No. _____

In The

Supreme Court of the United States

IN RE KYKO GLOBAL INC.
AND KYKO GLOBAL GMBH,

Petitioners,

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF MANDAMUS

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QUESTION PRESENTED

Petitioners Kyko Global Inc. and Kyko Global GmbH assert breach of fiduciary duty claims against Respondent Omkar Bhongir in his capacity as a corporate director under Pennsylvania law. Relying upon the government interest choice-of-law analysis set forth in *Nelson v. International Paint Co.*, 716 F.2d 640 (9th Cir. 1983), the Panel affirmed the application of California law to dismiss these claims.

Petitioners assert that the application of *Nelson* has no basis in law and that the application of Pennsylvania law is required under the internal affairs doctrine pursuant to *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1527 (9th Cir. 1985), *superseded on other grounds* and Cal. Corp. Code § 2116. Without explanation, the Panel has refused to apply these authorities.

The question presented for review is whether the Panel abused its discretion and improperly created a new legal rule to evaluate Petitioners' breach of fiduciary duty claims when it applied *Nelson* – and failed to apply *Davis* and Cal. Corp. Code § 2116 – to hold the California law, instead of Pennsylvania law, applies to the breach of fiduciary duty claims.

PARTIES TO THE PROCEEDING

Kyko Global Inc. and Kyko Global GmbH are the Petitioners.

Omkar Bhongir and the Panel of the Ninth Court Circuit Court of Appeals are the Respondents.

CORPORATE DISCLOSURE STATEMENT

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

RELATED FEDERAL AND STATE PROCEEDINGS

Kyko Global Inc. v. Bhongir, Case No. 19-1807, U.S. Court of Appeals for the Third Circuit. Judgment entered on April 1, 2020.

Kyko Global Inc. v. Bhongir, Case No. 20-342, U.S. Supreme Court. Certiorari denied on November 2, 2020.

Kyko Global Inc. v. Bhongir, Case No. 20-17526, U.S. Court of Appeals for the Ninth Circuit. Judgment entered on October 26, 2021.

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PETITION FOR A WRIT OF MANDAMUS

Petitioners respectfully apply for a writ of mandamus pursuant to 28 U.S.C. § 1651 and Supreme Court Rule 20.3 directed to the Panel of the Ninth Circuit Court of Appeals. In the alternative, Petitioners request this Court to treat this Petition as a petition for a writ of certiorari pursuant to 28 U.S.C. § 1254 and Supreme Court Rule 13 and related Rules.

OPINIONS BELOW

The United States District Court for the Northern District of California's Opinions are reported at 2020 WL 5816728 and 2020 WL 7319360.

The Ninth Circuit Court of Appeals' Opinion is reported at 2021 WL 4958989. The Order Denying Panel Rehearing and Rehearing En Banc is not reported but is attached in the Appendix.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651, and in the alternative, 28 U.S.C. § 1254. This Petition is timely filed within 90 days of the December 8, 2021 Order Denying Panel Rehearing and Rehearing En Banc.

STATUTORY PROVISIONS INVOLVED

Cal. Corp. Code § 2116, 42 Pa. C.S.A. § 402, and Ninth Circuit Court of Appeal's General Order § 4.3.a. The text is set forth in the attached Appendix.

STATEMENT OF THE CASE

Petitioners provide accounts receivable loan factoring services. Non-party Prithvi Information Solutions Ltd. ("PISL") is a struck-off and delisted Indian corporation that was, and remains, registered to do business in Pittsburgh, Pennsylvania. PISL was never a California corporation nor was it ever registered to do business in California. Mr. Bhongir is a California citizen.

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

Petitioners subsequently discovered that PISL was insolvent and its directors and executives created fraudulent accounts receivable to create non-existing customers to induce Petitioners to enter into the loan factoring agreement.

In 2013, Petitioners filed a lawsuit against PISL and others[1] in the U.S. District Court for the Western District of Washington Case No. 2:13-cv-1034 – MJP that asserted, among other things, violation of the Racketeer Influenced Corrupt Organization Act with respect to the bogus accounts receivable and Kyko's failure to receive payment under the loan factoring agreement.

To try to conceal the fraud, PISL's executives destroyed evidence, refused to abide by court orders leading to an arrest warrant, invoked the 5th Amendment right against self- incrimination, fled to India to hide from the FBI, and allowed a trial *in absentia* to occur to avoid providing the factual details regarding the fraud which resulted in a money judgment in excess of $100,000,000 to be entered against the defendants. Moreover, the U.S. Justice Department has indicted several of PISL's directors based on their fraudulent conduct.

In March 2015, evidence surfaced which showed that Mr. Bhongir was a director of PISL and member of its Audit and Remuneration Committees from 2005-2009 who was involved with the bogus accounts receivable. Because PISL was, and remains, registered to do business in Pittsburgh, Pennsylvania and Mr. Bhongir was a director and committee member of PISL, Petitioners filed their Complaint against Mr. Bhongir in the U.S. District Court for the Western District of Pennsylvania Case No. 2:17-cv-00212 on February 14,

[1] Mr. Bhongir was not a party to this lawsuit.

2017. This case was dismissed based on lack of personal jurisdiction and was transferred to the U.S. District Court for the Northern District of California pursuant to 28 U.S.C § 1631 because Mr. Bhongir is a resident of California.

Because PISL was, and remains, actively registered to do business in Pennsylvania, it is subject to the laws of Pennsylvania the same as if it were originally formed in Pennsylvania. 15 Pa. C.S.A. § 402(d). (App. 34-35). Accordingly, Petitioners asserted claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty against Mr. Bhongir under Pennsylvania law in his capacity as a director of PISL arising from his involvement with the bogus accounts receivable.

Nelson is a transferred products liability case that discusses the government interest choice-of-law analysis, which evaluates the interests of respective jurisdictions to make a choice-of-law determination. *Nelson* has nothing to do with breach of fiduciary duty claims arising from corporate directorships or the internal affairs doctrine.

Davis addresses fiduciary duty claims and the internal affairs doctrine. The court held that "[c]laims involving 'internal affairs' of corporations, such as the breach of fiduciary duties, are subject to the laws of the state of incorporation." *Davis*, 751 F.2d at 1527. Similarly, Cal. Corp. Code § 2116 holds corporate directors liable "for the making of . . . false certificates, reports or public notices or other violation of official duty

according to any applicable laws of the state or place of incorporation or organization, whether committed or done in [California] or elsewhere."

The District Court applied *Nelson*, and failed to apply *Davis* and Cal. Corp. Code § 2116, and in doing so unilaterally[2] embarked on a government interest choice-of-law analysis and held that:

> "'[o]nly California has an interest in having its statute of limitations applied' where, as here, 'the forum is in California, and the only defendant is a California resident.' See Nelson, 716 F.2d at 645 . . . Consequently, the Court finds California's statute of limitations applies to the breach of fiduciary duty claims." (App. 21-23).

Petitioners appealed the District Court's ruling as a final order to the Ninth Circuit Court of Appeals. The Panel similarly failed to address *Davis* and Cal. Corp. Code § 2116 and affirmed the District Court's holding:

> "The district court was correct in applying California law to Kyko's breach of fiduciary duty claims. In cases transferred "to cure a lack of personal jurisdiction . . . it is necessary to look to the law of the transferee state. . . ." See Nelson v. Int'l Paint Co., 716 F.2d 640, 643 (9th Cir. 1983). In choice of law questions, where a conflict exists between two jurisdictions, California law directs courts to

[2] Neither Petitioners nor Mr. Bhongir were afforded an opportunity to brief the issue prior to the District Court issuing its holding.

> "determine what interest, if any, the competing jurisdictions have in the application of their respective laws." Cooper v. Tokyo Elec. Power Co., 960 F.3d 549, 559 (9th Cir. 2020). Here, the district court correctly concluded that because "the forum is in California, and the only defendant is a California resident," "[o]nly California ha[d] an interest in having its statute of limitations applied."1 Nelson, 716 F.2d at 645." (App. 2-3).

The Panel issued its disposition as a "Memorandum." (App. 1). Ninth Circuit Court of Appeal's General Order § 4.3.a addresses Memorandum dispositions. (App. 37). This section states in part,

> "Unlike an opinion for publication which is designed to clarify the law of the circuit, a memorandum disposition is designed only to provide the parties and the district court with a concise explanation of this Court's decision. Because the parties and the district court are aware of the facts, procedural events *and applicable law* underlying the dispute, the disposition need recite *only such information crucial to the result*." (emphasis added).

Accordingly, the Panel made clear that, in its view, *Nelson* is the "applicable law," which the Panel does not need to "clarify" with respect to any other authorities, and that only *Nelson* is "crucial" to the Panel's determination that California law applies.[3]

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[3] The Panel also cites in passing *Cooper v. Tokyo Elec. Power Co.*, 960 F.3d 549, 559 (9th Cir. 2020) which, like *Nelson*,

Petitioners subsequently informed the Panel of their failure to apply *Davis* and Cal. Corp. Code § 2116 – which were set forth in their briefs – and requested a rehearing en banc if the Panel was not going to apply *Davis* and Cal. Corp. Code § 2116 which are binding authorities. The Panel denied the request and failed to follow these authorities without any explanation. (App. 31-32). Consequently, the Panel affirmed the application of California law to dismiss the breach of fiduciary duty claims as either time-barred or as having failed to state a claim upon which relief can be granted under California law. In doing so, the Panel has impermissibly imposed a new legal rule on Petitioners under *Nelson* which resulted in the dismissal of their breach of fiduciary duty claims. Issuance of a writ of mandamus is warranted as set forth below.

REASONS FOR ALLOWANCE OF THE WRIT

At its core, this Petition asks this Court to require that Petitioners receive equal application of the law.

A writ of mandamus should be issued when (1) "the party seeking issuance of the writ [has] no other adequate means to attain the relief he desires," (2) the party establishes that its "right to issuance of the writ is 'clear and indisputable'"; and (3) the party

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generically references the government interest choice-of-law analysis. *Cooper*, like *Nelson*, also has nothing to do with breach of fiduciary duty claims arising from corporate directorships or the internal affairs doctrine.

establishes "that the writ is appropriate under the circumstances." *Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81 (2004) (citation omitted).

Each of these elements is satisfied as discussed below.

I. Petitioners Have No Other Means To Obtain Relief

Petitioners appealed the District Court's application of California law to the breach of fiduciary duty claims as a final order to the Ninth Circuit Court of Appeals and filed a Petition For Rehearing and Rehearing En Banc which the Ninth Circuit Court of Appeals denied. Accordingly, Petitioners have no other means to obtain relief other than to file this Petition and it is otherwise not being used as a substitute for the regular appeals process. *Cheney*, 542 U.S. at 381.

II. Petitioners' Right To Relief Is Clear and Undisputable

The Panel's application of *Nelson* is wrong: with respect to breach of fiduciary duty claims, the law to be applied is already pre-determined and that is the law of the place of incorporation or organization. The Ninth Circuit Court of Appeals has said so for 37 years: "[c]laims involving 'internal affairs' of corporations, such as the breach of fiduciary duties, are subject to the laws of the state of incorporation." *Davis*, 751 F.2d at 1527.

It is unknown why the Panel has opted to depart from *Davis*. But it is unfair; and it must follow binding authority. As the Ninth Circuit Court of Appeals has stated:

> "Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved . . . [A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule. It may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court."
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> *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001).

Moreover, "Corporations Code section 2116 codifies the internal affairs doctrine."[4] *Drulias v. 1st Century Bancshares Inc.*, 30 Cal.App.5th 696, 705 (2018). This is "a conflict of laws principle which recognizes that only one State should have the authority to regulate a corporation's internal affairs. . . ." *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); *see also Batchelder v. Kawamoto*, 147 F.3d 915, 920 (9th Cir. 1998); *Vaughn v. LJ International Inc.*, 174 Cal.App.4th 213, 223 (2009).

Under the internal affairs doctrine, "States normally look to the State of a business' incorporation for

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[4] A plain reading of *Nelson*, 716 F.2d at 643, also demonstrates that this statute applies: "In diversity cases, the district court normally applies the substantive law of the forum state, including its choice of law rules."

the law that provides the relevant corporate governance general standard of care." *Atherton v. F.D.I.C.*, 519 U.S. 213, 224 (1997). Cal. Corp. Code § 2116 does exactly that. It states (App. 33):

> "[t]he directors of a foreign corporation transacting intrastate business are liable to the corporation, [and] its . . . creditors . . . for the making of . . . false certificates, reports or public notices or other violation of official duty *according to any applicable laws of the state or place of incorporation or organization*, *whether committed or done in this state or elsewhere. Such liability may be enforced in the courts of this state*." (emphasis added).

The plain statutory text of Cal. Corp. Code § 2116 demonstrates that California law does not apply to Petitioners' claims because the California legislature has explicitly said so. *See Salisbury v. City of Santa Monica*, 998 F.3d 852, 858 (9th Cir. 2021) ("It is a fundamental canon that where the statutory text is plain and unambiguous, a court must apply the statute according to its terms.") (citation omitted).

Under Cal. Corp. Code § 2116, Mr. Bhongir is a "director[]" of a "foreign corporation" (PISL) that transacted "intrastate business" in California. Accordingly, Mr. Bhongir is "liable to . . . [PISL's] . . . creditors" (Petitioners) "for the making of . . . false certificates, reports or public notices or other violation of official duty" (generating bogus accounts receivable in breach of his fiduciary duty) "according to any applicable laws of the state or place of incorporation or organization"

(Pennsylvania as discussed below); this is true "whether [Mr. Bhongir's acts were] committed or done in [California] or elsewhere" and his "liability may be enforced in the courts of [California]."

Further, as a matter of law, California's common law choice-of-law analysis does not apply when there is a statute that controls the choice-of-law inquiry. *See Barclays Discount Bank Ltd. v. Levy*, 743 F.2d 722, 725 (9th Cir. 1984); *McCann v. Foster Wheeler LLC*, 225 P.3d 516, 527 (Cal. 2010).[5] And Cal. Corp. Code § 2116 has been explicitly found to apply to breach of fiduciary duty claims. *E.g., In re Verisign Inc. Derivative Litigation*, 531 F.Supp.2d 1173, 1215 (N.D. Cal. 2007) (holding that Cal. Corp. Code § 2116 required application of Delaware law to fiduciary duty claims); *In re Wells Fargo & Co. S'holder Derivative Litig.*, 282 F.Supp.3d 1074, 1111-12 (N.D. Cal. 2017) (holding Cal. Corp. Code § 2116 required the rejection of California law to breach of fiduciary duty claims against directors of Delaware corporation).

Accordingly, in applying *Nelson* – and discarding *Davis* and Cal. Corp. Code § 2116 – the Panel has improperly created a new legal rule to evaluate breach of fiduciary duty claims which it has utilized to wrongly lay Petitioners' claims to rest under California law.

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[5] *See Also Voss v. Sutardja*, 2015 WL 349444, Case No. 14-cv-01581, at *7 (N.D. Cal. Jan. 26 2015) (holding that "Section 2116 . . . unambiguously directs courts to apply the law of the jurisdiction of incorporation in suits concerning the internal affairs of the corporation. . . . As a result, the Court need not perform a governmental interest analysis in this case.").

This is plain legal error that warrants mandamus relief.

A writ of mandamus is proper when "there is a usurpation of judicial power or a clear abuse of discretion." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (citation omitted). *See Also Cheney*, 542 U.S. at 380. "A court 'would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.' " *Dart Cherokee Basin Operating Co. LLC v. Owens*, 574 U.S. 81, 91 (2014) (citation omitted). A "writ of mandamus has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Will v. United States*, 389 U.S. 90, 95 (1967). Moreover, "when a party seeking the writ has no other adequate means to attain the relief he desires and the court below has committed a clear error of law, it may issue. . . . The clear error should at least approach the magnitude of an unauthorized exercise of judicial power, or a failure to use that power when there is a duty to do so." *Lusardi v. Lechner*, 855 F.2d 1062, 1069 (3d Cir. 1988) *citing Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 661 (1978).

The Panel has abused its discretion and exceeded the lawful exercise of its prescribed jurisdiction. Simply put: *Davis* and Cal. Corp. Code § 2116 are the law and *Nelson* is not. *See Northbay Wellness Group Inc. v. Beyries*, 789 F.3d 956, 959 (9th Cir. 2015) (A court "abuses its discretion if it does not apply the correct law. . . . "). Petitioners requested a rehearing en banc if the Panel was not going to following these authorities.

See Hart, 266 F.3d at 1171 ("Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court."). The request was denied and the Panel opted not to provide any explanation for its failure to follow these binding authorities.

Mandamus relief is appropriate where, as here, a court fails to properly apply the law. *See Mallard v. United States District Court*, 490 U.S. 296, 309 (1989) (holding that attorney was entitled to writ of mandamus because the district court "plainly acted beyond its 'jurisdiction'" when it applied 28 U.S.C. § 1915(d) to compel the attorney to serve as counsel); *Los Angeles Brush Corp. v. James*, 272 U.S. 701, 706 (1927) and *McCullough v. Cosgrave*, 309 U.S. 634 (1940) (holding mandamus relief warranted for court's failure to follow the federal rules of civil procedure); *In re Link A Media Devices Corp.*, 662 F.3d 1221, 1223-25 (Fed. Cir. 2011) (holding mandamus relief appropriate where district court misapplied 28 U.S.C. § 1404 and failed to transfer venue); *In re Itron Inc.*, 883 F.3d 553, 568 (5th Cir. 2018) (holding mandamus relief warranted due to court's failure to properly apply Mississippi law regarding waiver of attorney-client privilege).

PISL is an insolvent, struck-off and delisted entity in India. However, PISL was, and remains, actively registered to do business in Pennsylvania. Accordingly, Petitioners, which are PISL's creditors, asserted their fiduciary duty claims against Mr. Bhongir under Pennsylvania law – in accordance with *Davis* and Cal. Corp. Code § 2116 – because PISL is subject to the laws of

Pennsylvania the same as if it were originally formed in Pennsylvania. *See* 15 Pa. C.S.A. § 402(d) (stating that a foreign corporation which maintains an active registration "shall enjoy the same rights and privileges as a domestic entity and shall be subject to the same liabilities, restrictions, duties and penalties . . . to the same extent as if it had been formed under this title.") (App. 34-36).[6] [7]

Moreover, a director of an insolvent corporation owes a fiduciary duty to a corporation's creditors under Pennsylvania law. *See In re Lemington Home For Aged*, 659 F.3d 282, 290 (3d Cir. 2011) (describing fiduciary duties owed by corporate directors under Pennsylvania law and holding that, "[t]hese fiduciary duties are owed not only to the corporation and its shareholders, but also to the creditors of an insolvent entity"); *Brown v. Presbyterian Ministers Fund*, 484 F.2d 998, 1005 (3d Cir. 1973) (holding under Pennsylvania law that, "[a]s an officer, director, and principal stockholder of an insolvent corporation . . . [the litigant] was duty bound to act 'with absolute fidelity to both creditors and stockholders'" (citation omitted)). Accordingly, Mr.

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[6] The Panel also failed to address this statute.

[7] Realizing that California law does not apply, Mr. Bhongir argued impermissibly for the first time on appeal that under this statute Indian law, instead of Pennsylvania law, applies because PISL was originally an Indian entity (The Panel also did not address this argument). However, as set forth above, PISL is a struck-off and delisted entity in India. Nevertheless, and albeit legally incorrect, Mr. Bhongir's argument further demonstrates that California law simply cannot apply. It is Pennsylvania law (or *arguendo* Indian law according to Mr. Bhongir).

Bhongir owed Petitioners a fiduciary duty as a matter of law.

For the reasons set forth above, California law does not apply to the fiduciary duty claims as a matter of law. Full stop. Because the Panel and the District Court erroneously determined that California law applied, they expressed no opinions regarding the breach of fiduciary duty claims under Pennsylvania law. Accordingly, these claims should go forward on the merits under Pennsylvania law.

III. The Writ Is Appropriate Under The Circumstances

"[B]inding authority is very powerful medicine." *Hart*, 266 F.3d at 1171. Without explanation, and declining to conduct an en banc hearing, the Panel failed to apply *Davis* and Cal. Corp. Code § 2116. Accordingly, issuance of the writ is appropriate under the circumstances because, without legal justification, Petitioners have been denied equal application of the law to their fiduciary duty claims which countless litigants before them have received. *Cf. Romer v. Evans*, 517 U.S. 620, 633-34 (1996) ("The guaranty of equal protection of the laws is a pledge of the protection of equal laws") (citation omitted); *Powell v. Nevada*, 511 U.S. 79, 84 (1994) ("[S]elective application of new rules violates the principle of treating similarly situated [litigants] the same.") (citation omitted).

CONCLUSION

This Petition presents an extraordinary circumstance where a litigant has been denied equal application of the law. Petitioners are mindful that this Court receives thousands of petitions for review each year and that its time is extremely limited. However, the legal issue raised is straightforward which the Court can address in short order.

Accordingly, Petitioners request this Court to issue a writ of mandamus and direct the Panel to vacate the application of California law to the breach of fiduciary duty claims and order that they proceed under Pennsylvania law. Alternatively, Petitioners request that this Court treat this Petition as a petition for a writ of certiorari and grant certiorari on the question presented.

Respectfully submitted,

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