No. _____

In The
Supreme Court of the United States

KYKO GLOBAL INC. and KYKO GLOBAL GMBH,

Petitioners,

v.

OMKAR BHONGIR,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners' Complaint was dismissed for lack of personal jurisdiction under *Walden v. Fiore*, 571 U.S. 277 (2014). Respondent was a California-based director of a corporation registered to do business in Pennsylvania. Respondent electronically contacted his fellow corporate directors in Pennsylvania to create fraudulent accounts receivable in Pennsylvania to induce lenders, such as Petitioners, to lend money to the corporation. As a result, Petitioners suffered the loss of millions of dollars. Relying upon *Walden*, the lower courts both opined that Respondent's electronic communications from California to his fellow corporate directors in Pennsylvania were insufficient to establish personal jurisdiction over Respondent notwithstanding that Pennsylvania statute 42 Pa. C.S.A. § 5322(a)(7)(iv) expressly permits the assertion of personal jurisdiction over corporate directors for causes of action arising from their directorships.

Petitioners' Complaint was also dismissed for lack of personal jurisdiction on a legal doctrine—the "Effects Test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984)—which Respondent failed to raise in his Motion to Dismiss and without the district court providing Petitioners an opportunity to address the Effects Test prior to dismissal of their Complaint.

The questions before this Court are as follows:

(1) Whether *Walden v. Fiore*, 571 U.S. 277 (2014) nullifies Pennsylvania statute 42 Pa. C.S.A. § 5322(a)(7)(iv)—and similar statutes and

QUESTIONS PRESENTED—Continued

rules from other jurisdictions—which asserts personal jurisdiction over corporate directors regarding a cause of action related to the person's directorship?

(2) Whether a defendant must legally support his Fed. R. Civ. P. 12(b)(2) motion by identifying the specific legal basis that allegedly demonstrates lack of personal jurisdiction before the burden shifts to a plaintiff to produce jurisdictional evidence in response to a Fed. R. Civ. P. 12(b)(2) motion.

LIST OF PARTIES TO THE PROCEEDING

Kyko Global Inc., Kyko Global GmbH, and Omkar Bhongir were parties in the district court and appellate court proceedings.

CORPORATE DISCLOSURE STATEMENT

Indus Limited is the parent company of Kyko Global Inc. Kyko Global Inc. is the parent company of Kyko Global GmbH. No publicly held company owns 10% or more of any of these entities' stock.

RELATED FEDERAL AND STATE PROCEEDINGS

To ensure that the statute of limitations period would not run in the event the district court's dismissal based on lack of personal jurisdiction was affirmed on appeal, Petitioners filed a motion pursuant to 28 U.S.C. § 1631 to transfer the underlying proceeding from the U.S. District Court for the Western District of Pennsylvania case no. 2:17-cv-00212-YK to the U.S. District Court for the Northern District of California. After the Third Circuit Court of Appeals affirmed the dismissal, Petitioners requested the Pennsylvania District Court to stay its decision regarding the transfer motion until after this Court completed its review of this Petition for Writ of Certiorari. Petitioners' stay request was denied, and the transfer motion was granted. Accordingly, the underlying proceeding is

RELATED FEDERAL AND STATE PROCEEDINGS—Continued

currently pending in the U.S. District Court for the Northern District of California, case no. 20-cv-04136-MMC.

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The Third Circuit Court of Appeals' opinion is reported at 2020 WL 1545858. The U.S. District Court for the Western District of Pennsylvania's opinion is reported at 2019 WL 1493400.

STATEMENT OF JURISDICTION

On March 19, 2020, this Court entered an order that permits a party to file a petition for a writ of certiorari within 150 days from entry of the lower court judgment or order denying a petition for rehearing (ORDER LIST: 589 U.S.).

The Third Circuit Court of Appeals entered its judgment on April 1, 2020, and entered its order denying Petitioners' Petition for Rehearing on April 24, 2020. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment and Fourteenth Amendment of the U.S. Constitution.

Pennsylvania statute 42 Pa. C.S.A. § 5322(a)(7)(iv).

The text of these materials is set forth in the Appendix pursuant to Supreme Court Rule 14.1(f).

STATEMENT OF THE CASE

1. Petitioners' Complaint was dismissed pursuant to Fed. R. Civ. P. 12(b)(2) under a legal doctrine Respondent failed to raise in support of his motion—the Effects Test set forth in *Calder v. Jones*, 465 U.S. 783 (1984)—and without the District Court providing Petitioners notice and opportunity to be heard prior to entry of the dismissal order.

Petitioners provide accounts receivable loan factoring services. Non-party Prithvi Information Solutions Limited ("PISL" or "Prithvi") is an Indian corporation that is registered to do business in Pittsburgh, Pennsylvania.[1] Respondent is a California citizen and was formerly a Director of PISL and a member of its Audit Committee and Remuneration Committee.

In 2011, Petitioners entered into a loan factoring agreement with PISL. To induce Petitioners to enter into the loan factoring agreement, PISL supplied Petitioners with accounts receivable. After conducting their due diligence regarding the receivables, Petitioners entered into the loan factoring agreement. However, they failed to receive the required payments.

Petitioners subsequently discovered that PISL's Directors and Executives created fraudulent accounts receivable to create non-existing customers to induce Petitioners to enter into the loan factoring agreement.

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[1] As such, it is governed under Pennsylvania law to the same extent as if it were a domestic entity. 15 Pa. C.S.A. § 402(d).

In 2013, Petitioners filed a lawsuit against PISL and others[2] in the U.S. District Court for the Western District of Washington, Case No. 2:13-cv-1034—MJP, that asserted, among other things, violation of the Racketeer Influenced Corrupt Organization Act with respect to the bogus accounts receivable and Kyko's failure to receive payment under the loan factoring agreement.

To try to conceal the fraud, Prithvi's executives destroyed evidence, refused to abide by court orders leading to an arrest warrant, invoked the 5th Amendment right against self-incrimination, fled to India to hide from the FBI, and allowed a trial *in absentia* to occur to avoid providing the factual details regarding the fraud which resulted in a money judgment in excess of $100,000,000 to be entered against the defendants.

Due to the destruction of evidence, in March of 2015, Petitioners learned that Respondent was a member of PISL's Audit and Remuneration Committees from 2005-2009 who was involved with the bogus accounts receivable. Because PISL is registered to do business in Pittsburgh, Pennsylvania and Respondent was a Director and Committee member of PISL, Petitioners subsequently filed their Complaint against Respondent in the U.S. District Court for the Western District of Pennsylvania ("District Court") on February 14, 2017. The Complaint asserted that diversity jurisdiction exists under 28 U.S.C. § 1332, that personal jurisdiction exists pursuant to 42 Pa. C.S.A. § 5322, and

[2] Respondent was not a party to this lawsuit.

that venue is proper pursuant to 28 U.S.C. § 1391. The Complaint asserted a Fraud claim and a Negligence claim arising under Pennsylvania law.

On April 17, 2017, Respondent filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2), (3), (6) ("Initial Motion to Dismiss"). In doing so, Respondent failed to address the personal jurisdiction analysis under the "Effects Test" established in *Calder v. Jones*, 465 U.S. 783 (1984), which is applicable to intentional tort claims (here Petitioner's Fraud claim).[3] The District Court denied the Initial Motion to Dismiss without prejudice to allow Petitioners to conduct jurisdictional discovery.

After jurisdictional discovery was completed, Respondent filed another Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(2), (3), (6) on September 20, 2018 ("Second Motion to Dismiss"). Like the Initial Motion to Dismiss, Respondent again failed to address the personal jurisdiction analysis under the Effects Test. In response, Petitioners explicitly informed the District Court that they were unfairly prejudiced given Respondent's failure and were denied notice and opportunity to be heard on this issue because Petitioners

[3] A challenge to personal jurisdiction is claim-specific when a complaint asserts different forms of substantive claims. *Remick v. Manfredy*, 238 F.3d 248, 255-56 (3d Cir. 2001). Respondent only addressed the three-part "traditional" personal jurisdiction test regarding non-intentional tort claims (here Petitioners' Negligence claim) set forth in *Marten v. Godwin*, 499 F.3d 290, 296 (3d Cir. 2007).

were left to guess as to how personal jurisdiction was allegedly lacking under the Effects Test.

The District Court dismissed the case solely under Fed. R. Civ. P. 12(b)(2). In doing so, and notwithstanding Respondent's failure to address the Effects Test, the District Court nevertheless legally premised its dismissal order under the Effects Test and failed to provide Petitioners with any opportunity to be heard on this issue prior to entry of her dismissal order.

2. Petitioners' Complaint was dismissed for lack of personal jurisdiction under *Walden v. Fiore*, 571 U.S. 277 (2014) even though Pennsylvania statute 42 Pa. C.S.A. § 5322(a)(7)(iv) expressly permits the assertion of personal jurisdiction over corporate directors for causes of action arising from their directorships.

Petitioners' jurisdictional evidence and allegations established that Respondent, while being located in California, contacted his fellow in-state Pennsylvania corporate directors including, without limitation, PISL's Chairwoman—Madhavi Vuppalapati—by email and telephone to perpetrate the fraudulent loan receivables scheme.[4]

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[4] Because the District Court did not hold an evidentiary hearing, Petitioners were required only to establish a prima facie case of personal jurisdiction and have their allegations accepted as true and have factual disputes construed in their favor. *Miller Yacht Sales Inc. v. Smith*, 384 F.3d 93, 97 (3d Cir. 2004).

Petitioners also established that Respondent: (1) was aware that PISL's U.S. operations were based in Pittsburgh; (2) was involved with PISL's sales and strategy operations and was a member of PISL's Audit Committee that had oversight over PISL's accounts receivable; and (3) received financial compensation for serving as a PISL Director/Committee member.

To establish personal jurisdiction under the Effects Test, the Third Circuit Court of Appeals requires a showing that: "(1) The defendant committed an intentional tort; (2) The plaintiff felt the brunt of the harm in the forum such that the forum can be said to be the focal point of the harm suffered by the plaintiff as a result of that tort; (3) The defendant expressly aimed his tortious conduct at the forum such that the forum can be said to be the focal point of the tortious activity." *Imo Industries Inc. v. Kiekert AG*, 155 F.3d 254, 265-66 (3d Cir. 1998). After embarking on its Effects Test analysis *sua sponte* as discussed in the preceding section, the District Court found that the jurisdictional evidence and allegations satisfied elements (1) and (2),[5] but failed to satisfy element (3).

Relying upon *Walden*, the District Court found specific jurisdiction lacking and summarized its holding as follows:

[The Evidence] appear[s] only to posit that Defendant contacted Ms. Vuppalapati, who was based in

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[5] The District Court also opined that some of Petitioners' evidence "may be interpreted as implicating [Mr. Bhongir] in Prithvi's fraud generally. . . ."

Pittsburgh during the relevant times in question. . . . While Defendant's relationship with Ms. Vuppalapati may be of import as to this Court's jurisdictional analysis, it cannot, on its own, render the exercise of personal jurisdiction over Defendant proper. *See*, *e.g.*, *Walden v. Fiore*, 571 U.S. 277, 286 (2014) ("To be sure, a defendant's contacts with the forum [s]tate may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant's relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction." [citation omitted]

. . .

[T]he crux of Plaintiffs' entire argument as to their ability to satisfy the personal jurisdiction test for their fraud claim appears grounded in the notion that, by virtue of his affiliation with a company having a location in Pittsburgh and communications with individuals, such as Ms. Vuppalapati, who were based in Pittsburgh at the time, Defendant directed his tortious conduct at this forum so as to render him subject to specific jurisdiction here. Such an argument, however, is unsupported by the governing law. . . .

The Third Circuit Court of Appeals affirmed stating:

Kyko's jurisdictional evidence is limited to several calls and emails exchanged between Bhongir and another Prithvi board member who was based in Pittsburgh. The mere fact that Bhongir communicated with a board member in Pittsburgh is not, standing alone,

sufficient to show that he specifically aimed any allegedly fraudulent conduct at Pennsylvania. *Walden v. Fiore*, 571 U.S. 277, 286 (2014). . . .

In doing so, the District Court and the Third Circuit Court of Appeals ignored 42 Pa. C.S.A. § 5322(a)(7)(iv) which states in pertinent part: "A tribunal of this Commonwealth may exercise personal jurisdiction over a person . . . who acts **directly or by an agent** as to a cause of action or other matter **arising** from such person . . . [a]ccepting election or appointment or exercising powers under the authority of this Commonwealth as a . . . [d]irector or officer of a corporation." (emphasis added).

In ignoring this statutory link that created Respondent's contacts with Pennsylvania, the lower courts, relying on *Walden*, treat Madhavi Vuppalapati and other PISL executives as mere individual third-parties who cannot establish Respondent's contacts with Pennsylvania, instead of Respondent's fellow in-state Pennsylvania corporate Directors whom Respondent contacted via email and telephone to perpetrate the fraudulent loan receivables scheme in Pennsylvania, thereby giving rise to personal jurisdiction under 42 Pa. C.S.A. § 5322(a)(7)(iv).

In short, the Third Circuit Court of Appeals has effectively held that *Walden* nullifies 42 Pa. C.S.A. § 5322(a)(7)(iv) and the Pennsylvania legislature's intent to allow claims asserted against corporate directors to be adjudicated in Pennsylvania. In doing so, the Third Circuit Court of Appeals has also called into

question all other similar state statutes that permit the assertion of personal jurisdiction over corporate directors.

On April 9, 2019, Petitioners filed their Notice of Appeal to the Third Circuit Court of Appeals. On April 1, 2020, the Third Circuit Court of Appeals affirmed the District Court's dismissal based on the Effects Test, but failed to address the threshold legal issue of whether Respondent's Fed. R. Civ. P. 12(b)(2) motion was legally deficient at the outset due to Respondent's failure to address the Effects Test. Accordingly, on April 13, 2020, Petitioners filed a Petition for Panel Rehearing wherein Petitioners informed the Panel that they failed to address the issue and requested the Panel to reconsider its ruling under *Walden* with respect to 42 Pa. C.S.A. § 5322(a)(7)(iv). Without providing any further analysis or explanation, the Petition for Panel Rehearing was denied on April 24, 2020.

REASONS FOR ALLOWANCE OF THE WRIT

The Third Circuit Court of Appeals has effectively held that *Walden* nullifies Pennsylvania statute 42 Pa. C.S.A. § 5322(a)(7)(iv)—thereby calling into question all other similar state statutes—which expressly permits the assertion of personal jurisdiction over corporate directors regarding claims arising from the person's directorship. This Court should grant this Writ to clarify the role of these types of state statutes

and rules in the specific personal jurisdiction minimum contacts analysis.

The Third Circuit Court of Appeals has also failed to adhere to the principles and dictates of the Federal Rules of Civil Procedure and constitutional requirements of notice and opportunity to be heard by creating a Fed. R. Civ. P. 12(b)(2) motion practice procedure wherein the defendant, as the moving party, does not have to set forth the legal basis of his motion and the district court does not have to provide a plaintiff with notice and opportunity to be heard to address a legal doctrine absent from a defendant's motion prior to entering a dismissal order disposing of the case. This Court should grant this Writ to clarify the proper procedure for lower courts to adjudicate Fed. R. Civ. P. 12(b)(2) motions.

I. REVIEW IS WARRANTED TO DETERMINE WHETHER *WALDEN* NULLIFIES 42 Pa. C.S.A. § 5322(a)(7)(iv)—AND ALL OTHER SIMILAR STATE STATUTES AND RULES—WHICH PERMITS THE ASSERTION OF PERSONAL JURISDICTION OVER CORPORATE DIRECTORS AND TO OTHERWISE CLARIFY THE ROLE THESE STATE STATUTES AND RULES PLAY IN THE MINIMUM CONTACTS ANALYSIS.

This Court's personal jurisdiction jurisprudence has evolved from permitting the assertion of personal jurisdiction no further than the geographical bounds of a state as discussed in *Pennoyer v. Neff*, 95 U.S. 714

(1878) to the seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), where the Court held that a state may exercise personal jurisdiction over an out-of-state defendant if the defendant has "certain minimum contacts with [the state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " (citations omitted). As stated in *Daimler AG v. Bauman*, 571 U.S. 117, 128 (2014), "*International Shoe*'s momentous departure from *Pennoyer*'s rigidly territorial focus, we have noted, unleashed a rapid expansion of tribunals' ability to hear claims against out-of-state defendants when the episode-in-suit occurred in the forum or the defendant purposefully availed itself of the forum."

In *Walden*, Justice Thomas summarized the Court's holding as follows:[6]

"This case asks us to decide whether a court in Nevada may exercise personal jurisdiction over a defendant on the basis that he knew his allegedly tortious conduct in Georgia would delay the return of funds to plaintiffs with connections to Nevada. Because the defendant had no other contacts with Nevada, and because a plaintiff's contacts with the forum State cannot be 'decisive in determining whether the defendant's due process rights are violated,' *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980), we hold that the court in Nevada may not exercise personal jurisdiction under these circumstances."

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[6] 571 U.S. at 279

In finding that personal jurisdiction did not exist, the Court relied upon *International Shoe* and other Court precedent to state the following regarding the personal jurisdiction analysis: (i) "[T]he relationship must arise out of contacts that the 'defendant *himself*' creates with the forum State." *Id.* at 284 (emphasis included); (ii) The " 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.* at 285; (iii) "[A]lthough physical presence in the forum is not a prerequisite to jurisdiction . . . physical entry into the State—either by the defendant in person or through an agent, goods, mail, or some other means—is certainly a relevant contact." *Id.* at 285; (iv) "[I]t is the defendant's conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Id.* at 285; and (v) "[w]ell-established principles of personal jurisdiction are sufficient to decide this case. The proper focus of the 'minimum contacts' inquiry in intentional-tort cases is 'the relationship among the defendant, the forum, and the litigation.' *Calder*, 465 U.S., at 788, 104 S.Ct. 1482." *Id.* at 291.

Relying upon *Walden*, this Court held in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773, 1779 (2017) that "[t]he primary focus of our personal jurisdiction inquiry is the defendant's relationship to the forum State." The Court also stated that,"[i]n determining whether personal jurisdiction is present, a court must consider a variety of interests. These include 'the interests of the forum State and of

the plaintiff in proceeding with the cause in the plaintiff's forum of choice.'" *Id.* at 1780 (citations omitted).

However, neither *Walden* nor any other Supreme Court case specifically addresses the role that state statutes which assert jurisdiction over corporate directors play in the minimum contacts analysis when an out-of-state director contacts a fellow in-state director to engage in tortious conduct in the forum state.

In *R.F. Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court indirectly addressed the role of a state statute which confers personal jurisdiction over a director of a corporation. In *Shaffer*, the Court found that a Delaware statute that allowed in-state property of the nonresident defendants to be sequestered to coerce the out-of-state defendants' appearances in Delaware violated the defendants' due process rights. Relying upon the "minimum contacts" paradigm of *International Shoe*, the Court held that, because the underlying stock owned by the defendant directors in a shareholder derivative lawsuit was unrelated to the litigation, the defendant directors' stock did not permit the assertion of personal jurisdiction. Then this Court notably stated: "Appellants have simply had nothing to do with the State of Delaware. Moreover, appellants had no reason to expect to be haled before a Delaware court. **Delaware, unlike some States,[47] has not enacted a statute that treats acceptance of a**

directorship as consent to jurisdiction in the State." *Id.* at 216 (emphasis added).[7]

In *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522, 526 (4th Cir. 1987), the court interpreted *Shaffer's* bolded language above as follows: "The Court did *not* hold, however, that the acceptance and exercise of a directorship in a domestic corporation was an insufficient contact to allow jurisdiction. In fact, the implications of the Court's language suggest just the opposite." (emphasis included). The court further stated: "In noting that the defendants had no reason to expect to be sued in Delaware, the Court contrasted the Delaware statute to those in States explicitly making directors amenable to suit. 433 U.S. at 216, 97 S.Ct. at 2586. Were such a statute constitutional, as the Court implies, then it follows that the acceptance of a directorship constitutes minimum contacts in a derivative suit." *Id.* at 526-27.[8]

In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), the Court granted certiorari to address whether a California statute—which was similar to other state statutes—that subjected foreign insurance corporations to personal jurisdiction in California arising from insurance contracts the companies entered

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[7] In Note 47, the Court cites Conn. Gen. Stat. Rev. § 33-322 (1976); N.C. Gen. Stat. § 55-33 (1975); S.C. Code Ann. § 33-5-70 (1977).

[8] *Pittsburgh Terminal* cites *Stearn v. Malloy,* 89 F.R.D. 421 (E.D. Wisc. 1981) as additional constitutional support for such statutes. *Id.* at 527 n.6.

into with California residents violated the Texas-based insurance company defendant's Due Process rights when the defendant was served in Texas. Relying upon the "minimum contacts" paradigm set forth in *International Shoe*, the Court found that defendant's Due Process rights were not violated because the insurance contract was delivered in California, the premium payments were made from California, and the insured was a resident of California at the time of his death. In doing so, the Court stated: "Looking back over this long history of [personal jurisdiction] litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents . . . [W]ith this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity." *Id.* at 222-23.

In *Rosenblatt v. American Cyanamid Co.*, 86 S.Ct. 1 (1965), the defendant allegedly conspired to steal biological cultures and confidential documentation pertaining to newly developed antibiotics and, in doing so, visited New York to inspect the stolen material and paid part of the purchase price for the material in New York. The Appellant sought issuance of a stay pending appeal of a New York Court of Appeals' decision sustaining the denial of a pretrial motion to dismiss for lack of personal jurisdiction.

The issue before Justice Goldberg was whether plenary review by the Court regarding defendant's claim that a New York statute that provided personal jurisdiction over an out-of-state defendant who acts directly or through an agent to "commit[] a tortious act within the state" was unconstitutional. Justice Goldberg held that plenary review was unlikely and, accordingly, denied the application to obtain a stay. Justice Goldberg opined that *International Shoe* and *McGee* "support[] the validity of state 'long arm' statutes such as the one involved here which base in personam jurisdiction upon commission of a 'tortious act' in the forum State. Since those decisions a large number of States have enacted statutes similar to the one here. In cases under these statutes in state and federal courts, jurisdiction on the basis of a single tort has been uniformly upheld." *Id.* at 3.

This Petition does not present the case of an out-of-state director who had *no* contacts with the forum other than the director's mere agreement to serve as a director of a company located in the forum. *Cf. Rush v. Savchuk*, 444 U.S. 320, 332-33 (1980) ("Here, however, the defendant has *no* contacts with the forum, and the Due Process Clause 'does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations.'") (citation omitted) (emphasis included). Here, Respondent contacted his fellow in-state Pennsylvania corporate directors via email and telephone—knowing that they were located in Pennsylvania—to perpetrate the fraudulent

loan receivables scheme. Relying upon *Walden*, the Third Circuit Court of Appeals characterized these communications as mere contacts with individual third-parties which were insufficient to establish a jurisdictional connection to Pennsylvania.

Further, the Third Circuit Court of Appeals contradicts its own prior case law by creating an improper legal fiction between PISL's directors and PISL as a corporate entity by treating PISL's directors as detached third-parties instead of PISL's agents. Clearly, and as the Third Circuit Court of Appeals previously acknowledged, a corporation can only act through its directors and agents. *Tracinda Corp. v. Daimler Chrysler AG*, 502 F.3d 212, 225 (3d Cir. 2007) ("It is axiomatic that a corporation by structural necessity must act, if it acts at all, through its agents.") (citation omitted).

As a result of the foregoing, the Third Circuit Court of Appeals has stripped Pennsylvania of its legislative intent to allow claims against corporate directors to be adjudicated in Pennsylvania. In effect, out-of-state directors who communicate with their colleagues in Pennsylvania via email and telephone to engage in tortious conduct in Pennsylvania have now been given jurisdictional immunity under the auspices of *Walden*.

In *J. McIntyre Machinery Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011) the Court stated:

As a general rule, the sovereign's exercise of power requires some act by which the defendant "purposefully avails itself of the privilege of conducting

activities within the forum State, thus invoking the benefits and protections of its laws . . . though in some cases, as with an intentional tort, the defendant might well fall within the State's authority by reason of his attempt to obstruct its laws." (citations omitted).

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) the Court stated that "[t]his 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts." (citations omitted).

Against the backdrop of *J. McIntyre Machinery* and *Burger King*, *Shaffer*, *McGee* and *Rosenblatt* should be viewed as permitting personal jurisdiction under state statutes and rules which assert jurisdiction over corporate directors when the requisite contacts over the director would not otherwise exist in the absence of the state statute/rule. Thus, assuming *arguendo* Respondent's contacts with PISL's directors in Pennsylvania standing alone were too attenuated under the minimum contacts analysis generally set forth in *Walden*, 42 Pa. C.S.A. § 5322(a)(7)(iv) nevertheless provides the jurisdictional "link" to connect Respondent to Pennsylvania. To hold otherwise would be to render the statute meaningless and grant, as previously discussed above, out-of-state directors jurisdictional immunity in Pennsylvania.

"Federal courts ordinarily follow state law in determining the bounds of their jurisdiction over persons." *Walden*, 571 U.S. at 283 (citation omitted). Like

Pennsylvania, many states have enacted statutes and court rules in various forms that permit the assertion of personal jurisdiction over corporate directors and officers. *See* Alaska Stat. § 09.05.015(a)(8); Delaware Code Ann. Tit. 10 § 3114(a), (b); Illinois Comp. Stat. 735 § 5/2-209(a)(12); Indiana Code § 34-33-2-1; Kansas Stat. Ann. § 60-308(b)(F); Maine Rev. Stat. Ann. Tit. 14 § 704-A(2)(H); Michigan Comp. Laws Ann. § 600.705(6); Montana R. Civ. P. 4(b)(1)(F); North Carolina Gen. Stat. Ann. § 1-75.4(8); North Dakota R. Civ. P. 4(b)(2)(G); Oregon R. Civ. P. 4(G); South Carolina Code Ann. § 15-9-430; South Dakota Codified Laws § 15-7-2(6); Tennessee Code Ann. § 20-2-223(a)(7); Wisconsin Stat. § 801.05(8).

For the reasons set forth above, this Court should grant this Writ because the role of 42 Pa. C.S.A. § 5322(a)(7)(iv) and similar state statutes/rules in the personal jurisdiction analysis with respect to *Walden* should be clarified. *Cf. McGee*, 355 U.S. at 221 ("Since the case raised important questions, not only to California but to other States which have similar [personal jurisdiction] laws, we granted certiorari.").

II. REVIEW IS WARRANTED TO DETERMINE WHETHER A DEFENDANT MUST LEGALLY SUPPORT HIS FED. R. CIV. P. 12(b)(2) MOTION BEFORE THE BURDEN SHIFTS TO A PLAINTIFF TO PRODUCE JURISDICTIONAL EVIDENCE IN SUPPORT OF ITS CLAIMS.

This Court has never specifically addressed whether a defendant must legally support his Fed. R.

Civ. P. 12(b)(2) motion by identifying the specific legal basis that allegedly demonstrates lack of personal jurisdiction before the burden shifts to a plaintiff to produce jurisdictional evidence in response to a Fed. R. Civ. P. 12(b)(2) motion. Given that challenges to personal jurisdiction are a routine part of the federal litigation process, this Court should grant this Writ to affirmatively state whether a defendant's Fed. R. Civ. P. 12(b)(2) motion must be *legally* supported at the outset.

The courts of appeals have also not specifically addressed this issue. Some courts of appeals, including the Third Circuit Court of Appeals, state that a defendant must "properly" challenge personal jurisdiction without defining what constitutes a "proper" jurisdictional challenge. *See Grand Entertainment Group Ltd. v. Star Media Sales Inc.*, 988 F.2d 476, 482 (3d Cir. 1993) ("Once a **proper jurisdictional objection is raised**, the plaintiff bears the burden of proving the facts necessary to establish the minimum contacts the Constitution requires.") (emphasis added); *Carefirst of Maryland Inc. v. Carefirst Pregnancy Centers Inc.*, 334 F.3d 390, 396 (4th Cir. 2003) ("When personal jurisdiction is **properly challenged** under Rule 12(b)(2), the jurisdictional question is to be resolved by the judge, with the burden on the plaintiff ultimately to prove grounds for jurisdiction by a preponderance of the evidence.") (emphasis added).

Other courts of appeals state that a defendant must merely "contest" or "challenge" personal jurisdiction, or otherwise "raise" or "present" a jurisdictional defense.

See Negrón-Torres v. Verizon Communications Inc., 478 F.3d 19, 24 (1st Cir. 2007) ("Where a district court's personal jurisdiction is **contested**, 'plaintiff[s] ultimately bear[ ] the burden of persuading the court that jurisdiction exists.' ") (emphasis added) (citation omitted); *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1168 (6th Cir. 1988) ("Where personal jurisdiction is **challenged** in a Rule 12(b) motion, the plaintiff bears the burden of establishing that jurisdiction exists") (emphasis added); *Hyatt International Corp. v. Gerardo COCO*, 302 F.3d 707, 713 (7th Cir. 2002) ("If personal jurisdiction is **challenged** under Rule 12(b)(2), the court must decide whether any material facts are in dispute.") (emphasis added); *Allred v. Moore & Peterson P.C.,* 117 F.3d 278, 281 (5th Cir. 1997) ("When a nonresident defendant **presents** a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident.") (citation omitted) (emphasis added); *Sinatra v. National Enquirer Inc.*, 854 F.2d 1191, 1194 (9th Cir. 1988) ("When a defendant **challenges** the sufficiency of personal jurisdiction, the plaintiff bears the burden of establishing personal jurisdiction over the defendant.") (emphasis added); *Wenz v. Memery Crystal*, 55 F.3d 1503, 1505 (10th Cir. 1995) ("We note at the outset that when the court's jurisdiction is **contested**, the plaintiff has the burden of proving jurisdiction exists.") (emphasis added); *Oldfield v. Pueblo De Bahia Lora S.A.*, 558 F.3d 1210, 1217 (11th Cir. 2009) ("It goes without saying that, where the defendant **challenges** the court's exercise of jurisdiction over its person, the plaintiff bears the ultimate

burden of establishing that personal jurisdiction is present.") (emphasis added); *Estate of Esther Klieman v. Palestinian Authority*, 923 F.3d 1115, 1128 (D.C. Cir. 2019), *rev'd on other grounds*, ___ S.Ct. ___, 2020 WL 1978929 ("[O]nce defendants **raise** personal jurisdiction as a defense, '[t]he plaintiffs have the burden of establishing the court's personal jurisdiction over' defendants.") (emphasis added) (citation omitted).

Other courts of appeals merely focus on a plaintiff's burden to "respond" or to "defeat" a defendant's personal jurisdiction motion. *See Bank, Brussels, Lambert v. Fiddler, Gonzalez & Rodriguez*, 171 F.3d 779, 784 (2d Cir. 1999) ("When **responding** to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant.") (emphasis added); *Epps v. Stewart Information Services Corp*., 327 F.3d 642, 647 (8th Cir. 2003) ("To **defeat** a motion to dismiss for lack of personal jurisdiction, the nonmoving party need only make a prima facie showing of jurisdiction.") (emphasis added).[9],[10]

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[9] The U.S. Court of Appeals for the Federal Circuit generally applies the law of the applicable regional circuit. *See Trilogy Communications Inc. v. Times Fiber Communications Inc.*, 109 F.3d 739, 744 (Fed. Cir. 1997) ("When reviewing the application of the Federal Rules of Civil Procedure, this court generally applies the law of the applicable regional circuit.").

[10] These cases are illustrative of how the courts of appeals have framed the legal standard and there exists variations within the respective courts of appeals.

The determination of whether personal jurisdiction exists is a threshold legal matter. "[A] federal court generally may not rule on the merits of a case without first determining that it has jurisdiction over the category of claim in suit (subject-matter jurisdiction) and the parties (personal jurisdiction)." *Sinochem International Co. Ltd. v. Malaysia International Shipping Corp.*, 549 U.S. 422, 430-31 (2007). Further, this Court has stated with respect to personal jurisdiction, "[t]he expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights." *Insurance Corp. of Ireland Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 705 (1982). As discussed below, the Federal Rules of Civil Procedure require a motion to dismiss based on lack of personal jurisdiction to be legally supported at the outset.

Fed. R. Civ. P. 1 states in pertinent part, "[t]hese rules . . . should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding."

Fed. R. Civ. P. 7(b)(1)(B) states, "[a] request for a court order must be made by motion. The motion must: state **with particularity** the grounds for seeking the order." (emphasis added). In *Andreas v. Volkswagen of America Inc.*, 336 F.3d 789, 793 (8th Cir. 2003) the court stated: "The purpose of Rule 7's particularity requirement is to give notice of the basis for the motion to the court and the opposing party so as to **avoid prejudice**, 'providing that party with a meaningful

opportunity to respond and the court with enough information to process the motion correctly.'") (citation omitted) (emphasis added). *Accord Registration Control Systems Inc. v. Compusystems Inc.*, 922 F.2d 805, 807-08 (Fed. Cir. 1990).

Fed. R. Civ. P. 12(b)(2) states in pertinent part: "Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party **may** assert the following defenses by motion: lack of personal jurisdiction." (emphasis added). Accordingly, a defendant is permitted but not required to assert the defense of lack of personal jurisdiction by motion.

As set forth above, if a defendant chooses to contest personal jurisdiction by way of motion, the defendant is required to set forth the particular legal basis in support of the motion. Under the Third Circuit Court of Appeals' view, the Federal Rules of Civil Procedure permit a defendant to challenge personal jurisdiction by merely stating the functional equivalent of "I contest personal jurisdiction," thereby leaving it to a district court and plaintiff to figure out the legal basis of the motion and how the governing legal standard applies to the jurisdictional allegations and facts.

This is what precisely occurred in this case. With Respondent having failed to address the Effects Test, Petitioners—to preserve the issue for appeal—were forced to blindly brief the issue on their own accord ultimately leading to dismissal because the District Court disagreed with Petitioners' arguments. As such,

the Third Circuit Court of Appeals has turned the adversarial process on its head because the defendant, as the moving party, has been removed from the adversarial process leaving the plaintiff and the district court—which is to act as the umpire—to effectively engage in argument with each other to determine the governing legal standard and whether the jurisdictional allegations and facts satisfy the governing legal standard. *Cf. McNeil v. Wisconsin*, 501 U.S. 171, 181 n.2 (1991) ("What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties."); *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 357 (2006) ("In an inquisitorial system, the failure to raise a legal error can in part be attributed to the magistrate, and thus to the state itself. In our system, however, the responsibility for failing to raise an issue generally rests with the parties themselves.").

The Third Circuit Court of Appeals also permits dismissal under Fed. R. Civ. P. 12(b)(2) pursuant to a legal doctrine absent from a defendant's motion without providing the plaintiff notice and opportunity to be heard. Even though Respondent failed to raise the Effects Test, the District Court nevertheless retained discretion to conduct its own investigation of the governing law. *See Kamen v. Kemper Financial Services Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but

rather retains the independent power to identify and apply the proper construction of governing law.").[11] However, Petitioners were entitled to notice and opportunity to be heard prior to the District Court issuing its ruling based on its own analysis of the Effects Test, which Respondent failed to raise.

Generally, "[t]he right to a prior hearing [before a party's rights are to be affected] has long been recognized by this Court under the Fourteenth and Fifth Amendments." *Fuentes v. Shevin*, 407 U.S. 67, 82 (1972). Specifically, when a court considers a legal matter on its own accord or one not raised in the parties' briefs, the potentially affected party is entitled to notice and opportunity to be heard. *See United States National Bank of Oregon v. Independent Ins. Agents of America Inc.*, 508 U.S. 439, 448 (1993) (holding that appellate court did not abuse its discretion by considering legal issue parties failed to raise because appellate court provided "the parties ample opportunity to address the issue."); *Acosta v. Artuz*, 221 F.3d 117, 124 (2d Cir. 2000) (vacating judgment based on statute of limitations the court raised *sua sponte* without providing petitioners notice and opportunity to be heard); *Hughes v. Anderson*, 449 Fed. Appx. 49 (2d Cir. 2011) (finding district court erred in dismissing case on basis not raised by defendant in Fed. R. Civ. P. 12(b)(6)

[11] The Court also stated, "[w]e do not mean to suggest that a court of appeals should not treat an unasserted claim as waived or that the court has no discretion to deny a party the benefit of favorable legal authorities when the party fails to comply with reasonable local rules on the timely presentation of arguments." *Kamen*, 500 U.S. at 99.

motion without providing plaintiff notice and opportunity to be heard).[12]

In *McGinty v. New York*, 251 F.3d 84, 90 (2d Cir. 2001) the court found that the district court's *sua sponte* dismissal for lack of subject matter jurisdiction was improper because the district court failed to provide notice and opportunity to be heard. In doing so, the court stated: "Notice serves several important purposes. It gives the adversely affected party a chance to develop the record to show why dismissal is improper; it facilitates *de novo* review of legal conclusions by ensuring the presence of a fully-developed record before an appellate court . . . and, it helps the trial court avoid the risk that it may have overlooked valid answers to what it perceives as defects in plaintiff's case." Here, at a minimum, the District Court should have required Respondent to brief the Effects Test and allow Petitioners to respond before issuing its ruling based upon its own analysis of the governing law and perceived defects in the facts and allegations.

For the reasons set forth above, this Court should grant this Writ.

[12] In *Tenafly Eruv Ass'n Inc. v. The Borough of Tenafly*, 309 F.3d 144, 158 n.15 (3d Cir. 2002) the Third Circuit appears to recognize that a party is entitled to notice and opportunity to be heard regarding a legal matter a court addresses *sua sponte* but failed to afford Petitioners the same in this matter.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that this Court grant review of this matter.

Respectfully submitted,

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