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

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

Liebherr's 37-page brief is most remarkable for what it *does not* say. It does not deny federal courts of appeals and state high courts are intractably split on whether due process permits exercising personal jurisdiction over a nonresident defendant based on the forum contacts of the defendant's alleged co-conspirators. Liebherr thus cannot dispute that the personal-jurisdiction analysis would have looked very different if this case had arisen from Texas or Nebraska, where (Liebherr does not dispute) State Supreme Court precedent precludes reliance on the conspiracy theory of personal jurisdiction. Pet. 15-17.

Nor does Liebherr dispute that the conspiracy theory's viability is a frequently recurring question that warrants this Court's consideration but is "particularly susceptible to evading appellate review." Brief of *Amicus Curiae* the Chamber of Commerce of the United States of America in Support of Petitioner at 14, *Fitch Ratings, Inc.* v. *First Community Bank, N.A.*, No. 15-1151 (Apr. 15, 2016), http://bit.ly/2lRMGPN. Liebherr does not even contest that the conspiracy theory of personal jurisdiction "is seriously flawed" and violates fundamental due process principles, Stuart M. Riback, Note, *The Long Arm and Multiple Defendants: The Conspiracy Theory of In Personam Jurisdiction*, 84 Colum. L. Rev. 506, 510 (1984), although Liebherr admits the theory served as a "basis" for its hometown court's exercise of personal jurisdiction in imposing *$121 million* in trebled damages on a Chinese state-owned entity, Br. in Opp. 2 (BIO).

Instead, Liebherr tries to change the subject, devoting much of its brief to a one-sided recitation of the allegations in its complaint and the evidence allegedly presented at an *ex parte* damages hearing that was *not transcribed* and was conducted before MCC appeared to challenge personal jurisdiction. MCC, of course, has a very different view of the facts, which it could have presented had Liebherr brought suit in a proper forum. The true culprit in this case is DHTE, which charged MCC millions for thousands of hours of claimed engineering design work that it guaranteed in writing would not infringe intellectual property rights, concealed that it was relying on Liebherr information, and *sold the same design to MCC's competitor*. See Pet. 6 n.7, 13. In any event, Liebherr's tendentious factual allegations are irrelevant because the trial court's undisputed reliance on a broad conspiracy theory of personal jurisdiction (Pet. App. 16a, 33a) means this case presents an opportunity to resolve the widely acknowledged "split among [lower courts] regarding the constitutionality of the conspiracy theory." *Knaus* v. *Guidry*, 906 N.E.2d 644, 660 (Ill. App. Ct. 2009).

Liebherr contends this case "is not an appropriate vehicle" (BIO 25) for addressing the conspiracy theory because, Liebherr asserts, MCC did not preserve the issue below and the trial court's exercise of personal jurisdiction *might* be justified under other theories. Liebherr is wrong. The conspiracy theory's viability was pressed *and* passed upon below. Indeed, the conspiracy theory was the *only* personal-jurisdiction rationale articulated with any clarity in the trial court's orders, which the Virginia Supreme Court

concluded contained "no reversible error." Pet. App. 1a. In any event, MCC's challenge to the conspiracy theory is a further argument supporting its consistently asserted, indisputably preserved claim that the trial court's exercise of personal jurisdiction violated due process. The possibility that the lower courts on remand *might* find alternative grounds for exercising jurisdiction over MCC provides no basis for denying review of a frequently recurring question, and regardless, Liebherr's alternative jurisdictional theories are meritless.

A. The Conspiracy Theory's Validity Is Properly Presented

Apparently recognizing that the question presented here warrants review and must be resolved in MCC's favor on the merits, Liebherr attempts to avoid the issue by arguing it was inadequately preserved below. See BIO 22-24. That is false.

1. This Court may review any issue *either* "pressed" by the parties *or* "passed upon" by the court below. *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted); accord Stephen M. Shapiro et al., *Supreme Court Practice* 203 (10th ed. 2013) (Court may review federal questions "raised *or* decided" in state court (emphasis added)); cf. *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1969) (cited at BIO 22) (not reviewing question not "raised, preserved, *or* passed upon" below (emphasis added)). Both happened here.

MCC raised the question of the conspiracy theory's viability in both the trial court and Virginia Supreme Court. Liebherr grudgingly concedes MCC challenged

the conspiracy theory in its Virginia Supreme Court petition for appeal, but downplays the extent to which the issue was litigated. See BIO 19; see also Pet. for Appeal 28-32. Liebherr fails to mention that its Virginia Supreme Court brief—in stark contrast to its brief here—vigorously defended the conspiracy theory, arguing that it "is a well-established means of asserting jurisdiction adopted by numerous courts applying Virginia law." Va. Br. in Opp. 20.

In the trial court, MCC emphasized that Liebherr's "*sole basis* for alleging personal jurisdiction" was MCC's alleged participation in a "conspiracy directed at Liebherr." Mot. to Set Aside Default J. ¶¶ 3-5 (Oct. 25, 2016) (emphasis added); accord Br. Supp. Mot. 2 (Oct. 25, 2016) (Liebherr relied "solely" on conspiracy theory). And MCC indisputably challenged Liebherr's conspiracy theory. Among other things, MCC argued that "[t]he use of a co-conspirator's acts as a basis for personal jurisdiction is not well recognized under Virginia law," and "[n]o case cited by Liebherr provides that a defendant who lacks a regular connection with Virginia can be subject to personal jurisdiction here through conspiratorial acts taking place outside the Commonwealth." Suppl. Reply Br. Supp. Mot. 2 (Jan. 26, 2017); see also Hr'g Tr. 13:10-17 (Nov. 30, 2016) ("Liebherr cites no case for the proposition that the requirements under [Va. Code Ann. § 8.01-328.1(A)(4)] can be satisfied by the acts of a conspiracy that are entirely done by, again, looking at my client, MCC, even if the allegations are true, done outside Virginia where my client, MCC, otherwise has no regular conduct with Virginia apart

from the alleged tort.").[1] Liebherr cites no finding by the lower courts that MCC failed to properly assert a challenge to the conspiracy theory of personal jurisdiction in accordance with Virginia's procedural rules. This Court may thus review the question presented. See *Michigan* v. *Long*, 463 U.S. 1032, 1044 (1983) ("[W]e have jurisdiction in the absence of a plain statement that the decision below rested on an adequate and independent state ground."); *Caldwell* v. *Mississippi*, 472 U.S. 320, 327-328 (1985) (applying *Long* to alleged procedural bar); see also *Orr* v. *Orr*, 440 U.S. 268, 274-275 (1979) (it is "irrelevant * * * when a Federal question was raised" where "the state court deemed the * * * question to be before it" (citations omitted)).

Even if MCC had failed to challenge the conspiracy theory's viability in the trial court—indeed, even if MCC had "expressly disavowed" such a challenge—this Court would nonetheless be "free to address" the issue because "it was addressed by the [trial] court," the only court that issued reasoned decisions below. *Lebron*, 513 U.S. at 378-379; see also *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 667 (1991) (Court may review "federal-law issue" that state court "considered

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[1] MCC's arguments about the "correct" or "right" test for the conspiracy theory of personal jurisdiction (BIO 23-24) were made "[a]ssuming *arguendo* that a conspiracy can satisfy the requirements for personal jurisdiction"—an assumption MCC separately contested in the above-quoted passages. Suppl. Reply Br. Supp. Mot. 2; see also Hr'g Tr. 13:18-22 ("*[E]ven if their participation in the alleged conspiracy could suffice as a matter of law*, there's no evidence of my client, MCC's, knowing participation in the conspiracy." (emphasis added)).

and decided," even if parties did not raise issue). Liebherr *concedes* the conspiracy theory served as a "basis for jurisdiction" in the trial court. BIO 2. In its amended judgment order, the trial court concluded that it had personal jurisdiction over MCC "based on the jurisdictional contacts" of MCC's alleged co-conspirators. Pet. App. 33a. And in denying MCC's motion to vacate the default judgment, the trial court again relied on "the conspiracy theory of jurisdiction," which the court expressly concluded did "not offend[]" "[d]ue process." *Id.* at 16a.

2. The extent to which MCC challenged the conspiracy theory below is also irrelevant because the challenge is merely a further argument supporting its basic due process claim that the trial court lacked personal jurisdiction. Contrary to Liebherr's suggestion that MCC "failed to raise a Due Process argument in the trial court," BIO 20, MCC asserted beginning on page 1 of the brief supporting its motion to vacate the default judgment that "[i]t is a well-settled principle of constitutional law that a court has jurisdiction only over a corporation that has purposefully established minimum contacts in the forum state." Br. Supp. Mot. 1 (internal quotation marks omitted). "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

B. Liebherr's Alternative Jurisdictional Theories Do Not Militate Against Granting Review

1. Liebherr also argues this case is a poor vehicle for addressing the question presented because, although the trial court undeniably invoked the conspiracy theory of personal jurisdiction as a "basis" for its judgment (BIO 2), alternative jurisdictional theories purportedly can be teased out of the court's amended judgment order. See *id.* at 25-37. But the conspiracy theory is the *only* legal basis for asserting personal jurisdiction articulated with *any* clarity in that order, which—according to the trial court—"specifically delineat[ed] the basis" for the court's exercise of personal jurisdiction. Pet. App. 5a. Tellingly, the only precedents the order cited all invoke the conspiracy theory. See *id.* at 33a. Aside from invoking the conspiracy theory, the judgment order merely lists a hodgepodge of "factors" supposedly supporting the exercise of personal jurisdiction, *id.* at 30a-33a, without any discussion of weight given to the various factors or any analysis of how they satisfy the traditional, "defendant-focused" minimum-contacts test, *Walden* v. *Fiore*, 571 U.S. 277, 284 (2014). Contrary to Liebherr's suggestion, BIO 1, 3, 25, this nebulous listing of supposed jurisdictional factors was not "independent" of the court's reliance on the conspiracy theory: One of the "factors" the court cited was that MCC allegedly "conspired with * * * other Defendants" who allegedly "took numerous actions in furtherance of the conspiracy in Virginia." Pet. App. 32a.

Further confirming that the trial court considered "the issue of conspiracy" to be "dispositive of" and "central to jurisdiction in this case," BIO 3, the court's personal-jurisdiction analysis in its opinion denying MCC's motion to vacate the default judgment focused almost exclusively on the conspiracy theory. Pet. App. 16a-18a. Although the trial court's opinion also briefly "cited to general law on personal jurisdiction," BIO 19, it never explained how exercising jurisdiction over MCC was justifiable under any other theory, see Pet. App. 17a.

Because the conspiracy theory was the only legal rationale the trial court specifically invoked in exercising jurisdiction over MCC, Liebherr's argument amounts to little more than the contention that the Virginia courts might, after further analysis on remand from this Court, find other legally supportable grounds for exercising jurisdiction over MCC. But the possibility the lower courts might ultimately reach the same result on alternative grounds is no reason to deny review of the question presented. This Court routinely reviews cases where it is uncertain if the petitioner would prevail once an erroneous legal standard is rejected. See, *e.g.*, *Rosemond* v. *United States*, 572 U.S. 65, 83 (2014); *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201-202 (2012). Such uncertainty in no way undercuts the benefit of resolving a split among lower courts, nor renders an opinion from this Court merely "advisory." BIO 3.

2. In any event, Liebherr's alternative jurisdictional theories are meritless. Although Liebherr tortures language by claiming MCC had "direct contacts with Virginia," BIO 1, it is clear what

Liebherr really means is that MCC arguably had *indirect* contacts with Virginia through its contractual relationship with DHTE, which employed some Virginia residents. See BIO 4-12. Liebherr does not contest that MCC *itself* has never had any offices or employees in Virginia and has never contracted with any Virginia resident or taken any other action in Virginia. See Pet. 11-12.

Grasping for a non-conspiracy-based theory to impute the forum contacts of DHTE personnel to MCC, Liebherr contends those contacts are imputable under an agency theory. BIO 32-37. But the only trial-court finding Liebherr manages to muster to support its agency argument is patently insufficient. The court's judgment order merely asserted, without elaboration, that MCC "directly encouraged its agents *and representatives* (including Virginia residents) to steal and provide Liebherr information." Pet. App. 31a (emphasis added); see also BIO 32-33. That passing statement does not identify which persons were agents, as opposed to non-agent "representatives"; does not explain the legal standard the court employed in finding agency, much less whether that standard comports with case law holding that forum contacts are imputable only when the purported principal can *control* (not merely "encourage[]") the purported agent's "means and method" of performance,[2] *Stover* v. *O'Connell Assocs.,*

[2] The standard for determining whether a purported agent's conduct is imputable to a purported principal for purposes of personal jurisdiction is a question of law, not fact. See, *e.g.*, *Daimler AG* v. *Bauman*, 571 U.S. 117, 134-136 (2014) (criticizing Ninth Circuit's agency test for imputing subsidiary's forum

Inc., 84 F.3d 132, 135 (4th Cir. 1996); and makes no finding that the supposed "agents" took actions against Liebherr *in Virginia*. And it is telling that the finding Liebherr cites uses the word "encouraged." Principals do not "encourage" agents; they issue orders to them. Confirming that the trial court did not understand its exercise of personal jurisdiction to be grounded on an agency theory, the letter opinion denying MCC's motion to vacate the default judgment invokes only the conspiracy theory of personal jurisdiction, not agency. See Pet. App. 16a.

Finally, Liebherr's contention that personal jurisdiction existed because MCC allegedly "direct[ed] tortious activity" into Virginia (BIO 29) simply recasts the argument *Walden* rejected—i.e., that a nonresident defendant "creates sufficient minimum contacts with a forum when he [] intentionally targets [] a known resident of the forum [] for imposition of an injury [] to be suffered by the plaintiff while she is residing in the forum state." *Walden*, 571 U.S. at 289 n.8 (citation omitted). Although Liebherr relies heavily on *Calder* v. *Jones*, 465 U.S. 783 (1984), it ignores MCC's (and *Walden*'s) explanation that

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contacts to parent). Contra BIO 33. To the extent Liebherr disagrees with MCC's articulation of the standard for agency-based imputation, see BIO 33-37, that only counsels in favor of granting review to resolve the conspiracy-theory issue presented here, and then remanding to provide the lower courts an opportunity to squarely address any agency question. Cf. Petition for a Writ of Certiorari at 19-23, *Exxon Mobil Corp.* v. *Healey*, No. 18-311 (Sept. 10, 2018) (requesting Court to resolve "confusion" regarding agency standard for personal jurisdiction). Indeed, because they involve similar issues, this Court may wish to hold MCC's case for consideration with *Exxon Mobil*.

Calder turned on the unique "nature of the libel tort" alleged there. Pet. 24 (quoting *Walden*, 571 U.S. at 287). The *Calder* defendants used information from California sources about the plaintiff's activities in California to write a defamatory article widely circulated in California that they knew would likely affect the California public's impression of the plaintiff's character. See *id.*

Here, by contrast, the trial court's exercise of personal jurisdiction ultimately relied on little more than its impression that "injury has occurred * * * to a resident corporation in * * * Virginia." Pet. App. 25a. As *Walden* explains, "mere injury to a forum resident" is insufficient to establish personal jurisdiction. 571 U.S. at 290. Consistent with *Walden*, numerous courts have held that the alleged receipt of trade secrets outside the forum state does not give rise to personal jurisdiction there, even if the trade secrets came from a former employee of the forum-state company.[3] See, *e.g.*, *ESAB Grp., Inc.* v.

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[3] The district court decisions in "trade secret and business tort cases" that Liebherr cites (BIO 29-30) are distinguishable, and only highlight that lower courts would benefit from greater guidance from this Court on personal-jurisdiction issues. For example, in *Commissioning Agents, Inc.* v. *Long*, 143 F. Supp. 3d 775 (S.D. Ind. 2015), the defendant company advertised the trade-secret misappropriator as its "Principal" and "Owner Leader." *Id.* at 782, 793. Here, by contrast, DHTE—not MCC—employed the alleged misappropriators. The *Commissioning Agents* plaintiff also alleged the defendant entered into contracts in the forum, *id.* at 783; MCC has done no business in Virginia. Despite all this, the district court in *Commissioning Agents* said the personal-jurisdiction issue was a "close call," noting that courts "have divided" in their personal-jurisdiction analysis in

Centricut, Inc., 126 F.3d 617, 621, 625-626 (4th Cir. 1997); *Cayenne Med., Inc.* v. *MedShape, Inc.*, No. 14-cv-451, 2015 WL 5363199, at *5-6 (D. Ariz. Sept. 15, 2015).

CONCLUSION

The petition should be granted. The Court should also consider summary reversal given Liebherr's failure to defend the merits of the trial court's reliance on the conspiracy theory of personal jurisdiction.

Respectfully submitted.

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intentional-tort cases. *Id.* at 790-791; see also *Seattle Sperm Bank, LLC* v. *Cryobank Am., LLC*, No. C17-1487, 2018 WL 3769803, at *1 (W.D. Wash. Aug. 9, 2018) (trade-secret misappropriators founded defendant company); *Intermoor Inc.* v. *Wilson*, No. 14-cv-1392, 2016 WL 1107083, at *4-5 (S.D. Tex. Mar. 22, 2016) (defendants' executive director met with trade-secret misappropriator in forum). Liebherr's reliance on *Thermal Components Co.* v. *Griffith*, 98 F. Supp. 2d 1224 (D. Kan. 2000), is misplaced not only because the defendant company there appears to have directly "affiliated" itself with the trade-secret misappropriators, *id.* at 1226-1227, but also because that district has since acknowledged that *Walden* "may require a different analysis" than *Thermal Components* undertook, *AgJunction LLC* v. *Agrian Inc.*, No. 14-cv-2069, 2014 WL 3361728, at *8 (D. Kan. July 9, 2014).

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SEPTEMBER 2018