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of Appeals 3rd Cir. App. I, IOP 5.1, 5.3, and 5.7.
United States Court of Appeals, Third Circuit.

KYKO GLOBAL, INC., a Canadian Corporation;
KYKO GLOBAL GMBH, a Bahamian Corporation,
Appellants
v
OMKAR BHONGIR, an Individual

No. 19-1807

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Submitted Under Third Circuit
LAR 34.1(a) March 23, 2020

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(Filed: April 1, 2020)

On Appeal from the United States District Court for the Western District of Pennsylvania, (D.C. No. 2-17-cv-00212), District Judge: Honorable Yvette Kane.

Attorneys and Law Firms

Jayson M. Macyda, Esq., Kyko Global Inc., Canton, MI, Joseph F. Rodkey, Jr., Esq., Fowkes Rodkey, Oakmont, PA, for Plaintiffs-Appellants

Laura A. Lange, Esq., Sewickley, PA for Defendant-Appellee

Before: JORDAN, RESTREPO, and GREENBERG, *Circuit Judges.*

OPINION*

JORDAN, Circuit Judge.

In this diversity action, Kyko Global Inc., a Canadian corporation, and Kyko Global GmbH, a Bahamian corporation (collectively, "Kyko"), brought fraud and negligence claims against Omkar Bhongir, a California resident who was once a member of the board of directors of an Indian company that used Kyko's services. After jurisdictional discovery, the District Court granted Bhongir's motion to dismiss for lack of personal jurisdiction, denied Kyko's motion to compel the production of documents, and ordered Kyko to pay the attorneys' fees that Bhongir incurred in defending against the motion to compel. Kyko has appealed all three orders. We will affirm.

I. BACKGROUND

Kyko, a company providing accounts receivable factoring services, alleges that Prithvi Information Solutions Ltd., an Indian corporation, fabricated information about customers and accounts receivables that fraudulently induced Kyko to enter into a loan factoring agreement with it. Kyko sued Bhongir, who was on the board of Prithvi from 2005-2009, claiming that he

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* This disposition is not an opinion of the full court and, pursuant to I.O.P. 5.7, does not constitute binding precedent.

either assisted in the creation of that false information or knew of its existence.[1]

Bhongir moved to dismiss, alleging lack of personal jurisdiction, improper venue, expiration of the statute of limitations, and failure to state a claim. Bhongir also moved to stay the matter until the District Court determined whether it could exercise personal jurisdiction over him. Kyko opposed the stay and sought jurisdictional discovery. The Court denied Bhongir's motion to dismiss, without prejudice, and granted Kyko's motion for jurisdictional discovery.

In the course of that discovery, Kyko requested, *inter alia*, "all documents that pertain to [Bhongir's] employment and/or service as a director" on Prithvi's board and copies of all the notices, agendas, and minutes of the board meetings, including recordings. (App at 231.) Bhongir produced some, but not all, of the requested documents, asserting that the requests were overly broad. In response, Kyko sought to compel the production of those documents and extend the time period for jurisdictional discovery. The District Court denied Kyko's motion to compel and ordered Bhongir to produce an itemized statement of attorneys' fees incurred in opposing the motion. Bhongir produced that

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[1] Kyko has successfully sued other individuals and Prithvi itself for fraud in the United States District Court for the Western District of Washington. *Kyko Glob. Inc. v. Prithvi Info. Sols., Ltd.*, No. 2:13-cv-1034, 2016 WL 3226347, at *18 (W.D. Wash. June 13, 2016), *modified by Kyko Glob., Inc. v. Prithvi Info. Sols., Ltd.*, No. 2:13-cv-1034, 2018 WL 4804587 (W.D. Wash. Apr. 23, 2018).

statement, and Kyko filed a brief in opposition to the grant of attorneys' fees.

Jurisdictional discovery revealed that Bhongir had visited Pennsylvania twice in his life, both times on family trips. During one of those family trips, he also stopped by Prithvi's Pittsburgh office to celebrate a colleague's birthday. As a member of Prithvi's board, Bhongir was physically present for only one board meeting, which was held in India. Otherwise, he participated in board meetings via telephone from California. Bhongir did know, however, that Prithvi's U.S. operations were based in Pittsburgh.

Given those facts, Bhongir renewed his motion to dismiss for lack of personal jurisdiction at the close of jurisdictional discovery. The District Court granted Bhongir's renewed motion, denied Kyko's motion to compel, and awarded attorneys' fees to Bhongir in the amount of $3,660.

II. DISCUSSION[2]

Kyko claims that the District Court erred in dismissing its case under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction. According to

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[2] The District Court had jurisdiction under 28 U.S.C. § 1332. We have jurisdiction under 28 U.S.C. § 1291. *See also Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008) ("Under the 'merger rule,' prior interlocutory orders . . . merge with the final judgment in a case, and the interlocutory orders (to the extent that they affect the final judgment) may be reviewed on appeal from the final order." (internal quotation marks omitted)).

Kyko, Bhongir directed his activities at Pennsylvania, home of Prithvi's U.S. operations, while on the board of Prithvi. Kyko also argues that the District Court abused its discretion when it denied the motion to compel production of documents and when it awarded Bhongir attorneys' fees incurred in defending against that motion. We address each argument in turn.

A. Personal Jurisdiction[3]

Personal jurisdiction comes in two varieties: general and specific. *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 317 (3d Cir. 2007). General personal jurisdiction requires that the defendant in question has had "continuous and systematic" contacts with the forum state. *Id.* Specific personal jurisdiction depends upon satisfying a three-part inquiry. *Id.* First, the defendant must have "purposefully directed [its] activities" at the forum state. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). Second, the litigation must "arise out of or relate to at least one of those activities." *Id.* (quoting *Helicopteros Nacionales de Colom., S.A. v. Hall*, 466 U.S. 408, 416 (1984)) (internal quotation marks omitted). Third and last, if the first two steps of the inquiry have been met, the court must consider whether the exercise of personal jurisdiction "comport[s] with fair play and substantial justice." *Id.* (quoting *Burger King*, 471 U.S. at 476)

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[3] We review a district court's dismissal for lack of personal jurisdiction *de novo*. *Danziger & De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124, 129 (3d Cir. 2020).

(alteration in original) (internal quotation marks omitted). No one contends that there could be general jurisdiction over Bhongir in Pennsylvania, so we consider only whether the District Court could properly exercise specific personal jurisdiction over him.

Kyko argues that Bhongir submitted to personal jurisdiction in the District Court by his earlier actions. In particular, Kyko says that Bhongir agreed to jurisdiction because he sought "affirmative relief" from the Court by filing motions to stay discovery and strike declarations related to jurisdictional discovery. (Opening Br. at 18-19.) But submission to personal jurisdiction based on seeking affirmative relief is implicated only when a court "considers the merits or quasi-merits of a controversy." *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 443 (3d Cir. 1999) (quoting *Wyrough & Loser, Inc. v. Pelmore Labs., Inc.*, 376 F.2d 543, 547 (3d Cir. 1967)). Bhongir's motions did not require the District Court to consider the merits of the controversy. On the contrary, his efforts were all directed at opposing jurisdiction and avoiding the merits.

Next, Kyko argues that the District Court misapplied the jurisdictional analysis required for fraud and negligence claims and that it failed to consider the jurisdictional evidence offered to demonstrate that Bhongir directed his conduct at Pennsylvania. Because fraud is an intentional tort, we examine the exercise of jurisdiction, as the District Court did, using the "effects" test provided in *Calder v. Jones.* 465 U.S. 783 (1984). Under that test, personal jurisdiction is satisfied if the defendant committed (1) an intentional tort,

(2) the forum bore "the brunt of the harm" and was "the focal point . . . of the harm suffered," and (3) the tortious conduct was "expressly aimed" at the forum state. *Id.* at 789.

The District Court concluded that Kyko met the first two elements of the effects test but failed to satisfy the third element. We agree, certainly as to the last point. 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) ("[A] defendant's contacts with the forum State 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." (citations omitted)); *see also IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 266 (3d Cir. 1998) ("[T]he *Calder* 'effects test' can only be satisfied if the plaintiff can point to contacts which demonstrate that the defendant *expressly aimed* its tortious conduct at the forum, and thereby made the forum the focal point of the tortious activity.").

Regarding its negligence claim, Kyko similarly failed to demonstrate that Bhongir purposefully directed his conduct at Pennsylvania. Bhongir's communications with a Prithvi board member located in Pennsylvania cannot alone serve as the basis to

establish Bhongir's connection to the forum state. Nor can his visits to Pennsylvania for personal reasons. In order for the District Court to assert personal jurisdiction over Bhongir, Kyko's claims must "arise out of or relate to" Bhongir's conduct associated with the forum state. *Danziger & De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124, 130 (3d Cir. 2020) (internal quotation marks omitted). There has been, however, no nexus shown between Kyko's claims of negligence and Bhongir's visits to Pennsylvania for family trips.

The facts simply do not demonstrate that Bhongir had sufficient contacts with Pennsylvania to warrant the assertion of personal jurisdiction over him in this case. We will, accordingly, affirm the District Court's decision that it did not have personal jurisdiction.

B. Discovery Motions[4]

Kyko says that the District Court abused its discretion when it denied the motion to compel document production and when it granted attorneys' fees to Bhongir in defending against that motion. Both assertions are meritless.

It is well within the District Court's discretion to set the scope of discovery. "We will not interfere with the discretion of the district court by overturning a discovery order absent a demonstration that the court's

[4] "We . . . review a district court's discovery orders for abuse of discretion, and will not disturb such orders without a showing of actual and substantial prejudice." *Cyberworld Enter. Techns., Inc. v. Napolitano*, 602 F.3d 189, 200 (3d Cir. 2010).

action made it impossible to obtain crucial evidence. . . ." *Lehman Bros. Holdings, Inc. v. Gateway Funding Diversified Mortg. Servs., L.P.*, 785 F.3d 96, 102 (3d Cir. 2015) (internal quotation marks omitted).

The District Court granted Kyko leave to conduct discovery for the limited purpose of determining personal jurisdiction. Kyko's disputed requests for document production, however, exceeded that limited scope by seeking all documents relevant to Bhongir's membership on the Prithvi board and all information pertaining to board meetings. On that basis alone, denial of a motion to compel would have been reasonable. Equally significant, Kyko does not argue that the denial of the motion to compel made it impossible to obtain crucial information to make its case for jurisdiction. Indeed, Kyko argues that, even as the record stands, it has already asserted a *prima facie* case for personal jurisdiction. Therefore, the denial of the motion to compel was not an abuse of discretion.

Similarly, the District Court's grant of attorneys' fees incurred in defending against Kyko's overly-broad document requests was not an abuse of discretion. Kyko's chief arguments are that the District Court cannot *sua sponte* order attorneys' fees and that the District Court denied Kyko any appropriate notice and opportunity to be heard. But the text of Federal Rule of Civil Procedure 37(a)(5)(B) directs that when a motion to compel is denied, the court "must, after giving an opportunity to be heard, require the movant . . . to pay the party . . . who opposed the motion its reasonable expenses incurred in opposing the motion,

including attorney's fees." The order in question did in fact permit Kyko to oppose the motion for attorneys' fees and thus be heard. The District Court did not decide the attorneys' fees issue until after briefing had been provided by both sides. Clearly, Kyko had the requisite notice and opportunity to be heard on the issue. The District Court thus operated within the boundaries set by the Federal Rules of Civil Procedure and did not abuse its discretion.

III. CONCLUSION

For the foregoing reasons, we will affirm the District Court's dismissal of this case for lack of personal jurisdiction, denial of the motion to compel, and award of attorneys' fees.

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United States District Court, W.D. Pennsylvania.

KYKO GLOBAL, INC., et al., Plaintiffs
v.
Omkar BHONGIR, Defendant

No. 2:17-cv-00212
|
Signed 04/04/2019

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MEMORANDUM

Yvette Kane, District Judge Sitting by designation.

Before the Court is Defendant Omkar Bhongir ("Defendant")'s renewed motion to dismiss (Doc. No. 74), Plaintiffs Kyko Global, Inc. and Kyko Global GmbH's complaint (Doc. No. 1),[1] pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), and 12(b)(6); Defendant's motion to strike (Doc. No. 91); Defendant's motion for attorney's fees (Doc. No. 61); and Plaintiffs'

[1] When referring to Plaintiffs Kyko Global, Inc. and Kyko Global GmbH together, the Court refers to them as "Plaintiffs."

motion to strike Defendant's renewed motion to dismiss as to an unconstitutionality argument raised therein (Doc. No. 94). For the reasons stated herein, the Court will grant Defendant's motion to dismiss and motion for attorney's fees and deny Defendant's motion to strike and Plaintiffs' motion to strike as moot.

I. BACKGROUND

Plaintiffs initiated the above-captioned action by filing a complaint against Defendant in this Court on February 14, 2017, asserting claims for fraud (Count I) and negligence (Count II), in connection with Defendant's alleged role in a fraudulent scheme perpetrated by Prithvi Information Solutions Ltd. ("Prithvi"), of whose board of directors Defendant was previously a member. (Doc. No. 1.) In sum, Plaintiffs allege that Defendant was involved in the creation of phony accounts receivable in connection with a factoring agreement while he was serving as a director of Prithvi, and that the fraud carried out by Prithvi resulted in significant monetary loss to Plaintiffs.[2] Defendant filed a motion to dismiss the complaint on April 17, 2017 pursuant to Federal Rules of Civil Procedure 12(b)(2), 12(b)(3), and 12(b)(6) (Doc. No. 12),[3] which this Court denied without

[2] This Court previously recounted the factual background of this action in its Memorandum discussing Defendant's first motion to dismiss. (Doc. No. 55.) Accordingly, the Court declines to repeat said factual discussion herein, and, rather, incorporates the factual background discussed in its prior Memorandum herein.

[3] While this motion was pending, the case was reassigned to the undersigned on September 26, 2017. (Doc. No. 46.)

prejudice in a Memorandum and Order dated April 11, 2018 (Doc. Nos. 55, 55-1). The Court considered Defendant's motion only as to his request for relief based on personal jurisdiction under Rule 12(b)(2), and after concluding that it was unable to ascertain whether it possesses personal jurisdiction over Defendant, granted Plaintiffs' request for jurisdictional discovery and ordered limited jurisdictional discovery as to the nature of Defendant's contacts with Pittsburgh, Pennsylvania, which is located in the Western District of Pennsylvania (Doc. No. 55 at 12). Specifically, the Court denied Defendant's motion to dismiss without prejudice and permitted Plaintiffs "to conduct jurisdictional discovery, limited to the issue of whether personal jurisdiction exists over Defendant in this [C]ourt[,]" to begin on April 11, 2018 and conclude on July 31, 2018. (Doc. No. 55-1.)

Following the entry of the aforementioned order permitting jurisdictional discovery as to Defendant, Plaintiffs filed a motion to compel production of documents and Defendant's attendance at a deposition under Federal Rule of Civil Procedure 37(a) and to extend the jurisdictional discovery period pursuant to Federal Rule of Civil Procedure 16(b)(4) on June 12, 2018. (Doc. No. 56.) On July 20, 2018, the Court denied Plaintiffs' motion to compel on the basis that Plaintiffs' requests were overly broad, and, in accordance with Rule 37(a)(5)(B), directed Defendant to "submit . . . an itemized statement, including attorney's fees, of the expenses incurred in opposing Plaintiffs' motion to compel." (Doc. No. 60 at 1.) Additionally, the Court

permitted an extension of the jurisdictional discovery period until August 30, 2018 (*id*. at 2), ordering that no further extensions of the jurisdictional discovery period would be granted and permitting Defendant to "file a renewed motion to dismiss Plaintiffs' complaint within twenty-one (21) days of the conclusion of the jurisdictional discovery period." (*Id*.) In accordance with the Court's previous order, Defendant filed a motion for attorney's fees on July 25, 2018 (Doc. No. 61), which is currently pending before the Court.

On August 29, 2018 – one day prior to the date on which the jurisdictional discovery period was to expire – Plaintiffs filed a motion to compel a non-party, Sybase Inc. ("Sybase"), to produce documents and attend a deposition pursuant to Federal Rule of Civil Procedure 45. (Doc. No. 67.) In their motion, Plaintiffs stated, inter alia, that: "Defendant had been employed at Sybase for approximately [twenty-five] years"; "Defendant served on [Prithvi's] Board of Directors between 2005-2009"; "Plaintiffs believe that Defendant may have provided consulting services to [Prithvi] after 2009"; and "Sybase was a client of [Prithvi] while Defendant served on [Prithvi's] Board of Directors." (*Id*. at 1-2.) Plaintiffs further stated that they have alleged "that Defendant was involved in the creation of bogus accounts receivable that [Prithvi] used to induce Plaintiffs to enter into a loan factoring agreement with [Prithvi]." (*Id*. at 2.) According to Plaintiffs, "Defendant may have used, among other things, Sybase email addresses and its telephone system to undertake activities on behalf of [Prithvi] by directing his

communications from the San Francisco, California metropolitan area to Pittsburgh, Pennsylvania where [Prithvi's] U.S. operations are headquartered" (*id*. ¶ 9), and, therefore, Plaintiffs "sent Sybase a subpoena to produce documents and have a corporate designee appear to give deposition testimony" (*id*. ¶ 12). Plaintiffs filed the motion to compel after Sybase "objected to the [s]ubpoena and did not produce any documents" and a corporate designee did not appear for purposes of said deposition. (*Id*. ¶ 13.) While that motion was pending, Defendant filed the instant renewed motion to dismiss Plaintiffs' complaint on September 20, 2018 (Doc. No. 74), along with a brief in support thereof (Doc. No. 75).

On October 2, 2018, the Court issued an Order granting in part and denying in part Plaintiffs' motion to compel production and attendance at a deposition by Sybase. (Doc. No. 78.) Specifically, the Court denied Plaintiffs' request to depose Sybase's corporate designee in Oakmont, Pennsylvania as improper under Rule 45 and granted Plaintiffs' request to depose the designee via remote means, while denying certain requests by Plaintiffs for production of documents "as overly broad for purposes of the limited jurisdictional discovery previously authorized by the Court." (*Id*. at 1.) As it relates to Plaintiffs' remaining requests for production, the Court granted those requests "only insofar as the requests are limited to the years 2005-2009 and specifically pertain to Defendant's activities as a board member of Prithvi Information Solutions Ltd." (*Id*.) Further, the Court denied Plaintiffs' request for an Order directing Sybase "to produce documents

in accordance with the search terms contained in Exhibit G" accompanying their motion to compel. (*Id*.) Lastly, the Order stated that due to the Court's disposition of the motion to compel therein, "any brief in opposition to Defendant's renewed motion to dismiss (Doc. No. 74), shall be filed within fourteen (14) days of Plaintiffs' receipt of the aforementioned discovery material from Sybase in accordance with this Order." (*Id*. at 2.)

On March 13, 2019, Plaintiffs filed their brief in opposition to Defendant's renewed motion to dismiss (Doc. No. 87), to which Defendant filed a brief in reply on March 27, 2019 (Doc. No. 93).[4] Having been fully briefed, therefore, Defendant's motion to dismiss is ripe for disposition.

II. LEGAL STANDARD

Pursuant to Federal Rule of Civil Procedure 12(b)(2), a defendant may move to dismiss a complaint

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[4] On March 27, 2019, Defendant also filed a motion to strike certain declarations (Doc. No. 91), submitted by Plaintiffs in connection with their brief in opposition to Defendant's renewed motion to dismiss (Doc. 87), along with a brief in support of the motion to strike (Doc. No. 92). Although the motion to strike is, as of this date, not fully briefed, because the disposition of the motion to strike is unnecessary to the Court's resolution of the motion to dismiss, as explained more fully infra, the Court will deny the motion to strike as moot. Similarly, while Plaintiffs' motion to strike a portion of Defendant's motion to dismiss (Doc. No. 94), which was filed on April 3, 2019, is not fully briefed, because the Court will grant Plaintiff 's motion to dismiss for lack of jurisdiction, Plaintiffs' motion to strike will be denied as moot.

for lack of personal jurisdiction. See Fed. R. Civ. Pro. 12(b)(2). Once "the defendant raises the question of personal jurisdiction, the plaintiff bears the burden to prove, by a preponderance of the evidence, facts sufficient to establish personal jurisdiction." *Carteret Sav. Bank, FA v. Shushan*, 954 F.2d 141, 146 (3d Cir. 1992). At the pleading stage, a plaintiff is required only to establish a prima facie case of personal jurisdiction over the defendant, and the court must accept the plaintiff's allegations as true and construe disputed facts in the plaintiff's favor. *See Metcalfe v. Renaissance Marine, Inc*., 566 F.3d 324, 330 (3d Cir. 2009); *Carteret Sav. Bank*, 954 F.2d at 146. Further, a court may consider the parties' affidavits and other evidence when making determinations regarding personal jurisdiction. *See Metcalfe*, 566 F.3d at 330; *Connell v. CIMC Intermodal Equip*., No. 1:16-cv-714, 2016 WL 7034407, at *1 (M.D. Pa. Dec. 2, 2016).

"The two types of jurisdiction are general jurisdiction and specific jurisdiction." *O'Connor v. Sandy Lane Hotel Co., Ltd*., 496 F.3d 312, 317 (3d Cir. 2007) (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-15 & n.9, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984)). "If the plaintiff's claim does not arise out of the defendant's contacts with the forum, the [C]ourt is said to exercise 'general jurisdiction.'" *IMO Indus., Inc. v. Kiekert AG*, 155 F.3d 254, 259 n.2 (3d Cir. 1998) (quoting *Helicopteros*, 466 U.S. at 414 & n.9, 104 S.Ct. 1868). "To establish general jurisdiction over a defendant, the contacts must be shown to be 'continuous and systematic.'" *Id*. (quoting *Helicopteros*, 466 U.S. at 416, 104

S.Ct. 1868). In contrast, a court exercises specific jurisdiction over a defendant "[w]here . . . the plaintiff's cause of action is related to or arises out of the defendant's contacts with the forum." *See id*. at 259 (citing *Helicopteros*, 466 U.S. at 408, 414 n.8, 104 S.Ct. 1868). A court's determination as to whether the exercise of specific jurisdiction is proper entails a three-part inquiry: (1) "the defendant must have 'purposefully directed [its] activities' at the forum"; (2) "the litigation must 'arise out of or relate to' at least one of those activities"; and (3) "if the prior two requirements are met, a court may consider whether the exercise of jurisdiction otherwise 'comport[s] with 'fair play and substantial justice.'" *See O'Connor*, 496 F.3d at 317 (alterations in original) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 472, 476 (1985); *Helicopteros*, 466 U.S. at 414, 104 S.Ct. 1868; *Grimes v. Vitalink Commc'ns Corp*., 17 F.3d 1553, 1559 (3d Cir. 1994)). When a plaintiff asserts multiple claims of different types, a court's personal jurisdiction analysis may be claim-specific. *See Remick v. Manfredy*, 238 F.3d 248, 255-56 (3d Cir. 2001) (remarking that while conducting a claim-specific analysis may not be required in every case, such an analysis may be appropriate, for example, due to "different considerations in analyzing jurisdiction over contract claims and over certain tort claims").

Where a plaintiff asserts an intentional tort claim and a Defendant raises the issue of personal jurisdiction, courts within this circuit apply the Calder "effects

test," which requires the plaintiff to establish the following:

> (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; [and]
>
> (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.

Id. at 258 (quoting *IMO Indus*., 155 F.3d at 265-66). This test requires "that the tortious actions of the defendant have a forum-directed purpose." *See Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 99 (3d Cir. 2004). When analyzing the existence of personal jurisdiction over a defendant for purposes of a negligence claim, however, courts employ "the traditional specific jurisdiction analysis [that] simply requires that the plaintiff's claims 'arise out of or relate to' the defendant's forum contacts." *See id*. at 99 (citing *Burger King*, 471 U.S. at 472, 105 S.Ct. 2174).

III. DISCUSSION

Because the Court concludes herein that it lacks personal jurisdiction over Defendant, it addresses Defendant's motion to dismiss only as to Federal Rule of Civil Procedure 12(b)(2) and does not examine Defendant's other asserted bases for relief regarding improper venue under Rule 12(b)(3) and Plaintiffs'

failure to state a claim upon which relief may be granted under Rule 12(b)(6). (Doc. No. 74.) In addition, because the issue of general jurisdiction over Defendant is not present in this case, the Court's examines only whether there is specific personal jurisdiction over Defendant.[5]

A. Arguments of the Parties

1. Defendant's Arguments in Favor of Dismissal

In support of his motion, Defendant argues primarily that: (1) he lacks minimum contacts necessary to establish jurisdiction in Pennsylvania; (2) the claims at issue "do not arise out of or relate to any forum-related conduct" on his part; (3) the Court's exercise of jurisdiction over him in this case "would offend 'traditional notions of fair play and substantial justice' "; and (4) the exercise of jurisdiction over him is precluded by operation of the fiduciary shield doctrine in light of Defendant's former role as a board member of Prithvi. (Doc. No. 75 at 10-15.) As to his first basis for dismissal, Defendant notes that one's relationship with a third party, alone, is not enough to render the exercise of

[5] In its Memorandum addressing Defendant's first motion to dismiss, the Court stated that "for purposes of its Rule 12(b)(2) analysis, it is not concerned with the existence of general jurisdiction, as it is clear that [Plaintiffs have] not shown, nor [do they] allege, that Defendant possesses 'continues and systematic' contacts with Pennsylvania so as to render him subject to jurisdiction in Pennsylvania generally." (Doc. No. 55 at 9) (citing *O'Connor*, 496 F.3d at 317). The Court renews this conclusion herein and, therefore, addresses only the issue of specific personal jurisdiction.

jurisdiction proper (*id*. at 10) (citing *Bristol-Meyers Squibb Co. v. Super. Ct. of Cal*., ___ U.S. ___ (2017)), and that Plaintiffs have failed to demonstrate that he, "not third parties associated with Prithvi, has contacts with the forum and that those contacts deliberately targeted the forum." (*id*. at 11). Defendant describes his relevant activities as follows: "[h]e served as an independent non-executive board member of an Indian corporation"; "[h]e resided and worked in California during his tenure as an independent non-executive board member"; "[h]e attended board meetings that took place in India via telephone from California or in person in India"; and "[h]e had no role in the operations of Prithvi and no financial interest in the company." (*Id*. at 11.) According to Defendant, such contacts do not establish that he is subject to jurisdiction in this Court, for "Plaintiffs have not identified any intentional conduct by Defendant that created contacts with the forum" in that they "appear to be relying on hypothetical telephone calls and emails to individuals who may have been residing in Pittsburgh at the time." (*Id*. at 12.)

In support of his argument that "Plaintiffs' claims do not arise out of or relate to any forum-directed conduct" on his part, Defendant asserts that "Plaintiffs' claims derive from the fraudulent conduct of Prithvi that occurred in Seattle" and "[t]he facts dictate that the fraud occurred in Seattle and was directed at Canada[,]" thus demonstrating the absence of any "link to Pittsburgh other than it was where the main [tortfeasor] formerly lived and worked, but even then she had

relocated to Seattle prior to any involvement with Plaintiffs." (*Id*. at 13.) Further, Defendant argues that "[a]ny action or inaction" on his part "as a board member or purported audit committee member would have occurred in California and would have been directed to Prithvi's corporate headquarters in India." (*Id*. at 14.) With respect to his additional argument that the exercise of jurisdiction over him by this Court would not comport with traditional notions of fair play and substantial justice, Defendant states that he "could not have reasonably anticipated that his short tenure as an independent non-executive board member of an Indian corporation, which ended in 2009, would demand that he be haled into court in Pittsburgh (where he has only been twice in his life) eight years later for an alleged fraudulent scheme committed over two years after he resigned from the position." (*Id*.)[6]

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[6] On a related note, Defendant asserts that "Plaintiffs' attempt to hold [him] liable for Prithvi's conduct over two years after he resigned from his role and several years after having fully litigated the case against Prithvi and sixteen other defendants in federal court is transparent – they simply seek anyone in the United States associated with Prithvi to write them a check." (Doc. No. 75 at 15.)

As to his argument regarding the application of the fiduciary shield doctrine, Defendant asserts that the doctrine bars the exercise of jurisdiction over him in Pennsylvania because he "had a limited role as an independent non-executive board member, de minimis contact with Pennsylvania, and a non-existent role in the alleged fraud, evidenced by Plaintiffs' prosecution over five years ago against the primary defendants before dragging [Defendant] into a Pennsylvania lawsuit." (*Id*. at 16.) As stated by Defendant in his brief, the fiduciary shield doctrine generally mandates that "individuals performing acts in a state in their corporate capacity

2. Plaintiffs' Arguments Against Dismissal

In opposition, Plaintiffs argue primarily that this Court has personal jurisdiction over Defendant for purposes of both of their claims under the governing legal standards. First, Plaintiffs state that as it pertains to their negligence claim, the exercise of jurisdiction over Defendant by this Court is proper because: (1) "Defendant executed his duties as a Board Member by purposefully directing his activities to Pittsburgh"; (2) "Plaintiffs' claims 'arise out of or relate to' Defendant's activities"; (3) and "[t]he assertion of personal jurisdiction comports with 'fair play and substantial justice.'" (Doc. No. 87 at 10-15.) As to the first point, Plaintiffs point to certain testimony of Defendant, stating that Defendant admitted that Prithvi's U.S. operations were located in Pittsburgh, and that he was aware that Madhavi Vuppalapati ("Ms. Vuppalapati"), one of the primary tortfeasors, was located in Pittsburgh while he was a board member. (*Id*. at 11.) Further, Plaintiffs refer to Defendant's testimony "that he executed his Board duties by communicating with Ms. Vuppalapati via email, and by telephone by dialing her phone number that had a '412' area code, which corresponds to Pittsburgh[,]" and state that Prithvi's "records show that [it] paid for Defendant to have a Pittsburgh cell phone number." (*Id*.) Additionally, Plaintiffs state that "Defendant testified that he

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are not subject to the personal jurisdiction of the courts of that state for those acts." (*Id*.) (citing *Nat'l Precast Crypt Co. v. DyCore of Pa., Inc*., 785 F. Supp. 1186, 1191 (W.D. Pa. 1992)).

traveled to [Prithvi's] Pittsburgh office for an office party to celebrate Ms. Vuppalapati's birthday." (*Id*.) As to communications between Ms. Vuppalapati and Defendant, Plaintiffs also assert that Defendant exchanged emails with her to arrange board meetings and inform her of his intent to resign from the board. (*Id*. at 11-12.) Plaintiffs also note that Defendant previously sent an email prior to his resignation regarding "issues" faced by Prithvi "from the audit" and that when questioned about such issues, "Defendant testified that a newspaper article had been published that stated [Prithvi's] auditors found evidence that [Prithvi] created fake customers." (*Id*. at 12.)

Additionally, Plaintiffs refer to the documents produced by Sybase to support its argument that this Court has personal jurisdiction over Defendant. Specifically, Plaintiffs cite email communications between Ms. Vuppalapati and Defendant, noting that Ms. Vuppalapati's email signature block "contains her Pittsburgh telephone number" and stating that when Defendant requested permission from Sybase to become a board member of Prithvi in June of 2005, he "acknowledged" Prithvi's office in the United States. (*Id*.) Further, Plaintiffs state that when Ms. Vuppalapati extended Defendant an offer to become a board member, she did so "using her corporate email address with a signature block that contains [her] Pittsburgh telephone number." (*Id*. at 12-13.)[7] Further, Plaintiffs

[7] On a similar note, Plaintiffs state that subsequent to becoming a board member, Defendant communicated with Ms. Vuppalapati while she "was located in Pittsburgh" and that their

make reference to an email exchange in September of 2008 between Defendant and an individual named Daarun Ghosh ("Ghosh"), who reportedly "contacted Defendant to inform him of fraud in connection with [Prithvi's] bond offering[,]" maintaining that Ghosh contacted Defendant again in October of that year in an email referring to fraud in connection with the bond offering and "suggested that Defendant resign from [the] [b]oard." (*Id*. at 13.) According to Plaintiffs, Defendant then discussed this communication with Ms. Vuppalapati, who dismissed Ghosh's comments and described Ghosh as a "disgruntled broker" previously engaged by Prithvi for purposes of the bond offering, and that Defendant expressed concern about Ghosh's allegations to Ms. Vuppalapati by stating that he agreed with her, but if he did not inquire to her regarding this allegation, he "would not be doing [his] job." (*Id*.)[8]

With regard to their argument that Plaintiffs' claims "arise out of or relate to" Defendant's activities,

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communications pertained to Prithvi's "business affairs including, without limitation, M&A activities." (Doc. No. 87 at 13.) Plaintiffs additionally state that Defendant contacted Prithvi's "personnel in Pittsburgh to conduct business, and specifically to obtain a [non-disclosure-[a]greement that lists Pittsburgh as the business address." (*Id*.)

[8] Plaintiffs also refer to a declaration from Guru Pandyar, "a former [Prithvi] employee who resided in Pittsburgh and was responsible for managing [Prithvi's] accounts receivable[,]" who stated that "between 2005-2009, Ms. Vuppalapati executed [Prithvi's] U.S. operations in Pittsburgh, not in Washington, and that she was involved with [Prithvi's] accounts receivable." (*Id*. at 14.)

Plaintiffs assert Defendant "was involved with the Bogus Accounts Receivable, was a member of [Prithvi's] audit committee, and routinely conducted his Board duties by contacting personnel in Pittsburgh." (*Id*. at 14-15.) Moreover, Plaintiffs state that Defendant has not shown that the exercise of personal jurisdiction over him by this Court as to the negligence claim contradicts traditional notions of "fair play and substantial justice" because in this regard, "Defendant simply repeats his argument that he was not involved with the Bogus Accounts Receivable and that it would be unfair to require Defendant to defend himself in Pittsburgh when he resides in California[,]" which warrants denial of his motion. (*Id*. at 15.) Ostensibly in further support of this point, Plaintiffs state that "[i]n fact, it makes little sense for Defendant to contest personal jurisdiction because, even if he is successful, he may have to re-litigate in California some of the issues already decided by this Court . . . and continue to litigate this matter at a higher hourly rate" because "San Francisco attorney hourly rates are generally higher than Pittsburgh's." (*Id*. at 15-16.)

As to Plaintiffs' fraud claim, Plaintiffs assert that the applicable legal standard for personal jurisdiction is satisfied because: (1) "Defendant committed an intentional tort"; (2) "Plaintiffs felt the brunt of the harm in Pittsburgh"; and (3) "Defendant expressly aimed his tortious conduct [toward] Pittsburgh." (*Id*. at 16-17.) In support of the first point, Plaintiffs note that their complaint alleges that Defendant committed an intentional tort – fraud – and that they "have otherwise

presented evidence" supporting this allegation. (*Id*. at 16.) As to the second argument noted supra, Plaintiffs contend that they "entered into the loan factoring agreement with [Prithvi] based in Pittsburgh . . . and sent a total of $97,249,417 to [Prithvi's] PNC Bank account located in Pittsburgh pursuant to the factoring receivable fraud[,] which resulted in $33,579,660 in total loss to Plaintiffs." (*Id*.) Because Prithvi "and others then transferred almost the entire amount received from Plaintiffs out of PNC Bank in Pittsburgh and Plaintiffs have not been able to recover same[,]" according to Plaintiffs, they "felt the brunt of the harm in Pittsburgh and Pittsburgh is the focal point of the harm suffered by Plaintiffs." (*Id*. at 16-17.) Finally, as to the third argument prong noted above, Plaintiffs refer to previous portions of their briefing to support the contention that "Defendant directed his fraudulent conduct activities toward Pittsburgh." (*Id*. at 17.)[9]

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[9] In addition, Plaintiffs criticize Defendant's argument as to the applicability of the fiduciary shield doctrine, stating that, first, "it is questionable whether this doctrine even exists[,]" and asserting that even if the doctrine is recognized, "Defendant's attempt to hide behind the fiduciary shield doctrine" lacks merit because: (1) "Defendant was a [Prithvi] Board Member and member of the Audit Committee who worked directly with [Prithvi's] senior executives"; (2) "Defendant had extensive contacts with Pittsburgh"; and (3) "Defendant created, or assisted in the creation of, the Bogus Accounts Receivable to induce investors to invest in [Prithvi] and to induce commercial lenders such as Plaintiffs to lend money to [Prithvi][,]" an issue that "goes to the heart of the parties' dispute and cannot be decided pre-merits discovery." (*Id*. at 18.) Because the Court ultimately concludes herein that it lacks jurisdiction over Defendant under the jurisdictional analyses applicable to both of Plaintiffs' claims, the Court does not resolve

B. Whether this Court has Personal Jurisdiction over Defendant

Upon careful consideration of the record, the parties' arguments, and the applicable law, the Court concludes that it lacks personal jurisdiction over Defendant for purposes of both of Plaintiffs' claims,[10] and, as a result, the Court must dismiss the complaint in its entirety under Federal Rule of Civil Procedure 12(b)(2).[11]

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any issue as to the applicability of the fiduciary shield doctrine to Defendant.

[10] To the extent Plaintiffs assert that Defendant has waived any Rule 12(b)(2) argument by "seeking affirmative relief from this Court[,]" (Doc. No. 87 at 5), the Court rejects this argument because although Defendant may have filed other motions in this action while either his original motion to dismiss or the instant renewed motion to dismiss was pending, "the mere filing of a motion does not necessarily constitute a waiver of the personal jurisdiction defense." *See Ciolli v. Iravani*, 625 F. Supp. 2d 276, 290 (E.D. Pa. 2009) (concluding that the defendants' filing of certain motions did not amount to a submission to the court's jurisdiction and explaining that "[t]he Third Circuit has concluded that affirmative relief is implicated where the [C]ourt 'considers the merits or quasimerits of a controversy' " (quoting *Wyrough & Loser, Inc. v. Pelmore Labs., Inc.*, 376 F.2d 543, 547 (3d Cir. 1967))).

[11] As noted previously, because the Court concludes that personal jurisdiction over Defendant is lacking and dismissal of the complaint is warranted, the Court need not address Defendant's other asserted bases for dismissal that invoke Rules 12(b)(3) and 12(b)(6).

1. Plaintiffs' Fraud Claim (Count I)

The Court finds that it would be improper to exercise personal jurisdiction over Defendant as to the fraud claim asserted in Count I of the complaint. As a threshold matter, "Plaintiffs bear the burden to show a prima facie case of personal jurisdiction over [D]efendant[.]" *See In re Nazi Era Cases Against German Defendants Litig.*, 153 F. App'x 819, 823 (3d Cir. 2005). Further, because Defendant has raised the defense of lack of personal jurisdiction, Plaintiffs must demonstrate the existence of jurisdiction with "affidavits or other competent evidence that jurisdiction is proper." *See Metcalfe*, 566 F.3d at 330 (quoting *Dayhoff Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1302 (3d Cir. 1996)); see also In re Nazi Era Cases, 153 F. App'x at 823 (noting that "[t]he [d]istrict [c]ourt did not conduct an evidentiary hearing, but it did allow jurisdictional discovery" and stating that, accordingly, the court was concerned with whether the plaintiffs had met their burden in establishing the existence of jurisdiction based on competent evidence, "and not merely upon [the] plaintiffs' allegations"). Here, despite having been afforded the opportunity to conduct jurisdictional discovery as to Defendant, Plaintiffs have failed to meet this burden.

As to Plaintiffs' fraud claim, the complaint states that Defendant "knew that the [f]raudulent [d]ocuments were actually false or was reckless by failing to determine whether or not they were actually false"; Defendant made representations "with the intent that the public at large and commercial lenders such as [Plaintiffs] would rely upon it"; and having relied on

the documents at issue in "deciding to enter into the Factoring Agreement[,]" Plaintiffs were harmed because they "would not have entered into the Factoring Agreement" had they known that the documents were, in actuality, fraudulent. (Doc. No. 1 ¶¶ 33-39.) Because Plaintiffs have asserted a claim for fraud, which is an intentional tort,[12] the Court examines the propriety of personal jurisdiction for purposes of this claim using the "effects" test enunciated in *Calder v. Jones*, 465 U.S. 783 (1984), and, therefore, must determine whether the following elements have been satisfied:

> (1) [Defendant] committed an intentional tort;
>
> (2) [Plaintiffs] 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 [Plaintiffs] as a result of that tort; [and]
>
> (3) [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 Indus., 155 F.3d at 265-66 ("To summarize, we believe that the Calder 'effects test' requires the plaintiff to show the following. . . .").

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[12] *See, e.g.*, *Mendelsohn, Drucker & Assocs. v. Titan Atlas Mfg., Inc.*, 885 F. Supp. 2d 767, 782 (E.D. Pa. 2012) (stating that the first prong of the "effects test" used for analyzing personal jurisdiction in an intentional tort case was met when the plaintiff "alleg[ed] that [the defendant] committed fraud, an intentional tort" (citing *Remick*, F.3d at 258)).

In light of this standard, it is evident that this Court lacks personal jurisdiction over Defendant for purposes of Plaintiffs' fraud claim. Plaintiffs have met the first element by virtue of their assertions regarding Defendant's alleged tortious conduct because, as noted supra, courts have held that this element is met when there is an allegation of an intentional tort claim, such as one for fraud. *See, e.g.*, *Mendelsohn*, 885 F. Supp. 2d at 782; *see also Vizant Techs., LLC v. Whitchurch*, 97 F. Supp. 3d 618, 637 (E.D. Pa. 2015) (concluding that the court had personal jurisdiction over defendants for purposes of fraud claim under "effects test" and noting first that the "plaintiffs have alleged an intentional tort"). Accordingly, the first element of the effects test is satisfied. Turning to the second element – whether Plaintiffs "felt the brunt of the harm" in Pennsylvania such that this forum is "the focal point" of Plaintiffs' harm – the Court finds that this element is also satisfied in that Plaintiffs assert that upon entering into the loan factoring agreement with Prithvi, Plaintiffs "sent a total of $97,249,417 to [Prithvi's] PNC Bank Account located in Pittsburgh pursuant to the factoring receivable fraud [that] resulted in $33,579,660 in total loss to Plaintiffs." (Doc. No. 87 at 16.) Plaintiffs' monetary loss, therefore, occurred in Pittsburgh for purposes of its claim against Defendant and, therefore, the Court finds that this element is satisfied.

Despite the first two elements of the Calder effects test being met, though, the Court concludes that jurisdiction over Defendant is improper as to the fraud claim because the third element – that 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" is not met. Notably, this Court previously permitted jurisdictional discovery as to Defendant's contacts with Pittsburgh in disposing of Defendant's first motion to dismiss, and subsequently permitted Plaintiffs additional time to conduct said discovery, demonstrating that Plaintiffs have been afforded ample opportunity to develop and present evidence to this Court establishing that jurisdiction over Defendant is proper. Despite these opportunities, however, Plaintiffs have directed the Court to evidence of Defendant's contacts with Pittsburgh that may be generously described as sparse.

First, while Plaintiffs have submitted multiple declarations ostensibly to speak to Defendant's alleged involvement in the underlying fraud, none of these declarations adequately demonstrates that Defendant specifically directed fraudulent conduct as this forum. While these declarations may speak to the process through which others learned of Prithvi's fraud (Doc. No. 87-1 at 1-3), or the manner in which Plaintiffs were harmed as a result of the fraud (Doc. No. 89-9 at 3), none of them explains, in a non-conclusory fashion, how Defendant aimed his alleged tortious conduct at this forum.[13] Rather, for purposes of this Court's

[13] Defendant filed a motion to strike the declarations of Srivastav, Pandyar[,] and Kulkarni (Doc. No. 91), concurrently with his reply brief as to his renewed motion to dismiss (Doc. No. 93), on March 27, 2019. Because of the Court's conclusion herein that there is insufficient evidence to establish the existence of personal jurisdiction over Defendant, however, the Court need not

personal jurisdictional analysis, they appear only to posit that Defendant contacted Ms. Vuppalapati, who was based in Pittsburgh during the relevant times in question. *See* Doc. No. 87-8 at 2-3 (stating that Ms. Vuppalapati "was involved in managing [Prithvi's] accounts receivable" and that Defendant contacted her "via telephone on multiple occasions to execute his Board duties while she was located in Pittsburgh"). 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*, 572 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." (citing *Rush v. Savchuk*, 444 U.S. 320, 332 (1980))).

Even considering Plaintiffs' additional evidence submitted in opposition to the motion to dismiss, Plaintiffs have failed to meet their burden in demonstrating that Defendant expressly aimed his conduct at this forum so as to render jurisdiction proper under the "effects" test. Specifically, Plaintiffs point to email communications between Defendant and Ms. Vuppalapati, as well as email messages between Defendant and another actor in the fraudulent scheme, Satish Vuppalapati ("Mr. Vuppalapati"), as demonstrative of

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address the arguments presented in Defendant's motion to strike and, accordingly, will deny the motion as moot.

Defendant's efforts to direct fraudulent actions toward Pittsburgh. These exhibits, however, are unavailing for purposes of the relevant inquiry the Court must employ because they simply do not demonstrate that Defendant directly aimed his alleged conduct toward the forum. For example, Plaintiffs have submitted a message in which Defendant forwarded an email from Mr. Vuppalapati that included a powerpoint presentation on Prithvi's IPO as an attachment. (Doc. No. 87-2.) While this message may be interpreted as implicating Defendant in Prithvi's fraud generally, it does nothing to demonstrate a sufficient connection to this forum for purposes of Plaintiffs' fraud claim in the instant case. While Plaintiffs also submit miscellaneous email messages between Defendant and Ms. Vuppalapati (Doc. No. 87-8 at 2-8, 12-16), and email exchanges between Defendant and associates of Sybase (*id*. at 9-11), these messages do not refer to any activities on the part of Defendant with respect to Prithvi's fraud and, therefore, are of no use in establishing that Defendant aimed his tortious conduct at this forum.

Moreover, even the communications that make some reference to the alleged fraud – such as an email sent to Ms. Vuppalapati, Mr. Vuppalapati, and Defendant by a "freelance journalist doing a story on Prithvi" in connection with "the use of Indian IT companies for money laundering" (Doc. No. 87-7 at 2-4) – are insufficient to satisfy the effects test for Plaintiff's fraud claim because they similarly do not demonstrate that Defendant specifically aimed his conduct at this forum. Rather, the 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, and as a result, this Court cannot exercise jurisdiction over Defendant for purposes of Plaintiffs' fraud claim.[14] Accordingly, the Court will grant Defendant's motion to dismiss as to Count I of the complaint pursuant to Federal Rule of Civil Procedure 12(b)(2).

2. Plaintiffs' Negligence Claim (Count II)

The Court similarly concludes that it lacks personal jurisdiction over Defendant for purposes of Count II of the complaint, which sets forth a negligence claim against Defendant. Through Count II, Plaintiffs

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[14] The Court notes that, even if it were to examine the propriety of personal jurisdiction using the "traditional" test, rather than the Calder "effects" test, the Court would also conclude that it lacks personal jurisdiction over Defendant for purposes of the fraud claim, for courts have appeared to treat the "traditional" standard as imposing a higher bar for Plaintiffs seeking to demonstrate the presence of personal jurisdiction. *See*, *e.g.*, *Vizant*, 97 F. Supp. 3d at 636-37 ("Thus, even if our jurisdiction is lacking pursuant to the traditional analysis, we may exercise personal jurisdiction over defendants with respect to plaintiffs' conversion claim based upon Calder's 'effects test.'").

allege that Defendant: (1) "had a duty to conduct due diligence and to otherwise undertake all actions necessary to ensure that Prithvi's customers and accounts receivables were accurately reflected on Prithvi's books and records" and (2) "had a duty to ensure that any false information pertaining to Prithvi's customers and accounts receivable would not be disseminated to the public at large and to . . . [Plaintiffs][,]" and that Defendant breached these duties by not "conducting due diligence" and "otherwise undertak[ing] all actions necessary" to ensure that Prithvi's customers and accounts receivable were accurately recorded, and by not taking action "to have Prithvi withdraw the fraudulent documents upon learning that they were disseminated to the public at large and . . . [Plaintiffs]." (Doc. No. 1 ¶¶ 41-45.) Plaintiffs also allege that Defendant's breaches of these duties caused Plaintiffs "to rely upon the Fraudulent Documents to decide to enter into the Factoring Agreement" and that, consequently, Plaintiffs suffered harm in that they would not have entered into the agreement had they been aware of the fraudulent nature of these documents. (*Id*. ¶¶ 46-47.) Because Count II of Plaintiffs' complaint sets forth a negligence claim against Defendant, in order to determine whether there is personal jurisdiction over Defendant as to this claim, the Court must resolve whether Defendant "purposefully directed" his activities at the forum, and whether Plaintiffs' claim "'arise[s] out of or relate[s] to' at least one of those activities." *See O'Connor*, 496 F.3d at 317 (quoting *Burger King*, 471 U.S. at 472, 105 S.Ct. 2174; *Helicopteros*, 466 U.S. at 414, 104 S.Ct. 1868). If those requirements are

satisfied, the Court may then "consider whether the exercise of jurisdiction over [Defendant] otherwise 'comport[s] with fair play and substantial justice.'" *See id*. (quoting *Burger King*, 471 U.S. at 476, 105 S.Ct. 2174).

Having reviewed the record, the parties' arguments, and the applicable law, the Court concludes that Plaintiffs have not met their burden in showing that this Court has personal jurisdiction over Defendant as to their negligence claim. Similar to its jurisdictional analysis as to Plaintiffs' fraud claim, the Court finds that under the analysis applicable to the negligence claim, Defendant did not "purposefully direct" his alleged fraudulent conduct toward Pittsburgh. Because the aforementioned legal standard requires that both elements are satisfied, the exercise of jurisdiction would be improper because Plaintiffs have not met the "purposefully directed" prong of this test. Moreover, even if this Court were to find that Defendant purposefully directed his activities at the forum and that Plaintiffs' claim arises out of or relates to those activities, it is clear that the exercise of jurisdiction over Defendant would offend traditional notions of fair play and substantial justice. *See id*. (quoting *Burger King*, 471 U.S. at 476, 105 S.Ct. 2174).

It bears noting that, although "[p]hysical entrance into the forum is not required[,]" Defendant must have engaged in "deliberate targeting of the forum." *See id*. In the instant case, this simply did not occur. Here, Defendant recalls having been to Pittsburgh only twice in his life, visiting the city in 2007 with his family and, during that trip, "visit[ing] Prithvi's office . . . for

Madhavi[ ] [Vuppalapati's] birthday party during which [he] met with some company personnel," and, in another instance, traveling to Pittsburgh for a wedding. (Doc. No. 75-1 ¶¶ 33-34.) Needless to say, such contacts are insufficient to render the exercise of jurisdiction over Defendant consonant with traditional notions and fair play and substantial justice, given that they are unrelated to Plaintiffs' allegations regarding Defendant's tortious activity in connection with the fraudulent accounts receivable. Moreover, while the Court is mindful of the fact that physical presence in the forum is not always required to establish the existence of personal jurisdiction, the other purported contacts emphasized by Plaintiffs are similarly insufficient to defeat Defendant's motion, as explained previously. In light of Defendant's sparse contacts with the forum, which are, at best, only tenuously related to Plaintiffs' negligence claim, the Court cannot exercise jurisdiction over Defendant so as "to ensure that [D]efendant[ ] receive[s] due process as required by the Fourteenth Amendment." *See Pennzoil Prods. Co. v. Colelli & Assocs., Inc*., 149 F.3d 197, 201 (3d Cir. 1998). Accordingly, the Court will grant Defendant's motion to dismiss as to Count II of the complaint for lack of personal jurisdiction.

IV. CONCLUSION

Based on the foregoing, the Court will grant Defendant's motion to dismiss (Doc. No. 74), and motion

for attorney's fees (Doc. No. 61),[15] in their entirety, and deny Defendant's and Plaintiff's motions to strike as moot (Doc. Nos. 91, 94). An appropriate Order follows.

ORDER

AND NOW, on this 4th day of April 2019, in accordance with the Memorandum issued concurrently with this Order, **IT IS ORDERED THAT**:

1. Defendant Omkar Bhongir ("Defendant")'s renewed motion to dismiss (Doc. No. 74), is **GRANTED** pursuant to Federal Rule of Civil Procedure 12(b)(2);

2. Defendant's motion for attorney's fees incurred in opposing Plaintiffs' motion to compel (Doc. No. 61), is **GRANTED**, and Defendant shall be awarded three thousand, three hundred and sixty-six dollars and sixty cents ($3,366.60) in attorney's fees. The attorney's fees will be paid directly to Defendant, and sent to the law offices of Defendant's counsel, Laura A. Lange, Esquire;

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[15] As noted *supra*, in disposing of Plaintiff's motion to compel production of documents and Defendant's attendance at a deposition (Doc. No. 56), the Court directed Defendant to submit, pursuant to Federal Rule of Civil Procedure 37(a)(5)(B), "an itemized statement, including attorney's fees, of the expenses incurred in opposing Plaintiff's motion to compel" (Doc. No. 60 at 1). Accordingly, having already determined that such an award of attorney's fees is proper under Rule 37, the Court will grant Defendant's motion for attorney's fees. (Doc. No. 61.)

3. Defendant's motion to strike (Doc. No. 91), and Plaintiffs' motion to strike (Doc. No. 94), are **DENIED AS MOOT**; and

4. The Clerk of Court is directed to **CLOSE** the above-captioned case.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1807

KYKO GLOBAL, INC., a Canadian Corporation;
KYKO GLOBAL GMBH, a Bahamian Corporation,

Appellants

v.

OMKAR BHONGIR, an Individual

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2-17-cv-00212)
District Judge: Hon. Yvette Kane

SUR PETITION FOR PANEL REHEARING

(Filed Apr. 24, 2020)

Present: JORDAN, RESTREPO, and GREENBERG, *Circuit Judges*.

The petition for rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court,

it is hereby ORDERED that the petition for rehearing by the panel is denied.

BY THE COURT,

s/ Kent A. Jordan
Circuit Judge

Dated: April 24, 2020

CJG/cc: Laura A. Lange, Esq.
Joseph F. Rodkey, Jr., Esq.
Jayson M. Macyda, Esq.

U.S.C.A. Const. Amend. V

Amendment V. Grand Jury Indictment for Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process of Law; Takings without Just Compensation

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. Const. Amend. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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42 Pa.C.S.A. § 5322

§ 5322. Bases of personal jurisdiction over persons outside this Commonwealth

(a) General rule. – A tribunal of this Commonwealth may exercise personal jurisdiction over a person (or the personal representative of a deceased individual who would be subject to jurisdiction under this subsection if not deceased) who acts directly or by an agent, as to a cause of action or other matter arising from such person:

(1) Transacting any business in this Commonwealth. Without excluding other acts which may constitute transacting business in this Commonwealth, any of the following shall constitute transacting business for the purpose of this paragraph:

(i) The doing by any person in this Commonwealth of a series of similar acts for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object.

(ii) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(iii) The shipping of merchandise directly or indirectly into or through this Commonwealth.

(iv) The engaging in any business or profession within this Commonwealth, whether or not such business requires license or approval by any government unit of this Commonwealth.

The ownership, use or possession of any real property situate within this Commonwealth.

(2) Contracting to supply services or things in this Commonwealth.

(3) Causing harm or tortious injury by an act or omission in this Commonwealth.

(4) Causing harm or tortious injury in this Commonwealth by an act or omission outside this Commonwealth.

(5) Having an interest in, using, or possessing real property in this Commonwealth.

(6)(i) Contracting to insure any person, property, or risk located within this Commonwealth at the time of contracting.

(ii) Being a person who controls, or who is a director, officer, employee or agent of a person who controls, an insurance company incorporated in this Commonwealth or an alien insurer domiciled in this Commonwealth.

(iii) Engaging in conduct described in section 504 of the act of May 17, 1921 (P.L. 789, No. 285), known as The Insurance Department Act of 1921. 1

(7) Accepting election or appointment or exercising powers under the authority of this Commonwealth as a:

(i) Personal representative of a decedent.

(ii) Guardian of a minor or incapacitated person.

(iii) Trustee or other fiduciary.

(iv) Director or officer of a corporation.

(8) Executing any bond of any of the persons specified in paragraph (7).

(9) Making application to any government unit for any certificate, license, permit, registration or similar instrument or authorization or exercising any such instrument or authorization.

(10) Committing any violation within the jurisdiction of this Commonwealth of any statute, home rule charter, local ordinance or resolution, or

rule or regulation promulgated thereunder by any government unit or of any order of court or other government unit.

(b) Exercise of full constitutional power over nonresidents. – In addition to the provisions of subsection (a) the jurisdiction of the tribunals of this Commonwealth shall extend to all persons who are not within the scope of section 5301 (relating to persons) to the fullest extent allowed under the Constitution of the United States and may be based on the most minimum contact with this Commonwealth allowed under the Constitution of the United States.

(c) Scope of jurisdiction. – When jurisdiction over a person is based solely upon this section, only a cause of action or other matter arising from acts enumerated in subsection (a), or from acts forming the basis of jurisdiction under subsection (b), may be asserted against him.

(d) Service outside this Commonwealth. – When the exercise of personal jurisdiction is authorized by this section, service of process may be made outside this Commonwealth.

(e) Inconvenient forum. – When a tribunal finds that in the interest of substantial justice the matter should be heard in another forum, the tribunal may stay or dismiss the matter in whole or in part on any conditions that may be just.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 19-1807

Kyko Global Inc. and Kyko Global GmbH,
Plaintiffs/Appellants

v.

Omkar Bhongir
Defendant/Appellee

On Appeal From Western District of Pennsylvania
Civil Action No. 2-17-cv-00212

Petition for Panel Rehearing

(Filed Apr. 13, 2020)

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[1] **I. Introduction**

Appellants Kyko Global Inc. and Kyko Global GmbH ("Kyko") assert that this Panel overlooked a critical aspect of Kyko's appeal that has broad implications for the bench and bar: Whether a defendant, as the moving party, is required to *legally* support his Fed. R. Civ. P. 12(b)(2) motion and advance legal arguments in support of same *before* a plaintiff incurs the burden of producing jurisdictional evidence in response to the motion? The case law does not clearly define what is required of a defendant to legally mount a challenge to jurisdiction at the outset. Here, Kyko's Complaint was dismissed under a legal precept – the "effects test" – that Appellee Omkar Bhongir failed to raise and without Kyko having any opportunity to address prior to dismissal.

This Panel misapprehended Walden v. Fiore, 571 U.S. 277 (2014) to find personal jurisdiction lacking. Contrary to this Panel's view, Kyko does not assert that personal jurisdiction exists due to Mr. Bhongir's mere association with individuals in Pennsylvania. 42 Pa. C.S.A. § 5322(a)(7)(iv) explicitly permits the exercise of personal jurisdiction over a Director of a corporation. Personal jurisdiction exists over Mr. Bhongir given his role as a Director of Prithvi Information Solutions Ltd. ("PISL") and his email and telephone contacts that he

directed to Pittsburgh to doctor PISL's books to fraudulently induce Kyko to lend money to PISL in Pittsburgh.

[2] Kyko was wrongfully denied jurisdictional evidence. Mr. Bhongir claimed that he did not know whether the documents in his possession contain jurisdictional information. Yet, Mr. Bhongir unilaterally withheld these documents based on a relevancy objection when he admitted that he does not even know whether the documents in his possession are relevant. This Panel has, in Kyko's view, inadvertently sanctioned this conduct. To the extent this Panel believes personal jurisdiction is lacking based on the evidence adduced to date (and that Mr. Bhongir's motion was somehow legally supported), this Panel should remand to the District Court to have these documents be produced, or a log generated which describes these documents, to allow the jurisdictional discovery process to be completed.

The issuance of an attorney fee award was legal error regardless of whether this Panel finds that Kyko's motion to compel documents/production of a log was properly denied or was not substantially justified under Fed. R. Civ. P. 37(a)(5)(B).

Accordingly, this Panel should reverse the District Court's dismissal for lack of personal jurisdiction; or alternatively, remand to the District Court to allow the jurisdictional discovery process to be completed. The attorneys' fees award should be vacated.

[3] II. Argument

Point 1: This Panel Did Not Address Whether Mr. Bhongir's Fed. R. Civ. P. 12(b)(2) Motion Was Legally Supported.

Kyko asserted that Mr. Bhongir's Fed. R. Civ. P. 12(b)(2) Motion was not legally supported because he failed to address the personal jurisdiction analysis applicable to intentional tort claims ("effects test") set forth in Calder v. Jones, 465 U.S. 783 (1984) and Imo Industries, Inc. v. Kiekert AG, 155 F.3d 254 (3rd Cir. 1998). [Appellant Brf. Pgs. 20-23]; [Appellant Reply Brf. Pgs. 11-14]; [Appellant Oral Argument Request]. This Panel's Opinion does not address the issue.[1]

Case law is replete with statements that, upon a defendant's challenge, it is a plaintiff's burden to establish personal jurisdiction. However, the case law does not clearly define what is required of a defendant to legally mount a challenge to jurisdiction at the outset. *E.g.* Marten v. Godwin, 499 F.3d 290, 295-296 (3rd. Cir. 2007) ("*If an issue is raised* as to whether a court lacks personal jurisdiction over a defendant, the plaintiff bears the burden of showing that personal jurisdiction exists") (Emphasis Added); Metcalfe

[1] Kyko asserts that this issue should qualify for en banc review under Fed. R. App. P. 35 and L.A.R. 35.1 given the Panel's decision could significantly modify the standard of review applicable to Fed. R. Civ. P. 12(b)(2) motions and otherwise affirmatively place an obligation upon defendants to legally (as opposed to merely factually) support their motions at the outset. However, because this Panel has not yet addressed this issue, Kyko, consistent with I.O.P. 9.5.1., defers to this Panel's determination regarding whether en banc review of this issue is warranted.

v. Renaissance Marine Inc., 566 F.3d 324, 331 (3rd Cir. 2009) ("[T]he burden of demonstrating the facts that [4] establish personal jurisdiction," falls on the plaintiff, *and once a defendant has raised a jurisdictional defense*," the plaintiff must 'prov[e] by affidavits or other competent evidence that jurisdiction is proper.' ") (Citations Omitted) (Emphasis Added); Grand Entertainment Group Ltd. v. Star Media Sales Inc., 988 F.2d 476, 482 (3rd 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).

In addressing the impact of Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) on the scope of this Court's *de novo* review under Fed. R. Civ. P. 12(b)(6), this Court stated: "Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts." Phillips v. County of Allegheny, 515 F.3d 224, 230 (3rd Cir. 2008). Similarly, this case presents the Panel with the opportunity to define the scope of review with respect to a Fed. R. Civ. P. 12(b)(2) motion: Particularly, whether a defendant, as the moving party, is required to *legally* support his Fed. R. Civ. P. 12(b)(2) motion and advance legal arguments in support of same *before* a plaintiff incurs the burden of producing jurisdictional evidence in response to the motion?

Plaintiffs informed the District Court that they were prejudiced by Mr. Bhongir's failure to properly brief the jurisdictional analysis:

> Instead of addressing the personal jurisdictional analysis under the rubric applicable to non-intentional tort and intentional tort claims on a claim-by-claim and temporal basis, Defendant avoids the analysis [5] altogether and posits a legally impermissible generic "one size fits all" argument that has prevented Plaintiffs from having a fair opportunity to respond because they are simply left to guess how jurisdiction is allegedly lacking under the applicable legal standards. [App'x Vol. IV, Pg. 752].

Yet, the District Court failed to deny Mr. Bhongir's motion, and otherwise premised her ruling under the "effects test" without giving Kyko an opportunity to respond. See Huber v. Taylor, 532 F.3d 237, 249 (3rd. Cir. 2008) (holding that a district court must provide a plaintiff an "opportunity to address the court's concerns" before dismissing a case for lack of subject matter jurisdiction on a basis not raised by the parties). Moreover, as explicitly provided in Fletcher-Harlee Corp. v. Pote Concrete Contractors Inc., 482 F.3d 247, 252 (3rd Cir. 2007), Kyko explicitly requested the District Court to allow Kyko to amend its Complaint as of right before the District Court dismissed the Complaint but amendment was not permitted. [App'x Vol. IV, Pg. 775].

The net effect of Mr. Bhongir's failure to legally support his Motion, and the District Court's failure to allow Kyko to respond to the Court's application of the "effects test" prior to dismissal, was that Kyko's Complaint was dismissed without Kyko being able to

respond to how its jurisdictional evidence allegedly failed to establish a prima facie case of jurisdiction under the "effects test."[2]

[6] In essence, by dismissing Kyko's Complaint under a legal precept Mr. Bhongir failed to pursue, and otherwise failing to provide Kyko the opportunity to address the District Court's jurisdictional concerns prior to dismissal, the District Court acted outside the permissible scope of the adversary process. See 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*"(Emphasis Added)); United States. v. Bendolph, 409. F.3d 155, 172 (3rd Cir. 2005) (Nygaard, J. concurring in part, dissenting in part) ("Typically, it is not fair for courts to act as surrogate counsel for one side but

[2] Anticipating that Mr. Bhongir may attempt to raise and brief the "effects test" for the first time in his Reply Brief (which he ultimately chose not to do), Kyko discussed the "effects test" in its Opposition in order to preserve the issue for appeal. Nevertheless, Kyko was not required to litigate in the dark because Mr. Bhongir, as the moving party, was required to specifically set forth the legal basis for his Motion. See Fed. R. Civ. P. 7(b)(1)(B) (a motion "must . . . state with *particularity* the grounds for seeking the order") (Emphasis Added); Andreas v. Volkswagen of America Inc., 336 F.3d 789, 793 (8th Cir. 2003) ("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).

not the other"); United States v. Pryce, 938 F.2d 1343, 1353 (D.C. Cir. 1991) (Silberman, J., dissenting in part) ("We thus ordinarily have no right to consider issues not raised by a party in either briefing or argument, both because our system assumes and depends upon the assistance of counsel . . . and because of the unfairness of such a practice to the other party")

[7] In conclusion, this Panel should affirmatively hold that, under Fed. R. Civ. P. 12(b)(2), a defendant is required to *legally* support his Fed. R. Civ. P. 12(b)(2) motion at the outset; if the defendant fails to do so, then the burden does not shift to a plaintiff to produce jurisdictional evidence which requires the defendant's motion to be denied.

The District Court's dismissal order should be reversed.

Point 2: This Panel Misapprehended Walden When It Found Personal Jurisdiction Lacking.

This Panel, relying upon Walden v. Fiore, 571 U.S. 277, 286) (2014), stated:

> 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) ("[A] defendant's contacts with the forum State 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. (Op. pg. 6).

Mr. Bhongir was a Director of Prithvi Information Solutions Ltd. ("PISL") which is registered to do business in Pittsburgh. [Appellant Brf. Pg. 3].[3] 42 Pa. [8] C.S.A. § 5322(a)(7)(iv) permits a court to exercise personal jurisdiction over a person for "[a]ccepting election or appointment or exercising powers under the authority of this Commonwealth as a. . . . Director or officer of a corporation." [Appellant Brf. Pg. 26]. See Irons v. Steinberg, 22 Pa. D.&C.3d 36, 37 (1981) ("It is clear that by its terms, Section 5322(a)(7)(iv) purports to give the Pennsylvania courts personal jurisdiction over all directors of all Pennsylvania corporations with respect to causes of action arising from their directorships"); Eurofins Pharma US Holdings v. Bioalliance Pharma SA, 623 F.3d 147, 155 (3rd Cir. 2010) ("[A] federal district court may assert personal jurisdiction over a nonresident of the state in which the court sits to the extent authorized by the law of that state.").

Kyko asserts that Mr. Bhongir is personally liable for the torts he committed in his capacity as a PISL Director. [App'x Vol. II, Pgs. 28-37]. The torts he

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[3] Although PISL is a foreign corporation, it is governed under the laws of Pennsylvania the same as if it were a domestic corporation. See 15 Pa. C.S.A. § 402(d).

committed were done to induce lenders, such as Kyko, to lend money to PISL in Pittsburgh. [App'x Vol. I, Pgs. 21-22]. The District Court found that some of Kyko's evidence "may be interpreted as implicating [Mr. Bhongir] in Prithvi's fraud generally." [App'x. Vol I, Pg. 24].

To effectuate the fraud, the evidence demonstrated that Mr. Bhongir contacted his fellow Directors and Board Members in Pittsburgh via telephone and emails. [Appellant Brf. Pgs. 25-27]; [Appellant Reply Brf. Pgs. 7-10]; [App'x Vol. IV, Pgs. 752-756]. See Carrabba v. Morgat, 2014 WL 229280, Case No. 2:12- 6342, at *4 (D.N.J. Jan. 17, 2014) (Citing Grand Entertainment Group, Ltd. v. Star [9] Media Sales, Inc., 988 F.2d 476, 482 (3rd Cir.1993) and O'Connor v. Sandy Lane Hotel Co., Ltd., 496 F.3d 312, 318 (3rd Cir. 2007) and related cases for the proposition that "[v]arious forms of communications between parties, including written correspondence, telephone calls, and emails factor into the minimum contacts analysis.").

Notwithstanding the foregoing, the Panel found that jurisdiction was lacking under Walden on the basis that Kyko attempted to assert personal jurisdiction based on Mr. Bhongir's mere association with individuals. This is incorrect.

Personal jurisdiction exists because Mr. Bhongir, a PISL Director, purposefully directed his phone calls and emails to his fellow PISL Directors/Board Members in Pittsburgh to doctor the books of PISL to induce lenders, such as Kyko, to lend money to PISL in

Pittsburgh. Had Mr. Bhongir engaged in this exact same conduct by being physically present in PISL's office in Pittsburgh, nobody would question whether personal jurisdiction exists; there is no legal distinction made under Walden just because Mr. Bhongir engaged in this conduct via telephone calls and emails. See Walden 571 U.S. at 285 ("And although 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").

Stated another way, personal jurisdiction exists over Mr. Bhongir given his role as a Director of PISL as expressly permitted under 42 Pa. C.S.A. § [10]5322(a)(7)(iv) and his email and telephone contacts that he directed to Pittsburgh to fraudulently induce Kyko to lend money to PISL in Pittsburgh. See Walden 571 U.S. at 284 ("the relationship [with the forum] must arise out of contacts that the defendant *himself* creates with the forum State) (Emphasis Included)). Accordingly, Mr. Bhongir expressly aimed his conduct to Pittsburgh under the Calder "effects test" and Kyko's claims asserted against Mr. Bhongir arise out of his conduct directed to Pittsburgh.

In conclusion, to the extent that this Panel finds that Mr. Bhongir's Fed. R. Civ. P. 12(b)(2) motion should not be denied for failure to legally support the motion, personal jurisdiction nevertheless exists.[4]

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[4] While Mr. Bhongir denies engaging in this conduct or directing his phone calls and emails to Pittsburgh, his denials are

Point 3: Kyko Was Improperly Denied Access to Evidence.

Mr. Bhongir's discovery responses and declaration establish the following: (i) the only way for Mr. Bhongir to have conducted his duties for PISL in Pittsburgh would have been by telephone, email, fax, written correspondence and the like; (ii) Mr. Bhongir is incapable of determining whether he directed his communications to individuals located in Pittsburgh; (iii) Mr. Bhongir claims he [11] does not have "any" knowledge of PISL's accounts receivable. [Appellant Brf. Pgs. 11-15]; [Appellant Reply Brf. Pgs. 4-5]. Accordingly, this case presents the Panel with the opportunity to define the scope of discovery under Fed. R. Civ. P. 26(b)(1) when a party asserts ignorance of the substantive documents in his possession yet withholds the same documents on the purported basis that they are irrelevant.[5]

Under this Panel's current Opinion, a party is permitted to withhold documents on the purported basis that they are irrelevant even though the party does not

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irrelevant for purposes of this appeal. Miller Yacht Sales Inc. v. Smith, 384 F.3d 93, 97 (3rd Cir. 2004) ("[W]hen the court does not hold an evidentiary hearing on the motion to dismiss [for lack of personal jurisdiction], the plaintiff need only establish a prima facie case of personal jurisdiction *and the plaintiff is entitled to have its allegations taken as true and all factual disputes drawn in its favor*") (Emphasis Added).

[5] Mr. Bhongir has engaged in this conduct to try to preclude Kyko from challenging his narrative that his contacts were with India, not Pittsburgh. [Appellant Reply Brf. Pg. 5].

know whether the documents are relevant. Kyko asserts that this is not what this Panel intended.

The District Court, and this Panel, opined that Kyko's discovery requests were overly broad. [Op. Pg. 8]. However, understandably, neither the District Court nor this Panel discuss how Kyko could have narrowed its discovery requests because it is not possible to do what Mr. Bhongir himself claims he cannot do: specify the jurisdictional documents in his possession. Thus, while at first glance it appears that requests for documentation pertaining to Mr. Bhongir's board membership and board meetings are beyond the scope of jurisdiction, there was simply no other way to have narrowed the requests because within the requested [12] documents jurisdictional information may exist; nor was there another way to challenge Mr. Bhongir's claimed ignorance of jurisdictional information.

Accordingly, after Mr. Bhongir blindly withheld documentation, Kyko requested that the documents be produced, or in the alternative, to have Mr. Bhongir produce a log of all documents that he withheld. [Appellant Brf. Pgs. 14- 15]. Although the District Court denied Kyko's motion to compel on the basis that the request was overly broad, for reasons unknown, the District Court also refused to order Mr. Bhongir to produce the requested log – this would have allowed Kyko to assess the documentation being withheld and alleviated any concern that documents beyond jurisdiction would be produced. There is simply no reason why the District Court should have not ordered that a log be produced. Moreover, there was simply no other way to

try to discover the documentation that was being unilaterally withheld. See Sanchez v. U.S. Airways, Inc., 202 F.R.D. 131, 135 (E.D. Pa. 2001) ("It is not for a party to determine, by a unilateral review of documentation, whether information is relevant to the case.")

Fed. R. Civ. P. 26(b)(1) states that the scope of discovery is determined by, among other things, "the parties' relative access to relevant information." Kyko asserts that where, as here, a party claims that he does not know whether he has jurisdictional documents in his possession yet seeks to withhold documentation, the scope of discovery necessary includes all documentation that relates to his role at a corporation and that the requesting party is entitled to, at a minimum, receive a [13] log of all withheld documents. Otherwise, a party who exclusively holds the documentation, such as Mr. Bhongir, can artificially cutoff the jurisdictional inquiry (and cross-examination) by simply claiming ignorance thereby allowing the Complaint to be dismissed for lack of jurisdictional evidence.[6]

In conclusion, to the extent this Panel finds that Kyko's evidence currently fails to establish personal jurisdiction, this Panel should order that the withheld documents be produced, or alternatively a log generated, and remand this case to the District Court to allow the jurisdictional discovery process to be completed. See Lehman Bros. Holdings Inc. v. Gateway

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[6] Mr. Bhongir also refused to produce various documents as part of his jurisdictional discovery deposition. [Appellant Brf. Pg. 29]; [App'x Vol. IV, Pg. 761].

Funding Diversified Mortg. Servs. L.P. 785 F.3d 96, 102 (3rd Cir. 2015) ("We will not interfere with the discretion of the district court by overturning a discovery order absent a demonstration that the court's action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery was impossible.").[7]

Point 4: Kyko Should Not Be Ordered to Pay Attorneys' Fees.

As set forth above, Kyko's motion to compel documents/production of a log should have been granted. However, even if this Panel disagrees, Kyko's motion was substantially justified under Fed. R. Civ. P. 37(a)(5)(B) making an attorney fee [14] award unjust given the circumstances of this case. [Appellant Brf. Pgs. 15-18]; [App'x Vol. III, Pgs. 479-518].[8]

Regardless, the attorney fee award is improper as set forth below [Appellant Brf. Pgs. 17-18]:

(1) The District Court failed to provide any explanation for the attorney fee award. [App'x Vol. I, Pg.

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[7] Kyko explicitly informed the District Court that it was "impossible" for Kyko to complete discovery of Mr. Bhongir's contacts with Pittsburgh without production of these documents. [App'x Vol. II, Pg. 246].

[8] Mr. Bhongir refused to respond to Kyko's Motion: "Defendant is not going to engage in this unnecessary discussion simply to incur more fees than are subject to the motion – which is presumably the goal of Plaintiffs here." [Appellant Reply Brf. Pg. 6 n. 6].

27, n. 15]. See Hensley v. Eckerhart, 461 U.S. 424, 437 (1983) (holding that while a district court has discretion in determining the amount of an attorney fee award, "[i]t remains important, however, for the district court to provide a concise but clear explanation of its reasons for the fee award"); Public Interest Research Group of New Jersey Inc. v. Windall, 51 F.3d 1179, 1189 (3rd Cir. 1995) ("*Hensley,* . . . directs district courts to consider a party's objections to particular time charges and make their findings on the hours that should be included in calculating the lodestar").

(2) Mr. Bhongir's counsel failed to provide any evidence that demonstrates that the attorney fees charged are reasonable given her skills, experience, and are reasonable relative to the prevailing hourly rates charged in Pittsburgh. [App'x Vol. III, Pgs. 490-491]. See Evans v. Port Authority of New York and New Jersey, 273 F.3d 346, 361 (3rd Cir. 2001) ("A District Court may not set attorney's fees based [15] on a generalized sense of what is usual and proper but 'must rely upon the record' ") (Citation Omitted); Washington v. Philadelphia County Court of Common Pleas, 89 F.3d 1031, 1035 (3rd Cir. 1996) ("The general rule is that a reasonable hourly rate is calculated according to the prevailing market rates in the community . . . The prevailing party bears the burden of establishing by way of satisfactory evidence, 'in addition to [the] attorney's own affidavits,' . . . that the requested hourly rates meet this standard").

(3) The District Court ordered Kyko to pay for "copy and paste" work that Mr. Bhongir submitted in a previous unrelated motion in this case. [App'x Vol. III, Pg. 492]. See Mosaid Techs Inc. v. Samsung Elecs. Co., 224 F.R.D. 595, 597 (D. N.J. 2004) ("The court should exclude hours that are not 'reasonably expended' by virtue of excessiveness, redundancy, or lack of necessity").

(4) The District Court ordered Kyko to pay for time Mr. Bhongir's counsel spent briefing an issue in Kyko Global Inc. et al v. Prithvi Information Solutions Limited et al. Case No. 2:13-CV-1034 MJP filed in the U.S. District Court for the Western District of Washington that is unrelated to the jurisdictional discovery issues in this case. [App'x Vol. III, Pg. 492]. See Mosaid 224 F.R.D. at 597.

(5) Kyko's motion was successful, in part, because Kyko's request to extend the jurisdictional discovery period was granted (and opposed by Mr. Bhongir) which permitted the District Court to apportion fees pursuant to Fed. R. Civ. P. 37(a)(5)(C). [App'x Vol. III, Pg. 490].

[16] In conclusion, an attorney fee award was improper regardless of whether this Panel finds that Kyko's motion to compel documents/production of a log was properly denied and was otherwise not substantially justified under Fed. R. Civ. P. 37(a)(5)(B).

III. Conclusion

For the reasons set forth above, the Petition for Rehearing should be granted.

Dated: April 13, 2020

Respectfully submitted,

/s/ Joseph F. Rodkey, Jr.

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[17] **CERTIFICATE OF BAR MEMBERSHIP**

The undersigned hereby certifies that pursuant to L.A.R. 46.1 that the attorneys for Appellants, Jayson M. Macyda and Joseph F. Rodkey, Jr., whose names appear on the Brief are duly admitted to the Bar of the United States Court of Appeals for the Third Circuit

and presently are members in good standing at the Bar of said Court.

Dated: April 13, 2020 */s/ Joseph F. Rodkey, Jr.*
Joseph F. Rodkey, Jr.

VIRUS SCAN CERTIFICATE

The undersigned hereby certifies that PDF file of this Brief was automatically scanned during preparation by Norton Security software program version 22.20.1.69, and no viruses were detected.

Dated: April 13, 2020 */s/ Joseph F. Rodkey, Jr.*
Joseph F. Rodkey, Jr.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief complies with the type-volume limitation of Fed. R. App. P. 35(b)(2) and Fed. R. App. P. 40(b)(1) because the Brief contains 3875 words excluding the parts of the Brief exempted by Fed. R. [18] App. P. 32(f). This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared in proportionally spaced typeface using Microsoft Word Office Professional (2007) in font 14, Times New Roman.

Dated: April 13, 2020 */s/ Joseph F. Rodkey, Jr.*
Joseph F. Rodkey, Jr.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Appellants' Petition For Reconsideration was served via electronic filing on the ECF System, this 13th day of April, 2020 upon the following:

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Dated: April 13, 2020 */s/ Joseph F. Rodkey, Jr.*
Joseph F. Rodkey, Jr.