No. 21-207

In The Supreme Court of the United States

BEHRMAN CAPITAL IV, L.P.,
BEHRMAN BROTHERS IV L.L.C., AND
MIDCAP FINANCIAL INVESTMENT, L.P.,

Petitioners,

v.

THOMAS E. REYNOLDS, TRUSTEE,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

This Court has applied the derivative jurisdiction doctrine only in cases concerning issues of subject matter jurisdiction. The court below restricted its application of the derivative jurisdiction doctrine to issues of subject matter jurisdiction. Did the court of appeals err when it refused to expand the derivative jurisdiction doctrine to apply to issues of personal jurisdiction?

RULE 29.6 DISCLOSURE STATEMENT

Debtor Atherotech Holdings, Inc., is the sole parent corporation for debtor Atherotech, Inc. No publicly held company owns 10% or more of Atherotech Holdings, Inc.'s stock.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

SUPREME COURT

COURTS OF APPEALS

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 988 F.3d 1314. The decisions of the district court dismissing the complaint (Pet. App. 21a-33a; 34a-51a) are not published in the Federal Supplement but are available at 2019 U.S. Dist. LEXIS 21630 and 2019 U.S. Dist. LEXIS 149390, respectively.

JURISDICTION

The court of appeals entered its judgment on February 23, 2021. The court of appeals denied the Petitioners' petition for rehearing on May 14, 2021. Pet. App. 53a-54a. The court of appeals entered a stay of its mandate on June 3, 2021. Pet. App. 51a-52a. The Petitioners filed their petition for a writ of certiorari on August 10, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A. The fraudulent transfer.

Atherotech, Inc. ("Atherotech") was a leading cholesterol blood-testing company located in Birmingham, Alabama. Pet. App. 3a. Atherotech Holdings, Inc. ("Holdings"), was Atherotech's sole shareholder. *Id*. Behrman Capital IV L.P. ("Behrman Capital") owned 94 percent of the Holdings stock, and Behrman Brothers IV L.L.C. ("Behrman Brothers") and MidCap

Investment, L.P. ("MidCap") owned the remaining 6 percent of the Holdings stock. *Id*. Behrman Capital also controlled Holdings' board of directors, and therefore Atherotech. *Id*.

Prior to 2012, Atherotech paid physicians that used Atherotech's services a processing and handling fee (the "P&H Fee"). *Id*. In 2012, the Department of Justice (the "DOJ") commenced an investigation into Atherotech's practice of paying P&H Fees as possible violations of the False Claims Act and the Anti-Kickback Statute, 31 U.S.C. §§ 3729-3730, and 42 U.S.C. § 1320a-7b, respectively. *Id*.

In the face of the DOJ investigation, in 2013 Atherotech – under Behrman Capital's control – executed a dividend recapitalization. Pet. App. 4a. The dividend recapitalization required Atherotech to obtain a $40.5 million loan, and then immediately pay dividends to its ultimate shareholders: Behrman Capital, Behrman Brothers, and MidCap. *Id*. Behrman Capital received a dividend in the amount of $31,433,596.05; Behrman Brothers received a dividend in the amount of $87,374.00; and MidCap received a dividend in the amount of $351,890.70. *Id*. Behrman Capital then distributed its dividend to its partners (collectively, the "Behrman Capital Partners"). *Id*. Likewise, Behrman Brothers distributed its dividend to its members (collectively, the "Behrman Brothers Members"). *Id*.

Subsequent to the DOJ investigation and the dividend recapitalization, in July 2014, Atherotech ceased paying P&H Fees to physicians. *Id*. Soon thereafter,

Atherotech's revenues began to decrease. *Id*. By March 2016, Atherotech and Holdings had no choice but to file for bankruptcy liquidation pursuant to chapter 7, title 11, United States Code. *Id*. The bankruptcy court appointed the Respondent, Thomas E. Reynolds ("Reynolds"), as chapter 7 trustee of the Atherotech and Holdings bankruptcy estates. *Id*. at 4a-5a.

B. The district court proceedings.

Reynolds filed a complaint in Alabama state court against Behrman Capital, Behrman Brothers, MidCap, the Behrman Capital Partners, and the Behrman Brothers Members to avoid and recover fraudulent transfers related to the dividend recapitalization. Pet. App. 5a. The defendants removed the case from the Alabama state court to the U.S. District Court for the Northern District of Alabama. *Id*. The district court determined that removal was appropriate pursuant to the bankruptcy removal statute, 28 U.S.C. § 1452(a). *Id*.

After removing the case to the district court, the defendants moved to dismiss the case pursuant to Rule 12(b)(2), arguing that because the state court did not have personal jurisdiction over the defendants, the district court could not acquire personal jurisdiction upon removal. *Id*. The district court agreed. *Id*. The district court held that the derivative jurisdiction doctrine prevented the court from obtaining personal jurisdiction pursuant to Fed. R. Bankr. P. 7004(a), because the state court did not have personal jurisdiction over the

defendants. *Id*. After giving Reynolds an opportunity to amend his complaint to bolster his allegations concerning the defendants' contacts with Alabama,[1] the district court dismissed Reynolds' amended complaint. *Id*.

C. The appellate court proceedings.

Reynolds timely appealed the district court's dismissal. Pet. App. 2a. The court of appeals reversed the district court and held that the derivative jurisdiction doctrine does not apply to issues of personal jurisdiction. Pet. App. 13a. Accordingly, the court of appeals reasoned, the district court could obtain personal jurisdiction over the defendants after removal pursuant to Fed. R. Bankr. P. 7004(a), assuming the defendants had sufficient minimum contacts with the United States. Pet. App. 18a-19a.

REASONS FOR DENYING THE PETITION

I. The Court should deny the Petition because the court of appeals, following this Court's application of the derivative jurisdiction doctrine, correctly held that the derivative jurisdiction doctrine is limited to issues of subject matter jurisdiction.

The Petitioners argue that this Court has held that the derivative jurisdiction doctrine applies to

[1] In the amended complaint, Reynolds voluntarily dismissed all defendants except Behrman Capital and Behrman Brothers.

issues of personal jurisdiction. Pet. 9-10. Specifically, the Petitioners contend that the Court's statement in *Lambert Run Coal Co. v. Baltimore & O.R. Co.*, that "If the state court lacks jurisdiction of the subject-matter or of the parties, the federal court acquires none. . . ." *Lambert Run Coal Co.* v. *Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922), extends to both personal and subject matter jurisdiction. However, a text without a context is a pre-text.

The context of *Lambert Run* and its progeny show that this Court has only applied the derivative jurisdiction doctrine in cases involving issues of subject matter jurisdiction. The Court first applied the "or of the parties" language in *Lambert Run*, and the Court's three subsequent cases discussing derivative jurisdiction never presented an opportunity for the Court to further analyze or parse this language. This Court's use of the statement "or of the parties" is therefore contextually dependent on the fact that the United States was the party in question in *Lambert Run*.

a. This Court has applied the derivative jurisdiction doctrine only to cases involving issues of subject matter jurisdiction.

In each of the four cases in which this Court has discussed the derivative jurisdiction doctrine, the issues involved only subject matter jurisdiction, at best. First, in *Lambert Run* the United States was an indispensable party to the action, was not joined in the

action, and had not consented to the state court's jurisdiction. *Lambert Run Coal Co.* v. *Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922). When the United States asserts immunity, a state court does not have subject matter jurisdiction over claims against the United States. *United States v. Mitchell*, 463 U.S. 206, 212 (1983) ("It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction."); *Ecker v. United States*, 358 F. App'x 551, 552-53 (5th Cir. 2009) ("Sovereign immunity ordinarily protects the United States from liability and deprives courts of subject matter jurisdiction over the claims against it."). Therefore, in *Lambert Run*, because the United States had not consented to the state court action, the state court did not have subject matter jurisdiction and neither did the district court upon removal. *Lambert Run*, 258 U.S. at 382.

Second, in *Minnesota v. United States*, the United States was a named party in a state court action but had not consented or otherwise waived its sovereign immunity. *Minnesota v. United States*, 305 U.S. 382, 383-84 (1939). The United States removed the case and then moved for dismissal, which the district court denied. *Id*. at 384. After the court of appeals reversed, this Court held that the state court did not have subject matter jurisdiction over the claims against the United States and therefore, the district court did not obtain subject matter jurisdiction over the claims against the United States upon removal. *Id*. at 389. Again, the issue before this Court was one of subject

matter jurisdiction. *See Harris v. FBI*, No. 2:16-CV-30, 2016 U.S. Dist. LEXIS 123955, at *4 (S.D. Ohio Sep. 13, 2016) (citing *Minnesota* for the proposition that "[t]he derivative jurisdiction doctrine holds that if the state court where an action is filed lacks subject matter jurisdiction, the federal court, upon removal, also lacks subject matter jurisdiction.").

Third, in *Freeman v. Bee Mach. Co.*, the plaintiff commenced an action in Massachusetts state court and the defendant removed to the district court on diversity grounds. *Freeman v. Bee Mach. Co.*, 319 U.S. 448, 449-50 (1943). After removal, the plaintiff moved to amend his complaint to include a claim under the Clayton Act; a claim over which the district court had exclusive subject matter jurisdiction. *Id.* at 450. The district court denied the motion to amend. *Id*. The court of appeals reversed on the issue of the amendment. *Id*. This Court ultimately affirmed the court of appeals and held that the amendment should have been allowed. *Id.* at 451. While the derivative jurisdiction doctrine was not specifically implicated, the context is clear: the state court would not have had subject matter jurisdiction over the Clayton Act claims and the district court did have subject matter jurisdiction after removal. *Id*. There was never an issue of personal jurisdiction in *Freeman*.

Fourth, this Court mentioned the derivative jurisdiction doctrine in *Arizona v. Manypenny*, 451 U.S. 232 (1981). As in *Freeman*, this Court did not extensively discuss the derivative jurisdiction doctrine, relegating its discussion to a single footnote. *See id.* at 242 n.17.

In *Arizona*, however, this Court analogized the derivative jurisdiction doctrine to issues of what law a court should apply on appeal when the case was removed from state court to federal court. *Id.* at 241-50. In *Arizona*, there was never an issue of personal jurisdiction before this Court.

This Court has discussed the derivative jurisdiction doctrine in two cases (*Lambert Run* and *Minnesota*), and merely mentioned the derivative jurisdiction doctrine in two cases (*Freeman* and *Arizona*). None of these cases involved issues of personal jurisdiction. Nonetheless, in this Court's articulation of the derivative jurisdiction doctrine, the Court described it as encompassing issues of jurisdiction of "the subject matter or of the parties." *See Lambert Run*, 258 U.S. at 382. The contextual key to understanding the statement "or of the parties" is the presence of the United States as a party in *Lambert Run* and in *Minnesota*. And the United States' presence in those cases presented the Court with issues of subject matter jurisdiction.

b. The Petitioners encourage this Court, as they did the court of appeals, to go beyond the Court's precedents and expand the scope of the derivative jurisdiction doctrine.

Despite this Court's application of the derivative jurisdiction doctrine to only issues of subject matter jurisdiction, the Petitioners urge the Court to expand the doctrine to include issues of personal jurisdiction as

well. Lower courts, however, have rejected this type of expansion of the derivative jurisdiction doctrine. *District Title v. Warren*, 181 F.Supp.3d 16, 21 n.2 (D.D.C. 2014) ("But that [derivative jurisdiction] doctrine does not transform a question of personal jurisdiction into a question of this Court's subject-matter jurisdiction."); *Rhoads v. Washington Mut. Bank, F.A.*, 2010 WL 2691560 (D. Ariz. July 6, 2010) (rejecting the argument that the derivative jurisdiction doctrine required case to be remanded because the state court lacked personal jurisdiction over defendants and thus federal court could not obtain it; "the doctrine of derivative jurisdiction cannot form the basis for remand, because . . . it does not prevent this court from obtaining personal jurisdiction over [defendants]."); *Harvey v. Price*, 603 F.Supp. 1205, 1207 (S.D. Ill. 1985) ("[A] federal court can retain a removed case for new service if it determines that the state court lacked jurisdiction over the person of the defendant."); *Samson v. General Cas. & Ins. Co. of America*, 104 F.Supp. 751, 752 (N.D. Iowa 1952) (stating that the derivative jurisdiction doctrine "does not necessarily compel dismissal of a removed case in which the state court lacked jurisdiction of the person of the defendant, because the federal court may acquire jurisdiction of the person of the defendant subsequent to removal of the case."). This Court should likewise resist the Petitioners' invitation to expand the derivative jurisdiction doctrine after nearly a century of this Court applying the doctrine only to issues of subject matter jurisdiction.

II. This Court should deny the Petition because the court of appeals correctly identified this Court's use of the statement "or of the parties" as dicta.

The Court's use of the statement "or of the parties" is dictum. Dicta are statements in an opinion that are not in any way necessary to the decision of the issue before the court. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 443 (1987) (defining dictum as "something mentioned in passing, which is not in any way necessary to the decision of the issue before the Court"). The Court's use of the statement "or of the parties" in *Lambert Run* and its progeny was not "necessary to the decision of the issue before the court" in any of those cases. Had the Court not used the statement "or of the parties," the result would have been the same in each of those cases because personal jurisdiction was not an issue before the Court.

While acknowledging the context of this Court's cases addressing the derivative jurisdiction doctrine – the context of subject matter jurisdiction – the Petitioners maintain that the statement "or of the parties" must be read as an integral part of the Court's holdings and that the Court intended to go beyond the context of the cases and address issues of personal jurisdiction as well. Pet. 11 ("While it is true that subject matter jurisdiction was the issue in *Lambert Run*, *Minnesota*, *Freeman*, and *Manypenny*, that does not change the fact that the Court held in each of those cases that the doctrine encompasses both forms of jurisdiction."). But such a reading is contrary to the context of the Court's

opinions. *Cf., Ex parte Watkins*, 32 U.S. 568, 680 (1833) ("It is but just and fair in construing the language of a judicial opinion, to consider it in reference to the point of the case, and to consider the court as not intending to extend the doctrine advanced, beyond the limit necessary to support the decision. All beyond that must be considered as a dictum, and of no greater weight than that of the authorities by which it is supported.").

The Petitioners' understanding of the statement "or of the parties" wrenches this Court's dictum from its context, and attributes to the Court an observation extraneous to its prior cases. The Petitioners' construction of the Court's dictum requires an assumption that the Court in *Lambert Run* (and to a lesser extent in *Minnesota*, *Freeman*, and *Arizona*) meant to decide an issue which was not before the Court: whether the state court must have personal jurisdiction over the parties for the federal court to acquire jurisdiction upon removal. Rather than focusing on the holding and historical context of these precedents, the Petitioners seize on dicta and, free from such context, repeatedly call it a holding. But, "[b]reath spent repeating dicta does not infuse it with life." *Metro. Stevedore Co. v. Rambo*, 515 U.S. 291, 300 (1995). *See also Gonzalez v. United States*, 553 U.S. 242, 256 (2008) ("a formula repeated in dictum but never the basis for judgment is not owed stare decisis weight"); *Fitzgerald v. Henderson*, 251 F.3d 345, 375 (2d Cir. 2001) (rejecting the notion that, "mere repetition can convert dictum to binding precedent"). The Court should not grant the Petition

based on the Petitioners' insistence that the Court treat its dictum in *Lambert Run* as a holding.

III. This Court should deny the Petition because Congress, like the court of appeals, understood that derivative jurisdiction concerned issues of subject matter jurisdiction.

The Petitioners further argue that Congress understood the derivative jurisdiction doctrine to include issues of personal jurisdiction. The Petitioners assert that, "Congress implicitly adopted this Court's articulation of the derivative jurisdiction doctrine as encompassing personal jurisdiction when it enacted the 1985 Act and 2002 Act and left the doctrine largely intact." Pet. 16. A close look at the congressional history, however, belies the Petitioners' assertions. When considering the Judicial Improvements Act, Pub. L. No. 99-336, § 3(e), 100 Stat. 633 (1985), a House Report stated:

> [t]he purpose of section 3 of H.R. 3570 is to abolish the present judicial rule that an improvidently brought state civil action, the subject matter of which is within the exclusive jurisdiction of a federal district court, must be dismissed when it is removed to the district court by the defendant under 28 U.S.C. § 1441. The theory behind the current rule is that removal confers only 'derivative jurisdiction' on the federal courts; and therefore, since the state court lacked *subject matter jurisdiction* of the civil action, the federal court cannot acquire *subject matter jurisdiction* by removal.

> The doctrine dates back to *Lambert Run Coal Co. v. Baltimore & Ohio Rail Co.*, 258 U.S. 377, 382 (1922).

H.R. Rep. No. 99-423, at 13 (1985), *reprinted in* 1986 U.S.C.C.A.N. 1545 (emphasis added). According to the House Report, it was Congress' concerns with issues of subject matter jurisdiction – not personal jurisdiction, as the Petitioners argue – that were the genesis of the amendments to the general federal removal statutes.

The court of appeals' decision was fully consonant with Congress' understanding of *Lambert Run* and its progeny. The derivative jurisdiction doctrine is limited to issues of subject matter jurisdiction. The Court should therefore deny the Petition.

IV. This case does not present a Cert-worthy issue because, while there are courts of appeals that have mentioned the derivative jurisdiction doctrine in cases discussing minimum contacts and service of process, those cases do not analyze the derivative jurisdiction doctrine as it relates to personal jurisdiction.

The Petitioners allege that the court of appeals has created a split among the circuits. Pet. 14 ("The court of appeals' opinion in this case is in direct conflict with the holdings of the four circuits that had previously addressed the scope of the derivative jurisdiction doctrine."). The Petitioners again fail to differentiate between the other courts' holdings and their dicta. For

example, in *Aanestad v. Beech Aircraft Corp.*, 521 F.2d 1298 (9th Cir. 1974), the court framed the issue as a straightforward question of the district court's concurrent personal jurisdiction in a diversity jurisdiction case based on whether the defendant had minimum contacts, stating "the only issue to be resolved is whether an exercise of jurisdiction by a California court would violate the Due Process Clause of the Fourteenth Amendment." *Aanestad*, 521 F.2d at 1300. The court went on to analyze the facts in accordance with its minimum contacts standard as announced in *L.D. Reeder Contractors v. Higgins Industries*, 265 F.2d 768 (9th Cir. 1959), and concluded that "[u]nder the standard announced in *Reeder*, the district court was correct in holding that California courts could not, within the requirements of due process, exercise jurisdiction over this case." *Id*. at 1301. While the court cited to *Freeman Bee* and made a single reference to the derivative jurisdiction doctrine, such a passing reference was not material to the court's analysis or its holding concerning the district court's concurrent personal jurisdiction with the state court. The court of appeals did not hold that the derivative jurisdiction doctrine applies to personal jurisdiction.

The Petitioners also cite to *Meyer v. Indian Hill Farm, Inc.*, 258 F.2d 287 (2d Cir. 1958), for the proposition that derivative jurisdiction applies to personal jurisdiction. Pet. 14. However, the Petitioners again fail to appreciate the difference between dicta and a holding. Furthermore, with regard to *Meyer*, the Petitioners also fail to grasp the difference between questions of

service of process and questions of a constitutionally sufficient relationship between the defendant and the forum; i.e., personal jurisdiction.[2] The issue in *Meyer* was a question of the former – service of process – not the latter. *Meyer*, 258 F.2d at 292. As the court of appeals framed the issue: "The crucial question is whether delivery of copies of the summons and complaint to the New Jersey Secretary of State is service [in accordance with New York law]." *Id*. The court resolved this issue, holding that "the service of process questioned here was proper service of process under the law of New York. Hence we hold that the district court acquired personal jurisdiction over [the defendant]. . . ." *Id.* at 293. As in *Aanestad*, the court made a single reference to the derivative jurisdiction doctrine, but that reference was not necessary to the court's analysis or its holding. The court of appeals did not hold that the derivative jurisdiction doctrine applies to personal jurisdiction.

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[2] Personal jurisdiction and insufficiency of process are two different but interrelated issues. In particular, adequate service of process is a prerequisite for a court's exercise of personal jurisdiction: "Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied." *Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987); *accord Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 350 (1999) ("In the absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant."); *see also* Fed. R. Civ. P. 4(k)(1)(A) ("[s]erving a summons . . . establishes personal jurisdiction over a defendant: (A) who is subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located[.]").

Next, the Petitioners rely on *Garden Homes, Inc. v. Mason*, 238 F.2d 651 (1st Cir. 1956), to support their assertion of a circuit split. Pet. 14. But the court of appeals in *Garden Homes* considered the sufficiency of service of process, not issues of strict personal jurisdiction. *Garden Homes*, 238 F.2d at 652 ("This is an appeal from an order by the district court dismissing an action removed from the state court in which it was begun. The ground of dismissal was the insufficiency of service of process upon the defendant."). The court resolved the issue by holding that, "[i]t is evident from the record that the plaintiff here has not complied with these service requirements, and it follows that neither the state court of Massachusetts, nor, derivatively, the federal district court, had personal jurisdiction over the defendant." *Id*. at 654. Like the court of appeals in *Meyer*, the court of appeals in *Garden Homes* mentioned the derivative jurisdiction doctrine, but did not apply it to an issue of personal jurisdiction. The court of appeals did not hold that the derivative jurisdiction doctrine applies to personal jurisdiction.

Finally, the Petitioners allege a circuit split based on *Block v. Block*, 196 F.2d 930 (7th Cir. 1952). *Block*, like *Meyer* and *Garden Homes*, concerned issues of service of process. *Block*, 196 F.2d at 932-33 ("When [the district court] developed upon this examination that this was an original proceeding and that there had been no personal service of process on defendant . . . it was clear that the state court had obtained no jurisdiction over him, hence that the District Court could obtain none upon removal."). *See also Allen v. Ferguson*,

791 F.2d 611, 615 (7th Cir. 1986) ("In [*Block*], there had been no personal service of process on the defendant prior to removal, and the district court dismissed the complaint."). The court in *Block* did not analyze the derivative jurisdiction doctrine as it applies to service of process or personal jurisdiction. It mentioned the doctrine, but that reference was not dispositive of the issue before the court.

The court of appeals' decision in this case is not in tension with any other court of appeals' holding concerning the derivative jurisdiction doctrine. While other courts have mentioned the derivative jurisdiction doctrine when addressing issues of minimum contacts or service of process, those courts have not analyzed whether the derivative jurisdiction doctrine applies to personal jurisdiction, as did the court of appeals below, nor have they held, in conflict with the court of appeals below, that the derivative jurisdiction doctrine applies to issues of personal jurisdiction. The Court should therefore deny the Petition.

CONCLUSION

The Petitioners trade dicta for precedent. This Court's analysis and application of the derivative jurisdiction doctrine is limited to issues of subject matter jurisdiction. In following this Court, and after extensive analysis of the derivative jurisdiction doctrine, the court of appeals limited the derivative jurisdiction doctrine to issues of subject matter jurisdiction. Other

courts of appeals have not analyzed the derivative jurisdiction doctrine to determine its application. Therefore the court of appeals' decision is not contrary to any holding of this Court or that of any other court of appeals. The Court should therefore deny the Petition.

Respectfully submitted,

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