No. 18-167

In the Supreme Court of the United States

MCC (XIANGTAN) HEAVY INDUSTRIAL EQUIPMENT CO., LTD.,
Petitioner,

v.

LIEBHERR MINING & CONSTRUCTION EQUIPMENT, INC.,
D/B/A LIEBHERR MINING EQUIPMENT NEWPORT NEWS CO.,
A VIRGINIA CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Should this Court grant certiorari to consider Petitioner's newly raised due process argument concerning "conspiracy jurisdiction" where:

(1) Petitioner failed to raise the issue in the trial court and preserve it for consideration by the Supreme Court of Virginia;

(2) Petitioner has misstated the ruling of the trial court as having exercised "personal jurisdiction over a nonresident defendant based on the contacts of the defendant's alleged co-conspirators with the forum State," (Pet. at I), when the trial court found jurisdiction on numerous grounds, including Petitioner's direct contacts with Virginia, the contacts of its agents, and Petitioner's intentional and knowing direction of tortious activity into Virginia; and

(3) reversing the trial court would require the Court to ignore the trial court's legal rulings and determine on an incomplete record that the factual findings made by the trial court after a two-day evidentiary hearing were clearly erroneous.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, Respondent makes the following disclosures:

1. Liebherr Mining & Construction Equipment, Inc., d/b/a Liebherr Mining Equipment Newport News Co. ("Liebherr"), changed its name to Liebherr-America, Inc., d/b/a Liebherr Mining Equipment Newport News Co.

2. Liebherr-America, Inc. is owned by Liebherr-Werk Ehingen GmbH and Liebherr-Mining Equipment SAS, both of whom are wholly owned subsidiaries of Liebherr-International AG.

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INTRODUCTION

This case involves the premeditated theft and use of Liebherr's trade secrets by and at the direction of Petitioner MCC (Xiangtan) Heavy Industrial Equipment Co., Ltd. ("Elite") for the purpose of allowing Elite to design and build a 400-ton, ultra-class mining truck in less than a year. Although served three times, Elite intentionally failed to appear in the trial court to defend its theft. Prior to entering judgment against Elite, the trial court conducted a two-day evidentiary hearing that included (1) live testimony, (2) deposition testimony in which numerous co-defendants conceded that Elite directed them to misappropriate Liebherr's trade secrets from Liebherr's Virginia facility, (3) the submission of six binders of exhibits demonstrating that Elite directed and encouraged the theft and use of trade secrets taken from Virginia, and (4) the submission of hundreds of thousands of files relating to the theft and use of Liebherr's trade secrets.

In addition to its factual findings on liability, the trial court made specific factual findings confirming that Elite was subject to personal jurisdiction in Virginia. Although Elite disingenuously attempts to argue that the trial court based its ruling *exclusively* on conspiracy jurisdiction, the trial court exercised jurisdiction over Elite on a number of independent and non-controversial grounds, including Elite's direct contacts with Virginia and Virginia residents, its intentional decision to direct tortious conduct into Virginia, and the contacts and tortious actions of Elite's agents in Virginia. After finding jurisdiction on these primary bases, the Court held that "[b]ecause Liebherr

also proved beyond any doubt a conspiracy among the defendants… personal jurisdiction is *independently* established based on the jurisdictional contacts" of Elite's co-conspirators. (App. at 33a) (emphasis added).

Over four years after being served, Elite filed a motion to set aside the judgment. In its pleadings and oral argument in the trial court, Elite never argued that conspiracy jurisdiction was constitutionally impermissible. Rather, Elite claimed that it was a mere innocent victim of the other defendants' use of Liebherr trade secrets on its behalf, and that Liebherr had not *factually* established that Elite participated in a conspiracy. The trial court rejected Elite's factual arguments and held that the evidence of Elite's knowledge and direction of the tortious activity was "overwhelming" and "irrefutable," and that if Elite was a criminal defendant "faced with the standard of beyond a reasonable doubt, the conviction would be a foregone conclusion." *Id*. at 23a-25a.

Having utterly failed to convince the trial court of its innocence, Elite abandoned its prior arguments in its petition for appeal to the Supreme Court of Virginia. Elite instead argued that, under *Walden v. Fiore*, 571 U.S. 277 (2014), a case it did not even cite in the trial court, a defendant cannot be subject to jurisdiction even if it intentionally directed tortious conduct into that forum, as long as the defendant accomplished its tortious plan through alleged contractors and other strawmen. Elite spent only a few pages on the trial court's conspiracy basis for jurisdiction (which it appeared to recognize as but one of many grounds under which the court exercised jurisdiction), and based its entire argument on its incorrect reading of

Walden. The Supreme Court of Virginia denied Elite's petition.

The present appeal is Elite's third attempt to craft an argument to set aside the judgment. Again, Elite has abandoned all of the arguments it made in the trial court, reformulated the arguments it presented in the Supreme Court of Virginia, and now focuses solely on "the conspiracy theory of personal jurisdiction." In order to support this new formulation, Elite has intentionally misstated the trial court's holding as being based solely on conspiracy jurisdiction, and asks this Court to ignore the trial court's factual findings supporting personal jurisdiction. Essentially, Elite seeks an advisory opinion on an issue it did not raise in the trial court, based on supposed facts that directly contradict the trial court's actual factual findings.

Elite's Petition should be denied because (1) it never challenged "conspiracy jurisdiction" on Due Process grounds in the trial court; (2) the trial court based jurisdiction on numerous grounds other than (and independent of) conspiracy jurisdiction and the issue of conspiracy is not dispositive of or even central to jurisdiction in this case; (3) accepting Elite's arguments would require the Court to disregard the careful factual findings made by the trial court; and (4) based on the egregious facts received by the court, it appropriately exercised jurisdiction under *Calder v. Jones*, 465 U.S. 783 (1984) and under an agency analysis.

COUNTERSTATEMENT OF THE CASE

I. Factual Background

A. "What truck do you want to copy?"

Liebherr is a Virginia corporation that designs and manufactures mining trucks in Newport News, Virginia. In early 2010, Elite, a Chinese company with no prior experience with mining equipment, decided it would design and build the largest mining truck in the world by the end of that year. Indeed, Elite had a mandate not only to build, but to sell fifty trucks by the following year. (Trial-Exh. 64B). Typically, it takes an established manufacturer 3-5 years to design a new truck. (App. at 21a). Elite proposed to do it in a little over six months.

To meet this extraordinary schedule, Elite helped establish Detroit Heavy Truck Engineering, LLC ("DHTE"), a new entity that had no experience with mining trucks. As the evidence would later demonstrate, Elite never intended to develop mining truck technology independently, but rather engaged DHTE and others as its agents to steal existing intellectual property from Liebherr. In marketing materials about Elite's forthcoming trucks, DHTE openly admitted that it "was formed for the purpose of providing certain technology transfer to Ceri Xiangtan Heavy Industrial Equipment Co. (Elite)…" (Trial-Exh. 64B). Internal DHTE documents similarly confirmed that, rather than develop its own technology, Elite intended to enter the market by "importing, digesting, absorbing, and recreating… existing heavy truck technologies." (Trial-Exh. 61, Ying Dep. Exh. 2).

When it was formed, DHTE consisted of Mike Huang and Ted Ying, both Chinese nationals living in the United States. Neither had any mining truck experience. (Ying Dep. at 44-45; Huang Dep. at 41-42). Huang testified that, at the time Elite hired him to run its multi-million dollar mining truck project, he did not know what a mining truck was or what it looked like. (Huang Dep. at 155-56).

With no experience with mining trucks but with Elite's mandate to "absorb and digest" existing technology within six months, Huang contacted Francis Bartley and Billy Lewis, two retired Liebherr executives about Elite's plan to copy a Liebherr truck. At that time, both Bartley and Lewis (a Virginia resident) possessed thousands of Liebherr design files they had unlawfully taken from Liebherr's Virginia facility. Lewis and Bartley agreed to help Elite copy Liebherr's trucks. In fact, early in their discussions with Elite, Bartley and Lewis drafted a document titled "China Questions" that directly asked Elite "What truck do you want to copy?" (Lewis Dep. Exh. 10). Both Bartley and Lewis testified that Elite informed them that it wanted them to copy Liebherr's T282 truck. (Bartley Dep. at 51, 62, 124) ("Q: We've already discussed, Liebherr [sic] wanted the truck to be like the 282 truck; correct? A: Elite – Elite wanted it to be like that. Q: And Elite wanted to copy that truck? A: They said that."). Lewis confirmed that Elite was "fixated" on and "infatuated" with the Liebherr T282. (Lewis Dep., Vol. II, at 17, 19-20, 56-57).

B. "[W]e have files, but too large in files. If Elite can set up FTP site to exchange files. Elite agrees to do it."

Shortly after learning that Elite wanted them to copy the T282, Bartley and Lewis traveled to Elite's facility to meet with Elite executives. (Lewis Dep., Vol. I, 155-56). The trip included two full days of presentation and a third day to discuss the project. Lewis confirmed that the presentation included almost exclusively Liebherr materials, that he and Bartley were not demonstrating how to build a generic mining truck, but rather were "essentially describing to Elite how the 282 was put together," and were showing Elite they had "access to other Liebherr materials and presentations about how their trucks are put together." *Id.* at 156-84. This presentation was attended by numerous Elite representatives, including its CEO. (Bartley Dep. at 89-90).

Following the presentation of Liebherr materials to Elite, the parties reached an "agreement in principle that DHTE was going to be the company to provide this design for Elite." (Lewis Dep. at 198).

Upon returning from Elite's facility, Bartley, Lewis and Huang participated in an organizational call with He Guogang and Fukai Xiao, Elite's top two executives. During that call, the parties openly discussed transferring Liebherr materials to Elite through an FTP site because the files were too numerous to send by email. The minutes of that meeting included the following action items along with a designation of the parties tasked with completion:

> (2) "Providing the list of potential improvement we can make over 400 ton Liebherr truck (DHTE);"
>
> (5) "Providing Liebherr materials (DHTE);" and
>
> (6) "Setting up FTP site for file exchange (Elite)."

(Bartley Dep. Exh. 17).

In another version of these same minutes, Ying noted, regarding the Liebherr files sought by Elite, "we have files, but too large in files. **If Elite can set up FTP site** to exchange files. **Elite agrees to do it**." (Huang Dep. Exh. 14) (emphasis added).

During this meeting, Elite instructed Lewis and Bartley to provide schematics for the truck's hydraulic system. Elite knew that DHTE had not started design work, and that any schematics would necessarily be from Liebherr. Immediately following the call, Bartley and Lewis began transferring Liebherr trade secrets to Elite. Among other things, Bartley sent Liebherr hydraulic schematics to Lewis in Virginia. Lewis forwarded these from Virginia to Elite, exactly as Elite had requested. When Bartley was asked why he sent these Liebherr design documents to Elite, he stated that Elite "asked for it and I gave it to them." (Bartley Dep. at 134-38, Lewis Vol. II, at 22-23).

C. "I understand you may need more time to come out [sic] the whole list of welding equipment, welding wire, material selection etc. while you work full time at Liebherr."

During the organizational call, the parties also discussed recruiting. The meeting minutes make clear that "Recruiting People" was the joint responsibility of "DHTE/Elite." Indeed, on the same day, Lewis prepared a list of personnel he suggested Elite recruit, all of whom were current or former Liebherr employees. Likewise, Mike Huang emailed proposed Elite/DHTE job postings to Fukai Xiao. The postings were copied from Liebherr postings and one even described the DHTE job as involving work on *Liebherr's* truck. (Lewis Vol. I, 218-19; Lewis Vol. II, 8-9; Lewis Dep. Ex. 37).

The first person recruited by Elite and DHTE was Richard Hudson, a current Liebherr employee working/residing in Virginia. While still employed by Liebherr, Hudson participated in a conference call with Elite executives. As shown by meeting minutes from that call, Elite directed that Hudson travel to China to train its welders and provide a list of materials and tools Elite would need to build its truck. (Bartley Dep. Ex. 17).

To prepare for the visit, Elite asked DHTE to translate and send information being compiled by Hudson. For example, in a June 28, 2010 email to Hudson, Ying wrote:

> I understand you may need more time to come out [sic] the whole list of welding equipment,

> welding wire, material selection etc. while you work full time at Liebherr. I would appreciate [sic] if you can provide partial list tomorrow, so I can translate/communicate with Elite…

(Lewis Dep. Ex. 52).

After speaking with Elite concerning his trip to China, Hudson returned to Liebherr in Virginia, where he began misappropriating thousands of Liebherr documents and transferring these to thumb drives and a new computer he would use during his work for Elite. He then took these devices with him to Elite. (Hudson Dep. at 210; Trial-Exhs. 6-8).

While the Liebherr factory was empty for the July 4 holiday, Hudson took photos of nearly every piece of equipment in Liebherr's Virginia facility and every step in its trade secret manufacturing process. He invoiced DHTE/Elite for "taking photos for China trip presentation." As directed by Elite, he then organized the pictures and created a summary called "equipment list." (Trial-Exh. 7).

On July 5th, Hudson traveled to Elite while still employed by Liebherr. Hudson later admitted (and forensics proved) that, during this trip, he showed Elite pictures of Liebherr's facility so Elite could see the types of equipment and layout it would need to build a truck. (Hudson Dep. at 200, 263-264, 293-94). Hudson confirmed that Elite was well aware that he was still a Liebherr employee. *Id.* at 201. Forensic evidence also demonstrated that Hudson showed Elite hundreds, if not thousands, of other Liebherr files during this first China trip and that numerous thumb drives had been

attached to his computer (which contained thousands of misappropriated files). (Trial-Exh. 3).

At the conclusion of this trip, Elite encouraged Hudson to return to Virginia and steal more Liebherr trade secrets, and Hudson complied. After returning to Virginia, Hudson continued working for Liebherr while downloading thousands of files to take to or use for Elite. (Trial-Exhs. 14-16). The files Hudson stole included the complete design of the Liebherr T282 and a 240-ton truck Liebherr was developing. While working for/stealing from Liebherr, he invoiced DHTE/Elite for conducting "research." (Trial-Exh. 11). Hudson then resigned from Liebherr and returned for months at a time to Elite's facility where he helped Elite set up its manufacturing process, develop the tools needed to build a truck, and design and build the prototype. On one of these trips, Elite's IT personnel intentionally obtained direct access to Hudson's computer (which contained Liebherr's complete designs) and set up the computer so that all of his Liebherr files were instantly shared with Elite. (Trial-Exh. 30, Journal Entry, stating, "Elite IT on my computer to load drives; After drives installed all my files were shared.").

Understanding that having access to Liebherr materials was essential, DHTE and Elite (which meeting minutes showed had joint responsibility for recruitment) also recruited other then-current Liebherr employees, including Larry Golladay, Marc Viau, and Allen Cunningham, all of whom were Virginia residents. All of the former Liebherr employees, including all of the Virginia residents, had signed

confidentiality agreements prohibiting them from taking or using Liebherr's confidential information.

D. "Well, sometimes you try to explain it in English and then you exhaust all of your attempts and then you show them a picture."

As the trial court later found, the brazen theft and sharing of Liebherr's trade secrets directly with Elite continued throughout the project. Not only did computer forensic evidence show that various individuals, including Virginia residents, were accessing and using Liebherr trade secrets virtually every day to design Elite's truck, but emails and deposition testimony make clear that Elite knew about, encouraged, and directed the use of Liebherr trade secrets. In fact, Lewis testified that Elite requested so much Liebherr information that Liebherr information became a "generic" term, that he repeatedly provided Liebherr information directly to Elite, and that DHTE and Elite continued to use the FTP site for the purpose of exchanging Liebherr files. (Lewis Vol. II at 16-25).

Allen Cunningham, another Virginia resident, similarly testified that he sent Liebherr information directly to Elite, often because it was the easiest way to explain what was needed. (Cunningham Dep. at 206-11) ("Well, sometimes you try to explain it in English and then you exhaust all of your attempts and then you show them a picture."). Hudson testified that Cunningham provided Mr. Kong (Elite's head of manufacturing), Liebherr photos and tooling drawings. Indeed, Hudson testified that Mr. Kong would often ask directly for Liebherr engineering drawings to help build tools needed to produce Elite's Liebherr-like

design. Hudson testified that these documents often had Liebherr written on the face of the document when given to Kong. (Hudson Dep. at 202-05).

Bartley similarly conceded that Elite knew he had access to Liebherr materials, that Elite asked for and was given Liebherr materials, and that having these Liebherr materials was a tremendous advantage in designing Elite's truck. (Bartley Dep. at 126-27, 176, 223).

The defendants were in such a hurry to meet Elite's deadlines, they frequently forgot to remove references to Liebherr from the information they stole and provided to or used for Elite. (Trial-Exhs. 17-19, 24).

E. "[M]ining dump truck was developed by MCC (Xiangtan) with independent intellectual property right" (Elite Press Release)

Although a little behind schedule, the first Elite truck rolled off the production line in June 2011, less than one year after design work began. In 2013, Elite won a "Bronze Award" at the China International Industry Fair for its mining truck. According to an Elite news release, the Elite "mining dump truck was developed by MCC (Xiangtan) with independent intellectual property right" and had achieved an "internationally advanced level" of technological sophistication. *See* http://en.helite.com.cn/news/13809_for_xinchanpindongtai_text.htm).

Elite currently sells three models of mining trucks, all of which directly compete with Liebherr's trucks in the international market.

II. Proceedings Below

A. Liebherr's Complaints

On October 29, 2010, Liebherr filed its original complaint against two recently departed employees after learning they had taken trade secrets when they left Liebherr's Virginia facility. After a forensic examination of Richard Hudson's computer revealed that he also misappropriated trade secrets, Liebherr filed suit against Hudson on January 26, 2011, and the cases were consolidated. Discovery subsequently revealed that Elite had directed DHTE and the individual defendants to copy Liebherr's T282 mining truck, to "absorb and digest" Liebherr's technology, to provide "Liebherr materials" to Elite, and to effectuate a "technology transfer" to Elite, all through the theft of trade secrets from Virginia. Accordingly, on April 4, 2012, Liebherr filed a Second Amended Complaint adding Elite. Liebherr filed a Third Amended Complaint on February 5, 2013, adding other individual and corporate defendants.

All of the defendants (except Elite) appeared and defended the case. Liebherr eventually settled with the other defendants and then moved for default against Elite.

After entering default against Elite, the trial court conducted a two-day evidentiary hearing in December 2015 ("Damages Hearing") as required by Virginia law when a plaintiff seeks unliquidated damages on default. In the Damages Hearing, Liebherr presented testimony from six witnesses, including four senior Liebherr managers qualified by the court as expert witnesses. A computer forensic expert testified at

length about the thousands of files copied and stolen from Liebherr's Virginia facility and found on the defendants' computers, and the near daily access, transfer and use of Liebherr files. The witnesses identified and explained the trade secrets taken and offered their expert opinion on the time Elite saved by using those materials. The Liebherr witnesses confirmed that the stolen materials included everything Elite needed to design and build a mining truck in a fraction of the time it would take using lawful means.

Liebherr also offered into evidence (1) six binders of documents, (2) disks containing compilations of evidence, (3) a hard-drive containing over 250,000 files found on the defendants' computers, and (4) deposition testimony. This evidence was accumulated despite numerous incidents of spoliation and without the benefit of a single document produced by Elite.

B. The Trial Court's Factual Findings

On April 12, 2016, the court issued an Order on Damages ("Damages Order") (App. at 37a-60a), specifically finding that it had personal jurisdiction over Elite on at least four different grounds. On May 2, 2016, the trial court entered an amended Judgment Order (App. at 28a-36a) that elaborated on the factual findings supporting personal jurisdiction. Among other things, the court found that jurisdiction was established because:

> (1) Elite "received the benefit of services from multiple Virginia residents, including Defendants Allen Cunningham, Billy Lewis,

Larry Golladay, Marc Viau, and Off-Highway Engineering, Inc.;"

(2) the Virginia residents provided confidential and proprietary Liebherr information to Elite during visits to Elite's facility in China *and* before and after those visits;

(3) Elite directly encouraged Richard Hudson, while he was still employed by Liebherr, "to visit the Chinese facility to provide services and to provide Liebherr trade secrets which were stolen from Virginia;"

(4) "the evidence admitted at the damages hearing clearly and unequivocally proved that [Elite] directly encouraged its agents and representatives (including Virginia residents) to steal and provide Liebherr information and used that material to help design a facility, procure tools, procure and design fixtures, and to help design and build their trucks;"

(5) Elite "encouraged Virginia residents to steal and use Liebherr information on their behalf, and knew or should have known that all Defendants were using trade secrets and other property misappropriated from Virginia;" and

(6) Elite "also aided and abetted the breach of fiduciary duties of individuals in Virginia, tortiously interfered with various non-disclosure and confidentiality contracts entered into in Virginia, and directly contracted and communicated with Virginia residents to perform design related services while in

> possession of Liebherr property and trade secrets."

Id. at 29a-32a. The trial court specifically found that these facts were "proven at the damages hearing." *Id.* at 32a.

C. Elite's Motion to Set Aside

On October 25, 2016, Elite filed a Motion to Set Aside Default and Default Judgment ("Motion"). In its Motion, Elite acknowledged that it had notice of the litigation but had exercised "its internationally recognized right not to appear or litigate." *Id.* at 1, 10. Elite's Motion did *not* challenge the "conspiracy theory of jurisdiction" on constitutional grounds. Instead, Elite asserted a variety of factual and procedural arguments, including that: (1) it was completely innocent and an unknowing victim of tortious conduct committed by other defendants; (2) Liebherr defrauded the court by attempting to establish that Elite knew about the tortious activity; (3) Elite was not properly served; and (4) Liebherr did not comply with the Foreign Sovereign Immunities Act.

The trial court permitted Elite to file a supplemental brief after reviewing the court's entire file, including materials filed under seal, and other material provided by Liebherr. After this review, Elite filed a Supplemental Reply Brief, candidly acknowledging that other defendants misappropriated Liebherr's trade secrets and used them to design Elite's truck. Nevertheless, Elite continued to assert its victim status, denied knowledge of the theft, and argued that under Virginia's test for conspiracy

jurisdiction, Liebherr had *factually* failed to prove the necessary elements.

D. The Court's Opinion and Factual Findings

In a letter opinion dated March 27, 2017, the trial court summarily rejected Elite's "mere victim" argument, and held that even if Elite was a criminal defendant "faced with the standard of beyond a reasonable doubt, the conviction would be a foregone conclusion." (App. at 23a). In explaining its factual findings, the court twice referred to Elite's knowledge of and participation in the trade secret theft as "irrefutable." *Id.* at 19a, 25a.

The trial court found that Elite saved 3-5 years by using Liebherr's proprietary information, *id.* at 21a, and that Elite could not have designed its own truck in the time it did without using the stolen material. *Id*. at 22a. As the court explained:

> This court concludes based on the facts presented in this case no reasonable jury would have found that Elite did not know or should not have known about the utilization of Liebherr's property and would have imposed liability in the same manner and amount as this court did as a result of the damages hearing.

Id. at 23a.

The court further found that:

> [Elite] has received constitutional due process in light of what is, overwhelming evidence of [Elite's] liability in this case, and, what this

> court concludes that a jury would find to be disingenuousness at a minimum and further finding that the evidence of [Elite's] liability in this case and the participation and conspiracy to utilize the trade secrets and proprietary information of Liebherr in order to gain an economic advantage to build their own truck is irrefutable. Any denials, again as I have stated before, simply strain credulity and require a suspension of disbelief.

Id. at 25a.

In reaching its conclusion, including with respect to personal jurisdiction, the trial court repeatedly emphasized that it was not relying on mere allegations, but rather on the evidence submitted by Liebherr. *Id.* at 16a. ("As stated in the foregoing, the court determined that the complaint stated a *prima facie* case as to the exercise of jurisdiction, and that the evidence presented at the [Damages Hearing] clearly established the jurisdiction by a preponderance of the evidence."); *id.* at 19a ("Elite does not address the evidence presented at the damages hearing for many reasons not the least of which was they were not there. They have not had the benefit of hearing the witnesses from Liebherr which this court did"); *id.* at 21a ("To reiterate all of the evidence… would extend this opinion double its length as the court in this case heard two days of testimony at the damages hearing alone.").

In concluding that jurisdiction over Elite was established, the trial court specifically applied the standards set forth by this Court, including that a "foreign corporation's activities must be purposefully directed" at the forum state, and that "[r]andom,

fortuitous or attenuated 'activity or the unilateral activity of another party or third person' is insufficient." *Id.* at 17a. The court emphasized that the factual findings in its previous orders concerning personal jurisdiction "remain the factual findings of this court for purposes of this decision." *Id.* at 5a.

In its opinion, the trial court never stated that its jurisdictional findings were based only on "conspiracy jurisdiction." Instead, after referencing conspiracy jurisdiction, it then cited to general law on personal jurisdiction and to its previous orders holding that conspiracy jurisdiction was but one of many bases for jurisdiction.

E. Elite's Petition for Appeal to the Supreme Court of Virginia

In its Petition for Appeal in the Supreme Court of Virginia, Elite abandoned all of its prior arguments and claimed for the first time that, under Elite's incorrect reading of *Walden*, a defendant can never be subject to jurisdiction if it uses persons other than its direct employees to accomplish its tortious purposes in the forum. Elite asserted this position despite having never even cited *Walden* in the trial court. Recognizing that the trial court had exercised jurisdiction on numerous grounds, Elite spent the majority of its brief addressing the other bases for jurisdiction, only getting to conspiracy jurisdiction on page 28. The Supreme Court of Virginia denied Elite's Petition for Appeal and subsequently denied Elite's Petition for Rehearing.

MISSTATEMENTS OF FACT AND LAW IN ELITE'S CURRENT PETITION

Having failed to raise a Due Process argument in the trial court, and in its misleading attempt to characterize this case as being only about conspiracy jurisdiction, Elite's Petition necessarily misstates numerous facts and rulings made by the trial court, including the following:

(1) Elite states that it is a "Chinese state-owned entity," (Pet. at 2), apparently in an attempt to elevate and portray this case as involving issues of "international comity." *Id.* at 32. Elite sheepishly admits later that it is a third-tier subsidiary of the Chinese government engaged in purely commercial activity. *Id.* at 5.

(2) Elite repeatedly mischaracterizes the trial court's ruling on personal jurisdiction, claiming that the court based its findings entirely on "mere allegations" of conspiracy and injury to Liebherr in Virginia. *Id.* at 2-3, 6-7, 14. Elite further argues that, by accepting Liebherr's allegations as true, Virginia "immunize[s] a default judgment… through tenuous allegations of conspiracy." *Id.* at 29-30.

As explained above, the trial court exercised personal jurisdiction on numerous grounds, all supported by actual evidence submitted by Liebherr, including evidence demonstrating Elite's direct involvement and contacts with Virginia residents and its direction that these residents steal Liebherr's trade secrets from Virginia, and that the defendants stealing from Virginia were "agents" of Elite. (App. 29a-32a). Indeed, the trial court's orders make clear that it did

not find jurisdiction based solely on allegations of conspiracy, but rather on factual findings, and after listing the other bases for jurisdiction it stated that "because Liebherr *also* proved beyond any doubt a conspiracy among the defendants… jurisdiction was *independently* established based on the jurisdictional contacts of the other defendants, who are either residents of Virginia or clearly subject to its jurisdiction." *Id.* at 33a.

(3) Elite claims that it had no contacts with Virginia and never directly conducted activities in Virginia, and that Liebherr did not even allege that Elite had any contacts directly with Virginia. (Pet. at 4, 11-12). The trial court's factual findings summarized above directly refute each of these claims.

(4) On pages 7-8 of its Petition, Elite purportedly summarizes the factors relied on by the trial court to support jurisdiction. Elite's summary intentionally mischaracterizes these factors, which are set forth verbatim in the Judgment Order. (App. at 29a-33a).

(5) Elite claims that it raised and preserved its Due Process argument in the Virginia state court system. As explained herein, Elite never raised this issue in the trial court and failed to preserve the issue for appeal.

REASONS FOR DENYING THE WRIT

I. Elite Did Not Challenge Conspiracy Jurisdiction on Due Process Grounds in the Trial Court and Failed To Preserve This Issue

Under the Rules of this Court and established principles of law, appellate review is not appropriate where the party appealing the decision failed to present and preserve an issue in the state court system. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("[T]he Court will not decide federal constitutional issues raised here for the first time on review of state court decisions"); *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987) ("[I]t is 'the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below.'") (quoting *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940)).

Rule 14 incorporates this principle by requiring the appealing party to identify at each level in the state system where it raised an issue being appealed and how the court(s) addressed the issue "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." U.S. Sup. Ct. R. 14(1)(g)(i).

"The result is the same when a party has attempted to raise an issue in the state court but has not done so in proper or timely fashion." *Lear, Inc. v. Adkins*, 395

U.S. 653, 681 (1969) (White, J., concurring); *See Also Radio Station WOW v. Johnston*, 326 U.S. 120, 128 (1945).

In its Petition, Elite claims that it raised its Due Process argument by (1) a passing reference to "the conspiracy theory of personal jurisdiction" not being "well recognized under Virginia law;" and (2) in a footnote in its *Supplemental* Brief that questioned whether a court can base jurisdiction on mere allegations. (Pet. at 9). In fact, Elite never raised a Due Process claim in the trial court and even affirmatively asked the court to apply what it described as the "correct test" for asserting conspiracy jurisdiction.

While Elite challenged the trial court's *factual* findings that Elite participated in the conspiracy and knew of the Virginia conduct, Elite never argued that conspiracy jurisdiction was an inherent violation of due process. On the contrary, it noted that, "[i]t may be true that once in a conspiracy, a conspirator would be liable if it knew or had reason to know that tortious acts would be committed in a forum state." (Reply Br. at 10). In the same brief, Elite argued, "[u]nder *the correct test*, Liebherr must prove that: (1) Elite knowingly and intelligently entered into a conspiracy with DHTE, not the individual defendants; (2) once in such a conspiracy, Elite knew or should have known that DHTE's employees or agents committed tortious acts….; and that (3) Elite knew or should have known those tortious acts would be committed within Virginia." *Id.* (Emphasis added). At oral argument on its Motion, Elite repeated the three-factor test, calling it "…the right test that's applicable here for

jurisdiction." (Hearing Tr. at 113). Although Elite submitted multiple briefs and appeared for oral argument in the trial court, Elite never mentioned, much less cited, this Court's decision in *Walden*, and never argued that conspiracy jurisdiction was inconsistent with due process. Instead, Elite repeatedly (and disingenuously) argued that conspiracy jurisdiction was not *factually* supportable because it was an unknowing victim of the other defendants' theft.

Elite conspicuously fails to identify where and how the trial court "passed on" the issue for the simple reason that Elite did not raise the issue and instead affirmatively asked the trial court to apply the "correct test" articulated in its briefs. When Elite argued for the first time on appeal that conspiracy jurisdiction under *any* facts violates due process, this argument came too late as the Virginia Supreme Court will not address issues raised for the first time on appeal except in extraordinary circumstances. *See* Va. S. Ct. R. 5:25; *see also Cohn v. Knowledge Connections, Inc.*, 585 S.E. 2d 578, 581 (Va. 2003) (party cannot "invite error" and then appeal on that basis). The court's orders denying Elite's Petition do not even mention conspiracy jurisdiction as the factual findings made by the trial court were sufficient to affirm the ruling on multiple, independent grounds.

II. Any Decision on Conspiracy Jurisdiction Would Not Impact the Underlying Decision Because the Trial Court Expressly and Correctly Exercised Personal Jurisdiction on Multiple Grounds Other than Conspiracy

Elite's Petition also should be denied because the trial court exercised personal jurisdiction over Elite on multiple grounds, of which conspiracy jurisdiction was but one "independent" ground. (App. at 33a). Because conspiracy jurisdiction (or even the alleged lack thereof) is not a dispositive issue, this case is not an appropriate vehicle to address the permissible scope of such jurisdiction.

III. The Court Did Not Base Jurisdiction on the Mere Contacts of Co-Conspirators

The evidence admitted in the Damages Hearing was clearly sufficient for the trial court to conclude, as it did, that Elite formed DHTE for the purpose of absorbing and transferring Liebherr's technology from Liebherr's Virginia facility; that DHTE (as Elite's agent) accomplished this purpose through tortious activity in Virginia; that Elite was jointly responsible for recruiting Virginia residents to steal Liebherr's trade secrets from Virginia; that Elite directly and repeatedly demanded that the other defendants copy Liebherr's trucks and provide Elite with Liebherr's trade secrets; that Elite received and used these trade secrets with knowledge that they came from Virginia; that Elite was so pleased with the trade secrets provided by Hudson while still employed by Liebherr that it sent him back to Virginia to steal more trade secrets; that Elite then recruited other Virginia

residents to steal trade secrets from Virginia, leave Liebherr and come use those trade secrets for Elite; and that Elite knowingly encouraged and accepted this theft in order to build a truck in record time. (*See supra* at 4-16).

After hearing that evidence, the trial court correctly concluded that it could exercise personal jurisdiction over Elite on any number of grounds and set out a detailed list of factors supporting jurisdiction, which did not depend on conspiracy jurisdiction. (App. at 29a-32a). The trial court also specifically found that each of these factors was "proven at the damages hearing" and were "more than sufficient to establish jurisdiction under [Virginia's long-arm statute] and to satisfy any constitutional due process requirements." *Id.* at 32a. In its letter opinion denying Elite's Motion, the trial court reaffirmed that "the factual findings [in its Judgment Order and Damages Order] remain the factual findings of the court for purposes of this decision." *Id.* at 5a. The trial court also expressly incorporated by reference "all facts and evidence presented up to and including the damages hearing" in support of its conclusion. *Id.* at 2a, 26a.

Throughout its Petition, Elite intentionally misrepresents that the trial court exercised personal jurisdiction over Elite solely by invoking "a broad conspiracy-based theory of personal jurisdiction." (Pet. at 2, 13-14, 17 and 19). While Elite grudgingly acknowledges that the trial court cited numerous grounds for asserting jurisdiction, Elite summarily claims that there was no factual basis for the trial court's conclusions and the trial court's decision was

"necessarily" based only on conspiracy jurisdiction under Elite's version of the "facts":

> Therefore, although the circuit court cited multiple "factors" that allegedly supported its exercise of personal jurisdiction, the court's decision ultimately, and necessarily, relied on a broad conspiracy theory of jurisdiction….

(Pet. at 13-14).

In short, Elite asks this Court to reject every factual finding made by the trial court concerning jurisdiction, ignore the trial court's actual ruling on jurisdiction, and instead accept this appeal based on Elite's own reformulation of the trial court's decision and the facts supporting that ruling.

A. Jurisdiction Was Clearly Appropriate under *Calder* and *Walden* without Reaching the Issue of Conspiracy Jurisdiction

1. The *Calder* and *Walden* Legal Framework

Elite bases much of its argument on the incorrect assertion that, under *Walden*, a defendant is not subject to jurisdiction in a state into which it intentionally directs tortious activity, no matter how heinous the conduct or clear the intent, as long as it does so through alleged independent contractors and other strawmen, and as long as its own direct employees never enter the state. Neither *Walden* nor any other case supports this broad assertion.

The defendant in *Walden* was a DEA agent who seized funds from Nevada residents while working at a *Georgia* airport. *Walden*, 571 U.S. at 279. Unlike here, the defendant in *Walden* had no connection with the forum, did not direct any tortious activity into the forum, and indeed no tort or unlawful activity was perpetrated in the forum. Nevertheless, the Ninth Circuit concluded that jurisdiction was proper simply because the plaintiffs were from Nevada, and the defendant knew his allegedly tortious conduct in Georgia would delay the return of funds to plaintiffs with connections to Nevada. *Id.* at 282. Under the specific facts of that case, this Court reached the unremarkable conclusion that when conducting a minimum contacts inquiry a court must "look[] to the defendant's contacts with the forum State itself" and not the defendant's "random, fortuitous, or attenuated contacts" with "persons affiliated with the State" or "persons who reside there." *Id.* at 285-86 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). The Court reversed the decision because the lower court had focused exclusively on the plaintiffs' connection with Nevada, instead of asking whether the defendant had aimed any tortious conduct at Nevada. *Id.*

Importantly, the Court expressly acknowledged that in some cases, "a defendant's contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or *other parties*." *Id.* The Court also noted that physical entry into the state by the defendant was *not* necessary, but that physical entry "either by the defendant in person or *through an agent … or some other means* —is certainly a relevant contact." *Id.* (Emphasis added).

In reaching its conclusion, the Court specifically reaffirmed its decision in *Calder*, noting that it "illustrates the application" of basic principles of jurisdiction and expressly held that "a nonresident's physical presence within the territorial jurisdiction of the court is not required." *Id.* at 287-92.

In *Calder*, two reporters were sued for libel in California related to a story they wrote about the plaintiff, a California resident. The reporters were Florida residents and had no business or other direct contacts with California. The story, however, focused on the plaintiff's activities in California and would cause reputational damage in California. 465 U.S. at 788-89. Despite the fact that the story was actually published by a separate entity in California (and not the reporters themselves), the Court concluded that the reporters were "primary participants in an alleged wrongdoing intentionally directed at a California resident, and jurisdiction over them is proper on that basis." *Id.* at 790.

The *Calder* line of cases, reinforced by *Walden,* has long stood for the proposition that a defendant who knowingly and intentionally directs tortious activity into a state should reasonably be expected to be haled into court there, especially when that state is the focal point of the tortious activity. This is so even when the defendant has no classic business contacts or physical presence in the state. Indeed, the *Calder* test has been repeatedly used to establish jurisdiction in trade secret and business tort cases involving similar circumstances both before and after *Walden*. *See Commissioning Agents, Inc. v. Long*, 143 F. Supp. 3d 775, 779 (S.D. Ind. 2015) (finding personal jurisdiction post-*Walden* where

plaintiff alleged that an out-of-state company "actively encouraged" or "deliberately turned a blind-eye" to its contractor's theft of plaintiff's trade secrets); *Thermal Components Co. v. Griffith*, 98 F. Supp. 2d 1224 (D. Kan. 2000) (defendant company with no direct contacts in forum state is subject to jurisdiction when it encouraged others to misappropriate trade secrets in the state); *Intermoor Inc v. Wilson*, No. 4:14-CV-01392, 2016 WL 1107083, at *5 (S.D. Tex. Mar. 22, 2016) (post-*Walden* case finding jurisdiction over Singapore company which encouraged its "consultants" to steal trade secrets from plaintiff in Texas); *Seattle Sperm Bank, LLC v. Cryobank Am., LLC,* No. C17-1487 RAJ, 2018 WL 3769803, at *2 (W.D. Wash. Aug. 9, 2018) (post-*Walden* case finding jurisdiction under *Calder* when defendants stole trade secrets from a server they knew was located in Washington, even when they were not present in Washington when the theft occurred).

2. Under The Facts Considered by the Trial Court, Jurisdiction Was Proper under *Walden* and *Calder* based on Elite's Direct Contacts with Virginia.

In order to support its newly raised appellate arguments, Elite had no choice but to misstate the trial court's factual findings supporting jurisdiction. Among other things, Elite claims that the trial court directly or implicitly found that Elite "never transacted any business in Virginia," (Pet. at 2), "has no contacts [with Virginia] supporting personal jurisdiction under any conventional theory," *id.* at 4, "never directly conducted any activities in Virginia," *id.* at 11, and "never conducted any activities in Virginia." *Id.* at 22. Elite

also claims that the trial court based jurisdiction solely on the injury incurred by Liebherr in Virginia. *Id.* at 3.

Each of these assertions directly conflicts with the express factual findings of the trial court. *See supra* at 14-19. Contrary to Elite's assertions, the trial court specifically found that Elite directly interacted and transacted business with Virginia residents, directed and encouraged Virginia residents to steal Liebherr's trade secrets from Liebherr's Virginia facility and to send the stolen material directly to Elite, and "directly encouraged its agents and representatives (including Virginia residents) to steal and provide Liebherr information and used that material to help design a facility, procure tools, procure and design fixtures, and to help design and build their trucks."

In its factual findings, orders, and opinion, the trial court made clear that the evidence irrefutably established that Elite was liable for multiple torts, that Elite intentionally directed tortious activity into Virginia by directing its agents and representatives (including multiple Virginia residents) to steal trade secrets from Virginia, and that all of the tortious conduct in Virginia was at the direction and for the benefit of Elite. These facts could not be further from the kind of "random, fortuitous, or attenuated contacts" with "persons affiliated with the State" or "persons who reside there" about which *Walden* cautioned. 571 U.S. at 286. Instead, these are exactly the kinds of contacts with a state that should cause a bad-actor to expect to be haled into that forum under *Calder*.[1]

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[1] Elite argues that Liebherr's reliance on *Calder* "only favors granting certiorari because this case offers an opportunity for the

B. Jurisdiction Is Also Appropriate Because the Court Found that Elite's Agents Committed Torts in Virginia

Recognizing that the authorized tortious activity of its agents would be imputable to Elite for jurisdictional purposes, Elite goes to great lengths to assert that none of the torts were committed by its direct employees. Elite further asserts (without citation to any of the trial court's orders or factual findings) that it lacked the power to control the other defendants, and thus cannot be liable for their actions, even if (as the trial court found) Elite directed these defendants to take the tortious actions in the first place.

Contrary to these assertions, the trial court specifically found that Elite's agents committed tortious acts in Virginia. According to the court, Elite "directly encouraged its *agents* and representatives

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Court to provide much needed guidance on the proper interpretation of a precedent that is a common source of confusion." (Pet. at 25). This too is incorrect. First, Elite never raised this issue at the trial court level, and did not cite *Calder* in its Petition to the Virginia Supreme Court. Secondly, even if confusion existed over *Calder* (and there is none), it is hard to imagine a worse case for providing clarification. Unlike in *Walden,* the focal point of the tortious activity orchestrated by Elite itself was in Virginia. Even under the narrowest interpretation of *Calder,* it clearly encompasses a case in which Elite established DHTE for the purpose of stealing trade secrets from Virginia, recruited Virginia employees to steal trade secrets from their employer in the state, told these defendants to provide Liebherr materials taken from (or to be taken from) Virginia, and then used the stolen trade secrets to digest Liebherr's Virginia-based technology to design and build the largest mining truck in the world in less than a year.

(including Virginia residents) to steal and provide Liebherr information and used that material to help design a facility, procure tools, procure and design fixtures, and to help design and build their trucks." (App at 31a) (emphasis added). This finding provides another separate and independent basis for the exercise of personal jurisdiction over Elite.

Because corporations act exclusively through their agents, their contacts with a forum necessarily are imputed through the acts of their agents. *Int'l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316-7 (1945); *see also Daimler AG v. Bauman*, 571 U.S. 117, 135 n.13 (2014) ("[A] corporation can purposefully avail itself of a forum by directing its agents or distributors to take action there."); *see also Walden*, 571 U.S. at 285 ("[P]hysical entry into the State—either by the defendant in person or through an agent… is certainly a relevant contact.").

Whether an agency relationship exists ordinarily is a question of fact. *Reistroffer v. Person*, 439 S.E.2d 376, 378 (Va. 1994); *see also Equilease Corp. v. M/V Sampson*, 756 F.2d 357, 363 (5th Cir. 1985) ("The existence of any agency relationship is a question of fact which should not be reversed on appeal unless it is clearly erroneous.").

The power of control is important in determining the existence of an agency relationship, but it is not necessary that a principal have complete control over the means and methods of the agent's relevant activities to establish an agency relationship for personal jurisdiction purposes. *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1360 (10th Cir. 1987); *see also Acordia of Va. Ins. Agency, Inc. v. Genito*

Glenn, L.P., 560 S.E.2d 246, 249–50 (Va. 2002) ("While the power of control is an important factor to consider in determining whether an agency relationship exists, . . . agency may be inferred from the conduct of the parties and from the surrounding facts and circumstances.").

Indeed, even the actions of a putative "independent contractor" can support personal jurisdiction over the principal where the actions are taken on the principal's behalf and are subject to some degree of control by the principal. *E.g., Bradbury*, 815 F.2d at 1360 ("[T]he terms 'agents' and 'independent contractor' are not necessarily mutually exclusive."); *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182, 1189 (9th Cir. 2002).

Moreover, in the context of intentional torts, the analysis is simplified by the presence of the alleged tortfeasor's manifestations of its intent: where a tortfeasor intentionally reaches into the forum state for the commission of acts essential to the tort, it has made contact with the forum state, even if it has done so through an innocent intermediary (much less one who was fully aware of the tortious intent). *See Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062, 1067 (4th Cir. 1982) (defendant's act of causing abusive process to be served in forum state sufficient to support personal jurisdiction); *Simon v. United States*, 644 F.2d 490, 499 (5th Cir. 1981), later appeal, 711 F.2d 740 (5th Cir. 1983).

In this case, the trial court made a factual finding that Elite acted through its agents in committing torts in Virginia. As described above, the trial court reviewed substantial evidence demonstrating that Elite

told the other defendants to "provide Liebherr materials." The defendants followed this instruction. Elite told the other defendants to set up a file transfer site for the purpose of transferring Liebherr information, and again they followed these instructions. Elite directed Lewis to provide Liebherr's hydraulic schematics, and Lewis did as he was told, sending this directly to Elite from Virginia. Elite instructed Hudson to breach his fiduciary duties by traveling to China to train its welders and tell it what equipment it needed to build a truck. He followed these instructions by taking pictures of Liebherr's facility, billing Elite for "taking photos for China Trip presentation" and then organizing the photos into a list of equipment needed. Elite directed Hudson to return to Virginia to steal more trade secrets, and he followed these instructions. Mr. Kong instructed Virginia residents Hudson and Cunningham to provide Liebherr drawings and pictures, and they followed these instructions. In the words of Francis Bartley when describing why he provided Liebherr design documents directly to Elite: "[Elite] asked for it and I gave it to them."

When describing why he gave Elite Liebherr documents, Lewis similarly stated, "So, as soon as the fire gets hot, then they (Elite) say, we have to have those the day after tomorrow or we're going to come unglued. Then, if we didn't have materials that weren't necessarily Elite materials, we would have provided what we had," (i.e. Liebherr materials). (Lewis Vol. II at 22).

Under these facts, the trial court was more than justified in finding that the Virginia-based defendants

were agents carrying out instructions from Elite when they stole trade secrets from Virginia, and then used those trade secrets to design Elite's truck. *See Ochoa* 287 F.3d 1189 (In determining agency "a strong indication of control is ... [the] power to give specific instructions with the expectation that they will be followed.").

Elite nevertheless asserts that it should be insulated from agency jurisdiction because the individual defendants were DHTE's direct employees. Even if Elite's assertion were valid, there is no question that DHTE was Elite's agent, DHTE itself is subject to jurisdiction in Virginia, DHTE stole trade secrets from Virginia at Elite's instruction, DHTE recruited employees to steal trade secrets from Virginia at Elite's instruction, and DHTE provided these Virginia trade secrets directly to Elite. At a minimum, DHTE's jurisdictional contacts are imputed to Elite for agency purposes. *Bradbury*, 815 F.2d at 1360.

Even if Elite falsely denies instructing its agents to enter Virginia to steal trade secrets, Elite ratified the tortious conduct when it knowingly accepted these trade secrets, requested more drawings and pictures from Hudson and Cunningham, told DHTE, Bartley and Lewis (who already shared Liebherr information) to set up an FTP site to share more materials, and knowingly allowed its truck to be designed through the use of these trade secrets. It is well established that even an initially unauthorized action can be imputed to a principal if the principal ratifies the conduct by knowingly accepting the benefits of the misconduct. Those actions are imputed to the principal for jurisdictional purposes. *See, e.g.*, *Hager v. Gibson*, 108

F.3d 35, 40 (4th Cir. 1997) (ratification by corporation of unauthorized filing of bankruptcy petition sufficient to establish subject matter jurisdiction).

Moreover, because the clear error standard applies to the trial court's factual findings, the cases Elite cited regarding agency all are inapposite: in each, the appellate court was confronted with a factual finding below that there was no agency relationship. *See,e.g.*, *Trois v. Apple Tree Auction Center, Inc.*, 882 F.3d 485, 490 (5th Cir. 2018) (affirming the district court's finding of no agency relationship, where the out of state defendant exercised no control over its agent and plaintiff had not even alleged that the putative principal directed the agent toward the forum state); *Stover v. O'Connell Associates., Inc.*, 84 F.3d 132, 135 (4th Cir. 1996) (affirming a finding of no agency relationship where there was no evidence that the out of state defendant had exercised any control over the investigation firm); *Williams v. Yamaha Motor Co.*, 851 F.3d 1015, 1025 (9th Cir. 2017) (affirming a dismissal for lack of personal jurisdiction where the plaintiffs never even pled or argued that the out of state defendant exercised any control over the alleged in-state agent). Here, the trial court found that Elite purposefully directed its agents to steal information from Liebherr's Virginia plant and found this to be a separate and independent basis for asserting personal jurisdiction.

CONCLUSION

For the foregoing reasons, Elite's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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