

No. 17-1442

In The
Supreme Court of the United States

◆

DIMOND RIGGING COMPANY, L.L.C.,
d/b/a ABSOLUTE RIGGING & MILLWRIGHTS,

Petitioner,

v.

ORDOS CITY HAWTAI AUTOBODY CO., LTD.,
and INNER MONGOLIA OED ENGINE CO., LTD.,

Respondents.

◆

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

◆

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

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**COUNTERSTATEMENT OF
QUESTIONS PRESENTED**

1. Did the district court abuse its discretion when it struck a twice tardy, nonconforming brief in opposition to a motion for partial summary judgment?

2. Petitioner Dimond Rigging Company, doing business as Absolute Rigging & Millwrights (“ARM”) forfeited the defense of illegality by failing to plead it as an affirmative defense in its Answer to the Complaint. Did the district court err when it declined to grant summary judgment in ARM’s favor on this waived defense?

3. Similarly, did the district court abuse its discretion when it later prohibited ARM from offering evidence of this waived defense at trial?

PARTIES

All of the parties to the proceedings below appear in the caption of the case.

CORPORATE DISCLOSURES

Respondents are two subsidiaries of Hawtai Motor Group Co., Ltd., a privately-held automotive manufacturing company headquartered in the People's Republic of China. No publicly-held company owns 10% or more of Hawtai or Respondents' stock.

TABLE OF CONTENTS

	Page
Counterstatement of Questions Presented	i
Parties	ii
Corporate Disclosures	ii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Constitutional, Statutory, and Regulatory Provisions Involved	2
Statement of the Case	3
Line 7 Equipment	4
Line 15 Equipment	5
Amended Transportation Agreement.....	5
Pleadings and Injunctions	6
Summary Judgment	7
“Motion <i>in Limine</i> ”	11
Joint Final Pretrial Order	11
Trial	12
Appeal of Right	12
Petition for Writ of Certiorari.....	16
Reasons to Deny a Writ of Certiorari	16
1. <i>No Jurisdiction</i> : The Court lacks jurisdiction over this untimely petition	16

TABLE OF CONTENTS – Continued

	Page
2. <i>Insubstantial Issues</i> : None of the traditional reasons for granting a writ of certiorari are present.....	17
3. <i>No Errors Below</i> : The Sixth Circuit correctly addressed each of the issues raised in the petition	18
A. <i>The Strike Order</i> : Striking ARM’s brief was not an abuse of discretion	18
B. <i>Illegality Defense</i> : ARM forfeited the defense of illegality by failing to plead it....	21
Conclusion.....	24

TABLE OF AUTHORITIES

	Page
CASES	
<i>Erie R. R. Co. v. Tompkins</i> , 304 U. S. 64 (1938)	21
<i>Federal Election Comm’n v. NRA Political Victory Fund</i> , 513 U. S. 88 (1994).....	1, 16
<i>Gasperini v. Center for Humanities, Inc.</i> , 518 U. S. 415 (1996).....	21
<i>Gregory v. Shelby Cty., Tenn.</i> , 220 F.3d 433 (CA6 2000)	15
<i>Henricks v. Pickaway Corr. Inst.</i> , 782 F.3d 744 (CA6 2015).....	22
<i>Huss v. King Co.</i> , 338 F.3d 647 (CA6 2003)	22, 23
<i>Meek v. Wilson</i> , 283 Mich. 679 (1938).....	22, 23
<i>Minger v. Green</i> , 239 F.3d 793 (CA6 2001)	21
<i>Old Line Life Ins. Co. of Am. v. Garcia</i> , 418 F.3d 546 (CA6 2005).....	22
<i>Ordos City Hawtai Autobody Co. v. Dimond Rigging Co.</i> , 695 Fed. Appx. 864 (CA6 2017)	<i>passim</i>
<i>Seay v. Tennessee Valley Auth.</i> , 339 F.3d 454 (CA6 2003).....	18
<i>Wood v. Milyard</i> , 566 U. S. 463 (2012)	23
STATUTES	
28 U. S. C. § 2101(c)	1, 2, 16, 17

TABLE OF AUTHORITIES – Continued

	Page
RULES	
Fed. Rule Civ. Proc. 8(c)	21
Rule 14.5 (U. S. Sup. Ct. 2017).....	17
Rule 16.2(a) (ED Mich. 2015)	11
Rule 5.1(a)(3) (ED Mich. 2015).....	19
Rule 7.1(d)(2) (ED Mich. 2015).....	19
Rule 7.1(d)(3)(A) (ED Mich. 2015).....	19

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit is reported unofficially at 695 Fed. Appx. 864.

The opinion and order of the U.S. District Court for the Eastern District of Michigan entering partial summary judgment is reported unofficially at 2015 WL 4966883.

The opinion and order of the U.S. District Court for the Eastern District of Michigan striking Petitioner's brief opposing summary judgment is unpublished, but reported unofficially at 2015 WL 13048810.



JURISDICTION

ARM incorrectly states the basis for the Court's jurisdiction. The Court has appellate jurisdiction over timely filed petitions for writs of certiorari under 28 U.S.C. § 2101(c). Respondents respectfully submit, however, that the Court lacks jurisdiction over this petition because it was filed out of time.

A petition for a writ of certiorari must be filed within 90 days after an appellate court enters judgment. 28 U.S.C. § 2101(c). The Court may extend this deadline by up to 60 days. *Id.* These time limits are jurisdictional in civil cases. *Federal Election Comm'n v. NRA Political Victory Fund*, 513 U.S. 88, 90 (1994).

The Sixth Circuit entered judgment on June 8, 2017. ARM filed a nonconforming petition 90 days later on September 6, 2017. The Clerk returned the petition with a deficiency letter, which allowed ARM to refile a corrected petition within 60 days. Rule 14.5. ARM filed a second nonconforming petition on November 15, 2017. The Clerk returned the second petition with a second deficiency letter. ARM then filed a conforming brief on or after February 28, 2018.

Respondents respectfully submit that Rule 14.5 does not permit the Clerk to repeatedly return nonconforming petitions. It authorizes a single deficiency letter and grants a single extension of 60 days to submit a conforming petition. Even if the Rule could be construed to permit multiple deficiency letters, it cannot be used to grant multiple 60-day extensions in civil cases. It would be inconsistent with the Court's limited authority to extend the jurisdictional deadline "for a period not exceeding [60] days" under § 2101(c).

The petition is jurisdictionally out of time, and the Court should therefore dismiss the petition on this basis alone.



CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

No constitutional provisions, treaties, statutes, ordinances, or regulations are involved in this case.



STATEMENT OF THE CASE

This contract action arose under the district court's alienage jurisdiction. It is governed by Michigan law.

Respondents Ordos City Hawtai Autobody Co., Ltd. ("Ordos") and Inner Mongolia OED Engine Co., Ltd. ("Inner Mongolia") are Chinese automotive parts suppliers. They each purchased a line of stamping equipment from a closed Chrysler plant in Ohio for their operations in China.¹ Ordos purchased what has been called the Line 7 equipment, and Inner Mongolia purchased what has been called the Line 15 equipment.²

They both hired ARM to rig and transport the equipment to China through rigging and transportation agreements.³ Although Ordos and Inner Mongolia paid ARM millions of dollars for its services, ARM did not uphold its end of the bargains.

¹ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶¶ 1, 3, 10, Page ID# 1199, 1201 (citing R. 1, Verified Compl. ¶¶ 1–3, Page ID# 1–2; R. 30, Joint Stmt. ¶ 1, Page ID# 415).

² R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶¶ 3, 10, Page ID# 1199, 1201 (citing R. 30, Joint Stmt. ¶ 3, Page ID# 415; R. 98-2, Invoice, Page ID# 1215–18; R. 98-3, Asset List, Page ID# 1219–20; R. 98-4, Hawtai RFQ, Page ID# 1221–32).

³ R. 98, Mot. Summ. J., Stmt. Mat. Facts at ¶¶ 4–7 and 11–14, Page ID# 1200–03 (citing R. 98-5, Line 7 Rigging Agmts., Page ID# 1233–67; R. 98-6, Line 7 Transp. Agmt., Page ID# 1268–73; R. 98-8, Line 15 Rigging Agmt., Page ID# 1279–88; R. 98-10, Line 15 Transp. Agmt., Page ID# 1299–1306).

Line 7 Equipment

Ordos and ARM executed a rigging agreement for the Line 7 equipment.⁴ They later entered into another agreement under which ARM agreed to transport Line 7 to China for an all-inclusive fixed fee.⁵

In December 2011, ARM shipped some of the Line 7 equipment to China, including an elevator.⁶ The elevator was lost at sea when the captain jettisoned cargo to save the ship and her crew during a storm.⁷ ARM had insured the shipment, as it was required to do under the transportation agreement.⁸ The insurer paid ARM \$975,000 to rebuild the lost elevator, but ARM never replaced it.⁹

⁴ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶ 4, Page ID# 1200 (citing R. 98-5, Line 7 Rigging Agmts., Page ID# 1233–67).

⁵ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶¶ 6–7, Page ID# 1200 (citing R. 98-6, Line 7 Transp. Agmt., Page ID# 1268–73).

⁶ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶¶ 17–18, Page ID# 1203–04; R. 141, Trial Tr. Vol. II 91:11–14 (Apr. 30, 2014).

⁷ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶ 18, Page ID# 1204 (citing R. 98-11, Claim Corresp., Page ID# 1306–39).

⁸ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶ 19, Page ID# 1204 (citing R. 98-6, Line 7 Transp. Agmt. §§ 1.8 and 3.1, Page ID# 1269, 1272; R. 98-11, Claim Corresp., Page ID# 1306–39).

⁹ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶¶ 20–22, Page ID# 1204 (citing R. 98-7, Hsueh Decl. ¶ 3, Page ID# 1275; R. 98-11, Claim Corresp., Page ID# 1306–39; R. 98-12, Insurer's Claim Pmt. Records, Page ID# 1340–51); R. 141, Trial Tr. Vol. II 90:4–10 (Apr. 30, 2014).

Line 15 Equipment

Inner Mongolia and ARM entered into rigging agreements for the Line 15 equipment.¹⁰ They later entered into a transportation agreement under which ARM agreed to ship Line 15 to China for an all-inclusive fixed fee.¹¹ The equipment was to be transported from the old Chrysler plant to a port on Lake Erie, and then loaded onto a cargo ship sailing to China in January 2012.¹²

Amended Transportation Agreement

As of March 2013—16 months after the partial shipment of Line 7, and 14 months after Line 15 was scheduled for shipment—ARM had not shipped the rest of Line 7 or any of the Line 15 equipment.¹³ So, in March 2013, the parties executed an amended transportation agreement, which required ARM to ship the

¹⁰ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶ 11, Page ID# 1201 (citing R. 98-8, Line 15 Rigging Agmt., Page ID# 1279–88).

¹¹ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶¶ 6–7, Page ID# 1200 (citing R. 98-10, Line 15 Transp. Agmt., Page ID# 1299; R. 43, Prelim. Inj. Order at 7, Page ID# 640).

¹² R. 98-10, Line 15 Transp. Agmt. Sched., Page ID# 1305.

¹³ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶¶ 23, 28–32, Page ID# 1204–06 (citing R. 98-10, Line 15 Transp. Agmt. Sched., Page ID# 1305; R. 98-14, ED Ohio Compl. ¶ 23, Page ID# 1358, 1362; R. 141, Trial Tr. Vol. II 40:4–8 and 41:12–15 (Apr. 30, 2014)).

rest of Line 7 by late March 2013 and all of Line 15 by late April 2013.¹⁴

ARM missed these shipment dates as well. It also tried to charge Inner Mongolia for additional millwright work for dismantling Line 15 and placed an “artisan’s lien” on the equipment, requiring Inner Mongolia to engage in further litigation in this case and in a separate case in Ohio to obtain its equipment.¹⁵ Finally, in July 2014, the rest of Line 15 sailed for China.¹⁶

Pleadings and Injunctions

In November 2013, Ordos and Inner Mongolia sued ARM and obtained a preliminary injunction to stop it from damaging, destroying, concealing, disposing of, or using the Line 15 equipment.¹⁷

¹⁴ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶ 25, Page ID# 1205 (citing R. 98-13, Am. Transp. Agmt. §§ 3(f)–3(g), Page ID# 1353–54; R. 30, Joint Stmt. ¶ 6, Page ID# 416).

¹⁵ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶¶ 32–52, Page ID# 1206–10 (citing R. 98-9, Lech Prelim. Inj. Tr., 10–12, 29, 32–33, 39, Page ID# 1290–98; R. 98-15, ARM Lien Notice, Page ID# 1369; R. 98-16, ARM Add’l Millwright Inv., Page ID# 1371–72; R. 98-17, Ltr. to Lech (Nov. 25, 2013), Page ID# 1374–76; R. 98-18, Email to Biehl (Nov. 27, 2013), Page ID# 1378; R. 98-20, ED Ohio Consent Order, Page ID# 1385–89; R. 43, Prelim. Inj. Order at 7, Page ID# 652).

¹⁶ R. 98, Motion Summ. J., Stmt. Mat. Facts at ¶ 52, Page ID# 1210.

¹⁷ R. 1, Complaint, Page ID# 1–137; R. 3, Inj. Mot., Page ID# 140–79; R. 5, TRO, Page ID# 182–83.

After losing a motion to dismiss, ARM answered the Complaint with affirmative defenses, which included the defense of *force majeure*.¹⁸ It also filed several counterclaims.¹⁹

Several months later, ARM added a new counterclaim seeking disgorgement of \$134,000, which it now claims to have paid as purported kickbacks to Hawtai representatives, but described in its pleading as an advancement toward personal expenses which were never incurred nor reimbursed.²⁰ This new counterclaim did *not* allege that any of the parties' contracts were unenforceable because of these alleged payments.

Summary Judgment

After discovery closed, Ordos and Inner Mongolia moved for partial summary judgment, seeking dismissal of ARM's counterclaims and summary judgment on liability on their claims against ARM.²¹ ARM did not file a brief opposing the motion.

The district court ordered ARM to show cause why the motion should not be granted.²² Rather than do so,

¹⁸ R. 35, ARM Aff. Defenses ¶ 57, Page ID# 466.

¹⁹ R. 35, ARM Countercls. ¶¶ 60–165, Page ID# 467–87.

²⁰ R. 73, ARM Am. Countercls. ¶¶ 24–25, 45, 64–80, Page ID# 876–77, 881, 885–87.

²¹ R. 97, Mot. Summ. J., Page ID# 1162–97; R. 98, Mot. Summ. J. Stmt. Mat. Facts, Page ID# 1198–1417.

²² R. 101, Order to Show Cause, Page ID# 1427–28.

ARM merely offered excuses for why it had failed to timely file an opposition to the motion.²³

The district court reluctantly ordered ARM to file an opposition brief by June 22, 2015.²⁴ It cautioned ARM that it would not accept any brief filed after that date or any brief that did not comply with the local rules or the district judge's practice guidelines.²⁵ The court also warned that it would bar ARM from participating in oral argument on the motion if it failed to comply with these conditions.²⁶

On June 23, 2016—the day *after* the new filing deadline—ARM filed its brief.²⁷ Its papers did not comply with the font-point requirements, conform to the district judge's practice guidelines, or provide evidentiary support for the averments and arguments raised in the opposition.²⁸

The district court enforced its order, struck ARM's (twice tardy) nonconforming brief, and barred ARM

²³ R. 103, ARM's Answer to Order to Show Cause, Page ID# 1431–58.

²⁴ R. 104, Order for Opp'n to Mot. Summ. J., Page ID# 1459–61.

²⁵ *Id.* at Page ID# 1460.

²⁶ *Ibid.*

²⁷ R. 105, ARM's Stricken Opp'n to Mot. Summ. J., Page ID# 1462–88; R. 106, ARM's Stricken Opp'n Stmt. Mat. Facts, Page ID# 1489–98; R. 107, Stricken Index, Page ID# 1499; R. 108, Stricken Exhs., Page ID# 1500–77.

²⁸ R. 109, Strike Order, Page ID# 1578–82.

from arguing against summary judgment at the hearing on the motion.²⁹

After the hearing, the district court granted partial summary judgment.³⁰ Even though it had stricken ARM's brief, the court considered ARM's papers in deciding the motion and stated that ARM's arguments would not have affected its ruling.³¹

Regarding Line 7, Ordos's only claim was for the value of the elevator lost at sea. The court determined that the transportation agreement (which assigned the risk of loss during transit to ARM) and the amended transportation agreement (in which ARM agreed to obtain or construct a replacement elevator) were valid.³² The court also determined that: (a) ARM had insured the elevator; (b) the insurer had paid ARM \$975,000 to reconstruct the elevator; (c) ARM had not reconstructed the elevator; and (d) ARM had not tendered the insurance funds to Ordos.³³ On these undisputed facts, it ruled that ARM was responsible for the lost elevator, leaving only the question of damages for the jury.³⁴

Regarding Line 15, Inner Mongolia asserted claims for damaged equipment and lost profits caused by

²⁹ *Ibid.*

³⁰ R. 116, Order Granting Summ. J., Page ID# 1877–1911.

³¹ *Id.* at Page ID# 1901, 1904 (n.9), 1905–06, 1909 (n.13), 1911 (n.18).

³² *Id.* at Page ID# 1901.

³³ *Ibid.*

³⁴ *Ibid.*

transportation delays under the original and amended transportation agreements. This required interpretation of the agreements. Inner Mongolia argued that the agreements required ARM to transport all of Line 15 to China, while ARM argued that it was only required to transport the pieces of equipment that could be packaged into containers for shipping.³⁵ Based on: (a) concessions from ARM that the Line 7 transportation agreement covered all of the shipping for Line 7; (b) the purpose of the Line 15 transportation agreement in conjunction with the Line 15 rigging agreement; (c) the plain language of the Line 15 transportation agreement; and (d) an integration clause, the court concluded that ARM was required to ship all of Line 15, but held the shipment hostage to a demand for more money to perform than that to which it was contractually entitled.³⁶ Thus, the court concluded that ARM breached the contract as a matter of law on the undisputed facts.³⁷ It therefore granted summary judgment to Inner Mongolia for breach of the original and amended Line 15 transportation agreements.³⁸

The trial court also granted summary judgment for Ordos and Inner Mongolia on ARM's counterclaims. It explained in detail why it dismissed each of them.³⁹

³⁵ R. 116, Order Granting Summ. J., Page ID# 1896–98.

³⁶ *Ibid.*

³⁷ *Id.* at Page ID# 1898–99.

³⁸ *Id.* at Page ID# 1900–10.

³⁹ R. 116, Order Granting Summ. J., Page ID# 1896–98. *Id.* at Page ID# 1900.

In light of these rulings, the only matters left for trial were Ordos’s damages for the lost elevator and Inner Mongolia’s damages for damaged Line 15 equipment and lost profits.

“Motion *in Limine*”

ARM filed a “motion *in limine*” to preclude evidence that it breached the parties’ agreements, arguing that the alleged kickback scheme it had attempted to argue in its denied summary judgment motion voided them *ab initio* under the doctrine of illegality.⁴⁰ The district court denied the motion, ruling that it was an untimely, disguised motion for summary judgment, not a true motion *in limine*.⁴¹

Joint Final Pretrial Order

In the Eastern District of Michigan, the parties must prepare a Joint Final Pretrial Order (“JFPTO”), which serves as the blueprint for trial and supersedes the pleadings. A party cannot add a new claim or defense, but any existing claim or defense not listed in the JFPTO is waived. Rule 16.2(a) (ED Mich. 2015).

ARM listed the defense of *force majeure* when answering the Complaint, but not in the JFPTO.⁴² Conversely, ARM did *not* list the defense of illegality when

⁴⁰ R. 113, ARM First Mot. *in Limine*, Page ID# 1793–1800.

⁴¹ R. 119, Order Denying Mot., Page ID# 1950–52.

⁴² Compare R. 35, ARM’s Answer, Aff. Def. No. 17 at ¶ 57, Page ID# 466, with R. 73, JFPTO, Page ID# 1912–30.

answering the Complaint, but wrongly tried to add it in the JFPTO.⁴³

Trial

ARM tried to raise both of these defenses at trial. The district court prevented ARM from doing so, but allowed ARM to seek reconsideration.⁴⁴ The court later affirmed its ruling on reconsideration.⁴⁵

The jury returned a split verdict. It found that Ordos suffered \$975,000 in damages for the lost elevator.⁴⁶ It also found that Inner Mongolia suffered \$239,000 in damages under the Line 15 transportation agreement by not transporting all of the Line 15 equipment to China.⁴⁷ But the jury found that ARM did not breach the Line 15 rigging agreement or convert the Line 15 equipment to use own use.⁴⁸

Appeal of Right

ARM timely appealed to the Sixth Circuit, alleging six errors:

⁴³ Compare R. 35, ARM's Answer, Aff. Defs. Nos. 1–19 at ¶¶ 41–59, Page ID# 464–66, with R. 73, JFPTO, Page ID# 1912–30.

⁴⁴ R. 198, Trial Tr. Vol. IV 61:8–65:24 (Nov. 16, 2015), Page ID# 3556–60.

⁴⁵ R. 157, Order on Mot. for Reconsid., Page ID# 2672–75.

⁴⁶ R. 170, Verdict Form at I(B)(1)-(2), Page ID# 2823.

⁴⁷ *Id.* at I(A)(1)-(2), Page ID# 2823.

⁴⁸ *Id.* at I(C)(1) and II(1), Page ID# 2823–24.

(1) the district court erred in striking ARM's twice tardy and nonconforming brief;

(2) the district court should have granted summary judgment in ARM's favor by invalidating the contracts under the doctrine of illegality;

(3) the district court should have granted summary judgment in ARM's favor on its counterclaims;

(4) the district court erred in granting summary judgment against ARM for the elevator lost at sea;

(5) the district court erred by precluding ARM from offering evidence in support of its *force majeure* and illegality defenses at trial; and

(6) the jury's finding that Inner Mongolia suffered damages of \$239,000 was inconsistent with the rest of the verdict because: (a) Inner Mongolia had asked for \$515,000 for breach of the Line 15 transportation agreement and \$239,000 for breach of the Line 15 rigging agreement; (b) the jury awarded \$239,000 for breach of the transportation agreement; and (c) the jury found no breach of the rigging agreement. In other words, it awarded damages in an amount equal to the requested damages for breach of the rigging agreement while finding no breach for the rigging agreement.

The Sixth Circuit affirmed the district court’s rulings and the jury verdict.

First, it held that the district court did not abuse its discretion by striking ARM’s opposition brief since ARM failed to abide by the terms of the court’s gracious decision to let it file a late brief after receiving flimsy excuses for missing the deadline. *Ordos City Hawtai Autobody Co., Ltd. v. Dimond Rigging Co., LLC*, 695 Fed. Appx. 864, 869–72 (CA6 2017).

Second, the Sixth Circuit held that the district court did not err in denying ARM summary judgment on its defense of illegality. It observed that ARM failed to assert illegality as an affirmative defense when answering the Complaint. It also observed that ARM’s counterclaims characterized the alleged bribes as payment of “personal expenses” that had not been “reimbursed.” Even when ARM amended its counterclaims to add a promissory-estoppel claim to seek to recover the payments, it did not allege that the contracts were contingent on the payments. While ARM argued that it offered evidence in support of the alleged kickback scheme, the Sixth Circuit noted that there is no evidence in the record—the evidence was tendered with the stricken brief and is therefore not part of the record. And since, on their face, the parties’ agreements do not offend public policy or law, there was no basis for the district court to grant summary judgment on this untimely defense. *Id.* at 872–73.

Third, the Sixth Circuit upheld the ruling that ARM was responsible for the lost elevator on the plain,

unambiguous language in the Line 7 transportation agreement (which assigned the risk of loss to ARM) and the amended transportation agreement (which obligated ARM to replace the elevator). *Id.* at 873–74.

Fourth, the Sixth Circuit held that ARM waived its right to appellate review of the district court’s dismissal of its counterclaims because it offered no analysis of those claims beyond the arguments in the stricken opposition brief, except for the promissory-estoppel claim. But, as to that claim, there is no record evidence to prove a broken promise. *Id.* at 874.

Fifth, the Sixth Circuit held that the district court did not abuse its discretion in excluding evidence offered by ARM in support of its *force majeure* defense. The court of appeals agreed that the JFPTO superseded the pleadings, and the omission of this defense from the JFPTO resulted in waiver under the local court rules and the law of the Sixth Circuit on pretrial statements. *Id.* at 875 (citing *Gregory v. Shelby Cty., Tenn.*, 220 F.3d 433, 442–43 (CA6 2000)).

Finally, the Sixth Circuit rejected ARM’s challenges to the jury verdict. Michigan law requires every effort to harmonize verdicts; any logical explanation for seemingly inconsistent verdicts is sufficient to affirm. The Sixth Circuit agreed with Respondents that there is a logical explanation for the seeming inconsistency: the jury found that ARM’s breach of the Line 15 transportation agreement caused damages, but not as high as Ordos and Inner Mongolia claimed. *Ordos*, 695 Fed. Appx. at 875–76.

Petition for Writ of Certiorari

Continuing its trend of failing to follow court rules, ARM filed at least two nonconforming petitions for a writ of certiorari before the Clerk docketed the petition. Respondents submit that ARM's nonconforming filings have caused this petition to be jurisdictionally out of time, as argued below.

Even if the Court concludes it has jurisdiction, the petition notably narrows the issues on appeal. ARM no longer claims that it was entitled to summary judgment on its counterclaims or that the jury verdict should be set aside. Although it presents four questions, there are really only three: (1) did the district court err in striking ARM's opposition brief; (2) should the district court have granted summary judgment in ARM's favor on the defense of illegality; and (3) even if not, should it have allowed ARM to assert this defense at trial?



REASONS TO DENY A WRIT OF CERTIORARI

1. *No Jurisdiction:* The Court lacks jurisdiction over this untimely petition.

A petition for a writ of certiorari must be filed within 90 days after a federal appellate court enters judgment. 28 U.S.C. § 2101(c). The Court may extend this deadline by no more than 60 days. *Id.* These time limits are jurisdictional in civil cases. *NRA Political Victory Fund*, 513 U.S. at 90.

The Sixth Circuit entered judgment on June 8, 2017. ARM filed a nonconforming petition with this Court 90 days later on September 6, 2017. The Clerk returned it with a deficiency letter, which allowed ARM to file a corrected petition within 60 days. Rule 14.5. ARM filed a second nonconforming petition on November 15, 2017. The Clerk returned it with a second deficiency letter. ARM then filed a conforming brief on or after February 28, 2018.

Respondents submit that Rule 14.5 does not permit the Clerk to repeatedly return nonconforming petitions. It authorizes one deficiency letter and one extension of 60 days to submit a conforming petition. Even if the Rule could be construed to permit multiple deficiency letters, it cannot be used to grant multiple 60-day extensions in civil cases. That would be inconsistent with the Court's limited authority to extend the jurisdictional deadline "for a period not exceeding [60] days" under § 2101(c).

The petition is jurisdictionally out of time, and the Court should dismiss the petition on this basis alone.

2. *Insubstantial Issues: None of the traditional reasons for granting a writ of certiorari are present.*

The petition identifies neither a circuit split nor an important federal question that calls for review. The only basis asserted for seeking certiorari is the rather cheeky claim that a trial court's decision to: (a) strike a twice-tardy brief that utterly failed to conform to

court rules; and (b) reject evidence and arguments in support of a waived defense, are rulings “so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court’s supervisory power.” (Petition at *ii*, 8.) It would be an understatement to call this an overstatement.

3. *No Errors Below: The Sixth Circuit correctly addressed each of the issues raised in the petition.*

A. *The Strike Order: Striking ARM’s brief was not an abuse of discretion.*

A district court’s decision to strike a party’s motion papers is reviewed for an abuse of discretion. *Seay v. Tennessee Valley Auth.*, 339 F.3d 454, 480 (CA6 2003). Unless arbitrary, such decisions will not be overturned. *Id.* The decision to strike ARM’s brief was not arbitrary.

ARM missed the deadline for responding to Ordos and Inner Mongolia’s motion for summary judgment. The district court ordered ARM to show cause why the motion should be denied. Rather than do so, ARM filed a rambling statement that took twelve pages to tell the court that its attorney must have inadvertently deleted the ECF email notice while on vacation, and it should be excused for this negligence because its counsel had vigorously defended the case in all other respects. The court was rightly skeptical of this excuse, since there would have been at least three ECF emails regarding the motion (one for the motion, one for

the separately filed statement of undisputed material facts, and one for the court-issued notice of hearing). It was implausible that all of these notices would have been “inadvertently” deleted, especially since the notice of hearing was filed on a different day.

After ARM missed the deadline and then failed to show cause why summary judgment should be denied, the district court still charitably allowed ARM an additional five days to file opposition papers. The court set reasonable conditions for this act of grace: (1) file by the new deadline; (2) comply with the Local Rules; and (3) comply with the district judge’s practice guidelines for summary judgment motions. The court warned ARM that a late or non-conforming brief would be rejected and would result in the forfeiture of ARM’s right to participate in oral argument.

This proved to be too much for ARM. It filed its opposition papers on the sixth day. It failed to comply with the local rules for briefs, utilizing 11-point font instead of the required 14-point font, omitting a statement of controlling or most appropriate authority, and exceeding the page limit. *See* Rule 5.1(a)(3) (font size); Rule 7.1(d)(2) (controlling authority); and Rule 7.1(d)(3)(A) (ED Mich. 2015) (25 pages). ARM also failed to comply with the district judge’s practice guidelines, which required a counter-statement of disputed facts with appropriate citations to the record. It answered less than half of the facts advanced in the motion. And its papers were rife with placeholders for dates and citations.

Simply put, after ARM was afforded three opportunities to file (the original deadline, the show cause order, and the second deadline), given twice the amount of time to file a brief (six weeks instead of the usual three), and cautioned about how further disobedience of the local rules and guidelines would be punished, ARM still failed to comply in practically every way possible. The district court did not act arbitrarily by doing what it clearly warned it would do for any continued non-compliance.

ARM still cries foul. It argues that it is reversible error for the district court to strike its opposition papers because its failure to comply was “non-willful,” it did not receive notice of earlier violations, and it made a “good faith” effort to comply with the trial court’s practice guidelines within a mere 2½ business days. These arguments lack merit.

ARM never says it looked at the local rules. It either chose to remain unfamiliar with them or it willfully disregarded them.

Similarly, the district court and the Sixth Circuit reasonably rejected ARM’s argument that a lack of notice about earlier filing errors is a legitimate reason to reverse the strike order. “That [ARM] has successfully skirted the Local Rules in the past does not excuse its non-compliance now, especially after [the trial court] warned [ARM] that non-compliance would result in rejection of its motion response.”

Likewise, ARM’s professed inability to comply with its self-inflicted time crunch is not grounds for reversal.

ARM says it had only 2½ business days to prepare its brief, but it really had 13 calendar days from the show cause order and 5 calendar days from the order establishing the second deadline. When your brief is 6 weeks overdue and you're on your third strike, you work over the weekend.

B. *Illegality Defense*: ARM forfeited the defense of illegality by failing to plead it.

ARM spills much ink in arguing the merits of its alleged kickback scheme, now dubbed extortion in its most recent iteration. Of course, this Court is not a fact-finding court. This is not the forum to prove (or disprove) ARM's accusations (although Respondents do deny them).

The threshold question (as it was for the Sixth Circuit) is whether ARM forfeited this defense. If it did, then the district court did not err in denying summary judgment on this defense or in preventing ARM from raising it at trial. The Sixth Circuit correctly held that ARM forfeited the defense by failing to plead it.

Under the *Erie* doctrine, federal law governs procedure in diversity actions. *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426–27 (1996) (quoting *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938)). This includes the rules governing pleadings. *Minger v. Green*, 239 F.3d 793, 800 (CA6 2001). In answering a complaint, “a party must affirmatively state any avoidance or affirmative defense, including illegality.” Fed. Rule Civ. Proc. 8(c). As a general rule, an affirmative

defense is forfeited unless pleaded. *Old Line Life Ins. Co. of Am. v. Garcia*, 418 F.3d 546, 550 (CA6 2005).

ARM did not assert illegality as an affirmative defense in its Answer to the Complaint. It therefore forfeited this defense.

The Sixth Circuit noted that courts can excuse this pleading requirement if the plaintiff received notice of the affirmative defense by other means and a reasonable opportunity to respond. *Ordos*, 695 Fed. Appx. at 872 (citing *Huss v. King Co.*, 338 F.3d 647, 651–52 (CA6 2003)). Under Michigan law, illegality can even be raised as a defense for the first time on appeal if the illegality is apparent from the face of the contract or the evidence in the record. *Ordos*, 695 Fed. Appx. at 872 (citing *Meek v. Wilson*, 283 Mich. 679, 689 (1938)). Neither exception to forfeiture applies.

In its Answer, ARM described the challenged payments as money it advanced for “personal expenses” that were not incurred and not reimbursed. When it later amended its counterclaims to mention “kickbacks” under its promissory-estoppel claim, ARM did not allege that Ordos or Inner Mongolia awarded the contracts contingent upon the alleged kickbacks. The first time ARM tried to raise illegality as a defense was in its now-stricken response to the motion for summary judgment after the close of discovery. Raising a defense after discovery has closed unfairly prejudices the plaintiff. *Henricks v. Pickaway Corr. Inst.*, 782 F.3d 744, 750–51 (CA6 2015). ARM’s late notice deprived Ordos and Inner Mongolia of a reasonable opportunity

to respond, so the lower courts were under no duty to exercise their discretion and excuse ARM's forfeiture of this defense under *Huss*.

Moreover, the alleged illegality is not apparent from the face of the rigging and transportation agreements; neither type of contract is void against public policy. And the record is devoid of evidence supporting ARM's alternating theories of kickbacks and extortion; the records ARM offered in support of its accusations have been stricken from the record. Thus, *Meek* offers ARM no means of salvaging its forfeited defense.

Accordingly, the district court cannot be said to have abused its discretion in denying summary judgment to ARM on a forfeited affirmative defense for which there is no record evidence to evaluate it. Likewise, the district court cannot be said to have erred in precluding ARM from offering evidence in support of this forfeited defense at trial. "An affirmative defense, once forfeited, is excluded from the case. . . ." *Wood v. Milyard*, 566 U.S. 463, 470 (2012) (cleaned up).



CONCLUSION

Respondents respectfully ask the Court to deny this petition for a writ of certiorari.

Respectfully submitted,

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