NO. 24-1126

In the Supreme Court of the United States

AVON CAPITAL, LLC,
A WYOMING LIMITED LIABILITY COMPANY,

Petitioner,

v.

UNIVERSITAS EDUCATION, LLC,

Respondent.

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

REPLY BRIEF OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Avon-WY has no parent company or publicly issued stock and no public company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS

JUDICIAL RULES

REPLY BRIEF OF PETITIONER

Avon Capital, LLC, a Wyoming limited liability company ("Avon-WY") respectfully files this reply to Respondent's response to Avon-WY's petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

INTRODUCTION

1. The original litigation involved a claim dispute regarding the Charter Oak Trust Welfare Benefit Plan, which was an ERISA Plan. To be clear, once the Oklahoma District Court lost Article III subject matter jurisdiction on December 3, 2020 it never regained it. Ancillary jurisdiction may not be exercised in a subsequent lawsuit to impose an obligation to pay an existing federal judgment on a person not already liable for that judgment. *Peacock v. Thomas*, 516 U.S. 349, 357-58 (1996) (citing *H.C. Cook Co. v. Beecher*, 217 U.S. 497 (1910)). There is no diversity jurisdiction because Universitas never met its burden of proof – Universitas never filed a complaint after subject matter jurisdiction expired. Also, there is no personal jurisdiction over Avon-WY because Avon-WY was never served.

Universitas's "Background" section provides little relevant information, as Universitas instead discusses non-party Dan Carpenter instead of the Petitioner, Avon-WY. While irrelevant to the lack of subject matter jurisdiction and lack of personal jurisdiction

that are issues in this case, Carpenter's challenges to the two convictions are currently pending in the First Circuit and the Second Circuit, as well as the district courts in Boston and Hartford. In both cases, the challenge is based in part upon this Court's 9-0 unanimous decisions in *Ciminelli*, *Percoco* and *Binday* from 2023 and the demise of the Right to Control Theory of Fraud. Moreover, as for the Connecticut case, Mr. Carpenter's appeal in the Second Circuit has been there since March of 2019 with the District Court Judge ignoring orders by the Second Circuit to rule on certain issues.

The Tenth Circuit correctly decided that Universitas lost Article III Standing in 2020 – but no one has explained how Universitas regained Article III Standing, or how the same District Court reacquired subject matter jurisdiction and personal jurisdiction over parties that were never served.

2. Moreover, Universitas states on page 1 of the Response that a judgment was entered against Avon Capital, LLC and that Avon-WY "was described as an important player" regarding the transfers of funds described in *United States v. Carpenter*, 190 F.Supp. 3d 260 (D.Conn.2016) (the "Connecticut Opinion"). Put simply, this is false. Instead, Avon-WY is not a judgment debtor named in the New York Judgment, which grants turnover relief based upon the transfers of funds. (Doc. 1) (Doc. 85) ("The post[-]judgment turnover order issued by the District Court for the Southern District of New York referred only to Delaware and Connecticut entities, making it clear that Avon-WY was not a party to that order.") (citing *Universitas Educ.,* 2014 U.S. Dist. LEXIS 109077 at *22.)). Further, Universitas states on page 2 that it moved for summary

judgment against Avon-WY on an alter ego theory (note that Universitas does not state it pleaded an alter ego theory) – this motion and alter ego allegation would be wholly unnecessary if Avon-WY was already a judgment debtor regarding the New York Judgment and the transfers of funds discussed in the Connecticut Opinion. Avon-WY is not mentioned at all in the Connecticut Opinion.

Next, Universitas states on page 3 that it refiled the New York Judgment before the Tenth Circuit Court of Appeals issued its mandate. While this is true, Universitas intentionally misses the point. On July 13, 2023 and again on August 4, 2023, the Tenth Circuit Court of Appeals issued opinions vacating the District Court's February 11, 2021 judgment when the Tenth Circuit Court of Appeals held that (1) the Universitas claims became moot and (2) the District Court lost subject matter jurisdiction when the judgment registered by Universitas in the District Court expired on December 3, 2020.

Universitas attempted to re-file the New York Judgment that previously expired on December 3, 2020 with the District Court by filing a notice of refiling judgment on August 7, 2023. (Doc. 511 (Notice (other) by Universitas Education LLC of *Refiling Judgment*)). The mandate was issued afterwards on September 28, 2023, which of course has jurisdictional significance.

3. On page 3, Universitas's response quotes the Tenth Circuit's holding that Universitas's claims became moot and the remand to the District Court for further proceedings. Because the (unpleaded) claims became moot in 2020, and Universitas never filed any claims after the claims became moot, there were no claims before the District Court. Further,

there was never service of process, nor even attempted service of process, after the unpleaded claims became moot and the District Court lost subject matter jurisdiction.

4. On page 4, Universitas points to the case activity before the District Court lost subject matter jurisdiction and argues that it somehow may be substituted for the previously clear federal law requiring that claims be pleaded and that service of process be effected.

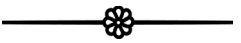
Universitas also points to the District Court's ruling that the filing of the New York Judgment after the District Court lost subject matter jurisdiction, and after the Tenth Circuit issued its two opinions holding that the District Court lost subject matter jurisdiction, somehow re-establishes subject matter jurisdiction. Of course, while a filing of a judgment by Universitas may place Universitas before the Court, a filing of a judgment does not place other parties before the District Court and also does not provide notice of Universitas's claims or personal jurisdiction as required by *Omni Cap. Int'l, Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97 (1987).

> "The requirement that a court have personal jurisdiction flows not from Art. III, but from the Due Process Clause. . . . It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). . . .

* * *

> Before a federal court may exercise personal jurisdiction over a defendant, the procedural requirement of service of summons must be satisfied. "[S]ervice of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Mississippi Publishing Corp. v. Murphree*, 326 U.S. 438, 444-445 (1946).

Omni Cap. Int'l, Ltd., 484 U.S. at 104.



ARGUMENT

> 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 a 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 . . . so as to call for an exercise of [the Supreme Court's] supervisory power, or if a United States court of appeals has decided an important federal question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court in a way that conflicts with relevant decisions of [the Supreme Court].

U.S. Sup. Ct. R. 10. While Universitas argues in its Response that none of these considerations are met,

actually all of these standards are met as shown below.

In summary, and fundamentally, it is axiomatic that federal law controls whether a federal court has subject matter jurisdiction and personal jurisdiction. The issue is not whether the Tenth Circuit correctly applied Oklahoma state law – instead, the issue is that federal court subject matter jurisdiction cannot, and should not, be expanded whenever it suits the lower courts.

I. The Tenth Circuit Decided an Important Federal Question in a Way That Conflicts with Relevant Decisions of the Supreme Court.

II. The Tenth Circuit Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, or Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings, or Sanctioned Such a Departure by a Lower Court, That This Calls for an Exercise of the Supreme Court's Supervisory Power.

The Tenth Circuit improperly created a new "exception" to the general rule that a case is dismissed when a case becomes moot and subject matter jurisdiction is lost. *Universitas Educ., LLC v. Avon Cap., LLC*, 124 F.4th 1231, 1245 & n.6 (10th Cir. 2024). The new exception simply involves (1) labeling the loss of subject matter jurisdiction as "temporary" and (2) generally pointing to cases where a "temporary" lapse in subject matter jurisdiction was cured. *Universitas* 124 F.4th at 1245. This new "exception" eradicates the general rule as stated in *Munsingwear*:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss. That was said in *Duke Power Co. v. Greenwood County*, 299 U.S. 259, 267 [1936], to be "the duty of the appellate court."

United States v. Munsingwear, Inc., 340 U.S. 36, 39-40 (1950).

The Petition for Writ of Certiorari cites this Court's *Munsingwear* opinion on page 11 and the Response misrepresents on page 7 that the Tenth Circuit "fully considered" *Munsingwear*." Creating an unlimited exception is not a "full consideration."

The Tenth Circuit opinion conflicts with a series of Supreme Court opinions. *Trump v. Hawaii*, 583 U.S. 941, 942 (2017) (order being appealed expired so that the appeal no longer presented a live case or controversy); *Alvarez v. Smith*, 558 U.S. 87, 93, 97 (2009) (vacating moot case with order to dismiss and recognizing an exception when the acts are "capable of repetition" while "evading review.").

Further, the Tenth Circuit recognized that "In other circumstances, the Supreme Court has allowed parties to cure their jurisdictional deficiencies while on appeal." *Universitas* 124 F.4th at 1244 (citing *Mullaney v. Anderson*, 342 U.S. 415 (1952).) (emphasis added). The Tenth Circuit thus created a new "circumstance" that does not require dismissal, but wholly failed to explain what the new "circumstance" is other than it being discretionary. Further, the Tenth

Circuit's reliance upon *Mullaney* is misplaced – *Mullaney* involved standing being raised for the first time in the Supreme Court, a claim that there was authorization to bring the claims on behalf of other persons, and the filing of a motion for leave to add parties. *Mullaney v. Anderson*, 342 U.S. at 416-17. Neither a proposed substitution of parties, or even an actual substitution of parties, is at issue here.

Notably, this Court held that dismissal was required when the "controversy did not become moot due to circumstances unattributable to any of the parties." *Karcher v. May*, 484 U.S. 72, 83 (1987) ("when a case becomes moot in its journey through the federal courts we will reverse or vacate the 'unreviewable' judgment below and remand with directions to dismiss").

On page 7, Universitas also points to the Tenth Circuit's statement: "[b[ut 'the Supreme Court's cases are less than clear as to whether and how a jurisdictional defect can be remedied in the course of litigation.'" *Universitas*, 124 F.4th at 1245 (quoting *Schreiber Foods, Inc. v. Beatrice Cheese, Inc.*, 402 F.3d 1198, 1203 (Fed. Cir. 2005). First, *Schreiber Foods* involves a substitution of a plaintiff in patent litigation and has no relevance to this case. Further, the Tenth Circuit omitted language in the *Schreiber Foods* opinion, which states "In cases where the plaintiff lacked initial standing or the case suffered from some other jurisdictional defect at the time suit is commenced, the Supreme Court's cases are less than clear as to whether and how a jurisdictional defect can be remedied in the course of litigation." *Schreiber Foods, Inc.*, 402 F.3d at 1203 (emphasis added). This case does not involve a plaintiff's initial lack of standing

or some jurisdictional defect at the time suit was commenced.

On page 8, Universitas points to the Tenth Circuit's reliance upon this Court's *Lewis* and *Caterpillar* opinions. First, *Lewis* involved a change in the law while the appeal was pending. *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482 (1990). In addition, *Lewis* supports dismissal of this case, as the *Lewis* Court refused to dismiss because Continental "was [not] negligently sleeping on its rights" and "could [not] properly be criticized" because the underlying law changed before the appellate court issued its opinion. *Lewis*, 494 U.S. at 492. Similarly, *Caterpillar* involved a removal where complete diversity did not exist, but the nondiverse defendant was dismissed shortly afterwards. *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 73 (1996). The issue in *Caterpillar* was "whether the absence of complete diversity at the time of removal is fatal to federal-court adjudication" (*Caterpillar*, 519 U.S. at 64) which is not relevant here.

Next, the Tenth Circuit's holding that no complaint is required under federal law is severely flawed. *Universitas*, 124 F.4th at 1248 (citing *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 484 (1982). Notably, *Kremer* involved an administrative proceeding and whether the complainant's claims were barred by collateral estoppel because the first proceeding lacked the requisite due process. *Id. Kremer* does not support the holding by the Tenth Circuit in this case. Further, the Tenth Circuit's reliance upon two Oklahoma state court cases (*Mattingly Law Firm* and *Sproles*[1]*)*

[1] Notably, while Oklahoma law does not replace federal due process requirements neither *Mattingly Law Firm, P.C. v. Henson*, 2020 OK CIV APP 19, 466 P.3d 590, 597 (Okla. App. 2019) nor

in support for a proposition that no veil piercing claim is required to be pleaded improperly substitutes the federal due process requirements with Oklahoma state law.

The Tenth Circuit's holding that "[federal law] did not require dismissal" (*Universitas*, 124 F.4th at 1245) is erroneous and conflicts with this Court's precedent, and also creates a new "judicial discretion" exception to the requirement that cases be dismissed when Article III subject matter jurisdiction is lost. This is also a departure from the accepted and usual course of judicial proceedings and a sanctioning of the departure by the lower court, that this calls for an exercise of the Supreme Court's supervisory power.

III. The Tenth Circuit Conflicts with Decisions of Other Courts on the Same Important Matter.

The Seventh Circuit rejected an argument based upon *Mullaney* and held that the District Court lacked jurisdiction and dismissed the case. *Northern Trust Co. v. Bunge Corp.*, 899 F.2d 591, 597-598 (7th Cir. 1990). The *Northern Trust* opinion refused to expand the holding in *Mullaney* to add defendants. *Id.*

Similarly, the Fifth Circuit refused to expand this Court's holding in *Lewis* and ordered a moot case be dismissed, and also refused to create an exception to the general rule because a party's rights changed, which is different than when a legal framework changes. *Rockett Special Utility District v. McAdams*, 858 Fed. Appx. 160, at 162 (5th Cir. 2021).

Sproles v. Gulfcor, Inc., 1999 OK CIV APP 81, 987 P.2d 454, 457 (Okla. App. 1999) holds that a pleading asserting a claim against a nonparty is unnecessary.

Next, the Second Circuit held a moot claim should be dismissed for lack of jurisdiction by the district court, or, if a claim becomes moot between the entry of final judgment and the completion of appellate review, the appellate court usually must either dismiss the appeal or vacate the judgment and remand for entry of a judgment dismissing the moot claim. *Altman v. Bedford Cent. Sch. Dist.*, 245 F.3d 49, 70-71 (2d Cir. 2001) (citing *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 72-73 (1983); *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93-94 (1979) (other cit. omitted). Similarly, in the Fourth Circuit, "[i]f a claim becomes moot after the entry of a district court's final judgment and prior to the completion of appellate review, we generally vacate the judgment and remand for dismissal." *Mellen v. Bunting*, 327 F.3d 355, 364 (4th Cir. 2003) (cit. omitted).

Finally in the Ninth Circuit, the established practice in the federal courts when a case becomes moot is for the appellate court to reverse or vacate the judgment below and remand with directions to dismiss). *McQuillan v. Sorbothane, Inc.*, 23 F.3d 1531, 1532 (9th Cir. 1994) (citing *Karcher*, 484 U.S. 72)).

IV. Petitioner Did Not "Participate" Willingly.

On page 9 of the Response, Universitas falsely claims that Avon-WY's "full participation" in the case was a waiver of the requirement that Universitas file a complaint and that Petitioner be served after Universitas's claims became moot and the District Court lost subject matter jurisdiction. To be clear, Avon-WY did not willingly participate – Avon-WY argued that the District Court lacked personal jurisdiction in every filing following the first Tenth Circuit opinion remanding the case – for example Doc. 515, Doc. 517 motion to dismiss, Doc. 542, Doc. 542, Doc. 546, Doc. 556, etc.

The failure of the Tenth Circuit and the District Court to address the lack of personal jurisdiction because there was no service of process after December 3, 2020 is a clear violation of Avon-WY's federal due process rights. There is no personal jurisdiction if a defendant is not served with process.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

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