No. 21-_____

In the Supreme Court of the United States

KWS INC., A MEMBER OF THE THIELE GROUP,
Petitioner.

v.

ERIC SCALLA,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT FOR THE EASTERN DISTRICT

PETITION FOR A WRIT OF CERTIORARI

COLIN E. WRABLEY
Counsel of Record
ARND VON WALDOW
DEVIN M. MISOUR
EZEKIEL K. REDIKER
REED SMITH LLP
255 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
(412) 288-3548
cwrabley@reedsmith.com

AUGUST 16, 2021

QUESTION PRESENTED

As this Court long has made clear, the Supremacy Clause of the United States Constitution "imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'" *Felder v. Casey*, 487 U.S. 131, 151 (1988) (quoting *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 245 (1942)). Thus, while the States "retain the authority to prescribe the rules and procedures governing suits in their courts[,]" *id.* at 141, "that authority does not extend so far as to permit States to place conditions on the vindication of a federal right." *Id.* at 147. That means, as relevant here, that state procedural law "cannot control the privilege of removal granted by the federal [removal] statute." *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954). In this case, Pennsylvania's state courts violated these bedrock principles of federal-law supremacy when they affirmed a default judgment against Petitioner because Petitioner failed to ask a federal district court to open the state court default following removal of the underlying suit, even though no federal law requires that procedural step. This Petition presents the following question:

Whether a state court may require a federal-court litigant that has exercised its federal statutory right of removal following the state court's entry of a default to petition the federal court to open the default as a prerequisite to obtaining relief from the default in state court following a remand?

PARTIES REPRESENTED

All parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner KWS Inc., a member of Thiele Corporation, states that it has no parent company, and no publicly held corporation owns 10% or more of its stock.

LIST OF ALL PROCEEDINGS

There are no proceedings directly related to this case in state and federal trial and appellate courts.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

App. Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

KWS Inc. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania.

INTRODUCTION

This case involves a default judgment entered by a Pennsylvania state trial court against KWS based on KWS's failure—following its removal of the underlying lawsuit to federal court—to petition the federal district court to open the default. No federal law or rule of procedure, including the federal removal statute itself, imposes such a requirement. Nor, prior to the rulings in this very case, did the law of Pennsylvania or that of any other jurisdiction in the country.

The Pennsylvania courts' imposition of this newly invented *de facto* rule of federal procedure on a federal-court litigant plainly contravenes this Court's precedent and the long-settled Supremacy Clause mandate that state courts must protect a party's federal rights—including federal removal rights—and may not "place conditions on the vindication" of those rights. *Felder v. Casey*, 487 U.S. 131, 147, 151 (1988); *Chicago, R.I. & P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954). It also contravenes the equally fundamental rule, first established in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), that federal procedural law alone governs federal-court proceedings. *See also Hanna v. Plumer*, 380 U.S. 460 (1965) (same).

The Pennsylvania courts' creation of a federal procedural requirement here violates these fundamental rules that define the respective spheres of state and federal judicial power and preserve the su-

premacy of federal law and the rights it confers. According to the rulings below, KWS could not establish the Pennsylvania-law requirement that it promptly sought to open the default entered against it because KWS failed to ask the federal district court to do so while that court decided the propriety of removal after Plaintiff had filed a remand motion calling that court's jurisdiction into question. The Pennsylvania courts cited no federal statutory or procedural law for this unprecedented rule—or a single case, federal or state, adopting such a novel requirement. Instead, the Pennsylvania courts predicated this brand-new *de facto* rule of federal procedure in removed cases on the mere fact that some federal district courts have *allowed* federal litigants to petition to open state-court default judgments.

Making matters worse, despite the serious due process concerns that arise from the decision to apply a newly adopted, judge-made legal principle to the parties in the case at hand, the state courts below did not hesitate to apply their newly minted rule of federal procedure to KWS. And they did so, further, knowing the disfavored status of default judgments and the severe consequences that follow from their entry. For these reasons alone, the Court should grant the petition, vacate the judgment below, and remand for further proceedings—or summarily reverse—in order to correct the Pennsylvania courts' clear departure from this Court's precedents and the foundational constitutional principles they establish.

Review also is needed because of the critical importance of the issues engendered by the Pennsylvania courts' unprecedented rulings. Ensuring that state courts do not encroach on the exclusive federal

domain is a paramount interest. It is all the more vital where, as here, state courts do so without acknowledging the settled federal ground rules, without any notice to the affected litigants, and without accounting for the severe consequences to those litigants—here, the entry of a default against KWS. The Court should intervene to underscore and reinforce the rules that constrain state courts when it comes to federal-court proceedings, and undo the grave prejudice and unfairness KWS suffered as a result of the Pennsylvania courts' failure to adhere to those rules.

OPINIONS BELOW

The order of the Supreme Court of Pennsylvania denying KWS's petition for allowance of appeal is not reported. App. 1a. The opinion of the Superior Court of Pennsylvania, App. 3a-33a, is reported at *Scalla v. KWS*, 240 A.3d 131 (Pa. Super. 2020). The opinion of the Court of Common Pleas of Philadelphia County, Pennsylvania, App. 35a-79a, 128a-142a, is not reported.

JURISDICTION

The Supreme Court of Pennsylvania entered its judgment denying KWS's petition for allowance of appeal on May 18, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.[1]

[1] Because the Pennsylvania Supreme Court issued its judgment before July 19, 2021, the extended window for filing petitions for certiorari established by the Court's March 19, 2020 order governs this petition.

CONSTITUTIONAL PROVISIONS INVOLVED

This case concerns Congress' power under Article I, Section 8 of the U.S. Constitution to make rules governing the practice and pleading in the courts of the United States, Art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"), as outlined in Art. III, § 2, ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority… to controversies… between citizens of different states"), and the Supremacy Clause, Article VI, Paragraph 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

STATEMENT OF THE CASE

A. Legal Background

The law is well-established that states cannot impose procedural requirements on federal-court litigants while in federal court because that is the exclusive province of federal law. This principle has been settled at least since *Erie*, where this Court held that while federal courts must apply the substantive law of the states to state-law claims in diversity jurisdiction cases, they must also apply federal procedural law.

Erie, 304 U.S. at 77–79. Under *Erie* and the cases that followed, this Court repeatedly reinforced that federal courts must apply federal procedural law, which can only be made by Congress.

In *Hanna v. Plumer*, 380 U.S. 460, 468 (1965), this Court held that when a Federal Rule is at issue, the Rules Enabling Act controls, and "federal courts are to apply state substantive law and federal procedural law." *Id.* at 465. Thus, the Court reasoned, in the event of a conflict between state and federal procedural rules, courts need only ask whether the Federal Rule is constitutional and within the ambit of Congressional legislation. *Id.* at 473. If so, the federal court must apply it. *Id.* (describing the "long-recognized power of Congress to prescribe housekeeping rules for federal courts"). Ultimately, this Court reasoned that "[t]o hold that a Federal Rule must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the [Rules] Enabling Act." *Id.* at 473.

More recent decisions reinforce and extend these firmly entrenched ground rules and clarify the constitutional limits on the authority of state courts. In *Felder*, the Court explained that, "[j]ust as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'" 487 U.S. at 151 (citation omitted). Thus, although the states do "retain the authority to prescribe the rules and procedures governing suits in their courts[,]" *id.*

at 147, "that authority does not extend so far as to permit States to place conditions on the vindication of a federal right." *Id.*; *see also Wayside Church v. Van Buren Cnty.*, 847 F.3d 812, 820 (6th Cir. 2017) (recognizing that a state court's "jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear") (internal quotation marks and citation omitted); *Klocke v. Watson*, 936 F.3d 240, 244 (5th Cir. 2019) (recognizing that "state procedural law yields to" federal procedural law); *Nuveen Mun. Trust ex rel. Nuveen High Yield Mun. Bond Fund v. WithumSmith Brown, P.C.*, 692 F.3d 283, 302 (3d Cir. 2012) ("*Erie* provides that a federal court sitting in diversity must apply … federal procedural law.").

As discussed below, these principles are directly implicated by the state-court rulings, and the federal procedural requirement they created and applied to KWS's detriment.

B. Procedural Background

1. Plaintiff's Lawsuit, The Default Judgment Against KWS, And Removal To Federal Court.

Plaintiff initiated this action on December 19, 2017, by filing a complaint against KWS, an Oklahoma corporation, in the Court of Common Pleas of Philadelphia County (the Trial Court). App. 4a. According to his complaint, Plaintiff was working at his construction job when an object held up by a crane hook allegedly manufactured by KWS fell, seriously injuring his leg. App. 3a-4a. Plaintiff asserted claims against KWS for strict liability, negligence, and breach of express and implied warranties. App. 107a.

The lone employee in KWS's only U.S. office, Elizabeth Roberts, is the company's Vice President of Operations. Plaintiff's counsel mailed the complaint to KWS's Tulsa office, but Ms. Roberts did not open the package, as it was her practice to set mail aside if she did not recognize the sender. App. 70a. Consequently, KWS only learned of the lawsuit by way of an email from Plaintiff's counsel on March 27, 2018—one day after Plaintiff filed a praecipe to enter default judgment in the Trial Court. App. 38a.

Upon learning of the lawsuit and the praecipe to enter a default, KWS promptly secured legal counsel and two days later, on March 29, removed the case to the U.S. District Court for the Eastern District of Pennsylvania (Federal Court) on the basis of diversity jurisdiction. *See Scalla v. KWS, Inc.*, No. 18-1333, 2018 U.S. Dist. LEXIS 203453, 2018 WL 6271646 (E.D. Pa. Nov. 30, 2018). At the time of removal, the Trial Court docket reflected Plaintiff's filing of a *praceipe* to enter default, not a formal default judgment by the Court. A week later, on April 5, KWS filed an answer and affirmative defenses in the Federal Court within the time prescribed by Federal Rule of Civil Procedure 81(c)(2)(C). Thereafter, Plaintiff moved to remand and, following two rounds of briefing and limited discovery ordered by the Federal Court, the Federal Court granted Plaintiff's motion to remand. *Id.* at *14-15.

2. Following Remand, KWS Promptly Petitions To Open The Default Judgment.

On Monday, December 31, 2018, the Trial Court received the case record from the Federal Court and noted the remand order on its docket. App. 46a. On Friday, January 4, 2019, the Trial Court listed the

case for "assessment," without further information. App. 10a.

Three weeks later, KWS filed a petition to open the default in the Trial Court. *Id.* KWS argued that its petition to open was timely because, although it had been approximately 10 months since the default had been entered, the Trial Court was divested of jurisdiction during that time while the case proceeded in Federal Court following removal.

3. The Trial Court Denies KWS's Petition To Open, Finding That KWS Failed To Timely File Its Petition Because It Did Not File It In The Federal Court, And The Superior Court Affirms.

The Trial Court denied KWS's petition with prejudice, declining to consider many of KWS's arguments for opening the default or the evidence KWS adduced under the three-pronged state-law standard governing such petitions. App. 36a-37a. That standard looks at three factors: whether (1) the petition was promptly filed; (2) the failure to appear or file a timely answer is excused; and (3) the party seeking to open the judgment has pleaded meritorious defenses. App. 54a (quoting *Cintas Corp. v. Lee's Cleaning Servs., Inc.*, 700 A.2d 915, 919 (Pa. 1997)); *see also Schultz v. Erie Ins. Exchange*, 477 A.2d 471, 472 (Pa. Super. 1984).

As is relevant here, the Trial Court concluded that KWS did not meet the first prong because it was required, but failed, to file a petition to open the judgment in the Federal Court after removal. App. 59a-61a. The Trial Court faulted KWS for "litigat[ing] the issue of whether it had been properly served with the complaint" for removal purposes, and noted that

"[n]othing stopped KWS from filing a petition to open the default judgment in the federal court while simultaneously litigating the service issue." *Id.* The Trial Court concluded that "[t]he *filing* of such a petition would have satisfied the state and federal tests to open default judgments[,]" and that "KWS was **required** to *file* a petition to open the default judgment at the earliest opportunity"—here, in the Federal Court on removal. *Id.* (bold emphasis added).

As to the second and third prongs, the Trial Court found that KWS did not allege a meritorious defense because it relied on "boilerplate allegations devoid of any supporting facts" and failed to offer a legitimate excuse for its failure to defend because KWS had no safeguards in place to identify and respond to legal claims. App. 68a-79a.[2]

The Pennsylvania Superior Court affirmed. In response to KWS's argument that it was not legally obligated to file its petition to open while in Federal Court, the Superior Court, like the Trial Court, found that KWS was obligated to file its petition to open in the Federal Court in order to establish the timeliness of its challenge. App. 11a-13a. Like the Trial Court, the Superior Court cited no legal authority or precedent to support this holding. In fact, it acknowledged that "KWS is correct in noting that there was nothing

[2] While not at issue here, KWS maintains that it met all of the requirements for opening the default, including pleading a meritorious defense and demonstrating a legitimate excuse for its failure to defend.

that *required* it to file its petition [to open] in federal court." App. 12a.[3]

4. The Pennsylvania Supreme Court Denies KWS's Petition For Allowance Of Appeal.

KWS filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court. KWS argued that the Supreme Court should grant review of the lower courts' finding that KWS's failure to petition the Federal Court to open the default established the untimeliness of its petition to open after remand in the Trial Court. *See* Petition for Allowance of Appeal, at 5, 8, 22-23. On May 18, 2021, the Pennsylvania Supreme Court denied KWS's Petition. App. 1a.[4]

REASONS FOR GRANTING THE PETITION

KWS seeks this Court's review or summary reversal of the lower courts' novel and unprecedented ruling that KWS was required to file a petition to open a state-court default while the case was removed to federal court in order to have timely filed its petition for purposes of state law. KWS had no notice of such a requirement at the time and, to KWS's knowledge, no such requirement exists anywhere in this country. The lower courts' ruling violates bedrock constitutional principles of federalism embodied in *Erie* and its progeny, and the Supremacy Clause. Put simply,

---

[3] KWS filed a timely Application for Reargument in the Superior Court on August 25, 2020. The Superior Court denied the application on October 14, 2020. App. 34a.

[4] On June 2, 2021, KWS asked the Pennsylvania Supreme Court to stay the remand to the Trial Court pending its filing of this petition. The Supreme Court granted the stay until August 17, 2021. App. 2a.

state courts cannot impose rules of federal-court procedure on federal-court litigants, and this Court should grant certiorari or—at the very least—summarily reverse and categorically reject the Pennsylvania courts' unconstitutional effort to do so.

I. THE PENNSYLVANIA COURTS' APPLICATION OF A NEWLY MINTED RULE OF FEDERAL PROCEDURE CONTRAVENES THIS COURT'S PRECEDENT AND WARRANTS SUMMARY REVERSAL.

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) and its progeny establish foundational principles of federalism and federal supremacy that govern the relationship between state and federal courts, and impose clear limitations on the role of state law and state courts when it comes to federal-court proceedings. In this case, the Pennsylvania courts cast aside these core principles by creating and imposing a rule of federal procedure requiring KWS to file a petition to open a default in federal court following removal of the case from state to federal court. This not only is without precedent in this Court or anywhere else in the federal and state reporters, but it plainly contravenes this Court's precedent and the United States Constitution. This Court, accordingly, should grant a writ of certiorari or summarily reverse the lower courts' plainly erroneous decisions.

A. *Erie* And Its Progeny Establish That Federal Courts Control Their Own Procedure.

Erie and its progeny have long established the boundaries between state and federal courts on matters of procedure and the limits on state courts when

it comes to the enforcement of federal rights. The message from those decisions is clear: matters of state concern must yield to federal procedural rules as applied to federal-court litigants and proceedings, and state courts may not impose limits or conditions on federal law or rights that they create.

In *Erie*, the Court held that federal courts must apply federal procedural law. *Erie*, 304 U.S. at 77–79. Later, in *Hanna*, the Court went a step further, recognizing Congress's power over matters of federal procedure, and noting that "[t]o hold that a Federal Rule must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the [Rules] Enabling Act." *Hanna*, 380 U.S. at 473–74.

Relatedly, pursuant to the command of the Supremacy Clause, the Court has erected high barriers to prevent state courts from intruding on the work of federal courts or impinging on federal-court litigants and their ability to vindicate federal rights. Particularly on point in this regard is *Felder*. There, this Court explained that, "[j]ust as federal courts are constitutionally obligated to apply state law to state claims, so too the Supremacy Clause imposes on state courts a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law [are] protected.'" *Felder*, 487 U.S. at 151 (quoting *Garrett*, 317 U.S. at 245). States "retain the authority to prescribe the rules and procedures governing suits in their courts." *Id.* at 147. But "that authority does not extend so far as to permit

States to place conditions on the vindication of a federal right." *Id.*; *see also Wayside Church*, 847 F.3d 812, 820 (6th Cir. 2017) (recognizing that a state court's "jurisdictional rule cannot be used as a device to undermine federal law, no matter how evenhanded it may appear") (internal quotation marks and citation omitted). These principles follow from the broad command of the Supremacy Clause. *See Trump v. Vance*, 140 S. Ct. 2412, 2425 (2020) (noting that federal law is the "supreme Law of the Land," U.S. Const. art. VI, cl. 2, and that "the Constitution guarantees 'the entire independence of the General Government from any control by the respective States'") (quoting *Farmers & Mechanics Sav. Bank of Minneapolis v. Minn.*, 343 U.S. 516, 521 (1914)); *Dixon v. von Blanckensee*, 994 F.3d 95, 105 (2d Cir. 2021) (noting that a "principal tenet of the Supremacy Clause is that 'the states have no power … to retard, impede, burden, or in any manner control the operations of the constitutional laws enacted by Congress.'") (quoting *McCulloch v. Maryland*, 17 U.S. 316, 436 (1819)).

Heeding their obligation to adhere to the Supremacy Clause and *Felder*, state courts long have acknowledged the need to protect federal rights and ensure their unencumbered enforcement even if that means relaxing otherwise generally applicable state law and procedure—or not applying that law or procedure at all. *See*, *e.g.*, *BHA Invs., Inc. v. City of Boise*, 108 P.3d 315, 322–23 (Idaho 2005) (finding that a state-law notice-of-claim requirement under the Idaho Tort Claim Act does not apply to a federal takings claim); *Shaw v. Leatherberry*, 706 N.W.2d 299, 308 (Wis. 2005) (finding that the heightened burden of proof in excessive force claims under state law was inconsistent with the congressional intent behind the

lower burden of proof in 42 U.S.C. § 1983 cases); *Johns v. Harborage I, Ltd.*, 664 N.W.2d 291, 298–99 (Minn. 2003) (recognizing that the federal successor-liability doctrine applied in state court where claims were brought pursuant to Title VII); *Sanchez v. Degoria*, 733 So. 2d 1103, 1107 (Fla. Dist. Ct. App. 1999) (concluding that state-law prerequisites for pleading a claim for punitive damages violated the Supremacy Clause as it related to a claim filed in state court pursuant to 42 U.S.C. § 1983); *Dep't of Human Servs. v. J.G. (In re C.G)*, 317 P.3d 936, 944 (Ore. Ct. App. 2014) (holding that state rule requiring preservation of arguments for appeal had to yield to federal Indian Child Welfare Act provision allowing arguments to be made for the first time on appeal, because the "state [rule] interferes with a method created to achieve the goal of the federal law").

In other cases, courts have taken this deference even further, and pointed to the Supremacy Clause and principles of comity as grounds to defer to federal law and federal rights, without even engaging in the preemption analysis outlined in *Felder*. *See Illinois Cent. Gulf R.R. Co. v. Price*, 539 So. 2d 202, 206 (Ala. 1988) ("Under the concepts of civility and courtesy …. We defer to federal law, whether it be substantive or procedural, in enforcing a federal cause of action ….").

Consistent with *Erie* and *Felder*, and the constitutional principles they implement, this Court specifically has protected the right of removal from state interference, making clear that state "procedural provisions cannot control the privilege of removal granted by the federal statute." *Chicago, Rock Island & Pac. R.R. Co. v. Stude*, 346 U.S. 574, 580 (1954). Thus, in

Shamrock Oil & Gas Corp. v. Sheets, this Court explained that "[t]he removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied." 313 U.S. 100, 104 (1941). As a result, the act of Congress that governs removal "must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts." *Id.* In other words, state courts cannot set up state-law barriers to removal that would impinge on the federal statutory right to remove—or, for that matter, that prioritize state-law interests over the federal right to remove—consistent with what *Felder* provides.

B. The Pennsylvania Courts Committed Clear Error By Creating a New Rule of Federal Procedure That Placed Unconstitutional Conditions On KWS's Federal Removal Right.

By requiring KWS to file a petition to open in federal court while the lawsuit against it was removed to federal court, the Pennsylvania courts plainly violated the clear constitutional limits on their authority by intruding into the exclusive territory of Congress and the federal courts. *Erie* and *Hanna* squarely forbid the lower courts' rulings, which impermissibly fashion a judge-made rule of federal procedure that must be followed by federal litigants against whom a state-court default judgment has been entered. *Felder* and *Chicago Railway* likewise foreclose the lower-court decisions, which unconstitutionally impose state-law conditions or limits on the federal rights of federal litigants. And no federal statute, rule of procedure, or

precedent requires or remotely supports the unconstitutional overreach of the Pennsylvania courts below.

But that is not the only error in the lower courts' rulings. As noted, the newly minted rule was unprecedented and was applied for the first time in this case to KWS, without any prior notice. That raises a different but no less serious set of constitutional due process concerns over the retroactive application of a new rule that prejudiced KWS in the most extreme way possible: depriving it of its day in court for failing to pursue a procedure in federal court that KWS could not reasonably have known existed. Indeed, given that the only reference to the default on the Trial Court's docket was a praecipe filed by the Plaintiff, not a formal judgment by the court, there was reason to doubt that a default had even been entered. And KWS did not learn of the newly adopted novel rule of procedure until *after* the case against it was remanded to state court—by which time, of course, it could *not* have even attempted to satisfy it by filing a petition in the Federal Court.

Nor was there any reason for KWS to anticipate such a radical usurpation of lawmaking authority, resulting in a state-court created rule of federal procedure. This kind of unfair and unconstitutional surprise is directly contrary to due process. Indeed, there are due process limits on the retroactive application of a judicial decision" including whether the decision is "is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." *Gibson v. Am. Cyanamid Co.*, 760 F.3d 600, 614 (7th Cir. 2014) (quoting *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001)); *De Niz Robles v. Lynch*, 803 F.3d

1165, 1170-71 (10th Cir. 2015) (Gorsuch, J.) (explaining that "the Constitution has sought to mitigate the due process and equal protection concerns associated with retroactive decisionmaking in other ways, by rules circumscribing the nature of the judicial function and the judicial actor… It invests judges with none of the 'legislative Power[]' to devise new rules of general applicability, a power Article I reserves to Congress and its elected officials alone.").

Given these clear, significant, and prejudicial constitutional errors, the Court should intervene to correct them and summarily reverse the decisions below. Intervention also would enable the Court to prevent future drastic departures from settled precedent and constitutional precepts. Few principles are more firmly settled than that, in our constitutional system, state courts cannot create and impose rules of *federal* procedure that purport to govern litigants in federal court, and constrain their federal rights.

II. SUMMARY REVERSAL OR CERTIORARI REVIEW IS NECESSARY TO PROTECT FEDERAL RIGHTS AND REINFORCE THE CONSTITUTIONAL BARRIERS TO STATE COURTS' INVASION OF FEDERAL-COURT PROCEDURE.

The principles at issue here could not be more important and there is a compelling need for this Court's involvement. To be sure, state and federal courts decide an enormous volume of cases, some correctly, others not. And this Court cannot—and does not—stand as error-corrector of all erroneous decisions that come from the respective judiciaries in this country.

But sometimes buried in the mass of lower-court jurisprudence are erroneous decisions that strike at the heart of the constitutional order and that, if left intact, threaten to erode some of our most basic constitutional safeguards. That is the case here. And these are no mere "structural" or academic constitutional principles. They go to the core of our separation of powers system of government and they are, as this Court often has stressed, essential to protecting the constitutional rights and liberties of the people. *See Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) ("[T]he separation of powers is designed to preserve the liberty of all the people"); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) ("This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers … that, within our political scheme, the separation of governmental powers … is essential to the preservation of liberty."). Federalism, too, plays an important role in safeguarding these liberties, and is directly implicated in this case. *See Rosebud Sioux Tribe v. Trump*, 495 F. Supp. 3d 968, 978 (D. Mont. 2020) ("These safeguards include the separation of powers between the coordinate branches, the qualified delegation of authority from Congress, and federalism.").

Apart from the critical need to preserve the broad principles outlined above, this Court's failure to intercede will have a particularly insidious effect on KWS here. The Pennsylvania courts' constitutional error gave rise to a uniquely draconian result—upholding a default judgment against KWS. Default judgments are universally disfavored. *See, e.g. Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 174 (2d Cir. 2001) ("[i]t is well established that default judgments are disfa-

vored. A clear preference exists for cases to be adjudicated on the merits."); *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985) ("[D]efault judgments are generally disfavored. Whenever it is reasonably possible, cases should be decided upon their merits."); *Bank & Tr. Co. v. Line Pilot Bungee*, 752 N.E.2d 650, 652 (Ill. 2001) ("A default judgment has been recognized as a drastic action, and it should be used only as a last resort."); *Velasco v. Ruiz*, 457 P.3d 1014, 1017 (Okla. 2019) ("we have consistently recognized that default judgments are disfavored."); *Richmond v. A.F. of L. Med. S. Plan*, 204 A.2d 271, 272 (Pa. 1964) (recognizing that default judgments should be avoided).

This unfortunate outcome merely underscores the critical role that this Court plays in the constitutional system of state and federal courts—no more so than when it comes to policing and upholding the bedrock principles that define the limits of state-court authority. The Pennsylvania courts here grossly overstepped that authority, and severely prejudiced KWS in the process.

CONCLUSION

The Court should grant certiorari or summarily reverse the rulings of the Pennsylvania courts.

Respectfully submitted,

COLIN E. WRABLEY
Counsel of Record
ARND VON WALDOW
DEVIN M. MISOUR
EZEKIEL K. REDIKER
REED SMITH LLP
255 Fifth Avenue
Pittsburgh, PA 15222
(412) 288-3131
cwrabley@reedsmith.com

AUGUST 16, 2021

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 443 EAL 2020

ERIC SCALLA,

Respondent,

v.

KWS, INC., A MEMBER OF THE THIELE GROUP,

Petitioner.

Petition for Allowance of Appeal from the
Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 18th day of May, 2021, the Petition for Allowance of Appeal is DENIED.

APPENDIX B

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

———

No. 443 EAL 2020

———

ERIC SCALLA,

Respondent,

v.

KWS, INC., A MEMBER OF THE THIELE GROUP,

Petitioner.

———

ORDER

PER CURIAM

AND NOW, this 7th day of July 2021, the Application for Stay of Remand is GRANTED. Per Pa.R.A.P. 2572(c), remand of the record is STAYED until August 17, 2021, unless extended by operation of that rule.

A True Copy
As Of 07/07/2021
Attest: /s/ Patricia A. Johnson
Patricia A. Johnson
Chief Clerk
Supreme Court of Pennsylvania

APPENDIX C

2020 PA Super 191

IN THE SUPERIOR COURT OF PENNSYLVANIA

[Filed: August 11, 2020]

No. 2003 EDA 2019

ERIC SCALLA,

v.

KWS, INC., A MEMBER OF THE THIELE GROUP,

Appellant.

Appeal from the Order Entered April 12, 2019
In the Court of Common Pleas of Philadelphia
County Civil Division at
No(s): 171202802

BEFORE: BENDER, P.J.E., LAZARUS, J., and STRASSBURGER, J.*

OPINION BY LAZARUS, J.:

KWS, Inc. (KWS), appeals from the order, entered in the Court of Common Pleas of Philadelphia County, denying its petition to open a default judgment. After careful review, we affirm.

On March 30, 2016, Eric Scalla worked as a laborer for Rockland Manufacturing. On that day, Scalla was assisting other employees to use an overhead crane to

---

* Retired Senior Judge assigned to the Superior Court.

move an excavation ripper. The excavation ripper was attached to the overhead crane with a chain hook, which was manufactured by KWS. At one point, the excavation ripper detached from the chain hook and crushed Scalla's leg, which required a below-the-knee amputation.

On December 19, 2017, Scalla filed a products liability case against KWS in Philadelphia County, seeking damages for his injuries. Scalla served his complaint on KWS via USPS certified mail, return receipt requested, and via regular mail, to KWS' Tulsa, Oklahoma office—its only United States office. On January 23, 2018, Elizabeth Roberts, Vice President of Operations and registered agent for KWS according to the Secretary of State of Oklahoma, signed for the USPS return receipt. Roberts, KWS' lone United States employee, set the package containing Scalla's complaint aside because she did not recognize the sender. Setting mail and packages aside, unopened, was Roberts' usual practice for KWS' mail received from senders that Roberts did not recognize. Roberts' superiors at KWS were familiar with her mail-opening practices.

On March 13, 2018, Scalla served KWS with a 10-day notice of intention to enter default judgment, pursuant to Pa.R.Civ.P. 237.1. Roberts received and signed for this notice as well—she signed both the FedEx package receipt and the USPS return receipt card, but, again, did not open the package. On March 26, 2018, Scalla filed a praecipe to enter default judgment, which was then entered in Scalla's favor and against KWS that same day.

On March 27, 2018, Scalla's counsel sent an email to KWS' company email address (sales@kwschain.com) notifying KWS that it was in default for failure to respond to Scalla's complaint. Roberts, who also

monitored this email account, opened the email and alerted her superiors to its contents. The next day, KWS' counsel responded to the email stating that they were retained for the matter and would respond to the complaint the following day. On March 29, 2018, KWS removed the action to federal court on the basis of diversity of citizenship jurisdiction, pursuant to 28 U.S.C. § 1332(a), and, on April 5, 2018, KWS filed an answer to Scalla's complaint in federal court. On April 19, 2018, Scalla filed a motion to remand the case back to state court, pursuant to 28 U.S.C. § 1446(b), on the grounds that more than thirty days had elapsed between KWS' receipt of notice of the complaint, which was effectuated on January 23, 2018. Because more than thirty days had elapsed, Scalla argued, the federal court no longer had jurisdiction to hear the case. On May 30, 2018, the federal court ordered that the parties engage in additional discovery on the issue of the sufficiency of the service of process, and ordered that the parties file supplemental briefs on that issue.

In an opinion filed November 30, 2018, the federal court agreed with Scalla and remanded the case back to state court, finding that: (1) under relevant Pennsylvania and Oklahoma law, Roberts was KWS' registered agent, at least between September 8, 2009 and May 31, 2018; (2) Roberts accepted service of process on behalf of KWS on January 23, 2018, under Pennsylvania law; (3) KWS' time for removal began when it was served with Scalla's complaint, on January 23, 2018; and (4) KWS' notice of removal to federal court was untimely filed because it was filed sixty-five days after Roberts accepted the complaint on behalf of KWS. *Scalla v. KWS,* 2018 WL 6271646 (filed November 30, 2018). On December 20, 2018, the federal court remanded the record to state court.

On December 31, 2018, the Court of Common Pleas of Philadelphia County acknowledged return of the record. On January 25, 2019, KWS filed a petition to open the default judgment. The parties then filed a series of counseled replies and sur-replies, amounting to ten briefs in total, which caused the trial court "to endure a death by a thousand cuts from eight separate sur-reply briefs." Trial Court Opinion, 9/30/19, at 12.

In an order dated April 10, 2019, the trial court denied with prejudice KWS' petition to open the default judgment, and issued a thirty-six-page opinion in support thereof, finding that: (1) the federal court's rulings have collateral estoppel effect, which prevents KWS from re-litigating the issues of Roberts' authority and the validity of service of Scalla's complaint; (2) KWS' petition was not verified, and four of five of KWS' reply briefs were unverified, which required that the court could not consider the claims made within those filings, pursuant to Pa.R.C.P. 206.3; (3) KWS filed an inappropriate number of reply briefs; and (4) on the merits, KWS failed each of the prongs of the three-part test for opening a default judgment. *See* Trial Court Opinion, 4/10/19. KWS appealed, and KWS and the trial court timely complied with Pa.R.A.P. 1925. On September 30, 2019, the trial court issued a thirteen-page opinion, and, in so doing, incorporated and adopted its initial thirty-six-page opinion dated April 10, 2019.

On appeal, KWS presents the following issues for our review:

(1) Did KWS establish its right to open the default judgment against it by proving each of the three prongs for opening under controlling Pennsylvania law?

(2) Does Pennsylvania law obligate courts to balance the equities in considering petitions to open default judgments?

(3) Did KWS establish its right to open the default judgment against it by proving that a balancing of the equities favored opening under controlling Pennsylvania law?

Appellant's Brief, at 6.

Our standard of review for a trial court's ruling on a petition to open a default judgment is well-settled:

> A petition to open a default judgment is addressed to the equitable powers of the court and the trial court has discretion to grant or deny such a petition. The party seeking to open the default judgment must establish three elements: (1) the petition to open or strike was promptly filed; (2) the default can be reasonably explained or excused; and (3) there is a meritorious defense to the underlying claim. The court's refusal to open a default judgment will not be reversed on appeal unless the trial court abused its discretion or committed an error of law. An abuse of discretion is not merely an error in judgment; rather it occurs when the law is overridden or misapplied, or when the judgment exercised is manifestly unreasonable or the result of partiality, prejudice, bias or ill-will. Moreover, this Court must determine whether there are equitable considerations that weigh in favor of opening the default judgment and allowing the defendant to defend the case on the merits. Where the equities warrant opening a default judgment, this

> Court will not hesitate to find an abuse of discretion.

Stabley v. A&P, 89 A.3d *715, 719* (Pa. Super. 2014) (quoting *Castings Condominium Assn, Inc. v. Klein,* 663 A.2d 220, 222-23 (Pa. Super. *1995))* (internal brackets omitted).

KWS first claims that the trial court abused its discretion in finding that it failed to satisfy each of the three prongs for opening a default judgment. With regard to the first prong, KWS claims that, "the undisputed record shows that it promptly filed its [p]etition once the [t]rial [c]ourt regained jurisdiction following the [f]ederal [c]ourt's remand ruling." *See* Appellant's Brief, at 23-24. KWS cites to our Court's decision in *Kelly v. Siuma,* 34 A.3d 86 (Pa. Super. 2011), and our Supreme Court's decision in *Queen City Elec. Supply Co., Inc. v. Soltis Elec. Co., Inc.,* 421 A.2d 174 (Pa. 1980), for the argument that,

> Pennsylvania courts have not established a specific time period within which a petition to open a default judgment must be filed to qualify as timely. Instead, the court must consider the length of time between discovery of the entry of the default judgment and the reason for delay. It is well established that where equitable circumstances exist, a default judgment may be opened regardless of the time that may have elapsed between entry of the judgment and filing of the petition to open.

Appellant's Brief, at 24 (internal citations, quotation marks, brackets, and original emphasis omitted). KWS claims that because it was actively litigating the case in federal court, there was good reason to delay filing its petition to open, since it was exercising "its

Important [ ] right' to remove the case to federal court on the basis of the parties' uncontested diversity of citizenship." *See id.* at 25 (internal citation and footnote omitted).

In *Kelly, supra,* we discussed the timeliness requirement of the first prong of the three-part test when considering a petition to open a default judgment:

> [w]ith regard to the first prong, whether the petition to open was timely filed, we note:
>
> > *The timeliness of a petition to open a judgment is measured from the date that notice of the entry of the default judgment is received.*
> >
> > * * *
> >
> > In cases where the appellate courts have found a 'prompt' and timely filing of the petition to open a default judgment, the period of delay has normally been less than one month. *See Duckson v. Wee Wheelers, Inc.,* [] 620 A.2d 1206 (Pa. Super. 1993) (one day is timely); *Alba v. Urology Associates of Kingston,* [] 598 A.2d 57 (Pa. Super. 1991) (fourteen days is timely); *Fink v. General Accident Ins. Co.,* [] 594 A.2d 345 (Pa. Super. 1991) ([] five days is timely).
>
> [*US Bank N.A. v. Mallory,* 982 A.2d 986, 995 (Pa. Super. 2009)] (quotation omitted) (finding eighty-two day delay was not timely).[]

Kelly, 34 A.3d at 92 (emphasis added).

Here, KWS claims that the trial court abused its discretion on the issue of prompt filing because: (1) KWS

was exercising its important federal statutory right to seek removal based on diversity of citizenship;[1] (2) KWS filed a timely answer within one week of removing the case to federal court; (3) KWS filed its petition to open the default judgment within twenty-one days of the trial court's post-remand listing of the case for "assessment"; and (4) it would have been a waste of resources for KWS, Scalla, and the federal court, to file the petition to open the judgment in federal court, since there existed the prospect that the federal court's ruling on the petition would be void if the federal court remanded for lack of jurisdiction. *See* Appellant's Brief, at 31-33.

As an initial matter, we note that the March 26, 2018 docket entry of "Judgment Entered by Default," states, "Notice Under Rule 236 Given. Notice Under 237.1 Given." Such a notation is sufficient to prove that the prothonotary sent notice either to an unrepresented party or to KWS' attorney of record under Pa.R.C.P. 236 and 237.[2] *See Murphy v. Murphy,* 988

---

[1] In its opinion, the federal court denied Scalla's motion for attorney's fees connected with the remand. In support of its ruling, the federal court found that KWS had "an objectively reasonable basis for seeking removal," and that there was "no reason to believe that [KWS'] position (i.e., that it was not properly served with the [c]omplaint) [was] not asserted in good faith." *Scalla v. KWS,* 2018 WL 6271646, at 9 (filed November 30, 2018).

[2] Pennsylvania Rule of Civil Procedure 236(b) provides in relevant part that "[t]he prothonotary shall immediately give written notice by ordinary mail of the entry of any order, decree or judgment." *See* Pa.R.Civ.P. 236(b). Additionally, Pa.R.A.P. 108(b) provides that "[t]he date of entry of an order in a matter subject to the Pennsylvania Rules of Civil Procedure shall be the day on which the clerk *makes the notation in the docket* that notice of entry of the order has been given as required by

A.2d 703, 710 (Pa. Super. 2010) (holding docket entry stating, "NS ORDER FOR HEARING FILED; HEARING FIXED FOR JUNE 12, 2008 AT 8:30AM. DATE REPLACES PRIOR HEARING DATE OF MAY 2, 2008," satisfied notice requirement and established presumption that opposing party received filing); *see also Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia,* 655 A.2d 666, 668 (Pa. Cmwlth. 1995) (holding docket entry stating, "Notice Under Rule 236" sufficient to establish notice was sent); *cf. Hepler v. Urban,* 609 A.2d 152, 154 (Pa. 1992) ("[A prothonotary's] notation [of 'N.S.'] on a blueback is *not* a 'notation in the *docket* that notice of entry of the order has been given.") (emphasis in original). Under these circumstances, we find that the trial court did not err in determining that KWS received notice of the entry of default judgment on March 26, 2018, when the prothonotary entered the appropriate notice in the docket.[3]

With regard to KWS' first argument on prompt filing—that KWS was actively litigating the matter in federal court and exercising its important federal right to do so—we note that there was nothing preventing KWS from filing its petition to open the default judgment in federal court during the pendency of the federal proceedings. Indeed, we have previously said that,

> [w]henever any action is removed from a State court to a district court of the United States, . . .[a]ll injunctions, orders, and other proceedings had in such action prior to its

---

Pa.R.Civ.P. 236(b)." *See* Pa.R.A.P. 108(b) (emphasis added). *See also Hepler v. Urban,* 609 A.2d 152, 154 n.2 (Pa. 1992).

[3] The trial court calculated that 304 days elapsed between March 26, 2018 and January 25, 2019, however, 306 days elapsed, in actuality.

> removal shall remain in full force and effect until dissolved or modified by the district court. 28 U.S.C. § 1450. After removal, the federal court takes the case up where the State court left it off. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters and Auto Truck Drivers Local No. 70 of Alameda County,* 415 U.S. 423, 436 [] (1974) (quotation and citation omitted).
>
> The federal court accepts the case in its current posture as though everything done in state court had in fact been done in the federal court. *See also Nissho-Iwai American Corp. v. Kline,* 845 F.2d 1300, 1303 (5th Cir. 1988) (quotation and citation omitted).

Kurns v. Soo Line R.R., 72 A.3d 636, 639 (Pa. Super. 2013) (internal quotation marks omitted). Also, federal courts are empowered to set aside a default judgment that was entered in state court and prior to the removal to federal court. *See Butner v. Neustadter,* 324 F.2d 783, 785-86 (9th Cir. 1963) ("The federal court takes the case as it finds it on removal and treats everything that occurred in the state court as if it had taken place in federal court. Therefore, this default judgment should be treated as though it had been validly rendered in the federal proceeding. . . . [A] motion to set aside a default may be made in the district court under Fed. R. Civ. P. 60(b) because of mistake, inadvertence, surprise, or excusable neglect.").

Here, KWS is correct in noting that there was nothing that *required* it to file its petition in federal court. *See* Appellant's Brief, at 33. Nevertheless, *KWS was permitted to do so. See Kurns, supra; see also Butner, supra.* We conclude that the trial court did not abuse its discretion in finding it unpersuasive that

KWS did not file the motion in federal court because it was exercising its "important federal right," given that a motion to set aside the default judgment could have been made in that court. *See Stabley, supra.*

Also, with regard to the "prompt filing" prong, KWS argues that it filed its petition to open within twenty-one days of the trial court's post-remand listing of the case for "assessment." *See* Appellant's Brief, at 31. This may be true, but is of no moment; our precedent is well-settled that, "[t]he timeliness of a petition to open a judgment is measured from *the date that notice of the entry of the default judgment is received." See Kelly, supra* (emphasis added). Here, more than three-hundred days elapsed after KWS received notice of the default judgment and before it filed its petition to open. *See Stabley, supra.*

Finally, KWS argues that its answer, filed in federal court less than ten days after the entry of default, should serve as the functional equivalent of a petition to open. First, this argument was never raised in the trial court. Second, when KWS ultimately filed a petition to open the default judgment, it was filed pursuant to the three-part test, and made no mention of Rule 237.3. *See* Petition to Open Default Judgment, 1/25/19, ¶ 22. Claims raised for the first time on appeal are waived. *See* Pa.R.A.P. 302(a) ("Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.") As a result, we discern no abuse of discretion where the trial court found that KWS did not promptly file its petition to open the default judgment on January 25, 2019.[4] *See Stabley, supra.*

---

[4] Since the three-part test is conjunctive and not disjunctive, we could end our analysis here. *See Stabley, supra* at 719. Because of the equitable nature of KWS' second and third claims

KWS also claims the trial court abused its discretion with regard to the second prong of the of the three-part test; the trial court found that KWS failed to provide a reasonable explanation or excuse for its default. *See* Trial Court Opinion, 4/10/19, at 30-33. One basis upon which the trial court relied for concluding that KWS failed to submit a reasonable explanation for its delay was that the court had no obligation to consider the contents of the eight sur-replies filed between the parties. The trial court stated:

> There is no provision in our rules for filing reply briefs to petitions to open default judgments. Petitions are ripe for disposition after the expiration of the response period. A judge has discretion to consider a reply brief as a matter of grace but not as of right.
>
> This [c]ourt finds it hard to understand how two law firm partners believed that it was appropriate or necessary to inundate the [c]ourt with five [ ] separate reply briefs on behalf of KWS. The [p]laintiff was forced to file four [ ] briefs in response. For the most part, each reply brief filed by KWS addressed issues raised in the [p]laintiff's original answer to the petition to open. All of those issues could—and should—have been addressed in KWS' first reply brief. Any new issues or factual allegations could not be raised in any

---

on appeal, however, we will review all of the three-part test. *See id.* ("Moreover, this Court must determine whether there are equitable considerations that weigh in favor of opening the default judgment and allowing the defendant to defend the case on the merits. Where the equities warrant opening a default judgment, this Court will not hesitate to find an abuse of discretion.").

> of KWS'[ ] subsequent reply briefs. They should have been raised in the petition itself.

Id. at 13-14. The trial court further clarified its position as to why it would not consider KWS' reply briefs in its opinion issued on September 30, 2019:

> The court's original opinion cited three Pennsylvania Supreme Court and one recent Superior Court decisions that held that reply briefs cannot be used to raise new issues or to remedy the original brief's deficient discussion of an issue. This trial court recognized that those cases were discussing appellate procedure but believed, and still believes, that []the principles they espouse are equally relevant to reply briefs filed in the trial courts.[ ]
>
> The usual course of events is that a lawyer files a motion, the opponent files an answer, and the first lawyer may file a reply. There is no provision in the Pennsylvania Rules of Civil Procedure or in the local Philadelphia Civil Rules that permitted KWS to file its sur-reply, sur-sur-reply, sur-sur-sur-reply, and sur-sur-sur-sur-reply. Further research revealed that the issue of sur-replies, sur-sur-replies, etc., is apparently one of first impression for Pennsylvania trial courts, although Pa.R.A.P. 2113(c) mandates that after a reply brief is filed, "no further briefs may be filed except with leave of court." The issue has been discussed at length by the federal courts. While federal court decisions are not binding on Pennsylvania courts, this [c]ourt found the reasoning of the federal cases discussed below to be very persuasive.

* * *

An endless volley of briefs and sur-replies occurred in the often-cited case of *U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.,* 498 F.Supp.2d 25 (D. D.C. 2007). The court set forth the standard of review as follows:

> The decision to grant or deny leave to file a sur-reply is committed to the sound discretion of the court. If the movant raises arguments for the first time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply.

[Hockett,] 498 F. Supp. 2d at 35.

A "popular mode of advocacy" in *Hockett* were motions seeking to strike filings or seeking leave to file sur-replies. *[Id.]* at 34. This left the "[c]ourt as the owner of what may be the world's first sur-sur-sur-reply, a position in which no [c]ourt should ever find itself." *Id.* at 35. The court granted the [p]laintiff leave to file the sur-sur-sur-reply because it responded to evidence first raised in HCA's reply. *Id.* The [c]ourt also was presented "with something it never thought it would see, a sur-sur-sur-sur-reply (hereinafter, 'reply'). All of these papers, particularly the reply, add very little that is new, and do not respond to any improper argument. We are now several steps removed from a substantive motion, and are faced only with filings about filings.

Eventually we reach a point where all this metapleading must stop, and this is that point. The [m]otion . . . is denied." *Hockett,* 498 F. Supp. 2d at 36 (emphasis added). [ ]

The problem with KWS' fusillade of sur-reply briefs was they raised issues and facts that could have been, and should have been, raised either in KWS'[ ] petition or in its first reply brief. [Scalla] raised issues in his answer to the [p]etition that certainly warranted a reply by KWS discussing them. Instead of discussing all of those issues in one reply brief, however, KWS spread them out among four separate sur-reply briefs, which necessitated [Scalla] filing four of his own sur-reply briefs in response. Between February 27 and March 11, 2019, the court was forced to endure a death by a thousand cuts from eight separate sur-reply briefs.

For example, KWS did not deign to submit the affidavit of [Attorney] Galligan[ ] until KWS'[ ] second reply brief, i.e., its first sur-reply, on February 28th. The matters [Attorney] Galligan discussed all occurred in the month before the petition to open was filed; they were not newly-discovered after the first reply brief had been filed by KWS.

The matters set forth in the affidavit went to the heart of KWS'[ ] claim that the petition to open was timely filed. Timeliness was

the first of the three elements KWS had to prove to open the default judgment. The affidavit should have been filed as part of the petition to open to prove that the petition

> was filed timely. There should have been no difficulty in obtaining the affidavit in time for inclusion in the petition to open because [Attorney] Galligan is counsel of record for KWS in this case. After [Scalla's] answer to the petition disputed timeliness, the affidavit should have been included in KWS'[] first reply to [Scalla's] answer, not in its second reply. Counsel for KWS have never explained why they failed to include [Attorney] Galligan's affidavit in the petition to open or in their first reply to [Scalla's] answer to the petition.

Trial Court Opinion, 9/30/19, at 8-12 (internal citations and footnote omitted).

As stated above by the trial court, there is no provision under Pennsylvania law for filing reply briefs to petitions to open a default judgment. Nevertheless, we note that our Supreme Court has stated:

> Although the [Pennsylvania] Constitution does not enumerate every specific power inherent in courts and incidental to the grant of judicial authority under Article V, the Judicial Code serves to codify some of these non-particularized powers. Section 323 of the Judicial Code provides:
>
> > Every court shall have power to issue, under its judicial seal, every lawful writ and process necessary or suitable for the exercise of its jurisdiction and for the enforcement of any order which it may make and all legal and equitable powers required for or incidental to the exercise of its jurisdiction, and, except as otherwise prescribed by general rules, *every*

> *court shall have power to make such rules and orders of court as the interest of justice or the business of the court may require.*
>
> 42 Pa.C.S. § 323. Section 912 of the Judicial Code similarly establishes that every court of common pleas "shall have power to issue, under its judicial seal, every lawful writ and process . . . as such courts have been heretofore authorized by law or usage to issue[,]" and every judge of a court of common pleas "shall have all the powers of a judge or magisterial district judge of the minor judiciary." 42 Pa.C.S. § 912.

In re Return of Seized Prop. of Lackawanna Cty, 212 A.3d 1, 12 (Pa. 2019) (emphasis added).

Here, despite citing no binding precedent for refusing to consider the reply briefs filed by the parties, the trial court nevertheless had the authority to limit its consideration of the reply briefs. The court has the "power to make such rules and orders of court as the interest of justice or the business of the court may require." *See In re Return of Seized Prop. of Lackawanna Cty, supra.* It is evident that the parties' use of reply briefs placed an undue burden on the "business of the court[.]" *See id.* KWS' series of reply briefs added no claims that could not have been raised in earlier filings; and, as noted by the trial court, the common sense considerations underlying Pa.R.A.P. 2113(c), which governs the submission of appellate briefs, are "equally relevant" to briefs submitted in the trial court. *See* Trial Court Opinion, 9/30/19, at 9. Consequently, the trial court did not abuse its discretion in refusing to consider the contents of KWS' sur-reply briefs. *See Stabley, supra.*

Additionally, the trial court found there were no facts before it that supported opening the default judgment because KWS' petition to open was not verified, and because four of the five reply briefs it filed were also unverified. *See* Trial Court Opinion, 4/10/19, at 12.

Pennsylvania Rule of Civil Procedure 206.3 requires verification of a petition to open a default judgment. Rule 206.3 states, "A petition or an answer containing an allegation of fact which does not appear of record shall be verified." Pa.R.C.P. 206.3. With regard to verification, we have previously stated that,

> the failure to verify a petition to open or strike a default judgment should not be routinely condoned. However, the error may be excused where it is inconsequential and not prejudicial. Moreover, courts should not be astute in enforcing technicalities to defeat apparently meritorious claims. . . . To determine whether the error is inconsequential and not prejudicial, we must examine the function of the allegation within the context of the petition to open.

Penn-Delco Sch. Dist. v. Bell Atlantic-Pa, Inc., 745 A. 2d 14, 18 (Pa. Super. 1999) (internal citation, quotation marks, and brackets omitted).

In *Penn-Delco Sch. Dist.,* we excused a party's failure to verify the allegation that "counsel filed the petition to open immediately after discovering the default judgment" because that allegation was immaterial and not prejudicial. *See id.* In that case, we held the allegation was immaterial and the opposing party was not prejudiced because the petition to open was filed pursuant to Pa.R.C.P. 237.3, which states that so long as the petition to open is filed within ten days after the entry of the judgment on the docket, the

petition may be granted if a meritorious defense is stated. *See id.* The petition to open in *Penn-Delco Sch. Dist.* was filed within the ten-day period, and as such, the unverified allegation was "mere surplusage." *See id.* at 19.

In declining to consider the unverified allegations in KWS' petition and reply briefs, the trial court stated the following in its opinion accompanying its order:

> The first, and only, document to contain a verification was KWS'[ ] third reply brief, filed March 6, 2019. That document, however, cannot be considered by the [c]ourt because a reply brief, especially a third reply brief, cannot raise new facts or legal arguments that could—and should—have been raised in the original petition.
>
> * * *
>
> KWS filed its second reply brief on February 28, 2019, which attached for the first time, an affidavit by defense counsel Thomas Galligan, Esq.
>
> Based on that affidavit, KWS'[ ] attorneys claim that "only after this case was remanded did KWS' counsel notice a docket entry indicating that a default judgment was entered by the [c]ourt, which led KWS to file its [p]etition to [o]pen [d]efault [j]udgment." [Attorney] Galligan stated in his [a]ffidavit:
>
> > 2. On Monday, December 3, 2018, I reviewed the online docket for this case to determine whether the matter had been remanded back to this [c]ourt. Upon reviewing the docket, I noticed for the

> first time that beneath the docket entry for [p]laintiff[']s [p]raecipe to [e]nter [d]efault [j]udgment was the language: "JUDGMENT IN FAVOR OF ERIC SCALLA AND AGAINST KWS[,] INC[.,] A MEMBER OF THE THIELE GROUP[,] FOR FAILURE TO FILE ANSWER WITHIN REQUIRED TIME. PRO-PROTHONOTARY. NOTICE UNDER RULE 236 GIVEN."
>
> 3. The foregoing language on the docket came as a surprise because neither KWS nor its counsel received any separate order or judgment entered by this [c]ourt in response to [p]laintiff[']s [p]raecipe to [e]nter [d]efault [j]udgment.
>
> Galligan Affidavit[, 2/28/19, at] ¶ ¶2 & 3.
>
> The [p]etition and its memorandum of law, and the first reply brief filed February 26, 2019, do not mention [Attorney] Galligan's discovery of the default on [December] 3, 2018. [Attorney] Galligan's discovery was first raised by KWS in its second reply brief filed on February 28, 2019. KWS has not alleged that it only discovered [Attorney] Galligan's proposed evidence between February 26th and 28th. Thus, the affidavit cannot be considered because a reply brief, especially a second reply brief, cannot raise new facts or legal arguments that could—and should—have been raised in the original petition.

Trial Court Opinion, 4/10/19, at 12, 24 (internal citations omitted).

Here, the instant facts can be distinguished from those in *Penn-Delco Sch. Dist.* In addition to KWS' failure to verify its petition to open the default judgment, KWS also failed to verify all of its reply briefs, except for its third reply brief. Additionally, KWS, unlike the petitioner in *Penn-Delco Sch. Dist.,* did not file its petition to open the default judgment pursuant to Rule 237.3. Thus, KWS was required to satisfy all three prongs of the test for opening a default judgment, instead of only satisfying the meritorious defense prong; KWS' unverified allegations, therefore, are not "mere surplusage." *See Penn-Delco Sch. Dist., supra* at 19. The unverified allegations here at issue are material, and would prejudice Scalla if they were considered by the court. *See id.* Moreover, in looking at the allegation's "function within the context of the petition," *see id.,* the allegation itself does not withstand scrutiny. In its response to Scalla's motion to remand, filed in federal court on March 3, 2018, KWS stated, *"Although a default judgment was entered against KWS by the Court of Common Pleas,* service was improper." Defendant's Response in Opposition to Plaintiff's Motion to Remand, 3/3/18, at ¶ 9 (emphasis added). The unverified allegation at issue is material, prejudicial, and lacks indicia of truthfulness; therefore, the trial court did not abuse its discretion, under these circumstances, in declining to consider the contents of the unverified petition and briefs. *See Stabley, supra; see also Penn-Delco Sch. Dist., supra.*

Additionally, on this second "reasonable explanation" prong of the analysis, KWS argues that,

> the [t]rial [c]ourt ignores the undisputed facts that [ ] Roberts was the only employee of KWS in the United States; did not have a sophisticated understanding of legal mail or

> service of process; did not open any mail that appeared to be seam or from an unknown sender; and had no knowledge of the lawsuit until March 27, 2018. And it disregards the undisputed fact that once [ ] Roberts—and KWS—learned of the lawsuit, KWS acted expeditiously to mount a vigorous defense and litigation strategy.

Appellant's Brief, at 45-46.

We addressed a similar argument in *Autologic, Inc. v. Cristinzio Movers,* 481 A.2d 1362 (Pa. Super. 1984), where we stated,

> we find appellant's excuse is rendered no more reasonable because its reliance on its insurance company was through what it now characterizes as an "unsophisticated, low-level employee." The fact remains that it was this type of employee that appellant chose to give responsibility to for handling damage claims. While it has been held that an employee's clerical error may constitute sufficient legal justification to open a default judgment, *see e.g., Campbell v. Heilman Homes, Inc., [ ]* 335 A.2d 371 ([Pa. Super.] 1975) (observing that [ ] employee's failure to forward [ ] complaint was not unlike [ ] clerical error), we do not believe the instant case falls within that category. *Appellant gave Ms. Fahrer the responsibility not simply to forward in every case all papers she received to her superiors, but to make the decision whether or not there was a need to do so. Thus, appellant's failure to respond to the complaint was not due simply to the inattentiveness of its employee, but to her conscious decision which*

> *it had empowered her to make.* We do not find it unjust to hold appellant responsible for that decision. If we were to hold otherwise, employers could cause interminable delays in litigation simply by intentionally choosing unqualified employees to handle claims brought against them.

Id. at 1364 (emphasis added).

Indeed, during her deposition, Roberts stated that her superiors were aware of her mail-opening practices:

> Q. Does the—the president, Mr. Kurz—is he aware that you don't open mail if you don't know who it's from?
>
> A. Yes.
>
> Q. And is he okay with that, as far as you know?
>
> A. We are changing procedure, yes.
>
> Q. What's the new procedure?
>
> A. I open everything.
>
> Q. Have you ever been reprimanded for not opening mail?
>
> A. No.

Roberts Deposition, 7/12/18, at 39.

Here, like the appellant in *Autologic,* KWS argues that it should be excused for the error of its "unsophisticated" employee. Also, similar to the appellant in that case, KWS gave its employee both the responsibility of deciding whether to open mail, and the power of deciding whether to forward that mail to her superiors. Like, in *Autologic, supra,* it is similarly not "unjust to hold appellant responsible for that decision."

Id. Consequently, we cannot find an abuse of discretion in the trial court's dismissal of this argument under the "reasonable explanation" prong of the three-part analysis. *See Stabley, supra.*

Finally, the third prong of the three-part test requires KWS to plead an arguably meritorious defense sufficient to justify relief if proven. *See Castings Condominium Assn v. Klein,* 663 A.2d 220, 224 (Pa. Super. 1995). KWS need not prove every element of the defense, however, it must plead the defense in precise, specific, and clear terms. *Id. See also Miller Block Company v. United States National Bank in Johnstown,* 567 A.2d 695, 700 (Pa. Super. 1989).

In *Castings Condominium Assn,* we stated that an averment was insufficient to establish a meritorious defense because it "summarily denie[d] any wrongdoing" and failed "to refute any of the allegations with particularity." *Id.* at 224. In its brief before this Court, KWS first argues that the trial court placed a burden on KWS in conflict with our precedent by requiring KWS to prove its defenses with "supporting facts." *See* Appellant's Brief, at 39. Second, KWS asserts that the trial court mischaracterized KWS' "detailed averments supporting its defenses as boilerplate.' *Id.*

The trial court found that all of KWS' allegations were boilerplate statements that failed to establish a meritorious defense:

> KWS' principal defense is that service of the complaint was improper. ¶ ¶ 38-47 of Petition. That defense fails due to [the federal court's] conclusive ruling that the complaint was validly served upon KWS. The [p]etition specifies only these other defenses that were

raised in KWS'[ ] federal court [a]nswer to [Scalla's c]omplaint:

> 50. KWS'[ ] answer denies all material allegations and pleads numerous affirmative defenses, that, if proved at trial, will absolve it of liability. First, KWS denies that it manufactured the product which is the subject of [p]laintiff's lawsuit. Further, proof that KWS produced this product has not been presented.
>
> 51. If any product designed, manufactured, distributed and/or sold by KWS is, in fact, made the basis of this lawsuit (which is categorically denied), then KWS denies that this product was in any way defective and/or unreasonably dangerous.
>
> 52. KWS averred that to the extent it manufactured the product at issue, this product was in all respects properly designed, manufactured, assembled, tested, inspected, distributed and/or sold, and the product departed KWS'[ ] control equipped with all elements necessary to make it safe and containing no elements making it unsafe, and was properly equipped with all necessary warnings and instructions for correct and safe use, operation, maintenance and servicing. No proof to the contrary has been presented.
>
> 53. Finally, in the further alternative, KWS averred that if any defect is found to have existed or exists in any KWS product made the basis of this lawsuit, which was again categorically denied,

> then KWS averred that any such defect was caused solely and wholly by the misuse, abuse, alteration, modification, damage or improper maintenance, repair, operation, handling, servicing, installation and/or contributory and comparative negligence, breach of duty and/or fault of others now unknown.
>
> All of these defenses are boilerplate allegations devoid of any supporting facts that establish that they are genuinely meritorious and can be established at trial. They fail the meritorious defense test.

Trial Court Opinion, 4/10/19, at 35-36 (internal citation, quotation marks, and ellipsis omitted).

Here, we agree with the trial court, and find that KWS' defenses do not refute any of Scalla's allegations *with particularity*. *See Castings Condominium Assn,* 663 A.2d at 225. Instead, all of the defenses summarily state that KWS denies any wrongdoing. As such, the above averments are insufficient to raise a meritorious defense under the third prong of the three-part test for opening a default judgment. *See id.* Accordingly, there was no abuse of discretion under this prong of the trial court's analysis. *See Stabley, supra.*

In turning to KWS' second and third issues on appeal—claims that relate to the equitable nature of the above three-part test—we have previously stated that,

> [w]e recognize the equitable nature of the trial court's task when deciding whether to open a default judgment. However, the trial court cannot open a default judgment based on the "equities" of the case when the

> defendant has failed to establish all three of the required criteria. In *Provident Credit Corporation* [*v. Young,* 446 A.2d 257 (Pa. 1982)], the defendant seeking to open the default judgment established two of the three elements—she pled a meritorious defense to the plaintiff's complaint and offered a reasonable excuse for the default. *[Id.]* at 262-63. Under these circumstances, the Court concluded that it would be inequitable to deny the request to open the judgment simply because she did not promptly file the petition to open. The Court weighed the equities of the case and ruled in favor of granting the petition to open the judgment. [Appellant], on the other hand, has not established any of the three elements in the tripartite test. Therefore, we reject her argument that the "equities" weigh in her favor requiring that we open the default judgment.

Castings Condominium Ass'n, 663 A.2d at 225.

Here, KWS, like the defendant in *Castings Condominium Ass'n,* argues that the equities required the court to open the default judgment. *See* Appellant's Brief, at 49-57. Nevertheless, KWS, also like the defendant in that case, failed to establish any of the three elements of the three-part test for opening a default judgment. Accordingly, we reject KWS' argument that the equities weigh in its favor with regard to opening the default judgment. *See Castings Condominium, supra; see also Seeger v. First Union Nat'l Bank,* 836 A.2d 163, 167 (Pa. Super. 2003).

Order affirmed.

President Judge Emeritus Bender joins this Opinion.

Judge Strassburger files a Concurring Opinion.

Judgment Entered.

/s/ Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/11/2020

APPENDIX D

2020 PA Super 191

IN THE SUPERIOR COURT OF PENNSYLVANIA

[Filed August 11, 2020]

No. 2003 EDA 2019

2020 PA Super 191

ERIC SCALLA,

Appellee

v.

KWS, INC., A MEMBER OF THE THIELE GROUP,

Appellant

Appeal from the Order
Entered April 12, 2019 in the
Court of Common Pleas of
Philadelphia County

Civil Division at No(s): 171202802

BEFORE: BENDER, P.J.E., LAZARUS, J. and STRASSBURGER, J.*

CONCURRING OPINION BY STRASSBURGER, J.:

I join the Majority Opinion with respect to the first two prongs of the tripartite test to open a default

---

* Retired Senior Judge assigned to the Superior Court.

judgment. *See* Majority Opinion, at 5-20. However, because I would not reach the merits of the third prong, I respectfully concur.

As the Majority explains, this Court has required a defendant to set forth a meritorious defense in "precise, specific, and clear terms" to satisfy the third prong of the test. Majority at 21, *citing Castings Condominium Ass'n v. Klein*, 663 A.2d 220, 224 (Pa. Super. 1995) ("Klein must plead an arguable meritorious defense sufficient to justify relief if proven. The defendant does not have to prove every element of her defense[;] however, she must set forth the defense in precise, specific and clear terms.") (citation omitted); *see also Penn-Delco Sch. Dist. v. Bell Atl.-Pa, Inc.*, 745 A.2d 14, 19 (Pa. Super. 1999) (same). Further, in *Smith v. Morrell Beer Distributors, Inc.*, we stated the following.

> Although timely filed, the petition [to open a default judgment] did not set forth allegations of a defense that, if proven at trial, would entitle [a]ppellants to relief. Instead of alleging facts of record in the petition that support a meritorious defense, [a]ppellants set forth in their petition conclusions of law and challenges to [a]ppellee's proof. Motion to Open Default Judgment, 1/12/10, at ¶¶ 2-9. In sum, [a]ppellants allege that they have "a strong defense for this matter and it is highly likely that plaintiff will not prevail on this case in chief." *Id.* at ¶ 8. We conclude that [a]ppellants' petition does not set forth a meritorious defense supported by verified allegations of fact.

29 A.3d 23, 28 (Pa. Super. 2011).

On the other hand, and as KWS argues in its brief, this Court has "accepted a broadly worded answer as sufficient to set forth a potentially meritorious defense, noting that '[t]here is no requirement that the answer attached to a petition to open be any more specific than the typical broad answer to a complaint.'" *Stabley v. Great Atl. & Pac. Tea Co.*, 89 A.3d 715, 720 (Pa. Super. 2014) (finding general averment of comparative negligence in answer and new matter, in conjunction with assertions made by defendants at hearing on petition to open default judgment, satisfied meritorious-defense prong), *quoting Attix v. Lehman*, 925 A.2d 864, 867 (Pa. Super. 2007) (concluding "broad averments of contributory negligence in defendant's answer and new matter [attached to a petition to open default judgment were] sufficient to plead a meritorious defense"); *see also* KWS's Brief at 37-42.

As the Majority points out, the three-part test is conjunctive and a trial court cannot open a default judgment based on the equities of the case when a defendant has failed to establish all three prongs of the test. *See* Majority at 11 n.4; *Seeger v. First Union Nat. Bank*, 836 A.2d 163, 167 (Pa. Super. 2003). Accordingly, because it is not necessary to the disposition and this Court has been inconsistent in its treatment of the meritorious-defense prong, I would not address the third prong of the test here. For these reasons, I respectfully concur.

APPENDIX E

IN THE SUPERIOR COURT OF PENNSYLVANIA
EASTERN DISTRICT

———

No. 2003 EDA 2019

———

ERIC SCALLA,

v.

KWS, INC., A MEMBER OF THE THIELE GROUP,

Appellant.

———

ORDER

IT IS HEREBY ORDERED:

THAT the application filed August 25, 2020, requesting reargument of the decision dated August 11, 2020, is DENIED.

PER CURIAM

APPENDIX F

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION

No. 02802
Control No. 19013624

ERIC SCALLA

vs.

KWS, INC.

December Term, 2017

ORDER

AND NOW this 10 day of April, 2019, upon consideration of the Petition to Open Default Judgment filed by Defendant KWS, Inc., and the parties' ten (10) responses thereto, it is hereby ORDERED and DECREED that the Petition to Open is DENIED with prejudice. *See* Opinion filed this date.

BY THE COURT:

/s/ J. Lachman
LACHMAN, J.

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION

———

No. 02802
Control No. 19013624

———

ERIC SCALLA

vs.

KWS, INC.

———

December Term, 2017

———

OPINION

Lachman, J. April 10, 2019

This opinion sets forth the rationale underlying the Court's order denying Defendant KWS, Inc.'s Petition to Open Default Judgment. In sum, those reasons were:

- Federal District Court Judge Joel Slomsky's opinion is conclusive on the issues of whether the complaint was properly served on KWS and whether KWS Vice-President Elizabeth Roberts had authority to sign for and accept the complaint and ten-day letter as the registered agent for KWS. The parties are collaterally estopped from disputing his determinations.

- The petition to open filed by KWS and four of its five (5) reply briefs failed to present any facts to support relief because they were not accompanied by verifications as required by Pa.R.C.P. 206.3.
- KWS failed to meet any of the three tests required to open a default judgment. 1. The petition to open was not promptly filed because it was filed 304 days after the entry of the default judgment and 25 days after this Court regained jurisdiction following Judge Slomsky's remand. 2. The failure to file a timely answer to the complaint was not reasonably excused by Vice President Roberts' deliberate policy of intentionally failing to open certified mail letters from senders she did not recognize. 3. KWS did not state a meritorious defense because the service issue was conclusively decided against KWS by Judge Slomsky, and KWS did not provide any facts to support its other defenses.

I. Factual Background

Plaintiff Eric Scalla was seriously injured due to a defective hook he asserts was manufactured and sold by Defendant KWS. Plaintiff commenced this case by filing a complaint on December 19, 2017. The complaint was reinstated on January 19, 2018. A copy of the state court docket is attached hereto as Exhibit "A."

The complaint was served upon Defendant KWS on January 23, 2018, by certified mail at KWS' office at 9718 E. 55th Place, Tulsa, OK 74147. The certified mail return receipt card was signed by Elizabeth Roberts, vice-president of operations, corporate secre-

tary, and the registered agent for service of process upon KWS. Ms. Roberts testified in a deposition that she put the unopened letter aside to deal with other matters.

On March 12, 2018, Plaintiff sent to KWS the ten-day notice required by Pa.R.C.P. 237.1, in the form mandated by Rule 237.5. The notice was sent to KWS at the Tulsa address via Federal Express, Regular Mail, and by Certified Mail, Return Receipt Requested. Vice President Roberts signed a receipt for the FedEx package and the return receipt card on March 13, 2018.

On March 26, 2018, thirteen days after service of the 10-day notice upon KWS, judgment was entered on the Plaintiff's praecipe for the entry of a default judgment against KWS for failing to answer the complaint.

The next day, March 27th, Plaintiffs counsel sent an e-mail message to Vice President Roberts informing her that KWS was in default for failing to respond to this lawsuit. It attached copies of the complaint, praecipe for entry of default, and the exhibits to the praecipe. Three attorneys with Reed Smith, LLP — Michael C. Falk, Thomas J. Galligan, and Arnd von Waldow — entered their appearances on behalf of KWS on March 28 and 30th.

On March 29, 2018, KWS removed the case to the United States District Court for the Eastern District of Pennsylvania ("federal court").[1] A copy of the federal court docket is attached hereto as Exhibit "B." Despite the existence of the state court default judgment, KWS

[1] The federal court docket shows that the notice of removal was filed in federal court on March 29, 2018. The state court docket shows that the notice of removal was filed in state court on April 2, 2018.

filed an answer to the complaint with affirmative defenses in federal court on April 5th. KWS never filed a petition to open the state court default judgment in federal court, although it had the right to file such a petition.[2]

On April 19th, Plaintiff filed a motion to remand the case back to state court, asserting that the removal was untimely. Plaintiff contended that the complaint was served on KWS on January 23, 2018, and the notice of removal was not filed until sixty-five days later, on March 29, 2018, which was beyond the thirty-day period for removal permitted by 28 U.S.C. § 1446(b).[3] KWS contended that removal was timely because it did not have notice of this lawsuit until March 27th, when it received notice of the entry of the default judgment. The motion was assigned to District Judge Joel Slomsky, who ordered the parties to conduct discovery on the timing issue and to file supplemental briefs.

On November 30, 2018, Judge Slomsky granted the motion to remand, ruling that the service of the complaint on January 23rd was valid and that the removal

---

[2] See discussion on pages 20 to 22.

[3] 28 U.S.C. § 1446(b) provides, in relevant part: "[t]he notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . ." A "defendant's time to remove starts with 'receipt of a copy of the Complaint, however informally . . . .' *Murphy Bros*., *Inc*. *v*. *Michetti Pipe Stringing*, *Inc*., 526 U.S. 344, 356 (1999). This has been interpreted to mean that time for removal commences to run when an agent of a corporation receives the Complaint. *Maglio v*. *F.W*. *Woolworth* Co., 542 F. Supp. 39, 41 (E.D. Pa. 1982)." *Scalla v*. *KWS*, *Inc*., No. CV 18-1333, 2018 WL 6271646, at *6 (E.D. Pa. Nov. 30, 2018).

clock started to run as of that date. A copy of Judge Slomsky's opinion is attached hereto as Exhibit "C." Consequently, the removal on March 29th was untimely. In making that ruling, Judge Slomsky made the following factual and legal determinations which the parties are collaterally estopped from disputing:

> On January 23, 2018, Plaintiff served the Complaint through certified mail at Defendant's principal place of business in Tulsa, Oklahoma. (Doc. No. 7, Ex. B.)[5] The envelope was addressed to "KWS, Inc., a member of the Thiele Group." (Id.) Defendant KWS has one office in the United States, which is located in Tulsa, Oklahoma. (Doc No. 16, Ex. G at 20:3-5.) Elizabeth Roberts accepted service of the Complaint by signing for it on behalf of Defendant. (Id., Ex. B, G at 30:8-19.) On the return receipt, Ms. Roberts did not check either box to the right of the signature line, which designated "Agent" in one box and "Addressee" in the other. (Id., Ex. B.)
>
> [5] On the return receipt, signed by Elizabeth Roberts, is handwritten by her, the date "1/23/18."
>
> Roberts is KWS's Vice President of Operations and the only employee who regularly works in the Oklahoma office. (Id., Ex. G at 10:21.) All other company employees are located in KWS's Germany offices. (Id. at 26:1-3.) Among other things, Roberts is responsible for receiving the mail on behalf of KWS at its Oklahoma location. (Id. at 19:25; Id. at 26:1-2.) This includes signing receipts for certified mail. (Id. at 24:4-8.) According to documents filed with the Office of the

Secretary of State of Oklahoma, Roberts is also authorized to receive service of process on behalf of Defendant KWS. Neither Roberts nor anyone else at KWS took any action to respond timely to the Complaint after receiving it.

Thereafter, on March 13, 2018, Plaintiff served Defendant with a 10-day notice of intention to enter default judgment, pursuant to Pennsylvania Rule of Civil Procedure 237.1, urging Defendant to file an answer within ten days to avoid the entry of the default judgment. (Doc. No. 7, Ex. E.) Roberts also received and signed for this notice. (Id.) Again no response was forthcoming, so on March 26, 2018, Plaintiff filed a Praecipe to Enter Default Judgment, alleging that Defendant failed to respond to the Complaint within 20 days, as required. (Id., Doc. 1-1, Ex. B at 21-22.) A default judgment was then entered in favor of Plaintiff and against Defendant in the Court of Common Pleas of Philadelphia County. (Doc. No. 7, Ex. D.)

The next day, on March 27, 2018, Plaintiffs counsel, Mr. Dan Hessel, Esquire sent an email to KWS, Inc.'s company email address, listed on its website (sales@kwschain.com), notifying them that the company is in default for failure to respond to the Complaint. (Id., Ex. E.) Roberts read the email, and KWS then secured counsel in this case. (Id.) On March 28, 2018, Defendant's counsel responded to Plaintiffs email, stating that they have been retained to represent KWS in the matter and that they would respond to the Complaint

that day. (Id., Ex. G.) On March 29, 2018, however, Defendant removed the action to this Court. (Doc. No. 1.)

Scalla v. KWS, 2018 WL 6271646, at *2—*3.

Here, Plaintiff has shown that on January 23, 2018, Ms. Roberts, the registered agent' who was authorized to accept service of process on behalf of KWS (Doc. No. 16, Exs. B, C, H) signed and returned the receipt. (Doc. No. 7, Ex. B.) According to the documents filed by KWS with the seal of the Secretary of State of Oklahoma, she is the authorized agent to accept service of process and was appointed on September 8, 2009. The documents from the Secretary of State also show that she was the registered agent for service of process at least until May 31, 2018, and that no one else has been designated as the registered agent for KWS. Moreover, she signed the return receipt on January 23, 2018, accepting service of the Complaint, and the fact that she did not check either box as "addressee" or "agent" is irrelevant, given her status as the registered agent to accept service of process.[8]

[7] A registered agent is a person authorized to accept service of process for another person, especially a foreign corporation, in a particular jurisdiction. *Registered Agent*, Black's Law Dictionary (10th ed. 2014). Even though KWS was incorporated in Oklahoma and is not a foreign corporation in that state, the definition of a registered agent is still pertinent.

[8] In her deposition, Roberts testified that even though her signature was on the successor form, and she considered herself to be the registered agent, she did not consider herself to be the registered agent for service of process. (Doc. No. 16, Ex. G at 31:2225; Id. at 32: 1-10; Id. at 42: 9-10; Id. at 47: 18-24; Id. at 48:1-6; Id. at 60: 1-25; Id. at 64: 1-4.) This testimony contradicts the express authority given to her to accept service in the filings with the Secretary of State of Oklahoma, and does not change her legal status to accept service as set forth in the documents. Under Oklahoma law, every domestic corporation is required to designate a registered agent to remain in the state to be generally present at the corporation's office to accept service of process and otherwise perform the functions of registered agent. 18 OkI. St. Ann. § 1022. KWS was incorporated in the state of Oklahoma (Doc. No. 16, Ex. D-4), and Roberts was so designated. As the designated individual to serve as registered agent on behalf of KWS, she was the person to be served with the Complaint. *Accord Build Servs. v. V.*, No. CJ-2012-6543, 2012 Okla. Dist. LEXIS 3570 (Dist. Ct. Okla. November 21, 2012) (service on the company's registered service agent was deemed good and effective service).

Scalla v. KWS, 2018 WL 6271646, at *4.

In its Supplemental Brief, Plaintiff has submitted the following documents, retrieved

> from the Office of the Secretary of State of Oklahoma, to prove that Roberts is KWS's authorized agent: (1) a three-page certificate issued by the Office of the Secretary of State of Oklahoma, and signed by the Secretary of State, which states that Elizabeth Roberts "is the registered agent for service of process for [KWS, Inc.]" (Doc. No. 16, Ex. B.); (2) a certificate of Successor Registered Agent, which appointed Elizabeth Roberts as the successor registered agent on September 8, 2009 (Id., Ex. C); (3) a document entitled "Resignation of Registered Agent Couple with Appointment of Successor" showing the appointment of Elizabeth Roberts to succeed another person as registered agent. (Id., Ex. D-3.) These three documents were submitted as part of an affidavit from Plaintiffs counsel stating that he requested the aforementioned forms from the Oklahoma Office of the Secretary of State and was directed to download them from their website. (Id., Ex. D.) Attached to this Opinion are copies of the documents numbered 1 to 3, as well as the affidavit of Plaintiffs counsel, designated as Document 4.

Scalla v. KWS, 2018 WL 6271646, at *2 n. 6.

> Roberts admitted in her deposition that she was employed at KWS since it was founded in 1996. (Id., Ex. G at 8:14-17.) In 2009, she was promoted from her position as Director of Sales to the Vice President of Operations at KWS. (Id. at 10: 16-25.) Since 2016, she has been the only employee of KWS that regularly reported to the company's Oklahoma office.

> (Id. at 16:4-9.) She is responsible for all mail to the office. (Id. at 20: 18-21.) All higher-ranking officers of the company are based in Germany. (Id. at 25: 19-25; Id. at 26: 1-3.) She has met the sole shareholder many times. (Id. at 28: 10-17.) She has access to KWS bank accounts and the authority to write checks and pay bills on behalf of KWS. (Id. at 24: 17-25.) In addition to the express authority given to her in the documents filed with the Secretary of State of Oklahoma, which show that she was the registered agent for service of process, her background with KWS establishes a sufficient connection between Roberts and KWS to confirm her implied authority to accept service of process on behalf of KWS. *Borah v. Monumental Life Ins. Co.*, No. 04-3617, 2005 WL 83261, at *3 (E.D. Pa. Jan. 14, 2005) (finding that service was proper under Pennsylvania law when it was addressed to the President and CEO of defendant company, signed for by a mail clerk and then delivered to the addressee's secretary); *Thomas v. Stone Container Corp.*, No. 89-1537, 1989 WL 69499, at *3 (E.D. Pa. June 21, 1989) (finding service proper where a secretary to a vice president of the defendant company received a complaint that was addressed to Defendant's office and served through certified mail).

Scalla v. KWS, 2018 WL 6271646, at *5.

Based on these determinations, Judge Slomsky ruled that KWS was properly served with the complaint under Pa.R.C.P. 403 and 404(2). 2018 WL 6271646, at *3—*5. "On January 23, 2018, Ms.

Roberts, the registered agent who was authorized to accept service of process on behalf of KWS . . . signed and returned the receipt." Id. at *4. "On its face, the return receipt expressly shows that service was complete." Id. at *5. These rulings are conclusive upon KWS and the Plaintiff.

KWS did not appeal Judge Slomsky's remand order, although KWS had the right to file such an appeal to the United States Court of Appeals for the Third Circuit.

The federal court docket indicates that the case record was mailed to the Philadelphia Court of Common Pleas on December 20, 2018. The Philadelphia court docket indicates that the record was received on December 31, 2018.

KWS did not file a petition to open the default judgment until January 25, 2019. That was twenty-five days after this court had regained jurisdiction over this case, and 304 days after the entry of the default judgment on the docket.

II. The Complaint Was Validly Served On January 23, 2018

Before this Court may address the merits of KWS's petition to open the default judgment, the Court must address the issue of whether the complaint was validly served on KWS.

> [W]here the party seeking to open a judgment asserts that service was improper, a court must address this issue first before considering any other factors. If valid service has not been made, then the judgment should be opened because the court has no jurisdiction over the defendant and is without power

> to enter a judgment against him or her. In making this determination, a court can consider facts not before it at the time the judgment was entered. Thus, if a party seeks to challenge the truth of factual averments in the record at the time judgment was entered, then the party should pursue a petition to open the judgment, not a petition to strike the judgment.

Cintas Corp. v. Lee's Cleaning Servs., Inc., 549 Pa. 84, 93-94, 700 A.2d 915, 919 (1997) (citations omitted).

Judge Slomsky's opinion in this case conclusively established that Vice President Roberts was authorized to accept service of process and that KWS was properly served with the complaint, rulings that KWS failed to appeal. Judge Slomsky's ruling collaterally estops KWS from relitigating the issues of Vice President Roberts' authority and the validity of service of the complaint.

Prior determinations by a federal court of competent jurisdiction are conclusive upon the same parties in state court when the issues presented in state court were raised and decided in the federal court. *Robinson v. Fye*, 192 A.3d 1225, 1232 (Pa. Cmwlth 2018) (former inmate's civil rights action in state court was barred by res judicata and collateral estoppel because it raised the same claims and issues as a previous federal court civil rights action he filed that was decided adversely to him); *Dempsey v. Cessna Aircraft Co.*, 653 A.2d 679 (Pa. Super. 1995) *(en banc)* (state court petition to set aside settlement was dismissed on res judicata grounds because earlier federal court action raising identical issues was litigated and dismissed by the federal court); *Corn. ex rel. Bloomsburg State Coll. by Nossen v. Porter*, 610 A.2d

516, 520 (Pa. Cmwlth 1992) (former associate professor was barred from pursuing state court litigation against college for its alleged breach of contract, due process violations, defamation, and intentional infliction of emotional distress, because of the res judicata effect of judgment entered in federal litigation concerning his alleged improper dismissal and lack of due process; the same factual information that was entered into evidence in federal suit underlay the professor's state court claims); *Rumbaugh v. Beck*, 601 A.2d 319, 323 (Pa. Super. 1991) (judgment in federal action finding that defendants breached agreement to buy-out plaintiff's share in corporation collaterally estopped plaintiff from bringing state court shareholder's derivative action); *London v. City of Phila.*, 412 Pa. 496, 194 A.2d 901, 902-03 (1963) (claim that could have been asserted in previous federal court action could not be litigated in subsequent state court action).

"[T]echnical res judicata (claim preclusion) and collateral estoppel (issue preclusion) are 'related, yet distinct' components of the doctrine known as res judicata." *Robinson*, 192 A.3d at 1231 (citation omitted). Collateral estoppel "is a broader concept than res judicata and operates to prevent a question of law or issue of fact which has once been litigated and fully determined in a court of competent jurisdiction from being relitigated in a subsequent suit." *Vignola v. Vignola*, 39 A.3d 390, 393 (Pa. Super. 2012) (citation omitted). Collateral estoppel bars the re-litigation of issues where

> (1) the issue decided in the prior case is identical to one presented in the later case;
>
> (2) there was a final judgment on the merits;

> (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case;
>
> (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and
>
> (5) the determination in the prior proceeding was essential to the judgment.

Radakovich v. Radakovich, 846 A.2d 709, 715 (Pa. Super. 2004) (citation omitted). When each of those elements are met, collateral estoppel "renders issues of fact or law, incapable of relitigation in a subsequent suit." *Robinson*, 192 A.3d at 1231-1232 (citation omitted).

Each of those elements are met in the present case. The identical issues of Vice President Roberts' authority and whether service of the complaint upon KWS was valid are at the crux of both the federal court's determination of the start time of the 30-day period for removal, and in the present petition to open the default judgment. KWS was a party in the federal action and had a full and fair opportunity to litigate both issues in that forum. KWS conducted discovery and filed a supplemental brief arguing its position on those issues. The determination of the extent of Vice President Roberts' authority and whether service of the complaint upon KWS was valid, were essential to the judgment that removal was untimely and that the case had to be remanded to state court.

Judge Slomsky's order granting the remand petition and ordering the case remanded was a final order on the merits of that issue. KWS could have immediately appealed Judge Slomsky's remand order to the Third

Circuit, but deliberately chose not to appeal. "[A] judgment is deemed final for purposes of res judicata or collateral estoppel unless or until it is reversed on appeal." *Robinson*, 192 A.3d at 1232 *quoting Shaffer v. Smith*, 543 Pa. 526, 673 A.2d 872, 874 (1996) (emphasis and citation omitted). *See*, *U.S. Nat'l Bank in Johnstown v. Johnson*, 506 Pa. 622, 629, 487 A.2d 809, 813 (1985) ("the dismissal of a complaint as to one defendant upon its preliminary objections . . . becomes res judicata if not appealed within the prescribed appeal period"); *Catanese v. Scirica*, 437 Pa. 519, 521, 263 A.2d 372, 374 (1970) (trial court sustained a demurrer and dismissed the complaint; "when the period during which an appeal could have been filed expired, the doctrine of *res judicata* became applicable to the cause of action the complaint attempted to state"); *Love v. Temple University*, 422 Pa. 30, 33, 220 A.2d 838, 840 (1966) (plaintiffs failure to appeal the trial court's order sustaining one defendant's preliminary objections and dismissing the complaint as to that defendant, "renders the doctrine of *res judicata* applicable and precludes the vacation of the order after the time of appeal has passed").

KWS is collaterally estopped from relitigating or challenging Judge Slomsky's rulings that Vice President Roberts was authorized to accept service and that the service of the complaint upon KWS was valid.

III. Because The Petition Was Not Verified, It Did Not Present Any Facts That Supported Opening The Default Judgment

A petition to open a default judgment is governed by Pa.R.C.P. 206.1(a)(1), and must be accompanied by a verification as required by Rule 206.3, which states: "A petition or an answer containing an allegation of fact which does not appear of record shall be verified." The

petition to open filed by KWS and four of the five (5) reply briefs it filed, were not accompanied by verifications of the non-record facts alleged therein. Plaintiff's counsel objected to the lack of a verification. See Answer to ¶ 51 of the Petition, and Plaintiff's memorandum of law at p. 37 n. 2. Thus, the only facts before this Court are those on the state and federal court dockets, and those presented in Plaintiff's verified answers and reply briefs.

The first, and only, document to contain a verification was KWS's third reply brief, filed March 6, 2019. That document, however, cannot be considered by the Court because a reply brief, especially a *third* reply brief, cannot raise new facts or legal arguments that could – and should – have been raised in the original petition. See discussion below on pages 13 to 15.

"Mere averments in an unverified petition do not constitute evidence." Thus, a court presented with an unverified petition has "absolutely no facts" before it from which to make a proper determination. *McKnight v. Corn. Dept. of Transp.*, 549 A.2d 1356, 1358 (Pa. Cmwlth 1988).

Failures to verify petitions under Rule 206.3 constitute fatal defects and "may not be brushed aside as mere 'legal technicalities.' *Pfuhl v. Coppersmith*, 434 Pa. 361, 367, 253 A.2d 271, 274 (1969) (construing former Pa.R.C.P. 206; the 1995 explanatory comment to present Rule 206.3 states, "Rule 206.3 which continues the requirement of verification is taken almost verbatim from former Rule 206.").[4]

---

[4] Rule 206.3 continues the requirement of verification of non-record facts mandated by former Rule 206. See, 1995 Explanatory Comment accompanying Rule 206.3. "The note to [former] Rule 206 of the Supreme Court Rules of Civil Procedure, 12 P.S.

IV. KWS Filed An Inappropriate Number Of Reply Briefs

There is no provision in our rules for filing reply briefs to petitions to open default judgments. Petitions are ripe for disposition after the expiration of the response period. A judge has discretion to consider a reply brief as a matter of grace but not as of right.

This Court finds it hard to understand how two law firm partners believed that it was appropriate or necessary to inundate the Court with five (5) separate reply briefs on behalf of KWS. The Plaintiff was forced to file four (4) briefs in response. For the most part, each reply brief filed by KWS addressed issues raised in the Plaintiff's original answer to the petition to open. All of those issues could — and should — have been addressed in KWS' first reply brief. Any new issues or factual allegations could not be raised in any of KWS's subsequent reply briefs. They should have been raised in the petition itself.

A party "is prohibited from raising new issues in a reply brief. Moreover, a reply brief cannot be a vehicle to argue issues raised but inadequately developed in [the] original brief." *Commonwealth v. Fahy*, 558 Pa. 313, 323 n. 8, 737 A.2d 214, 219 n. 8 (1999). *Accord*, *Commonwealth v. Bracey*, 568 Pa. 264, 274 n. 5, 795 A.2d 935, 940 n. 5 (2001) (a party "is prohibited from raising new issues or remedying an original briefs

---

Appendix, explains that the provision for verification continues the Act of April 9, 1915, P.L. 72, s 1, 12 P.S. s 514. That act provides that 'A judge of any court of record shall not, in any matter, case, hearing, or proceeding before him, receive or consider any petition, or paper in the nature of a petition, alleging any matter of fact, unless the petition or paper is duly verified as to such allegations." *Pfuhl v. Coppersmith*, 253 A.2d 271, 274 n. 4 (Pa. 1969).

deficient discussion in a reply brief."); *Michael G. Lutz Lodge No. 5, of Fraternal Order of Police v. City of Philadelphia*, 634 Pa. 326, 335 n. 5, 129 A.3d 1221, 1226 n. 5 (2015) (a party "may not raise a new issue, or adequately develop an existing issue, in a reply brief'). "[It] is axiomatic that arguments raised for the first time in a reply brief are waived." *Brown v. Halpern*, 2019 PA Super 5, -- A.3d ---, --- n.13, 2019 WL 991502019 at *14 n.13 (2019).[5]

The facts supporting a petition must be set forth in the petition itself and not in a reply brief, because briefs are not part of the record. "Because briefs are not 'facts' and are not of record, they cannot serve as a basis for the trial court's decision." *In re Lackawanna County Tax Claim Bureau*, 91 A.3d 316, 318 (Pa. Cmwlth. 2014), *citing Erie Indemnity* Co. v. *Coal Operators Casualty* Co., 441 Pa. 261, 272 A.2d 465, 466-67 (1971) ("Apparently, the court took into consideration facts alleged in the briefs, but briefs are not part of the record, and the court may not consider facts not established by the record."). *Accord*, *Scopel v. Donegal Mutual Insurance Co.*, 698 A.2d 602, 606 (Pa.Super. 1997) ("litigants' briefs are not part of the official record"); *Laspino v. Rizzo*, 398 A.2d 1069, 1073 (Pa. Cmwlth 1979) (factual "representations by counsel in legal memoranda on the issue cannot supplant proper documentation through" facts of record); *Bollinger v. Palmerton Area Communities Endeavor Inc.*, 361 A.2d 676, 681 n.11 (Pa. Super. 1976) (citation omitted) ("'[B]riefs are not part of the

[5] These cases dealt with reply briefs filed in appellate proceedings. The principles they espouse are equally relevant to reply briefs filed in trial courts.

record, and the court may not consider facts not established by the record.'").

V. KWS Failed The Three-Part Test For Opening A Default Judgment

KWS contends that it has met all three requirements of the traditional test to open a default judgment. *See* ¶¶ 22-60 of KWS' Petition, and pages 5-12 of its memorandum of law. KWS's petition and memorandum of law did not invoke Pa.R.C.P. 237.3(b)(2).[6]

> [A] petition to open a judgment is an appeal to the equitable powers of the court. It is committed to the sound discretion of the hearing court and will not be disturbed absent a manifest abuse of that discretion. Ordinarily, if a petition to open a judgment is to be successful, it must meet the following test: (1) the petition to open must be promptly filed; (2) the failure to appear or file a timely answer must be excused; and (3) the party seeking to open the judgment must show a meritorious defense.

Cintas, 549 Pa. at 94, 700 A.2d at 919 (citations omitted).

"[T]he trial court cannot open a default judgment based on the 'equities' of the case when the defendant has failed to establish all three of the required criteria" for opening a default judgment. *Myers v. Wells Fargo Bank, MA.*, 986 A.2d 171, 176 (Pa. Super. 2009).

---

[6] On March 6, 2019, KWS filed its *third* reply brief and mentioned Rule 237.3(b) for the first time. *See* page 3. Rule 237.3(b) clearly does not apply to this case because the petition to open was filed 304 days after the entry of the default judgment. See discussion at pages 18 to 23.

"Prejudice is not a separate element examined by the courts when [a petitioner does] not establish all three requirements of the test to open the default judgment." *Dumoff v. Spencer*, 754 A.2d 1280, 1283 (Pa. Super. 2000). To examine prejudice, or a lack thereof, when the tripartite test is not satisfied, runs counter to the basic principle that "a court cannot open a default judgment based upon equities." *Id.*

A. KWS did not successfully rebut the presumption that it received the Rule 236 and 237.1 notices of the entry of the default judgment

As a threshold matter, the Court must dispel KWS's claims in its second, third, fourth, and fifth reply briefs that it did not receive the notices of the entry of the default judgment and documents required by Pa.R.C.P. 236 and 237.1. That issue was raised for the first time in KWS's second reply brief, which was filed on February 28, 2019. That issue was not raised in the Petition to Open or its accompanying memorandum of law. It also was not raised in KWS's first reply brief filed on February 26, 2019. This issue is waived because a reply brief, especially a *second* reply brief, cannot raise new facts or legal arguments that could — and should — have been raised in the original petition. See discussion on pages 13 to 15.

The March 28, 2018 docket entry announcing the entry of the default judgment states, "Notice Under Rule 236 Given. Notice Under 237.1 Given."

A notation on the docket stating, "Notice Under Rule 236," is sufficient to establish that the prothonotary sent notice either to an unrepresented party or to the attorney of record. *Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia*, 655 A.2d 666, 668 (Pa. Cmwlth 1995); *Tiber Holding Corp., v. Diloreto*,

No. 89-00133, 2002 WL 34097874 (C.P. Chester Jan. 23, 2002) ("The July 31, 2000 docket notation- 'Certification – Notice sent 236', in and of itself, sufficiently establishes that notice was appropriately sent;" it satisfies all requirements of sending notice and cannot be disputed).

The burden is on "the recipient to prove that the notice was not received. Notably, testimony alone will not rebut the presumption" of receipt. The "mere assertion by counsel that the notice was not received [is] insufficient to overcome the presumption" that the notice had been mailed. *Wheeler v. Red Rose Transit Auth.*, 890 A.2d 1228, 1231 (Pa. Cmwlth 2006). *See*, *O'Hare v Mezzacappa*, No. 2012-3442, 2014 WL 3774010, at *14 (C.P. Northampton July 08, 2014) (a bald and unsupported denial of receipt of mail notices is not sufficient), *affirmed mem.* 125 A.3d 465 (Pa. Super. 2015) (Table). Consequently, the factually unsupported claims by KWS's attorneys that KWS did not receive the proper notice and documents are insufficient to establish lack of notice.

In the present case, by stating, "Notice Under Rule 236 Given. Notice Under 237.1 Given," the docket entry establishes that all of the requirements of notice have been satisfied and notice cannot now be disputed. *Corn.*, *Dep't of Transp.*, *Bureau of Driver Licensing v. Grassi*, 129 Pa. Cmwlth. 387, 391, 565 A.2d 865, 866 (1989) (driver would be deemed to have received notice of trial court's action on his license revocation appeal on the date noted on the docket, regardless of driver's claim that he did not receive notice until a later date), *appeal dismissed as improvidently granted*, 607 A.2d 1073 (Pa. 1992).

Moreover, KWS did not present any facts supporting its claim that it did not receive the Rule 236 and

237.1 notices and documents. Its bald claims that it did not receive them are not evidence and did not rebut the presumption of mailing and receipt.[7]

B. The petition to open was not timely filed

With regard to the first prong, whether the petition to open was timely filed, the Superior Court has stated:

> The timeliness of a petition to open a judgment is measured from the date that notice of the entry of the default judgment is received. The law does not establish a specific time period within which a

---

[7] An example of the type of evidence needed to rebut the presumption of mailing and receipt occurred in *Donegal Mut. Ins. Co. v. Ins. Dept*, 719 A.2d 825, 827 (Pa. Cmwlth 1998):

> Through witness testimony and documentation pertaining to their standard mailing practices, the Insurance Commissioner found that Donegal successfully established the presumption that it mailed the notice of cancellation and that it was received by the Rothbergs. However, the Insurance Commissioner then found that the Rothbergs successfully rebutted this presumption by credibly denying receipt of the notice and, more importantly, presenting corroborative testimonial evidence from a disinterested third party. Specifically, the Rothbergs presented the testimony of David Davitch, the president of Presidential Financial. Donegal allegedly mailed notices to both the Rothbergs and Presidential Financial, but Mr. Davitch testified that Presidential Financial, like the Rothbergs, never received the notice. The Insurance Commissioner considered Mr. Davitch's testimony highly credible and an excellent source of corroboration because Presidential Financial no longer held the Rothbergs' mortgage and thus had no stake in the outcome of this case.

> petition to open a judgment must be filed to qualify as timely. Instead, the court must consider the length of time between discovery of the entry of the default judgment and the reason for delay.
>
> * * *
>
> In cases where the appellate courts have found a "prompt" and timely filing of the petition to open a default judgment, the period of delay has normally been less than one month. *See Duckson v. Wee Wheelers, Inc.*, 423 Pa.Super. 251, 620 A.2d 1206 (Pa. Super. 1993) (one day is timely); *Alba v. Urology Associates of Kingston*, 409 Pa.Super. 406, 598 A.2d 57 (Pa. Super. 1991) (fourteen days is timely); *Fink v. General Accident Ins.* Co., 406 Pa.Super. 294, 594 A.2d 345 (Pa. Super. 1991) (period of five days is timely).
>
> *[US Bank N.A. v. Mallory*, 982 A.2d 986, 995 (Pa. Super. 2009)] (quotation omitted) (finding eighty-two day delay was not timely). *See Myers v. Wells Fargo Bank, N.A.*, 986 A.2d 171 (Pa. Super. 2009) (indicating delay of fourteen days in filing petition to open was timely); *Pappas v. Stefan*, 451 Pa. 354, 304 A.2d 143 (1973) (fifty-five day delay was not prompt).

Kelly v. Siuma, 34 A.3d 86, 92 (Pa. Super. 2011) (tavern had no justifiable excuse for ten-month delay in filing an answer to civil complaint, and thus, trial court acted within its discretion in denying tavern's motion to open default judgment; tavern claimed to have referred the matter to an attorney, but tavern

did not provide a date when that occurred, and tavern was a corporate defendant, which should have had in place the means to monitor its legal claims).

KWS admits that on March 27, 2018, KWS received notice of the entry of the default judgment. ¶ 12 of Petition. That was the date Plaintiff's counsel sent an email to KWS that informed Vice President Roberts "that the Praecipe to Enter Default Judgment *was filed* against KWS." ¶ 12 of Petition (emphasis added). *See*, *Scalla v. KWS*, 2018 WL 6271646, at *3. KWS removed the case to federal court on March 29, 2018, and Judge Slomsky ordered it remanded on November 30, 2018. The federal court case record was mailed to the Philadelphia Court of Common Pleas on December 20, 2018. The record was received by the Philadelphia court on December 31, 2018.

KWS did not file a petition to open the default judgment until January 25, 2019. That was twenty-five days after this court had regained jurisdiction over this case, and 304 days after the entry of the default judgment on the docket.

1. The failure to file a petition to open in federal court

KWS argues that the time spent in federal court should not count on the timeliness issue because KWS was barred from filing a petition to open in *state* court during that period and Plaintiff was contesting the jurisdiction of the federal court. KWS, however, was not barred from *filing* a petition to open the default judgment in *federal* court during that time period.

A default judgment entered in state court before the case is removed to federal court, "is valid and must be treated *as if it were entered in federal court." J.K. ex rel. Kpakah v. CSX Transp.*, No. CIV.A. 14-729, 2014

WL 4632356, at *1-2 (E.D. Pa. Sept. 16, 2014) (emphasis added, citations omitted). "'Whenever any action is removed from a State court to a district court of the United States, . . . [41 injunctions, orders, and other proceedings had in such action prior to its removal shall remain in full force and effect until dissolved or modified by the district court.' 28 U.S.C. § 1450. After removal, the federal court takes the case up where the State court left it off. The federal court accepts the case in its current posture as though everything done in state court had in fact been done in the federal court." *Kurns v. Soo Line R.R.*, 72 A.3d 636, 639 (Pa. Super. 2013) (case citations and some quotes omitted).

"The proper procedure respecting the opening *vel non* of a removed default judgment is to file a motion to set aside or open the default judgment in federal court, Fed.R.Civ.P. 60(b), which treats the default judgment removed from state court 'as though it had been validly rendered in the federal proceeding'. The federal court tests the removed default judgment by the same legal standard used for ones entered in the federal forum." *Penna. Nat. Bank & Tr. Co.* v. *Am. Home Assur. Co.*, 87 F.R.D. 152, 154 (E.D. Pa. 1980) (case citations omitted). *Accord*, *Merk Constr., Inc. v. Jemco, Inc.*, No. 09-CV-1636, 2010 WL 11561118, at *1 (E.D. Pa. Dec. 15, 2010) (citations omitted) ("In a removal case, a federal district court may open a default judgment entered by the state court from which the case was removed where . . . defendant files a motion to open the default judgment in federal court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure."); *Defillipis v. Dell Fin. Servs.*, No. 3:14-CV-00115, 2014 WL 3921371, at *2 (M.D. Pa. Aug. 11, 2014) (citations omitted) ("[a]s far as the default judgment previously entered in the State Court is

concerned, there is no question that under the general removal statute it is within the power of a Federal Court to set aside a default judgment rendered by a State Court before removal of a particular case"); *Robert E. Diehl*, *Inc. v. Morrison*, 590 F. Supp. 1190, 1192 (M.D. Pa. 1984) ("This court has authority to set aside a judgment rendered by a state court before removal of the action.").

KWS did not exercise its right to ask the federal court to open the default judgment. Instead, KWS litigated the issue of whether it had been properly served with the complaint. Nothing stopped KWS from *filing* a petition to open the default judgment in the federal court while simultaneously litigating the service issue. The *filing* of such a petition would have satisfied the state and federal tests to open default judgments. KWS was required to *file* a petition to open the default judgment at the earliest opportunity. Whether Judge Slomsky would have ruled upon it, is of no moment.

What *is* important is that for 304 days, KWS slept on its duty to file a petition to open the default judgment. "Those who sleep on their rights must awaken to the consequence that they have disappeared." *Fulton v. Fulton*, 106 A.3d 127, 131 (Pa. Super. 2014) (citations omitted). *See*, *Cintas*, 549 Pa. at 94, 700 A.2d at 919 [IA] petition to open a judgment is an appeal to the equitable powers of the court."). The petition to open was not timely filed.

2. The 25-day delay after the court regained jurisdiction

Also untimely was the twenty-five days between this court regaining jurisdiction on December 31, 2018, and the filing of the petition to open on January 25,

2019. KWS did not present any verified facts in its motion or reply briefs that reasonably explained why one of its many defense attorneys or support staff did not monitor the federal court docket or the state court docket after Judge Slomsky's November 30, 2018 order remanding the case to state court. Instead, KWS presented unverified allegations that "do not constitute evidence," leaving this court with "absolutely no facts" before it from which to make a proper determination. *McKnight*, 549 A.2d at 1358.

Had defense counsel monitored the dockets, they would have discovered that the federal court record was sent to state court on December 20, 2018, and was received by the state court on December 31, 2018. KWS also did not present verified facts to reasonably explain why its counsel failed to understand that the state court immediately regained jurisdiction over the matter when it received the record from federal court.

3. A separate order is not needed to effectuate a default judgment

KWS repeatedly recites the incorrect mantra that a praecipe to enter a default judgment in a Pennsylvania state court is not effective until an actual court order granting a default judgment is filed. Such a two-step process may be the rule in federal court, but it is not the rule in state court. In Pennsylvania state courts, a default judgment comes into existence when the Prothonotary notes on the docket that the Plaintiff has filed the required praecipe for entry of default judgment. A separate "default judgment order" is not generated by the Prothonotary or the court, and is not required to effectuate the default judgment.

In this case, the default judgment was entered on March 26, 2018, as the docket clearly indicates by stating, "JUDGMENT ENTERED BY DEFAULT."

"The prothonotary, *on praecipe of the plaintiff*, *shall* enter judgment against the defendant for failure to file within the required time a pleading to a complaint which contains a notice to defend." Pa.R.C.P. 1037(b) (emphasis added). Plaintiff's complaint contained the required Notice to Defend. Plaintiff's ten-day notice and praecipe for the entry of a default judgment complied with all of the requirements of Pa.R.C.P. 237.1 through 237.5.

Default judgments are granted ministerially by prothonotaries and without judicial involvement. *Gotwalt v. Dellinger*, 577 A.2d 623, 625 (Pa. Super. 1990). "It is clear that the prothonotary can enter judgment against the defendant for want of an appearance or pleading to the complaint with the same effect as if moved for in open court." *Roberts v. Gibson*, 251 A.2d 799, 802 (Pa. Super. 1969).

Our situation also occurred in *Gall v. Crawford*, 982 A.2d 541 (Pa. Super. 2009). "After [defendants] failed to respond timely to the complaint and after they received notice of [plaintiff's] intent to seek a default judgment but failed to take any action, the prothonotary entered the default judgment. . . . Such procedure is explicitly permitted by Pa.R.C.P. 1037(b)[.]" 982 A.2d at 546.

4. The affidavit of Thomas Galligan

KWS filed its second reply brief on February 28, 2019, which attached for the first time, an affidavit by defense counsel Thomas Galligan, Esq.

Based on that affidavit, KWS's attorneys claim that "only after this case was remanded did KWS' counsel notice a docket entry indicating that a default judgment was entered by the Court, which led KWS to file its Petition to Open Default Judgment." Second Reply Brief p. 3 (dated Feb. 28, 2019). Mr. Galligan stated in his Affidavit:

> 2. On Monday, December 3, 2018, I reviewed the online docket for this case to determine whether the matter had been remanded back to this Court. Upon reviewing the docket, I noticed for the first time that beneath the docket entry for Plaintiffs Praecipe to Enter Default Judgment was the language: "JUDGMENT IN FAVOR OF ERIC SCALLA AND AGAINST KWS INC A MEMBER OF THE THIELE GROUP FOR FAILURE TO FILE ANSWER WITHIN REQUIRED TIME. PRO-PROTHONOTARY. NOTICE UNDER RULE 236 GIVEN."
>
> 3. The foregoing language on the docket came as a surprise because neither KWS nor its counsel received any separate order or judgment entered by this Court in response to Plaintiffs Praecipe to Enter Default Judgment.

Galligan Affidavit ¶¶ 2 & 3.

The Petition and its memorandum of law, and the first reply brief filed February 26, 2019, do not mention Mr. Galligan's discovery of the default on Dec. 3, 2018. Mr. Galligan's discovery was first raised by KWS in its second reply brief filed on February 28, 2019. KWS has not alleged that it only discovered Mr. Galligan's proposed evidence between February 26th

and 28th. Thus, the affidavit cannot be considered because a reply brief, especially a *second* reply brief, cannot raise new facts or legal arguments that could — and should — have been raised in the original petition. See discussion on pages 13 to 15.

The affidavit misrepresents the text of the docket entry in three important regards. First, it omits the date of that entry, which was "12-MAR-2018." That was nine months *before* Mr. Galligan or any other defense attorney apparently checked the docket. Second, it omits the notation "JUDGMENT ENTERED BY DEFAULT" which is the first line to that entry. Third, it omits the next-to-the-last part of the docket entry which stated: "NOTICE UNDER 237.1 GIVEN." Rule 237.1 is the default judgment rule; the docket entry states that KWS was given notice of the entry of the default judgment pursuant to Rule 237.1. The entire docket entry reads as follows:

26-MAR-2018 12:29:42
JUDGMENT ENTERED BY DEFAULT

26-MAR-2018
RYAN, TIMOTHY J.

PRAECIPE FOR ENTRY OF DEFAULT JUDGMENT FILED. JUDGMENT IN FAVOR OF ERIC SCALLA AND AGAINST KWS INCA MEMBER OF THE THIELE GROUP FOR FAILURE TO FILE ANSWER WITHIN REQUIRED TIME. PRO-PROTHONOTARY.

NOTICE UNDER RULE 236 GIVEN. NOTICE UNDER 237.1 GIVEN.

AFFIDAVIT OF NON-MILITARY SERVICE FILED.

The affidavit also misrepresents regarding when KWS and its counsel first received notice of the entry of the default judgment. KWS knew since March 27, 2018, and its counsel admit they knew at least since May 3, 2018, that a default judgment had been entered against KWS in state court. KWS's attorneys admitted that on March 27, 2018, KWS received notice of the entry of the default judgment. ¶ 12 of Petition. That was the date Plaintiff's counsel sent an email to KWS that informed Vice President Roberts "that the Praecipe to Enter Default Judgment *was filed* against KWS." ¶ 12 of Petition (emphasis added); Exhibit "M" to Plaintiff's Answer to the Petition. She immediately emailed it to her superiors in Germany. The next day, March 28th, Arnd von Waldow, Esq., sent an email to Plaintiff's counsel stating that Reed Smith had been retained by KWS in this matter. Exhibit "0" to Plaintiff's Answer to the Petition. KWS also admits these facts in paragraphs "g)" and "h)" on page four of its second reply brief.

On March 29, 2018, attorneys Falk, von Waldow, and Galligan filed a Notice of Removal in federal court on behalf of KWS. On page 2 of the Notice, they admit, "On March 26, 2018, Plaintiff filed a Praecipe to Enter Default Judgment" in state court. They attached a copy of the Praecipe for Enter Default Judgement, along with its exhibits, as Exhibit "B" to the Notice.[8] Those exhibits included the return receipt card for the certified mail copy of the complaint signed for by Vice President Roberts on January 23, 2018, and the FedEx and certified mail receipts for the ten-day

[8] A copy of the complete Notice of Removal package was attached as an exhibit to the Notification of Notice of Removal all three attorneys filed in state court on April 2, 2019. All of the documents are available on the Court's electronic docket system.

notice signed for by Vice President Roberts on March 13, 2019.

On May 3, 2018, the attorneys for KWS filed a response to Plaintiff's motion to remand in federal court. It unequivocally stated that as of May 3, 2018, KWS and its attorneys knew about the entry of the default judgment: "Although *a default judgment was entered against KWS by the Court of Common Pleas*, service was improper." Defendant KWS Inc.'s Response in Opposition to Plaintiff's Motion to Remand at ¶ 9 (emphasis added); Plaintiff's Ex. "A" to Plaintiff's Sur-Sur Reply in Opposition to Defendant's Petition to Open Default Judgment, filed on March 4, 2019. This judicial admission, that the attorneys for KWS knew about the entry of the default judgment on May 3, 2018, was made almost 10 months *before* Mr. Galligan's February 28, 2019 affidavit stating that the first defense counsel knew of the default judgment was on December 3, 2018.

In KWS's third reply brief, defense counsel again admit that they knew in March 2018 of the filing of the default judgment:

> KWS readily acknowledges that in late March 2018 it received Plaintiff's Praecipe to Enter Default Judgment and that during federal court proceedings Plaintiff construed that Praecipe as the equivalent of an actual judgment. Nevertheless and notwithstanding Plaintiff's argument to the contrary (Reply to Sur-Sur-Reply at pp. 2-4), knowledge of these facts is not tantamount to knowledge of an actual judgment by default having been entered by the Prothonotary, particularly when there is still today no copy of any judgment that was entered by the Prothonotary or

> served upon KWS as required by Rule 236(a)(2).

KWS Third Reply Brief page 7 (dated March 6, 2019).

A troubling issue is raised by defense counsels' repeated insistence that they did not realize that a default judgment had been entered until December 3, 2018. Mr. Galligan's knowledge of the existence of the default judgment was based solely on a docket entry made on March 26, 2018 that clearly stated, "JUDGMENT ENTERED BY DEFAULT." That docket entry did not change between March 26th and December 3rd.

The only logical conclusion is that none of the attorneys for KWS ever looked at the state court docket until December 3rd. The same information that led Mr. Galligan on December 3rd to realize that a petition to open needed to be filed, was available on the face of the docket beginning on March 26th.

The Court is left with two unpalatable conclusions. In the first, defense counsel never checked the state court docket during the first eight months of their representation of KWS. In the second, defense counsel are not being candid with the Court. The Court need not decide which is correct, because either situation prevents KWS from establishing a reasonable excuse for the 304 day delay in filing the petition to open.

This petition to open the default judgment is untimely and KWS failed to meet the first test.

C. The failure to file a timely answer cannot be excused

"[W]hether an excuse is legitimate is not easily answered and depends upon the specific circumstances of the case. The appellate courts have usually

addressed the question of legitimate excuse in the context of an excuse for failure to respond to the original complaint in a timely fashion." *Kelly v. Siuma*, 34 A.3d 86, 93 (Pa. Super. 2011) (tavern had no justifiable excuse for ten-month delay in filing an answer to civil complaint, and thus, trial court acted within its discretion in denying tavern's motion to open default judgment; tavern claimed to have referred the matter to an attorney, but tavern did not provide a date when that occurred, and tavern was a corporate defendant, which should have had in place the means to monitor its legal claims).

This Court has no hesitancy in concluding that KWS does not have a reasonable excuse for not answering the complaint after it was served or after it received the ten-day notice of intention to take a default judgment. Judge Slomsky's determination that Vice President Roberts was the registered agent for service of process upon KWS enjoys collateral estoppel effect. See the portions of Judge Slomsky's opinion quoted above on pages 4 to 7.[9]

> Vice President Robert testified that her "job duties include the daily operation of the office," including opening the mail. Roberts Dep. pp. 17, 19. Her routine was to "look through it, pick out the checks and the bills, and set the rest of it aside." Id. p. 19.

---

[9] Vice President Roberts admitted that documents filed with the Oklahoma Department of State named her as the registered agent for KWS, although she denied that she was the "registered agent for service of process." Roberts Dep. pp 30-31, 40, 41, 47, 52, 53, 54-55, 58, 59, 63-64, 70, 73. Judge Slomsky's rejection of that argument has collateral estoppel effect. See *Scalla v. KWS*, 2018 WL 6271646, at *4 & n. 8, quoted above on page 6.

Q Do you open all of the mail on the day that you receive it?

A No.

Q At some point, do you open the mail?

A Not if I don't recognize who it's from.

Q So what do you do with mail if you don't recognize who it's from?

A I just leave it to the side.

Q And then what happens to it?

A It just stays there.

Q Forever

A Well —

Q or somebody at some

A occasionally, I —

Q goes through it?

A Once it's stacked up, I put it in the shred pile.

Q Now, are your —is the process for you to open mail and respond to mail — is that in — in writing anywhere?

A No.

Q Did someone tell you, at KWS, if you don't recognize who the mail is from, to not open it and put it aside?

A No.

Q Why do you — why do you — why do you do that? Why don't you just open it and see what's in it?

A I just don't have time.

Q If you receive a certified letter, and you don't know who it's from, would you open it then?

A Probably not.

Q A certified letter is when the postal carrier has you actually sign the green card that's attached to the — to the package. Do you understand that?

A Yes, sir.

Q Are you — are you telling me that there are times that the mail carrier would hand you a document and ask you to sign the green card, you would sign it, and then put the mail aside and never open it?

A Yes.

Q Did it concern you at all that the fact that it was a certified mailing — it might be important, and you should read it?

A Not really.

Roberts Dep. pp. 21-23.

Vice President Roberts admitted that her signature appears on the return receipt card upon which she wrote the date "1/23/18." Roberts Dep. p. 29. She did not open the package at that time. Id. p. 32. "I had no clue what it was. ... I didn't know what it was." Id. p. 35. She agreed that the sender must have thought the contents were important because the package had to be received and signed for. Id. p. 36.

Q (By Mr. Hessel) Do you remember what you did with the package, when you got it, on January 23rd of 2018?

A I'm sure I set it aside with the rest of the mail that I didn't open.

Q Any reason you didn't open the package?

A It was not a check, and it was not a — an invoice, and it was not —

Q How do you know?

MR. VON WALDOW: I'm sorry. She's not done.

A And it was not addressed to me personally.

Q (By Mr. Hessel) So if mail comes in, and it's addressed just to KWS, do you — do you open it?

A If it's a check or if it's an — a bill.

How do you — how did you know that what was in this envelope that was sent certified mail might not be a check or a bill?

A Because I don't know the company.

Roberts Dep. pp. 36-37.

Q (By Mr.Hessel) Ms. Roberts, I just want to be crystal clear on what your process is for opening mail versus not opening mail, and you had mentioned a couple of different things. You'd said you open the envelopes if there's a check or an invoice in them; correct?

A Correct.

Q And you also said you open mail if you know who it's being sent from, but you don't open the mail if you don't know who it's being sent from

A Right.

Q — correct?

A Yes.

Q So — so how do you know that you might not be getting a check or an invoice from some company that you don't recognize?

A Well, I don't get checks from people that are not customers, and I don't get bills from people I don't do business with.

Q Okay. Has there ever been an occasion where you opened an envelope not knowing who the sender was?

A No.

Q Do you treat mail differently if it's addressed to KWS, Inc., versus Elizabeth Roberts at KWS, Inc.?

A Yes.

Q And how do you treat it differently?

A If it has my name on it, I for sure open it.

Q Is that true even if you don't know who the sender is?

A Yes.

Q And why is that? Why do you treat the mail differently?

A Well, because they had the patience to look up my name for my name to be on there.

Q Any other reason why you treat mail differently?

A No.

Q Does the — the president, Mr. Kurz — is he aware that you don't open mail if you don't know who it's from?

A Yes.

Q And is he okay with that, as far as you know?

A We are changing procedure, yes.

Q What's the new procedure?

A I open everything.

Q Have you ever been reprimanded for not opening mail?

A No.

Roberts Dep. pp. 37-39 (emphasis added).

Because corporate entities have the means and sophistication to monitor legal claims against them, they cannot establish a reasonable excuse for not timely answering a complaint when they do not have in-house mechanisms for monitoring those claims. *E.g.*, *Kelly v. Siuma*, 34 A.3d at 94 ("BBK, Inc. is a corporate defendant, which should have in place the means to monitor its legal claims"); *Myers v. Wells Fargo Bank*, *N.A.*, 986 A.2d 171, 177 (Pa. Super. 2009) ("U.S. Bank is a corporation and not a layperson," and it has "the means to monitor its legal claims"); *Reid v. Boohar*, 856 A.2d at 161 ("We emphasize Appellant is a layperson, not a corporate defendant with the means to monitor its legal claims.").

KWS must accept the consequences of Vice President Roberts' *modus operandi* regarding which mail she chose to open. An analogous situation arose in *Autologic Inc. v. Cristinzio Movers*, 481 A.2d 1362 (Pa. Super. 1984), where the Superior Court held that the trial court did not abuse its discretion in finding that the defendant failed to reasonably explain or excuse its default. The defendant's failure to respond to the complaint was due to its employee's conscious decision not to forward the complaint and notice of praecipe for entry of default judgment to the insurer or her superiors, a decision which the defendant had empowered her to make.

> [W]e find appellant's excuse is rendered no more reasonable because its reliance on its insurance company was through what it now characterizes as an "unsophisticated, low-level employee." The fact remains that it was this type of employee that appellant chose to give responsibility to for handling damage claims. While it has been held that an employee's clerical error may constitute sufficient legal justification to open a default judgment, see e.g., *Campbell v. Heilman Homes, Inc.*, 233 Pa.Super. 366, 335 A.2d 371 (1975) (observing that the employee's failure to forward the complaint was not unlike a clerical error), we do not believe the instant case falls within that category.
>
> Appellant gave Ms. Fahrer the responsibility not simply to forward in every case all papers she received to her superiors, but to make the decision whether or not there was a need to do so. Thus, appellant's failure to respond to the complaint was not due simply

> to the inattentiveness of its employee, but to her conscious decision which it had empowered her to make. We do not find it unjust to hold appellant responsible for that decision. If we were to hold otherwise, employers could cause interminable delays in litigation simply by intentionally choosing unqualified employees to handle claims brought against them.

Autologic, 481 A.2d at 1364 (emphasis and break added).

KWS failed to pass the second test for opening a default judgment.

D. KWS did not state a meritorious defense

In order to assert a meritorious defense, a party must assert a defense that, if proven at trial, would entitle the party to judgment in its favor. *Reid v. Boohar*, 856 A.2d 156, 162 (Pa. Super. 2004) (Appellant pled a "meritorious defense" by asserting facts showing that Appellee actually caused the accident in question).

Bald assertions of a meritorious defense are insufficient to open a default judgment. *Kramer v. City of Phila.*, 229 A.2d 875, 877 (Pa. 1967) ("the City's bald assertion in its petition that it has a valid action over against the additional defendant does not meet the requirement of showing that a defense exists on the merits").

"The requirement of a meritorious defense is only that a defense must be pleaded that if proved at trial would justify relief. The defense does not have to prove every element of its defense[;] however, it must set forth the defense in precise, specific and clear terms."

Seeger v. First Union Nat. Bank, 836 A.2d 163, 166 (Pa. Super. 2003) (citations omitted) (meritorious defense test met because defendant's proposed answer and new matter set forth sufficient facts to support one of its defenses).

"Merely asserting in a petition to open default judgment that one has a meritorious defense is insufficient. The moving party must set forth its meritorious defense. If any one of the alleged defenses would provide relief from liability, the moving party will have pled a meritorious defense and will have satisfied the third requirement to open the default judgment." Id.

"The meritorious defense must, however, be pleaded in a fashion which shows that the defense asserted is genuinely meritorious and that it can be established at trial." *City of Philadelphia v. New Sun Ray Drug, Inc.*, 394 A.2d 1311, 1313 (Pa. Cmwlth 1978) ("The appellant's petition amounting to nothing more than a general denial of the averments of the city's complaint falls woefully short of this standard.").

Consequently, a party must aver "the facts upon which the meritorious defense is based." *Young v. Mathews Trucking Corp.*, 119 A.2d 239, 239 (Pa. 1956). *Accord*, *Seeger*, 836 A.2d at 166; *Explo*, *Inc. v. Johnson & Morgan*, 441 A.2d 384, 388 (Pa. Super. 1982) (meritorious defense not found where there were no facts alleged in support of the "defense"); *Ecumenical Enterprises*, *Inc. v. NADCO Const.*, *Inc.*, 385 A.2d 392, 395 (Pa. Super. 1978) (mere allegations are "insufficient for the purposes of demonstrating the existence of a meritorious defense since the facts underlying the defense [are] not averred"); *Slott v. Triad Distributors*, *Inc.*, 327 A.2d 151, 154 (Pa. Super. 1974) (citation omitted) ("It is clear that the petition to open must set forth its defenses 'in precise, specific,

clear and unmistaken terms,' and must set forth the facts on which the defense is based."); *Girard Tr. Bank v. Remick*, 258 A.2d 882, 884 (Pa. Super. 1969) ("A petition to open the judgment and to let in a defense is proper only when sufficient facts are pleaded to show that the defense is meritorious and that the defense can be established at trial.").

KWS' principal defense is that service of the complaint was improper. ¶¶ 38-47 of Petition. That defense fails due to Judge Slomsky's conclusive ruling that the complaint was validly served upon KWS. The Petition specifies only these other defenses that were raised in KWS's federal court Answer to the Complaint:

> 50. KWS's answer denies all material allegations and pleads numerous affirmative defenses, that, if proved at trial, will absolve it of liability. First, KWS denies that it manufactured the product which is the subject of Plaintiff's lawsuit. Further, proof that KWS produced this product has not been presented.
>
> 51. If any product designed, manufactured, distributed and/or sold by KWS is, in fact, made the basis of this lawsuit (which is categorically denied), then KWS denies that this product was in any way defective and/or unreasonably dangerous.
>
> 52. KWS averred that to the extent it manufactured the product at issue, this product was in all respects properly designed, manufactured, assembled, tested, inspected, distributed and/or sold, and the product departed KWS's control equipped with all

> elements necessary to make it safe and containing no elements making it unsafe, and was properly equipped with all necessary warnings and instructions for correct and safe use, operation, maintenance and servicing. No proof to the contrary has been presented.
>
> 53. Finally, in the further alternative, KWS averred that if any defect is found to have existed or exists in any KWS product made the basis of this lawsuit, which was again categorically denied, then KWS averred that any such defect was caused solely and wholly by the misuse, abuse, alteration, modification, damage or improper maintenance, repair, operation, handling, servicing, installation and/or contributory and comparative negligence, breach of duty and/or fault of others now unknown.

All of these defenses are boilerplate allegations devoid of any supporting facts that establish that they are "genuinely meritorious and . . . can be established at trial." *City of Philadelphia v. New Sun Ray Drug, Inc.*, 394 A.2d at 1313. They fail the meritorious defense test.

VI. Conclusion

For the foregoing reasons, the petition to open default judgment filed by KWS was denied by this Court.

BY THE COURT:

/s/ J. Lachman
LACHMAN, J.

Exhibit "A"

Docket Entries
Philadelphia Court of Common Pleas

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

DOCKET REPORT

CASE NUMBER	CASE CAPTION
171202802	SCALLA VS KWS, INC., A MEMBER OF THE THIELE GROUP

FILING DATE: 19-DEC-2017

COURT: JC JURY: J

CASE TYPE: PRODUCT LIABILITY

STATUS: WAITING TO LIST ASSESSMENT

RELATED CASES:

Motions:

Motion Description	Assign Date	Date Received	Judge Name
PETITION TO OPEN JUDGMENT	21-FEB-2019	25-JAN-2019 19013624	LACHMAN MARLENE F

Parties:

Seq. No.	Assoc. With	Expiration Date	Party Type	ID	Party Name/ Address
1			APLF	A78457	HESSEL, DANIEL L. GOLKOW HESSEL LLC 1628 PINE ST PHILADELPHIA PA 19103 (215) 988-9400 (215) 988-0042 – FAX
2	1		PLF	@958 3294	SCALLA, ERIC 2594 MADLEY HOLLOW RD BUFFALO MILLS, PA 15534
3	6		DFT	@958 3295	KWS INC A MEMBER OF THE THIELE GROUP 9950 55TH PL TULSA, OK 74146
4		01-APR-2018	TL	J444	RAU, LISA M. ROOM 593 CITY HALL PHILADELPHIA PA 19107 (215) 686-3768
5	1		APLF	A316 975	RYAN, TIMOTHY J. GOLKOW HESSEL LLC 1628 PINE ST PHILADELPHIA PA 19103 (215) 988-9400 (215) 988-0042 – FAX

6			ADFT	A93187	FALK, MICHAEL C. REED SMITH LLP THREE LOGAN SQUARE 1717 ARCH STREET, SUITE 3100 PHILADELPHIA PA 19103 (215) 851-8222 (215) 851-8222 (215) 851-1420 - FAX
7			TL	J425	ROBINS-NEW, SHELLEY ROOM 673 CITY HALL PHILADELPHIA PA 19107
8	6		ADFT	A319487	GALLIGAN, THOMAS J. REED SMITH LLP REED SMITH CENTRE 225 FIFTH AVE SUITE 1200 PITTSBURGH, PA 15222 (412) 288-3121
9	6		ADFT	A56628	VON WALDOW, ARND N. REED SMITH LLP REED SMITH CENTRE 225 FIFTH AVENUE PITTSBURGH, PA 15222 (412) 288-3131 (412) 288-3063 - FAX

Docket Entries:

Filing Date/Time	Docket Entry	Date Entered
19-DEC-2017 10:47:44	ACTIVE CASE	19-DEC-2017
19-DEC-2017 10:47:44	E-Filing Number: 1712041566 COMMENCEMENT CIVIL ACTION JURY	19-DEC-2017 HESSEL, DANIEL L.
19-DEC-2017 10:47:44	COMPLAINT FILED NOTICE GIVEN COMPLAINT WITH NOTICE TO DEFEND WITHIN TWENTY (20) DAYS AFTER SERVICE IN ACCORDANCE WITH RULE 1018.1 FILED	19-DEC-2017 HESSEL, DANIEL L.
19-DEC-2017 10:47:44	JURY TRIAL PERFECTED 12 JURORS REQUESTED.	19-DEC-2017 HESSEL, DANIEL L.
19-DEC-2017 10:47:44	WAITING TO LIST CASE MGMT CONF	19-DEC-2017 HESSEL, DANIEL L.
19-JAN-2018 14:17:08	PRAECIPE TO REINSTATE CMPLT	19-JAN-2018 HESSEL, DANIEL L.

	COMPLAINT WITH NOTICE TO DEFEND WITHIN TWENTY (20) DAYS AFTER SERVICE IN ACCORDANCE WITH RULE 1018.1 REINSTATED. (FILED ON BEHALF OF ERIC SCALLA)	
26-JAN-2018 14:45:35	ORDER ENTERED/236 NOTICE GIVEN	26-JAN-2018 RAU, LISA M.

NOTICE OF STANDING ORDER FOR ALL CASES PENDING BEFORE JUDGE LISA M. RAU

AND NOW, THIS 15TH DAY OF NOVEMBER, 2017, ALL PARTIES AND COUNSEL ARE HEREBY NOTIFIED THAT BECAUSE JUDGE LISA RAU'S SPOUSE, LAWRENCE KRASNER, WAS A CANDIDATE FOR DISTRICT ATTORNEY IN PHILADELPHIA, THERE IS A POSSIBILITY THAT SOMEONE INVOLVED IN THIS CASE (COUNSEL, PARTY, OR WITNESS) MAY HAVE MADE A FINANCIAL CONTRIBUTION TO JUDGE RAU'S SPOUSE'S OR ANOTHER DISTRICT ATTORNEY CANDIDATE'S CAMPAIGN FUND OR PAC.

ALL COUNSEL AND PARTIES ARE THEREFORE DIRECTED TO REVIEW JUDGE RAU'S STANDING ORDER, AVAILABLE AT HTTP:// WWW.COURTS.PHILA.GOV/PDF/CP

CIVIL/RSO.PDF, WHICH DETAILS THE PROCEDURES THAT THE COURT IS IMPLEMENTING TO ALLOW COUNSEL AND LITIGANTS TO RAISE ANY CONCERNS THEY MAY HAVE WHERE SOMEONE INVOLVED IN A CASE ASSIGNED TO JUDGE RAU HAS MADE CONTRIBUTIONS TO JUDGE RAU'S SPOUSE'S CAMPAIGN FUND OR PAC OR THAT OF ANOTHER CANDIDATE WHO RAN FOR DISTRICT ATTORNEY.

BY THE COURT:

_____

LISA M. RAU, J.

FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

DOCKET REPORT

26-JAN-2018 14:45:36	NOTICE GIVEN UNDER RULE 236	29-JAN-2018
	NOTICE GIVEN ON 29-JAN-2018 OF ORDER ENTERED/236 NOTICE GIVEN ENTERED ON 26-JAN-2018.	
02-FEB-2018 13:33:23	AFFIDAVIT OF SERVICE FILED	02-FEB-2018 HESSEL, DANIEL L.
	AFFIDAVIT OF SERVICE OF PLAINTIFF'S COMPLAINT UPON KWS INC A MEMBER OF THE THIELE GROUP BY CERTIFIED MAIL ON 01/23/2018 FILED. (FILED ON BEHALF OF ERIC SCALLA)	
10-MAR-2018 17:45:47	LISTED FOR CASE MGMT CONF	10-MAR-2018
12-MAR-2018 13:31:15	ENTRY OF APPEARANCE	12-MAR-2018 RYAN, TIMOTHY J.
	ENTRY OF APPEARANCE OF TIMOTHY J RYAN FILED. (FILED ON BEHALF OF ERIC SCALLA)	
14-MAR-2018 00:30:19	NOTICE GIVEN	14-MAR-2018
26-MAR-2018 12:29:42	JUDGMENT ENTERED BY DEFAULT	26-MAR-2018 RYAN, TIMOTHY J.

	PRAECIPE FOR ENTRY OF DEFAULT JUDGMENT FILED. JUDGMENT IN FAVOR OF ERIC SCALLA AND AGAINST KWS INC A MEMBER OF THE THIELE GROUP FOR FAILURE TO FILE ANSWER WITHIN REQUIRED TIME. PRO-PROTHONOTARY. NOTICE UNDER RULE 236 GIVEN. NOTICE UNDER 237.1 GIVEN. AFFIDAVIT OF NON-MILITARY SERVICE FILED.	
26-MAR-2018 12:39:04	WAITING TO LIST ASSESSMENT	26-MAR-2018
28-MAR-2018 14:51:36	ENTRY OF APPEARANCE	28-MAR-2018 FALK, MICHAEL C.
	ENTRY OF APPEARANCE OF MICHAEL C FALK FILED. (FILED ON BEHALF OF KWS INC A MEMBER OF THE THIELE GROUP)	
30-MAR-2018 14:28:03	ENTRY OF APPEARANCE	02-APR-2018 GALLIGAN, THOMAS J.
	ENTRY OF APPEARANCE OF THOMAS J GALLIGAN FILED. (FILED ON BEHALF OF KWS, INC. AND KWS INC A MEMBER OF THE THIELE GROUP)	

30-MAR-2018 17:14:12	ENTRY OF APPEARANCE	02-APR-2018 VON WALDOW, ARND N.
	ENTRY OF APPEARANCE OF ARND N VON WALDOW FILED. (FILED ON BEHALF OF KWS INC. AND KWS INC A MEMBER OF THE THIELE GROUP)	
02-APR-2018 14:51:12	NOT OF REMOVAL TO US DIST CT	02-APR-2018 FALK, MICHAEL C.
	NOTICE OF REMOVAL TO THE U.S. (EASTERN) DISTRICT COURT UNDER 2:18-CV-01333. (FILED ON BEHALF OF KWS INC A MEMBER OF THE THIELE GROUP)	
31-DEC-2018 15:17:06	REMANDED BY US DISTRICT COURT	31-DEC-2018
	ORDERED THAT THIS CASE IS REMANDED TO THE COURT OF COMMON PLEAS OF PHILADELPHIA.	
04-JAN-2019 13:50:43	WAITING TO LIST ASSESSMENT	04-JAN-2019
25-JAN-2019 13:20:39	PETITION TO OPEN JUDGMENT	25-JAN-2019 FALK, MICHAEL C.

	24-19013624 RESPONSE DATE 02/14/2019. (FILED ON BEHALF OF KWS INC A MEMBER OF THE THIELE GROUP)	
14-FEB-2019 11:04:44	ANSWER (MOTION/ PETITION) FILED	14-FEB-2019 HESSEL, DANIEL L.
	24-19013624 ANSWER IN OPPOSITION OF PETITION TO OPEN JUDGMENT FILED. (FILED ON BEHALF OF ERIC SCALLA)	
19-FEB-2019 10:53:14	MOTION ASSIGNED	19-FEB-2019
	24-19013624 PETITION TO OPEN JUDGMENT ASSIGNED TO JUDGE: ROBINS-NEW, SHELLEY . ON DATE: FEBRUARY 19, 2019	
21-FEB-2019 09:02:54	MOTION ASSIGNMENT UPDATED	21-FEB-2019
	24-19013624 REASSIGNED TO JUDGE LACHMAN, MARLENE F ON 21-FEB-19	
26-FEB-2019 09:54:10	MOTION/PETITION REPLY FILED	26-FEB-2019 FALK, MICHAEL C.
	24-19013624 REPLY IN SUPPORT OF PETITION TO OPEN JUDGMENT FILED. (FILED ON BEHALF OF KWS INC A MEMBER OF THE THIELE GROUP)	

27-FEB-2019 09:46:36	MOTION/PETITION REPLY FILED	27-FEB-2019 HESSEL, DANIEL L.
	24-19013624 REPLY IN OPPOSITION OF PETITION TO OPEN JUDGMENT FILED. (FILED ON BEHALF OF ERIC SCALLA)	
28-FEB-2019 15:12:21	MOTION/PETITION REPLY FILED	28-FEB-2019 FALK, MICHAEL C.
	24-19013624 REPLY IN SUPPORT OF PETITION TO OPEN JUDGMENT FILED. (FILED ON BEHALF OF KWS INC A MEMBER OF THE THIELE GROUP)	
04-MAR-2019 09:47:41	MOTION/PETITION REPLY FILED	04-MAR-2019 HESSEL, DANIEL L.
	24-19013624 REPLY IN OPPOSITION OF PETITION TO OPEN JUDGMENT FILED. (FILED ON BEHALF OF ERIC SCALLA)	
06-MAR-2019 09:46:47	MOTION/PETITION REPLY FILED	06-MAR-2019 FALK, MICHAEL C.
	24-19013624 REPLY IN SUPPORT OF PETITION TO OPEN JUDGMENT FILED. (FILED ON BEHALF OF KWS INC A MEMBER OF THE THIELE GROUP)	

06-MAR-2019 13:26:21	MOTION/PETITION REPLY FILED	06-MAR-2019 HESSEL, DANIEL L.
	24-19013624 REPLY IN OPPOSITION OF PETITION TO OPEN JUDGMENT FILED. (FILED ON BEHALF OF ERIC SCALLA)	
07-MAR-2019 11:01:31	MOTION/PETITION REPLY FILED	07-MAR-2019 FALK, MICHAEL C.
	24-19013624 REPLY IN SUPPORT OF PETITION TO OPEN JUDGMENT FILED. (FILED ON BEHALF OF KWS INC A MEMBER OF THE THIELE GROUP)	
08-MAR-2019 08:39:00	MOTION/PETITION REPLY FILED	08-MAR-2019 HESSEL, DANIEL L.
	24-19013624 REPLY IN OPPOSITION OF PETITION TO OPEN JUDGMENT FILED. (FILED ON BEHALF OF ERIC SCALLA)	
11-MAR-2019 10:49:15	MOTION/PETITION REPLY FILED	11-MAR-2019 FALK, MICHAEL C.
	24-19013624 REPLY IN SUPPORT OF PETITION TO OPEN JUDGMENT FILED. (FILED ON BEHALF OF KWS INC A MEMBER OF THE THIELE GROUP)	

*** End of Docket ***

EXHIBIT "B"

Docket Entries — U.S. District Court

From Exhibit "P" to Plaintiff's Answer to Defendant KWS's Petition to Open

---

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
(PHILADELPHIA)

———

CIVIL DOCKET FOR CASE #: 2:18-cv-01333-JHS

———

SCALLA v. KWS, INC.

Assigned to: HONORABLE JOEL H. SLOMSKY

Cause: 28:1332 Diversity-Product Liability

Date Filed: 03/29/2018
Date Terminated: 11/30/2018
Jury Demand: Defendant
Nature of Suit: 365 P.I.: Personal Inj. Prod. Liability
Jurisdiction: Diversity

Plaintiff

ERIC SCALLA

represented by DANIEL L. HESSEL
GOLKOW HESSEL LLC
1800 JOHN F. KENNEDY BLVD
SUITE 1010
PHILADELPHIA, PA 19103
215-988-9400
Email: dhessel@golkowhessel.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

v.

Defendant

KWS, INC.

A MEMBER OF THE THIELE GROUP

represented by MICHAEL C. FALK
REED SMITH LLP
THREE LOGAN SQUARE
1717 ARCH STREET
SUITE 3100
PHILADELPHIA, PA 19103
215-851-8222
Fax: 215-851-1420
Email: mfalk@reedsmith.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

ARND N. VON WALDOW
REED SMITH CENTRE
225 FIFTH AVE
PITTSBURGH, PA 15222
412-288-7242
Email:
avonwaldow@reedsmith.com
ATTORNEY TO BE NOTICED

WAYNE W. RINGEISEN
REED SMITH LLP
435 6TH AVE
PITTSBURGH, PA 15219
412-288-3314
Fax: 412-288-3063
Email: wringeisen@
reedsmith.com
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/29/2018	1	NOTICE OF REMOVAL by KWS, INC. from Court of Common Pleas of Philadelphia County, Pennsylvania, case number 1712 02802 together with Certificate of Service. (Filing fee $ 400 receipt number 175948) (Attachments: # 1 Exhibit)(ti,) (Entered: 04/02/2018)
03/29/2018	2	Disclosure Statement Form pursuant to FRCP 7.1 by KWS, INC.(ti,) (Entered: 04/02/2018)
03/29/2018		Case Eligible for Arbitration(ti,) (Entered: 04/02/2018)
04/05/2018	3	ANSWER to Complaint with Affirmative Defenses by KWS, INC., (FALK, MICHAEL) (Entered: 04/05/2018)
04/10/2018	4	NOTICE of Appearance by WAYNE W. RINGEISEN on behalf of KWS, INC. with Certificate of Service (RINGEISEN, WAYNE) (Entered: 04/10/2018)
04/10/2018	5	NOTICE of Appearance by ARND N. VON WALDOW on behalf of KWS, INC. with Certificate of Service(VON WALDOW, ARND) (Entered: 04/10/2018)
04/13/2018	6	NOTICE of Hearing: ARBITRATION HEARING SET FOR 8/22/2018 09:30 AM IN

		Philadelphia. (jwl,) (Entered: 04/13/2018)
04/19/2018	7	MOTION to Remand to State Court filed by ERIC SCALLA.Memorandum of Law, Certificate of Service. (Attachments: # 1 Exhibit Exhibits)(HESSEL, DANIEL) (Entered: 04/19/2018)
05/03/2018	8	RESPONSE in Opposition re 7 MOTION to Remand to State Court filed by KWS, INC.. (FALK, MICHAEL) (Entered: 05/03/2018)
05/10/2018	9	REPLY to Response to Motion re 7 MOTION to Remand to State Court filed by ERIC SCALLA. (HESSEL, DANIEL) (Entered: 05/10/2018)
05/11/2018	10	ORDER THAT A HEARING ON PLAINTIFFS' MOTION TO REMAND TO STATE COURT (RE: DOC. NO. 7) WILL BE HELD ON 5/29/2018, AT 4:00 PM, IN COURTROOM 13A. SIGNED BY HONORABLE JOEL H. SLOMSKY ON 5/10/2018. 5/11/2018 ENTERED AND COPIES E-MAILED. (amas) (Entered: 05/11/2018)
05/30/2018	11	ORDER THAT THE PARTIES SHALL HAVE UNTIL 7/30/18 TO ENGAGE IN FACT DISCOVERY

		ON THE ISSUE OF THE SUFFICIENCY OF THE SERVICE OF PROCESS; ETC.. SIGNED BY HONORABLE JOEL H. SLOMSKY ON 5/29/18. 5/30/18 ENTERED AND E-MAILED.(jl,) (Entered: 05/30/2018)
05/31/2018	12	Minute Entry for proceedings held before HONORABLE JOEL H. SLOMSKY Motion Hearing held on 5/29/18 re 7 MOTION to Remand to State Court filed by ERIC SCALLA Court Reporter: ESR. (fdc,) (Entered: 05/31/2018)
06/22/2018	13	TRANSCRIPT of MOTIONS HEARING Proceedings held on 5/29/18 before Judge JOEL H. SLOMSKY. COURT REPORTER/ESR. (jaa,) (Entered: 06/25/2018)
06/29/2018	14	ORDER REFERRING CASE TO ARBITRATION AND APPOINTING ARBITRATORS FOR 8/22/18 AT 9:30 AM.. SIGNED BY HONORABLE JOEL H. SLOMSKY ON 6/29/18. 6/29/18 ENTERED AND COPIES E-MAILED. COPY TO ARB. (va,) (Entered: 06/29/2018)
07/26/2018	15	ORDER THAT FRANCINE HOLLY MAULTZ IS REPLACED AS AN ARBITRATOR WITH ALICE WALKER BALLARD.

		SIGNED BY HONORABLE JOEL H. SLOMSKY ON 7/24/18. 7/26/18 ENTERED AND COPIES E-MAILED.(jwl,) (Entered: 07/26/2018)
07/30/2018	16	Supplemental Brief in Support re 7 MOTION to Remand to State Court filed by ERIC SCALLA. (Attachments: # 1 Text of Proposed Order, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit, # 11 Exhibit, # 12 Exhibit, # 13 Exhibit, # 14 Exhibit) (HESSEL, DANIEL) Modified on 8/2/2018 (tjd). (Entered: 07/30/2018)
08/02/2018	17	MOTION for Extension of Time to File Response/Reply as to 16 Response in Support of Motion, filed by KWS, INC..Certificate of Service.(FALK, MICHAEL) (Entered: 08/02/2018)
08/02/2018	18	RESPONSE to Motion re 17 MOTION for Extension of Time to File Response/Reply as to 16 Response in Support of Motion, filed by ERIC SCALLA. (Attachments: # 1 Text of Proposed Order, # 2 Exhibit, # 3 Exhibit) (HESSEL, DANIEL) (Entered: 08/02/2018)

08/03/2018	19	RESPONSE in Support re 17 MOTION for Extension of Time to File Response/Reply as to 16 Response in Support of Motion, filed by KWS, INC.. (Attachments: # 1 Exhibit A, Declaration of Thomas Galligan, # 2 Exhibit B, Email correspondence)(FALK, MICHAEL) (Entered: 08/03/2018)
08/03/2018	20	ORDER THAT DEFENDANT KWS, INC.'S MOTION FOR EXTENSION OF TIME IS GRANTED. DEFENDANT SHALL FILE A RESPONSE TO PLAINTIFF'S SUPPLEMENTAL BRIEF IN SUPPORT OF HIS MOTION TO REMAND ON OR BEFORE 8/13/2018.. SIGNED BY HONORABLE JOEL H. SLOMSKY ON 8/3/2018.8/3/2018 ENTERED AND COPIES E-MAILED. (kp,) (Entered: 08/03/2018)
08/07/2018	21	MOTION Motion to Cancel, or Alternatively, Reschedule Compulsory Arbitration Hearing filed by KWS, INC.. Certificate of Service.(FALK, MICHAEL) (Entered: 08/07/2018)
08/09/2018	22	ORDER THAT DAVID RICHMAN IS REPLACED AS AN ARBITRATOR WITH FLORA L. BECKER.. SIGNED BY HONORABLE JOEL H. SLOMSKY ON 8/8/18. 8/9/18

		ENTERED AND COPIES E-MAILED.(jwl,) (Entered: 08/09/2018)
08/10/2018	23	ORDER THAT DEFENDANT'S MOTION IS GRANTED. THE ARBITRATION HEARING IS CANCELLED. THE CLERK OF COURT SHALL DOCKET THE ATTACHED LETTER.. SIGNED BY HONORABLE JOEL H. SLOMSKY ON 8/10/2018. 8/10/2018 ENTERED AND COPIES E-MAILED.(kp,) (Entered: 08/10/2018)
08/10/2018	24	Letter from DANIEL L. HESSEL TO JUDGE SLOMSKY ON 8/10/2018 RE:p REQUEST TO CANCEL ARBITRATION. (kp,) (Entered: 08/10/2018)
08/13/2018	25	Memorandum In Opposition re 7 MOTION to Remand to State Court (Supplemental) filed by KWS, INC.. (Attachments: # 1. Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(FALK, MICHAEL) (Entered: 08/13/2018)
11/30/2018	26	MEMORANDUM AND/OR OPINION. SIGNED BY HONORABLE JOEL H. SLOMSKY ON 11/30/2018. 11/30/2018 ENTERED AND COPIES E-MAILED.(kp,) (Additional attachment(s) added

		on 11/30/2018: # 1 Exhibit) (kp,). (Entered: 11/30/2018)
11/30/2018	27	ORDER THAT PLAINTIFF'S MOTION TO REMAND IS GRANTED. THE CLERK OF COURT IS DIRECTED TO REMAND THIS CASE TO THE COURT OF COMMON PLEAS PHILADELPHIA COUNTY.. SIGNED BY HONORABLE JOEL H. SLOMSKY ON 11/30/2018. 11/30/2018 ENTERED AND COPIES E-MAILED.(kp,) (Entered: 11/30/2018)
12/20/2018		Certified Copy of Memorandum and Order, dated 11/30/2018, along with docket entries, mailed to the Court of Common Pleas of Philadelphia County on 12/20/2018. (md) (Entered: 12/20/2018)

Exhibit "C"

Opinion — Slomsky, J.

2018 WL 6271646
Only the Westlaw citation is currently available.

UNITED STATES DISTRICT
COURT, E.D. PENNSYLVANIA

[Filed: November 30, 2018]

Civil Action No. 18-1333

Eric SCALLA,

Plaintiff,

v.

KWS, INC., a Member of the Thiele Group,

Defendant.

Attorneys and Law Firms

Daniel L. Hessel, Golkow Hessel LLC, Philadelphia, PA, for Plaintiff.

Michael C. Falk, Reed Smith LLP, Philadelphia, PA, Arnd N. Von Waldow, Wayne W. Ringeisen, Reed Smith LLP, Pittsburgh, PA, for Defendant.

OPINION

Slomsky, District Judge

I. INTRODUCTION

On December 19, 2017, Plaintiff Eric Scalla ("Plaintiff") filed a Complaint against Defendant KWS, Inc. ("Defendant" or "KWS") in the Court of Common Pleas of Philadelphia County (Doc. No. 1 at 5) seeking to recover damages for personal injuries sustained while

Plaintiff was assisting in the use of an overhead crane to move excavation equipment. (*Id.* at 6.) Plaintiff claims that the equipment unexpectedly unhooked from the chain hook on the crane, causing the equipment to fall on him, and that the defective crane was manufactured and sold by Defendant. (*Id.*)

Defendant removed the action to this Court based on diversity of citizenship jurisdiction pursuant to 28 U.S.C. § 1332(a).[1] Defendant asserts that this action was properly removed because the Notice of Removal was filed within thirty days of receipt of Plaintiffs Complaint by KWS, in accordance with the requirements of 28 U.S.C. §§ 1441(a)[2] and 1446(b).[3] (Doc. No 1-1 at 2.)

As noted, the Complaint was filed in state court on December 19, 2017. On March 26, 2018, while this case was still pending there, Plaintiff filed a Praecipe to Enter Default Judgment. Defendant claims that

---

[1] 28 U.S.C. § 1332(a) provides in relevant part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States . . . ."

There is no dispute here that the parties are citizens of different states.

[2] 28 U.S.C. § 1441(a) provides, in relevant part: "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 defendants, to the district court of the United States for the district and division embracing the place where such action is pending."

[3] 28 U.S.C. § 1446(b) provides, in relevant part: "[t]he notice of removal of a civil action or proceeding shall be filed within 30 days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based . . . ."

on March 27, 2018, it received notice of this lawsuit for the first time in an email sent by Plaintiffs counsel to Defendant, to which the Praecipe to Enter Default Judgment was attached. Two days later, Defendant removed the action to this Court believing that the removal was timely under 28 U.S.C. § 1446(b), and on April 5, 2018, Defendant filed an Answer to the Complaint in this Court. (Doc. No. 3.)

Before the Court is Plaintiffs Motion to Remand the case back to the Court of Common Pleas of Philadelphia County. (Doc. No. 7.) Plaintiff claims that Defendant had notice of this case, not on March 27, 2018, but on January 23, 2018, when service of process was made on its authorized agent, a person named Elizabeth Roberts ("Roberts"). For this reason, Plaintiff submits that removal was untimely. Defendant opposes Plaintiffs Motion to Remand (Doc. No. 8.), and on May 10, 2018, a hearing was held on the Motion. At the hearing, the Court noted that it would afford the parties the opportunity to engage in fact discovery on the issue of sufficiency of the service of process, which they did. (Doc. No. 11.) On July 30, 2018, Plaintiff filed a Supplemental Brief in Support of its Motion to Remand. (Doc. No. 16.) On August 13, 2018, Defendant filed a Supplemental Brief in Support of its Opposition to Plaintiffs Motion to Remand. (Doc. No. 25.) The Motion to Remand is now ripe for a decision. For reasons that follow, Plaintiffs Motion to Remand will be granted.

II. FACTUAL BACKGROUND

On March 30, 2016, Plaintiff was assisting in the use of an overhead crane to move an excavation ripper

with a KWS F 33210 clevis cradle style grab hook,[4] which he alleges was designed, manufactured, distributed, supplied, and/or sold by Defendant. (Doc. 1-1 ¶ 8.) The equipment unexpectedly unhooked from the chain hook of the machine, causing it to fall on Plaintiff. (*Id.* ¶ 10.) As a result, Plaintiff sustained serious and permanent injuries, including but not limited to a crush injury to his right foot, which resulted in a below-the-knee amputation, physical pain and suffering, mental and emotional anguish, loss of life's pleasures and enjoyment, loss of earnings and/or loss or diminishment of future earning capacity, past and future medical expenses, disfigurement and scarring, embarrassment and humiliation, and other physical, emotional and economic injuries. (*Id.* ¶ 13.) Plaintiff alleges that the incident was caused by a defective and unreasonably dangerous condition involving the chain hook. (*Id.* ¶ 12.)

In the Complaint, Plaintiff alleges claims of strict liability in Count I, negligence in Count II, and breach of express and/ or implied warranties of merchantability and fitness for particular purpose in Count III, all stemming from the design, manufacture, distribution, supply, assembly, installment, sale, service, repair and/or maintenance of the chain hook, which Plaintiff asserts contained defective and unreasonably dangerous conditions. (Doc. 1-1 at 10-18.)

On January 23, 2018, Plaintiff served the Complaint through certified mail at Defendant's principal place of business in Tulsa, Oklahoma. (Doc. No. 7, Ex. B.)[5]

---

[4] This is a type of hook that usually is attached to a machine that handles heavy loads.

[5] On the return receipt, signed by Elizabeth Roberts, is handwritten by her, the date "1/23/18."

The envelope was addressed to "KWS, Inc., a member of the Thiele Group." (*Id.*) Defendant KWS has one office in the United States, which is located in Tulsa, Oklahoma. (Doc No. 16, Ex. G at 20:3-5.) Elizabeth Roberts accepted service of the Complaint by signing for it on behalf of Defendant. (*Id.*, Ex. B, G at 30:8-19.) On the return receipt, Ms. Roberts did not check either box to the right of the signature line, which designated "Agent" in one box and "Addressee" in the other. (*Id.*, Ex. B.)

Roberts is KWS's Vice President of Operations and the only employee who regularly works in the Oklahoma office. (*Id.*, Ex. G at 10:21.) All other company employees are located in KWS's Germany offices. (*Id.* at 26:1-3.) Among other things, Roberts is responsible for receiving the mail on behalf of KWS at its Oklahoma location. (*Id.* at 19:25; *Id.* at 26:1-2.) This includes signing receipts for certified mail. (*Id.* at 24:4-8.) According to documents filed with the Office of the Secretary of State of Oklahoma, Roberts is also authorized to receive service of process on behalf of Defendant KWS.[6] Neither Roberts nor anyone else at

---

[6] In its Supplemental Brief, Plaintiff has submitted the following documents, retrieved from the Office of the Secretary of State of Oklahoma, to prove that Roberts is KWS's authorized agent: (1) a three-page certificate issued by the Office of the Secretary of State of Oklahoma, and signed by the Secretary of State, which states that Elizabeth Roberts "is the registered agent for service of process for [KWS, Inc.]" (Doc. No. 16, Ex. B.); (2) a certificate of Successor Registered Agent, which appointed Elizabeth Roberts as the successor registered agent on September 8, 2009 (*Id*., Ex. C); (3) a document entitled "Resignation of Registered Agent Couple with Appointment of Successor" showing the appointment of Elizabeth Roberts to succeed another person as registered agent. (*Id*., Ex. D-3.) These three documents were submitted as part of an affidavit from Plaintiff's counsel stating that he requested the aforementioned forms from the Oklahoma

KWS took any action to respond timely to the Complaint after receiving it.

Thereafter, on March 13, 2018, Plaintiff served Defendant with a 10-day notice of intention to enter default judgment, pursuant to Pennsylvania Rule of Civil Procedure 237.l, urging Defendant to file an answer within ten days to avoid the entry of the default judgment. (Doc. No. 7, Ex. E.) Roberts also received and signed for this notice. (*Id.*) Again no response was forthcoming, so on March 26, 2018, Plaintiff filed a Praecipe to Enter Default Judgment, alleging that Defendant failed to respond to the Complaint within 20 days, as required. (*Id.*, Doc. 1-1, Ex. B at 21-22.) A default judgment was then entered in favor of Plaintiff and against Defendant in the Court of Common Pleas of Philadelphia County. (Doc. No. 7, Ex. D.)

The next day, on March 27, 2018, Plaintiffs counsel, Mr. Dan Hessel, Esquire sent an email to KWS, Inc.'s company email address, listed on its website (sales@kwschain.com), notifying them that the company is in default for failure to respond to the Complaint. (*Id.*, Ex. E.) Roberts read the email, and KWS then secured counsel in this case. (*Id.*) On March 28, 2018, Defendant's counsel responded to Plaintiffs email, stating that they have been retained to represent KWS in the matter and that they would respond to the Complaint that day. (*Id.*, Ex. G.) On March 29, 2018, however, Defendant removed the action to this Court. (Doc. No. 1.)

Office of the Secretary of State and was directed to download them from their website. (*Id*., Ex. D.) Attached to this Opinion are copies of the documents numbered 1 to 3, as well as the affidavit of Plaintiffs counsel, designated as Document 4.

III. STANDARD OF REVIEW

A district court has original jurisdiction over a civil action between citizens of different states where "the matter in controversy exceeds the sum or value of $75,000." 28 U.S.C. § 1332(a)(1). Removal predicated on diversity of citizenship jurisdiction requires that the amount in controversy is satisfied and that there is "complete diversity between the parties, that is, every plaintiff must be of diverse state citizenship from every defendant." *In re Briscoe*, 448 F.3d 201, 215 (3d Cir. 2006) (citation omitted).

Pursuant to 28 U.S.C. § 1441(a), a defendant may remove "any civil action brought in a state court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441 (a). This statute must be construed against removal. *Samuel-Bassett v. KIA Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004); *see also Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d. Cir. 1990) (holding that the removal statutes "are to be strictly construed against removal and all doubts should be resolved in favor of remand").

Under 28 U.S.C. § 1446(b), the petition for removal of a civil action from state court to federal court "shall be filed within thirty days after the receipt by the defendant, through service or otherwise." 28 U.S.C. § 1446(b). This thirty-day period is mandatory and cannot be extended by the Court. *Typh*, *Inc. v. Typhoon Fence of Pennsylvania*, *Inc.*, 461 F. Supp. 994, 996 (E.D. Pa. 1978). A party seeking removal carries the burden of proving that removal is proper. *Samuel-Bassett*, 357 at 396 (3d Cir. 2004). As such, "a party who urges jurisdiction on a federal court bears the burden of proving that jurisdiction exists." *Boyer*, 913 F.2d at 111 (3d Cir. 1990).

IV. ANALYSIS

Plaintiff moves to remand this case to the Court of Common Pleas of Philadelphia County, arguing that (1) KWS's removal was untimely; (2) service of the Complaint on KWS was proper under Pennsylvania law; and (3) KWS waived any argument that service was improper by not asserting the affirmative defense in a responsive pleading. (Doc. No. 16 at 7-22.) In response, Defendant argues that (1) Plaintiff has not met his burden of proving service was effective; (2) KWS did not waive service prior to removal; and (3) the removal deadline was not triggered until March 27, 2018, when Roberts read the email with the notice that Defendant was in default for failure to respond to the Complaint. (Doc. No. 25 at 5-13.) The Court will address each argument in turn.

A. KWS Was Properly Served With the Complaint.

Under Pennsylvania Rule of Civil Procedure 404(2), service outside the Commonwealth of Pennsylvania may be made by mail in the manner provided by Rule 403. Rule 403 provides, in relevant part: "[i]f a rule of civil procedure authorizes original process to be served by mail, a copy of the process shall be mailed to the defendant by any form of mail requiring a receipt signed by the defendant or his authorized agent. Service is complete upon delivery of mail." Pa. R. Civ. P. 403.

Thus, Pennsylvania law only requires *"delivery of any form of mail"* and a "receipt signed *by the defendant or his authorized agent.*" Pa. R. Civ. P. 403 (emphasis added). In order for service of process upon an authorized agent to be effective, the party asserting the validity of process needs to demonstrate that the

agent had either implied or express authority to accept process. *United States ex rel. Thomas v. Siemens AG*, 708 F. Supp. 2d 505, 519 (E.D. Pa. 2010). Implied authority depends upon the relationship between the person receiving process and the party to the litigation. *Grand Entm't Group v. Star Media Sales*, 988 F .2d 476, 478 (3d Cir. 1993). There must be a sufficient connection between the person served and the defendant to demonstrate that service was reasonably calculated to give the defendant notice against it. *Cintas Corp. v. Lee's Cleaning Servs.*, 549 Pa. 84, 96 (1997).

Here, Plaintiff has shown that on January 23, 2018, Ms. Roberts, the registered agent[7] who was authorized to accept service of process on behalf of KWS (Doc. No. 16, Exs. B, C, H) signed and returned the receipt. (Doc. No. 7, Ex. B.) According to the documents filed by KWS with the seal of the Secretary of State of Oklahoma, she is the authorized agent to accept service of process and was appointed on September 8, 2009. The documents from the Secretary of State also show that she was the registered agent for service of process at least until May 31, 2018, and that no one else has been designated as the registered agent for KWS. Moreover, she signed the return receipt on January 23, 2018, accepting service of the Complaint, and the fact that she did not check either box as

[7] A registered agent is a person authorized to accept service of process for another person, especially a foreign corporation, in a particular jurisdiction. *Registered Agent*, BLACK'S LAW DICTIONARY (10th ed. 2014). Even though KWS was incorporated in Oklahoma and is not a foreign corporation in that state, the definition of a registered agent is still pertinent.

"addressee" or "agent" is irrelevant, given her status as the registered agent to accept service of process.[8]

On its face, the return receipt expressly shows that service was complete. Despite this clear showing, Defendants argue that the Certificate obtained from the Office of the Secretary of State of Oklahoma (Doc. No. 16, Ex. B), which certifies that Elizabeth Roberts is "the registered agent for service of process . . ." is dated May 28, 2018, five months after attempted service on KWS, and therefore does not establish that Roberts was the registered agent on January 23, 2018.

The record does not support this argument. Plaintiffs counsel has submitted an affidavit confirming that the Office of the Secretary of State of Oklahoma issued the documents he relies on. *(Id.*, Ex. D.) Further, the documents themselves are signed and

---

[8] In her deposition, Roberts testified that even though her signature was on the successor form, and she considered herself to be the registered agent, she did not consider herself to be the registered agent for service of process. (Doc. No. 16, Ex. G at 31:22-25; *Id*. at 32: 1-10; *Id*. at 42: 9-10; *Id*. at 47: 18-24; *Id*. at 48:1-6; *Id*. at 60: 1-25; *Id*. at 64: 1-4.) This testimony contradicts the express authority given to her to accept service in the filings with the Secretary of State of Oklahoma, and does not change her legal status to accept service as set forth in the documents. Under Oklahoma law, every domestic corporation is required to designate a registered agent to remain in the state to be generally present at the corporation's office to accept service of process and otherwise perform the functions of registered agent. 18 Okl. St. Ann. § 1022. KWS was incorporated in the state of Oklahoma (Doc. No. 16, Ex. D-4), and Roberts was so designated. As the designated individual to serve as registered agent on behalf of KWS, she was the person to be served with the Complaint. *Accord Build Servs*. *v*. *V*., No. CJ-2012-6543, 2012 Okla. Dist. LEXIS 3570 (Dist. Ct. Okla. November 21, 2012) (service on the company's registered service agent was deemed good and effective service).

sealed. *(Id.*, Exs. B, C, D-3, D-4, D-5, D-6, D-7.) They show that from September 8, 2009 to May 31, 2018, Roberts was the registered agent of KWS to accept service of process. This time period covers January 23, 2018, the date that service of the Complaint was made on Roberts. Defendant offers no evidence that another registered agent for service of process existed at the time the Complaint was served.

Defendant's further argument that service was improper because the mailing was not addressed to Ms. Roberts is also unpersuasive. Roberts admitted in her deposition that she was employed at KWS since it was founded in 1996. (*Id.*, Ex. G at 8:14-17.) In 2009, she was promoted from her position as Director of Sales to the Vice President of Operations at KWS. (*Id.* at 10: 16-25.) Since 2016, she has been the only employee of KWS that regularly reported to the company's Oklahoma office. *(Id.* at 16:4-9.) She is responsible for all mail to the office. (*Id.* at 20: 18-21.) All higher-ranking officers of the company are based in Germany. (*Id.* at 25: 19-25; *Id.* at 26: 1-3.) She has met the sole shareholder many times. *(Id.* at 28: 10-17.) She has access to KWS bank accounts and the authority to write checks and pay bills on behalf of KWS. (*Id.* at 24: 17-25.) In addition to the express authority given to her in the documents filed with the Secretary of State of Oklahoma, which show that she was the registered agent for service of process, her background with KWS establishes a sufficient connection between Roberts and KWS to confirm her implied authority to accept service of process on behalf of KWS. *Borah v. Monumental Life Ins. Co.*, No. 04-3617, 2005 WL 83261, at *3 (E.D. Pa. Jan. 14, 2005) (finding that service was proper under Pennsylvania law when it was addressed to the President and CEO of defendant company, signed for by a mail clerk and

then delivered to the addressee's secretary); *Thomas v. Stone Container Corp.*, No. 89-1537, 1989 WL 69499, at *3 (E.D. Pa. June 21, 1989) (finding service proper where a secretary to a vice president of the defendant company received a complaint that was addressed to Defendant's office and served through certified mail).[9]

B. KWS Failed to File the Notice of Removal in a Timely Manner.

Given that Roberts was an authorized agent to accept service of process, Defendant's time for removal began on January 23, 2018, when it was served with the Complaint. Defendant argues that the time for removal began to run on March 27, 2018, the date on which it first received notice of this lawsuit through an email from Plaintiffs counsel attaching the Praecipe to Enter Default Judgment. But as discussed above, on January 23, 2018 KWS was properly served with the Complaint, and the thirty-day time period for removal began to run on this day.

---

[9] Defendant also argues that Plaintiffs decision not to use the option of restricted delivery offered by the United States Postal Service contributes to its claim that service was improper. (Doc. No. 25 at 10.) The official note following Pa. R. Civ. P. 403 explains restricted delivery. It notes: "[t]he United States Postal Service provides for restricted delivery of mail, which can only be delivered to the addressee or his authorized agent." Pa. R. Civ. P. 403. There is no requirement, however, that restricted delivery be used. The official note only puts one on notice that this form of service exists, but it is evident that its use is optional. Pennsylvania law only requires that Plaintiff serve an authorized agent of Defendant through the mail and provide a return receipt, which was done here. Accordingly, the Court finds that Plaintiffs service of the Complaint on January 23, 2018 was proper under Pennsylvania law.

The statute governing removal is 28 U.S.C. § 1446(b), which provides that a petition for removal must be filed by the defendant within thirty days after its receipt "through service or otherwise" of a copy of the initial pleading. *International Equity Corp. v. Pepper & Tanner*, *Inc.*, 323 F. Supp. 1107, 1109 (E.D. Pa. 1971). In other words, defendant's time to remove starts with "receipt of a copy of the Complaint, however informally . . . ." *Murphy Bros.*, *Inc. v. Michetti Pipe Stringing*, *Inc.*, 526 U.S. 344, 356 (1999). This has been interpreted to mean that time for removal commences to run when an agent of a corporation receives the Complaint. *Maglio v. F.W. Woolworth Co.*, 542 F. Supp. 39, 41 (E.D. Pa. 1982).

Therefore, since the Court agrees that service of the Complaint was made on January 23, 2018, the Notice of Removal, filed on March 29, 2018 was untimely because it was filed sixty-five days after Ms. Roberts received the Complaint on behalf of KWS.

Accordingly, for this reason, Plaintiffs Motion to Remand (Doc. No. 7) will be granted.

C. KWS Waived its Right to Challenge Service.

Plaintiff argues that KWS waived its right to challenge service because it failed to raise the issue of improper service in a responsive pleading under Federal Rule of Civil Procedure 12(b). (Doc. No. 16 at 7-9.) Fed. R. Civ. P. 12(b) provides that "[e]very defense to a claim for a relief in any pleading must be asserted in the responsive pleading if one is required . . ." Fed R. Civ. P 12(b). Insufficient service of process is a defense that may be asserted by motion. *Id.*

In response, Defendant submits that it did not waive its right to assert the defense of insufficient service of

process in state court because under Federal Rule of Civil Procedure 81(c)(2), they could assert it after removal. (Doc. No. 25 at 11-12.)

Specifically, Federal Rule of Civil Procedure 81(c)(2) provides:

> After removal, repleading is unnecessary unless the court orders it. A defendant who did not answer before removal must answer or present other defenses or objections under these rules within the longest of these periods:
>
> (A) twenty days after receiving the initial pleading stating the claim for relief;
>
> (B) twenty days after service of the summons for an initial pleading on file at the time of service; or
>
> (C) seven days after the notice of removal is filed.

Since this case was removed from state court to federal court, Rule 81 applies. *Purcell v. State Farm Mut. Auto. Ins. Co.*, No. 11-7004, 2012 WL 425005 (E.D. Pa. Feb. 10, 2012) (holding that Plaintiff mistakenly relied on Fed. R. Civ. P. 12(a) when asserting that Defendant's motion was untimely since it was filed more than 21 days after service of the Complaint because Fed. R. Civ. P. 81(c)(2) applies once a case is removed from state court to federal court, and Defendant timely filed its motion within seven days after removal). Accordingly, KWS was required to file its answer or present other defenses or objections to the Complaint within seven days after March 29, 2018, when its Notice of Removal was filed. (Doc. No. 1.) On that day, KWS filed a Notice of Removal,

alleging that it was not properly served. (*Id.* at 5.) Seven days later, on April 5, 2018, KWS filed an Answer in this Court. (Doc. No. 3.) However, in its Answer, KWS did not set forth the affirmative defense of improper service of process. (*Id.*) It also did not file any responsive pleading to the Complaint alleging improper service. Federal Rule of Civil Procedure 81(c)(2) cannot be read to authorize the raising of a defense or other objection in a Notice of Removal. Aside from mentioning improper service in its Notice of Removal, KWS did not argue that it was improperly served until it opposed Plaintiffs Motion to Remand on May 3, 2018. (Doc. No. 8.) Therefore, under Federal Rule of Civil Procedure 81(c) (2), KWS waived its right to challenge service of process because it did not raise the issue within seven days after removing the case to this Court. Plaintiffs Motion to Remand (Doc. No. 7) will be granted for this additional reason.

D. The Court Will Not Award Plaintiff Fees and Costs Associated With The Remand To State Court.

In this case, the Court will not award fees and costs to Plaintiff associated with the remand to state court. 28 U.S.C. § 1447(c) provides that "[a]n order remanding the case may require payment of just costs and actual expenses, including attorney's fees, incurred as a result of the removal." 28 U.S.C. § 1447(c).

In *Martin v. Franklin Capital Corp.*, the United States Supreme Court held that absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal. 546 U.S. 132, 141 (2005). An award of fees under

§ 1447(c) is left to the discretion of the district court. *Id.* at 140.

In this case, there was an objectively reasonable basis for seeking removal even though it was untimely and a remand is warranted. First, there was diversity of citizenship between the parties in this case. Second, though its contentions were unpersuasive, Defendant asserted that it received notice of this case for the first time on March 27, 2018, when Plaintiff's counsel sent an email to KWS notifying them that the company was in default for failure to respond to the Complaint. There is no reason to believe that Defendant's position is not asserted in good faith. Therefore, the Court will not award Plaintiff attorney's fees and costs associated with removal.

V. CONCLUSION

For all the foregoing reasons, Plaintiff's Motion to Remand (Doc. No. 7) will be granted. Plaintiffs request for attorney's fees and costs associated with the removal will be denied. An appropriate Order follows.

Document "1"

OFFICE OF THE SECRETARY OF STATE
STATE OF OKLAHOMA
[SEAL]

I, THE UNDERSIGNED, Secretary of State of the State of Oklahoma, do hereby certify that I am, by the laws of said state, the custodian of the records of the state of Oklahoma relating to the right of corporations to transact business in this state and am the proper officer to execute this certificate.

I FURTHER CERTIFY that KWS, INC., was granted a charter on the 2nd day of November, 1995, a corporation duly organized and existing under and by virtue of the laws of the State of California

I FURTHER CERTIFY that ELIZABETH ROBERTS whose address is 9950-C EAST 55TH PL TULSA OK 74114 is the registered agent for service of process for said corporation.

IN TESTIMONY THEREOF, I heretofore set my hand and affixed the Great Seal of the State of Oklahoma, done at the City of Oklahoma City, this 31st day of May, 2018.

[SEAL] /s/ [Illegible]
Secretary of State

OFFICE OF THE SECRETARY OF STATE
STATE OF OKLAHOMA
[SEAL]

I, THE UNDERSIGNED, Secretary of State of the State of Oklahoma, do hereby certify that I am, by the laws of said state, the custodian of the records of the state of Oklahoma relating to the right of corporations to transact business in this state and am the proper officer to execute this certificate.

I FURTHER CERTIFY that KWS, INC., was granted a charter on the 2nd day of November, 1995, a corporation duly organized and existing under and by virtue of the laws of the State of California

I FURTHER CERTIFY that ELIZABETH ROBERTS whose address is 9950-C EAST 55TH PL TULSA OK 74114 is the registered agent for service of process for said corporation.

I FURTHER CERTIFY that KWS, INC. is a Domestic Fore Profit Business Corporation duly organized and existing under and by virtue of the laws of the state of Oklahoma and is in good standing according to the records of this office. This certificate is not to be construed as an endorsement, recommendation or notice of approval of the entity's financial condition or business activities and practices. Such information is not available from this office.

IN TESTIMONY THEREOF, I heretofore set my hand and affixed the Great Seal of the State of Oklahoma, done at the City of Oklahoma City, this 31st day of May, 2018.

Document "2"

OFFICE OF THE SECRETARY OF STATE
STATE OF OKLAHOM
[SEAL]

WHEREAS, *a Certificate of Resignation of Registered Agent Coupled wit Appointment of Successor Agent*, *executed and acknowledged by*

KWS, INC.

a corporation organized and existing under the laws of Oklahoma has been filed of the Secretary of State as provided by the laws of the State of Oklahoma

NOWTHEREFORE, *I the undersigned Secretary of State of the State of OK virtue of the powers vested in me by law*, *do hereby certify that*

ELIZABETH ROGERS
at
9950-C EAST 55TH PL
TULSA OK 74114

has become the successor registered agent of said corporation so ratifying and approving such change.

IN TESTIMONY THEREOF, *I heretofore set my hand and affixed the Great Seal of the State of Oklahoma.*

[SEAL] Filed in the city of Oklahoma City this 8th day of September, 2009.

/s/ [Illegible]
Secretary of State

Document "3"

RESIGNATION OF REGISTERED AGENT
COUPLED WITH
APPOINTMENT OF SUCCESSOR

TO: OKLAHOMA SECRETARY OF STATE
[street address illegible]
Oklahoma City, Oklahoma [illegible]
[phone number illegible]

The undersigned, for the purpose of changing the name of the registered agent and address of the registered office of the corporation, as provided by Section 1025 of the Oklahoma General Corporation Act, hereby certifies:

1. The name of the corporation is

KWS Inc.

2. The state of [illegible] jurisdiction of its [illegible]:
OK

3. The undersigned, [illegible] registered agent in the State of Oklahoma, [illegible] agent of said corporation for service of process.

4. Upon the filing of this document with the Secretary of State, the capacity of the undersigned at such and the successor agent and the address of the registered office for said corporation shall be:

Elizabeth Roberts 9950-C East 55th Place, Tulsa OK

Name of Agent Street Address City County Zip Code

Tulsa County 741

(P.O. BOXES ARE NOT ACCEPTED)

[STAMP]

(CONTINUED ON REVERSE SIDE)

IN WITNESS WHEREOF, the undersigned registered has caused this this 30 day of July, 2009.

ACKNOWLEGEMENT BY AN AGENT THAT IS A [ILLEGIBLE]

/s/ Elizabeth Roberts Elizab
Signature P

EXACT BUSINESS ENTITY NAME

[illegible] [illegible]

PLEASE PRINT NAME P

The undersigned corporation does hereby [illegible] and approve the [illegible] on this 30 day of July 2009.

by [signature cut off]

ATTEST

/s/ Elizabeth Roberts
by: Secretary

Elizabeth Roberts
(PLEASE PRINT NAME)

Document "4"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 2:18-cv-18-01333 JHS

ERIC SCALLA

Plaintiff,

v.

KWS, INC., A MEMBER OF THE THIELE GROUP

Defendant.

AFFIDAVIT OF DANIEL L. HESSEL, ESQ.

Upon information and belief and in good faith, Daniel L. Hessel, Esq. hereby swears, affirms and makes this Affidavit, stating as follows:

1. I am an attorney admitted to the practice before the United States District Court for the Eastern District of Pennsylvania and I understand the obligations of an oath.
2. Following oral argument of this matter on May 29, 2018, I conducted research on the corporate filings of Defendant KWS, Inc. with the Oklahoma Secretary of State.
3. Upon request, the office of the Oklahoma Secretary of State sent me a series of e-mails entitled "Your Requested Information," which directed me to a secure page on its website at www.sos.ok.gov which contained links to download KWS' corporate

filings. *See*, *emails and screenshots reflecting downloaded documents*, *attached hereto as Exhibit D-1.*

4. I downloaded the following documents from the Oklahoma Secretary of State's website

   a. Certified Copy of Defendant's Certificate of Incorporation, *Exhibit "D-2" (372277900022190 7464.pdf)*

   b. Certified Copy of the 09/08/09 Resignation of Registered Agent Coupled with Appointment of Successor, *Exhibit "D-3" (372277900022190745-1.pdf)*

   c. Certified Copy of the 09/08/09 Certification of Successor Registered Agent, *Exhibit "D-4" (372 27900922190745-3.pdf)*

   d. Certified copies of Certificates listing Elizabeth Roberts as the "registered agent for service of process" *Exhibit "D-5" (37227790 [illegible] 90024.pdf)*

   e. Certified Copy of Defendant's Certificate of Good Standing, *Exhibit "D-6" (372277900 021.pdf)*

   f. Certified Copy of All Documents on File for Defendant, *Exhibit "D-7"*, *(372277900025.pdf)*

   g. Printout listing KWS, Inc. corporate information, including identifying Elizabeth Robers as the agent, *Exhibit "D-8" (372277 [illegible] 22.pdf)*

SIGNED UNDER THE PAINS AND PENALTIES OF PERJURY

/s/ Daniel L. Hessel, Esq. — 7-30-18
DANIEL L. HESSEL, ESQ. — Date

Sworn to before me and subscribed in my presence this 30 day of July, 2018.

Notary Public /s/ [Illegible]

My commission expires Aug. 2021

[STAMP]

APPENDIX G

IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
CIVIL TRIAL DIVISION

[Filed: September 30, 2019]

No. 02802

Superior Court Docket No. 2003 EDA 2019

ERIC SCALLA

vs.

KWS, INC.

December Term, 2017

OPINION PER Pa.R.A.P. 1925(b)

Lachman, J. September 27 , 2019

The court adopts as its principal Pa.R.A.P. 1925(b) opinion, its opinion dated April 10, 2019, denying the petition to open default judgment filed by Defendant-Appellant KWS, Inc. A copy of that opinion and its exhibits is appended hereto. The court's original 36-page opinion thoroughly discusses the issues raised by the petition to open. The court will discuss below the other issues raised in KWS's timely filed Pa.R.A.P. 1925(b) Statement.

A. Failure to monitor the docket.

One of the most important facts in this case is the utter failure of the attorneys for KWS to check the Philadelphia docket at any point in time before December 3, 2018, even though they had entered their appearances on March 28 and 30, 2018. The only evidence that any of KWS's three attorneys ever checked the docket was in the February 28, 2019 affidavit of Thomas Galligan, Esquire. He said he reviewed the online docket on December 3, 2018, and "I noticed *for the first time"* that a default judgment had been entered against KWS on March 26, *2018,* or 251 days earlier. KWS did not assert that defense counsel or their staff had looked at the docket on previous occasions.

The only interpretation of Mr. Galligan's surprise is that he, his co-counsel, and their staff had never actually looked at the docket before that date. The docket entry also states that notice of the entry of default was given under Rules 236 and 237.1 (the default judgment rule). The petition to open was untimely because it was filed on January 25, 2019, 304 days after the entry of the default on March 26, 2018.

Mr. Galligan's affidavit states that on December 3, 2018, he reviewed the docket "to determine whether the matter had been remanded back to this court." Affidavit ¶ 2. Had he made additional reviews of the docket, he would have discovered that the record had been returned on December 31st. Instead of monitoring the docket he states in his affidavit that on December 5, 2018, he spoke with an unidentified "person at this Court's office."[1] This unidentified

[1] If Mr. Galligan is referring to the office of this judge, he is mistaken; no such call was received by any of my staff. My

person purportedly told him, "[o]nce the federal court transferred the record back to state court the parties would get an electronic notice and would again be able to file documents in the state court case at that time." Affidavit ¶ 7.

The information Mr. Galligan says he was told in this alleged conversation is not true. Housekeeping details such as the return of the record and event listings are placed on the docket and counsel are not given e-mail notification of them. That is why attorneys have the duty to frequently monitor the docket themselves to keep informed of what is happening in their cases.

The federal court mailed the record to the Philadelphia Court of Common Pleas on December 20th, which counsel would have known had they monitored the federal docket. The record was received by our court on December 31st, which counsel would have known had they monitored the court of common pleas docket. Mr. Galligan did not monitor the docket and did not discover until January 23, 2019, that the record had been returned. He said he learned this fact in a telephone conversation with an unidentified person in "this Court's office." Affidavit ¶ 9.[2,3]

---

involvement with this case did not begin until February 21, 2019, when the petition to open was assigned to me for disposition.

[2] No such conversation occurred with any of my staff. *See* footnote 1.

[3] The trial court did not find credible Mr. Galligan's affidavit primarily for three reasons. First, the affidavit misrepresented when KWS and its counsel first received notice of the entry of the default judgment. KWS knew since March 27, 2018, and its counsel admitted they knew at least since May 3, 2018, that a default judgment had been entered against KWS in state court. Petition to Open ¶ 12; Defendant KWS Inc.'s Response in

"It is plaintiffs duty to move the case forward and to monitor the docket to reflect that movement." *Golab v. Knuth,* 176 A.3d 335, 339 (Pa. Super. 2017) (citation and brackets omitted). Counsel for KWS had access to this court's electronic docket and provide no reason for their failure to check the docket, discover the entry of the default judgment and the return of the record, and file the petition to open in a timely manner. *See Lebby v. Septa,* April Term 2004, No. 4602, 2006 WL 1768248, at *1 (C.P. Phila. June 12, 2006) (petition to open denied as untimely where attorney failed to monitor the docket and did not discover the entry of a judgment of non pros for 14 months).

Neglecting to monitor the court's docket was not justified even when the docket was kept only in *paper* form and attorneys had to send their secretaries or paralegals to City Hall to obtain copies of it. There is even less justification for failing to monitor the *electronic* docket of this court. Our electronic docket permits attorneys to sit in their offices and, at their convenience, review the docket to keep apprised of what is happening in their cases. To allow attorneys to ignore entirely the electronic information at their fingertips would severely undermine the benefits for both courts and litigants fostered by the electronic docket system.

B. Due process.

Paragraph 2 of KWS's 1925(b) statement claims that the trial court's order denying the petition to open

---

Opposition to Plaintiff's Motion to Remand at ¶ 9. See pages 25-27 of the court's original opinion. Second, Mr. Galligan admittedly failed to monitor the docket. Third, he failed to identify the court personnel he allegedly spoke with on December 5, 2018, and on January 23, 2019.

default judgment "violates KWS's right to due process of law under the United Sates and Pennsylvania Constitutions." This claim is waived. The court does not recall KWS ever mentioning in its original petition or five separate reply briefs that denying its petition would be an unconstitutional denial of due process. "[I]t is not the responsibility of this Court to scour the record to prove that an appellant has raised an issue before the trial court, thereby preserving it for appellate review." *Phillips v. Lock,* 86 A.3d 906, 920 (Pa. Super. 2014), *quoting Commonwealth v. Baker,* 963 A.2d 495, 502 n. 6 (Pa. Super. 2008) (citations omitted).

The trial court certainly does not recall any actual legal argument with citation to pertinent authorities on this issue by KWS. "It is well settled that issues not raised below cannot be advanced for the first time in a 1925(b) statement or on appeal. *See* Pa.R.A.P. 302(a) (Issues not raised in the lower court are waived and cannot be raised for the first time on appeal.')". *Irwin Union Nat. Bank & Trust Co. v. Famous,* 4 A.3d 1099, 1104 (Pa. Super. 2010). If KWS actually raised this issue in the trial court, it should have no difficulty citing in its appellate brief the page of the record where it appears.

This issue also is waived because it does not state *how* or *why* the Court's decision violates due process; it is mere boilerplate. The due process issue, as stated by KWS, is waived because it is "too vague for the trial court to identify and address the issue to be raised on appeal." *Commonwealth v. Dowling,* 778 A.2d 683, 686 (Pa. Super. 2001). "When a court has to guess what issues an appellant is appealing, that is not enough for meaningful review." *Id.* (citation omitted). "In other words, a Concise Statement which is too vague to allow

the court to identify the issues raised on appeal is the functional equivalent of no Concise Statement at all." *Id.* 804 A.2d at 686-687 (defendant's 1925(b) statement claiming trial court erred "by prohibiting counsel from cross examining based on a prior inconsistent statement of an eyewitness on the issue of identification," was not sufficiently specific for the trial court to identify and address the issue to be raised on appeal, and thus, the issue was waived).

See also, Commonwealth v. Reeves, 907 A.2d 1, 2 (Pa. Super. 2006) (case citations omitted) (defendant waived claim that transit authority was not a "person" within meaning of statute that criminalized securing execution of documents by deception, where statement of matters complained of merely asserted that evidence was insufficient to support verdict); *Commonwealth v. Lemon,* 804 A.2d 34, 37 (Pa. Super. 2002) (1925(b) statement was too vague when it merely stated that the verdict was "against the evidence," "against the weight of the evidence," and "against the law"). *Hassel v. Franzi,* 207 A.3d 939, 949 (Pa. Super. 2019) (citations omitted) (plaintiff failed to preserve for appeal the issue of the improper use of learned treatises in a medical malpractice trial, where his unclear 1925(b) statement did not identify which treatises he intended to challenge, the relevant parts of the witnesses' direct or cross- examination testimony, and where in the record the challenges were preserved for appeal).

C. Pa.R.C.P. 237.3(b).

This issue is discussed on page 15 and n. 6 of the Court's original opinion. Briefly, KWS's petition and memorandum of law sought to open the default judgment under the traditional three-part test, and never mentioned Rule 237.3(b). Rule 237.3(b) permits a default judgment to be opened upon meeting only one

of those tests — a meritorious defense. KWS's reply brief and its sur-reply brief also litigated the three-part test and did not mention Rule 237.3(b). KWS raised Rule 237.3(b) for the first time in its sur-sur-reply brief filed on March 6, 2019. That was too late.

Furthermore, Rule 237.3(b) may be invoked *only* "if the petition is filed within ten days after the entry of a default judgment on the docket." Pa.R.C.P. 237.3(b)(1). "Rule 237.3(b) clearly does not apply to this case because the petition to open was filed 304 days after the entry of the default judgment." Original opinion p. 15 n. 6. Rule 237.3(b) would not apply even if the clock began to run when our court received the remanded federal court record on December 31, 2018. The petition to open was not filed until January 25, 2019, beyond the ten-day grace period.

D. Copies of the notice given by the court of the default judgment.

Paragraphs 4(d) and 4(e) of KWS's 1925(b) statement concern the notice given by the court to KWS of the entry of the default judgment. KWS asserts that "the Court has no copy of any such notice sent to KWS and no such copy is available on the docket for download unlike is *[sic]* the case with other filings." The entry of the default judgment occurred when the Plaintiff filed his praecipe for the entry of the default judgment including all of the necessary documents, and that fact was placed on the docket. The praecipe and related documents *are* downloadable. "Neither the Court nor the Office of Judicial Records are required to maintain a hard copy of any legal paper or exhibit, notice, or order filed or maintained electronically under this rule." Phila. Civil Rule *205.4(0(6).

The allegation that copies of Rule 236 notices are "available for download" in other case filings is simply erroneous. The trial court assumes that KWS is referring to the documents generated when a *party* to an action files a document electronically:

> (2) Upon receipt of the legal paper, the Office of Judicial Records shall provide the filing party with an acknowledgment, which includes the date and time the legal paper was received by the Electronic Filing System.
>
> (3) After review of the legal paper, the Office of Judicial Records shall provide the filing party with e-mail notification, or notification on the Electronic Filing System, that the legal paper has been accepted for filing ("filed") or not accepted or refused for filing.

Phila. Civil Rule *205.4(0(2) & (0(3). The Office of Judicial Records is not a "filing party" and Rule 236 notices and other notations by the court on the docket, are not "legal papers" covered by this electronic filings rule. *See* Pa.R.C.P. 205.4(a)(2) (definitions). Consequently, they do not generate e-mail notifications.

The trial court does not recall the lack of a downloadable copy of the notice being raised in the trial court. *See Phillips,* 86 A.3d at 920 ("[I]t is not the responsibility of this Court to scour the record to prove that an appellant has raised an issue before the trial court, thereby preserving it for appellate review."); *Irwin Union Nat. Bank & Trust Co.,* 4 A.3d at 1104 ("It is well settled that issues not raised below cannot be advanced for the first time in a 1925(b) statement or on appeal."). If KWS actually raised this issue in the trial court, it should have no difficulty

citing in its appellate brief the page of the record where it appears.

E. Waiver of "certain arguments and issues."

Paragraph 4(f) of KWS's 1925(b) statement asks "whether the Court erred in concluding that . . . . (f) KWS waived certain arguments and issues that it raised in certain of its reply briefs and accompanying exhibits filed in support of its Petition." Which arguments? What issues? Which reply briefs? This claim is waived because it is too vague to permit the trial court, or the appellate court, to know what arguments and issues KWS is attempting to raise. *Dowling,* 778 A.2d at 686.

> It is axiomatic that when a court has to guess what issues a defendant is appealing, that is not enough for meaningful review. Similarly, when a defendant fails adequately to identify in a concise manner the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues. In other words, a concise statement which is too vague to allow the court to identify the issues raised on appeal is the functional equivalent of no concise statement at all. In light of the foregoing, Appellant has waived this challenge for appellate review.

Hassel, 207 A.3d at 949 (citations omitted) (plaintiff failed to preserve for appeal the issue of the improper use of learned treatises in a medical malpractice trial, where his unclear 1925(b) statement did not identify which treatises he intended to challenge, the relevant parts of the witnesses' direct or cross- examination

testimony, and where in the record the challenges were preserved for appeal).

F. Sur-sur-sur-sur-reply briefs.

Paragraph 4(g) of KWS's 1925(b) statement asks "whether the Court erred in concluding that . . . . (g) Parties may not raise new issues in a reply brief filed in support of a trial court petition to open even though no Rule of Civil Procedure provides for that; default judgment are disfavored as a matter of law; and the appellate court decisions cited by the Court were interpreting an existing appellate rule of procedure that has no applicability to this court's proceedings." This issue is addressed at pages 13-15 of the court's original opinion.

The court's original opinion cited three Pennsylvania Supreme Court and one recent Superior Court decisions that held that reply briefs cannot be used to raise new issues or to remedy the original brief's deficient discussion of an issue. This trial court recognized that those cases were discussing appellate procedure but believed, and still believes, that "the principles they espouse are equally relevant to reply briefs filed in the trial courts." Original opinion p. 14 n. 5.

The usual course of events is that a lawyer files a motion, the opponent files an answer, and the first lawyer may file a reply. There is no provision in the Pennsylvania Rules of Civil Procedure or in the local Philadelphia Civil Rules that permitted KWS to file its sur-reply, sur-sur-reply, sur-sur-sur-reply, and sur-sur-sur-sur-reply.

Further research revealed that the issue of sur-replies, sur-sur-replies, etc., is apparently one of first impression for Pennsylvania *trial courts,* although Pa.R.A.P. 2113(c) mandates that after a reply brief is

filed, "no further briefs may be filed except with leave of court." The issue has been discussed at length by the federal courts. While federal court decisions are not binding on Pennsylvania courts, this Court found the reasoning of the federal cases discussed below to be very persuasive.[4]

"Neither the Federal Rules of Civil Procedure nor this Court's Local Rules authorize the filing of surreplies." *Porter v. Am. Cast Iron Pipe Co.,* No. 2:09-CV-0845-AKK, 2010 WL 11507904, at *1 (N.D. Ala. May 28, 2010) (citations omitted), *aff'd on other grounds,* 427 F.App'x 734 (11th Cir. 2011) (non-precedential). "[C]ourts have interpreted [F.R.C.P.] Rule 56's silence with respect to surreplies to mean that such filings are not automatically permitted" in the summary judgment context. *Id.* (citation omitted).[5]

"Parties do not have the right to file surreplies and motions are deemed submitted when the time to reply has expired. The court generally views motions for

---

[4] "[D]ecisions of the federal district courts are not binding on Pennsylvania courts, but we may look to them as persuasive authority." *Czimmer v. Janssen Pharm., Inc.,* 122 A.3d 1043, 1048 n.5 (Pa. Super. 2015) (citation omitted). See *Ira G. Steffy & Son, Inc. v. Citizens Bank of Pa.,* 7 A.3d 278, 284 & n.7 (Pa. Super. 2010) (repeated the principle that the "decisions of federal district courts are not binding on Pennsylvania courts," but quoted and relied on an unpublished federal district court decision and found it to be "illuminating"); *Dietz v. Chase Home Finance LLC,* 41 A.3d 882, 886 n.3 (Pa. Super. 2012) (decisions of the federal district courts are not binding on Pennsylvania courts; however, they "are persuasive authority and helpful in our review of the issue presented").

[5] The general practice in Pennsylvania state courts is to hyphenate "sur-reply," but not in the federal courts. This court has left the federal practice alone instead of interrupting the text with repetitive Tr or "[sic]."

leave to file a surreply with disfavor. However, district courts have the discretion to either permit or preclude a surreply." *Garcia v. Biter,* 195 F.Supp.3d 1131, 1133-34 (E.D. Cal. 2016) (citations omitted). Courts have "warned that '[t]o allow such surreplies as a regular practice would put the court in the position of refereeing an endless volley of briefs.'" *Porter,* 2010 WL 11507904, at *1 (citation omitted).

An endless volley of briefs and sur-replies occurred in the often-cited case of *U.S. ex rel. Hockett v. Columbia/HCA Healthcare Corp.,* 498 F.Supp.2d 25 (D. D.C. 2007). The court set forth the standard of review as follows:

> The decision to grant or deny leave to file a sur-reply is committed to the sound discretion of the court. If the movant raises arguments for the first time in his reply to the non-movant's opposition, the court will either ignore those arguments in resolving the motion or provide the non-movant an opportunity to respond to those arguments by granting leave to file a sur-reply.

498 F. Supp. 2d at 35.

A "popular mode of advocacy" in *Hockett* were motions seeking to strike filings or seeking leave to file surreplies. 498 F.Supp.2d at 34. This left the "Court as the owner of what may be the world's first sur-sur-surreply, a position in which no Court should ever find itself." *Id.* at 35. The court granted the Plaintiff leave to file the sur-sur-surreply because it responded to evidence first raised in HCA's reply. *Id.*

The Court also was presented "with something it never thought it would see, a sur-sur-sur-surreply (hereinafter, 'reply'). All of these papers, particularly

the reply, add very little that is new, and do not respond to any improper argument. We are now several steps removed from a substantive motion, and are faced only with filings about filings. Eventually we reach a point where all this metapleading must stop, and this is that point. The Motion . . . is denied." *Hockett,* 498 F.Supp.2d at 36 (emphasis added). *See Greene v. IPA/UPS Sys. Bd. of Adjmt.,* No. 3:15-CV-00234-TBR, 2016 WL 6884689, at *2 (W.D. Ky. Nov. 21, 2016) (citations omitted) ("Greene's proposed memorandum . . . is actually a sur-sur-sur-reply . . . . Greene's proposed memorandum is indeed of a rare breed. . . . Although there may be an extraordinary case that calls for six rounds of argument on a single motion, the Court is satisfied that this is not such a case.").

The problem with KWS's fusillade of sur-reply briefs was they raised issues and facts that could have been, and *should* have been, raised either in KWS's petition or in its first reply brief. Plaintiff raised issues in his answer to the Petition that certainly warranted a reply by KWS discussing them. Instead of discussing all of those issues in one reply brief, however, KWS spread them out among four separate sur-reply briefs, which necessitated Plaintiff filing four of his own sur-reply briefs in response. Between February 27 and March 11, 2019, the court was forced to endure a death by a thousand cuts from eight separate sur-reply briefs.

For example, KWS did not deign to submit the affidavit of Thomas Galligan, Esquire, until KWS's second reply brief, i.e., its first sur-reply, on February 28th. The matters Mr. Galligan discussed all occurred in the month *before* the petition to open was filed; they

were not newly-discovered *after* the first reply brief had been filed by KWS.

The matters set forth in the affidavit went to the heart of KWS's claim that the petition to open was timely filed. Timeliness was the first of the three elements KWS had to prove to open the default judgment. The affidavit should have been filed as part of the petition to open to prove that the petition was filed timely. There should have been no difficulty in obtaining the affidavit in time for inclusion in the petition to open because Mr. Galligan is counsel of record for KWS in this case. After Plaintiffs answer to the petition disputed timeliness, the affidavit should have been included in KWS's first reply to the Plaintiff's answer, not in its second reply. Counsel for KWS have never explained why they failed to include Mr. Galligan's affidavit in the petition to open or in their first reply to Plaintiff's answer to the petition.

G. Commonwealth Court cases

Many Commonwealth Court decisions are cited in the court's original opinion. The trial court is bound by Commonwealth Court cases as much as it is bound by Superior Court decisions. The trial court recognizes that the Superior Court "is not bound by decisions of the Commonwealth Court. However, such decisions provide persuasive authority, and we may turn to our colleagues on the Commonwealth Court for guidance when appropriate." *Petow v. Warehime,* 996 A.2d 1083, 1089 n. 1 (Pa. Super. 2010), *quoting Maryland Casualty Co. v. Odyssey Contracting Corp.,* 894 A.2d 750, 756 n. 2 (Pa. Super. 2006).

H. Conclusion.

It is respectfully submitted that the Superior Court should affirm the denial of Appellant KWS, Inc.'s petition to open default judgment.

BY THE COURT:

/s/ J. Lachman
LACHMAN , J.