No. _____

In the
Supreme Court of the United States

EE HOONG LIANG,

Petitioner,

v.

PANIRCELVAN KALIANNAN; TONG LAY YEEN GIOVANNA; TAN HOCK SENG; ROGER TEO KOK WEI; TEO KHIM HO; CHANG MUN KUMCHRISTINA; KOH HWEE BEN ERIN; NG YIM HAR; KOH THONG JUAY; TONG SIEW GEOK,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITION FOR A WRIT OF CERTIORARI

MICHAEL CONFUSIONE
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550
mc@heggelaw.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Personal Jurisdiction and *Forum Non Conveniens*

1) All the parties are citizens and residents of the Republic of Singapore, where they live, work, and shared their investment group in which the "untrue statements" and "sales" by Mr. Ee allegedly occurred. The Singaporean plaintiffs, however, represented by United States lawyers, sued their fellow Singaporean in the United States District Court, and the lower courts ruled that specific jurisdiction existed over Mr. Ee because he visited North Dakota once and emailed to his fellow group members pictures of the "man camps" in which they were all (Mr. Ee too) investing. Did this satisfy the "arise out of" or "relate to" aspects of the minimum contacts requirement?

2) Was the District Court required to assess principles of *forum non conveniens* in deciding whether it was "reasonable" for the United States court to exercise personal jurisdiction over the foreign Mr. Ee such that it did not "offend traditional notions of fair play and substantial justice"?

Summary Judgment

Does Fed. R. Civ. Pr. 56 require a District Court to assess all the evidence a moving party presents on summary judgment, or may the court rely solely on "deemed admitted" Requests for Admissions obtained by default – even if the sales contracts and other proofs also attached to the motion belie the elements of the breach of contract and other claims on which the plaintiff demands judgment?

PARTIES TO THE PROCEEDINGS

Petitioner Ee Hoong Liang was the defendant in the United States District Court and the appellant in the United States Court of Appeals. Respondents (identified in the caption above) were the plaintiffs in the District Court and the appellees in the Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings in any court that are directly related to this case.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

CASES

CONSTITUTION AND STATUTES

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Ee Hoong Liang petitions this Court for a writ of certiorari to review the published decision of the Court of Appeals and underlying District Court decision.

OPINIONS BELOW

The June 18, 2021 Decision of the United States Court of Appeals for the Eighth Circuit is published, *Kaliannan v. Liang*, 2 F.4th 727, 731 (8th Cir. 2021), and appears at Appendix A. The March 27, 2018 Order and Memorandum Decision of the United States District Court for the District of North Dakota is unpublished and appears at Appendix B.

JURISDICTION

The Decision of the United States Court of Appeals was entered on June 18, 2021. App. A. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law."

Federal Rule of Civil Procedure 56 provides in part as follows (emphasis added):

> (a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense —

on which summary judgment is sought. **The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.** ***

(c) Procedures.

(1) Supporting Factual Positions. **A party asserting that a fact cannot be or is genuinely disputed must support the assertion by**:

(A) **citing to particular parts of materials in the record**, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) **showing that the materials cited do not establish the absence or presence of a genuine dispute**, or that an adverse party cannot produce admissible evidence to support the fact. ***

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

STATEMENT OF THE CASE

In 2015, the United States Securities and Exchange Commission instituted proceedings against North Dakota Developments, LLC ("NDD"), and its two owners, Robert Gavin and Daniel Hogan, alleging that Gavin and Hogan fraudulently raised more than $62 million from investors around the world through sales of "man camps" – mini-hotels designed to house workers in North Dakota's oil fields. This was a Ponzi scheme orchestrated by Gavin and Hogan but appeared legitimate to those defrauded. Housing for oil workers was in short supply in 2012. NDD began offering to investors the purchase of modular housing units that could be leased to oil workers. The operations appeared to run smoothly before sewerage tank leaks and other issues caused low occupancy and a massive drop in expected returns from their anticipated 25 percent to 2 percent. Some purchasers sold their units back to NDD; some did not. Following complaints, the SEC intervened and closed down the operation. *United States Securities and Exchange Commission v. North Dakota Developments, LLC, et al.*, 4:15-cv-0053, Doc. 1, ¶ 41 (D.N.D., May 5, 2015).

Gavin and Hogan absconded with much of the money paid into NDD. Defrauded investors began looking elsewhere for redress. Lawyers instituted a class action against the law firm that served as escrow agent, *Aleem v. Pearce & Durick*, No. 1:15-cv-85; *Wright v. Pearce & Durick*, No. 1:15-cv-98, and considered others who could be pursued.

This Lawsuit Against Mr. Ee

Mr. Ee was not identified as a wrongdoer in the SEC lawsuit. Mr. Ee and his wife also purchased man camp units from NDD and at one point were members of the *Aleem* class action against the lawyers who participated in the scheme.

In fact, Mr. Ee communicated with lawyers about representing Mr. Ee and his wife in claims for relief. These same lawyers then later sued Mr. Ee on behalf of plaintiffs in this lawsuit (Mr. Ee raised conflict of interest objections against plaintiffs' lawyers, but the District Court denied relief on this ground, and the Court of Appeals did not consider these arguments in its decision below).

Plaintiffs, via their United States counsel, charged in the District Court below that Mr. Ee was an "agent" of the fraudulent company NDD and its two owners, Gavin and Hogan, and that Mr. Ee made knowingly "untrue statements" to plaintiffs in "sales" of the man camp units to plaintiffs. Plaintiffs alleged that Mr. Ee "as NDD's sales agent" "actively assist[ed] NDD in connection with the unlawful NDD Offering." "Plaintiffs' claims against Defendant are for negligence and strict liability arising out of Defendant's sales of NDD's unregistered and fraudulent securities, and Defendant's sales of securities as an unregistered agent, in violation of the North Dakota securities laws." Plaintiffs asserted claims under Section 12(a)(2) of the Securities Act of 1933 (15 U.S.C. § 771(a)(2)); violations of N.D.C.C. § 10-04-17 by offering and selling unregistered securities, selling securities as an

unlicensed agent, and making untrue statements and omissions; and negligence.

The threshold question of personal jurisdiction arose because all the plaintiffs and Mr. Ee are citizens of Singapore who live and work in Singapore, and where they had their investment group at which Mr. Ee was alleged to have made his "untrue statements" and other wrongful acts.

Plaintiffs were represented in the United States court by their United States lawyers, who acted on their Singaporean clients' behalf.

Defendant had no lawyer. He tried to represent himself *pro se* from Singapore where he lived. He filed a response to plaintiffs' Complaint which the District court clerk deemed an "answer." Shortly after, he filed a motion to dismiss for lack of personal jurisdiction and improper venue, arguing that "the Court lacks jurisdiction over him because neither the Plaintiffs nor the Defendant are citizens of the United States; the Plaintiffs and the Defendants do not operate businesses in North Dakota, do not possess a North Dakota mailing address, and do not hold North Dakota assets or property." The District Court denied defendant's motion on the papers, ruling, it was "evident Liang transacted business with North Dakota entities on several occasions. Liang's contact with North Dakota is not random, fortuitous, and attenuated. The nature and quality of these contacts support the exercise of personal jurisdiction over Liang." "The Plaintiffs presented *prima facie* evidence in their complaint that Liang traveled to North Dakota to facilitate business with NDD… Such contact satisfies the single contact

needed to give rise to personal jurisdiction over Liang… Liang's contact with Plaintiffs to facilitate the sale of unregistered, fraudulent NDD securities related to North Dakota real estate more than satisfies the quantity of contacts needed to support personal jurisdiction." Though "none of the parties are residents of North Dakota, the State would be a convenient forum for this dispute because the property related to the sale of unregistered, fraudulent securities is located in North Dakota. Moreover, much of the activity related to the sale or solicitation of unregistered, fraudulent securities," the court said. *Id.* "The exercise of personal jurisdiction would not offend traditional notions of fair play and substantial justice," the court ruled.

Still in Singapore and without United States counsel, defendant did not respond to Requests for Admissions that plaintiffs' counsel had served. The District Court said the Requests were "deemed admitted." Plaintiffs' counsel quickly moved for summary judgment. The District Court granted the motion and entered judgment against Mr. Ee for $852,638.81 based *solely* on the "deemed admitted" Request that Mr. Ee – still in Singapore and without United States counsel – failed to answer, stating, "Considering that the Court deems the matters in the Plaintiffs' Request for Admission admitted and in light of Liang's failure to respond to the motion for summary judgment, the Court GRANTS the Plaintiffs' motion for summary judgment."

The Appeal Below

Mr. Ee appealed the District Court's rulings on personal jurisdiction and summary judgment (Mr. Ee also tried to appeal the District Court's denial of a Rule 60 motion he had filed, but the Court of Appeals ruled there was no appellate jurisdiction over that ruling). Mr. Ee argued that the exercise of personal jurisdiction over him was improper under the Due Process Clause and related principles of *forum non conveniens*, and that entry of the massive $852,638.81 judgment premised on solely on the "deemed admitted" Requests for Admissions was improper under Federal Rule of Civil Procedure 56 in light of the contradictory documentary proof that also was submitted with plaintiffs' own motion.

After oral argument, the Court of Appeals affirmed in a published decision, *Kaliannan v. Liang*, 2 F.4th 727, 731 (8th Cir. 2021).

The court ruled that the exercise of personal jurisdiction over defendant was proper under the the Due Process Clause of the Fourteenth Amendment. Citing Eight Circuit precedent, the court said, "To assess minimum contacts, we use a five-factor test, with the first three factors being of 'primary importance': '(1) the nature and quality of [defendant's] contacts with the forum state; (2) the quantity of such contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) convenience of the parties." *Whaley v. Esebag*, 946 F.3d 447, 452 (8th Cir. 2020). "The fourth and fifth factors 'carry less weight and are not dispositive," the court said (*citing K-V*

Pharm. Co. v. J. Uriach & CIA, S.A., 648 F.3d 588, 592–93 (8th Cir. 2011)).

> Viewing the facts in the light most favorable to Plaintiffs, we find that the first and second factors weigh in favor of exercising jurisdiction. Plaintiffs allege that Defendant, among other things: (1) actively recruited investors, including Plaintiffs, to invest in a North Dakota company; (2) brokered the sale of interests in North Dakota real property and of North Dakota-issued securities; (3) received commissions from North Dakota in connection with sales of NDD securities; (4) communicated extensively with various North Dakota entities in connection with the sales; and (5) traveled to North Dakota in order to market and sell the investments to Plaintiffs and other investors, and on such trips took photos and videos as "evidence" that the NDD properties were functioning. Accepting Plaintiffs' allegations as true, Defendant's contacts with North Dakota were numerous, and furthermore "were not 'random, fortuitous, or attenuated,' but rather were central to an alleged scheme to 'purposely avail[] [himself] of the privilege of conducting activities' in [North Dakota]." See *Whaley, 946 F.3d at 452* (first and second alterations in original) (citations omitted). Accordingly, the first and second factors weigh in favor of finding personal jurisdiction.
>
> We also agree with the district court that the third factor weighs in favor of finding

> jurisdiction because Defendant's contacts with North Dakota "directly relate to" Plaintiffs' claims. See generally *Ford Motor Co., 141 S. Ct. 1017* (holding that state can exercise specific jurisdiction over defendant if defendant's contacts "relate to" plaintiff's claim). According to the amended complaint, Defendant participated in an allegedly fraudulent scheme by soliciting Plaintiffs to purchase unregistered securities relating to North Dakota real estate. Defendant communicated extensively with Plaintiffs regarding the North Dakota properties in order to convince Plaintiffs to invest. Additionally, Plaintiffs allege that Defendant traveled to North Dakota to take pictures and videos of the properties, and in fact sent such pictures and videos to Plaintiffs to help convince them that their "investments" would be sound. Defendant stresses that many of the parties' communications about Plaintiffs' "investments" took place in Singapore. Assuming this is true, the communications—and "investments" themselves—still concerned North Dakota properties. That the communications occurred elsewhere does not undermine a finding that Defendant's North Dakota contacts "relate to" Plaintiffs' claims. Accordingly, we find that the third factor weighs in favor of finding jurisdiction. [App. 6]

The court of appeals said "the fourth factor does not weigh in favor of finding jurisdiction," but also stated, "We do not disagree with the notion that there are local elements to this dispute" despite the fact that all the

parties – every plaintiff included – was from Singapore. The court said only that "the district court's conclusion does not precisely track our articulation of the fourth factor as the 'interest of the forum state in providing a forum for its residents.'" (citing *K-V Pharm. Co.*, 648 F.3d at 595 (finding that "Missouri obviously has an interest in providing a forum for resident corporations like [the plaintiff]");*Wells Dairy, Inc. v. Food Movers Int'l*, 607 F.3d 515, 520 (8th Cir. 2010) ("Iowa, as the forum state, has an interest in providing a forum for its company."); *Digi-Tel Holdings, Inc. v. Proteq Telecomms. (PTE), Ltd.*, 89 F.3d 519, 525 (8th Cir. 1996) (noting that "Minnesota has an obvious interest in providing a local forum in which its residents may litigate claims")). The Court of Appeals acknowledged, "Here, none of the Plaintiffs are North Dakota residents, suggesting that the forum state's interest is not implicated with respect to providing a forum for its residents," citing this Court decision *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 114 (1987), but nonetheless ruled that "this factor does not outweigh the first three 'primary' factors.'" App. 7 (*citing K-V Pharm. Co.*, 648 F.3d at 592- 93). "Thus, it does not undermine the propriety of jurisdiction here," the court ruled.

The Court of Appeals ruled that "the fifth factor, convenience of the parties, does not weigh in favor of exercising jurisdiction" either but "does not change the outcome here."

> Although the at-issue properties are in North Dakota, it cannot fairly be said that it is convenient for the parties—all Singapore

> residents and citizens—to litigate in North Dakota. Nonetheless, because the fifth factor carries less weight, any inconvenience to the parties does not undermine the propriety of jurisdiction here. Moreover, Defendant was willing to travel to North Dakota to advance the alleged investment scheme, so his complaint that it would be inconvenient for him to litigate in North Dakota rings hollow. Based on the weight of the first three factors and the totality of the circumstances, Defendant's "conduct and connection with [North Dakota] [were] such that he should [have] reasonably anticipate[d] being haled into court there." *See Burger King, 471 U.S. at 474 (quoting World-Wide Volkswagen, 444 U.S. at 297*). Accordingly, we conclude that the exercise of personal jurisdiction over Defendant was proper [App. 7-8]

The Court of Appeals declined to consider *forum non conveniens*, stating that defendant did not sufficiently raise the argument in the District Court. App. 9.

With regard to the grant of summary judgment, the Court of Appeals rejected Mr. Ee's argument that Fed. R. Civ. Pr. 56 required the District Court to assess all of the evidence that plaintiffs' counsel submitted with the summary judgment motion, with the Court of Appeals ruling that the "deemed admitted" Requests for Admissions were sufficient standing alone to enter the $852,638.81 judgment against Mr. Ee – even if the actual sales contracts the plaintiffs had signed and the other documents attached to plaintiffs' summary judgment motion belied the central legal elements of

the breach of contract and other claims on which plaintiffs' counsel demanded entry of judgment against the foreign Mr. Ee:

> The Requests asked Defendant to admit liability for all five counts of the amended complaint, including the elements of each claim and underlying facts. Regarding Count 1—violation of the Securities Act of 1933, 15 U.S.C. § 77a et seq.—Defendant was asked to admit that he violated the Securities Act of 19338 and that he was liable to Plaintiffs for the violations. See R. Doc. 50-1, at 1-5 (Requests Nos. 1, 3-4, 6-7, 11-14, 17-20, 22-26, 31-32). Regarding Count 2—violation of the North Dakota Securities Act for offering and selling unregistered securities—Defendant was asked to admit that he acted as an offeror/seller of NDD securities and as NDD's agent, in which he offered and sold NDD securities that were unregistered and not exempt from registration in violation of N.D. Cent. Code § 10-04-04; and that he was liable to Plaintiffs for these violations. See R. Doc. 50-1, at 1-6 (Requests Nos. 1-5, 7, 11-14, 19-20, 24, 33, and 40). Regarding Count 3—violation of the North Dakota Securities Act for sales of securities by unlicensedagents—Defendant was asked to admit that he acted as a seller of NDD securities, that he acted as NDD's agent, that he was unlicensed to sell securities in violation of N.D. Cent. Code § 10-04-10, and that he was liable to Plaintiffs for these violations. See R. Doc. 50-1, at 1-6 (Requests Nos. 1-5, 7, 10-11, 14-16, 19-21, 27, 29, 30, 34, and 40). Regarding

Count 4—violation of the North Dakota Securities Act for sales of securities through untrue statements and omissions—Defendant was asked to admit that he sold and aided in selling securities to Plaintiffs without disclosing material facts in violation of N.D. Cent. Code § 10-04-15(2) (including that the investments were securities, the securities were unregistered, and Defendant was receiving commissions); and that he was liable to Plaintiffs for these violations. See R. Doc. 50-1, at 1-6 (Request Nos. 1, 3-7, 11, 17-20, 22-26, 28-29, 33, 35-40).

Finally, regarding Count 5—negligence under North Dakota law—Defendant was asked to admit that he owed Plaintiffs a duty of care (to, among other things, make sure that the investments were issued in accordance with securities laws), that he breached the duty of care (by, among other things, failing to make sure that the investments complied with securities laws), and that his breach actually and proximately caused Plaintiffs' injuries (investment losses). See R. Doc. 50-1, at 1, 7-8 (Requests Nos. 1, 3, 41-44); see also *Doan, 632 N.W.2d at 820* (stating negligence standard under North Dakota law). Because the Requests were deemed admitted, Defendant admitted to violating federal securities law, violating North Dakota securities laws, and to being negligent under North Dakota law. [App. 10-12]

REASONS FOR GRANTING THE PETITION

I. The Court should clarify the due process limits of specific jurisdiction over a foreign person.

Most decisions address jurisdiction over foreign companies, not people. The Court should clarify the due process requirements for obtaining specific jurisdiction over a foreign person named as a defendant in a lawsuit in our Country.

Here, none of the parties are citizens or even residents of the United States, let alone of North Dakota specifically. They all live and work in Singapore, where they had their investment group out of which Mr. Ee committed his alleged wrongs.

Do our laws really envision that a dispute solely among Singaporeans that arose in Singapore where the parties are from will be litigated in our Country's courts, rather than in the county where the parties are from, where they live and work, and where the "untrue statements," "sales," "negligence" and other charged wrongs by the foreign defendant occurred?

If United States citizens who lived in North Dakota and had an investment group there claimed they were defrauded by misrepresentations made to them by a fellow North Dakota group member, would we expect the lawsuit to take place in our County, in North Dakota where all the parties are from and had their investment group from which the claims arose, or would we expect the United States citizens to go litigate their dispute in the foreign country where the investment happened to be located? Any sensible

person would conclude the former. The Due Process Clause's limits on personal jurisdiction over a foreign person should not be so stretched that it defies such common sense.

By exercising personal jurisdiction over Mr. Ee in this case, the courts not only stretched the minimum contacts test too far, they permitted the very type of unfair litigation that due process and related principles of forum *non conveniens* are supposed to avoid. The *only* reason this lawsuit was filed in our Country is because plaintiffs' lawyers are United States lawyers. They represented the foreign plaintiffs in the lawsuit below while their clients remained in Singapore. Defendant Mr. Ee had no United States counsel. These lawyers obtained "deemed admitted" Requests for Admissions then summary judgment premised on them – even though the actual sales contracts and other documents belied plaintiffs' central assertions that Mr. Ee was a party to the contracts the plaintiffs signed, or an "agent" who "sold" securities for the actual wrongdoers who had absconded with everyone's money. Exercising personal jurisdiction over Mr. Ee in this lawsuit gave a tremendous advantage for plaintiffs, represented by United States counsel, over Mr. Ee, in Singapore without United States counsel.

We respectfully submit that exercising personal jurisdiction over this foreign person exceeds the limits of the minimum contacts test and disregards the overriding requirement that it must be "reasonable" for the United States court to exercise personal jurisdiction such that it does not "offend traditional notions of fair play and substantial justice."

Recently, in *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1024–25, 209 L. Ed. 2d 225 (2021), the Court stressed again that minimum contacts require a showing that the defendant "purposefully availed" himself "of the privilege of conducting activities within the forum State," *citing Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985), *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958). The contacts cannot be "isolated," the court stressed (*citing Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 774, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984)). The defendant must have deliberately "reached out beyond" his home -- "by, for example, 'exploi[ting] a market' in the forum State or entering a contractual relationship centered there," *quoting Walden v. Fiore*, 571 U.S. 277, 285, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014).

The plaintiff 's claims "must arise out of or relate to the defendant's contacts" with the forum. *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cty.*, 137 S. Ct. 1773, 1780, 198 L. Ed. 2d 395 (2017) (*quoting Daimler AG v. Bauman*, 571 U.S. 117, 127, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014); *Burger King Corp.*, 471 U.S. at 472; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984); *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. & Placement*, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945). "[T]here must be 'an affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation.'" *Bristol-*

Myers Squibb Co., 137 S. Ct. at 1780 (*quoting Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011)); *Ford Motor Company*, 141 S. Ct. at 1024–25.

In the seminal *International Shoe* decision, the Court founded specific jurisdiction on an idea of reciprocity between a defendant and the forum state. When the defendant "exercises the privilege of conducting activities within a state" he "enjoy[s] the benefits and protection of [its] laws" and the state, therefore, may hold the company to account for related misconduct. *International Shoe Co.*, 326 U.S. at 319; *Burger King Corp.*, 471 U.S. at 475. The doctrine is rooted on the notion of "fair warning" to the defendant—knowledge that "a particular activity may subject [the defendant] to the jurisdiction of a foreign sovereign." *Burger King Corp.*, 471 U.S. 462; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 580, 62 L. Ed. 2d 490 (1980) (referring to "clear notice").

Can it really be concluded that Mr. Ee "reached out" to North Dakota in this sense? All the plaintiffs are from Singapore, not North Dakota.

The courts below said that Mr. Ee had "extensive contacts with North Dakota" "in connection with his marketing and sales of the NDD investments and real estate to Plaintiffs." But the injuries that plaintiffs claim Mr. Ee caused to them arose from "untrue statements" that Mr. Ee made to plaintiffs in Singapore where they all live, work, and have their investment group.

The investment happened to be in North Dakota, but the actionable conduct—the alleged misrepresentations by Mr. Ee to his fellow group members—occurred in Singapore. Plaintiffs charged that "Defendant violated Section 12(a)(2) of the Securities Act of 1933" and North Dakota law and "acted negligently by making material misstatements and/or omissions regarding the North Dakota-issued NDD Securities." These "material misstatements" occurred in Singapore, not in North Dakota or in the United States at all.

The Court should grant Certiorari here to clarify that this does not satisfy the "arise out of" or "relate to" aspects of the minimum contacts test. The Court should stress, further, that the minimum contacts required for a United States court to exercise specific jurisdiction applies with even greater force where the defendant is a foreign citizen and resident, not merely a resident of another state. *Cf. Walden*, 571 U.S. 277, (no jurisdiction over out of state officer because no part of officer's conduct occurred in forum state).

The Court should define further the limits of the "relate to" provision by declaring that Mr. Ee's single visit to the place where the investment happened to be located did not satisfy this test. Though *Ford Motor Company*, 141 S. Ct. at 1026–27, rejected Ford's argument for an "exclusively causal test of connection" and ruled some relationships will support jurisdiction without a causal showing under the "relate to" portion of the minimum contacts test, the Court also noted that this "does not mean anything goes. In the sphere of specific jurisdiction, the phrase 'relate to' incorporates

real limits, as it must to adequately protect defendants foreign to a forum." *Ford Motor Company*, 141 S. Ct. at 1026–27. The Court said that "allowing jurisdiction in these cases treats Ford fairly, as this Court's precedents explain. In conducting so much business in Montana and Minnesota, Ford 'enjoys the benefits and protection of [their] laws'—the enforcement of contracts, the defense of property, the resulting formation of effective markets. *International Shoe Co.*, 326 U.S. at 319. All that assistance to Ford's in-state business creates reciprocal obligations—most relevant here, that the car models Ford so extensively markets in Montana and Minnesota be safe for their citizens to use there. Thus our repeated conclusion: A state court's enforcement of that commitment, enmeshed as it is with Ford's government-protected in-state business, can 'hardly be said to be undue.'" *Ford Motor Company*, 141 S. Ct. at 1029–30.

Does the Court's rationale in *Ford Motor Company* support the District Court's exercise of personal jurisdiction over Mr. Ee in this case? Could Mr. Ee have "reasonably anticipated" being sued in the District Court by his fellow Singaporean investment group members for whatever he said to them in Singapore about the North Dakota man camps in which they all were investing?

Do Mr. Ee's contacts with North Dakota fall within the allowable limits of the "relate to" jurisdiction found proper in *Ford Motor Company*, or was jurisdiction over Mr. Ee improper under *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1785, where the Court said that jurisdiction was improper because the forum State and

defendant's activities in it lacked sufficient connection to the plaintiffs' claims, and the plaintiffs there, like the Singaporean plaintiffs here, were not citizens or residents of the forum.

The Eighth Circuit below applied a five-factor test to measure defendant's contacts with the forum: (1) the nature and quality of the contacts with the forum state; (2) the quantity of those contacts; (3) the relation of the cause of action to the contacts; (4) the interest of the forum state in providing a forum for its residents; and (5) the convenience of the parties, citing *Land-O-Nod Co. v. Bassett Furniture Indus., Inc.*, 708 F.2d 1338, 1340 (8th Cir. 1983). The Court of Appeals said that factors (4) and (5) are of "lesser importance," however, and though they weighed against the exercise of specific jurisdiction over Mr. Ee in this case were not sufficient to defeat plaintiffs' claim of jurisdiction.

The Court should clarify that these fourth and fifth factors granted only "lesser important" under Eighth Circuit precedent are, in fact, an important part of the specific jurisdiction inquiry limiting a court's exercise of jurisdiction over a defendant—particularly a foreign person as in this case—to only that which is "reasonable, in the context of our federal system of government" and "does not offend traditional notions of fair play and substantial justice.'" *Ford Motor Company*, 141 S. Ct. at 1024 (*quoting International Shoe Co.*, 326 U.S. at 316–17).

The Court should clarify the importance of applying *forum non conveniens* principles in assessing that "reasonableness" aspect of personal jurisdiction law. *Ford Motor Company*, 141 S. Ct. at 1025, stressed that

forums have interests relative to each other in regards to personal jurisdiction – one state's "sovereign power to try" a suit may prevent "sister States" from exercising their authority over the suit. Specific jurisdiction limits the exercise of a court's authority over "absent" defendants, but it also seeks to ensure that states with "little legitimate interest" in a suit do not encroach on states – or here nations - more affected by the controversy. *Bristol-Myers Squibb Co.*, 137 S. Ct. at 1780.

Here, Singapore would certainly seem to have the greater interest in adjudicating breach of contract, fraud, and related claims by some of its citizens against another. Plaintiffs argued in the Court of Appeals below, "North Dakota certainly has an interest in adjudicating the sale of unregistered and nonexempt—and therefore unlawful—securities related to real property located in North Dakota and issued by a North Dakota company." But this was already part of the lawsuits by the SEC against Gavin and Hogan, and part of the claims against the lawyers involved. North Dakota's interests have little to do with this dispute between foreigners over charged misrepresentations, negligence, and other wrongs committed by one investment member against his fellow members. That the investment was in North Dakota was pure happenstance; it did not give North Dakota or any of its citizens a real interest in this lawsuit in a constitutional sense.

The alleged misrepresentations and wrongs by Mr. Ee occurred almost entirely—if not entirely—in Singapore. The place where the alleged wrongs

occurred is typically the place whose laws apply, which also weighed heavily against exercising personal jurisdiction over the foreign defendant here, the Court should clarify, *see*, *e.g.*, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 705–07, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004) (noting "dominant principle in choice-of-law analysis for tort cases was lex loci delicti: courts generally applied the law of the place where the injury occurred"), *citing Richards v. United States*, 369 U.S. 1, 11–12, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962) ("The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties"); Restatement (First) of Conflict of Laws § 379 (1934) (defendant's liability determined by "the law of the place of wrong"; same principle for torts of fraud and torts involving harm to property); *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 96 S. Ct. 167, 46 L. Ed. 2d 3 (1975) (noting Texas would apply Cambodian law to wrongful-death action involving explosion in Cambodia of an artillery round manufactured in United States).

The courts below disregarded these critical aspects of due process law—that even where a defendant purposefully established minimum contacts with the forum, the presence of other considerations may "render jurisdiction unreasonable" constitutionally, *Burger King Corp.*, 471 U.S. at 477. The exercise of jurisdiction must comport with "fair play and substantial justice" and be "reasonable" as judged by (1) the extent of the defendants' purposeful injection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state;

(4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

The Eight Circuit failed to apply those factors. Their precedent that the fourth and fifth factors of their test are of "lesser importance" fails to properly apply the "reasonable" component of governing due process law and the related principles of *forum non conveniens*. Applying those factors here - nationalities of the parties, location of the evidence, location and availability of witnesses, respective burdens on the parties of proceeding in the North Dakota forum, and the potential impact of the lawsuit on the relationship between the United States and another sovereign nation – they all weigh in favor of declining to exercise jurisdiction over this almost purely Singaporean dispute. This *forum non conveniens* analysis is consistent with *Asahi Metal Industry Co.*, 480 U.S. at 114, where the Court said, "The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." Only Courts of Appeals seem to have addressed the showing required for a foreign individual defendant to show that the exercise of personal jurisdiction over him in the case at hand would be "unreasonable," *see, e.g.*, *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708 (1st Cir. 1996) (noting that because it is almost always inconvenient and costly for foreign party to litigate in state court, defendant must demonstrate that exercise of jurisdiction is onerous in

special, unusual, or other constitutionally significant way); *Ballard v. Savage*, 65 F.3d 1495 (9th Cir. 1995) (addressing issue).

We respectfully ask the Court to grant Certiorari in this case to correct the wrongful assertion of jurisdiction over Mr. Ee by the District Court and to clarify the important principles of due process law discussed above.

II. The Court should clarify the extent to which a district court is required to assess the evidence that the plaintiff submits on summary judgment, and related aspects of Fed. R. Civ. Pr. 56.

The Court of Appeals' ruling that summary judgment for plaintiffs could be premised *solely* on the "deemed admitted" Requests for Admissions that plaintiffs' counsel obtained against the foreign defendant contradicts the language of Federal Rule of Civil Procedure 56, part (c) of which provides,

> (1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed **must support the assertion by**:
>
> (A) **citing to particular parts of materials in the record**, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or
>
> (B) **showing that the materials cited do not establish the absence or presence of a**

> **genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact**.
>
> … (3) Materials Not Cited. The court need consider only the cited materials, **but it may consider other materials in the record**.

(emphasis added)

Here, plaintiffs cited to particular parts of the record by submitting with their summary judgment motion not only the "deemed admitted" Requests for Admissions, but the underlying documents on which plaintiffs premised their claims on which they demanded judgment—including the sales contracts the plaintiffs signed. Yet the District Court disregarded the evidence, and the Court of Appeals ruled, "assuming Defendant is correct about the alleged shortcomings in some of Plaintiffs' evidence, the deemed-admitted Requests for Admission alone demonstrate that Plaintiffs were entitled to summary judgment." App. 10.

The Court should grant Certiorari here to clarify that a District Court must review the materials the plaintiff has submitted in its summary judgment motion in order to determine whether the materials the moving party has "cited" show that a fact cannot be disputed, or that there is an absence of a genuine dispute on material facts that establish the elements of the moving party's claims. Where the District Court disregards the "cited" materials the moving party has submitted in its own summary judgment motion, and

those materials belie the material facts on which the moving party is relying for its claims, the District Court violates subsection (1) (A) and (B) of Fed. R. Civ. Pr. 56, and abuses its discretion with regard to the "may" provision of subsection (3) of the Rule.

In the District Court in this case, plaintiffs submitted only three exhibits in support of their summary judgment motion: Exhibit A - Plaintiffs' Requests for Admissions, which had been deemed admitted; Exhibit B - form affidavits, obviously prepared by a lawyer and not by the foreign plaintiffs, parroting the elements of the causes of action and attaching the sale documents; and Exhibit C - a one page Affidavit from Plaintiffs' lawyer stating that the Requests for Admissions were served on defendant and no response was received. Plaintiffs contended in part as follows in their motion for summary judgment:

> Defendant offered and sold unregistered, nonexempt and fraudulent securities and acted as an agent on behalf of North Dakota Developments, LLC ("NDD") to Plaintiffs. See Exhibit A (Plaintiffs' Requests for Admissions) and Exhibit B (Plaintiffs' Affidavits) appended hereto.
>
> Defendant utilized offering materials of NDD that contained material misrepresentations and omissions. See Exhibit A appended hereto.
>
> Defendant is strictly liable to plaintiffs. See Exhibit A appended hereto.

Defendant is not and has never been a licensed securities agent. See Exhibit A appended hereto.

Defendant's National Registration Identity Card (NRIC) number is S1305526B.

Defendant negotiated and accepted compensation based on sales commissions for the sales of unregistered NDD securities to Plaintiffs and did not disclose this to Plaintiffs. See Exhibit A and Exhibit B, appended hereto.

Plaintiffs relied upon the fraudulent misrepresentations and omissions of Defendant. See Exhibit A appended hereto.

Plaintiffs, as a direct and proximate result of Defendant's sales of NDD, have been damaged. See Exhibit A and Exhibit B, appended hereto.

Defendant owed a duty of care to the Plaintiffs and breached that duty. See Exhibit A appended hereto.

Defendant has not responded to Plaintiffs' Request for Admissions. See Exhibit C appended hereto (Affidavit of Plaintiffs' Counsel James Booker). Defendant's failure to respond to Plaintiffs' Requests for Admissions deems those facts admitted and summary judgment warranted.

Fed. R. Civ. P. 9 provides, "In alleging fraud or mistake, a party must state with particularity the

circumstances constituting fraud or mistake." Plaintiffs' own summary judgment submission does not meet that standard. The Affidavits of the individual plaintiffs submitted as Exhibit B by plaintiffs' counsel were boilerplate affidavits drafted by plaintiffs' counsel that simply parroted the required elements of the claims asserted and on which plaintiffs' counsel demanded entry of judgment. No specifics are set forth for any individual plaintiff as to what Mr. Ee said, when he said it, who heard the statement, whether it was reduced to writing, etc. The Affidavit of Chang Mun Kum, for instance, simply states,

> 3. I along with TEO KHIM HO, KOH HWEE BEN ERIN and NG YIM HAR was offered and sold an investment in North Dakota Developments, LLC ("NDD") by Defendant WINSTORN EE HOONG LIANG on January 2, 2013. See Exhibits 1 and 2 to Christina Affidavit.
>
> I relied upon Defendant WINSTORN EE HOONG LIANG's representations regarding the NDD investments that were offered and sold to me.
>
> 4. Defendant WINSTORN EE HOONG LIANG acted as NDD's agent and sold the investment on their behalf in the form of Land Lease and Management Agreements and Membership Units.
>
> 5. Defendant WINSTORN EE HOONG LIANG, never informed me that the NDD investments

> he sold me were unregistered securities, that NDD and its various projects were not profitable, that most of the NDD projects were never built, that NDD was paying outsized commissions to salespersons like himself, that the NDD founders were siphoning enormous amounts of money from NDD and using it for personal purposes, and that NDD was a fraudulent, Ponzi-type scheme.
>
> 6. The damages TEO KHIM HO, KOH HWEE BEN ERIN, NG YIM HAR and I incurred as a result of Defendant' s misconduct and the fraudulent investments sold to me by Defendant WINSTORN EE HOONG LIANG is $196,035.00. See Exhibits 1 and 2 to Christina Affidavit.

The documents attached to Mr. Chang's Affidavit throw serious doubt on plaintiffs' central charge that Mr. Ee was the "agent" for NDD who "sold" on NDD's behalf the man camps to plaintiffs. The "Bill of Sale" attached to Mr. Chang's Affidavit identifies the "SELLER" as North Dakota Developments, LLC and the "BUYER" as "Koh Hwee Ben Erin & Teo Khim Ho & Ng Yim Har & Chang Mun Kum." This Bill of Sale provides that Seller "grants, sells, conveys, transfers and delivers to BUYER the following Studio"—identifying a particular unit of the man camps. Attached is an accompanying letter from NDD's Danny Hogan to the Buyers referencing their purchase of the "executive hotel studio" unit. A "Studio Purchase and Sale Agreement" again identifies the agreement as between North Dakota Developments and the particular plaintiffs. *Mr. Ee is not identified or noted*

anywhere in these written sale documents attached to plaintiffs' summary judgment submission. Id.

One of plaintiffs' central charges below was that each plaintiff "relied upon the fraudulent misrepresentations and omissions of Defendant." Yet paragraph 3 of the Sales Agreement attached to plaintiffs' summary judgment motion provides, "3. No covenants or representations. Buyer acknowledges that he/she has not relied on any plans, brochures, advertisements, representations, covenants, warranties, or statements of any kind, whether made by Seller, its agents, assigns, or otherwise, except as specifically set forth in this Agreement and the Operating Agreement of the Company. Buyer has determined to purchase the Studio and related membership interest in NDD Holdings, LLC in reliance on his/her own investigation and judgment." The District Court did not apply any legal principles of North Dakota law—or of Singaporean law—to determine to what extent plaintiffs' claims against Mr. Ee, the claimed "agent" of NDD, might be precluded by this paragraph in the written agreement that plaintiffs had signed.

The Court should clarify that the District Court erred by granting summary judgment to plaintiffs solely on the "deemed admitted" Requests without assessing these documents also "cited" by plaintiffs' counsel in the summary judgment motion that plaintiffs' counsel filed. The ruling in this case conflicts with rulings by other Circuits that Rule 56 *does not* allow district courts to automatically grant summary judgment simply because a summary judgment motion

is unopposed. *Interstate Power Co. v. Kansas City Power & Light Co.*, 992 F.2d 804, 807 (8th Cir. 1993) ("Even if a motion for summary judgment on a particular claim stands unopposed, the district court must still determine that the moving party is entitled to judgment as a matter of law on that claim"); *Jaroma v. Massey*, 873 F.2d 17 (1st Cir. 1989) ("a district court cannot provide by local rule that a motion for summary judgment will be automatically granted when the opposing party fails to respond"); *Jackson v. Fed. Exp.*, 766 F.3d 189, 194–95 (2d Cir. 2014); *Anchorage Assocs. v. Virgin Islands Bd. of Tax Rev.*, 922 F.2d 168, 175 (3d Cir. 1990) (for entry of summary judgment, district court must find that judgment for moving party is "appropriate"; where the moving party has the burden of proof on the relevant issues, this means that the district court must determine that the facts specified in or in connection with the motion entitle the moving party to judgment as a matter of law).

In this case, in their first cause of action, plaintiffs charged that Mr. Ee was liable because "in connection with the offer or sale of securities" **he made "untrue statements of a material fact** or omits a material fact necessary in order to make the statements, in light of the circumstances under which they were made, not misleading" and that **plaintiffs** "**relied on the misrepresentations and omissions**" and "**have not and could not reasonably discover the misrepresentations and omissions**." In their second cause, plaintiffs charged that **Mr. Ee offered or sold a security** that was not registered nor exempt from registration and that Mr. Ee was an "agent" under N.D.C.C. § 10-04-02.1. In their third cause, plaintiffs

charged that "**Defendant acted as a 'seller' of NDD securities and an 'agent' of NDD**." In their fourth cause, plaintiffs charged that **defendant made "untrue statements and omissions** in violation of N.D.C.C. § 10-04-15(2)[.]" In their fifth cause, plaintiffs charged that defendant was liable for negligence—relying on North Dakota law even though all the parties, and all the communications between them, occurred in Singapore where they live, work, and had their investment group. The Affidavits and sales documentation that plaintiffs submitted on summary judgment did not establish a *prima facie* case of those required legal elements on which plaintiffs demanded their massive judgment.

Rule 56 (e) likewise provides that "Affidavits or Declarations" "used to support or oppose a motion" must "be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." How did the boilerplate affidavits written by plaintiffs' United States counsel and merely signed by the foreign plaintiffs satisfy this requirement of the Rule? The affidavits are identical except for the names on them. They parrot what the plaintiffs' lawyers know is needed to satisfy each element of the claims on which the demanded judgment was being premised. Were these really "properly supported" assertions of fact under subsection (e) of the Rule? The Court should grant Certiorari to clarify these important aspects of summary judgment procedure that affect not only Mr. Ee's case here but countless parties involved in civil litigation in lower federal courts.

CONCLUSION

The Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

MICHAEL CONFUSIONE
Counsel of Record
HEGGE & CONFUSIONE, LLC
P.O. Box 366
Mullica Hill, NJ 08062-0366
(800) 790-1550
mc@heggelaw.com

Counsel for Petitioner

Dated: September 22, 2021