No. 17-1025

In The

Supreme Court of the United States

FROST-TSUJI ARCHITECTS,

Petitioner,

v.

HIGHWAY INN, INC., *et al.*,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

REPLY BRIEF FOR PETITIONER

Respondents Highway Inn, Inc. ("HII") and J. Kadowaki, Inc. ("JKI") raised two new issues in their joint Brief in Opposition to Frost-Tsuji Architects' ("Frost-Tsuji") Petition for Writ of Certiorari ("Petition") filed on February 23, 2018 ("HII/JKI Opposition"). Neither issue is pertinent to whether the Petition itself should or should not be granted. Instead, both highlight key problems with the decisions made by the District Court and the Ninth Circuit Court of Appeals, along with the disparity between the various Federal Circuits. Specifically, the HII/JKI Opposition shows that the core principle in reviewing a motion for summary judgment was *not* followed and that the Ninth Circuit is *not* following this Court's principles for reviewing and awarding fees in copyright infringement cases.

ARGUMENT

I. THE LOWER COURTS FAILED TO APPLY THE APPROPRIATE STANDARD FOR REVIEWING CROSS MOTIONS FOR SUMMARY JUDGMENT

The HII/JKI Opposition asserts as pertinent to the decision to grant Frost-Tsuji's Petition the principle that state law controls in the interpretation of contract law. That principle is well established but is irrelevant here. *See*, *e.g.*, *Volt Information Sciences Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468,

474, 109 S.Ct. 1248, 103 L.Ed. 488 (1969). The pertinent principle which was not followed by the District Court is that on a motion for summary judgment all inferences must be given to the non-moving party. As the District Court noted in its own initial order regarding summary judgment standards:

> All evidence and inferences must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Serv., Inc.*, 809 F.2d at 631. Inferences may be drawn from underlying facts not in dispute, as well as from disputed facts that the judge is required to resolve in favor of the nonmoving party. Id. When "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." Id.

See Pet. App. 21-22. These standards were not applied. *See also Hevia v. Portrio Corp.*, 602 F.3d 34, 40 (1st Cir. 2010) for the appropriate review standard for simultaneous cross motions for summary judgment.

Further, the HII/JKI Opposition fails to account for the decisions in *Nelson-Salabes, Inc. v. Morningside Development, LLC*, 284 F.3d 505 (4th Cir. 2002) and *Johnson v. Jones*, 149 F.3d 494 (6th Cir. 1998) on this precise point. As in *Johnson* and *Morningside*, it is irrelevant here that the AIA contract was not executed. The unexecuted contract is compelling evidence of Frost-Tsuji's intent that its plans were not to be used

without its future involvement or its express consent. This shows that Frost-Tsuji never intended to grant any implied license as the draft "greenmarked" contract language at section 7.4 stated that "[e]xcept for the license granted in this Article 7, no other license or right shall be deemed granted or implied." This key provision was not even cited by the District Court. This failure by the District Court was not in accordance with the legal standards for reviewing a motion for summary judgment. Frost-Tsuji never indicated that HII's use of its design, layout or any form of modification to the attribution and Plans without Frost-Tsuji's continued involvement to completion or consent was permissible. Neither party nor Frost-Tsuji made any changes to the specific clause that no implied license would be granted. The application of state law is irrelevant to this analysis as the application of the summary judgment review principles dictated that Frost-Tsuji be granted this inference. Further, in copyright cases, where the Plaintiff proves valid registration, access and substantial similarity, which FTA did, and was fully acknowledged by the District Court, the burden of proof for further use, shifts to the Defendants to prove their claims.

II. THERE IS NO EVIDENCE OF MISCONDUCT BY FROST-TSUJI

The inference that Frost-Tsuji engaged in litigation misconduct is not only unsupported – a "red herring" – but it is essentially an admission that the lower courts failed to abide by this Court's directions

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