APPENDIX

APPENDIX A

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 19-13537

D.C. Docket No. 2:18-cv-00514-ACA

THOMAS E. REYNOLDS,
PLAINTIFF - APPELLANT,

v.

BEHRMAN CAPITAL IV L.P., AXA PRIMARY FUND AMERICA IV LP, AXA PRIVATE CAPITAL I, LP, CORE AMERICAS/GLOBAL HOLDINGS, LP, GLOBAL FUND PARTNERS II, LP, ET AL., DEFENDANTS - APPELLEES,

BEHRMAN BROTHERS MANAGEMENT CORPORATION, ET AL., DEFENDANTS.

Appeal from the United States District Court for the Northern District of Alabama

(February 23, 2021)

Before JORDAN, LAGOA, and BRASHER, Circuit Judges.

JORDAN, Circuit Judge:

Thomas Reynolds, the Chapter 7 trustee for the bankruptcy estates of Atherotech Inc. and Atherotech Holdings, appeals the dismissal of his complaint for lack of personal jurisdiction. The district court, following removal of the case from Alabama state court, applied the doctrine of derivative jurisdiction articulated in *Lambert Run Coal Co. v. Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922), and ruled that because the state court did not have personal jurisdiction over the defendants under Alabama's long-arm statute, it too lacked personal jurisdiction. In so ruling, the district court concluded that Mr. Reynolds could not rely on Bankruptcy Rule 7004(d) (which looks to a defendant's national contacts and permits nationwide service of process) to establish personal jurisdiction. And it denied as futile Mr. Reynolds' motion to transfer the case to the Southern District of New York under 28 U.S.C. § 1406, explaining that under the doctrine of derivative jurisdiction a New York district court would likewise lack personal jurisdiction over the defendants.

The Supreme Court has applied the doctrine of derivative jurisdiction only with respect to subject-matter jurisdiction, so that if a state court lacks subject-matter jurisdiction over a case when it is initially filed, a federal court also lacks subject-matter jurisdiction when the case is removed (even if the federal court would have had jurisdiction had the case originally been filed in a federal forum). The main question for us in this appeal is whether the doctrine applies when the state court from

which the case is removed lacks personal jurisdiction over the defendants.

I

We accept as true, at this stage of the litigation, the facts as alleged in the complaint filed by Mr. Reynolds in Alabama state court (and later amended in federal court). *See Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 130 (11th Cir. 2013). Given the posture of the appeal, we express no view on the validity of the allegations or the merits of the claims.

A

Atherotech operated a laboratory that conducted testing on blood cholesterol levels. Atherotech was wholly owned by Atherotech Holdings, which was in turn owned by three shareholders: Behrman Capital IV LP, Behrman Brothers LLC, and Midcap Financial Investment, LP. Behrman Capital was the majority shareholder of Atherotech Holdings, owning 94% of its stock and controlling three of five seats on its board of directors. Behrman Brothers—which was also Behrman Capital's general partner—and MidCap owned the remaining shares in Atherotech Holdings.

As part of its business, Atherotech paid physicians who ordered blood cholesterol levels a processing and handling fee, known as a P&H fee. Although Medicare rules and regulations prohibit the payment of P&H fees, Atherotech nevertheless submitted claims for those fees to Medicare and other federal healthcare programs.

In 2012, the Department of Justice began to investigate Atherotech's payments of P&H fees as a potential violation of the False Claims Act, 31 U.S.C. §§ 3729-3730, and the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b.

Violations of the False Claims Act can result in a per-claim penalty of between $5,500 and $11,000, in addition to treble damages. *See* 31 U.S.C. § 3729(a).

Despite knowing of the investigation, Atherotech continued to make P&H fee payments and submit Medicare claims for those payments. From January of 2011 through June of 2013, Medicare reimbursed Atherotech about $35,691,000 for tests associated with P&H fee payments. The complaint alleges that, by June of 2013, Atherotech had up to $107,073,000 in contingent liabilities for violations of the False Claims Act.

In 2013, as the DOJ investigation was ongoing, Atherotech borrowed $40.5 million under a credit agreement. Atherotech then executed a dividend recapitalization under which it paid Atherotech Holdings' shareholders—Behrman Capital, Behrman Brothers, and MidCap—dividends totaling $31,872,860.75. Behrman Capital received $31,433,596.05; Behrman Brothers received $87,374.00; and MidCap received $351,890.70. Behrman Capital distributed its portion of the dividend to its limited partners and its general partner, Behrman Brothers. Behrman Brothers in turn distributed its share of the dividends to its members, along with the portion it received from Behrman Capital as its general partner.

By July of 2014, Atherotech could no longer pay P&H fees, and its revenues decreased significantly. From July through October of 2015, Behrman Capital invested $6.9 million in Atherotech to keep the business afloat. Despite the influx of funds, Atherotech and Atherotech Holdings filed for bankruptcy in March of 2016. The bankruptcy court appointed Mr. Reynolds as the

Chapter 7 trustee for both companies, and he eventually sold Atherotech's assets for $19.6 million.

B

In March of 2018, Mr. Reynolds, as trustee for the bankruptcy estates of Atherotech and Atherotech Holdings, filed a complaint in Alabama state court. The initial complaint named 30 defendants: Behrman Capital; Behrman Capital's 15 limited partners; Behrman Brothers; Behrman Brothers' 12 members; and MidCap. Mr. Reynolds asserted several federal and state law claims stemming from the dividend issued by Atherotech Holdings to its shareholders.

The defendants removed the case to the district court under 28 U.S.C. § 1441, asserting that the complaint implicated significant federal issues, and alternatively under 28 U.S.C. § 1452(a), asserting that pursuant to 28 U.S.C. § 1334 the district court had subject-matter jurisdiction under the Bankruptcy Code. The district court concluded that the case did not implicate a significant federal issue under § 1441, but held that Mr. Reynolds' claims "arose under" the Bankruptcy Code or were "related to" the bankruptcy proceedings of Atherotech and Atherotech Holdings. As a result, it ruled that removal was proper under § 1452(a).

The defendants moved to dismiss for lack of personal jurisdiction under Rule 12(b)(2). The district court granted their motions. It concluded that Bankruptcy Rule 7004(d), which allows for nationwide service of process, *see, e.g.*, *Double Eagle Energy Services, L.L.C. v. MarkWest Utica EMG, L.L.C.*, 936 F.3d 260, 264 (5th Cir. 2019), did not apply because its jurisdiction was derivative of the Alabama state court. Turning to Alabama's long-arm statute, the district court ruled that the

defendants did not have minimum contacts with Alabama that would permit it to exercise personal jurisdiction over them. The district court, however, allowed Mr. Reynolds to file a motion to amend his complaint and explain why doing so would not be futile.

In his motion to amend, Mr. Reynolds asserted that the proposed amended complaint would "remedy the deficiencies cited" by the district court, and would drop MidCap and the limited partners and members as defendants. *See* D.E. 109 at 2-3. He further stated that "[t]he only two defendants named in the [a]mended [c]omplaint" were Behrman Capital and Behrman Brothers. *See id.* Consistent with this representation, Mr. Reynolds' amended complaint listed Behrman Capital and Behrman Brothers as the sole defendants.

Behrman Capital and Behrman Brothers moved to dismiss the amended complaint for lack of personal jurisdiction under Rule 12(b)(2). Mr. Reynolds asserted that there was personal jurisdiction under the Alabama long-arm statute, and alternatively requested that the district court transfer the case to the Southern District of New York pursuant to 28 U.S.C. § 1406 if it concluded that it lacked personal jurisdiction over the defendants. The district court ruled that, under Alabama's long-arm statute, it could not exercise personal jurisdiction over Behrman Capital and Behrman Brothers. It also concluded that transfer would be futile "because the derivative removal jurisdiction bars any federal court from acquiring personal jurisdiction over this suit after its removal from a state court that lacked such personal jurisdiction." The district court therefore dismissed Mr. Reynolds' amended complaint without prejudice.

On September 9, 2019, Mr. Reynolds filed a notice of appeal in which he included all the original defendants, including MidCap. In his notice of appeal, Mr. Reynolds sought to appeal the district court's dismissal of both his original and amended complaints.

II

As noted, Mr. Reynolds dropped MidCap as a defendant in his amended complaint. MidCap now argues that this constituted a waiver by Mr. Reynolds of any argument that the district court erred by initially dismissing it for lack of personal jurisdiction. We are not persuaded.

An amended complaint supersedes and replaces the original complaint. *See Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016); *Dresdner Bank AG v. M/V Olympia Voyager*, 463 F.3d 1210, 1215 (11th Cir. 2006); *Fritz v. Standard Sec. Life Ins. Co. of N.Y.*, 676 F.2d 1356, 1358 (11th Cir. 1982). We have held, however, that a plaintiff does not waive his right to appeal the dismissal of a claim in the original complaint by amending the complaint and omitting the dismissed claim. "[W]e do not require a party to replead a claim following a dismissal under Rule 12(b)(6) to preserve objections to the dismissal on appeal" where repleading "would have been futile and would have resulted in a second dismissal[.]" *Dunn v. Air Line Pilots Ass'n*, 193 F.3d 1185, 1191 n.5 (11th Cir. 2001). See also *Varnes v. Local 191, Glass Bottle Blowers Ass'n of the United States and Canada*, 674 F.2d 1365, 1370 (11th Cir. 1982) ("Varnes was not barred, by consenting to the dismissal and filing the amended

complaint, from raising on appeal the correctness of the dismissal order.").[1]

As the Tenth Circuit has explained, "a rule requiring plaintiffs who file amended complaints to replead claims previously dismissed . . . in order to preserve those claims merely sets a trap for unsuspecting plaintiffs with no concomitant benefit to the opposing party." *Davis v. TXO Prod. Corp.*, 929 F.2d 1515, 1518 (10th Cir. 1991). We agree. "Without more, the action of the amending party should not result in completely denying the right to appeal the court's ruling." 6 Arthur R. Miller, Mary Kay Kane, & Benjamin Spencer, Federal Practice & Procedure § 1476 (3d ed. 2020 update).

Applying *Dunn*, we conclude that Mr. Reynolds did not waive his right to appeal the district court's dismissal of MidCap for lack of personal jurisdiction by failing to name MidCap in the amended complaint because amendment would have been futile. In dismissing MidCap, the district court rejected Mr. Reynolds' arguments that MidCap had the requisite minimum contacts under Alabama's long-arm statute, and, alternatively, that Bankruptcy Rule 7004(d) could be used to obtain personal jurisdiction over the defendants. Apparently, Mr. Reynolds had no additional facts that could establish minimum contacts for MidCap under Alabama's long-arm statute, and requesting for a second time that the district court apply Bankruptcy Rule 7004(d) therefore would have been futile. Under these circumstances,

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[1] We had come to a similar conclusion in *Wilson v. First Hous. Inv. Corp.*, 566 F.2d 1235, 1238 (5th Cir. 1978), but that decision was vacated by the Supreme Court, *see* 444 U.S. 959 (1979), and as a result it does not have any precedential force. *See United States v. Sigma Int'l, Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002) (en banc).

Mr. Reynolds did not waive his right to appeal the district court's dismissal of MidCap from the original complaint for lack of personal jurisdiction. *See Dunn*, 674 F.2d at 1191 n.5.[2]

III

"We review de novo the district court's dismissal for lack of personal jurisdiction." *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006).

A

The parties dispute whether the doctrine of derivative jurisdiction prevents the post-removal use of Bankruptcy Rule 7004(d) to establish personal jurisdiction over the defendants. Mr. Reynolds contends that the doctrine applies only to subject-matter jurisdiction, and not personal jurisdiction. Behrman Capital and Behrman Brothers argue that the doctrine applies to both types of jurisdiction, and urge affirmance. We provide some background on the doctrine of derivative jurisdiction, and then turn to the parties' arguments.

"[W]hen a federal court has jurisdiction, it also has a 'virtually unflagging obligation . . . to exercise' that authority." *Mate v. Lynch*, 576 U.S. 143, 150 (2015) (citation omitted). But almost a century ago, in *Lambert Run*

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[2] Given our precedent in *Dunn*, we need not address MidCap's reliance on *United States ex rel. Atkinson v. PA. Shipbuilding Co.*, 473 F.3d 506, 516 (3d Cir. 2007) (explaining that "[i]f a party omits a claim from an amended complaint that it would not have been futile to replead, that party can still preserve the claim for appellate review by standing on the dismissed claim despite leaving it out of the amended complaint").

Coal Co., the Supreme Court explained that "[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." 258 U.S. at 382. The complaint in that case, which was filed in state court and then removed to federal court, sought to challenge and set aside an order of the Interstate Commerce Commission. Because federal courts had exclusive jurisdiction over such claims, and because the United States had not consented to be sued in state courts, the Supreme Court held that the state court did not have subject-matter jurisdiction to entertain the complaint. And so, when the case was removed to federal court, that court also lacked subject-matter jurisdiction. *See id.* ("As the state court was without jurisdiction over either the subject-matter or the United States, the District Court could not acquire jurisdiction over them by the removal.").

The Supreme Court has kept the doctrine of derivative jurisdiction alive over the years by sporadically applying it or discussing it. *See, e.g.*, *Gen. Inv. Co. v. Lake Shore & M.S. Ry. Co.*, 260 U.S. 261, 288 (1922) ("When a cause is removed from a state court into a federal court, the latter takes it as it stood in the former. A want of jurisdiction in the state court is not cured by the removal, but may be asserted after it is consummated."); *Minnesota v. United States*, 305 U.S. 382, 389 (1939) (applying the doctrine of derivative jurisdiction to dismiss an action because the state court lacked subject-matter jurisdiction); *Freeman v. Bee Machine Co. Inc.*, 319 U.S. 448, 449-51 (1943) (discussing the doctrine of derivative

jurisdiction and refusing to extend it to bar the post-removal amendment of the complaint); *Arizona v. Manypenny*, 451 U.S. 232, 242 n.17 (1981) (describing the doctrine of derivative jurisdiction as well-settled). The doctrine, according to the Supreme Court, applies "even where the federal court would have had jurisdiction if the suit were brought there." *Freeman*, 319 U.S. at 449. *See, e.g.*, *Fed. Nat. Mortg. Ass'n v. LeCrone*, 868 F.2d 190, 192 (6th Cir. 1989); *Reid v. United States*, 715 F.2d 1148, 1153-54 (7th Cir. 1983).

Over the years, the doctrine has been criticized by some courts and commentators. *See, e.g.*, *Washington v. Am. League of Pro. Baseball Clubs*, 460 F.2d 654, 658 (9th Cir. 1972) (describing the doctrine as a "kind of legal *tour de force* that most laymen cannot understand, particularly in a case where the federal court not only has subject matter jurisdiction, but has exclusive subject matter jurisdiction"); 14C Charles Alan Wright, Arthur R. Miller, Edward H. Cooper et al., Federal Practice & Procedure § 3722 (Rev. 4th ed. 2020) (collecting cases criticizing the doctrine of derivative jurisdiction and characterizing the criticism as "deserved"). In 1985, Congress partially abrogated the doctrine of derivative jurisdiction by adding a new subsection (e) to 28 U.S.C. § 1441. The amended § 1441(e) provided that a federal court on removal was "not precluded from hearing and determining any claim" simply "because the State court from which such civil action is removed did not have jurisdiction over that claim." 28 U.S.C. § 1441(e) (1986). In 2001, we said that the amended § 1441(e) "abrogated the theory of derivative jurisdiction." *Hollis v. Florida State University*, 259 F.3d 1295, 1298 (11th Cir. 2001).

The 1985 amendment to § 1441 resulted in some disagreement as to whether Congress had abrogated the doctrine of derivative jurisdiction for all removal statutes or just for § 1441. *See generally Palmer v. City Nat. Bank*, 498 F.3d 236, 245 (4th Cir. 2007) (explaining the different views of the Fourth and Eighth Circuits). The disagreement proved to be relatively short-lived, for in 2002 Congress again amended § 1441, "creating a new § 1441(e) and redesignating the prior § 1441(e) as § 1441(f) and slightly changing its language." *Id.* The new (and current) § 1441(f) now reads as follows (emphasis ours): "Derivative removal jurisdiction.-- The court to which a civil action is removed *under this section* is not precluded from hearing and determining any claim in such civil action because the [s]tate court from which such civil action is removed did not have jurisdiction over that claim."[3]

Following the 2002 amendments to § 1441, several of our sister circuits have held that the "under this section" language in the new § 1441(f) abrogates the doctrine of derivative jurisdiction only in cases removed to federal court pursuant to § 1441. These circuits have therefore continued to apply the doctrine in cases removed under other federal statutes, such as 28 U.S.C. § 1442. *See Palmer*, 498 F.3d at 244-46; *Rodas v. Seidlin*, 656 F.3d 610, 615-25 (7th Cir. 2011); *Bullock v. Napolitano*, 666 F.3d 281, 286 (4th Cir. 2012); *Lopez v. Sentrillon Corp.*, 749 F.3d 348, 350-51 (5th Cir. 2014); *Conklin v. Kane*, 634 F. App'x 69, 73 (3d Cir. 2015). *Accord* 14C

[3] Congress has also abrogated the doctrine of derivative jurisdiction in "patent, plant variety protection, and copyright cases." *See* 28 U.S.C. § 1454(c). But this is not one of those types of cases.

Federal Practice & Procedure § 3726. *But cf. North Dakota v. Fredericks*, 940 F.2d 333, 337 (8th Cir. 1991) (holding, before the 2002 amendments, that the "policy of Congress underlying new § 1441(e) supports the complete abandonment of the derivative-jurisdiction theory"). These decisions, however, are of limited value here because they all involved scenarios where the state court lacked subject-matter (not personal) jurisdiction.

B

The question for us is whether the doctrine of derivative jurisdiction applies to removed cases in which the state court lacked personal jurisdiction over the defendants. Our answer, at least in this case, is that it does not.

We begin by acknowledging the obvious—though the Supreme Court has applied the doctrine of derivative jurisdiction only in cases where the state court lacked subject-matter jurisdiction, it has described the doctrine as encompassing both subject-matter and personal jurisdiction. *See, e.g.*, *Manypenny*, 451 U.S. at 242 n.17 ("[I]f the state court lacks jurisdiction over the subject matter or the parties the federal court acquires none upon removal."); *Freeman*, 319 U.S. at 449 ("[W]here a state court lacks jurisdiction of the subject matter or of the parties, the federal District Court acquires none on removal of the case."); *Lambert Run Coal Co.*, 258 U.S. at 382 ("If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction."). These characterizations are dicta, but Supreme Court dicta "is not something to be lightly cast aside." *F.E.B. Corp. v. United States*, 818 F.3d 681, 690 n.10 (11th Cir. 2016) (noting that "there is dicta . . . and then there is Supreme Court dicta").

Moreover, over the years a number of circuits have applied the doctrine of derivative jurisdiction to require dismissal in cases where the state court, prior to removal, lacked personal jurisdiction over the defendants (usually due to ineffective service of process). *See Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298, 1300 (9th Cir. 1974); *Meyer v. Indian Hill Farm, Inc.*, 258 F.2d 287, 290 (2d Cir. 1958); *Garden Homes, Inc. v. Mason*, 238 F.2d 651, 653 (1st Cir. 1956); *Block v. Block*, 196 F.2d 930, 933 (7th Cir. 1952). We can therefore understand why the district court here applied the doctrine of derivative jurisdiction.

Giving the Supreme Court's dicta the respect and consideration it is due, and acknowledging the cases cited above, we choose to go in a different direction. We hold, for several reasons, that the doctrine of derivative jurisdiction does not apply in cases where the state court lacks personal jurisdiction over the defendants.

First, having acknowledged the importance of the Supreme Court's dicta, we note that there are specific reasons in each of the derivative jurisdiction cases cited above for the Court to have included the "of the parties" language in its dicta (i.e., language that appears to encompass personal jurisdiction). In *Lambert Run Coal Co.*, for example, the question at issue involved federal sovereignty. Thus, the issue of jurisdiction in that case largely hinged on *who* the party was. The same is true in *Manypenny*, which was a criminal case between a state and a federal officer. And in *Manypenny*, the "of the parties" language was not relevant to the outcome of the case and appears only in a footnote.

Second, in *Freeman*, the Supreme Court acknowledged that *Lambert Run Coal Co.* had rejected the idea

that jurisdictional defects were *cured* or *waived* by removal, but nonetheless held that district courts have the power to cure or fix whatever jurisdictional defects existed. 319 U.S. at 452. The Court explained that the *Lambert Run Coal Co.* line of cases stands for the proposition that removal, in and of itself, does not cure any state court jurisdictional defects: "The *Lambert Co.* case and those which preceded and followed it merely held that defects in the jurisdiction of the state court either as respects the subject matter or the parties were not cured by removal but could thereafter be challenged in the federal court." *Id.* at 451. The Court held that, although removal "does not cure jurisdictional defects present in the state court action," federal courts have "the full arsenal of authority with which they have been endowed." *Id.* at 452. Accordingly, the Court held that a plaintiff could add a claim after removal—even though that claim could not have been added in state court—because the federal rules allow such an amendment.

Under *Freeman*, defendants who remove their action to federal court do not waive their challenge to personal jurisdiction. But *Freeman* also means that the district court to which the case is removed has the "full arsenal of authority with which [it has] been endowed" to establish personal jurisdiction over the defendants. *Id.* Part of that "arsenal of authority," as relevant here, is Bankruptcy Rule 7004(d), which looks to a defendant's national contacts and permits nationwide service of process to establish personal jurisdiction.

Third, the Supreme court has consistently held that once a case has been removed from state court to federal court, federal law "govern[s] the mode of procedure[.]" *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*

& Auto Truck Drivers Local No. 70, 415 U.S. 423, 438 (1974). *See also Willy v. Coastal Corp.*, 503 U.S. 131, 134-35 (1992) (explaining that the Federal Rules of Civil Procedure, pursuant to the language in Rule 81(c), "govern procedure after removal"); *Freeman*, 319 U.S. at 452 ("The jurisdiction exercised on removal is original not appellate . . . . The forms and modes of proceeding are governed by federal law.") (citations omitted). It is therefore difficult to understand why a federal statute or rule governing personal jurisdiction (including one providing for nationwide service of process) would not control following the removal of a case from state court.

Indeed, we have suggested for this reason that the doctrine of derivative jurisdiction does not apply to defects in personal jurisdiction. In *Aguacate Consolidated Mines, Inc., of Costa Rica v. Deeprock, Inc.*, 566 F.2d 523 (5th Cir. 1978), the plaintiff filed suit in Georgia state court, and the defendant removed the action to federal court. The Georgia district court, applying the Georgia long-arm statute, concluded that it lacked personal jurisdiction over the defendant and dismissed the case. *See id.* at 524. The plaintiff filed a motion for reconsideration, asking the Georgia district court to transfer the case to an Alabama district court with personal jurisdiction over the defendant, and the Georgia district court decided that transfer was appropriate. *See id.* The Alabama district court nevertheless dismissed the case, concluding that the Georgia district court "could not transfer a case under 28 U.S.C. § 1406(a) without first acquiring personal jurisdiction." *Id.* On appeal, we reversed and rejected the defendant's argument based on the doctrine of derivative jurisdiction: "Although the jurisdiction of a federal court after removal is, in a limited sense, derivative, removed actions become subject to federal

rather than state rules of procedure." *Id.* at 525. We therefore allowed the transfer to take place even though the Georgia district court (and presumably the Georgia state court prior to removal) did not have personal jurisdiction over the defendant. *See id. See also Bentz v. Recile*, 778 F.2d 1026, 1027 (5th Cir. 1985) ("Precedent of this court supports transfer of a case pursuant to section 1406(a) or section 1404(a) from a federal Court lacking personal jurisdiction to one possessing it, even if the case was removed from a state court that itself lacked personal jurisdiction.").

Fourth, we agree with the Third Circuit's decision in *Witherow v. Firestone Tire & Rubber Co.*, 530 F.2d 160, 168-69 (3d Cir. 1976) (reasoning that the doctrine of derivative jurisdiction requires dismissal only when the state court lacks subject-matter jurisdiction over the case, but holding that the plaintiff's failure to comply with the applicable state statute of limitations could not be cured or remedied in federal court after removal). As the Third Circuit explained, a "clear purpose of the derivative limitation" is that "federal courts not entertain, on removal, actions that the state court could not entertain in the first instance." *Id.* at 168. *Cf. Welsh v. Cunard Lines, Ltd.*, 595 F. Supp. 844, 845-46 (D. Ariz. 1984) (stating that the doctrine of derivative jurisdiction is "an archaic and unhelpful principle," and limiting its application by noting that "while [it is] still the law, [it] should be carefully confined to cases where precedent unquestionably compels that it be applied").

Fifth, the leading federal court treatises take the position that the doctrine of derivative jurisdiction is limited to cases in which the state court lacks subject-matter jurisdiction. *See* 14C Federal Practice & Procedure

§ 3722 ("The derivative-jurisdiction principle pertains only to subject-matter jurisdiction."); 16 Daniel Coquillette et al., Moore's Federal Practice § 107.23 (3d ed. 2020) ("Prior to the Judicial Improvements Act of 1985, a case could not be removed to federal court if the state court in which it had been initiated would not have had subject-matter jurisdiction over the action."); 1A Federal Procedure, Lawyers Edition § 1.723 (Oct. 2020 update) (the doctrine of derivative jurisdiction "is properly applied, if to anything, to cases involving a defect in the state court's subject-matter jurisdiction over the case"). Their view is not, of course, dispositive, but it is certainly informative, and we find it persuasive.

Sixth, subject-matter jurisdiction and personal jurisdiction differ in an important respect. The former (which is structural) cannot be waived or conferred by the parties, while the latter (which is personal) can. *Compare Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 850-51 (1986), *with Ins. Co. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). We realize that this difference is not a game-breaker, for it does not adequately explain why the doctrine of derivate jurisdiction would deprive a federal court of jurisdiction in a case where subject-matter jurisdiction is exclusively federal. But it does provide an additional reason for not extending the doctrine to the realm of personal jurisdiction.

The district court, then, could exercise jurisdiction following removal notwithstanding the state court's lack of personal jurisdiction over the defendants under Ala-

bama's long-arm statute. And it could look to Bankruptcy Rule 7004(d) to decide whether personal jurisdiction existed.[4]

C

Bankruptcy Rule 7004(d) permits nationwide service of process: "The summons and complaint and all other process except a subpoena may be served anywhere in the United States." In this circuit, when a federal statute or rule "provides for nationwide service of process, it becomes the . . . basis for federal jurisdiction." *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942 (11th Cir. 1997).

When the district court applies Bankruptcy Rule 7004(d) on remand, it will need to ensure that the exercise of jurisdiction over the defendants is "not unconstitutionally burdensome" under the Fifth Amendment. *See id.* at 947. The court must "examine a defendant's aggregate contacts with the nation as a whole rather than [its] contacts with the forum state in conducting the Fifth Amendment analysis." *Id.* (citation omitted). Although a defendant's contacts with the United States do "not automatically satisfy the due process requirements of the Fifth Amendment," the burden is on a defendant "to demonstrate that the assertion of jurisdiction in the forum will make litigation so gravely difficult and inconvenient that [it] unfairly is at a severe disadvantage in comparison to [its] opponent." *Id.* at 947-48 (citations and internal quotation marks omitted). If a defendant

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[4] Given our conclusion about the inapplicability of the doctrine of derivative jurisdiction, we need not address Mr. Reynolds' argument that there was personal jurisdiction over the defendants under Alabama's long-arm statute.

"makes a showing of constitutionally significant inconvenience, jurisdiction will comport with due process only if the federal interest in litigating the dispute in the chosen forum outweighs the burden imposed on the defendant." *Id.* at 948 (describing the factors a court should consider). *See also Managed Care Advisory Group, LLC v. Cigna Healthcare, Inc.*, 939 F.3d 1145, 1158 (11th Cir. 2019) (articulating the same standard).

There is one final matter. Our decision in *Aguacate Consolidated Mines*, 566 F.2d at 525, makes it clear that the district court could consider Mr. Reynolds' alternative request for a transfer to the Southern District of New York pursuant to 28 U.S.C. § 1406 even if there was no personal jurisdiction over the defendants under Alabama's long-arm statute. So, if the district court on remand decides that the exercise of personal jurisdiction under Bankruptcy Rule 7004(d) would violate the Fifth Amendment as to some or all of the defendants, it will need to turn to the § 1406 motion to transfer. The defendants are correct that *Aguacate Consolidated Mines* does not mandate a transfer, but it does require consideration of Mr. Reynolds' motion.

IV

The district court's dismissal of Mr. Reynolds' complaint pursuant to the doctrine of derivative jurisdiction is reversed, and the case is remanded for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

2:18-cv-00514-ACA

THOMAS E. REYNOLDS, as Trustee,
Plaintiff,

v.

BEHRMAN CAPITAL IV L.P, ET AL.,
Defendants.

MEMORANDUM OPINION

Plaintiff Thomas Reynolds, as chapter 7 trustee for the estates of Atherotech Inc. ("Atherotech") and Atherotech Holdings ("Holdings") filed suit against Behrman Capital IV L.P. ("Fund IV") and Behrman Brothers IV LLC ("Behrman Brothers"), seeking to recover purportedly fraudulent transfers made through a dividend recapitalization before Atherotech and Holdings declared bankruptcy. Mr. Reynolds alleges that Fund IV and Behrman Brothers engineered the dividend recapitalization, eventually bankrupting Atherotech and Holdings.

Fund IV and Behrman Brothers have filed a joint motion to dismiss for lack of personal jurisdiction under Federal Rule of Civil Procedure 12(b)(2).[5] (Doc. 116). Mr.

[5] Defendants also seek dismissal of the amended complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Because the court concludes that it lacks personal jurisdiction over

Reynolds has filed a motion to change venue as an alternative to dismissal. (Doc. 130).

Because the court finds that it lacks personal jurisdiction over each defendant, the court **WILL GRANT** the motion to dismiss the amended complaint and **WILL DISMISS** the case **WITHOUT PREJUDICE**. And because the court finds that, under the doctrine of derivative jurisdiction, transfer would be futile, the court **WILL DENY** Mr. Reynolds' motion to change venue.

I. BACKGROUND

In deciding a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the court must accept as true the factual allegations made in the complaint unless the defendant contradicts those allegations with evidence. *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1215 (11th Cir. 1999). Accordingly, the court's description of the facts draws from both the uncontradicted allegations made in the amended complaint and the evidence submitted by the parties in connection with this motion.

1. Underlying Facts

The plaintiff, Mr. Reynolds, is the chapter 7 trustee for the estates of Atherotech and Holdings. (Doc. 115 at 1). Atherotech is the wholly-owned subsidiary of Holdings. (*Id.* at 2 ¶ 3). Atherotech operated a laboratory that conducted testing on blood cholesterol levels. (*Id.* at 9 ¶ 25). It paid physicians who ordered such testing a processing and handling fee, also known as a P&H fee. (*Id.* ¶¶ 27–28). Although Medicare rules and regulations prohibit the payment of P&H fees, Atherotech would nevertheless submit claims that included the payment of

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the defendants, the court will not address the request to dismiss the amended complaint for failure to state a claim.

those fees to Medicare and other federal healthcare programs.[6] (*Id.* at 10 ¶¶ 29, 32). The Department of Justice eventually began to investigate Atherotech's payments of P&H fees for violation of the federal False Claims Act, 31 U.S.C. §§ 3729–3730, and the federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b, giving rise to $107,073,000 in contingent liabilities. (Doc. 115 at 11 ¶¶ 36–37).

In June 2013, while the DOJ was conducting its investigation, Atherotech issued a dividend recapitalization. (Doc. 115 at 13 ¶ 43). Mr. Reynolds alleges that investors in Holdings (Atherotech's parent company) engineered the dividend recapitalization, knowing that it would leave Atherotech insolvent in light of the contingent liabilities for violations of federal law relating to the P&H fee payments. (*Id.* at 21 ¶ 73).

By July 2014—over a year after the dividend recapitalization—Atherotech could no longer pay P&H fees. (Doc. 115 at 21 ¶ 70). Almost two years later, in March 2016, Atherotech and Holdings declared bankruptcy. (*Id.* at 2–3 ¶ 7). The bankruptcy court appointed Mr. Reynolds as the trustee for both estates (*id.* at 3 ¶ 8), and he filed this lawsuit against a number of defendants. (Doc. 1-1 at 9–40).

2. This Lawsuit

After several rounds of motions practice,[7] the only remaining defendants are Fund IV and Behrman Brothers. In the amended complaint, Mr. Reynolds asserts

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[6] Defendants dispute whether the practice was prohibited at the time, but that dispute does not affect this opinion.

[7] A more complete procedural history of the case is available at Docs. 77 and 107.

against them claims for intentionally fraudulent transfer, under 11 U.S.C. § 544 and Ala. Code § 8-9A-4(a); constructively fraudulent transfer, under 11 U.S.C. § 544 and Ala. Code §§ 8-9A-4(c), 8-9A-5(a); and recovery of fraudulent transfer, under 11 U.S.C. § 550(a)(1). (Doc. 115 at 22–25). Mr. Reynolds alleges that Fund IV and Behrman Brothers, both investors in Holdings, engineered the dividend recapitalization with the goal of paying a dividend to themselves before the DOJ could take action against Atherotech for the payment of P&H fees. (*Id.* at 13 ¶ 43).

3. Facts Relating to Personal Jurisdiction

Fund IV is a private equity fund (*see* docs. 120-1, 120-2), which owned 94% of Holdings' stock. (Doc. 115 at 3 ¶ 12). Behrman Brothers is Fund IV's general partner, and it also owned some portion of the remaining 6% of Holdings' stock. (*Id.* at 3 ¶ 13). According to the uncontroverted evidence, Fund IV and its general partner (and co-defendant) Behrman Brothers lack both employees and operations. (Doc. 117 at 3 ¶ 8; Doc. 118 at 3 ¶ 10; doc. 120 at 3 ¶ 10). For this reason, Fund IV entered a management agreement with a non-party to this action, Behrman Brothers Management Company ("BBMC") (not to be confused with the similarly-named Behrman Brothers, which is a defendant in this action). (Doc. 118 at 3 ¶ 10; Doc. 120-1). Adding to this tangle, BBMC also provided "advisory services" to Atherotech and Holdings. (Doc. 118 at 3 ¶ 11; Doc. 120-2).

Fund IV appointed a number of individuals to serve on Holdings' board of directors. Among those individuals were Grant Behrman (a managing member of Behrman Brothers and the president and managing partner of

BBMC) (doc. 117 at 1–2 ¶¶ 3–5), Tom Perlmutter (a partner at BBMC) (doc. 118 at 1 ¶ 3), and Mark Visser (a partner at BBMC) (doc. 120 at 1–2 ¶ 3). (*See also* Doc. 120 at 6 ¶ 19). Although Mr. Reynolds alleges that these individuals "collectively oversaw and had direct involvement in the operations of Atherotech" (*id.* at 4 ¶ 15; *see also id.* at 4– 5 ¶ 16), they attest that their actions in connection with Holdings were in their capacities as either BBMC employees or Holdings board members, but never on behalf of Fund IV or Behrman Brothers (doc. 117 at 2 ¶ 6; Doc. 118 at 2 ¶ 5; Doc. 120 at 5 ¶ 15). Because Mr. Reynolds has presented no evidence to create an inference in support his allegation, and because Defendants have submitted sworn testimony contravening that allegation, the court accepts the testimony of Mr. Behrman, Mr. Perlmutter, and Mr. Visser that they were not acting on behalf of Defendants.

Mr. Reynolds also alleges that Fund IV and Behrman Brothers controlled Atherotech's sole director and its Chief Executive Officer, Michael Mullen. (Doc. 115 at 6–7 ¶¶ 17–19). Mr. Mullen became Atherotech's CEO before Fund IV and Behrman Brothers invested in Holdings. (*Compare* Doc. 115 at 3 ¶ 12; Doc. 132 at 1 ¶ 2). However, Mr. Mullen attests that he "understood that there could be adverse consequences related to my employment with Atherotech if I refused to sign the [dividend recapitalization] paperwork that Behrman provided to me." (Doc. 132 at 2 ¶ 6). His affidavit does not clarify exactly to what or to whom he refers by the use of the word "Behrman." (*See generally* Doc. 132).

II. DISCUSSION

Fund IV and Behrman Brothers jointly move to dismiss the complaint for lack of personal jurisdiction under

Federal Rule of Civil Procedure 12(b)(2). (Doc. 116). Mr. Reynolds responds that the court has both general and specific personal jurisdiction over both defendants (doc. 125), but he asks that if the court finds jurisdiction lacking, the court transfer the case to the Southern District of New York instead of dismissing it (doc. 130). The court will address Defendants' motion to dismiss first.

1. Defendants' Motion to Dismiss

Under Rule 12(b)(2), the court may dismiss a complaint for "lack of personal jurisdiction." To withstand a Rule 12(b)(2) motion, the plaintiff "bears the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). Where the defendant challenges personal jurisdiction and submits affidavits in support of its position, the burden shifts back to the plaintiff to produce evidence supporting the existence of personal jurisdiction. *Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1269 (11th Cir. 2002). To the extent the facts alleged in the complaint are uncontroverted by the defendant's evidence, the court must accept them as true, and "where the plaintiff's complaint and the defendant's affidavits conflict, the district court must construe all reasonable inferences in favor of the plaintiff." *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990).

The plaintiff satisfies his burden of showing the existence of personal jurisdiction if he "presents enough evidence to withstand a motion for directed verdict." *Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357, 1360 (11th Cir. 2006) (quotation marks omitted). The court may grant a motion for a di-

rected verdict "[i]f the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict." *Carter v. City of Miami*, 870 F.2d 578, 581 (11th Cir. 1989). On the other hand, the court must deny a motion for a directed verdict "if there is substantial evidence opposed to the motion such that reasonable people, in the exercise of impartial judgment, might reach differing conclusions." *Id.*

The Supreme Court has recognized two kinds of personal jurisdiction: general and specific. *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1779–80 (2017). "A court with general jurisdiction may hear *any* claim against that defendant, even if all the incidents underlying the claim occurred in a different State." *Id.* at 1780. But a court with specific jurisdiction may hear only claims that "aris[e] out of or relate[ ] to the defendant's contacts with the forum." *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (quotation marks omitted).

i. General Personal Jurisdiction

An entity is subject to general personal jurisdiction where it "is fairly regarded as at home." *Bristol-Myers Squibb Co.*, 135 S. Ct. at 1780. This means that the entity's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)). Mr. Reynolds contends that this court has general personal jurisdiction over Fund IV and Behrman Brothers because Atherotech and Holdings were their alter egos, effectively making Fund IV and Behrman Brothers "at home"

wherever Atherotech and Holdings were "at home." (Doc. 125 at 26–28).

Under Alabama law, a party can establish alter ego liability by showing that (1) the dominant party had "complete control and domination of the subservient corporation's finances, policy and business practices so that at the time of the attacked transaction the subservient corporation had no separate mind, will, or existence of its own"; (2) the dominant party misused that control; and (3) the misuse of control proximately caused harm or unjust loss. *First Health, Inc. v. Blanton*, 585 So. 2d 1331, 1334–35 (Ala. 1991).

Mr. Reynolds has not present evidence of alter ego liability sufficient to withstand Defendants' motion to dismiss for lack of personal jurisdiction. Although he alleges that Fund IV and Behrman Brothers exerted complete control over Holdings and Atherotech, Fund IV and Behrman Brothers have submitted evidence contravening those allegations. (*See* Docs. 117, 118, 120). Specifically, Fund IV and Behrman Brothers have submitted affidavits from Holdings' board members attesting that their actions were on behalf of Holdings or BBMC, not on behalf of Fund IV and Behrman Brothers. (Doc. 117 at 2 ¶ 6; Doc. 118 at 2 ¶ 5; Doc. 120 at 5 ¶ 15). The burden therefore shifted to Mr. Reynolds to present evidence from which "reasonable people, in the exercise of impartial judgment, might reach differing conclusions." *Carter*, 870 F.2d at 581. He has not done so, instead relying only on his unsupported allegations. The evidence does not create even an inference that Fund IV and Behrman Brothers were the alter egos of Holdings and Atherotech, and the court cannot find that general

personal jurisdiction over Fund IV and Behrman Brothers exists.

ii. Specific Personal Jurisdiction

A court with specific personal jurisdiction may hear only claims that "aris[e] out of or relate[ ] to the defendant's contacts with the forum." *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (quotation marks omitted). An entity is subject to specific personal jurisdiction where it has "minimum contacts" with the forum. Because state courts are limited by the Fourteenth Amendment to the United States Constitution, the question in those cases is whether the court's exercise of jurisdiction would violate the Fourteenth Amendment's Due Process Clause. *See Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 925 (11th Cir. 2007).

"Alabama's long-arm statute permits the exercise of personal jurisdiction to the fullest extent constitutionally permissible." *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 925 (11th Cir. 2007). Thus, the court must examine "whether exercising jurisdiction over the defendant would violate the Due Process Clause of the Fourteenth Amendment, which requires that the defendant have minimum contacts with the forum state and that the exercise of jurisdiction not offend 'traditional notions of fair play and substantial justice.'" *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

Mr. Reynolds argues that the court has specific personal jurisdiction over Fund IV and Behrman Brothers because (1) individuals acting as agents of Fund IV and Behrman Brothers took actions in and directed at Alabama; and (2) under *Calder v. Jones*, 465 U.S. 783, 788 (1984), Fund IV and Behrman Brothers' actions outside

Alabama caused injuries within Alabama. (Doc. 125 at 13–24).

Both of Mr. Reynolds' arguments fail because the evidence establishes that Fund IV and Behrman Brothers could not take any actions, whether inside or outside Alabama. Mr. Grant, Mr. Perlmutter, and Mr. Visser all attested that Fund IV and Behrman Brothers lack both employees and operations. (Doc. 117 3 ¶ 8; Doc. 118 at 3 ¶ 10; Doc. 120 at 3 ¶ 10). Mr. Reynolds has not presented any evidence to the contrary; he attempts to refute the evidence with allegations, but at this stage, allegations do not suffice. *See Meier*, 288 F.3d at 1269. The evidence before the court establishes that Fund IV and Behrman Brothers could not act; therefore, they could not have minimum contacts with Alabama, either under a traditional minimum contacts test or under the *Calder* test.

With respect to Mr. Reynolds' agency argument, as discussed above, the purported agents of Fund IV and Behrman Brothers presented uncontroverted affidavits attesting that they were not acting on behalf of Fund IV or Behrman Brothers. (Doc. 117 at 2 ¶ 6; Doc. 118 at 2 ¶ 5; Doc. 120 at 5 ¶ 15). And Mr. Reynolds has not presented any evidence from which the court could infer that they were, in fact, acting as agents of Fund IV or Behrman Brothers. The court cannot exercise personal jurisdiction over Fund IV or Behrman Brothers on that basis.

For the same reason, Mr. Reynolds' reliance on the Alabama Supreme Court's decision in *Ex parte Kohlberg Kravis Roberts & Co., L.P.*, 78 So. 3d 959, 963 (Ala. 2011) is inapposite. The limited partnerships at issue in that case took direct actions relating to the acquisition of an

Alabama company. *Id.* at 962–65, 973. Fund IV and Behrman Brothers, however, have presented evidence that they cannot take any actions because they do not have employees or operations.

The court concludes that Mr. Reynolds has failed to meet his burden of establishing that the court has personal jurisdiction over Fund IV and Behrman Brothers. Accordingly, the court **WILL GRANT** the motion to dismiss the amended complaint.

2. Mr. Reynolds' Motion to Transfer Venue

After briefing on Defendants' motion to dismiss was complete, Mr. Reynolds filed an "alternative motion to transfer" the case. (Doc. 130). In that motion, he requests that if the court finds that it lacks personal jurisdiction over Fund IV and Behrman Brothers, it transfer the case to the Southern District of New York because that court would have general personal jurisdiction over them. (*Id.* at 5). He relies on 28 U.S.C. § 1406, which permits the court to transfer a case "to any district or division in which it could have been brought" if the interest of justice requires such a transfer. *See Goldlawr, Inc. v. Heiman*, 369 U.S. 463, 466–67 (1962) (holding that, under § 1406, a court that lacks personal jurisdiction over the defendants may nevertheless transfer the case to a court where venue is proper).

Fund IV and Behrman Brothers oppose transfer, contending that the derivative removal jurisdiction doctrine would make transfer futile and that the interests of justice do not permit transfer in any event. (Doc. 134 at 6–13). The court agrees that transfer would be futile because the derivative removal jurisdiction bars any federal court from acquiring personal jurisdiction over this

suit after its removal from a state court that lacked such personal jurisdiction.

As the court has discussed in more detail in a previous order (*see* doc. 107 at 8–11), the derivative removal jurisdiction doctrine provides that "[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter *or of the parties*, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run Coal Co. v. Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922) (emphasis added). The doctrine applies in this case because Defendants removed the case from state court under 28 U.S.C. § 1452(a), to which the derivative removal jurisdiction still applies. (*See* Doc. 107 at 9–10). Accordingly, the only question this court (or any other federal court) can consider in determining the existence of personal jurisdiction after removal under § 14529(a) is whether the state court in which the case was originally filed would have had personal jurisdiction over Defendants.

As the court explained above, the Alabama court in which this case was filed lacked personal jurisdiction over Defendants. Thus, under the derivative removal jurisdiction doctrine, no federal court to which the case is removed can acquire personal jurisdiction, even if that court would have had personal jurisdiction over the defendants in a lawsuit filed directly with that court. *See Lambert Run Coal Co.*, 258 U.S. at 382. Because transferring this case to the Southern District of New York would be futile, the court **WILL DENY** Mr. Reynolds' motion to transfer venue.

III. CONCLUSION

The court **WILL GRANT** the motion to dismiss the amended complaint for lack of personal jurisdiction, and **WILL DISMISS** the amended complaint **WITHOUT PREJUDICE**. The court **WILL DENY** Mr. Reynolds' motion to transfer venue.

The court will enter a separate order consistent with this opinion.

DONE and **ORDERED** this September 3, 2019.

ANNEMARIE CARNEY AXON
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

2:18-cv-00514-ACA

THOMAS E. REYNOLDS, as Trustee,
Plaintiff,

v.

BEHRMAN CAPITAL IV L.P, ET AL.,
Defendants.

MEMORANDUM OPINION

Plaintiff Thomas Reynolds, as chapter 7 trustee for the estates of Atherotech Inc. ("Atherotech") and Atherotech Holdings ("Holdings") has sued thirty related defendants, seeking to recover purportedly fraudulent transfers of a dividend recapitalization performed by Atherotech before Atherotech and Holdings declared bankruptcy. The thirty defendants have filed four motions to dismiss for lack of jurisdiction under Federal Rule of Civil Procedure 12(b)(2) or, in the alternative, for failure to state a claim under Rule 12(b)(6). (Docs. 28, 33, 37, 39).

Because the court finds that it lacks personal jurisdiction over each defendant, the court **WILL GRANT** the motions and **WILL DISMISS** each defendant **WITHOUT PREJUDICE**. The court will also permit Plaintiff Thomas Reynolds leave to file a proper motion to amend the complaint, attaching to it a proposed amended complaint that omits any facts, defendants, and

claims that are related only to the previously severed cases.

I. BACKGROUND

In deciding a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the court must accept as true the factual allegations made in the complaint unless the defendant contradicts those allegations with evidence. *Posner v. Essex Ins. Co.*, 178 F.3d 1209, 1215 (11th Cir. 1999).

Before setting out the facts underlying this case, the court must discuss how the parties are related to each other. The plaintiff, Mr. Reynolds, is the chapter 7 trustee for the estates of Atherotech and Holdings. (Doc. 1-1 at 10). Atherotech was wholly owned by Holdings, which was in turn owned by three shareholders: Defendant Behrman Capital IV LP ("Fund IV"), Defendant Behrman Brothers IV, LLC ("Behrman Brothers"), and Defendant MidCap Financial Investment, LP ("MidCap"). (Doc. 1-1 at 15-16 ¶ 44-45). Fund IV was Holdings' majority shareholder, owning 94% of its stock and controlling three of its five seats. (*Id.* at 23 ¶ 98). Behrman Brothers—which was also Fund IV's general partner—and MidCap owned the remaining shares in Holdings. (*Id.* at 17 ¶ 46, 24 ¶99).

The thirty defendants can be grouped as follows: (1) Fund IV; (2) Fund IV's fifteen limited partners (the "Limited Partners"); (3) Behrman Brothers and its twelve members (the "Behrman Brothers Defendants"); and (4) MidCap. (*See* Doc. 1-1 at 16-18 ¶¶ 46-48).

According to the complaint, Atherotech operated a laboratory that conducted testing on blood cholesterol

levels. (Doc. 1-1 at 20 ¶ 67). It paid physicians who ordered such testing a processing and handling fee, also known as a P&H fee. (*Id.* ¶¶ 69-70). Although Medicare rules and regulations prohibit the payment of P&H fees, Atherotech would nevertheless submit claims that included the payment of those fees to Medicare and other federal healthcare programs.[8] (*Id.* at 20-21 ¶¶ 71, 74).

In 2012, the Department of Justice began to investigate Atherotech's payments of P&H fees for violation of the federal False Claims Act, 31 U.S.C. §§ 3729-3730, and the federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b. (Doc. 1-1 at 21 ¶¶ 78-79, 28 ¶ 122). Violations of the False Claims Act can result in a per-claim penalty of between $5,500 and $11,000, in addition to treble damages. *See* 31 U.S.C. § 3729(a).

Despite knowing of the investigation, Atherotech continued to make P&H fee payments. (*See* Doc. 1-1 at 22 ¶¶ 81-82). From January 2011 through June 2013, Medicare reimbursed Atherotech about $35,691,000 for tests Atherotech had run that were associated with P&H fee payments. (*Id.* at 22 ¶ 82). Accordingly, Mr. Reynolds contends that by June 2013, Atherotech had $107,073,000 in contingent liabilities for violations of the False Claims Act. (*Id.* ¶¶ 82-85).

In 2013, while the Department of Justice investigation was ongoing, Atherotech entered a credit agreement with certain lenders under which the lenders loaned Atherotech $40.5 million. (Doc. 1-1 at 22-23 ¶¶ 88-90, 23 ¶ 97). Atherotech then executed a dividend

[8] Defendants dispute whether the practice was prohibited at the time, but that dispute does not affect this memorandum opinion.

recapitalization under which it paid Holdings' shareholders—Fund IV, Behrman Brothers, and MidCap—$31,559,342.45. (*Id.* at 22-23 ¶¶ 86, 97-98).

Fund IV received $31,433,596.05 from the dividend; Behrman Brothers received $87,374; and MidCap received $351,890.70. (Doc. 1-1 at 23-24 ¶¶ 98-99). Fund IV then distributed its portion of the dividend to its Limited Partners and its general partner Behrman Brothers, and Behrman Brothers distributed its portion of the Fund IV dividend to its twelve members. (Doc. 1-1 at 24-25 ¶¶ 102, 104).

By July 2014, Atherotech could no longer pay P&H fees and its revenues decreased significantly. (Doc. 1-1 at 29 ¶¶ 134-35). From July through October 2015, Fund IV invested $6.9 million into Atherotech. (*Id.* at 30 ¶¶ 137-39).

In March 2016, Atherotech and Holdings filed for bankruptcy. (Doc. 1-1 at 16-17 ¶40). The bankruptcy court appointed Mr. Reynolds as the Chapter 7 trustee for both companies *(id.* at 16 ¶ 41), and he eventually sold Atherotech's assets for $19.6 million. (*Id.* at 30 ¶ 141).

In 2018, Mr. Reynolds, as trustee for the estates of Holdings and Atherotech, filed this lawsuit in state court, asserting the following claims:[9]

Count One: intentionally fraudulent transfer, under 11 U.S.C. § 544 and Ala. Code

[9] The complaint actually asserted thirteen claims against thirty-two defendants. (*See* Doc. 1-1). The court severed the claims against two of the defendants, and the only claims remaining in this case are the ones listed in this memorandum opinion.

§ 8-9A-4(a), against Fund IV and MidCap

Count Two: constructively fraudulent transfer, under 11 U.S.C. § 544 and Ala. Code § 8-9A-4(c), against Fund IV and MidCap

Count Three: constructively fraudulent transfer, under 11 U.S.C. § 544 and Ala. Code § 8-9A-5(a), against Fund IV and MidCap

Count Four: recovery of fraudulent transfer, under 11 U.S.C. § 550(a)(1), against Fund IV, Behrman Brothers, and MidCap

Count Five: recovery of fraudulent transfer, under 11 U.S.C. § 550(a)(1), against Behrman Brothers and the Limited Partners

Count Six: recovery of fraudulent transfer, under 11 U.S.C. § 550(a)(2), against Behrman Brothers and the Limited Partners

Count Seven: recovery of fraudulent transfer, under 11 U.S.C. § 550(a)(2), against Behrman Brothers' members

(Doc. 1-1 at 30-34; *see also* Doc. 86 at 11; Doc. 87 at 11).

Defendants removed the case to this court under 28 U.S.C. § 1441 on the basis that the complaint implicated significant federal issues and under 28 U.S.C. § 1452(a) on the basis that, pursuant to 28 U.S.C. § 1334(a), the court has jurisdiction under the Bankruptcy Code. (Doc.

1 at 3, 11). The court concluded that this case does not implicate a significant federal issue, but that Counts One through Seven "arise under" or "relate to" the Bankruptcy Code. (*Id.* at 9-12). Accordingly, the court found that removal of this action was authorized by § 1452(a).

II. DISCUSSION

All of the defendants move to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction and, in the alternative, under Rule 12(b)(6) for failure to state a claim. Because the court concludes that Mr. Reynolds has not established that the court has personal jurisdiction over any of the defendants, the court will not address any of the arguments about the merits of his claims.

1. Personal Jurisdiction

Under Federal Rule of Civil Procedure 12(b)(2), the court may dismiss a complaint for "lack of personal jurisdiction." To withstand a Rule 12(b)(2) motion, the plaintiff "bears the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction." *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009). Where the defendant challenges personal jurisdiction and submits affidavits in support of its position, the burden shifts back to the plaintiff to produce evidence supporting jurisdiction. *Meier ex rel. Meier v. Sun Int'l Hotels*, Ltd., 288 F.3d 1264, 1269 (11th Cir. 2002).

The Supreme Court has recognized two kinds of personal jurisdiction: general and specific. *Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty.*, 137 S. Ct. 1773, 1779-80 (2017). Mr. Reynolds has made no argument that the court has general personal

jurisdiction over any of the defendants; accordingly, he has waived any reliance on general personal jurisdiction and the court will address only whether it has specific personal jurisdiction.

A court with specific jurisdiction may hear only claims that "aris[e] out of or relate[ ] to the defendant's contacts with the forum." *Daimler AG v. Bauman*, 571 U.S. 117, 127 (2014) (quotation marks omitted). An entity is subject to specific personal jurisdiction where it has "minimum contacts" with the forum. But "the forum" means different things depending on the case. In most cases, Federal Rule of Civil Procedure 4 permits the court to exercise personal jurisdiction over a defendant "who is subject to the jurisdiction of a court of general jurisdiction in the State where the district court is located." *See* Fed. R. Civ. P. 4(k)(1)(A), (C).[10] Because state courts are limited by the Fourteenth Amendment to the United States Constitution, the question in those cases is whether the court's exercise of jurisdiction would violate the Fourteenth Amendment's Due Process Clause. *See Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 925 (11th Cir. 2007). Under the Fourteenth Amendment, the court must determine whether the defendant has "certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co.*, 326 U.S. at 316.

But Rule 4(k) also provides for personal jurisdiction over a defendant "when authorized by a federal statute." Fed. R. Civ. P. 4(k)(l)(C). This refers to federal statutes

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[10] Rule 4(k)(2), which also addresses the court's personal jurisdiction, does not apply in this case because this court does not have exclusive jurisdiction over the claims asserted.

that provide for nationwide service of process. *See Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 942 (11th Cir. 1997) ("When a federal statute provides for nationwide service of process, it becomes the statutory basis for personal jurisdiction."). In those cases, "the constitutional limits of due process derive from the Fifth, rather than the Fourteenth, Amendment." *Id.* Under the Fifth Amendment, the court must determine only whether the defendant has minimum contacts with the United States. *Id.* at 946-47.

Mr. Reynolds contends that the court must analyze whether it has personal jurisdiction under the Fifth Amendment. (Doc. 85 at 8-11). He asserts that because this court has already determined that it has subject matter jurisdiction under the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, which provide for nationwide service of process, govern. (*Id.* at 8). Defendants argue that the doctrine of derivative removal jurisdiction precludes a finding of personal jurisdiction under the Fifth Amendment. (Doc. 95 at 9-12).[11]

In general, "[t]he jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject- matter or of the parties, the federal court acquires none, *although it might in a like suit originally brought there have had jurisdiction.*" *Lambert Run Coal Co. v. Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922) (emphasis

[11] Fund IV and the Behrman Brothers Defendants adopt and incorporate the Limited Partners' arguments about the applicability of Bankruptcy Rule 7004. (Doc. 93 at 8-9; Doc. 94 at 6-7). Although MidCap does not expressly adopt the Limited Partners' arguments, its arguments are the same. (Doc. 92 at 2-6).

added). The parties and the court refer to that rule as the derivative removal jurisdiction doctrine.

Congress has abrogated the derivative removal jurisdiction doctrine for cases removed under 28 U.S.C. § 1441, the general removal statute. 28 U.S.C. § 1441(f) ("The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim."); *see Hollis v. Fla. State Univ.*, 259 F.3d 1295, 1298 (11th Cir. 2001). But the plain language of § 1441(f) makes clear that Congress has not abrogated the rule for cases removed under other removal statutes—it specifically applies only to civil actions "removed under *this section*." *See* 28 U.S.C. § 1441(f) (emphasis added); *see also Lopez v. Sentrillon Corp.*, 749 F.3d 347, 351 (5th Cir.), *as revised* (Apr. 28, 2014) ("The [derivative removal jurisdiction] doctrine therefore continues to apply to cases removed pursuant to other statutes…."); *Bullock v. Napolitano*, 666 F.3d 281, 286 n.2 (4th Cir. 2012) ("Congress has specifically abrogated the doctrine of derivative jurisdiction in cases removed under 28 U.S.C. § 1441, but it has not done so with respect to actions removed under [a different removal statute]."); *Rodas v. Seidlin*, 656 F.3d 610, 618-19 (7th Cir. 2011) ("Congress has specifically abrogated the [derivative removal jurisdiction] doctrine only with respect to removals under the general removal statute. Given that Congress explicitly abrogated the doctrine of derivative jurisdiction only with respect to removals under Section 1441, it supports the notion that—for whatever reasons—Congress intended to keep the doctrine in place with regard to other removal provisions.") (citations omitted).

In supplemental briefing, Mr. Reynolds argues that the derivative removal jurisdiction doctrine does not affect this court's subject matter jurisdiction. (Doc. 104 at 1-5). While that may be true, the question here is not whether the doctrine divests this court of subject matter jurisdiction, but whether it precludes the court from conducting a Fifth Amendment analysis to determine whether it has personal jurisdiction over the defendants. It does.

Mr. Reynolds also argues that the doctrine does not prevent a district court from acquiring personal jurisdiction after removal. (*Id.* at 5-10). But that is precisely what the doctrine does: "[i]f the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none, although it might in a like suit originally brought there have had jurisdiction." *Lambert Run Coal Co.*, 258 U.S. at 382.

Accordingly, even though this court has found that under 28 U.S.C. § 1334(b), it has subject matter jurisdiction over this case, the Fifth Amendment analysis is not applicable in this case. Instead, the court must determine whether the state court in which the case was originally filed would have been able to exercise specific personal jurisdiction over the defendants.

"Alabama's long-arm statute permits the exercise of personal jurisdiction to the fullest extent constitutionally permissible." *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 925 (11th Cir. 2007). Thus, the court must examine "whether exercising jurisdiction over the defendant would violate the Due Process Clause of the Fourteenth Amendment, which requires that the defendant have minimum contacts with the forum state and that the exercise of jurisdiction not offend 'traditional notions

of fair play and substantial justice.'" *Id.* (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

Mr. Reynolds did not argue in his briefs or at oral argument that the Behrman Brothers Defendants and the Limited Partners had minimum contacts with Alabama. (*See* Doc. 86 at 6-11 (brief in response to Behrman Brothers); Doc.87 at 6-11 (brief in response to Limited Partners)). Nor can the court discern from the complaint any basis to find that those defendants had the requisite minimum contacts. (*See generally* Doc. 1-1 at 9-40). Accordingly, the court **WILL GRANT** the motion to dismiss the Behrman Brothers Defendants and the Limited Partners.

But Mr. Reynolds did argue that Fund IV and MidCap each had minimum contacts with Alabama sufficient to give the court personal jurisdiction, based on the test the Supreme Court set out in *Calder v. Jones*, 465 U.S. 783, 788 (1984). He asserts that (1) Fund IV and MidCap had business dealings with Atherotech and Holdings, which had their principal place of business in Alabama; (2) they accepted fraudulently transferred funds from Holdings; and (3) the fraudulently transferred funds caused the ruin of Atherotech. (Doc. 85 at 13-15; Doc. 88 at 4- 6).

In *Calder*, a national magazine based in Florida but with a large circulation in California published an article about the plaintiff. 465 U.S. at 784-85. The defendant-reporter, who lived in Florida, frequently traveled to California for business and called sources in California for the information that appeared in the article. *Id.* at 785. Before publishing the article, he also called the plaintiff at her California home and read the article to her husband. *Id.* at 785-86. The other defendant was the

president and editor of the magazine, who oversaw "just about every function" of the magazine, "reviewed and approved the initial evaluation of the subject of the article," edited it before publication, and declined to print a retraction after its publication. *Id.* at 786.

The Supreme Court held that because "California is the focal point both of the story and of the harm suffered," the defendants' contacts with California were sufficient to give the California court personal jurisdiction. *Calder*, 465 U.S. at 788-89. The Eleventh Circuit has explained that the *Calder* effects test requires "the commission of an intentional tort, expressly aimed at a specific individual in the forum whose effects were suffered in the forum." *Licciardello v. Lovelady*, 544 F.3d 1280, 1288 (11th Cir. 2008).

Mr. Reynolds contends that under *Calder*, he has demonstrated that Fund IV had sufficient minimum contacts with Alabama because it "devised the scheme to undertake the dividend recapitalization," it was the driving force in executing the dividend recapitalization, and the effects of the dividend recapitalization were felt in Alabama. (Doc. 85 at 15). He contends that MidCap had sufficient minimum contacts with Alabama because it accepted the fraudulent transfer and it had "business dealings with an ownership interest in" Atherotech and Holdings. (Doc. 88 at 6).

Mr. Reynolds reads *Calder* too broadly. He cites a number of cases that he says stand for the proposition that the mere acceptance of a fraudulent transfer is enough to establish minimum contacts with a State. (*Id.* at 14-15). For example, he refers to *In re Chase & Sanborn Corp.*, 835 F.2d 1341 (11th Cir. 1988), *reversed on other grounds sub. nom Granfinanciera, S.A. v.*

Nordberg, 492 U.S. 33 (1989), which involved the question whether the court had personal jurisdiction based on the defendants' minimum contacts with the United States. The Eleventh Circuit held that fraudulent transfers of U.S. currency made from New York and Miami bank accounts into the defendants' Miami bank accounts sufficed to establish minimum contacts with the United States. *Id.* at 1346. But *Chase & Sanborn* is distinguishable because in that case, the defendants had bank accounts located in the forum (the United States), whereas in this case, no allegation or evidence indicates that Fund IV or MidCap had Alabama bank accounts; the only alleged connection to Alabama is that Atherotech and Holdings had their principal place of business here.

The other cases Mr. Reynolds cites are non-binding but persuasive decisions, and Mr. Reynolds again reads them too broadly. *See Montoya v. Akbari*, 2016 WL 6783245, at *3 (Bankr. D.N.M. Nov. 14, 2016) (intentional acceptance of fraudulent transfer enough to establish minimum contacts with the United States); *Mullins v. TestAmerica, Inc.*, 564 F.3d 386, 401-02 (5th Cir. 2009) (intentional acceptance of fraudulent transfer that defendant had engineered enough to establish minimum contacts); *Gambone v. Lite Rock Drywall*, 288 F. App'x 9, 13-14 (3d Cir. 2008) (finding personal jurisdiction where the defendant "participated in a fraudulent conveyance"); *Sugartown Worldwide LLC v. Shanks*, 2015 WL 1312572, at *6-7 (E.D. Pa. 2015)(finding personal jurisdiction where defendant was actively involved in the fraudulent transfer); *Sourcing Mgmt., Inc. v. Sinclair, Inc.*, 118 F. Supp. 3d 899, 911-12 (N.D. Tex. 2015) (finding personal jurisdiction where the defendant "collude[ed] to transfer … assets"); *Racher v. Lusk*, 2013 WL 6037122, at *3 (W.D. Okla. 2013) (finding personal

jurisdiction where defendants operated, managed, and controlled the transferor); *State Farm Mut. Auto. Ins. Co. v. Tz'Doko V'Chesed of Klausenberg*, 543 F. Supp. 2d 424, 430-31 (E.D. Pa. 2008) (finding personal jurisdiction in a fraudulent transfer case where the plaintiff alleged that the defendants' actions were "malicious and outrageous").

In *Mullins*, the Fifth Circuit expressed skepticism "that a non-resident defendant's receipt of assets transferred with an intent to hinder, delay, or defraud a creditor *ipso facto* establishes personal jurisdiction in the state where a complaining creditor resides." 564 F.3d at 400. This court agrees. "The 'effects test in *Calder* does not supplant the need to demonstrate minimum contacts that constitute purposeful availment, that is, conduct by the non-resident defendant that invoked the benefits and protections of the state or was otherwise purposefully directed toward a state resident." *Id.* All of the cases Mr. Reynolds cite involve active involvement in the fraudulent transfer, and that is the standard this court must use as well.

Mr. Reynolds has not alleged facts or presented evidence showing that MidCap was involved enough in the alleged scheme to have minimum contacts with Alabama. MidCap was a minority shareholder in Holdings and Mr. Reynolds has not alleged that it was in any way involved in the decision to do the dividend recapitalization. All Mr. Reynolds has presented is a vague statement in his brief—which constitutes neither a valid factual allegation nor evidence—that MidCap had "business dealings with" Atherotech and Holdings. (Doc. 88 at 6). He has not made allegations sufficient to allow this court to exercise personal jurisdiction over MidCap.

Similarly, Mr. Reynolds has not alleged facts sufficient to demonstrate that Fund IV was involved in Atherotech's decision to do the dividend recapitalization. The complaint alleges that Fund IV is the majority shareholder of Holdings, controls a majority of Holdings' board seats, and that it actively invested $6.9 million in Holdings after the dividend recapitalization. (Doc. 1-1 at 23 ¶ 98, 30 ¶¶ 137-39). That may be enough to demonstrate that Fund IV controlled Holdings. But the complaint does not allege that either Fund IV or Holdings exercised active control over Atherotech. (*See* Doc. 1-1 at 23 ¶98). To the contrary, the complaint alleges that "*Atherotech* determined that it would execute a dividend recapitalization." (*Id.* at 22 ¶ 86) (emphasis added).

All of the wrongs alleged in the complaint stem from the decision to execute the dividend recapitalization: at the hearing Mr. Reynolds argued that the entire purpose of the recapitalization was to liquidate the company before the DOJ's investigation could result in massive fines. Accordingly, without a connection drawn from Fund IV to Holdings to Atherotech, Mr. Reynolds cannot meet the *Calder* effects test because he cannot show that Fund IV committed an intentional act expressly aimed at Atherotech. All he can show is that Atherotech decided to execute a dividend recapitalization, perhaps with fraudulent intent, and afterward Holdings distributed those funds to Fund IV and other investors.

At the hearing, Mr. Reynolds emphasized paragraph 143 of his complaint, in which he stated that "Fund IV—by virtue of controlling three of the five seats on the Holdings Board—controlled [Holdings and Atherotech] and were insiders of [Holdings and Atherotech]." He argues that this paragraph is enough to establish that

Fund IV exercised active control over both Holdings and Atherotech. But the court cannot accept conclusory allegations in determining whether a plaintiff has made a prima facie case of personal jurisdiction. *See Snow v. DirecTV, Inc.*, 450 F.3d 1314, 1318 (11th Cir. 2006) (rejecting the plaintiffs "vague and conclusory allegations" as "insufficient to establish a prima facie case of personal jurisdiction" over the defendant). Mr. Reynolds must allege facts showing how Fund IV controlled Atherotech. And all he has alleged so far is that Fund IV controlled Holdings and Holdings was the sole shareholder of Atherotech. That allegation is insufficient.

Accordingly, the court **WILL GRANT** the motion to dismiss all defendants for lack of personal jurisdiction.

2. Amendment

At the hearing, Mr. Reynolds requested leave to amend the complaint. Under Federal Rule of Civil Procedure 15, the time for amendment as a matter of course has passed. *See* Fed. R. Civ. P. 15(a)(1). "In all other cases, a party may amend its pleading only with the opposing party's consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Justice does not require permitting amendment when any amendment would be futile. *Jameson v. Arrow Co.*, 75 F.3d 1528, 1534-35 (11th Cir. 1996). In addition, a request for leave to amend should be accompanied by "the substance of the proposed amendment or … a copy of the proposed amendment." *Cita Tr. Co. AG v. Fifth Third Bank*, 879 F.3d 1151, 1157 (11th Cir. 2018).

Mr. Reynolds has represented that he could amend his complaint to establish personal jurisdiction, but he has not explained how. Fund IV opposed amendment,

arguing that Mr. Reynolds has already had the opportunity to do discovery in other cases pending in state court, including a long deposition of Fund IV's corporate representative.

The court cannot evaluate whether amendment would be futile without more information. Accordingly, the court will not allow amendment at this point. But the court will allow Mr. Reynolds to file a formal motion to amend, attaching to it his proposed amended complaint. The complaint as it currently stands includes facts, defendants, and claims that the court has already severed from this case. To aid the court in evaluating the amended complaint, Mr. Reynolds must omit any facts, defendants, and claims that are related only to the severed cases.

III. CONCLUSION

The court **WILL GRANT** the motions to dismiss on the basis that the court lacks personal jurisdiction over the defendants, and **WILL DISMISS** each defendant **WITHOUT PREJUDICE**. The court will permit Mr. Reynolds to file a motion amend the complaint. The amended complaint must omit any facts, defendants, and claims that are related only to the severed cases.

DONE and **ORDERED** this February 11, 2019.

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ANNEMARIE CARNEY AXON
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 19-13537-HH

THOMAS E. REYNOLDS,
PLAINTIFF - APPELLANT,

v.

BEHRMAN CAPITAL IV L.P., AXA PRIMARY FUND AMERICA IV LP, AXA PRIVATE CAPITAL I, LP, CORE AMERICAS/GLOBAL HOLDINGS, LP, GLOBAL FUND PARTNERS II, LP, ET AL., DEFENDANTS - APPELLEES,

BEHRMAN BROTHERS MANAGEMENT CORPORATION, ET AL., DEFENDANTS.

Appeal from the United States District Court for the Northern District of Alabama

June 3, 2021

ORDER:

The motions of Appellees, Behrman Capital IV L.P., and Midcap Financial SBIC, L.P., for stay of the issuance of the mandate pending petition for writ of certiorari are GRANTED to and including August 12, 2021, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon

expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

DAVID J. SMITH
Clerk of the United States Court of
Appeals for the Eleventh Circuit
ENTERED FOR THE COURT - BY DIRECTION

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 19-13537-HH

THOMAS E. REYNOLDS,
PLAINTIFF - APPELLANT,

v.

BEHRMAN CAPITAL IV L.P., AXA PRIMARY FUND AMERICA IV LP, AXA PRIVATE CAPITAL I, LP, CORE AMERICAS/GLOBAL HOLDINGS, LP, GLOBAL FUND PARTNERS II, LP, ET AL., DEFENDANTS - APPELLEES,

BEHRMAN BROTHERS MANAGEMENT CORPORATION, ET AL., DEFENDANTS.

Appeal from the United States District Court for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

May 14, 2021

BEFORE: JORDAN, LAGOA, and BRASHER, Circuit Judges.

PER CURIAM:

Midcap Financial SBIC, L.P. and Behrman Capital IV L.P.'s Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) Midcap Financial SBIC, L.P.'s Petition for

Panel Rehearing is also denied. (FRAP 40). Berhman Capital IV L.P.'s Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

APPENDIX F

28 U.S.C. 1334 Bankruptcy cases and proceedings.

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)

(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under subsection (c) (other than a decision not to abstain in a

proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction—

(1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

APPENDIX G

28 U.S.C. 1441 Removal of civil actions.

(a) Generally.—

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal Based on Diversity of Citizenship.—

(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

(2) A civil action otherwise removable solely on the basis of the jurisdiction under section 1332(a) of this title may not be removed if any of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Joinder of Federal Law Claims and State Law Claims.—

(1) If a civil action includes—

(A) a claim arising under the Constitution, laws, or treaties of the United States (within the meaning of section 1331 of this title), and

(B) a claim not within the original or supplemental jurisdiction of the district court or a claim that has been made nonremovable by statute,

the entire action may be removed if the action would be removable without the inclusion of the claim described in subparagraph (B).

(2) Upon removal of an action described in paragraph (1), the district court shall sever from the action all claims described in paragraph (1)(B) and shall remand the severed claims to the State court from which the action was removed. Only defendants against whom a claim described in paragraph (1)(A) has been asserted are required to join in or consent to the removal under paragraph (1).

(d) Actions Against Foreign States.—

Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

(e) Multiparty, Multiforum Jurisdiction.—

(1) Notwithstanding the provisions of subsection (b) of this section, a defendant in a civil action in a State court may remove the action to the district court of the United States for the district and division embracing the place where the action is pending if—

(A) the action could have been brought in a United States district court under section 1369 of this title; or

(B) the defendant is a party to an action which is or could have been brought, in whole or in part, under section 1369 in a United States district court and arises from the same accident as the action in State court, even if the action to be removed could not have been brought in a district court as an original matter.

The removal of an action under this subsection shall be made in accordance with section 1446 of this title, except that a notice of removal may also be filed before trial of the action in State court within 30 days after the date on which the defendant first becomes a party to an action under section 1369 in a United States district court that arises from the same accident as the action in State court, or at a later time with leave of the district court.

(2) Whenever an action is removed under this subsection and the district court to which it is removed or transferred under section 1407(j) [1] has made a liability determination requiring further proceedings as to damages, the district court shall remand the action to the State court from which it had been removed for the determination of damages, unless the court finds that, for the convenience of parties and witnesses and in the interest of justice, the action should be retained for the determination of damages.

(3) Any remand under paragraph (2) shall not be effective until 60 days after the district court has issued an order determining liability and has certified its intention to remand the removed action for the determination of damages. An appeal

with respect to the liability determination of the district court may be taken during that 60-day period to the court of appeals with appellate jurisdiction over the district court. In the event a party files such an appeal, the remand shall not be effective until the appeal has been finally disposed of. Once the remand has become effective, the liability determination shall not be subject to further review by appeal or otherwise.

(4) Any decision under this subsection concerning remand for the determination of damages shall not be reviewable by appeal or otherwise.

(5) An action removed under this subsection shall be deemed to be an action under section 1369 and an action in which jurisdiction is based on section 1369 of this title for purposes of this section and sections 1407, 1697, and 1785 of this title.

(6) Nothing in this subsection shall restrict the authority of the district court to transfer or dismiss an action on the ground of inconvenient forum.

(f) Derivative Removal Jurisdiction.—

The court to which a civil action is removed under this section is not precluded from hearing and determining any claim in such civil action because the State court from which such civil action is removed did not have jurisdiction over that claim.

APPENDIX H

28 U.S.C. 1452 Removal of claims related to bankruptcy cases.

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title.