced at App'x 27a).

INTRODUCTION

This matter presents two issues of constitutional importance. *First*, the Seventh Circuit's decision below represents yet another significant departure from this Court's precedent detailing the deference and regard that federal courts, when sitting in diversity jurisdiction and applying state law, owe to their sister courts within the judicial systems of the 50 States. Federal courts (including this Court) generally recognize that any given State's highest court and intermediate appellate courts are entitled to significant deference from federal courts when federal courts are sitting in diversity jurisdiction and interpreting issues of state law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *Comm'r v. Bosch's Est.*, 387 U.S. 456, 465 (1967). But the federal Circuits vary widely in terms of the deference and regard—in this case, any deference and regard—that is to be afforded to rulings made by state trial courts and other courts of original jurisdiction on the same issues presented to federal district courts in cases where a State's law governs the dispute.

Some Circuits, following precedent from this Court going back nearly 100 years, recognize that the rulings of state trial courts offer valuable guidance to federal courts tasked with navigating the oftentimes murky nuances of state law. Under this line of case law, the decisions of state trial courts are, at a minimum, entitled to proper regard from federal courts when they are determining issues of state law.

Other Circuits, conversely, reject that federal courts must give any weight to—or even consider—

the decisions from state trial courts, instead holding in effect that rulings from state trial courts are owed absolutely zero regard by federal courts navigating state law. Under this approach, directly on-point and unchallenged trial-court decisions are given no deference or regard and, even, no acknowledgement whatsoever. Below, the Seventh Circuit embraced the latter approach, opting to not so much as acknowledge the existence of multiple, directly-on-point Illinois Circuit Court decisions, even though Saks' counsel brought those decisions to the Seventh Circuit's attention.

The facts of this case starkly reflect the Seventh Circuit's disregard of the Illinois Circuit Court's knowledge of Illinois law. Following a bankruptcy proceeding that triggered alleged defaults under Illinois law on Saks' lease guarantees, multiple suits were filed in both the Illinois Circuit Court and the Northern District of Illinois. Three cases in the Illinois Circuit Court proceeded to trial based on the State Courts' interpretations of the language in the guarantees and the statutory duty imposed on landlords to mitigate damages. On a parallel path in the federal courts, both the Seventh Circuit and the District Court were tasked with determining the bounds of Saks' rights pursuant to the same lease guaranty terms under the same Illinois law. Multiple Illinois Circuit Court judges had examined this *exact* same issue, under the *exact* same relevant lease and guaranty language, and each of them reached the *exact* same conclusion: the language of the lease and guaranty did not waive Saks' legal right to raise the defense of failure to mitigate under Illinois law.

The District Court below, however, reached the opposite conclusion, holding as a matter of law that Saks could not raise the defense of failure to mitigate under the guaranty. The District Court's decision was based on its interpretation of an Illinois appellate decision from 1981, the meaning of which was thoroughly considered by each of the Illinois Circuit Courts, and each of the State Courts held that Saks *could* assert the defense of failure to mitigate. Saks cited all of the Illinois State Court decisions and attached them as exhibits to its briefing in both the District Court and the Seventh Circuit, yet both ignored the Illinois Circuit Court rulings entirely. At oral argument in the Seventh Circuit, Saks *again* raised the fact that multiple separate Illinois Circuit Courts had ruled that Saks did not waive the mitigation defense under the same guarantee language, yet in its opinion affirming the District Court, the Seventh Circuit did not even pay lip service, let alone distinguish, the Illinois Circuit Court rulings. Simply put, the Seventh Circuit gave the Illinois trial courts no regard by willfully ignoring their on-point rulings. The Seventh Circuit proceeded as if those three State trial judges had written mere law review articles opining on the meaning of state law.

The Seventh Circuit's approach is improper—a clear violation of *Erie*, its progeny requiring that federal courts sitting in diversity show "proper regard" for state trial court rulings on the meaning of their own State's law, and fundamental principles of federalism underlying the Constitution—and the approach demands vacating by this Court. The Seventh Circuit's judgment should be summarily

reversed. Alternatively, this Court should order full briefing and oral argument after granting this Petition to provide guidance that resolves the split among the Circuit Courts on the proper regard due State court decisions.

Second, the holding below by the Court of Appeals contravenes decades of consistent precedent from this Court detailing the requirements that a party must meet to establish Article III standing. As this Court has repeatedly made clear, a claimant must possess Article III standing at *every* phase of federal litigation. There is no "one size fits all" approach to establishing standing at various points in litigation. For reasons this Court has made clear many times, the burden of establishing standing increases as a case progresses.

When a case reaches the summary judgment phase of litigation, the claimant seeking summary judgment must provide the trial court with evidence demonstrating the elements of standing. Unlike a motion to dismiss under Rule 12, where the factual allegations of a complaint are accepted as true, under Rule 56 a claimant may not merely rely on their pleadings to establish standing. Rather, the claimant must establish that *evidence* (like interrogatory responses, depositions, and other forms of discovery) establishes the claimant's Article III standing.

Here, standing was a critical issue because Respondent lender 4 Stratford Square Mall Holdings, LLC ("Stratford") sought to recover rent for the period before Stratford had acquired the property at the same time that the plaintiff landlord, WEC 98C-3

LLC ("WEC"), also sought to recover rent for the same period. When Stratford moved for summary judgment, the parties had not conducted *any* discovery on the claimants' conflicting rent claims because the District Court would not allow Saks to do so. With no evidence introduced by Stratford to establish its standing to recover rent for any time period, Saks opposed Stratford's motion because Stratford failed to establish standing—and particularly, an injury in fact—to sue Saks for unpaid rent for the period before Stratford alleged that it acquired the property. The District Court swept standing aside, took Stratford at its word in the complaint in intervention, and granted Stratford's motion for summary judgment for the entire period Stratford alleged—but never proved—it was entitled to rent. The District Court's refusal to allow discovery into Stratford's standing mattered: Saks later learned that Stratford did not even own the property when it intervened.

The Seventh Circuit (like the District Court below it) also rejected Saks' argument. The Seventh Circuit, relying on an unverified mortgage agreement attached to Stratford's motion that purportedly contained an assignment-of-rent clause, also blithely took Stratford at its word that Stratford—and not WEC or any other entity—had standing to seek these rents. Saks had no opportunity to test Stratford's unverified assertion of standing through discovery on the purported assignment or the mortgage document on which Stratford relied.

The Seventh Circuit's approach flies in the face of decades of consistent precedent from this Court.

When Stratford sought summary judgment, Stratford *should have* been required to establish standing with verified, tested evidence. It did not do so here. The Seventh Circuit was not permitted to allow Stratford to establish standing to seek and obtain summary judgment based entirely on its pleadings and unverified attachments. This Court should summarily reverse the Court of Appeals' ruling and reaffirm this Court's longstanding precedent that claimants who seek summary judgment must introduce evidence of injury in fact to establish their right to do so.

STATEMENT OF THE CASE

I. Factual Background.

On October 31, 1985, Plaintiff WEC 98C-3 LLC's ("WEC") predecessor-in-interest entered into a lease (the "Lease") with CPS Department Stores, Inc., the predecessor to Bon-Ton Stores, Inc. ("Bon-Ton"), which operated a Carson Pirie Scott ("Carson's") department store at the leased property (the "Property"). The Property was an anchor store located in the Stratford Square Mall (the "Mall") in Bloomingdale, Illinois. (ECF 1 ¶ 1; ECF 70 ¶¶ 5–7.)[1] On August 5, 1998, by a corporate guaranty, Saks' predecessor-in-interest guaranteed Carson's performance under the Lease (the "Guaranty"). (ECF 70 ¶¶ 8–9.)

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[1] All "ECF" citations referenced by Saks in this Petition refer to docket entries in the District Court proceedings below. *See WEC 98C-3 LLC*, No. 1:20-cv-04356.

As alleged, the Lease, as amended, provides that "'Tenant covenants and agrees to pay as net rental . . . to Landlord for the [Property] for each Lease Year of the [Lease's term] the amounts of Basic Rent for the [Property] set forth" in the schedules to the Lease.[2] (ECF 57 at 21; *see id.* at 99 (defining "Landlord" as "WEC," and "Tenant" as "CPS Department Stores, Inc.").) Pursuant to a second amendment to the Lease signed by Carson's and WEC on August 5, 1998, the parties agreed that Lease's term would expire on January 31, 2024. (*Id.* at 100.)

Under the terms of the Lease, "[a]fter the termination of this Lease or Tenant's right to possession," Landlord is obligated "use commercially reasonable efforts to relet the [Property] or any part thereof for the account of Tenant." (*Id.* at 52, 107.) Further, "the rents from any such reletting" collected by the Landlord are to be applied to "the payment of Basic Rent, additional rent and other sums herein provided to be paid by Tenant" and to "the payment of the expenses of reentry, . . . attorneys' fees and costs incurred by Landlord in connection with any Event of Default and in connection with such reletting, the expenses of redecoration, repair and alterations and the expenses of reletting." (*Id.* at 107.)

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[2] The alleged terms of the Lease, Guaranty, and Mortgage (defined below) are reproduced here from the unverified exhibits attached to Stratford's complaint in intervention filed in the District Court below. (*See* ECF 70 (Stratford's Statement of Undisputed Facts filed in support of its Motion for Summary Judgment, citing to the exhibits attached to Stratford's complaint in intervention.).)

The Guaranty, in turn, provides that "Guarantor, intending to be legally bound, hereby guarantees to Landlord the full and prompt payment when due of all Basic Rent, additional rent, and any and all other sums and charges payable by Tenant under the Lease," along with the "full, faithful and prompt performance and observance of all the covenants, terms, conditions, and agreements therein provided to be performed and observed by Tenant." (*Id.* at 131.) The Guaranty further states that Saks' liability as Guarantor "shall not be subject to any reduction, limitation, termination, defense, offset, counterclaim, or recoupment" in the event that Carson's defaults on the Lease. (*Id.* at 132.)

In August 1998, WEC acquired title to the Property through an agreement with its predecessor-in-interest. (*Id.* at 147.) As part of this arrangement, WEC agreed to enter into a $13,026,000 mortgage to fund its purchase of the Property (the "Mortgage"). (*Id.*) Under the terms of the Mortgage, Carson's monthly Basic Rent payments for the Property would be paid directly to the mortgagee, which would then apply these amounts to the outstanding Mortgage balance and satisfy the monthly Mortgage payment requirements. (ECF 70 at 10.) In the event that Carson's failed to make Basic Rent payments, WEC was obligated to make such payments to the mortgagee to satisfy the monthly Mortgage payment. (ECF 57 at 152.) Upon an "Event[] of Default," which included the failure to make a monthly Mortgage payment within ten days from the payment's due date, the mortgagee had the right to declare the entire debt to be immediately due and payable, institute

foreclosure proceedings, and foreclose and sell the Property. (*Id.* at 169–72.)

The Mall underwent significant changes after the Lease was initially executed in 1985. In a roughly five-year period, from 2014 to 2019, three of the Mall's anchor stores permanently closed and were not replaced by new anchor tenants. (ECF 79-1 at 56–58.) Excluding Carson's, by 2020, only two anchor stores remained at the Mall. (*Id.*)

On February 4, 2018, Bon-Ton filed for bankruptcy, causing Carson's to default on its February 2018 rent payment. *See WEC 98C-3 LLC v. SFA Holdings Inc.*, 99 F.4th 961, 965 (7th Cir. 2024). Carson's rejected the Lease in its entirety in August 2018. *See id.* Following Carson's rejection of the Lease as part of Bon-Ton's bankruptcy, neither Carson's nor Saks made any payments to WEC to cover monthly Basic Rent amounts.

WEC made no mortgage payments under the Mortgage after Carson's ceased making Basic Rent payments. *See id.* The mortgagee then initiated a foreclosure proceeding to sell the Property and recover the Mortgage balance. *Id.* Stratford alleged that on February 28, 2020—over two years after Bon-Ton declared for bankruptcy and a year-and-a-half after Carson's rejected the Lease and ceased making any Basic Rent payments—Stratford purchased the Property in foreclosure, becoming the Property owner and the Landlord under the Lease and Guaranty. (ECF 57 ¶¶ 8–9.)

II. Procedural Background.

A. District Court Proceedings.

WEC filed its lawsuit against Saks on July 24, 2020, seeking to recover from Saks under the Guaranty. (ECF 1.) WEC sought damages against Saks equal to the base rent for the entirety of the Lease's term, from Carson's first missed rent payment through January 31, 2024. (*Id.* ¶ 37.)

On October 26, 2020, before the parties conducted any discovery, Stratford moved to intervene in the matter, attaching a proposed complaint in intervention. (ECF 24.) Stratford—exactly as WEC had done—sought damages including the base rent from the point of Carson's first missed rent payment through the end of the Lease's term. (ECF 57 ¶¶ 26, 52, p. 10.)

On July 19, 2021, Saks moved to dismiss both Stratford's complaint in intervention and WEC's complaint because, among other things, both Stratford and WEC had failed to mitigate their damages after Carson's ceased making Basic Rent payments and rejected the Lease in bankruptcy. (*See* ECF 42; ECF 45.) Saks, Stratford, and WEC all agreed not to conduct a Rule 26(f) conference nor to conduct any discovery before the District Court ruled on Saks' motions to dismiss. (ECF 49 at 4–5.) The District Court ultimately rejected Saks' motions to dismiss, and, in doing so, left Saks' mitigation argument for determination for a later phase of the litigation. (ECF 67 at 8.)

The District Court set March 2, 2022, as Saks' deadline to answer Stratford's complaint in intervention. But on February 28, 2022, before Saks filed its answer, Stratford moved for partial summary judgment on the issues of liability and base rent damages. (ECF 68.) No discovery had been conducted and neither WEC nor Stratford had provided their initial disclosures. Stratford's motion for summary judgment requested limited damages discovery solely on the fair market value of the Property and argued that no other discovery was appropriate. (*Id.* at 2.)

Saks filed a memorandum in opposition, asserting, among other things, that Saks' affirmative defense of mitigation precluded entry of summary judgment. (ECF 79 at 9.) In its opening motion, Stratford had argued that the Guaranty "includes a broad waiver of tenant defenses," including the ability to assert the defense of failure to mitigate damages. (ECF 69 at 1.) Saks countered that both the language of the Lease and Illinois law obligated the Landlord, whether WEC or Stratford, to mitigate its damages following Carson's default on the Lease. (ECF 79 at 9.)

In support, Saks cited (and attached as exhibits) two separate decisions from the Illinois Circuit Court—Illinois' trial court—where the Court held that the *exact* same Lease and Guaranty language was insufficient to waive Saks' ability to assert the defense of failure to mitigate. (*Id.* at 6, 11; ECF 79-1, Exhibits 1–2.) These cases—*GMAC 2004-C1 Yorktown Mall LLC v. Saks Incorporated*, 2018MR001624 (Ill. Cir. Ct. 2020) and *WEC 98C-2 LLC v. Saks Incorporated*, 2020 L 003232 (Ill. Cir. Ct.

2020)—similarly involved lawsuits brought by landlords of former Carson's stores against Saks, as Carson's guarantor, seeking to recover rents and other damages under their respective leases. (*See* ECF 79-1, Exhibits 1–2.) In each case, two different judges of the Illinois Circuit Court determined that, under Illinois law, the identical language in those leases and guarantees did not waive Saks' ability to raise the affirmative defense of failure to mitigate, and that should be the ruling under this Lease and Guaranty. (*See WEC 98C-2 LLC*, 2020 L 003232 at 17:15–23, located at ECF 79-1 at 46 (recognizing that, under the applicable lease, "[the Landlord] do[es] have [the] duty to mitigate"); *GMAC 2004-C1*, 2018MR001624 at 1, located at ECF 79-1 at 8 (denying plaintiff-GMAC 2004-C1's motion for partial summary judgment "as to Sak's affirmative defense of failure to mitigate damages").)

Saks also argued that Stratford failed to establish Article III standing to make a claim for damages. (ECF 79 at 6–7.) Saks emphasized to the District Court that no discovery had been conducted, and thus Saks "lack[ed] access to any further documents or communications," including those clarifying the validity of the purported assignment or the relationship between WEC and Stratford's contradictory damages claims. (ECF 79 at 7.) In reply, Stratford cited to the Mortgage—which it attached as an unverified exhibit to its motion for summary judgment—in an attempt to show that it was assigned beneficiary rights under the Lease and Guaranty. (ECF 69 at 5.)

The District Court assumed Stratford's standing[3] and granted Stratford's motion, ruling that, under Illinois law, the language of the Lease and Guaranty waived the ability of a guarantor to assert the landlord's duty to mitigate as a defense under the Lease and Guaranty. (App'x 22a–23a.)

B. Seventh Circuit Proceedings.

Saks timely appealed the District Court's judgment to the Court of Appeals for the Seventh Circuit. (Seventh Circuit Dkt. No. 1.) Among other things, Saks argued that (1) the District Court erroneously ruled as a matter of law that Saks could not assert the defense of the landlord's failure to mitigate damages, and (2) the District Court erred by implicitly rejecting Saks' Article III standing argument. (Seventh Circuit Dkt. No. 22 at 20–23, 28–35.)

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[3] Saks' unanswered questions about Stratford's standing were not fanciful, but it was not until long after the District Court had entered summary judgment for Stratford and certified its judgment for immediate appeal under Rule 54(b) that the consequences of the District Court's unquestioning acceptance of Stratford's allegations of ownership began to appear. Months after oral argument in the Seventh Circuit, Stratford produced documents in response to a third-party subpoena showing that Stratford had sold the Property on March 19, 2021, six months before it filed its complaint in intervention. Neither Saks nor the District Court were aware of this transaction (because the District Court did not allow Saks to conduct discovery in the matter) when Stratford's summary judgment motion was briefed and argued before the District Court, or when the District Court entered summary judgment in Stratford's favor, or when jurisdiction shifted to the Court of Appeals.

On appeal, Saks again cited the Illinois Circuit Court cases holding that Saks had the right to assert mitigation as a defense under both Illinois law and the terms of the Lease and Guaranty. In the time between Stratford's motion for summary judgment and Saks' appeal, a *third* Illinois Circuit Court determined that Saks' guaranty of a Carson's lease permitted a mitigation defense and ultimately ruled that the landlord in the action was not entitled to any damages for the period of time it failed to mitigate its damages. *BRE Streets of Woodfield, LLC v. Saks Incorporated*, 2018 L 010452 (Ill. Cir. Ct. 2020), located at Seventh Circuit Dkt. No. 22 at A-37.

The Seventh Circuit nonetheless affirmed the judgment of the District Court in full. At oral argument, a significant portion of Saks' argument time was spent on the fact that there were multiple Illinois Circuit Court decisions directly on point and that the federal courts should give at least some consideration to the state courts' construction of the Lease, the Guaranty and the statutory obligation to mitigate. *See* Oral Argument at 5:25, *WEC 98C-3 LLC*, 99 F.4th 961.[4] Just as the District Court had declined to discuss the State court decisions, the Court of Appeals failed even to acknowledge the three Illinois Circuit Court decisions in its opinion affirming the judgment of the District Court. The Court of Appeals did not explain its silence about the work of multiple State trial judges interpreting

[4] Available at https://media.ca7.uscourts.gov/sound/2023/kra.23-1489.23-1489_12_07_2023.mp3.

identical language in identical circumstances who came to the opposite conclusion.

Instead, the Seventh Circuit turned to an opinion by another panel of the Court of Appeals, which, in construing an entirely different guaranty in an entirely different context, relied on the District Court's opinion in this case prior to this appeal. *WEC 98C-3 LLC*, 99 F.4th at 970. Citing that Seventh Circuit opinion, the panel below stated that "[o]ur circuit has already implicitly found that this language waives affirmative defenses." *Id.* (*citing Hovde v. ISAL Dev. LLC*, 51 F.4th 771 (7th Cir. 2022)). *Hovde,* however, relies upon the District Court's opinion *before* that decision was brought to the Seventh Circuit for examination. This *ipse dixit* was the primary precedent on which the Court of Appeals relied.

The Seventh Circuit's treatment of the line of analysis adopted by the three Illinois Circuit Courts is apparent from its gloss on the seminal Illinois case on the effect of guarantees like this one, *Blackhawk Hotel Assocs. v. Kaufman*, 421 N.E.2d 166, 168 (Ill. 1981). *Blackhawk Hotel* received barely a mention in a string cite by the Seventh Circuit in its opinion below. *WEC 98C-3 LLC*, 99 F.4th at 969–70. Yet *Blackhawk Hotel* was the central case on which the three Illinois Circuit Courts based their construction of the Lease and Guaranty in holding that they did not foreclose the defense of mitigation. (*See* ECF 79-1 at 16.)

Turning to Stratford's standing to seek damages for the period before it acquired the

property, the Seventh Circuit held that Stratford had established standing under the purported Mortgage's assignment-of-rent clause. The Seventh Circuit rested its decision entirely upon the pleadings with no demand for evidence of any element of Stratford's standing or even discovery into the unverified document attached by Stratford to its pleading and challenged by Saks in both the trial and appellate courts. *WEC 98C-3 LLC*, 99 F.4th at 966.

Saks petitioned for rehearing, pointing out that the Seventh Circuit panel decision had failed to give adequate regard (and really, *any* regard) to the Illinois Circuit Court decisions, and that the Seventh Circuit's holding disregarded decades of this Court's precedent requiring that, when moving for summary judgment, a party must establish standing through *evidence*, not mere allegations. The full Court of Appeals denied Saks' petition for rehearing on May 30, 2024. *See* App'x 25a–26a.

Saks now petitions this Court for a writ of certiorari.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Decision Contravenes this Court's Precedent and Deepens a Divide Among the Circuit Courts Regarding the Proper Regard that Federal Courts Must Give to Decisions from State Trial Courts.

The Seventh Circuit here and the District Court below, sitting in diversity jurisdiction, were

tasked with interpreting the terms of the Lease and Guaranty *under Illinois law* and determining whether these agreements waived Saks' right to raise certain affirmative defenses at trial. Saks repeatedly cited and attached as exhibits multiple decisions from the Illinois Circuit Court that the exact same lease and guaranty language was insufficient to constitute a waiver. (*See* ECF 79 at 6, 10; ECF 79-1, Exhibits 1–2; Seventh Circuit Dkt. No. 22 at 31, A-37.)

Without explanation in the District Court, and without even a passing reference to these three Illinois Circuit Court decisions in the Court of Appeals, both federal courts treated decisions by their State Court brothers and sisters as if they did not exist. Saks does not argue that State trial court decisions are binding on the federal courts sitting in diversity, but well-established principles of federalism and respect for their fellow jurists in place since *Erie* teach that federal courts may not simply ignore such State Court decisions. The complete lack of regard shown by the federal courts below to their brother and sister trial courts is not a precedent that this Court should countenance. The interpretations of Illinois law issued by Illinois Circuit Courts are entitled to be considered by federal courts sitting in diversity and are due, at a minimum, the respect of being disagreed with in a reasoned fashion. The Seventh Circuit's judgment should be summarily reversed, and the Seventh Circuit instructed to reconsider the question of Illinois state law—this time, giving proper regard to the decisions of the Illinois Circuit Court. Alternatively, this Court should order briefing and oral argument after granting this Petition to resolve the split among the

Circuit Courts on the proper regard due State trial court decisions on questions presented to federal courts in diversity cases.

A. Federal Courts Must, at Minimum, Give Proper Regard to Rulings by State Trial Courts in Interpreting Questions of State Law While Sitting in Diversity Jurisdiction.

Nearly a century ago, in this Court's foundational decision in *Erie Railroad Co. v. Tompkins*, this Court mandated that federal courts sitting in diversity jurisdiction must "apply the substantive law of the forum state, absent a federal statutory or constitutional directive to the contrary." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 226 (1991) (citing *Erie*, 304 U.S. at 78 ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.")).

The Court's holding repudiated a stubborn strain of federal judicial indifference and amounted to a directive that federal courts could not ignore the law of forum States when sitting in diversity jurisdiction and, instead, apply a nebulous and relatively unconfined "federal general common law" as they saw fit. *Erie*, 304 U.S. at 78; *see, e.g.*, *Swift v. Tyson*, 41 U.S. 1, 18 (1842), *overruled by Erie*, 304 U.S. 64. Before *Erie*, federal courts could disregard the law of the forum State (and relatedly, disregard rulings from the forum-State's courts), and instead exercise their "independent judgment" to determine "what the law is." *Erie*, 304 U.S. at 70; *see Tompkins v. Erie R. Co.*,

90 F.2d 603, 604 (2d Cir. 1937) (ignoring the "local law" in a diversity action, and instead applying "general law," untied to any particular State, which left "federal courts . . . free, in absence of a local statute, to exercise their independent judgment as to what the law is"). Even the law of the State as declared by its highest court was not entitled to deference or regard from federal courts sitting in diversity. *See Swift*, 41 U.S. at 18.

Recognizing that this approach fundamentally conflicted with the principles of federalism underlying the Constitution, this Court in *Erie* rejected the notion of a general federal common law and, along with it, rejected federal courts' growing penchant for ignoring the forum State's law. *See Erie*, 304 U.S. at 78. As the Court made clear, federal courts sitting in diversity have no right to ignore the law of the forum State. *See id.*; *id.* at 79 ("Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States."). To do so would be a wrongful "interference" with the rights of a State, amounting to "an invasion of the authority of the state" and "a denial of its independence." *Id.*; *see id.* ("The authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word.").

Underlying *Erie* was the implicit recognition from this Court that States are the best deciders and arbiters of their own law. *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (recognizing

that State courts offer a "a surer-footed reading" of State law). Federal courts—as equipped and experienced as they are on questions of federal law—are not the only or even the primary tribunals determining the confines and limits of State law. Since federal courts lack authority to craft their own general federal common law, and relatedly, lack authority to interpret a given State's law however they see fit, federalism teaches that sister State courts can offer current and valuable guidance on the meaning of state law, especially where there is on-point guidance from State courts. In contrast to federal courts who sit in diversity jurisdiction from time to time, State courts deal with issues of State law day in and day out; their unique experience in constantly adjudicating issues of their own State's law equips them in ways that federal courts can rarely achieve.

To be clear, in *Erie,* this Court recognized that the "law of the state" could be "declared" by the State's "Legislature in a statute" or by the State's "highest court in a decision." *Erie*, 304 U.S. at 78. But the Court at that time was not concerned with, and did not try to delineate, every particular method that a State could use to "declare" its law for purposes of federal court deference. *Id.*

Clarification came in the decade following *Erie*. *First*, in *West v. American Telephone*, this Court held that *Erie*'s deferential approach applied with equal force to decisions from States' intermediate appellate courts. 311 U.S. 223 (1940). *West* allowed this Court to recognize an important point of law: while the highest court of a State may decide and clarify the

State's law and is entitled to deference from federal courts sitting in diversity, the State's lower courts may not be ignored where the State's highest court has not ruled on the matter. *Id.* 236–38.

Federal courts giving deference and proper regard to the decisions of State courts—the highest court or otherwise—is crucial to federal courts' applying the law of the respective State. A federal court is "not free to reject the state rule merely because it has not received the sanction of the highest state court, even though [the federal court] thinks the rule is unsound in principle or that another is preferable." *Id.* at 236–37. "A state is not without law save as its highest court has declared it." *Id.* at 236. Instead, there are "many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them." *Id.* Rather than ignoring pronouncements of the law from lower state courts, it is instead "the duty of [federal courts] in every case to ascertain from all the available data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law' and however much the state rule may have departed from prior decisions of the federal courts." *Id.* at 237 (quoting *Erie*, 304 U.S. at 78).

Relatedly, federal courts may not rely on speculation that a State's lower court ruling might ultimately be reversed or vacated by a higher court. There may be times where the State's highest court "will at some later time modify the rule" of a lower court decision. *Id.* at 238. But that such a subsequent

modification "will ever happen [is] a matter of conjecture." *Id.* In the meantime—until that happens—federal courts must show proper deference to "the state law applicable to these parties" as "authoritatively declared by the highest state court in which a decision could be had." *Id.*

Here, not one, but two Illinois Circuit Courts have reviewed the identical question presented below and have uniformly allowed Saks to assert the defense that a landlord must show that it mitigated damages in order to recover. And a third—considering similar language—ruled that the landlord was not entitled to damages for the period it failed to mitigate damages. While an appellate court may reach that issue, it would ignore *Erie*, its progeny, and the broader principles of federalism for which it stands for the federal court not to consider a consistent rule articulated by multiple State courts and, without bothering to distinguish that rule, come to the completely opposite conclusion.

Second, this Court in *Fidelity Union Trust v. Field* clarified that, in determining a forum State's substantive law in a diversity action, federal courts must also give proper regard to decisions from non-appellate lower courts. 311 U.S. 169 (1940). There, in the district court below, the claimant sued the executors of a decedent's estate to obtain a decree that she was entitled to the decedent's bank account savings, arguing that the bank account was left to her by the decedent in trust. *Id.* at 174. The district court ruled in favor of the bank and executors, determining that there was no trust established under New Jersey law. *Id.*

The Third Circuit reversed the district court's judgment, and "[i]n so ruling, the court declined to follow contrary decisions of the Chancery Court of New Jersey" interpreting the relevant statutes applicable to the question at issue.[5] *Id.* at 174–75. The Third Circuit recognized that the Chancery Court decisions were directly on point, yet nevertheless, "took the view that it was not so bound by 'the pronouncements of other state courts,'" believing that Chancery Court decisions did "not truly express the state law." *Id.* at 177 (quoting *Field*, 108 F.2d at 526).

This Court reversed. Taking the lesson from *West v. American Telephone*, this Court held that a federal court's duty to determine the law of the State extends further than strictly considering the law pronounced by the State's highest court or intermediate appellate courts. *Id.* For issues regarding the "construction and effect of a state statute," a federal court does not have the "liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute." *Id.* at 178. "That construction and effect are shown by the judicial action through which the State interprets and applies its legislation," which is not

[5] New Jersey's 1844 Constitution, as amended, established the Court of Chancery as a non-appellate court of original jurisdiction, with right of first review over questions arising in equity. *See Field v. Fid. Union Tr. Co.*, 108 F.2d 521, 522, 524 (3d Cir. 1939) (describing the New Jersey Court of Chancery as a "court of original jurisdiction" and a "trial [court] unconnected with any appellate tribunal."); *see also* N.J. Const. art. VI, § 2 (1844); N.J. Dep't of State, *Organizational Chart for Pre 1948 Ct. Sys.*, https://www.nj.gov/state/archives/catcourtstructure.html.

limited to judicial action just from a State's highest court and intermediate courts. *Id.* For this Court, where there were not decisions by New Jersey's highest court or intermediate courts, this meant that the federal courts were obligated to give proper regard to the decisions of the New Jersey Chancery Court. *Id.* at 178–79; *see id.* at 179 (recognizing that decisions from lower courts are entitled to more regard where there "is no conflict of decision" and the trial court decisions are "uniform . . . over a course of years."). The Seventh Circuit's failure to give *any* regard to multiple State trial court decisions directly on point warrants summary reversal.

Where such courts "stand as the only exposition of the law of the State with respect to the construction and effect of [statutes], . . . the [federal court is] not at liberty to reject these decisions," even if the federal court "d[oes] not agree with their reasoning," without at least *considering* the decisions made by those State trial courts. *Id.*

To be sure, as this Court has recognized, generally, the "Circuit Court of Appeals d[oes] not *have* to follow the decision[s] of [a State's trial court]." *King v. Order of United Com. Travelers of Am.*, 333 U.S. 153, 162 (1948) (emphasis added); *see id.* at 160–61 (recognizing that rulings from South Carolina's Court of Common Pleas do not have precedential effect and that its decisions were only published by "judgment rolls."). But this Court stopped well short of adopting a rule that federal courts sitting in diversity need not give *any* regard to decisions from State trial courts. *Id.* at 162 ("Nor is our decision to be taken as promulgating a general rule that federal

courts need never abide by determinations of state law by state trial courts."). Federalism teaches that State trial court opinions, when they interpret the same State law at issue before a federal court, are not to be simply ignored, especially when there are several such decisions that all interpret state law the same way.

Importantly, decades later in *Bosch*, this Court reaffirmed *King*'s holding that federal courts must at least *consider* determinations of State law by State trial courts. *Comm'r v. Bosch's Est.*, 387 U.S. 456. While "the decision[s] of a state trial court as to an underlying issue of state law should a fortiori not be controlling," still, if "there be no decision by [the State's highest court,] then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of other courts of the State"—including rulings from "state trial courts." *Id.* at 464–65. This approach, this Court has consistently held, is the best "application of the rule of *Erie* . . . ." *Id.* at 465. Hence, it should have been the rule followed by the Seventh Circuit and the District Court.

B. Some Circuit Courts Have Made an Unlicensed Shift from this Court's Precedent.

Alternatively, this Court should order briefing and oral argument after granting Saks' Petition to address the different standards being applied in the Circuit Courts and to reaffirm the principle that decisions by State trial courts on issues of State law are entitled to proper regard by the federal courts.

Since this Court clarified the scope of *Erie* deference, the lower federal courts—when determining issues of state law while sitting in diversity jurisdiction—have adopted significantly different approaches to considering (or not considering) rulings from State trial courts. On one end of the spectrum is the approach taken below by the Seventh Circuit: explicitly or implicitly holding that State trial court decisions are entitled to no deference or regard whatsoever in determining questions of State law. *See, e.g.*, *Weisberg v. Powell*, 417 F.2d 388, 393 (7th Cir. 1969); *Hove v. Atchison*, 238 F.2d 819, 823 (8th Cir. 1956).

But this approach is certainly not the norm. Other Circuits—indeed, a majority of Circuits—recognize that *at a minimum*, State trial court decisions are entitled to "proper regard" from federal courts sitting in diversity jurisdiction tasked with determining questions of State law in the absence of rulings from the State's highest court or intermediate appellate courts. Under the most common approach—the "proper regard" approach—federal courts sitting in diversity must give State trial court decisions "proper regard" when deciding issues of State law in the absence of higher court authority, but are not absolutely obligated to follow such rulings. *See MicroStrategy Inc. v. Bus. Objects, S.A.*, 429 F.3d 1344, 1359 (Fed. Cir. 2005) ("[W]hen a state court has decided a matter of state law . . . federal courts should pay careful attention to the state court decision. If there is no decision by the state's highest court, proper regard should be given relevant rulings of other courts of that state." (internal citation and quotation marks omitted)); *Rippstein v. City of Provo*,

929 F.2d 576, 578 (10th Cir. 1991) ("While we are not bound by the state trial court's opinion, at the very least it provides evidence of what the state courts would do in this circumstance."); *see also Krakoff v. United States*, 439 F.2d 1023, 1025 (6th Cir. 1971); *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 399 (2d Cir. 2001); *Bryant v. Civiletti*, 663 F.2d 286, 292 n.15 (D.C. Cir. 1981); *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 826 n.15 (9th Cir. 1974).[6]

Under this approach, a federal court may give "proper regard" by viewing the State trial court decisions as strongly persuasive authority. But at the very least, "proper regard" requires that a federal court not entirely ignore State trial court decisions or "deny their existence." *Motschenbacher*, 498 F.2d at 826 n.15.

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[6] Some Circuits have even gone further than the rule of law clarified by this Court in *Bosch*, holding that States' trial courts are entitled to a higher degree of deference, more akin to the deference owed to States' highest courts and intermediate appellate courts. *See Universal Concrete Prods. v. Turner Constr. Co.*, 595 F.3d 527, 531 (4th Cir. 2010) ("Because we are bound to follow Virginia law, we must follow the Virginia trial court's lead in the absence of any indication that the Virginia Supreme Court would disagree with its holding."); *Hertz Corp. v. Cox*, 430 F.2d 1365, 1370–71 (5th Cir. 1970) ("Being a diversity case as to which this court should pay substantial deference to the views of the trial court of the state involved, where jurisprudence at the highest level of the state court is lacking, we consider that we can do nothing better with respect to our judgment that the case should be affirmed than to accept and adopt the opinion of the trial court, which we do.").

Aside from Circuits deviating from this Court's pronouncements in *Erie* and its progeny, as the Seventh Circuit did here, this circuit split also has resulted in litigants facing uncertainty and drastically different outcomes regarding how questions of State law are determined depending on the particular Circuit in which they are litigating. That is a disturbing trend because it means that federal courts are playing significantly different roles from State to State. For example, uniform State trial court decisions in one State may be entitled to significant weight from one federal court sitting in diversity, while similar State trial court decisions in another State (*e.g.*, Illinois) may be disregarded completely by federal courts.

If it does not summarily reverse the decision of the Seventh Circuit, this Court should resolve this circuit split and end this uncertainty. In particular, this Court should reaffirm that, at a minimum, federal courts sitting in diversity must give State trial court decisions "proper regard" when determining issues of State law. This approach vindicates the twin, interrelated aims of *Erie* and its progeny—*first*, principally, States are entitled to decide issues of their own law and have those decisions be respected by federal courts; and *second*, practically, federal courts are not better equipped than the States themselves—including State trial courts—to determine the bounds and limits of their own law. The "proper regard" approach prevents federal courts from overstepping by requiring them to give adequate respect to the rulings of State trial court judges, who realistically are closer than federal judges to the law of their States. This is the approach required by *Erie*

and its progeny; the approach that should have been followed below; and the approach that this Court should reaffirm by summarily reversing and remanding the decision of the Seventh Circuit.

II. The Seventh Circuit's Decision Below Contravenes Decades of Consistent Precedent from this Court on Establishing Article III Standing.

In affirming the District Court's grant of Stratford's motion for summary judgment, the Seventh Circuit applied the incorrect standard in holding that Stratford possessed Article III standing at the summary judgment phase of the litigation. Saks, in opposing Stratford's motion for summary judgment, argued that Stratford failed to establish that it had standing—and particularly, that it had suffered an injury in fact—regarding its claim for Carson's missed rent payments that accrued during the period *before* WEC transferred title to the Property to Stratford in 2020. But the District Court and the Seventh Circuit disagreed with Saks in a ruling based entirely on the pleadings and certain unverified documents attached as exhibits to Stratford's motion for summary judgment. It evidently did not trouble either the District Court or the Seventh Circuit that Stratford did nothing to establish that it was assigned the right to collect rent for the period before WEC transferred title to the Property, even though WEC's complaint sought exactly the same amounts.

The Seventh Circuit's approach to standing was improper; it significantly departs from decades of

consistent precedent from this Court holding that upon summary judgment, a party may establish standing only by a sufficient *evidentiary* showing. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Stratford unquestionably did not meet this standard here—no discovery was conducted before the District Court granted Stratford's summary judgment motion. The Seventh Circuit's decision warrants summary reversal.

Under Article III, a claimant is required to establish the elements of standing at all phases of the litigation to invoke the authority of the federal courts. *See id.* To establish Article III standing, a claimant must show (1) an "injury in fact"; (2) a "causal connection between the injury and the conduct complained of"; and (3) a likelihood that "the injury will be redressed by a favorable decision." *Id.* at 560–61 (internal quotation marks omitted).

Under the first prong—the injury-in-fact requirement—a claimant "must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (quoting *Lujan*, 504 U.S. at 560). A concrete and particularized invasion is one in which the plaintiff has "a personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U.S. 186, 204 (1962), and in which the invasion is a "living contest[] between adversaries," *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 20 (1998). To be actual or imminent the injury must either have already occurred, be presently occurring, or will imminently occur.

Clapper v. Amnesty Int'l USA, 568 U.S. 398, 409 (2013).

Crucially, and as this Court has repeatedly recognized, a claimant's burden to establish standing increases as the litigation progresses. At the "pleading stage," a claimant may establish standing through their well-pleaded factual allegations. *See Lujan*, 504 U.S. at 561. But "[i]n response to a summary judgment motion," a claimant "can no longer rest on . . . 'mere allegations,'" but rather, must set forth specific facts by an evidentiary showing. *Id.* (citing Fed. R. Civ. P. 56(e)); *see id.* ("[E]ach element [of standing] must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.").

Federal Rule 56(e) details the evidentiary burden required at the summary judgment phase. Summary judgment is proper only where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986) (citing Fed. R. Civ. P. 56). A claimant thus fails to establish standing where such proffered evidence does not demonstrate that each prong of the standing test is satisfied. This is blackletter federal courts law.

As this Court has made clear, the question of a party's standing to litigate any given claim in federal

court may not be ignored or sidestepped. Determining that a given matter "before the federal courts is a proper case or controversy under Article III . . . assumes particular importance in ensuring that the Federal Judiciary respects the proper—and properly limited—role of the courts in a democratic society." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (cleaned up). Accurately conducting this analysis is "crucial in maintaining the tripartite allocation of power set forth in the Constitution," as a federal court adjudicating a case with no standing is an intrusion upon the powers of the other branches. *Id.* (cleaned up). The necessity of maintaining the proper role of the federal courts within the federal government is an "essential and unchanging" part of the Constitution, and there is "[n]o principle . . . more fundamental to the judiciary's proper role in our system of government." *Id.* at 341–42; *see also Clapper*, 568 U.S. at 408 (same); *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (same); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 37 (1976) (same).

But here, in holding that Stratford established standing, thereby entitling it to summary judgment before discovery was conducted and without *any* evidence to support its standing to recover for the period before Stratford acquired the property, the Seventh Circuit significantly deviated from these unchanging and fundamental principles. Stratford presented no evidence of the purported assignment, perfection of a security interest, or other key facts of the underlying foreclosure. The District Court compounded its error by refusing to allow discovery or to give Saks the opportunity to verify the documents

and provisions attached as exhibits to Stratford's motion.

The Seventh Circuit treated Saks' standing challenge as if it were made on a Rule 12 motion to dismiss at the pleading phase of the litigation. Fed. R. Civ. P. 12(b). But the presumptions applied at the pleading stage do not govern a motion for summary judgment under Rule 56. *See Lujan*, 504 U.S. at 561. Indeed, the case law in the Seventh Circuit mandates that the trial court examine standing at each step of the litigation and insist upon evidence of standing when considering summary judgment. *See Flynn v. FCA US LLC*, 39 F.4th 946, 952 (7th Cir. 2022). The Seventh Circuit's reference to an unverified copy of a mortgage to gloss over the District Court's error sets a dangerous precedent; the Court should not have accepted at face value the veracity and validity of the unverified exhibits attached to Stratford's motion for summary judgment.

The Seventh Circuit, in rejecting the standing requirements repeatedly reaffirmed by this Court, has brought instability to the judicial process. Allowing a claimant seeking summary judgment to rely upon unverified exhibits and unsupported allegations of standing upsets decades of precedent from this Court. By relaxing the standing requirements at the summary judgment stage, the Seventh Circuit has deviated from the remaining Circuits; if the decision below is allowed to stand, the Seventh Circuit stands alone in this regard.[7]

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[7] *See Suarez-Torres v. Panaderia Y Reposteria Espana, Inc.*, 988 F.3d 542, 549–50 (1st Cir. 2021); *Nat. Res. Def. Council, Inc. v.*

Standing alone on standing is not a tenable posture for a Circuit Court. This Court should summarily reverse the Seventh Circuit's ruling to preserve the summary judgment standard and realign the Seventh Circuit with this Court's precedent, the Federal Rules of Civil Procedure, and the law applied in the other federal Circuits.

CONCLUSION

For the foregoing reasons, the decision below should be summarily reversed and remanded for further proceedings consistent with this Court's longstanding precedents. Alternatively, to resolve the differing approaches taken by the Circuit Courts on the proper regard that federal courts must accord decisions of State trial courts on issues of State law, this Court should grant the petition for a writ of certiorari and order merits briefing and oral argument.

U.S. Food & Drug Admin., 710 F.3d 71, 84 (2d Cir. 2013); *Johnson v. Marberry*, 549 F. App'x 73, 75 (3d Cir. 2013); *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 253 (4th Cir. 2020); *Ass'n of Cmty. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 357 (5th Cir. 1999); *McKay v. Federspiel*, 823 F.3d 862, 867 (6th Cir. 2016); *Hargis v. Access Cap. Funding, LLC*, 674 F.3d 783, 790 (8th Cir. 2012); *United States v. $133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012); *Rio Grande Found. v. Oliver*, 57 F.4th 1147, 1162 (10th Cir. 2023); *Bischoff v. Osceola Cnty.*, 222 F.3d 874, 878 (11th Cir. 2000); *Swanson Grp. Mfg. LLC v. Jewell*, 790 F.3d 235, 240 (D.C. Cir. 2015); *Salmon Spawning & Recovery All. v. U.S. Customs & Border Prot.*, 550 F.3d 1121, 1131 n.9 (Fed. Cir. 2008).

Respectfully submitted.

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August 26, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED APRIL 24, 2024

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 23-1489

WEC 98C-3 LLC,

Plaintiff,

and

4 STRATFORD SQUARE MALL HOLDINGS, LLC,

Plaintiff-Intervenor-Appellee,

v.

SFA HOLDINGS INC., FORMERLY KNOWN AS SAKS INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 1:20-cv-04356 — **Harry D. Leinenweber**, *Judge.*

December 7, 2023, Argued
April 24, 2024, Decided

Appendix A

Before WOOD, KIRSCH, and JACKSON-AKIWUMI, *Circuit Judges*.

JACKSON-AKIWUMI, *Circuit Judge*. This case involves two contracts, three litigants, four companies, and millions of dollars of unpaid rent. CPS Partnership operated a department store at an Illinois mall for over thirty years. The corporate entities changed over those years but suffice it to say that CPS leased the retail space from a company called WEC 98C-3 LLC, and Saks[1] guaranteed that it would pay the rent if CPS could not. But when CPS stopped paying rent, Saks did not send WEC a single payment. The lost income caused WEC to default on its mortgage, and 4 Stratford Square Mall Holdings, LLC ("Stratford"), the successor in interest to WEC's mortgagee, purchased the property at the foreclosure auction. Initially, WEC sued Saks for damages. Later, Stratford intervened with its own distinct claim for damages. The district court ruled only on Stratford's claim for unpaid rent, finding that it was entitled to payment from Saks. Stratford then waived its claim for non-basic rent damages, and the district court certified the judgment in favor of Stratford for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b).

Saks took up the invitation and urges us to reverse. On the jurisdictional grounds for reversal that Saks raises, we conclude that Stratford did have standing to sue Saks even though it entered the story much later, and

1. The company originally known as Saks Holdings, Inc., merged with Proffitt's, Inc., in 1998 to form Saks Inc. Saks Inc. then changed its name to SFA Holdings during this litigation. We refer to the entity as "Saks" throughout this opinion.

the district court did properly certify its judgment for appeal under Federal Rule of Civil Procedure 54(b). On the merits, we conclude that Saks cannot mount any of its desired defenses: It waived its right to present affirmative defenses to liability in the guaranty that it signed. We therefore affirm the district court's judgment.

I

At the heart of this dispute is a rental contract between CPS and WEC that Saks guaranteed. In 1985, CPS signed a lease with WEC to operate a Carson Pirie Scott Department Store at the Stratford Square Mall in Bloomingdale, Illinois. Under the lease terms, CPS agreed to pay WEC rent in monthly installments plus a penalty on any overdue rent. The parties agreed that the penalty would amount to

> a rate of interest equal to the lesser of: (a) the maximum amount of interest permitted under applicable state law, or (b) the greater of (i) four percent (4%) in excess of the yield, from time to time, as quoted daily in the Wall Street Journal (or if the same is not then published, another similar national journal selected by Landlord), of U.S. Treasury Bonds having an maturity closest to that date which is ten (10) years after the date of the Event of Default, or (ii) sixteen percent (16%) per annum.

CPS and WEC amended the lease twice, in 1994 and 1998. The second amendment, which extended

the rental period through January 2024, is when Saks entered the picture. At the same time WEC signed the second amendment, it entered into a corporate guaranty agreement with Saks's predecessor in interest, Proffitt's, Inc. Under the terms of the guaranty, if CPS defaulted on its rent, Saks, as its guarantor, would pay the outstanding rent on CPS's behalf. The guaranty established that "the liability and obligation of Guarantor hereunder shall be absolute and unconditional" and "not subject to any reduction, limitation, termination, defense, offset, counterclaim or recoupment" because of CPS's bankruptcy, default, or lease rejection.

For the next twenty years, CPS reliably paid rent to its landlord WEC. But in 2018, CPS's parent company, Bon-Ton Stores, filed for bankruptcy. CPS defaulted on its February 2018 rent, and then rejected the lease entirely in August 2018. So WEC asked Saks to pay the outstanding rent. Saks did not, even though Saks had reaffirmed its obligation as a guarantor as recently as 2017.

With neither CPS nor Saks paying rent, WEC fell into arrears on its mortgage. WEC's mortgagee (Stratford's predecessor in interest) initiated foreclosure proceedings, and Stratford purchased the property at public auction. Bereft of its property, in July 2020, WEC sued Saks for breach of the guaranty. In October 2020, Stratford, who now owned the property, intervened to assert its own breach of guaranty claim against Saks.

At the time, the district court was overseeing an unrelated case in which a different party was attempting

to hold Saks liable for breaching a guaranty with identical language to the guaranty at issue here. *See WEC 98C-4 LLC v. Saks Inc.*, No. 20 C 4363, 2021 U.S. Dist. LEXIS 219008, 2021 WL 5280947 (N.D. Ill. Nov. 12, 2021). In that case, the district court granted summary judgment to the party in Stratford's position, ruling that Saks could not assert affirmative defenses to liability. *See* 2021 U.S. Dist. LEXIS 219008, [WL] at *4-5. Consequently, when Stratford moved for summary judgment in the instant case, the district court granted the motion with heavy reliance on the reasoning from the court's other summary judgment decision. The court ruled that Saks was liable to Stratford for CPS's unpaid rent from February 2018 through September 2022, plus 9% interest on that unpaid rent pursuant to the penalty provision. Finding no just reason for delay, the court certified its judgment as final for appeal.

Saks now appeals, arguing that (1) Stratford lacked standing to bring its claim, (2) the district court erred in certifying its judgment in favor of Stratford for immediate appeal pursuant to Rule 54(b), and (3) the district court erred in rejecting Saks's affirmative defenses. We evaluate each argument in turn.

II.

We begin with Saks's contention that Stratford lacked standing to sue for rent owed before Stratford even purchased the property. To establish standing, Stratford must show that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant,

and (3) that is likely to be redressed by a favorable judicial decision." *Taylor v. McCament*, 875 F.3d 849, 853 (7th Cir. 2017) (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016)). A district court may only dismiss a case for lack of standing when "there are no set of facts consistent with the complaint's allegations that could establish standing." *Lac Du Flambeau Band of Lake Superior Chippewa Indians v. Norton*, 422 F.3d 490, 498 (7th Cir. 2005).

Saks claims that Stratford failed to show that it suffered an actual, concrete, and particularized injury because it did not establish it had the right to recover rent for the period before it owned the property. Saks is incorrect.

Under Illinois law, a mortgagor may include an assignment-of-rent clause in the mortgage, which gives the mortgagee an interest in any rent the mortgagor is entitled to once the mortgagee gains possession of the property. *See In re Wheaton Oaks Office Partners Ltd. Partnership*, 27 F.3d 1234, 1242 (7th Cir. 1994). Such affirmative action may include actual possession of the mortgaged property or constructive possession by seeking a court-appointed receiver. *See BMO Harris Bank N.A. v. Joe Contarino, Inc.*, 2017 IL App (2d) 160371, ¶ 42, 412 Ill. Dec. 168, 74 N.E.3d 1091.

Stratford demonstrated that the mortgage included an assignment-of-rent clause and that it had constructive and actual possession of the property. Stratford produced WEC's mortgage agreement, which assigned Stratford's

predecessor in interest the right to CPS's lease and Saks's guaranty agreement. The mortgage also provided that the mortgagee could apply for a receiver to enforce its rights. When CPS rejected the lease, the Illinois court appointed a receiver, giving Stratford's predecessor in interest constructive possession and the right to the outstanding rent. *See id.* And when Stratford's predecessor in interest foreclosed on the property, the foreclosure included "all personal property subject to the security interest held by" the mortgagee. Stratford then gained actual possession of the property and the interest in the rent when it purchased the foreclosed property in February 2020. As a result, Stratford owns the mortgagee's interest in the lease and guaranty. Saks's failure to abide by the guaranty harmed Stratford by depriving it of the rent to which it was entitled. That concrete harm satisfies our standing inquiry.

III.

We next consider Saks's assertion that the district court erred in certifying its judgment for appeal. Under Rule 54(b) of the Federal Rules of Civil Procedure, a district court "may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." Appellate courts employ a two-step framework to evaluate whether a district court properly certified a judgment under Rule 54(b). First, we review de novo whether the district court's order "was truly a final judgment." *Peerless Network, Inc. v. MCI Commc'ns Servs. Inc.*, 917 F.3d 538, 543 (7th Cir. 2019). Next, we

ask "whether the district court abused its discretion in finding no just reason to delay the appeal of the claim that was finally decided." *Id.* Appellate courts give "[s]ome deference" to the opinion of the district court "that the Rule 54(b) requirements are satisfied." 10 Wright, Miller & Kane, *Federal Practice and Procedure* § 2655 (4th ed. 2023) (citing cases).

A. Finality

A judgment is final under Rule 54(b) when it constitutes "an ultimate disposition of an individual claim entered in the course of a multiple claims action." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 7, 100 S. Ct. 1460, 64 L. Ed. 2d 1 (1980). If a party challenges a Rule 54(b) certification, we consider "whether there is too much factual overlap with claims remaining in the district court." *Peerless Network, Inc.*, 917 F.3d at 543. "Even if two claims arise from the same event or occurrence, they may be separable for Rule 54(b) purposes if they rely on entirely different legal entitlements yielding separate recoveries, rather than different legal theories aimed at the same recovery." *Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 518 F.3d 459, 464 (7th Cir. 2008).

Saks advances two theories why the district court's judgment was not final. First, it contends that Stratford has outstanding claims against Saks. Second, it asserts that WEC and Stratford have overlapping claims against Saks. Neither theory wins the day.

Appendix A

1. Stratford's allegedly outstanding claims

To understand Saks's first theory, some background on Stratford's lawsuit is necessary. In its intervenor complaint, Stratford alleged that Saks failed to honor its guaranty obligation, and Stratford sought money damages as a result. The district court resolved Stratford's claim in its entirety by determining that Saks was liable under the guaranty and ordering Saks to pay damages for unpaid basic rent from February 2018 through September 2022, the last month for which rent was owed at the time of the court's judgment.

On appeal, Saks argues that even though the district court awarded damages for the entire period under consideration, the judgment was not final because the court did not resolve whether Saks owes Stratford rent through January 2024, the end of the lease period. According to Saks, because Stratford told the district court that it "reserves the right to seek recovery of these rents at a later date," Stratford still has unresolved claims against Saks.

In essence, Saks argues that Stratford is limited to bringing a single action for all the rent Saks could possibly owe. But that is not the law in Illinois. (The parties agree that Illinois state law applies. *See Wood v. Mid-Valley Inc.*, 942 F.2d 425, 427 (7th Cir. 1991) ("Courts do not worry about conflict of laws unless the parties disagree on which state's law applies.").)

In Illinois, landlords can sue for rent as the rent comes due. The Illinois Supreme Court has held that, "in the case of a judgment for the payment of money in periodic installments[,] a right of action accrues *on each installment as it becomes due*, and [] the period of limitations runs on each installment only from the time it becomes due." *Light v. Light*, 12 Ill. 2d 502, 506, 147 N.E.2d 34 (1957) (emphasis added). Contracts for monthly rental payments give landlords "the right to sue for the installments as they come due, the right to sue for several installments that have accrued, and the right to sue for the entire amount due at the end of the term." *Dorris v. Ctr.*, 284 Ill. App. 344, 349, 1 N.E.2d 794 (1936). *See also Miner v. Fashion Enterprises, Inc.*, 342 Ill App. 3d 405, 417, 794 N.E.2d 902, 276 Ill. Dec. 652 (2003) ("[A] lessor has the options of suing for rent as they come due, suing for several accrued installments, or suing for the entire amount at the end of the lease term.").

Stratford chose the second option—suing for several installments that had accrued—and the district court resolved that claim. If Saks continues to refuse to honor the guaranty, Stratford could bring a new claim. Or Saks could pay what it owes and avoid future litigation. Either way, the hypothetical possibility of future litigation does not mean that the district court failed to resolve the claim in front of it. Saks in fact concedes that Stratford can sue for one or more installments of outstanding rent, calling it a "vanilla proposition." Saks cannot credibly claim that Stratford presently has outstanding claims against Saks.

2. Stratford's and WEC's allegedly overlapping claims

Saks's second theory why the district court's judgment was not final rests on the notion that both Stratford and WEC seek unpaid rent. Therefore, Saks argues, the companies' claims are inextricably intertwined, and the district court did not enter a final judgment.

In order to evaluate Saks's argument, we need to take a closer look at what happened in the district court. When Stratford intervened in this litigation, both Stratford and WEC did claim the right to overdue rent, so their claims indeed overlapped. But that changed when WEC subsequently disclaimed on the record its right to collect unpaid basic rent. At a November 8, 2022, hearing on Stratford's motion for entry of final judgment, WEC stated, "We're not making a claim for a basic rent claim as in the related case. It's for consequential damages."

On the record before us, we are satisfied that there is no overlap between damages for unpaid basic rent (what Stratford sought and was awarded) and consequential damages (what WEC seeks). Both the lease and the guaranty anticipate the existence of damages separate and apart from any unpaid rent. The lease provides that the landlord may be owed "reasonable attorneys' fees and expenses," for example, and Saks agreed under the guaranty to pay "all damages and all costs and expenses that may arise in consequence" of CPS's failure to pay rent. WEC itself told the district court that it expected consequential damages to consist of "attorneys' fees that [WEC] incurred as a result of the foreclosure in this case

and the loss in value and the equity of the property that [WEC] incurred as a result of the foreclosure." Unpaid rent is only relevant to WEC's claim as a backdrop against which it suffered consequential damages. WEC's and Stratford's claims therefore amount to "entirely different legal entitlements yielding separate recoveries." *Marseilles Hydro Power, LLC*, 518 F.3d at 464. WEC's remaining claim will neither strengthen nor weaken Stratford's rights against Saks, making the claims separable for Rule 54(b) purposes.

Certification under Rule 54(b) would only be inappropriate, then, if WEC's on-the record oral waiver of its claim to basic rent had no effect. Saks provides no authority suggesting that this is the case. On the contrary, we have repeatedly credited such waivers. *See, e.g., Portalatin v. Blatt, Hasenmiller, Leibsker & Moore, LLC*, 900 F.3d 377, 381 (7th Cir. 2018) ("In September 2015, Portalatin expressly abandoned her claim for actual damages against Blatt; her attorney stated in open court that they were only seeking statutory damages."); *Miller v. Willow Creek Homes, Inc.*, 249 F.3d 629, 631 (7th Cir. 2001) ("A waiver, which can be either expressed or implied, is an intentional relinquishment of a known right. Here, the requirements of waiver are easily satisfied. In open court, the Millers' attorney announced that he had conferred with the Millers and that they decided not to proceed with the Magnuson-Moss claims." (internal citation omitted)); *McCoy v. WGN Cont'l Broad. Co.*, 957 F.2d 368, 370 (7th Cir. 1992) ("McCoy appeals the judgment below only insofar as it rejects his discriminatory demotion and discharge claim, having expressly abandoned his retaliatory discharge claim at oral argument.").

In sum, WEC waived its right to unpaid basic rent, distinguishing its claim from Stratford's. That left the district court free to certify its judgment on Stratford's claim as final for appeal. The court's final judgment resolves only Stratford's claim and says nothing about WEC's rights. WEC remains free to pursue its claim for consequential damages before the district court. The district court correctly determined that Stratford and WEC had distinct claims against Saks and properly entered final judgment pursuant to Rule 54(b).

B. Abuse of discretion

Having determined that the district court's order was indeed a final judgment, we commence step two and evaluate whether the court abused its discretion by finding no just reason to delay certification under Rule 54(b). We will overturn a district court's certification for abuse of discretion only if the certification was "clearly unreasonable." *Curtiss-Wright Corp.*, 446 U.S. at 10. We cannot find that the certification here was. The district court resolved Stratford's claim, and correctly determined that Saks had prejudiced Stratford by refusing to pay rent for over five years. We conclude that further litigation on this point would not serve "judicial administrative interests" or the parties' interests. *See id.* at 8. Accordingly, the district court did not abuse its discretion in certifying its judgment as final for appeal under Rule 54(b).

IV.

We have now resolved the alleged jurisdictional defects Saks raised—standing and the judgment's certification—so we turn to Saks's substantive assertions. Saks alleges that the district court made a legal error by rejecting Saks's affirmative defenses and entering summary judgment in favor of Stratford. We review a district court's grant of summary judgment de novo, construing all facts and drawing all reasonable inferences in favor of Saks as the non-moving party. *See Barnes-Staples v. Carnahan*, 88 F.4th 712, 715 (7th Cir. 2023).

Saks asserted three defenses to liability: failure to mitigate damages, impossibility, and frustration of purpose. The district court found that none of these defenses had merit. It determined that Saks could not assert failure to mitigate because Saks did not present any case in which a guarantor can assert failure to mitigate as a defense under Illinois law. It also found that the Illinois court-appointed receiver attempted to mitigate damages, which satisfied any duty to mitigate that might exist. Lastly, it found that Saks could not meet the legal elements of frustration of purpose or impossibility.

Because we conclude that Saks waived its right to assert any defenses under the plain language of the guaranty, we affirm the district court's judgment. *See O'Brien v. Caterpillar Inc.*, 900 F.3d 923, 928 (7th Cir. 2018) ("We may affirm on any ground supported in the record so long as it was adequately addressed below and the plaintiffs had an opportunity to contest the issue.").

Under Illinois law, courts evaluate guaranties and sureties using principles of contract law. *See, e.g., People ex rel. Ryan v. Env't Waste Res., Inc.*, 335 Ill. App. 3d 751, 757, 782 N.E.2d 291, 270 Ill. Dec. 97 (2002) ("The fundamental principle of surety law is that the surety is bound by the terms of its contract."); *Blackhawk Hotel Assocs. v. Kaufman*, 85 Ill. 2d 59, 64, 421 N.E.2d 166, 51 Ill. Dec. 658 (1981) ("A guaranty contract is to be interpreted 'according to the standards that govern the interpretation of contracts in general.'" (quoting Restatement of Security § 88 (1941))). As with any contract, the parties to the guaranty select its terms, and "[w]here the terms of a guaranty are clear and unambiguous, they must be given effect as written." *Roth v. Dillavou*, 359 Ill. App. 3d 1023, 1028, 835 N.E.2d 425, 296 Ill. Dec. 391 (2005).

The guaranty established that Saks's liability as a guarantor "shall not be subject to any reduction, limitation, termination, *defense*, offset, counterclaim or recoupment" if CPS were to default on the lease or reject the lease through bankruptcy. CPS indeed defaulted on the lease in February 2018 and then rejected the lease through bankruptcy in August 2018. Under that plain language, Saks waived its right to assert affirmative defenses to both the default and the rejection.

Our circuit has already implicitly found that this language waives affirmative defenses. In *Hovde v. Isla Dev. LLC*, 51 F.4th 771 (7th Cir. 2022), we used the language at issue here to shed light on the meaning of a different guaranty agreement. The parties in *Hovde* disagreed over whether language providing that a guarantor's

"obligations under this Guaranty shall be unconditional, irrespective of . . . any other circumstance which might otherwise constitute a legal or equitable discharge or defense of a guarantor" waived the guarantor's right to assert affirmative defenses to liability. *Id.* at 775-76. We concluded that the language waived affirmative defenses as to the guarantor's *obligation* to the loan, but not to its *liability. See id.* at 777. In our analysis, we contrasted the language of the guaranty at issue there with the "more expansive language that courts frequently encounter in waivers, in which the language applies not only to defenses as to the obligation itself but also to defenses to liability or enforcement." *Id.* at 779. Among the waivers that we cited was the exact waiver in the very case before us: This guaranty states that "*the liability and obligation* of Guarantor . . . shall not be subject to any . . . defense." *Id.* (emphasis in original) (quoting *WEC 98C-3 LLC v. Saks, Inc.*, No. 20 C 4356, 2022 U.S. Dist. LEXIS 27820, 2022 WL 474204, at *4 (N.D. Ill. Feb. 16, 2022)). Thus, we have little trouble concluding that, under the plain language of the guaranty Saks signed, it waived its right to assert affirmative defenses to liability.

Saks contends that it could not have waived its failure-to-mitigate defense because failure to mitigate is a statutory defense. According to Saks, Illinois law requires a "clear waiver of a statutory right." But that is not exactly right. Illinois law provides that a party can waive statutory rights, "so long as the waiver is voluntary, knowing, and intentional." *Takiff Props. Grp. Ltd. #2 v. GTI Life, Inc.*, 2018 IL App (1st) 171477, ¶ 13, 429 Ill. Dec. 242, 124 N.E.3d 11. Saks agreed to the guaranty and, as a

sophisticated party, Saks is "presumed to have understood the[] clear terms" of the guaranty. *Cincinnati Ins. Co. v. Leighton*, 403 F.3d 879, 887 (7th Cir. 2005).

The cases that Saks relies on, *Chemical Bank v. Paul*, 244 Ill. App. 3d 772, 614 N.E.2d 436, 185 Ill. Dec. 302 (1993), and *Gallagher v. Lenart*, 226 Ill. 2d 208, 874 N.E.2d 43, 314 Ill. Dec. 133 (2007), do not support its argument to the contrary. In *Chemical Bank*, an Illinois appellate court found that a guaranty stating "[t]he undersigned hereby warrants and represents that the undersigned has no defense, offset or counterclaim with respect to the Guaranty or the obligations of the undersigned thereunder" did not waive the implied covenant of good faith. 244 Ill. App. 3d at 781. But that holding applied *only* to the implied covenant of good faith. In fact, the court noted that "[g]uaranty agreements containing waivers of all defenses, including the duty to act in a commercially reasonable manner, have been upheld as validly binding." *Id.* A covenant of good faith is different because "fair dealing is implied into every contract, absent express disavowal." *Id.* In short, *Chemical Bank* instructs that the implied covenant of good faith is a special case that requires express waiver. Parties can waive other defenses with more general language.

Gallagher, a case about workers' compensation liens, does not support Saks's argument either. *See* 226 Ill. 2d 208, 874 N.E.2d 43, 314 Ill. Dec. 133. Gallagher was an employee of Rail Terminal Services who suffered an on-the-job injury when he collided with a truck operated by Lenart. Following the accident, Gallagher pursued

a workers' compensation claim against Rail Terminal and a personal injury suit against Lenart. The workers' compensation case settled, with the parties agreeing to a "full and final settlement of all claims under the Workers' Compensation Act" for injuries associated with the accident. *Id.* at 212. Gallagher then settled with Lenart, and Rail Terminal asserted a statutory right to impose a lien on that settlement under the Workers' Compensation Act. Gallagher argued that although the Workers' Compensation Act gives employers a statutory right to liens on workers' settlements with third parties, Rail Terminal had waived that right pursuant to the terms of *their* settlement. The Illinois Supreme Court disagreed. It determined that, given "the integral role the workers' compensation lien plays in the workers' compensation scheme . . . the waiver of a workers' compensation lien must be explicitly stated." *Id.* at 238.

We do not find *Gallagher* relevant for two reasons. First, the *Gallagher* court found that the settlement agreement did not waive a statutory right to collect on a judgment that arose from a different court proceeding. That is fundamentally different from the situation here, where the guaranty waived a statutory right to assert a defense against breach of the very contract it guarantees. Second, the *Gallagher* court based its reasoning on the central role the statutory right to a lien played in the workers' compensation scheme. Saks has provided no evidence that the Illinois statute establishing a landlord's duty to mitigate acts as a linchpin in any larger statutory scheme.

In sum, the plain meaning of the guaranty controls the outcome here. Saks waived its right to assert affirmative defenses to liability. The district court's determination that Saks had no defense to liability was therefore correct.

V.

Saks's final claim of error involves the interest rate the district court applied to the unpaid rent. The guaranty provision allows a late penalty based on "the maximum amount of interest permitted under applicable state law." The Illinois Interest Act, 815 ILCS 205/4, allows "the parties to stipulate or agree that an annual percentage rate of 9%, or any less sum, shall be taken and paid upon every $100 of money loaned or in any manner due." 815 Ill. Comp. Stat. 205/4. Saks argues, based on *Celotex Corp. v. Discount Roofing Materials, LLC*, 2012 IL App (1st) 110614-U, and *McGinley Partners, LLC v. Royalty Properties, LLC*, 2018 IL App (1st) 171317, 427 Ill. Dec. 270, 117 N.E.3d 1207, that "maximum amount of interest" is ambiguous. Those cases do not support Saks's position. In both *Celotex* and *McGinley Partners*, the court declined to apply the 9% interest rate because it found that the statute authorizing the 9% interest rate did not apply to the transactions at issue. *Celotex Corp.*, 110614-U at ¶ 31; *McGinley Partners*, 171317 at ¶ 65. Here, Saks provides no evidence that Section 205/4 does not apply to real estate transactions. Therefore, Statute 205/4 applies, and the district court did not err in applying a 9% prejudgment interest rate to the unpaid rent.

For these reasons, we AFFIRM the district court's judgment.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED SEPTEMBER 30, 2022

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case No. 20 C 4356

WEC 98C-3 LLC,

Plaintiff,

v.

SAKS INCORPORATED,

Defendant.

and

4 STRATFORD SQUARE MALL HOLDINGS LLC,

Plaintiff,

v.

SAKS INCORPORATED,

Defendant.

Judge Harry D. Leinenweber

Appendix B

ORDER

This case is a carbon copy of the related case of *WEC 98C-4 LLC v. Saks Incorporated*, 2022 WL 3212369 (ND. Ill. 2022) ("the Companion Case"). Both cases involve identical Carson Pirie Scott & Co. ("Carson's") department store leases and identical corporate guaranties executed by a predecessor to Saks Incorporated (Now known as SFA Holdings Inc., "Saks"). *Id.* at *1; (Pl.'s Resp. to Def.'s Stmt. of Facts ("PSOF"), ¶¶ 1—3, Dkt. No. 89.) The two cases differ in that this case involved a Carson's stores that was in the Stratford Square Mall in Bloomingdale, Illinois (PSOF ¶ 1.) The Companion Case involved a Carson's Store that was in the Riverside Park Mall in North Riverside, Illinois. *WEC 98C-4*, 2022 WL 3212369 at *1. The cases also differ as to intervening mortgage holders who have obtained title to the premises. In the instant case the intervening mortgage holder is 4 Stratford Square Mall Holdings LLC ("Stratford"). (Order Granting Mot. to Intervene, Dkt. No. 40.) In the Companion Case, the intervening mortgage holder is TOCU II LLC. *WEC 98C-4*, 2022 WL 3212369 at *1. In both cases, the intervening mortgage holders seek to recover unpaid rentals due on the Carson leases from Saks' under the corporate guaranties. *Id.;* (Compl. ¶ 37, Dkt. No. 1.). The non-payments resulted from Bon Ton's lease rejection in the bankruptcy proceeding. *WEC 98C-4* 2022 WL 3212369 at *1; (PSOF ¶ 12.) In both cases, the plaintiffs seek to recover consequential damages resulting from the termination of the lease. *WEC 98C-4* 2022 WL 3212369 at *1; (Compl. ¶37.).

Appendix B

Here, WEC 98C-3 LLC, was the owner of the leased premises in the Stratford Square Mall in Bloomingdale, Illinois. (Def.'s Resp. to Pl.'s Stmt. of Facts ("DSOF") ¶ 4, Dkt. No. 80.) It is the lessor under a lease executed by CPS Department Stores, Inc. ("Tenant") which was occupied by a Carson department Store until 2018. (PSOF ¶ 1.) WEC mortgaged the property to Stratford Square Mall Holding LLC. (DSOF ¶ 26.) Carson's filed for bankruptcy on February 4, 2018. (PSOF ¶ 11.) Carson's received permission from the bankruptcy court to reject the lease, effective August 30, 2018. (*Id.* ¶ 12.) Caron's subsequently quit paying rent that year. (DSOF ¶ 16.)

The mortgage between WEC and Stratford was secured by an assignment of rentals due from Carson's and the assignment of the Saks Corporate Guaranty. (DSOF ¶¶ 26—27.) WEC has demanded that Saks honor its guaranty, but Saks has refused to do so. (*Id.* ¶ 18.) The mortgage ultimately went into default and Stratford filed a foreclosure Suit against WEC, eventually obtaining a judgment of foreclosure in the Circuit Court of DuPage County. (J. of Foreclosure, Intervenor Compl., Ex. 9, Dkt. No. 57.) On February 27, 2020, Stratford obtained an order of possession of the property and became entitled to the rentals due under the Carson's lease and the protection of the guaranty. (Order Awarding Possession, Intervenor Compl., Ex. 10.) Stratford then moved as a matter of right under F. R. C. P. 24 (a) (2) to intervene in this case to protect its interest. (Mot. to Intervene, Dkt. No. 24.)

Saks has raised the same defenses in this case as it did in the Companion Case, namely, it is a surety and

not a guarantor so that the release of the tenant in the bankruptcy court, released the guarantor, Saks; The plaintiffs failed to mitigate damage; impossibility or frustration of purpose due to changes in anchor stores; and the plaintiff and intervenor waived any claim by failing to file a claim in the bankruptcy proceeding. All these defenses were soundly and repeatedly rejected by the Court in the Companion Case. *WEC 98C-4 v. Saks Incorporated*, 2021 WL 5280947 (ND. Ill. 2021) (order granting summary judgment); *WEC 98C-4 v. Saks Incorporated*, 2020 WL 7183745 (ND. Ill, 2020) (order denying Saks' motion to dismiss); *WEC 98C-4 v. Saks Incorporated*, 2021 WL 5033463 (ND. Ill, 2021) (order denying Saks' motion for an interlocutory appeal).

The Court will not reiterate its findings and conclusions and reasonings in this order other than to state that they clearly apply here as well, which entitles 4 Stratford Square Mall Holdings LLC to summary judgment on the issue of liability for rent due. As was true in the Companion Case, the amount of rent due merely involves a simple mathematical calculation of monthly base rental times the number of months of non-payment. Saks does not dispute the monthly base rental is $91,530. (DSOF ¶ 21.) Stratford's motion for summary judgment for rent due is granted as of the date of this order. Stratford should calculate the amount of rent due and submit a judgment order.

Saks has moved to pursuant to Rule 56(d) for discovery. The Court finds that the only issue that justifies discovery is the unliquidated damages claim which are a consequence of Carson's lease default. Saks has 60 days

from the date of this opinion to complete discovery on the issue of consequential damages. Telephonic status hearing is set for 11/8/22 at 9:15 a.m.

IT IS SO ORDERED.

/s/
Harry D. Leinenweber, Judge
United States District Court

Dated: 9/30/2022

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED MAY 30, 2024

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

May 30, 2024

Before

DIANE P. WOOD,* *Circuit Judge*

THOMAS L. KIRSCH, *Circuit Judge*

CANDACE JACKSON-AKIWUMI, *Circuit Judge*

No. 23-1489

WEC 98C-3 LLC,

Plaintiff,

and

4 STRATFORD SQUARE MALL HOLDINGS, LLC,

Plaintiff-Intervenor-Appellee,

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* Circuit Judge Wood retired on May 1, 2024, and did not participate in the consideration of this petition.

Appendix C

v.

SFA HOLDINGS INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:20-cv-04356

Harry D. Leinenweber,
District Judge.

ORDER

Defendant-Appellant filed a petition for rehearing and rehearing *en banc* on May 8, 2024. No judge in regular active service has requested a vote on the petition for rehearing *en banc*, and a quorum of members of the original panel have voted to deny panel rehearing.[*]

The petition for rehearing and rehearing *en banc* is therefore **DENIED**.

APPENDIX D — CONSTITUTIONAL PROVISION

ARTICLE III, SEC. 2 OF THE CONSTITUTION

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.