No. 22-670

In The
Supreme Court of the United States

PACESETTER CONSULTING, LLC,

Petitioner,

v.

HERBERT A. KAPREILIAN; EASTSIDE PACKING, INC.; CRAIG L. KAPREILIAN; FRUIT WORLD NURSERY, INC.; AGRICARE, INC.; TOM AVINELIS; MARK R. BASSETTI; MICHAEL MOORADIAN; DUDA & SONS, LLC; A. DUDA & SONS, INC.; DUDA FARM FRESH FOODS, INC.; AND DAN DUDA,

Respondents.

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

BRIEF IN OPPOSITION FOR MARK BASSETTI, DANIEL DUDA, A. DUDA & SONS, INC., AND DUDA FARM FRESH FOODS, INC.

DAVID L. O'DANIEL
GORDON REES SCULLY MANSUKHANI, LLP
Two North Central Ave. #2200
Phoenix, AZ 85004
602-794-2472
Dodaniel@grsm.com

Counsel for Respondents Mark Bassetti, Daniel Duda, A. Duda & Sons, Inc., and Duda Farm Fresh Foods, Inc.

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review an unpublished Memorandum Decision that does not discuss "special appearances," does not use the terms or concepts of "special appearance" as a basis for the Decision, created no conflict with any court of appeals' decision, correctly affirmed the dismissal of the Duda Corporate Entities on the basis that they were not sufficiently served with process, and ruled in favor of Pacesetter on the sufficiency of service on Daniel Duda but affirmed the district court's dismissal of Duda on the basis of harmless error, all in a fact specific case.

2. Whether this Court should review an unpublished Memorandum Decision that considered and analyzed the benefit of the bargain damages theory but found no cognizable evidence of damages for any claim.

3. Whether this Court should review an unpublished Memorandum Decision that does not address or use as its basis the statute of limitations, discovery rule, or waiver by conduct.

PARTIES TO THE PROCEEDING

Petitioner's List of Parties is inaccurate. Duda & Sons, LLC is a non-existent entity and is not a party to this proceeding. Michael Mooradian is not a party to this proceeding.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Respondents A. Duda & Sons, Inc., and Duda Farm Fresh Foods, Inc., are Florida corporations and neither has a parent corporation. No publicly traded company owns ten percent (10%) or more of either corporation.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

CITATION OF DECISIONS BELOW

Pacesetter Consulting, LLC v. Kapreilian, et al., United States District Court for the District of Arizona, No. 2:19-cv-003880. Judgment entered July 27, 2021.

Pacesetter Consulting, LLC v. Kapreilian, et al., United States Court of Appeals for the Ninth Circuit, No. 21-16244. Memorandum Disposition entered September 26, 2022.

Pacesetter Consulting, LLC v. Kapreilian, et al., United States Court of Appeals for the Ninth Circuit, No. 21-16244. Order entered October 18, 2022.

STATEMENT OF JURISDICTION

On September 26, 2022, the United States Court of Appeals for the Ninth Circuit filed its unreported opinion, entitled Order and Memorandum Decision (Pet. App. 2), affirming the July 27, 2021 Order of the United States District Court for the District of Arizona. Dkt. 280; Pet. App. 10.

On October 18, 2022 the Ninth Circuit denied Pacesetter's Petition for Panel Rehearing (Dkt. 69). Dkt. 70; Pet. App. 78.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

Pacesetter fails to establish any compelling reasons why this Court should grant its Petition for Writ of Certiorari. The issues Pacesetter sets forth do not raise a question of federal law on which federal circuit courts conflict, the Ninth Circuit did not render its unpublished Memorandum Decision in a manner that conflicts with this Court's precedent, nor does the Petition present any important federal law issues of great national significance. Though this Court has not previously addressed these particular issues, they are not the type that this Court should have addressed in the past nor should they be addressed now.

Pacesetter urges this Court to examine three issues – two phantom issues that were neither addressed nor determined by the Ninth Circuit Court of Appeals and issues pertaining to the interpretation of state law. First, the Petition suggests that this Court examine the allegedly suspect practice of "special appearances," mischaracterizing the same as something "filed daily in federal courts" and an issue of great importance requiring resolution. Second, the Petition asks this Court to examine whether or not the district court's refusal to apply a specific substantive Arizona state law damages rule was proper – a fact specific inquiry of no importance to anyone other than the immediate parties. Third, the Petition encourages this court to again examine the propriety of the district court's failure to apply Arizona's waiver-by-conduct doctrine and certain statutes of limitation principles.

As explained below, however, the Ninth Circuit *did not* address the issue of special appearances. The term "special appearance" does not appear in the Ninth Circuit's Memorandum Decision at all. Similarly, the Memorandum Decision does not contain the words "statute of limitations," "discovery rule," or "waiver by conduct" and does not use these state law principles as the basis for its Decision. A Petition cannot challenge issues that were not addressed by the lower court. Further, the remaining issue is one of fact-specific state law. As a result, the Petition for Writ of Certiorari should be denied.

STATEMENT OF THE CASE

Respondents Mark Bassetti ("Bassetti"), Daniel Duda ("Duda"), A. Duda & Sons, Inc. ("AD&S"), and Duda Farm Fresh Foods, Inc. ("DFFF") (AD&S and DFFF are collectively "Duda Corporate Entities") (all are collectively "Duda Respondents") do not agree with most of the statements in the Introduction of Pacesetter's Statement of the Case, but they do agree that the alleged issues are "mundane" and involve primarily "state law on . . . [the lack of evidence of] damages and statutes of limitations" that are not the subject of conflicting federal decisions. Pet. 2. They also agree that these are not issues of "personal rights and vast constitutional import, that grab public attention. . . ." *Id*. The Duda Respondents agree that this Court has not addressed these alleged issues, but unlike Pacesetter's implication, these issues are not the type that should

have been addressed in the past nor should these issues be addressed now by this Court.

The Petition results from the Ninth Circuit Court of Appeals affirming the district court's dismissal of all claims based on the lack of cognizable evidence of damages, which is an element of all the claims, and dismissing the Duda Corporate Entities for lack of service of process. The Ninth Circuit found that Duda had been properly served, but the district dismissal on insufficient service grounds was harmless error based on the lack of cognizable evidence of damages.

I. Factual Background

Pacesetter is the assignee of the purported claims of the Judson C. Ball Revocable Trust ("Trust"), and Judson Ball is the trustee of the Trust and the managing member of Pacesetter.

In 1996, Judson Ball and/or the Trust based on an investment he made through the Trust, invested in Phoenix Orchard Group I and Phoenix Orchard Group II ("POG I and II" respectively), two limited partnerships involved in mandarin projects in California. Duda Respondents provide this background information to correct the incorrect implications created by Petitioner concerning the investment and the person involved in soliciting the investment. In 1996, John R. Norton, a close friend of Judson Ball, asked Mr. Ball to invest in the two limited partnerships, and Mr. Ball caused the Trust to invest without investigating the projects. Pet. App. 10-11. In fact, the district court determined that

Mr. Ball, "didn't read any of the relevant materials before investing." Pet. App. 12. Consequently, the district court found that "it was Ball's "extreme carelessness" that led to his alleged injuries, rather than misrepresentations made by the defendants." Pet. App. 12-13.

Duda and Bassetti were employed by AD&S, and AD&S provided marketing and sales of the mandarins when Craig Kapreilian and Fruitworld Nursery began growing mandarins. Duda Farm Fresh Foods, Inc. took over the role of AD&S and marketed and sold the mandarins for the company that contracted with POG I and II to operate the ranches and sell and market the mandarins. Pet. App. 62. The Duda Respondents had no contact with Mr. Ball, had no contract with him, and were not employed by him or the Trust, and did not solicit or participate in the investment by the Trust. United States District Court for the District of Arizona, Case 21-16244, Dkt. 207 (Bassetti Motion for Summary Judgment, Exhibit 1, 12/07/2020).

II. Procedural Background

In 2015, Mr. Ball and/or his Trust sued Mr. Norton and others in the Maricopa County Superior Court, which resulted in appellate opinions. In one of the lawsuits, the defendants forced the Trust to take back the investment plus interest and attorneys' fees. Mutual rescission was ordered in the Maricopa County Superior Court case, CV2015-011768. Pet. App. 12-13.

After litigating no less than 3 cases through the State of Arizona courts, Judson Ball decided to pursue

numerous parties in the district court. In February 2019, Pacesetter filed an Amended Complaint and named "Duda & Sons, LLC," a non-existent entity, as a defendant. The district court dismissed Duda for lack of personal jurisdiction and dismissed Duda & Sons, LLC for lack of jurisdiction over a non-existent entity. United States District Court for the District of Arizona, Case 21-16244, Dkt. 57 (ME, 4/15/2019). Pacesetter added the names of the Duda Corporate Entities in the Second Amended Complaint but did not serve them. Pacesetter added Duda back into the Third Amended Complaint ("TAC") and included the Duda Corporate Entities. United States District Court for the District of Arizona, Case 21-16244, Dkt. 129 (Third Amended Complaint, 12/23/2019). The Duda Corporate Entities were not served under Rule 4, Fed.R.Civ.P. Counsel for Pacesetter only served counsel for Bassetti. The district court granted a Motion to Dismiss Duda and the Duda Corporate Entities for insufficiency of service of process and other reasons. United States District Court for the District of Arizona, Case 21-16244, Dkt. 160 (Order, 7/30/2020).

Bassetti and all remaining Respondents filed Motions for Summary Judgment. The Third Amended Complaint did not allege claims for fraud, fraudulent misrepresentation, or fraudulent omission as asserted by Pacesetter, but alleged various Arizona tort and statutory claims against Bassetti including conversion, consumer fraud, fraudulent concealment, tortious interference with contract, unjust enrichment, and aiding and abetting fraud. The district court granted

the Motion for Summary Judgment filed by Bassetti on the basis of no cognizable evidence of damages for any claim and no evidence of the other elements of the various claims against Bassetti. Pet. App. 65.

Pacesetter appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit held oral argument only on the issue of the dismissal of Duda and the Duda Corporate Entities. In an Order and Memorandum Decision not published ("Memorandum Decision" or "Decision"), the Ninth Circuit affirmed the grant of summary judgment to Bassetti on the lack of cognizable evidence of damages, affirmed the dismissal of the Duda Corporate Entities on the basis of insufficient service under Rule 4, and found the district court erred by dismissing Duda for insufficient service of process. The Ninth Circuit found service of process on Duda was sufficient under Rule 5, Fed.R.Civ.P., but held that the error in dismissing Duda was harmless based on the lack of cognizable evidence of damages and affirmed the dismissal. Pet. App. 8-9.

Contrary to the Petition, neither the district court's decision nor the Ninth Circuit's Memorandum Decision were based on the concept of special appearances. Tellingly, the Ninth Circuit Decision does not even contain those words and those words are not a basis for its Decision. Similarly, the Memorandum Decision does not contain the words "statute of limitations," "discovery rule," or "waiver by conduct" and does not use these state law principles as the basis for the Decision. Pet. App. 1-9.

REASONS FOR DENYING THE PETITION

Before discussing the reasons for denying the Petition, the Duda Respondents advise this Court that Pacesetter Consulting, LLC ("Pacesetter") misstated and omitted facts in its Petition. Pacesetter incorrectly presents issues in its Questions Presented that are not the bases of the Ninth Circuit's Memorandum Decision. For example, the type of appearance presented as the issue in the first Question Presented is not in the Memorandum Decision from the Ninth Circuit. The Memorandum Decision does not discuss general or special appearances, does not use those concepts as a basis for the Decision and does not contain those terms. Pacesetter failed to advise this Court that the Ninth Circuit found that the district court erred in dismissing Duda, but held that the error was harmless given the lack of cognizable evidence of damages, an issue for which review is not sought.

Pacesetter also failed to advise this Court that the Memorandum Decision does not address Arizona state law related to statutes of limitations, the discovery rule, or waiver by conduct and that those terms are not in the Decision. Additionally, Pacesetter failed to advise this Court in connection with the second Question Presented that the Decision is based on the lack of cognizable evidence of damages and fully discusses the benefit of the bargain damage measure and the lost opportunity cost measure of damages. This case is based on the specific facts and lack of evidence, and thus does not merit certiorari. These issues and others are discussed below.

I. The Ninth Circuit's Unpublished Memorandum Decision Affirming the Dismissal of Duda and the Duda Corporate Entities Does Not Merit Review

A. Contrary to Pacesetter's First Question and Related Argument on the Dismissal of Duda and the Duda Corporate Entities, No Issue Exists Related to a Dismissal Based on Special Appearances and the Ninth Circuit's Unpublished Memorandum Decision Did Not Use those Words or Concept as a Basis for Its Memorandum Decision

Pacesetter seeks review on a question it presents as dismissals purportedly based on special appearances, but this issue is not presented by this case and is not a basis of the Memorandum Decision. After multiple irrelevant questions, Pacesetter states the question as:

> When, as here, defendants make a purported "special appearance" and obtains dismissal from a case without prejudice, may the plaintiff serve those former specially appearing lawyers with a copy of an amended complaint – or must the plaintiff serve the amended complaint on the former defendants that had made the special appearances?

Pacesetter incorrectly contends that the Ninth Circuit affirmed dismissal of Duda and the Duda Corporate Entities on the basis that counsel made a special appearance on their behalf and service of process,

pursuant to Rule 5, Fed.R.Civ.P., was insufficient. Pacesetter is incorrect.

The concept of a special appearance is not a basis for the unpublished Memorandum Decision from the Ninth Circuit. A search of the entire Memorandum Decision reveals that the words "special appearance" do not appear in the Memorandum Decision nor is the concept represented by those words a basis of the Memorandum Decision. Pet. App. 7-9. The Ninth Circuit actually based its affirmance of the dismissal of the Duda Corporate Entities in the Memorandum Decision on the insufficiency or lack of service of process on the Duda Corporate Entities pursuant to Rule 4, Fed.R.Civ.P. The Ninth Circuit held that the Duda Corporate Entities had never been served with process pursuant to Rule 4, Fed.R.Civ.P., and Pacesetter provided no citation to any contrary evidence. Pet. App. 7-8. The Ninth Circuit stated:

> The district court did not err in dismissing the claims in the TAC against A. Duda & Sons, Inc. and Duda Farm Fresh Foods, Inc. (the "Duda Corporate Entities"). Pacesetter acknowledges that service of the First Amended Complaint ("FAC") on A. Duda & Sons, Inc. did not satisfy Federal Rule of Civil Procedure 4, because that complaint mistakenly named a non-existent entity, "Duda and Sons, LLC," as the defendant. Accordingly, Pacesetter was obligated to comply with Rule 4 when it served the Second Amended Complaint ("SAC"), which named the Duda corporate entities for the first time, or when it served the TAC.

Pet. App. 7. The court concluded "[b]ecause Pacesetter served the SAC and TAC on attorneys for the Duda corporate entities . . . but not by Rule 4, . . . the district court correctly dismissed the claims in the TAC against the Duda corporate entities for insufficient service of process." *Id.* at 7-8. The court said nothing about special appearances. Thus the issue of special appearance is not presented by the Decision.

As to Duda, the Ninth Circuit actually found the district court erred in dismissing Duda and found that service of process on the attorneys for Duda under Rule 5 was sufficient because of the earlier service under Rule 4. Pet. App. 8. The Ninth Circuit stated:

> The district court erred, however, in dismissing the claims in the TAC against Daniel Duda. Daniel Duda was properly served with the FAC under Rule 4. Although the district court dismissed the FAC's claims against Daniel Duda for lack of personal jurisdiction, the district court ultimately gave Pacesetter the opportunity to attempt to cure the jurisdictional defect by granting leave to file the SAC and TAC. Once proper service of the FAC was accomplished pursuant to Rule 4, Pacesetter was permitted to serve the later-amended complaints on Daniel Duda's attorney through the district court's electronic filing system, as allowed by Rule 5. [Citations omitted].

Id.

Regarding Duda, Pacesetter failed to advise this Court of this ruling in its favor. As discussed *infra*, Pacesetter's lack of cognizable evidence of damages, which applied to Duda, rendered the dismissal by the district court's error in finding an insufficiency of service and dismissing Duda a harmless error. With no ruling against Pacesetter on the service issue related to Duda, the reasons for denying the Petition are increased. Duda was not even correctly dismissed according to the Ninth Circuit, and does not present any issue of a dismissal based on a special appearance for review by this Court.

The basis for the Ninth Circuit's rulings is not a special appearance as argued by Pacesetter. Sufficiency of service of process as to Duda and the insufficiency of service of process as to the Duda Corporate Entities under Rule 4 are the bases for the rulings. The absence of any ruling based on special appearance, the question presented by Pacesetter, and the ruling in its favor on the sufficiency of service of process on Duda make review unwarranted.

B. No Conflict Is Created By the Memorandum Decision or Exists Among the Circuit Courts that Requires Review Regarding Special Appearances and Dismissals for Insufficiency of Service of Process

Pacesetter cites to no cases from the circuit courts of appeals that are in conflict regarding special

appearances. More significantly, Pacesetter cites no decision by a circuit court of appeals that is in conflict with the unpublished Memorandum Decision. Pacesetter only cites to cases discussing special appearances in the context of personal jurisdiction and to secondary authority discussing special appearances. And these do not create any conflict that this Court should review and address. Also absent from the Petition is any identified national furor over special appearances.

The cases cited by Pacesetter in its special appearance argument do not support its argument. In *McGarr v. Hayford*, 52 F.R.D. 219, 221 (S.D. Cal. 1971), the court indicated that use of the words "special appearance" did not carry a penalty and is not prohibited and stated:

> Initially, it must be noted that Rule 12 has eliminated the necessity of appearing specially. The technical distinctions between general and special appearances have been abolished. *Bjorgo v. Weerden*, 342 F.2d 558 (7th Cir. 1965). 'However, there is no penalty if the pleader, mindful of the old ways, undertakes a 'special appearance,' although the label has no legal significance.' [Citations omitted].

The rules and other decision cited by Pacesetter, Pet. Br. 7, involve admiralty and do not create any conflict. Pacesetter misses the point that special or general appearance relate to personal jurisdiction. Use of these words is not prohibited. These words do not relate to the insufficiency of service of process, which is the

actual issue addressed by the Ninth Circuit. Correctly, the district court and the Ninth Circuit focused on the actual issue of service of process and not on terms relating to personal jurisdiction. Use of the words "special appearance" is not shown to be an important national issue nor the subject of any conflict between the circuit courts. The Ninth Circuit found that service of the Third Amended Complaint was proper on Duda but that the dismissal of Duda was harmless error based on Pacesetter's lack of cognizable evidence of damages. The Duda Corporate Entities had never been served with process and thus sending the Third Amended Complaint to counsel for Bassetti was not sufficient service under Rule 5 because proper service of process had never been effectuated under Rule 4. Accordingly, the dismissal of the Duda Corporate Entities was properly affirmed. The words "special appearance" were not used in or the basis for the Memorandum Decision and cannot cause a conflict between the unpublished Memorandum Decision and any other appellate decision. Thus, with no existing conflict, review is not warranted.

Pacesetter's citation to a local rule of the United States District Court for the District of Arizona addressing counsel of record is not relevant and is not presented as a conflict with other rules of national application. The Local Rule does not govern service of process under Rule 4 or 5, Fed.R.Civ.P. If service under Rule 5 on counsel for a party is proper, Local Rule Civ. 83.3(a) provides the duration of the time an attorney is

counsel of record. This is clearly not an issue of national significance or even national conflict.

C. The Ninth Circuit Held the District Court Erred in Its Dismissal of Daniel Duda on the Basis that Service Was Sufficient, But Affirmed the Dismissal on the Basis of Harmless Error, Which Is Not an Issue on Which Pacesetter Seeks Review and Thereby Waives the Issue

The Ninth Circuit determined that service of process on Duda was correctly accomplished by service on counsel pursuant to Rule 5, Fed.R.Civ.P., based on the prior proper service of the First Amended Complaint pursuant to Rule 4 on Duda. Pet. App. 8. The alleged dismissal of Duda based on a special appearance is obviously incorrect. With the Ninth Circuit finding that dismissal for insufficiency of process was incorrect, Pacesetter has no argument to present for review. This is true even if the Memorandum Decision is assumed to be based on a special appearance. The Court should not review the issue of special appearance presented by Pacesetter where the Ninth Circuit ruled in its favor on the sufficiency of the service of process on Duda but affirmed the dismissal on the ground of harmless error. The Ninth Circuit stated:

> Still, we will not reverse when an error is harmless. *See* 28 U.S.C. § 2111; *Shinseki v. Sanders*, 556 U.S. 396, 407-08 (2009). Given our conclusion that the other defendants were

> entitled to summary judgment due to Pacesetter's failure to offer any cognizable evidence of damages, we hold that Duda's dismissal did not affect any substantial rights Pacesetter may have had in this action.[1] The district court's error was therefore harmless pursuant to 28 U.S.C. § 2111.

Pet. App. 8-9.

Based on Pacesetter's failure to discuss the finding of a harmless error and failure to seek review, no review can be granted on this omitted issue. Pacesetter's failure to raise this holding of harmless error is a waiver of that issue. Pacesetter understandably omits this issue because such a ruling is fact specific and is not a conflict with any court of appeals or this Court.

The Ninth Circuit's ruling also demonstrates that the court did not base its decision on a special appearance because the Ninth Circuit found that service of process on the "specially appearing" attorney was sufficient. And, Pacesetter should not be able to seek review of the finding of sufficiency of service of process as to Duda because that finding was in its favor and is not one of the issues for which review can be sought. In fact, it is contrary to the question presented by Pacesetter.

II. The Ninth Circuit's Unpublished Memorandum Decision Affirming the Grant of Summary Judgment Based on the Absence of Cognizable Evidence of Damages and Not on a Misapplication of the Benefit of the Bargain Damages Theory Does Not Warrant Review by this Court

The Ninth Circuit correctly analyzed and applied the benefit of the bargain damages theory and no conflict exists regarding the state law theory. Pacesetter's argument that the benefit of the bargain theory is unique is not supported by any citation. Petitioner's effort to transform this evidentiary issue to an issue on which a Writ of Certiorari could be granted fails. Pacesetter's Question Presented regarding benefit of the bargain incorrectly states that the *district court* did not apply the benefit of the bargain damages rule; the district court expressly discussed both the benefit of the bargain theory and the lost opportunity cost damage theory. Pet. App. 13-65.

The issue should be the actions of the Ninth Circuit not the district court. In this case, the Ninth Circuit correctly analyzed and applied the benefit of the bargain damages theory and the lost opportunity costs theory. Pet. App. 5-7. The Ninth Circuit found that no cognizable evidence of damages had been presented by Pacesetter in the district court, and Pacesetter did not draw the Ninth Circuit's attention to any evidence on this theory. Pet. App. 5 and 8.

The admissible evidence indisputably revealed that no damages had been sustained by Pacesetter on

any legal theory in its Third Amended Complaint. Judson Ball, the trustee of the Trust and the managing member of Pacesetter, testified as the Rule 30(b)(6) designee for Pacesetter. The Ninth Circuit analyzed Ball's deposition and stated:

> In its Rule 30(b)(6) deposition, Pacesetter expressly denied that it was seeking the $63 million in benefit-of-the-bargain damages in the federal lawsuit. Instead, Pacesetter's representative said that he did not have an estimate of damages because he had not "asked [his expert] to do those calculations for [him] yet." Because Pacesetter disclaimed any reliance on a benefit-of-the-bargain theory in its deposition, a benefit-of-the-bargain approach cannot provide a damages theory sufficient to survive summary judgment.

Pet. App. 6.

The Ninth Circuit also analyzed the lost opportunity costs theory of damages. The Ninth Circuit stated:

> Pacesetter also has not offered any evidence of lost-opportunity-cost damages. To the contrary, Pacesetter's representative at its Rule 30(b)(6) deposition stated that, at the time he made the $400,000 investment, he "had plenty of money on hand," agreed that he "could have" and "did make investments in other things" and was "well able to make any investment [he] want[ed] at any time," and affirmed that the $400,000 did not "keep [him] from making other investments" and did not

> "keep [him] awake at night, either." Those concessions are fatal to Pacesetter's assertion that it sustained lost-opportunity costs from not having use of the $400,000 to put toward other investments during the investment period.

Pet. App. 6.

The basis for the decision of the Ninth Circuit is not a misapplication of the damage theory, but rather a determination that Pacesetter had no cognizable evidence of damages under either theory of damages. Whether evidence exists and is sufficient in this specific case to establish damages under any claim is not a question presented to this Court and accordingly is not an issue for review. The issue is one of evidence and state law claims of damages. This is a fact specific inquiry and no conflict with the Ninth Circuit's Memorandum Decision is identified. Pacesetter's question presented is not the basis for the Memorandum Decision. Accordingly, review is not warranted.

III. The Third Question Presented on Statute of Limitations, Discovery Rule, and Waiver By Conduct Is Not Relevant to These Respondents, Is Not a Basis for the Ninth Circuit's Memorandum Decision, and Does Not Justify Review

The statute of limitations is not a basis for the unpublished Memorandum Decision regarding Bassetti, Duda and the Duda Corporate Entities. As with the "special appearance" question, the Memorandum

Decision does not address the statute of limitations, discovery rule, or waiver by conduct. The third Question Presented and its argument does not provide a basis for review. With the Memorandum Decision being devoid of a discussion of the statute of limitations, discovery rule, or waiver by conduct and with those theories not providing a basis for the Memorandum Decision, no conflict is presented with any decision of another court of appeals or this Court. No extended discussion is necessary based on the prior reasons to deny the Petition and the Petition should be denied.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DAVID L. O'DANIEL
GORDON REES SCULLY MANSUKHANI, LLP
Two North Central Ave. #2200
Phoenix, AZ 85004
602-794-2472
Dodaniel@grsm.com

Counsel for Respondents
Mark Bassetti, Daniel Duda,
A. Duda & Sons, Inc., and
Duda Farm Fresh Foods, Inc.