No. 18-119

IN THE

Supreme Court of the United States

GOTECH INTERNATIONAL TECHNOLOGY LIMITED; ZHUHAI GOTECH INTELLIGENT TECHNOLOGY COMPANY LIMITED,

Petitioners,

v.

NAGRAVISION SA,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONER

The brief in opposition only bolsters the case for this Court's review. Respondent does not dispute that Rule 4(k)(2)'s pleading requirements constitute an important legal question warranting this Court's resolution. Nor can respondent seriously dispute that the courts of appeals have divided over whether a plaintiff seeking to establish personal jurisdiction under the Rule must plead all of its elements, including the requirement in subsection (A) that "the defendant is not subject to jurisdiction in any state's courts." Fed. R. Civ. P. 4(k)(2)(A). Instead, respondent primarily argues that this case does not implicate the split because the Fifth Circuit actually "requir[ed] [it] to . . . plead all elements of Rule 4(k)(2)." BIO 11.

This is demonstrably incorrect. Pleading satisfaction of an overall rule—as the Fifth Circuit requires—is not the same as pleading satisfaction of its elements. Indeed, the distinction is outcome-determinative here. If, as the First and Fourth Circuit have held, a plaintiff invoking Rule 4(k)(2) is required to allege that the defendant is not subject to jurisdiction in any state's courts, then the default judgment has to be vacated. This case thus presents the ideal vehicle to resolve this decisional conflict.

A. This Case Squarely Implicates The Circuit Conflict Over The Question Presented

Respondent acknowledges that the First and Fourth Circuits require "a plaintiff to plead that all elements of Rule 4(k)(2), including Rule 4(k)(2)(A), are satisfied." BIO 11; *see also* Pet. 12-13. But respondent suggests no court of appeals has held

squarely to the contrary and—more energetically—that the Fifth Circuit did not do so here. Neither argument passes inspection.

1. The Federal Circuit in *Touchcom, Inc. v. Bereskin & Parr*, 574 F.3d 1403 (Fed. Cir. 2009), expressly rejected the First Circuit's holding in *United States v. Swiss American Bank, Ltd.*, 191 F.3d 30 (1st Cir. 1999), that plaintiffs must plead satisfaction of Rule 4(k)(2)'s "no state's courts" element, calling that requirement "undesirable." *Touchcom*, 574 F.3d at 1415. In fact, respondent openly acknowledged this conflict below. It recognized that *Touchcom* "reject[ed]" the pleading "requirement in the *Swiss American* case [as] inconsistent with the Fifth Circuit's holding in *Adams* [*v. Unione Mediterranea Di Sicurta*, 220 F.3d 659, 667 (5th Cir. 2000),]" that plaintiffs are "not required to plead personal jurisdiction in the complaint." Appellee's CA5 Br. at 25-26.

Respondent now suggests the Federal Circuit's holding in *Touchcom* may not squarely conflict with the rule in the First and Fourth Circuits because that holding was rendered in the midst of opining on the permissibility of alternative pleading. BIO 17. That suggestion is meritless. As respondent itself previously recognized, the fact that *Touchcom* found jurisdiction despite the lack of *any* allegation under Rule 4(k)(2) necessarily means that a plaintiff in the Federal Circuit need not allege that the "no state's courts" element is satisfied. *See* Appellee's CA5 Br. at 25-26.

2. The only real question, therefore, is whether the Fifth Circuit's decision here implicates the circuit split over what Rule 4(k)(2) requires. Respondent argues that it does not, because the Fifth Circuit held

that plaintiffs must "plead Rule 4(k)(2)'s applicability." BIO 11-12 (quoting Pet. App. 6a). But pleading that an *overall rule* is satisfied is not the same as pleading satisfaction of its *elements*. *See* Pet. 19-20. And the Fifth Circuit requires only the former.

a. This Court has long distinguished between generally referencing a statute or rule and a requirement to plead satisfaction of all elements. No plaintiff may assert, for example, that she stated a valid cause of action merely by citing the governing statute; "[t]he plaintiff must, of course, allege each of the[statutory] elements" of the claim. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Nor may a plaintiff simply allege that jurisdiction exists under 28 U.S.C. § 1332; a complaint "is fatally defective unless it contains a proper allegation of the amount in controversy." *Schlesinger v. Councilman*, 420 U.S. 738, 744 n.9 (1975); *see also Dart Cherokee Basin Operating Co. v. Owens*, 135 S. Ct. 547, 554 (2014). And a plaintiff does not have standing simply by declaring that Article III is satisfied; she must allege "each element" of that constitutional provision's jurisdictional test. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

b. It follows that the Fifth Circuit's holding that a plaintiff is required to "plead Rule 4(k)(2)'s applicability," Pet. App. 6a, is not the same as holding that a plaintiff must plead satisfaction of the "no state's courts" element of that rule. An element-based pleading requirement requires more than a general reference to a statute or rule; it requires expressly pleading satisfaction of the element at issue. And the Fifth Circuit plainly did not require that more specific and demanding showing here. If it had, then it would have

had to vacate the judgment below, since respondent never pleaded satisfaction of the "no state's courts" requirement. All it pleaded was that "[u]pon information and belief," the court had "personal jurisdiction over Defendants under Rule 4(k)(2)" because "[e]xercising jurisdiction over Defendants is consistent with the Constitution and laws of the United States." DE 12 ¶ 10; *see also* BIO 12.

The broader context of the court of appeals' decision confirms the limits of the Fifth Circuit's holding. The courts of appeals explained that Rule 4(k)(2) requires plaintiff to "plead" one element of the rule—namely, "the requisite contacts with the United States." Pet. App. 6a; *see also* Fed. R. Civ. P. 4(k)(2)(B). If—as respondent contends—pleading Rule 4(k)(2)'s applicability automatically means pleading satisfaction of all of its elements, the court's pinpoint explanation that a plaintiff must plead satisfaction of the "requisite contacts" element would make no sense. The only plausible reading of the court of appeals' decision is that it means exactly what it says: A plaintiff is required to plead satisfaction of Rule 4(k)(2)(B) but *not* Rule 4(k)(2)(A) because *the defendant*, not the plaintiff, bears the burden to disprove the "no state's courts" element. Pet. App. 6a-7a.

3. The 2-2 split between the First and Fourth Circuits on the one hand and the Fifth and Federal Circuits on the other is reason enough for this Court to grant certiorari. But the case for review here is even stronger because numerous district courts are divided as well—a fact respondent does not dispute. *See* Pet. 13 & nn.2-3.

Furthermore, the answer to the question presented is all but certain in four additional circuits. Pet. 15 n.4. Respondent observes (BIO 18-19) that the Seventh, Ninth, Eleventh, and D.C. Circuits have not directly answered the question—and petitioners readily concede the point (Pet. 15 n.4). But if, as these courts have held, the plaintiff does not bear the burden of proof on Rule 4(k)(2)(A), it presumably follows that the plaintiff is not required to plead it either.

In short, there is no reason to let the conflict over the question presented percolate any further. There is an intractable circuit conflict over whether a plaintiff invoking Rule 4(k)(2) must plead that the defendant is not subject to jurisdiction in any state's courts. The decision below squarely implicates, and deepens, that conflict.

B. This Case Is An Ideal Vehicle For Resolving The Question Presented

The petition demonstrated that this is a particularly suitable case for this Court's review. Pet. 18-19. Respondent presents three arguments to the contrary. Each is wrong.

1. Respondent first contends that this case is ill suited for this Court's review because it arises in the context of a motion to vacate a default judgment. BIO 19-22. "[T]hat distinction matters," *id.* at 4, respondent says, because it is unsettled which party bears the burden on a Rule 60(b)(4) motion to vacate a default judgment for lack of personal jurisdiction, and this Court will have to confront that issue to answer the question presented, *id.* at 19-22. Respondent is incorrect.

The proper allocation of burdens under Rule 60(b)(4) has no bearing on the validity of the default judgment because petitioners challenge a facial defect in respondent's complaint. It is well established that "[e]ntry of default judgment does not preclude a party from challenging the sufficiency of the complaint." *Marshall v. Baggett*, 616 F.3d 849, 852 (8th Cir. 2010); *see Ohio Cent. R. Co. v. Cent. Tr. Co.*, 133 U.S. 83, 91 (1890). Where the "pleadings fail to support the judgment rendered," a default judgment must be vacated. *Nishimatsu Constr. Co. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975); *see Ohio Cent. R. Co.*, 133 U.S. at 91; *Cragin v. Lovell*, 109 U.S. 194, 198-99 (1883); *McCallister v. Kuhn*, 96 U.S. 87, 89 (1877); *Taizhou Zhongneng Import & Export Co. v. Koutsobinas*, 509 F. App'x 54, 58 (2d Cir. 2013); *see also Recreational Props., Inc. v. Sw. Mortg. Serv. Corp.*, 804 F.2d 311, 314 (5th Cir. 1986) ("When … the motion is based on a void judgment under rule 60(b)(4), the district court has no discretion—the judgment is either void or it is not."). Thus, if the Court agrees with petitioners that plaintiffs invoking Rule 4(k)(2) are required to allege that defendants are not subject to personal jurisdiction in any state, then the default judgment would have to be vacated, for respondent never made any such allegation. Pet. 18-19.

This would be true *even if* petitioners bear the burden of proof under Rule 60(b)(4). Respondent suggests it might suffice in the First or Fourth Circuit for a plaintiff to assert in "a post-complaint brief" during Rule 60(b)(4) proceedings—apparently, such as its BIO here, since this is the first time respondent has made any such assertion—that the "no state's courts"

element is satisfied. BIO 22. But respondent is wrong. The question here is whether the complaint itself sufficiently alleged personal jurisdiction. And the First and Fourth Circuits require satisfaction of the "no state's courts" element in the complaint itself. In particular, the First Circuit's adoption in *Swiss American Bank* of a "certification" requirement is clearly an invocation of Rule 11, which applies to the plaintiff's complaint as the first filed "pleading." Fed. R. Civ. P. 11; *see also* Fed. R. Civ. P. 3. That is why the Federal Circuit understood that decision (which the Fourth Circuit has since followed) to adopt a pleading requirement. *See Touchcom*, 574 F.3d at 1415 (rejecting *Swiss American Bank* rule on the ground that it affected what plaintiffs may "plead").

If anything, the default context makes this case a particularly good vehicle because it crystalizes the issues. Whereas defective pleadings ordinarily can easily be amended, here the default judgment cannot stand if respondent were required to allege satisfaction of Rule 4(k)(2)'s "no state's courts" element. Pet. 18. Even if respondent were later allowed to replead, the Fifth Circuit's decision would have to be reversed, the judgment below vacated, and petitioners given a chance to answer the new complaint.

The adverse consequences of the Fifth Circuit's rule, moreover, are especially stark in the default judgment context. As petitioners have explained (and respondent does not deny), jurisdictional clarity is particularly important for foreign defendants contemplating whether to exercise their right not to appear in a forum that lacks any plausible basis for jurisdic-

tion. Pet. 17-18. And because Rule 4(k)(2) is a nationwide long-arm statute, the Fifth Circuit's rule invites forum shopping by plaintiffs hoping to secure multimillion dollar default judgments against foreign defendants. *Id.*

2. Respondent next contends that a California court would not, in fact, have personal jurisdiction over petitioners. BIO 22-28. The validity of the default judgment, however, turns entirely on whether respondent was required to *allege* that no state court (including California) would have personal jurisdiction. If the answer to that question is yes, the judgment would have to be vacated. This would be true even if respondent were correct that "[p]ersonal jurisdiction would *not* have been proper in California," *id.* at 4, because respondent did not allege that in its complaint.

In any event, jurisdiction likely does exist in California. As respondent explained, there were "two separate components" to the default judgment. DE 28-1 at 8; *see also* Pet. App. 14a-16a. Based on respondent's own allegations that petitioners had imported 7,274 infringing receivers exclusively to California, DE 28-3 ¶ 30, Exs. 25-31, the district court awarded $1.45 million, calculated as "7,274 receivers multiplied by the $200 minimum." DE 28-1 at 8; *see also* Pet. App. 14a-16a. Respondent now contends that petitioners' California imports were "insufficient to establish personal jurisdiction" because they were "shipped FOB China." BIO 24-25. But if that were true, Rule 4(k)(2) would have been inapplicable because there would also have been no minimum U.S. contacts. Fed. R. Civ. P. 4(k)(2)(B). These California contacts were the

sole basis for this aspect of the default judgment, and it must necessarily be true that if these imports establish minimum contacts with the United States as a whole, then they also establish minimum California contacts.

The remainder of the district court's award was based (among other things) on petitioners' alleged operation of a piracy network using six internet servers in California and a California internet service provider, DE 28-3 ¶ 12, Exs. 7, 9, 11, 12, 14, 17, as respondent concedes, BIO 23-24. Respondent nonetheless asserts, without explanation or citation, that these contacts "do[] not show that [petitioners] targeted California to a sufficient extent to warrant the exercise of personal jurisdiction," *id.* at 24 n.1, but respondent omits to mention that its evidence also showed that petitioners' alleged agent had expressly requested California servers, thus clearly targeting California. DE 40-3 at 133.

3. Respondent finally quips that if petitioners had consented to jurisdiction in California in a timely manner, the district court may never have entered the default judgment in the first place. BIO 28. But respondent never explains why (or actually argues that) the timing of respondent's concession presents an impediment to this Court's review. It does not. In any case, as respondent itself previously recognized, petitioners' post-default consent, whenever made, likely would not have been sufficient to vacate the default judgment. *See* Appellee's CA5 Br. at 28-29 (citing *Merial Ltd. v. Cipla Ltd.*, 681 F.3d 1283, 1295 (Fed. Cir. 2012) ("a defendant . . . challenging a prior de-

fault judgment may not do so by naming another forum that would not have had an independent basis for jurisdiction at the time of the original complaint").

C. The Decision Below Is Wrong

Consistent with the rest of its brief, respondent's argument on the merits characterizes the decision below as requiring plaintiffs to plead Rule 4(k)(2)(A)'s "no state's courts" element. As we have shown, that characterization is incorrect.

To the extent respondent does engage with the Fifth Circuit's actual holding that invoking Rule 4(k)(2) in general is enough to make out a valid complaint, respondent's principal argument is that it would be unduly burdensome to require the plaintiff to allege and then prove the absence of personal jurisdiction everywhere. BIO 29. But as the opposition in fact illustrates, in the mine run of cases, a plaintiff will need to assess the defendant's contacts with only one or two states. *See* Pet. 23. Here, the question if a new complaint were filed would be simply whether California would have jurisdiction.

At any rate, practical challenges confer no license to erase legal requirements. And the Fifth Circuit's rule conflicts with this Court's well-established requirements across several areas of law that, when satisfying a rule or statute is necessary to establish jurisdiction or prove a claim, it is not enough to invoke the rule or statute in a complaint. Rather, plaintiffs must plead all the elements of the rule or statute. *Supra* at 3; *see also* Pet. 19-20.

There are good reasons for imposing such a requirement. Unlike citing a law generally, requiring

the plaintiff to plead a given element forces it to certify under penalty of perjury that a particular fact is true. In statutes with alternative elements, it also provides a defendant with due notice of the nature of the claims and allegations against it. Such procedural mechanisms are core features of our adversarial system and should not be lightly discarded—particularly in the context of a rule designed to be nothing more than a "narrow" jurisdictional fix to a "gap in the enforcement of federal law." Fed. R. Civ. P. 4, Advisory Committee's Note (1993); *see* Pet. 4-5.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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