No. 23-24

IN THE

Supreme Court of the United States

GRIST MILL CAPITAL, LLC,

Petitioner,

—v.—

UNIVERSITAS EDUCATION, LLC, DANIEL CARPENTER and NOVA GROUP, INC., AS TRUSTEE, SPONSOR AND NAMED FIDUCIARY OF THE CHARTER OAK TRUST WELFARE BENEFIT PLAN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

The questions presented are:

Whether the Panel for the United States Court of Appeals for the Second Circuit (the "Panel") correctly found that the Petitioner failed to provide justification for relief in its motions under Rules 60(b)(4) and 60(b)(6).

Whether the Panel correctly upheld the District Court's findings that the Petitioner forfeited its personal jurisdiction defenses.

A motion made pursuant to Federal Rule of Civil Procedure 60(b)(4) is "not a substitute for a timely appeal." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010) (internal citations omitted). Similarly, Rule 60(b)(4) "does not provide a license for litigants to sleep on their rights." *Id.* at 275. When a party has been "afforded a full and fair opportunity to litigate" an issue and fails to do so, its failure to "avail itself of that opportunity will not justify Rule 60(b)(4) relief." *Id.* at 276. Further, all motions under Rule 60(b) "must be filed within a reasonable time." *Kemp v. United States*, 142 S. Ct. 1856, 1861 (2022) (quoting Fed. R. Civ. P. 60(c)(1)).

Federal Rule of Civil Procedure 12(h)(1) requires a party to raise a defense of lack of personal jurisdiction in its first motion or responsive pleading; otherwise, the defends is deemed waived.

Fed. R. Civ. P. 12(h)(1). Personal jurisdiction is a due process right that "may be waived either explicitly or implicitly." *Robbins v. Bennaceur*, 658 F. App'x 611, 616 (2d Cir. 2016) (citing *Ins. Corp. of Ireland v. Compagnie de Bauxites de Guinee*, 456 U.S. 694, 703-705 (1982)). Even if a party meets the requirements of Rule 12(h)(1) a court may obtain, "through implied consent, personal jurisdiction over a defendant if the actions of the defendant during the litigation amount to a legal submission to the jurisdiction of the court, whether voluntary or not." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 134 (2d Cir. 2011) (quoting *Ins. Corp. of Ireland*, 456 U.S. at 703).

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INTRODUCTION

Petitioner's explanation of the questions presented does not capture the issues as they were argued and decided below. Instead, Petitioner seeks to create a reductive *per se* rule that any motions made pursuant to Federal Rule of Civil Procedure 60(b)(4) are always timely, no matter the circumstances and even if a party has slept on their rights for years prior to bringing the motion. Furthermore, Petitioner apparently seeks to establish unintuitive bright line rules regarding the exercise of personal jurisdiction that run contrary to the well-established precedent of this Court. The Counterstatement of the Question Presented delineates the actual issues before this Court and the interaction of those issues with this Court's well-established precedent.

The arguments made by Petitioner are contrary to this Court's established precedent in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010) and its progeny, and cannot be framed in the high level of generality proposed by Petitioner. Petitioner misstates the contents of the decision of the Panel of the United States Court of Appeals for the Second Circuit ("Panel"). Contrary to the Petitioner's bald and unsupported assertions that the Panel's decision conflicts with precedent, the Panel never held that there existed a time limit for the filing of a motion for relief pursuant to Rule 60(b)(4). The Panel found that the Petitioner had the opportunity to and should have sought relief in a timely appeal. The Panel

further found that the Petitioner's failure to timely appeal and then to sleep on its rights for six years, without any "cogent explanation," prevented it from acquiring relief under Rule 60(b). These are precisely the issues addressed in *Espinosa*, where this Court held that a motion for relief under Rule 60(b)(4) was not a "substitute for a timely appeal" and found that Rule 60(b)(4) does not grant a party a "license to sleep on its rights." 559 U.S. 260 at 275-76.

Moreover, Petitioner's attempt to assert that intervening changes of law in the form of this Court's decisions in *Walden v. Fiore*, 571 U.S. 277 (2014), and *Daimler v. AG Baumann*, 571 U.S. 117 (2014), necessitate a different result than that reached by the District Court and Panel are unavailing. Both *Walden* and *Daimler* simply applied this Court's prior precedent to specific factual circumstances that are inapposite here. Courts examining similar circumstances to those at bar have specifically analyzed *Daimler* and *Walden* and found that the court's exercise of personal jurisdiction over defendants was proper. Petitioner's claim that certiorari should be granted to "resolve uncertainty regarding personal jurisdiction automatically being present when a fraudulent transfer is alleged" is a completely reductive analysis that is not only inconsistent with well-reasoned decisions applying *Walden* and *Daimler*, but also not a holding in any of the decisions below. In any event, these arguments are immaterial, as Petitioner has long since waived any personal jurisdiction defenses.

STATEMENT OF THE CASE

Respondent fundamentally disagrees with the factual background presented by Petitioner. Petitioner's recitation of the legal and factual background is wholly unsupported by the record below and is rife with misstatements of fact and law.

I. Background

Daniel Carpenter, a convicted felon and fraudster, operated a criminal conspiracy to defalcate and launder $30 million of life insurance proceeds taken out on the life of Sash Spencer for the benefit of Respondent Universitas Education, LLC ("Respondent"). Petitioner Grist Mill Capital, LLC was one of the most significant shell companies Mr. Carpenter used to transfer the stolen funds and to conceal them from Respondent. Mr. Carpenter's conduct resulted in fifty-seven (57) felony convictions. *See United States v. Carpenter*, 190 F. Supp. 3d 260 (D. Conn. Jun. 6, 2016), *aff'd sub nom*, *United States v. Bursey*, 801 F. App'x 1 (2d Cir. 2020), *cert denied*, *Carpenter v. United States*, 141 S. Ct. 820 (2020). These insurance policies were held for the benefit of Respondent in the Charter Oak Trust, the trustee of which was Nova Group, Inc. ("Nova"). The argument made by Petitioner in the Petition for Writ of Certiorari ("Petition") that the actual beneficiary was Grist Mill Capital is an outright falsehood, which has been rejected by multiple courts. *See e.g.*, *Universitas Educ., LLC v. Nova*

Grp., Inc., No. 1:15-cv-1590-LTS-HBP, 2014 U.S. Dist. LEXIS 109077, at *6 (S.D.N.Y. Aug. 7, 2014) ("Mr. Spencer named [Universitas] the sole, irrevocable beneficiary of a Charter Oak Trust death benefit . . . .").

Petitioner claims in its Petition that the Charter Oak Trust was a plan formed under the Employee Retirement Income Security Act of 1974 ("ERISA"). This assertion has been rejected by the courts for over a decade. The District Court for the Southern District of New York ("District Court") found that the arguments made by Nova that the Charter Oak Trust was an ERISA plan were sanctionable because it was inconsistent with prior arguments made, and that Nova, "without explanation for its change of position, embraced the very opposite position in the amended motion to dismiss" which "ineluctably leads to the inference that Nova Group's reversal was based not on sound legal merit, but rather on strategic delay." *Universitas Educ., LLC v. Nova Grp., Inc.*, No. 11-cv-1590-LTS-HBP, 2013 U.S. Dist. LEXIS 142902, at *20 (S.D.N.Y. May 21, 2013), *adopted* 2013 U.S. Dist. LEXIS 142479 (S.D.N.Y. Sep. 30, 2013). The findings in Mr. Carpenter's criminal case, which was affirmed and to which this Court declined to grant certiorari also indicate that the factual assertions made by Petitioner are knowingly false, as that court held that the Charter Oak Trust was "formed by [Mr. Carpenter] to serve, and did serve, as a vehicle for obtaining [stranger-originated life insurance] policies." *Carpenter,* 190 F. Supp. 3d at 273.

When Mr. Spencer died, Nova wrongfully denied Respondent's claim to the insurance proceeds at Mr. Carpenter's direction. Mr. Carpenter then directed that the funds be fraudulently conveyed through shell entities under his control. Respondent demanded arbitration against Nova following the wrongful denial of its claim to the Spencer insurance proceeds, which was required to take place in New York. Mr. Carpenter was the architect and financier of Nova's claims and defenses throughout the arbitration. *Universitas Educ., LLC v. Nova Grp., Inc.*, No. 11-cv-1590-LTS-HBP, 2014 U.S. Dist. LEXIS 3983, at *21 (S.D.N.Y. Jan 13, 2014) ("Mr. Carpenter was actively involved in, and controlled, Nova's litigation efforts in the Arbitration."). A binding arbitration award was entered against Nova and in favor of Universitas in January of 2011.

II. Post-Judgment Discovery and the Turnover Proceedings

After Nova refused to pay the judgment entered against it, Respondent sought post-judgment discovery. Post-judgment discovery revealed that Mr. Carpenter, with the aid of Petitioner, laundered the money through various shell companies, ultimately using the stolen proceeds to purchase, *inter alia*, an extravagant beachfront property and a portfolio of life insurance policies with a face value in excess of $30 million. Respondent then initiated two turnover

proceedings in an attempt to execute on its judgment.

The District Court held a bench trial on May 9, 2013 regarding the first turnover motion. Counsel for both Petitioner and Mr. Carpenter were present, and Mr. Carpenter testified at the bench trial. Counsel for other Turnover Respondents, confirmed at the bench trial that all of the named respondents, including Mr. Carpenter (but not Petitioner Grist Mill Capital), himself an attorney, waived any objections to personal jurisdiction. [Pet. For Writ of Cert., App'x B at 23a-24a.]

Respondent filed the second turnover motion in October of 2013. The District Court found that Petitioner agreed to accept service of process by email, and Mr. Carpenter further received noticed through counsel through the electronic case filing system. [Pet. for Writ of Cert., App'x B, at 29a-30a.] Mr. Carpenter filed an opposition brief to this motion on October 25, 2013. Mr. Carpenter's opposition brief argued, inter alia, that the District Court lacked subject matter jurisdiction over the proceedings pursuant to *Peacock v. Thomas*, 516 U.S. 349 (1996), but did not argue that the Court lacked personal jurisdiction over him or that he had not been served process.

Petitioner responded to the second turnover motion on November 20, 2013 through an opposition brief filed jointly with numerous other

turnover respondents. The joint filing specifically argued that the District Court lacked personal jurisdiction over Grist Mill Holdings, LLC; Hanover Trust; Carpenter Financial Group, Inc.; and Phoenix Capital Management, but did not make any claims that the District Court lacked personal jurisdiction over Petitioner Grist Mill Capital. Petitioner claims in its Petition that as a respondent, it automatically made arguments that the District Court lacked personal jurisdiction. [Pet. for Writ of Cert at 13.] This argument is unavailing and misleading. The joint brief explicitly only argued that the District Court lacked jurisdiction over the aforementioned entities, and in context, the use of the words "Respondents" in that section of the brief was limited to those four entities. In any event, this is the first time that Petitioner has made the argument that it joined in this section of the joint brief, and it is inconsistent with Petitioner's assertions in the District Court that it never had the opportunity to present its personal jurisdiction defenses, which was its basis for seeking relief in the first instance. [Pet. for Writ of Cert., App'x B, at 30a-31a (Petitioner Grist Mill Capital argued in its Motion to Vacate that it was "denied [] the opportunity ever to raise an argument based on lack of personal jurisdiction[]").] The fact that Petitioner is now reneging on its prior position and arguing the exact opposite of what it argued in District Court is clearly in bad faith.

On June 16, 2014, certain turnover respondents filed a Supplemental Memorandum of

Law arguing that they had not been properly served. Petitioner did not join this motion or file for similar relief. After Respondent submitted a sworn affidavit of service that the turnover respondents agreed to accept service electronically, the District Court denied lack of service as a basis for relief in the final judgment. [Pet. for Writ of Cert., App'x B, at 29a.]

Petitioner failed to timely appeal the turnover judgment against them. Now, for the first time, Petitioner claims that it lacked the "money or interest" to contest the judgment. However, this claim is patently untrue, as both Petitioners continued to actively litigate in multiple other fora during the relevant time period and in the intervening years. [Pet. for Writ of Cert., App'x B, at 31a (listing cases during that time in which Petitioners were actively litigating).] Petitioner also summarily states, with no proof, that none of the turnover judgment debtors had any money or property. This assertion is flatly untrue, as at least one turnover respondent, Avon Capital, LLC, possessed a full ownership interest in a company that held an insurance portfolio with a face value of over $ 30 million at the time.

III. Other Court Decisions Cited by Petitioner.

Petitioner also cites to a decision by the Honorable Judge Scheindlin for the proposition that any suit against Carpenter-related entities was time-barred as of October of 2012. *Universitas*

Educ., LLC v. T.D. Bank, N.A., No. 15-cv-5643-SAS, 2015 U.S. Dist. LEXIS 170264 (S.D.N.Y. Dec. 21, 2015). Petitioner's assertions are misleading, and in any event, its reliance on this opinion is misplaced. First, the opinion only concerned substantive claims against a third-party bank, which Judge Scheindlin held were time-barred under various New York and federal statutes of limitation. *Id.* at *5-*9. The turnover proceedings which Petitioner challenges were not an attempt to impose substantive liability on unrelated parties. Instead, it was a proper and timely post-judgment collection action authorized by New York law. Second, the opinion only dealt with certain claims, which were enumerated in that decision. *Id.* Petitioner can point to no language that supports its overbroad assertion that "any lawsuit by Universitas against anyone for anything after October 2012 was time-barred" because no such language exists in the opinion.

This is not Petitioner's only attempt to mislead this Court regarding the substance of a decision by a district court judge. Petitioner's assertion that the District Court ruled in 2020 that it had no jurisdiction over alter ego determinations is similarly unsupported by the text of the Honorable Judge Swain's order. In March of 2020, Universitas sought to impose liability on certain putative alter egos by letter motion. Judge Swain's order denied the letter motions without prejudice to formal motions practice in compliance with relevant local and federal rules. While Judge Swain further noted that any such motions

practice would have to address issues of personal and ancillary jurisdiction, Judge Swain never "ruled that she had no jurisdiction over the case," as Petitioner claims.

Petitioner's complete lack of candor with this Court in its recitation of the relevant factual and legal background belies the real intent in seeking relief before this Court—to continue the unrelenting war of attrition against Respondent and to continue to increase Respondent's already astronomical legal costs in an attempt to indefinitely delay recovery. Against this backdrop, this Court should deny the Petition.

REASONS FOR DENYING CERTIORARI

"Review on a writ of certiorari is not a matter of right, but of judicial discretion." U.S. Sup. Ct. R. 10. Generally, in determining to hear a case, this Court considers whether a United States court of appeals has, *inter alia*, "entered a decision in conflict with the decision of another United States court of appeals on the same important matter;" "[] has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of [the Supreme Court's] supervisory power;" or if a "United States court of appeal has decided an important federal question . . . in a way that conflicts with relevant decisions of [the Supreme Court]." U.S. Sup. Ct. R. 10(a) & 10(c). Petitioner has failed to demonstrate any persuasive reason for granting their Petition and fails to provide any compelling reason recognized

by United States Supreme Court Rule 10 for review.

I. The Court of Appeals Decisions do not Conflict with the Decisions of Other Courts of Appeals or this Court.

Petitioner claims with little analysis that the Circuit Court Panel's decision conflicts with this Court's prior precedent and with the precedent of the other circuits because it allegedly imposed a time limit on motions for relief pursuant to Federal Rule of Civil Procedure 60(b)(4), where Petitioner contends no such time limit exists. This contention amounts to nothing more than an intentional misreading of the decision below and this Court's precedent. As Petitioner concedes, this Court recently held in *Kemp v. United States*, 142 S. Ct. 1856, 1864 (2022) that all motions for relief made pursuant to Rule 60(b) must be "filed within a reasonable time" and that for certain types of relief, that reasonable time may not exceed one year.

Rule 60(b)(4) permits a Court to set aside a judgment if that judgment is void. Rule 60(b)(6) permits a court to set aside a judgment for "any other reason that justifies relief." Respondent acknowledges, and there is no meaningful dispute, that motions for relief made pursuant to Rules 60(b)(4) and 60(b)(6) are not subject to the one-year time limitation. Respondent also acknowledges that the majority of circuit courts, including the

Second Circuit, have held that there is effectively no reasonableness requirement or time limit to bring motions pursuant to Rule 60(b)(4). *Gater Assets Ltd. v. Moldovagaz*, 2 F.4th 42, 53 (2d Cir. 2021) ("A motion to vacate a . . . judgment as void under Rule 60(b)(4), however, usually may be made at any time.") (internal citations and quotations omitted); *Myzer v. Bush*, 750 F. App'x 644, 647 (10th Cir. 2018) (finding that motions made pursuant to Rule 60(b)(4) have effectively no time limit because any time period preceding a challenge of voidness is reasonable as a matter of law); *Procom Supply, LLC v. Langner*, No. 20-3232, 2020 U.S. App. LEXIS 40148, at * 6-*7 (6th Cir. Dec. 22, 2020) (finding that, generally, subject-matter jurisdiction may be challenged at any time under Rule 60(b)(4) but a Court must still analyze whether it is brought in a reasonable time under Rule 60(c)(1)); *Bell Helicopter Textron, Inc. v. Islamic Republic of Iran*, 734 F.3d 1175, 1179 (D.C. Cir. 2013).

However, Petitioner fails to reconcile this Court's other precedent and guidance regarding the use of motions under Rule 60(b)(4). A motion made pursuant to Federal Rule of Civil Procedure 60(b)(4) can never take the place of a timely appeal. Specifically, this Court reaffirmed in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010), that a motion made under Rule 60(b)(4) "is not a substitute for a timely appeal." Moreover, this Court found that Rule 60(b)(4) "does not provide a license for litigants to sleep on their rights," especially when a party has

been "afforded a full and fair opportunity to litigate" an issue and has failed to do so. *Id.* at 275-76. This Court noted that the failure of a party to "avail itself of that opportunity [to fully litigate an issue] will not justify Rule 60(b)(4) relief." *Id.*

Petitioner summarily states that the Panel affirmed the denial of their motions for relief pursuant to Rule 60(b)(4) because it held that those motions were not made within a reasonable time. Petitioner then summarily contends that this denial is grounds for granting their Petition. However, Petitioner neglects to analyze that their motions were filed pursuant to Rules 60(b)(4) and 60(b)(6). Motions for relief under Rule 60(b)(6) have uniformly been found to be subject to the reasonableness time limit prescribed by Rule 60(c)(1). *See, e.g.*, *Canouse v. Protext Mobility, Inc.*, No. 22-1335, 2023 U.S App. LEXIS 12070, at *3-*4 (2d Cir. May 17, 2023) (finding that motions made pursuant to Rule 60(b)(6) must be brought within a reasonable time, determined by "scrutinizing the particular circumstances of the case"); *O'Neal v. Reilly*, 961 F.3d 973, 975 (7th Cir. 2020). Any findings by the Second Circuit that relief under Rule 60(b)(6) was improper because of Petitioner's delay in seeking relief would be consistent with this Court's and other Circuits' precedent.

Similarly, while the Panel noted that Petitioner waited six years to collaterally attack subject-matter and personal jurisdiction, there is no language in the Second Circuit's Order that states that the delay was the only reason for

denying relief. In fact, the Panel then goes on to state that the fundamental infirmity with bringing jurisdictional arguments through a motion pursuant to Rule 60(b)(4) is that those arguments "should have been raised through a timely appeal" and that the Petitioner "never offered a cogent explanation" for its delay or its failure to file a timely appeal. [*Universitas Educ., LLC v. Grist Mill Capital, LLC*, No. 21-2690(l), 21-2691, 2023 U.S. App. LEXIS 4257, at *6 (2d. Cir. Feb. 23, 2023), Pet. for Writ of Cert., App'x A, at 6a-7a.] This decision is thus consistent with this Court's precedent and its admonition in *Espinosa* that motions made pursuant to Rule 60(b)(4) are not a substitute for a timely appeal.

The Panel is not alone in their analysis. The Eleventh Circuit acknowledges that motions made pursuant to Rule 60(b)(4) are not subject to a typical laches or reasonableness analysis. *Stansell v. Revolutionary Armed Forces of Columbia*, 771 F.3d 713, 737 (11th Cir. 2014) (citing *Hertz Corp. v. Alamo Rent-a-Car, Inc.*, 16 F.3d 1126, 1130 (11th Cir. 1994) (accepting the position of other circuits that voidness challenges may be made at any time)). However, the Court in *Stansell* found that there existed "limitations on this doctrine" that challenges to jurisdictional defects may be made at any time through a Rule 60(b)(4) motion, especially if those challenges are predicated on lack of personal jurisdiction, which is generally waivable. 771 F.3d at 737. The *Stansell* Court then went on to hold that because the movant sat on his rights with respect to challenging service of

process and personal jurisdiction, the movant could not then revive these arguments using a Rule 60(b)(4) motion. *Id.* (citing *Espinosa*, 559 U.S. at 275). This is consistent with the analysis of the Panel below. Petitioner only seeks to challenge the lower Courts' findings with respect to personal jurisdiction in its Petition. Thus, the Panel's decision remains consistent with this Court's prior precedent and the decisions of other Circuit Courts, and Petitioner has not demonstrated any departure from or conflict with other relevant decisions that would merit a grant of Certiorari. U.S. Sup. Ct. R. 10(a) & 10(c).

II. Petitioner Forfeited its Personal Jurisdiction Defenses.

Petitioner next argues that this Court should grant its Petition because Petitioner did not waive its personal jurisdiction defenses. Generally, a party must diligently pursue its personal jurisdiction defenses, and its failure to do so in its first significant defensive move is considered a waiver of the defense. *See Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-05 (1982)); *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 133 (2d Cir. 2011) ("Personal jurisdiction, unlike subject matter jurisdiction, can . . . be purposefully waived or inadvertently forfeited."); *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 162 F.3d 724, 730 (2d Cir. 1998) ("Rule 12(h)(1) 'advises a litigant to exercise great diligence in challenging personal jurisdiction . . . or service of process. If he wishes

to raise [either] of these defenses he must do so at the time he makes his first significant defensive move[.]'") (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1391 (1990)); *see also* Fed. R. Civ. P. 12(h)(1)(b) (a party must raise the defense of personal jurisdiction in a "responsive pleading"). A court must consider all the "relevant facts and circumstances" in determining whether a party has waived its personal jurisdiction defenses. *See Mickalis Pawn Shop*, 645 F.3d at 134.

In support of its argument, Petitioner states that its attorney in the underlying proceeding, Carole Bernstein, signed a joint Memorandum in Opposition to Respondent's second turnover motion, and that in doing so, automatically made every argument in that motion applicable to Petitioner. The District Court's analysis of the joint brief in opposition indicates that this position is frivolous. As explained *supra*, the joint brief in opposition specifically argues that the District Court only lacked jurisdiction over four of the turnover respondents. Petitioner's *post hoc* attempts to join in the argument are unavailing.

Petitioner's argument is also frivolous for another reason. Petitioner's initial Motion to Vacate the Turnover Judgment was explicitly predicated on the fact that it alleged that it never had the opportunity to contest the District Court's exercise of personal jurisdiction. Thus, the position now taken by Petitioner is completely at odds with its prior position before the District Court. This

unexplained and unsupported change of position is clearly made in bad faith, and certainly does not constitute a compelling reason for this Court to grant the Petition.

Other than the clearly frivolous and inconsistent argument that Petitioner did in fact avail itself of its personal jurisdiction defenses, Petitioner offers no further factual analysis that supports its position that the personal jurisdiction defenses were not forfeited. Petitioner failed to argue that service of process was defective despite other turnover respondents making those same arguments and failed to challenge the affidavit of service filed by Respondent. Petitioner] had clear opportunities to avail itself of personal jurisdiction defenses and join in those defenses and failed to do so. Petitioner provides no basis to disturb the Panel's holding that the Petitioners "present[ed] no grounds to set aside as clearly erroneous the district court's [findings of fact supporting waiver.]" [Pet. for Writ of Cert., App'x A, at 7a.] Petitioners further fail to make any meaningful showing that the Panel's decision departed from or conflicted with other relevant decisions regarding waiver that would merit a grant of Certiorari. U.S. Sup. Ct. R. 10(a) & 10(c).

III. Even if Petitioners did not Waive Personal Jurisdiction Defenses, the District Court Properly Exercised Personal Jurisdiction over Petitioner.

Petitioner attempts to reduce the question presented to this Court to a *per se* rule regarding whether a transfer of funds automatically confers personal jurisdiction over the transferee. This is a fundamental misstatement of the issues in the case. In support of this over-simplified question, Petitioner wrongly alleges that Respondent's "sole accusation" in support of personal jurisdiction in its turnover motions was that Petitioner "received funds." This is misleading. Respondent did not merely assert that Petitioner received funds. Respondents asserted that Petitioner received funds in connection with a tortious scheme to defalcate money belonging to Respondent and to interfere with the execution of a New York judgment through concealment of that money using fraudulent transfers. Analyzed through this lens, it is clear that the District Court properly exercised personal jurisdiction over Petitioner, and that the Panel's affirmance of that exercise does not run contrary to established Supreme Court precedent or the decisions of its sister circuits.

In order to determine whether a district court properly exercised jurisdiction over a party, a court must determine whether that exercise "comports with the limits imposed by federal due process" on the forum state. *Walden v. Fiore*, 571

U.S. 277, 283 (2014) (finding that a Nevada court lacked personal jurisdiction over a Georgia-based DEA agent defendant who improperly seized plaintiff's money in Atlanta because DEA agent's actions were not targeted at Nevada and were only attenuated contacts with residents of the state). Due process "protects a party from being subject to personal jurisdiction in a forum with which it has no connections." *Gater Assets*, 2 F. 4th at 53 (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). For nonresidents, due process simply requires "certain minimum contacts" with the forum, "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Walden*, 51 U.S. at 283.

Whether a state may assert specific jurisdiction over a nonresident "focuses on the relationship among the defendant, the forum, and the litigation." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984). The minimum contacts must arise out of contacts that a defendant himself creates; must be with the forum state itself (instead of to persons that reside in the forum state); and cannot simply be "random, fortuitous or attenuated." *Walden*, 571 U.S. 284-85 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)).

In performing this analysis, the Supreme Court has found that intentional tortious conduct calculated at causing harm in a forum state is sufficient to support the exercise of personal jurisdiction against the tortfeasor. *Calder v. Jones*,

465 U.S. 783 (1984). The various Circuit Courts have reaffirmed that tortious conduct aimed at residents of a state can support the exercise of jurisdiction over out-of-state tortfeasors. *Motus, LLC v. Cardata Consultants, Inc.*, 23 F. 4th 115, 126 (1st Cir. 2022) (finding that the premise that "intentional tortious conduct causing an injury in a given state may . . . constitute purposeful availment and . . . give rise to specific jurisdiction in that state" is "sound"); *Licci v. Lebanese Canadian Bank*, 732 F.3d 161, 172 (2d Cir. 2013) (finding that minimum contacts would exist in a case if defendants engaged in intentional tortious actions aimed at United States citizens); *Dontos v. Vendomation NZ, Ltd.*, 582 F. App'x 338, 345 (5th Cir. 2014) (noting that tortious conduct committed outside a forum state that has effects in the forum will establish minimum contacts if that tortious conduct was expressly aimed at the forum state); *Skyhop Techs, Inc. v. Narra*, 58 F.4th 1211, 1230 (11th Cir. 2023) ("A nonresident defendant's single tortious act in the forum state can satisfy the effects test, even if the defendant lacks any other contacts with the forum state.") (internal citations omitted).

New York courts undertake a two-part analysis to determine whether the exercise of personal jurisdiction is proper: (1) whether the state's long-arm statutes, N.Y. C.P.L.R. §§ 301 or 302 provide a basis for personal jurisdiction, and (2) if so, whether the exercise of jurisdiction would comport with the due process requirements of *International Shoe* and its progeny. *See A.I. Trade*

Finance, Inc. v. Petra Bank, 989 F.2d 76, 82 (2d Cir. 1993). Pursuant to N.Y. C.P.L.R. § 302, a New York court may "exercise personal jurisdiction over any non-domiciliary" who in person or through an agent . . . commits a tortious act within the state . . . or commits a tortious act without the state causing injury to person or property within the state . . . if he expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from [interstate commerce]." N.Y. C.P.LR. § 302(a)(2)-(3)(ii).

Circuit Courts have routinely found that they can properly exercise jurisdiction over nonresident transferees who knowingly participated in fraudulent transfer schemes designed to frustrate a party's collection efforts on a judgment within the forum. *See Dontos*, 582 F. App'x at 345 (noting that a debtor who is liable for fraudulent transfers would almost certainly be subject to suit in the creditor's forum state); *Gambone v. Lite Rock Drywall*, 288 F. App'x 9, 12-14 (3rd Cir. 2008) (finding that exercise of ancillary and personal jurisdiction were proper in a fraudulent transfer case). District Courts also routinely apply this Court's precedent in holding the same. *Warren Hill, LLC v. Neptune Inv'rs, LLC*, No. 20-0452, 2020 U.S. Dist. LEXIS 78685, at *8-*9 (E.D. Pa. May 5, 2020) (finding that unlike in *Walden* where the defendant lacked contacts with Nevada, the defendants had "a substantial connection with [the forum state] through their efforts to interfere with a judgment" entered by a court in the forum); *In re Akbari-Shahmirzadi*,

Adv. No. 13-01035, 2016 Bankr. LEXIS 3957, at *7 (Bankr. N.M. Nov. 14, 2016) ("Courts have held with near uniformity that they have personal jurisdiction to hear fraudulent transfer cases . . . even when the transfer is the only contact between the debtor and the foreign transferee.").

Petitioner fails to reconcile *Calder* and its progeny with its argument, instead opting to make sweeping and inaccurate generalizations that the sole basis for the assertion of jurisdiction over Petitioner is that it received funds. This is not, nor ever has been, the argument advanced by Respondent. Respondent argued, and the District Court found, that Petitioner was a participant in a scheme to conceal assets from Respondent through their fraudulent transfer in an attempt to interfere with a judgment rendered under the auspices of New York law. As a result of Petitioner's knowing and willing participation in that scheme, and its fraudulent receipt and subsequent transfer of funds, it was haled into the District Court. The District Court's exercise of personal jurisdiction over Petitioner under those circumstances comports both with this Court precedent, decisions by other Courts of Appeals, and numerous, nearly uniform, decisions by District Courts applying personal jurisdiction analysis to attempts to frustrate collection of a judgment.

Any suggestion that Petitioner had "no alleged activities in New York" is unavailing, wrong as a matter of law, and wholly inconsistent with nearly forty years of precedent. Thus,

Petitioner once again fails to meet its burden of demonstrating that the Panel's affirmance of the decision departed from or conflicted with this Court's or any other court's decisions regarding waiver and that such departure would merit a grant of Certiorari. U.S. Sup. Ct. R. 10(a) & 10(c).

CONCLUSION

For all the aforementioned reasons, the petition for writ of certiorari should be denied.

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Respectfully submitted,

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