No. 23-232

IN THE

SUPREME COURT OF THE UNITED STATES

BASF METALS LIMITED AND ICBC STANDARD BANK PLC,

*Petitioners,*

v.

KPFF INVESTMENT, INC, et al.,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

# MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE AND* BRIEF OF THE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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October 13, 2023

## MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, the International Association of Defense Counsel ("IADC") hereby respectfully moves for leave to file the accompanying brief as *amicus curiae* supporting the Petition for Writ of Certiorari in this case. Timely notice under Rule 37.2 of the intent to file this brief was given to Petitioners, but not Respondents. While the IADC gave notice of its intent to Respondents, KPFF Investments, Inc., et al., it did so within the 10-day period. The IADC asked if Respondents would waive the notice period and has yet to receive a response. Given the recent extension granted to Respondents to file their brief in opposition, the IADC does not believe the lack of more notice should be a concern.

The IADC believes that the attached brief sheds additional light on the issues presented in the Petition for Writ of Certiorari, but from a broader group that is affected by the use of conspiracy jurisdiction to bring foreign parties before U.S. Courts. The IADC is an invitation-only, peer-reviewed membership organization of about 2,500 in-house and outside defense attorneys and insurance executives. They are tasked with advising their clients regarding personal jurisdiction issues—when they can expect to be hailed into a U.S. Court, and when not.

In view of its interest in and unique perspective on these issues, the IADC respectfully requests that

the Court grant it leave to participate as *amicus curiae* by filing the attached brief in support of the Petition for Writ of Certiorari.

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## INTEREST OF AMICUS CURIAE[1]

The International Association of Defense Counsel ("IADC") is an invitation-only, peer-reviewed membership organization of about 2,500 in-house and outside defense attorneys and insurance executives. IADC is dedicated to the just and efficient administration of civil justice and improvement of the civil justice system. IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

IADC participate as amici curiae in Supreme Court cases raising issues of exceptional importance to their membership, such as this case, which threatens to expand personal jurisdiction over non-resident defendants beyond the constitutional limits and long-standing precedent. The theory of conspiracy jurisdiction currently proposed would permit personal jurisdiction over a non-resident defendant even where there is no agency "relationship of control, direction, or supervision" between the defendant and the alleged co-

[1] While Petitioners' counsel received timely notice in accordance with Supreme Court Rule 37.2, Respondent's counsel did not. The IADC asked if Respondents will waive notice and Respondents have consented to do so. In accordance with Supreme Court Rule 37.6, the IADC certifies that no counsel for a party authored this brief in whole or in part, and that no party or counsel other than the amici curiae, their members, and their counsel, made a monetary contribution intended to fund preparation or submission of this brief.

conspirator." *Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC (Schwab II)*, 22 F.4th 103, 124-25 (2d Cir. 2021), cert denied, 142 S. Ct. 2852 (2022). Indeed, the question before the Court in this case—whether the exercise of personal jurisdiction over a defendant with no forum contacts, so long as plaintiffs allege that the defendant participated in the conspiracy and an alleged co-conspirator is subject to personal jurisdiction in the forum—is a subject of fundamental significance to *amici*. Whether that is a permissible form of personal jurisdiction directly impacts both domestic and foreign business organizations represented by IADC members.

IADC therefore has a vital interest in the issue presented in this case, and their views can assist the Court in its decision.

IADC fully supports the Petition for Writ of Certiorari.

## INTRODUCTION

This case is about allowing civil litigants access to use U.S. Courts to adjudicate what is essentially a foreign controversy involving foreign defendants. In *Asahi Meal*, this Court held that in determining the reasonableness of the exercise of jurisdiction, courts must weigh "'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and '[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Asahi Metal*

*Indus. Co. ltd. v. Superior Ct. of California, Solano Cnty.*, 480 U.S. 102, 107 S. Ct. 1026, 1034, 94 L.Ed.2d 92 (1987) (*quoting United States v. First National City Bank*, 379 U.S. 378, 404, 85 S. Ct. 528, 542, 13 L.Ed.2d 365 (1965) (Harlan, J., dissenting)). Somehow that principle has been lost in the rush to embrace conspiracy jurisdiction, a form of personal jurisdiction inconsistent with defendant directed forum contacts that have always been the bedrock of specific jurisdiction. The Second Circuit was too quick to reject BASF and ICBC's[2] call for court consideration of the procedural and substantive policies of other nations whose interests are affected by the exercise of conspiracy jurisdiction, saying "BASF and ICBC overestimate the weight of 'international rapport' in this context." *In re Platinum and Palladium Antitrust Litigation,* 61 F.4th 242, 274 (2023). IADC disagrees.

Just like the split in authority that led to this Court's decision in *Mallory v Norfolk Southern Railway Co.,* 600 U.S. 122, 143 S.Ct. 2028, 216 L.Ed.2d 815 (2023), this case presents another split, equally troubling, and unlikely to go unimpeded, absent intervention.

## SUMMARY OF ARGUMENT

This is a London-based dispute, involving London-based parties, and activities in London. Yet the case was filed in New York.

[2] BASF Metals Limited and ICBC Standard Bank PLC are referred to herein as BASF and ICBC.

Neither BASF nor ICBC consented, express or implied, to be sued in New York. There was admittedly no basis for the proper exercise of general jurisdiction. There was also no basis for "tag" jurisdiction. The fact another entity has been tagged is not enough to allow the exercise of specific jurisdiction.

Federal due process has never squared well with conspiracy jurisdiction. Heretofore recognized forms of personal jurisdiction have always allowed alien and non-resident defendants to structure their conduct to avoid being hailed into more friendly United States Courts, at least until now. The focus has always been on the contacts the defendant himself creates, not those of an alleged co-conspirator.

Conspiracy jurisdiction violates long-standing case precedent and creates uncertainty for foreign defendants. It is a form of personal jurisdiction unfamiliar to European entities. The allegations to support such jurisdiction are relatively easy to make. Indeed, the Second Circuit panel said so, remarking that this "is not a difficult requirement to meet." This leads to foreign corporations being subjected to personal jurisdiction despite a lack of control over the alleged co-conspirator, sometimes unknown to the defendant. This cannot possibly be the result intended, nor constitutionally permissible. The split of authorities over the propriety of conspiracy jurisdiction is not in dispute. A different rule of law should not depend upon mere geography.

Clarification is in order.

## ARGUMENT

### I. CONSPIRACY JURISDICTION IS INCONSISTENT WITH LONG-STANDING SUPREME COURT PRECEDENT

#### A. *THE PROPER EXERCISE OF PERSONAL JUSDICTION IS BASED ON CONTACTS THE DEFENDANT HIMSELF CREATES WITH THE FORUM STATE*

Before any court can render judgment over a non-resident defendant, the court must have personal jurisdiction over that person or entity, consistent with due process. The Fifth Amendment limits a federal court's power to exercise jurisdiction over a defendant. Historically, personal jurisdiction over persons reached no farther than the geographic bounds of the forum. *See Pennoyer v. Neff*, 95 U.S.714, 720, 24 L. Ed. 565 (1877).

As times changed, that "strict territorial approach yielded to a less rigid understanding" while remaining true to the Due Process Clause that "act[s] as an instrument of interstate federalism . . . sometimes act[ing] to divest the State of its power to render a valid judgment." *Daimler AG v. Bauman*, 571 U.S. 117, 126, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 294 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980). Thus, following the canonical opinion of *Int'l Shoe Co. v. State of Wash., Off. of Unemployment Comp. &*

*Placement*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945), "the relationship among the defendant, the forum, and the litigation . . . became the central concern of the inquiry into personal jurisdiction." *Daimler AG*, 571 U.S. at 126 (quoting *Shaffer v. Heitner*, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)). While the non-resident defendant may not be physically present, his forum-directed actions are the equivalent and when sufficient, the non-resident can expect to be hailed into court in those states.

A clearly understood basis for the *proper* exercise of personal jurisdiction is that a defendant can "structure [its] primary conduct" to lessen or avoid exposure to a given State's courts. *World-Wide Volkswagen*, 444 U. S at 297. Again, the defendant's form-directed actions either allow or disallow the court's exercise of personal jurisdiction. And although the connection has been loosened and at times termed "close enough," based upon the non-resident defendant's other forum activities, proof of a connection is still required. *Ford Motor Co. v. Montana Eighth Judicial Dist. Court*, 592 U. S. ——, ——, 141 S.Ct. 1017, 209 L.Ed.2d 225 (2021).

Personal jurisdictional generally falls into two categories: general and specific. *Daimler AG*, 571 U.S. at 127. Both are based upon the defendant's decisions and actions.

General jurisdiction can only be exercised in states where the defendant is "essentially at home." It is dispute-blind, meaning that "[a] court may assert

general jurisdiction over foreign (sister-state or foreign country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011). Those claims may concern events and conduct anywhere in the world. But only a select set of affiliations with a forum will permit the exercise of such sweeping jurisdiction. *Id.*

Absent exceptional circumstances, a corporation is generally "at home" only where it is incorporated or where it is headquartered. *Daimler AG*, 571 U.S. at 135–38. Both are forum contacts purposefully created by the defendant. A corporation can choose where to incorporate and where to be headquartered.

The facts and holdings in *BNSF Railway* are illustrative . In *BNSF Ry. Co. v. Tyrrell*, 581 U.S. 402, 137 S. Ct. 1549, 198 L. Ed. 2d 36 (2017), railroad employees sued their employer, BNSF, in Montana state court for damages suffered from an on-the job injury under the Federal Employers' Liability Act. *Id.* at 1553. The employees did not reside in Montana and the injuries did not occur there. *Id.* BNSF did not maintain its principal place of business there, nor was it incorporated there. *Id.* To be sure, BNSF maintained tracks in Montana, did business there, and employed Montana workers. *Id.* at 1554. BNSF had contacts with the forum. In concluding that Montana ***could not***

***exercise general jurisdiction*** over BNSF, this Court explained:

> BNSF, we repeat, is not incorporated in Montana and does not maintain its principal place of business there. Nor is BNSF so heavily engaged in activity in Montana "as to render [it] essentially at home" in that State. As earlier noted, BNSF has over 2,000 miles of railroad track and more than 2,000 employees in Montana. But, as we observed in *Daimler*, "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts." Rather, the inquiry "calls for an appraisal of a corporation's activities in their entirety"; "[a] corporation that operates in many places can scarcely be deemed at home in all of them." In short, the business BNSF does in Montana is sufficient to subject the railroad to specific personal jurisdiction in that State on claims related to the business it does in Montana. But in-state business, we clarified in *Daimler* and *Goodyear*, does not suffice to permit the assertion of general jurisdiction over claims like [Plaintiffs'] that are unrelated to any activity occurring in Montana.

*Id*. at 1559.

Consent jurisdiction, a form of general jurisdiction, is conceptually similar. It too is defendant focused. *Mallory,* 600 U.S. at 138 ("[o]ur precedents have recognized, too, that 'express or implied consent'

can continue to ground personal jurisdiction—and consent may be manifested in various ways by word or deed"). Consent, either expressly or implied, can be used to invoke jurisdiction over a non-resident defendant. *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703–04, 102 S. Ct. 2099, 72 L.Ed.2d 492 (1982). Consent can be found in a variety of legal scenarios, including when parties agree in advance to submit to the jurisdiction of a given court, *see e.g., National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316, 84 S.Ct. 411, 414, 11 L.Ed.2d 354 (1964), and based on the defendant's stipulation, *See Petrowski v. Hawkeye-Security Co.*, 350 U.S. 495, 76 S. Ct. 490, 100 L.Ed. 639 (1956).

Specific jurisdiction, in contrast, is neither dispute blind nor based upon consent but instead "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Bristol-Myers Squibb Co. v. Superior Ct. of California, San Francisco Cnty.*, 582 U.S. 255, 262, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017). Pragmatically, it is known as case-linked jurisdiction. *See Goodyear,* 564 U.S. at 919. Specific jurisdiction requires purposeful availment. The contacts must be the defendant's own choice and not "random, isolated, or fortuitous." *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 774, 104 S. Ct. 1473, 79 L.Ed.2d 790 (1984).

Before a court may exercise specific jurisdiction over a defendant, three requirements must be met: (1) "the plaintiff's service of process upon the defendant must have been procedurally proper"; (2) "there must

be a statutory basis for personal jurisdiction that renders such service of process effective"; and (3) "the exercise of personal jurisdiction must comport with constitutional due process principles." *Waldman v. Palestine Liberation Org.*, 835 F.3d 317, 327-28 (2d Cir. 2016) (*quoting Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59-60 (2d Cir. 2012)).

The third requirement — compliance with due process — is at issue here. As this Court has long held, due process demands that each defendant over whom a court exercises jurisdiction have some "minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316.

The unilateral activity of another party or a third person has never been a factor. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); *see also Walden v. Fiore*, 571 U.S. 277, 284, 134 S. Ct. 1115, 188 L.Ed.2d 12 (2014). This Court has "consistently rejected attempts to satisfy the defendant-focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff . . . and the forum State." *Id.; Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984). "[H]owever significant the plaintiff's contacts with the forum may be, those contacts cannot be 'decisive in determining whether the defendant's due process rights are violated.'" *Walden*, 571 U.S. at 284*; Rush v.*

*Savchuk,* 444 U.S. 320, 332, 100 S. Ct. 571, 62 L. Ed. 2d 516 (1980)*; Keeton*, 465 U.S. at 781 n.13 ("[e]ach defendant's contacts with the forum State must be assessed individually.").

The proper exercise of personal jurisdiction may not rest upon the contacts with the forum state of another corporate entity, even if it is an affiliated entity. *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335, 45 S. Ct. 250, 69 L. Ed. 634 (1925).

To be sure, there are situations where the contacts of another related entity may satisfy the required minimum contacts. Piercing the corporate veil, is one such situation. But more typically, corporations are treated as separate persons. *Daimler*, 571 U.S. at 134–35, 135 n.13.

In sum, what all these forms of personal jurisdiction have in common is that courts cannot impute the actions of another to the non-resident defendant to create personal jurisdiction.

### B. *IN RE PLATIUM AND PALLADIUM LITIGATION*

Contrary to this well-established, defendant conduct focused framework, the Second Circuit holds that specific jurisdiction also exists so long as the plaintiff *alleges* that "(1) a conspiracy existed; (2) the defendant participated in the conspiracy; and (3) a co-conspirator's overt acts in furtherance of the conspiracy had sufficient contacts with a state to

subject that co-conspirator to jurisdiction in that state." *Charles Schwab Corp. v. Bank of Am. Corp. (Schwab I),* 883 F.3d 68, 86-88 (2d Cir. 2018). One conspirator's minimum contacts allow for personal jurisdiction over all co-conspirators, even when each alleged co-conspirator lacks minimum contacts with the forum. *Id.* at 86. In other words, a co-conspirator's minimum contacts, exercised in furtherance of the alleged conspiracy, fulfill the requirement that the defendant must have purposefully availed itself of the privilege of doing business in the forum. *Id.*

Conspiracy jurisdiction ignores the requirement that the alien or non-resident defendant have a "relationship of control, direction, or supervision." *In re Platinum & Palladium Antitrust Litig.,* 61 F.4th at 272 ("But the argument that our exercise of conspiracy jurisdiction should be limited by agency principle is no longer available."); *see also Schwab Short-Term Bond Mkt. Fund v. Lloyds Banking Grp. PLC (Schwab II)*, 22 F.4th 103, 124-25 (2d Cir. 2021), *cert. denied*, 142 S. Ct. 2852 (2022) ("[O]ur caselaw does not require a relationship of control, direction, or supervision" to establish conspiracy jurisdiction).

Ignoring the defendant-focused activity requirement which has always been the bedrock for the proper exercise of specific jurisdiction is troubling. This has caused at least one district court to propose *additional* criteria.

> In addition, I adopt the following two principles under the purposeful

> availment analysis to further ensure that its application is consistent with due process:
>
> 1. The act or effect in the forum must be a "principal object of the conspiracy." *RMS Titanic, Inc. v. Kingsmen Creatives, Ltd.,* 579 Fed. Appx. 779, 789-90 (11th Cir. 2014); and
>
> 2. While "control, direction, or supervision" is not required, "[t]he conspiratorial contacts must be of the sort that a defendant 'should reasonably anticipate being haled into court' in the forum as a result of them." *Schwab II* at 125 (citation omitted).

*Sotloff v. Qatar Charity,* No. 22-CV-80726, ___F. Supp. 3d ___, 2023 WL 3721683 at *17 (S.D. Fla. 2023).

Creating more criteria to save a theory that should not exist is not the proper direction.

### C. *THE HISTORY AND SPLIT OF AUTHORITIES ON WHETHER CONSPIRACY JURSIDICTION IS A PROPER FORM OF SPECIFIC JURISDICTION*

The exercise of conspiracy jurisdiction can be traced back to the Ninth Circuit's decision in *Giusti v. Pyrotechnic Industries*, 156 F.2d 351 (9th Cir.), *cert.*

*denied*, 329 U.S. 787 (1946), where service was permitted on a non-resident defendant under sections of the California Civil Code. *Id*. The non-resident defendant objected to the court's exercise of personal jurisdiction, arguing that the statute did not permit service because the complaint cited only business transacted by alleged co-conspirators, and the objecting defendant corporation itself had done "nothing in California." *Id*. at 352. The Ninth Circuit rejected that argument, holding that "the California members of the conspiracy were agents of the non-resident corporation in the conspiracy's attempt to destroy appellant's business." *Id*. at 354. It equated co-conspirators with agents employed to act in the state and, without more, reversed the district court's order that service be quashed. *Id*.

Thereafter conspiracy jurisdiction largely remained dormant until the 1970s. In *Leasco Data Processing Equipment Corp. v. Maxwell*, the Second Circuit noted that "the mere presence of one conspirator . . . does not confer personal jurisdiction over another alleged conspirator." 468 F.2d 1326, 1343 (2d Cir. 1972), *abrogated by Morrison v. Nat'l Australia Bank Ltd*., 561 U.S. 247, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010). However, the court remanded the case for a determination as to whether an *agency* relationship existed such that it could be shown one of the alleged conspirators who had acted in the forum state might have done so under the direction and authority of the one over whom jurisdiction was sought. *Id*.

Despite the lack of a definitive holding and analysis of conspiracy jurisdiction, subsequent cases viewed *Leasco* as "opening the door" to conspiracy jurisdiction. *Turner v. Baxley*, 354 F. Supp. 963, 978-79 (D. Vt. 1972) (relying on *Leasco* to hold that, although an act in furtherance of a conspiracy is alone insufficient to establish personal jurisdiction over an out-of-state co-conspirator, conspiracy jurisdiction was applied by analyzing whether the alleged conspiratorial conduct, which occurred outside the state, entailed actual or constructive knowledge of the effect—the tortious act of the co-conspirator—in the state); *Socialist Workers Party v. Attorney General*, 375 F. Supp. 318, 332-33 (S.D.N.Y. 1974) (after the plaintiffs sought to base jurisdiction on one act, committed in the forum and attributed to the defendants only through the allegation of conspiracy, the court declared that "under certain circumstances"' New York law recognizes a conspiracy theory of jurisdiction, noting, however, that the plaintiff bears the burden of going forward with the evidence and concluded that the facts alleged did not adequately "connect"' the defendants with the forum state).

Although some courts embraced or at least recognized the existence of conspiracy jurisdiction, others rejected it. The Seventh Circuit has rejected conspiracy jurisdiction, explaining that "[e]ven if it were viable, the [conspiracy jurisdiction] theory would not permit a plaintiff to draw a defendant into court in Illinois simply by alleging a conspiracy that includes some Illinois defendants and some out-of-state defendants, while making no effort to connect the two."

*Smith v. Jefferson Cnty. Bd. of Educ.*, 378 F. App'x 582, 586 (7th Cir. 2010); *see also Ploense v. Electrolux Home Products, Inc.*, 377 Ill. App. 3d 1091, 317 Ill.Dec. 773, 882 N.E.2d 653, 666 (2007) (stating that an Illinois Supreme Court case "effectively scuttl[ed]" the theory). Illinois courts reiterated that "in order to exercise in personam jurisdiction over a non[ ]resident defendant, due process requires that he have certain 'minimum contacts' with the forum so that 'maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Ploense*. 882 N.E.2d at 667 ("our supreme court was concerned that the conspiracy theory of jurisdiction would allow the exercise of personal jurisdiction over a nonresident defendant who had no minimum contacts with the forum state. We should be concerned, too.").

The First Circuit, Third Circuit, and Ninth Circuit have similarly rejected conspiracy jurisdiction. *LaSala v. Marfin Popular Bank Pub. Co.*, 410 F. App'x 474, 478 (3d Cir. 2011) (concluding that "it cannot be said that the New Jersey Supreme Court would be likely to adopt this [conspiracy] theory of jurisdiction, and the District Court's refusal to do so does not provide grounds for reversing its decision."); *Chirila v. Conforte*, 47 F. App'x 838, 843 (9th Cir. 2002) (refusing to reach a conclusion on conspiracy theory of personal jurisdiction and questioning its validity); *EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1089 (C.D. Cal. 2010) ("California law does not recognize conspiracy as a basis for acquiring jurisdiction over a foreign defendant.").

The District Court in Maine provided a summation of several courts throughout the United States who rejected conspiracy jurisdiction, noting that using conspiracy jurisdiction as a basis for personal jurisdiction is frivolous with courts and scholars alike being skeptical of its conformance with notions of constitutional due process. *In re New Motor Vehicles Canadian Exp.*, 307 F. Supp. 2d 145 (D. Me. 2004), amended sub nom. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, No. MDL 1532, 2004 WL 1571617 (D. Me. Apr. 20, 2004) (holding that the assertion of specific personal jurisdiction over foreign corporations through conspiracy theory, based upon jurisdictional contacts of co-conspirators, was not available to obtain personal jurisdiction over non-resident defendants); *see*, *e.g.*, Ann Althouse, *The Use of Conspiracy Theory to Establish in Personam Jurisdiction: A Due Process Analysis*, 52 Fordham L. Rev. 234 (1983) (expressing skepticism of the conspiracy jurisdiction theory's conformance to notions of constitutional due process).

Suffice it to say, there is a strong split of authority.

Although not addressing the question of the existence of conspiracy personal jurisdiction, this Court itself has labeled the analogous conspiracy venue doctrine as having "all the earmarks of a frivolous albeit ingenious attempt to expand the statute." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384, 74 S. Ct. 145, 98 L. Ed. 106 (1953).

Conspiracy venue, in contrast, has been easily rejected. One court declined to apply conspiracy venue jurisdiction, because "the adoption of the co-conspirator theory of venue would greatly and unwarrantedly extend the already liberal antitrust venue provision. *Id.* at 262. "[O]ne defendant could be sued any place that any one other defendant could be sued, despite the fact that Congress definitely established detailed venue provisions separately applicable to each defendant. It is better that venue as to each and every defendant in an antitrust action be individually established." *Id.*

Another court explained that, "[i]f venue could be established by merely alleging that a corporate defendant participated in a conspiracy, some alleged members of which transacted business in the district, antitrust plaintiffs would then have the power to force suit in distant, inconvenient forums, a result apparently unintended by Congress." *West Virginia v. Morton Int'l, Inc.*, 264 F. Supp. 689, 695-96 (D. Minn. 1967). The place of venue would "depend upon mere allegations that the company transacting business conspired with the defendant sought to be sued in the district," merits-based proof. *Id.*

If conspiracy venue is unacceptable, then the same should hold true for conspiracy personal jurisdiction.

## II. THE FORGOTTEN ROLE OF INTERNATIONAL COMITY

The personal jurisdiction inquiry usually proceeds in two steps. First the court determines whether each defendant has minimum contacts with the forum. Second, the court determines whether the exercise of jurisdiction would "comport with fair play and substantial justice." *Walden*, 571 U.S. at 283 (quoting *International Shoe*, 326 U.S. at 316).

The Second Circuit acknowledged that conspiracy jurisdiction is controversial and may suffer from several flaws, as "[c]onspiracy jurisdiction seems to have expanded beyond its more limited roots." *In re Platinum & Palladium Antitrust Litig.*, 61 F.4th at 272. Subjecting foreign defendants to suit in the United States does have comity implications. Yet, the Second Circuit briskly dismissed those concerns, remarking, "international rapport concerns … do not apply equally in a case, such as this one, that involves specific jurisdiction." *Id.* at 274. But why not? There is no reason that this London-based dispute, involving London-based entities could not and should not be litigated in the U.K.

The concept of international comity requires courts to at least balance competing public and private interests in a manner that takes into account any conflict between the public policies of the domestic and foreign sovereigns.

There are many reasons for this requirement, including diplomacy, *see e.g.*, Harold Maier, Interest Balancing and Extraterritorial Jurisdiction, 31 Am. J. Comp. L. 579, 589 (1983), reciprocity, *see e.g.*, *Hilton v. Guyot*, 159 U.S. 113, 123, 16 S. Ct. 139, 143, 40 L. Ed. 95 (1895), utility, *see, e.g.*, Henry Wheaton, Elements of International Law § 79 (Richard Henry Dana, Jr. ed., 8th ed. 1866), moral obligation, *see, e.g.*, Ian Brownlie, Principles of Public International Law 31 (3d ed. 1979); Joseph Story, Commentaries on the Conflict of Laws § 33 (1834), expediency, *see, e.g.*, *Somportex, Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971), or courtesy.

None of this is found in the Second Circuit's reasoning.

Comity, particularly towards European entitles, should not be relegated to a concern that can be ignored when convenient to provide a U.S. venue for a civil dispute. Judicial decisions should reflect the systemic value of reciprocal tolerance. *See* Maier, Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and International Law, 76 Am. J. Int'l L. 280, 281–285 (1982); J. Story, Commentaries on the Conflict of Laws §§ 35, 38 (M. Bigelow ed. 1883); *Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 555, 107 S. Ct. 2542, 2561, 96 L. Ed. 2d 461 (1987).

Under international comity, "states normally refrain from prescribing laws that govern activities

connected with another state when the exercise of such jurisdiction is unreasonable." *Maxwell Comm'n Corp. v. Societe Generale (In re Maxwell Comm'n Corp.),* 93 F.3d 1036, 1047–48 (2d Cir. 1996) (*"Maxwell II")* (quoting Restatement (Third) of Foreign Relations § 403(1)). The doctrine is "concerned with maintaining amicable working relationships between nations…" *JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 423 (2d Cir. 2005) (quoting *British Airways Bd. v. Laker Airways Ltd.*, [1984] E.C.C. 36, 41 (Eng. C.A.)).

Again, broad conspiracy jurisdiction designed to bring foreign controversies and defendants into U.S. courts does just the opposite. The Restatement lists a number of considerations for determining whether the exercise of jurisdiction is "unreasonable," including: (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted[;] (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international

political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state. Restatement (Third) of Foreign Relations Law § 403(2) (1987).

All of these should be considered *before* conspiracy jurisdiction is invoked.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

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