No. 23-

IN THE

Supreme Court of the United States

PHOTOPLAZA, INC., GOLDSHOP 300, INC., GOLDSHOP, INC., INSTOCK GOODIES, INC., TZVI HESCHEL, SHLOMA BICHLER AND LALI DATS,

Petitioners,

v.

HERBAL BRANDS, INC.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Personal jurisdiction exists over a non-resident defendant only if it has "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). Additionally, "the defendant's suit-related conduct must create a substantial connection with the forum State" arising out of contacts created with the forum by the *defendant* itself, and *not* by others who reside there. *Walden v. Fiore*, 571 U.S. 277, 284-85 (2014).

Even with these principles, the circuits are divided over whether a "substantial connection" exists for a non-resident defendant whose only contact with the forum is the use of a third-party fulfillment company, such as Amazon, to sell products that may be purchased by buyers nationwide—some of whom happen to reside in the forum. In the decision below, the Ninth Circuit acknowledged the five-circuit split. App. 21a.

The Question Presented is:

Whether a seller whose products ship nationwide is subject to personal jurisdiction in every forum into which even one of its products is shipped.

PARTIES TO THE PROCEEDING

Photoplaza, Inc., Goldshop 300, Inc., Goldshop, Inc., Instock Goodies, Inc., Tzvi Heschel, Shloma Bichler, and Lali Dats, petitioners on review, were the appellees below and the defendants in the district court.

Herbal Brands, Inc., respondent on review, was the appellant below and the plaintiff in the district court.

CORPORATE DISCLOSURE STATEMENT

Petitioners InStock Goodies, Inc., Photoplaza, Inc., Goldshop 300, Inc., and Goldshop, Inc. have no parent corporations, and no publicly held corporation owns 10% or more of the stock of any of these entities.

RELATED PROCEEDINGS

Herbal Brands, Inc. v. Photoplaza, Inc., No. 21-17001, United States Court of Appeals for the Ninth Circuit. Judgment entered on July 5, 2023. Petition for rehearing en banc denied on August 11, 2023.

Herbal Brands Inc. v. Photoplaza Inc., No. 2:21-cv-577, United States District Court for the District of Arizona. Judgment entered November 15, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Photoplaza, Inc., Goldshop 300, Inc., Goldshop, Inc., Instock Goodies, Inc., Tzvi Heschel, Shloma Bichler, and Lali Dats (collectively, "Petitioners") respectfully submit this Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 72 F.4th 1085 and reproduced at App. 1a-25a. The district court's decision is unreported, but available at 2021 WL 5299677 and reproduced at App. 26a-35a. The Ninth Circuit's order denying rehearing en banc is unreported and reproduced at App. 36a-37a.

JURISDICTION

The Ninth Circuit issued its decision on July 5, 2023, and denied a timely petition for rehearing en banc on August 11, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment states that no person shall be "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

STATEMENT OF THE CASE

The Ninth Circuit held that Petitioners are subject to specific personal jurisdiction in Arizona despite not being residents of Arizona, having no business presence in the state of Arizona, and there being "no evidence that [Petitioners] specifically targeted that forum." App. 4a, 14a. The sole basis for jurisdiction was nationwide shipping of their products offered on Amazon. As the district court recognized: "[i]f [Petitioners] can be haled into Arizona courts, then virtually any seller who places products for sale on Amazon can be haled into Arizona courts as well." *Id.* at 34a. This Court's review is necessary to determine the circumstances in which due process allows a court to exercise specific personal jurisdiction over a non-resident defendant based on nationwide shipping of its products.

This issue is subject to contradictory approaches amongst five circuits. The prevalence of e-commerce transactions demands uniform enforcement of the constitutionally mandated restrictions on the exercise of personal jurisdiction.

I. Factual Background

Petitioners are New York citizens. App. 27a. Respondent is a Delaware corporation with its principal place of business in Arizona and is in the business of selling health and wellness products. *Id.* Alleging that Petitioners unlawfully sold Respondent's products through online storefronts on Amazon.com, Respondent brought suit against Petitioners for trademark infringement and related claims. *Id.* at 28a.

To sell their products through Amazon, Petitioners ship their products to an Amazon facility and list them on Amazon.com. From that point, Amazon receives, processes, and ships the orders without further involvement by Petitioners. *See Amazon FBA: Fulfillment services for your ecommerce business*, AMAZON, https://sell.amazon.com/fulfillment-by-amazon (last visited Nov. 7, 2023).

II. Procedural History

Petitioners moved to dismiss the complaint for lack of personal jurisdiction. App. 26a. Respondent claimed personal jurisdiction was proper because the products at issue were shipped—by Amazon—to consumers nationwide, including Arizona. *Id.* at 27a.

The district court disagreed with Respondent, holding that Petitioners had not "expressly aimed" their conduct at Arizona and therefore had not established personal jurisdiction over Petitioners under the "purposeful direction" test set forth in *Calder v. Jones*, 465 U.S. 783 (1984), which has become known as the *Calder* "effects" test. App. 30a, 33a-34a. In doing so, the district court held that Respondent "could not establish specific personal jurisdiction through nonspecific, nationwide sales because any contact with Arizona would be random, fortuitous, or attenuated." *Id.* at 34a (cleaned up). Respondent appealed.

The Ninth Circuit reversed the district court's decision. *Id.* at 25a. Like the district court, the Ninth Circuit applied the *Calder* effects test to determine whether Petitioners had purposefully directed their activities at Arizona. *Id.* at 10a. The opinion focused on the

second element: express aiming. *Id.* at 11a. In holding for Respondent, the Ninth Circuit concluded that "operating a website in conjunction with something more—conduct directly targeting the forum—is sufficient to satisfy the express aiming prong." *Id.* at 12a (cleaned up). The opinion reasoned that a defendant who sells and ships even one product into a forum via an interactive website has engaged in "something more" than operating a website sufficient to satisfy the express aiming prong of the *Calder* effects test—even if the defendant sells nationwide. *Id.* at 14a-15a, 20a; *see also id.* at 18a ("[T]he express aiming inquiry does not require a showing that the [Petitioners] targeted [their] advertising or operations at the forum."); *id.* at 14a ("[T]here is no evidence that the [Petitioners] specifically targeted that forum.").

Petitioners' application for rehearing en banc was denied. *Id.* at 36a-37a. This Petition follows.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit Opinion Deepens an Entrenched Five-Circuit Split

The Ninth Circuit opinion furthers an already-entrenched split among the courts of appeals, reaching starkly different results. The Circuits were already split regarding what contacts are sufficient to establish "minimum contacts" and specifically as to whether the sale and delivery of a product via a nationally accessible website, from which products are shipped nationwide, satisfies "minimum contacts." The Ninth Circuit opinion deepens that split, and this Court's review is needed to resolve it.

A. The Circuit Courts are Split on Whether Sales Into a Forum Via an Interactive Website, From Which Products are Shipped Nationwide, are Sufficient to Establish "Minimum Contacts"

The circuit split at issue here is between the Fifth and Eighth Circuits, on one hand, and the Second, Seventh, and now the Ninth Circuits, on the other.

1. The Eighth and Fifth Circuits: Nationwide Shipping is Insufficient to Satisfy the Purposeful Direction Test

In *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, the Eighth Circuit held that the exercise of specific personal jurisdiction over a nonresident defendant—based on a forum resident's purchase of a claim-linked product through the defendant's nationally accessible website—was improper. 42 F.4th 948, 953 (8th Cir. 2022). Applying *Calder*, the Eighth Circuit found the sale into the forum through a nationally accessible website did not establish that the defendant had either "*uniquely or expressly aimed* its alleged tortious act" at the forum or "*specifically targeted* [forum] consumers or the [forum] market." *Id.* at 954 (emphasis added) (citing *Johnson v. Arden*, 614 F.3d 785, 798 (8th Cir. 2010); *Walden*, 571 U.S. at 287-88). The court held that the contacts alleged were no more than "random, isolated, or fortuitous." *Id.* at 953 (citing *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021)).

The Fifth Circuit ruled similarly a year earlier. *Admar Int'l, Inc. v. Eastrock, L.L.C.*, 18 F.4th 783 (5th Cir. 2021). In *Admar*, the plaintiff argued that the defendant

had minimum contacts with Louisiana because the defendant's website targeted the entire United States and the defendant shipped a single product into the forum. *Id.* at 786-87. But the Fifth Circuit held that a "[defendant's] delivery of a single $13 product to Louisiana is the type of isolated act that does not create minimum contacts." *Id.* at 788. Indeed, the Fifth Circuit held that for a court to exercise personal jurisdiction, the defendant must "*target the forum state*," and rejected the plaintiff's "greater includes the lesser" theory of targeting a forum—i.e., that where the entire country is targeted, the forum is necessarily targeted. *Id.* at 787 (emphasis added).

2. The Second, Seventh, and Now the Ninth Circuits: Nationwide Shipping is Sufficient to Satisfy the Purposeful Direction Test

Conversely, the Second and Seventh Circuits have held sales into a forum alone are sufficient to satisfy the purposeful direction test and establish the requisite "minimum contacts." In *Chloe v. Queen Bee of Beverly Hills, LLC*, the Second Circuit found that the defendant's conduct was purposefully directed toward New York because the defendant offered bags for sale on its website, which was accessible to New York customers, and had shipped at least one allegedly counterfeit bag into the forum. 616 F.3d 158, 165, 171–72 (2d Cir. 2010). The Second Circuit found that the exercise of personal jurisdiction premised upon the single claim-linked sale and shipment, together with *non-claim-linked* transactions, was proper as these actions amounted to "purposeful availment." *Id.* at 167.

NBA Props., Inc. v. HANWJH furthered the divide. There, the Seventh Circuit held that because the

defendant sold a single product to an Illinois resident, it had purposefully directed its conduct at Illinois. *NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 624-25 (7th Cir. 2022), *cert. denied*, 143 S. Ct. 577 (2023). The plaintiff there had "not alleged any other contacts between [defendant] and Illinois other than the single sale to its investigator and the accessibility of [defendant]'s online store from Illinois." *Id.* at 617. But despite the paucity of contacts between the defendant and the forum, the court found the exercise of personal jurisdiction proper based on the single sale.

The Ninth Circuit has followed the Second and Seventh Circuits' approaches in the opinion below. As discussed *supra*, the panel held that a single sale and shipment of a product into a forum through a website—accessible in all fifty states, and from which products are shipped nationwide—is sufficient to satisfy the express aiming prong of *Calder*. *See* App. 14a-15a, 20a.

The circuit split on the issue—now involving five circuits—warrants this Court's review.

II. The Court Should Reaffirm its Precedent and Reject the Second, Seventh, and Ninth Circuits' Approaches

Under the rule promulgated by the Second, Seventh, and now the Ninth Circuits, any seller who ships its products nationwide is subject to personal jurisdiction *in every forum* into which it ships even a single product. But this Court has never taken such a maximalist view of the "minimum contacts" test. On the contrary, this Court has stated that the "minimum contacts" requirement protects

a non-resident defendant from being forced to litigate in jurisdictions premised upon "random, fortuitous, or attenuated contacts" between the defendant and the forum. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (cleaned up). This Court has further held that "the defendant's suit-related conduct must create a *substantial connection* with the forum State" for the exercise of personal jurisdiction to comport with due process. *Walden*, 571 U.S. at 284 (emphasis added). Nationwide shipping through Amazon surely does not create such a substantial connection *with every state*.

A. This Court's Decisions in *Calder* and *Keeton* Govern When Personal Jurisdiction is Proper Over a Non-Resident Defendant Whose Products are Shipped Into a Forum

This Court's decisions in *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and *Calder*, 465 U.S. 783, guide the "minimum contacts" and "substantial connection" inquiries. Together, *Calder* and *Keeton* control when a non-resident defendant, whose products are shipped into a forum, is subject to personal jurisdiction.

In *Keeton*, a New York citizen sued Hustler Magazine, an Ohio corporation with its principal place of business in California, in New Hampshire over an allegedly libelous article. *Keeton*, 465 U.S. at 772. The article had nothing to do with New Hampshire, and the only connection to New Hampshire was the monthly circulation of tens of thousands of physical copies of Hustler Magazine in the state. *Id.* The case was brought in New Hampshire because the state's "unusually long statute of limitations" made it the only forum in which the plaintiff could still

bring suit. *Id.* at 773, 775. The district court dismissed the case for lack of personal jurisdiction, and the First Circuit affirmed. *Id.* at 772.

This Court disagreed and reversed the dismissal, focusing its analysis on the facts that (1) defendant Hustler Magazine circulated tens of thousands of physical copies of its magazine into New Hampshire per month; and (2) the circulation was purposeful, and therefore not "random, isolated, or fortuitous." *Id.* at 772, 775. This Court further held that this "regular circulation" of the magazine into the forum established that Hustler "chose to enter" the New Hampshire market, thus rendering the exercise of personal jurisdiction proper. *Id.* at 773-74, 779. In short, because Hustler had "*continuously and deliberately* exploited the New Hampshire market, it must reasonably anticipate being haled into court there . . . ." *Id.* at 781 (emphasis added).

On the same day *Keeton* was handed down, this Court decided *Calder*, which also found personal jurisdiction proper, but for an entirely different reason. Jones, the plaintiff, was a California resident who sued the National Enquirer, a Florida corporation, and two of its employees, both Florida citizens, over an allegedly libelous article. *Calder*, 465 U.S. at 785-86. This Court explained that jurisdiction over the defendant employees (an editor and writer) was proper because the allegedly libelous story concerned the California activities of a California resident, impugned the professionalism of an entertainer whose television career was *centered in California*, and the article was drawn from California sources. *Id.* at 785-86, 788–89. "*In sum, California is the focal point both of the story and of the harm suffered.* Jurisdiction over

petitioners is therefore proper in California based on the 'effects' of their Florida conduct in California." *Id.* at 789 (emphasis added). Thus, the *Calder* effects test—which turns on whether the forum is the "focal point" of the allegedly tortious conduct—was born.

Together, *Keeton* and *Calder* provide clear rules to lower courts as to when a non-resident defendant has sufficient "minimum contacts" to confer personal jurisdiction. Personal jurisdiction is proper when the non-resident defendant has continuously and deliberately exploited the forum market, such as when the defendant ships tens of thousands of claim-linked products into the forum each month. *Keeton*, 465 U.S. at 772. On the other hand, where such continuous and deliberate exploitation by the defendant is not present, this Court applies the *Calder* "effects" test. In *Calder*, since the defendants did not have such continuous and deliberate contacts with the forum, the Court could not apply the *Keeton* analysis and instead inquired whether the forum was the *focal point* of both the tortious conduct and the harm suffered.

This dichotomy is simple. Where the non-resident defendant has continuous, substantial, and deliberate contacts with the forum, such as shipping tens of thousands of products into the forum per month, *Keeton* applies, and personal jurisdiction is proper. But where the defendant does not have such substantial contacts, *Calder* applies, and courts inquire into whether the forum was the focal point of the defendant's conduct. *See*, *e.g.*, *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419, 425 (5th Cir. 2005) ("While *Keeton* jurisdiction demands substantial circulation that is lacking here, *Calder* jurisdiction requires a case-by-case analysis of the

purpose and impact of the" tortious conduct.); *Huizenga v. Gwynn*, 225 F. Supp. 3d 647, 659 (E.D. Mich. 2016) ("The Courts of Appeals have uniformly concluded that '*Keeton* jurisdiction demands *substantial* circulation.'") (quoting *Fielding*, 415 F.3d at 425; citing *Chaiken v. VV Pub. Corp.*, 119 F.3d 1018, 1029 (2d Cir. 1997); *Noonan v. Winston Co.*, 135 F.3d 85, 91 (1st Cir. 1998)).

As discussed *infra,* however, the Second, Seventh, and Ninth Circuits misapply this Court's precedent and, in doing so, have stripped away much of the due process protections afforded to non-resident defendants.

B. The Ninth, Second, and Seventh Circuits Are Unfaithful to *Calder* and *Keeton*

The Ninth Circuit opinion below does not properly apply *Calder* and *Keeton*. There is no contention here that Petitioners "continuously and deliberately" exploited the Arizona market such that they should reasonably expect to be haled into court there under *Keeton*. Instead, Respondent only alleged that Petitioners' products were available for nationwide online purchase via Amazon. Indeed, as the district court correctly held, "nonspecific, nationwide sales" cannot establish personal jurisdiction in Arizona because "any contact with Arizona would be 'random, fortuitous, or attenuated.'" App. 34a (citation omitted). Considering the absence of continuous and deliberate contacts like those in *Keeton, Calder* applies. And under *Calder*, the defendant's conduct must be "expressly aimed" at the forum. Stated differently, the forum must be the "focal point" of the conduct. Here, Petitioners' nationwide shipping of products is clearly not expressly aimed at Arizona.

If a defendant's nationwide sales do not confer personal jurisdiction, then shipment by a third-party fulfillment service such as Amazon—as in this case—is even further removed and cannot confer personal jurisdiction. Thus, personal jurisdiction is improper under *Keeton* because there, personal jurisdiction was established by the *defendant itself* having shipped large quantities of products into the forum every month, amounting to continuous and deliberate contacts. In contrast, here, it is Amazon that shipped the products nationwide, not Petitioners, App. 32a, nor is there any allegation that Petitioners shipped large quantities of products into Arizona, *id.* at 5a.

The exercise of personal jurisdiction over Petitioners is similarly improper under *Calder*, which permits the exercise of personal jurisdiction over a non-resident defendant where the forum is the "focal point" of the conduct. *Calder*, 465 U.S. at 783. Here, the alleged tortious conduct—infringement of Respondent's trademark—would, if true, be present in *every forum into which Petitioners' goods are delivered*. And, as with *Keeton*, Petitioners are a step further removed from this analysis as Petitioner's goods were sold and shipped by a third-party (Amazon). Therefore, it is clear that Arizona is not the "focal point" of the tortious conduct.

Like the Ninth Circuit below, the Second Circuit's decision in *Chloe* and the Seventh Circuit's decision in *NBA Props.* do not properly apply *Keeton* and *Calder*. In *Chloe*, the Second Circuit held that a single sale into New York was sufficient to establish that the defendant had purposefully directed its conduct at New York. 616 F.3d at 165, 171-72. There, *Keeton* would not be the proper

analysis as there were no continuous and deliberate contacts with the forum, such as the tens of thousands of monthly sales into the forum found to be sufficient in *Keeton*. Instead, *Calder* applies, and the Second Circuit should have analyzed whether New York was the focal point of the defendant's conduct. Under that analysis, a single product shipped into the forum would clearly not render New York the focal point. Indeed, such a conclusion would inherently mean that anywhere a single product is shipped becomes the focal point of that conduct, rendering the "focal point" analysis meaningless.

The Seventh Circuit's decision in *NBA Props.* similarly misapplies *Keeton* and *Calder*. There, as in *Chloe*, the defendant shipped a single product—a pair of shorts—to the forum (Illinois) and had no other contacts with the forum. *NBA Props.*, 46 F.4th at 617, 624-25. Since no continuous and deliberate contacts were at issue, *Calder*, not *Keeton*, controls. And under *Calder*, Illinois must be the focal point of the defendant's conduct, which cannot be established by a single pair of shorts shipped into the forum. Once again, finding that Illinois is the focal point of the defendant's conduct based solely on the shipment of a single product would render *every forum* into which the defendant ships its product the "focal point."

The Second, Seventh, and now Ninth Circuits therefore do not properly apply this Court's precedent in *Keeton* and *Calder*.

C. The Fifth and Eighth Circuits are Faithful to this Court's Precedent

The Fifth and Eighth Circuits' analyses of whether a non-resident defendant's internet-based contacts with

the forum are sufficient to establish personal jurisdiction follow this Court's precedent. The Fifth Circuit rejected the assertion that minimum contacts are satisfied in every jurisdiction into which a defendant's product is shipped through a website accessible nationwide. *Admar*, 18 F.4th at 787. As the Fifth Circuit correctly stated, accepting the "greater includes the lesser" approach—like the Second, Seventh, and now Ninth Circuits have—would mean that if the defendant "has minimum contacts with [one state], then it has minimum contacts with all 50 states[.]" *Id.* at 788. Such a conclusion violates the principles of due process because, if the requirement of minimum contacts subjects a defendant to personal jurisdiction *everywhere* based solely on nationwide contacts, then due process is a dead letter.

Following *Calder*, the Eighth Circuit correctly found the exercise of personal jurisdiction improper because the defendant had neither "uniquely or expressly aimed" its conduct at the forum, nor "specifically targeted" it. *Zazzle*, 42 F.4th at 954. Likewise, the Fifth Circuit came to the same conclusion because the defendant did not "target the forum" or otherwise "purposefully avail[]" itself of the opportunity to do business there. *Admar*, 18 F.4th at 787. Both Circuits properly focused on the *defendant's*—as opposed to the plaintiff's—contacts with the forum and concluded that the mere sale and delivery of a single product into the forum via a website, through which products are shipped nationwide, does not amount to "minimum contacts."

III. The Question Presented is of Critical Importance and This Case is an Ideal Vehicle to Answer It

This Court has recognized that personal jurisdiction "protects the defendant against the burdens of litigating in a distant or inconvenient forum" and ensures that the States "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980). The question presented by this case has clear legal and practical significance. This issue has caused a circuit split that has now grown to five circuits, and other circuits are sure to further this divide as e-commerce disputes continue to be litigated. The question presented has sufficiently percolated in the lower courts and is ripe for review by this Court.

The proper standard for determining when a court has personal jurisdiction over a non-resident defendant is a threshold issue for every case involving an out-of-state defendant, and it is critical that parties to such cases—and, indeed, all e-commerce sellers—have clear guidance on where they are subject to personal jurisdiction. The five circuits discussed above have reached conflicting conclusions, and the issue will continue to be litigated and appealed in the circuits unless this Court resolves the instant split. The Ninth, Seventh, and Second Circuits have so misapplied this Court's jurisprudence that they have vastly reduced the due process protections afforded to non-resident defendants. The Court should not allow those protections to be rolled back and should use this case as an opportunity to uphold due process rights.

Online commerce continues to gain market share. While traditional brick-and-mortar storefronts remain

popular with some consumers, the demand for business to be done online is overwhelming, as demonstrated by the popularity of e-commerce platforms like Amazon.com, Facebook Marketplace, and Etsy. But due process protections do not need to be diminished, as they have been by the Second, Seventh, and Ninth Circuits, to determine the propriety of personal jurisdiction over non-resident, e-commerce defendants. As discussed in this Petition, such cases should be resolved in accordance with *Calder*, *Keeton*, and their progeny.

Because this case was decided on an early motion to dismiss, this is an ideal vehicle to resolve the question presented. No discovery was taken and no extraneous facts cloud the record. The decisions of both the district court and the Ninth Circuit were based entirely on allegations in the complaint. Thus, a decision can be rendered without the need to address disputed factual issues.

E-commerce is fundamental to the U.S. economy, and the question presented continues to arise frequently with inconsistent results. Now is the time for this Court to resolve this issue, which comes to the Court as a purely legal question this Court is ideally positioned to resolve.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Date: November 9, 2023

Respectfully Submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JULY 5, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-17001

D.C. No. 2:21-cv-00577-SMB

HERBAL BRANDS, INC.,

Plaintiff-Appellant,

v.

PHOTOPLAZA, INC.; GOLDSHOP 300, INC.; GOLDSHOP, INC.; INSTOCK GOODIES, INC.; TZVI HESCHEL; SHLOMA BICHLER; LALI DATS,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Susan M. Brnovich, District Judge, Presiding

Argued and Submitted February 8, 2023
Phoenix, Arizona

Filed July 5, 2023

Before: Susan P. Graber, Richard R. Clifton, and Morgan Christen, Circuit Judges.

Opinion by Judge Graber.

Appendix A

SUMMARY*

PERSONAL JURISDICTION

Reversing the district court's dismissal for lack of personal jurisdiction over defendants in an action under the Lanham Act, the panel held that, if a defendant, in its regular course of business, sells a physical product via an interactive website and causes that product to be delivered to the forum, then the defendant has purposefully directed its conduct at the forum such that the exercise of personal jurisdiction may be appropriate.

Herbal Brands, Inc., which has its principal place of business in Arizona, brought suit in Arizona against New York residents that sell products via Amazon storefronts. Herbal Brands alleged that defendants' unauthorized sale of Herbal Brands products on Amazon, to Arizona residents and others, violated the Lanham Act and state law.

The panel applied the Arizona long-arm statute, which provides for personal jurisdiction co-extensive with the limits of federal due process. Due process requires that a nonresident defendant must have "certain minimum contacts" with the forum such that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice.

Addressing the first prong of the specific jurisdiction inquiry, the panel applied a purposeful direction analysis,

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* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

rather than a purposeful availment analysis, because Herbal Brands brought tortious claims for trademark infringement, false advertising, and tortious interference with business relationships. The panel held that Herbal Brands met its initial burden of showing that defendants purposefully directed their activities at the forum because, under the *Calder* effects test, defendants' sale of products to Arizona residents was an intentional act, and Herbal Brands' cease-and-desist letters informed defendants that their actions were causing harm in Arizona. In addition, defendants "expressly aimed" their conduct at the forum because an interactive website plus "something more" constitutes "express aiming." Defendants' Amazon storefronts were interactive websites, and defendants' sales of products to Arizona residents were the requisite "something more" because the sales occurred as part of defendants' regular course of business, and defendants exercised some level of control over the ultimate distribution of their products beyond simply placing their products into the stream of commerce. Recognizing a range of approaches adopted by other circuits in response to similar questions, the panel stated that it did not attempt to reconcile the split among the circuits.

Addressing the second prong of the specific jurisdiction inquiry, the panel held that Herbal Brands' harm arose out of defendants' contacts with Arizona. Addressing the third prong, the panel held that defendants failed to show that the exercise of jurisdiction would not be reasonable. Thus, in sum, defendants had sufficient minimum contacts with Arizona, Herbal Brands' harm arose out of those contacts, and the exercise of personal jurisdiction would be reasonable in the circumstances.

Appendix A

OPINION

GRABER, Circuit Judge:

Internet commerce is ubiquitous in the modern economy, allowing sellers to reach potential consumers around the globe. Yet we have not addressed directly the question presented by this appeal: Does the sale of a product via an interactive website provide sufficient "minimum contacts" to support personal jurisdiction over a nonresident defendant in the state where the defendant causes the product to be delivered, when the plaintiff in that state brings a claim for an intentional tort related to the sale of the product?

Plaintiff Herbal Brands, Inc., has its principal place of business in Arizona. It manufactures and sells health, wellness, fitness, and nutrition products under various trademarks and brands. Defendants are New York residents that sell products via Amazon storefronts. Plaintiff filed this action in Arizona, alleging that Defendants' unauthorized sale of Herbal Brands products on Amazon violated the Lanham Act and state law. The district court denied Plaintiff's request for jurisdictional discovery and dismissed the complaint on the ground that the court lacks personal jurisdiction over Defendants. Reviewing de novo the dismissal for lack of personal jurisdiction, *Picot v. Weston*, 780 F.3d 1206, 1211 (9th Cir. 2015), we reverse. We hold that, if a defendant, in its regular course of business, sells a physical product via an interactive website and causes that product to be delivered to the forum, the defendant has purposefully directed its

conduct at the forum such that the exercise of personal jurisdiction may be appropriate.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Herbal Brands is a Delaware corporation with its principal place of business in Arizona. Plaintiff sells its health, wellness, fitness, and nutrition products directly to consumers or through third parties that enter into agreements to become "Authorized Sellers." Plaintiff alleges that unauthorized sales of its products are not subject to quality control and thus may damage its reputation with consumers.

Defendants Photoplaza, Inc.; Goldshop 300, Inc.; Goldshop, Inc.; InStock Goodies, Inc.; Tzvi Heschel; Shloma Bichler; and Lali Dats are all New York residents. Plaintiff discovered that Defendants—who are not Authorized Sellers—were selling Herbal Brands products through two Amazon storefronts. [1] Plaintiff estimates that, as of April 5, 2021—the date when it filed its complaint—Defendants had sold more than 23,000 Herbal Brands products. Plaintiff alleges that Defendants sold products to Arizona residents "through the regular course of business," but, without access to Defendants' sales data, Plaintiff is unable to allege the exact number of sales made to Arizona customers.

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1. For the purposes of this opinion, we use the term "Amazon storefront" to describe an e-commerce store that is hosted on the Amazon platform and operated by a business to advertise and sell its products. See Ecommerce storefront: Build an online store on Amazon.com, Amazon.com, https://sell.amazon.com/learn/ecommerce-storefront#what-is-an-ecommerce-store.

Plaintiff sent three cease-and-desist letters to Defendants, asserting that Defendants were infringing Plaintiff's trademarks and tortiously interfering with Plaintiff's agreements with its Authorized Sellers. The letters informed Defendants that Plaintiff was based in Arizona and alleged that those sales harmed Plaintiff in Arizona. Despite Plaintiff's letters, Defendants' Amazon storefronts remained operational.

Plaintiff filed this action in federal district court in Arizona, bringing claims for (1) trademark infringement and unfair competition under the Lanham Act and under Arizona law; (2) false advertising under the Lanham Act; and (3) tortious interference with contracts and business relationships under Arizona law.

Defendants filed a motion to dismiss for lack of personal jurisdiction. Defendants did not submit an affidavit or any other evidence to contradict the allegations in the complaint. Notably, they did not contest Plaintiff's allegations that they sold Herbal Brands products to customers in Arizona. In opposition to the motion, Plaintiff submitted an additional declaration attesting that, as of July 2021, Defendants had sold more than 25,700 allegedly infringing products and that Defendants had taken no affirmative steps to prevent customers in Arizona from purchasing those products.

The district court granted the motion to dismiss for lack of personal jurisdiction, holding that Plaintiff failed to meet its burden of demonstrating that Defendants "expressly aimed" their conduct at Arizona. The court also denied Plaintiff's request for jurisdictional discovery as

unnecessary, predicting that discovery would reveal only a "sporadic smattering of sales to consumers in Arizona." Plaintiff timely appealed.

DISCUSSION

Plaintiff alleges that Defendants, in their regular course of business, (1) operated a universally accessible interactive website; (2) made an unknown number of sales to Arizona residents; and (3) received cease-and-desist letters from Plaintiff, an Arizona resident, after which Defendants made no effort to stop selling to Arizona residents. We hold that those allegations are sufficient to support the exercise of specific personal jurisdiction in this instance.

"Where, as here, there is no applicable federal statute governing personal jurisdiction, the district court applies the law of the state in which the district court sits." *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004); see Fed. R. Civ. P. 4(k)(1)(A). "The Arizona long-arm statute provides for personal jurisdiction co-extensive with the limits of federal due process." *Doe v. Am. Nat'l Red Cross*, 112 F.3d 1048, 1050 (9th Cir. 1997). Thus, "the jurisdictional analyses under state law and federal due process are the same." *Schwarzenegger*, 374 F.3d at 800-01. Due process requires that a nonresident defendant must have "certain minimum contacts" with the relevant forum such that the exercise of personal jurisdiction "does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (citation omitted).

"[P]laintiff bears the burden of establishing that jurisdiction is proper." *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011). When a defendant's motion to dismiss on jurisdictional grounds rests only on written materials rather than on testimony at an evidentiary hearing, "the plaintiff need only make a prima facie showing of jurisdictional facts." *Schwarzenegger*, 374 F.3d at 800 (citation and internal quotation marks omitted). And "uncontroverted allegations in the complaint must be taken as true." *Id.*

"The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant focuses on the relationship among the defendant, the forum, and the litigation." *Walden v. Fiore*, 571 U.S. 277, 283-84, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014) (citations and internal quotation marks omitted). We have established a three-part test for specific personal jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

(3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Schwarzenegger, 374 F.3d at 802 (citation omitted). "The plaintiff has the burden of proving the first two prongs." *Picot*, 780 F.3d at 1211. "If the plaintiff meets that burden, 'the burden then shifts to the defendant to "present a compelling case" that the exercise of jurisdiction would not be reasonable.'" *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1068-69 (9th Cir. 2017) (quoting *Schwarzenegger*, 374 F.3d at 802).

A. Defendants Purposefully Directed Their Activities at the Forum.

The first prong of the specific-jurisdiction inquiry encompasses two separate concepts: "purposeful availment" and "purposeful direction." *Glob. Commodities Trading Grp., Inc. v. Beneficio de Arroz Choloma, S.A.*, 972 F.3d 1101, 1107 (9th Cir. 2020). Although they are distinct, "[a]t bottom, both purposeful availment and purposeful direction ask whether defendants have voluntarily derived some benefit from their interstate activities such that they 'will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts.'" *Id.* (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

We look to the type of claim at issue to determine the applicable analytical approach. We generally use the purposeful availment analysis in suits sounding

in contract, *Schwarzenegger*, 374 F.3d at 802, and for unintentional tort claims, *see, e.g., Yamashita v. LG Chem, Ltd.*, 62 F.4th 496, 503-04 (9th Cir. 2023) (applying the purposeful availment test where the plaintiff brought product liability claims). We have often said, without qualification, that the purposeful direction test applies when "a case sounds in tort," *see, e.g., Axiom Foods*, 874 F.3d at 1069, but that test "applies only to *intentional* torts, not to . . . negligence claims." *Holland Am. Line Inc. v. Wärtsilä N. Am., Inc.*, 485 F.3d 450, 460 (9th Cir. 2007) (emphasis added). Here, Plaintiff brings claims for trademark infringement, false advertising, and tortious interference with business relationships. Because each of those claims requires an intentional tortious or "tort-like" act, we employ the purposeful direction test. *See Ayla, LLC v. Alya Skin Pty. Ltd.*, 11 F.4th 972, 979 (9th Cir. 2021) (applying the purposeful direction analysis because "[t]rademark infringement is treated as tort-like for personal jurisdiction purposes").

To determine whether a defendant "purposefully directed" its activities toward the forum, we apply, in turn, the "effects" test derived from *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984). That test "focuses on the forum in which the defendant's actions were felt, whether or not the actions themselves occurred within the forum." *Mavrix*, 647 F.3d at 1228 (quoting *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (en banc) (per curiam)) (internal quotation mark omitted). The *Calder* effects test asks "whether the defendant: '(1) committed an intentional act, (2) expressly aimed at the

forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.'" *Will Co. v. Lee*, 47 F.4th 917, 922 (9th Cir. 2022) (quoting *Schwarzenegger*, 374 F.3d at 803).

Plaintiff easily satisfies the first and third elements of the *Calder* effects test. Defendants' sale of products to Arizona residents is an intentional act, and the cease-and-desist letters informed Defendants that their actions were causing harm in Arizona. [2] *See Dole Food Co. v. Watts*, 303 F.3d 1104, 1113 (9th Cir. 2002) (recognizing that a corporation can suffer economic harm in many fora, including where the corporation has its principal place of business). The closer question is whether Defendants "expressly aimed" their conduct at the forum.

1. An Interactive Website Plus "Something More" Constitutes "Express Aiming."

We begin by considering Defendants' internet-based activity. More than two decades ago, we recognized a distinction between "passive" websites that merely make information available to visitors and "interactive"

2. The cease-and-desist letters are relevant to our analysis due to the specific facts and claims at issue in this case. Because Plaintiff's claims are based on trademark infringement, without the letters Defendants might not have known that Plaintiff would be harmed in Arizona. By contrast, if a plaintiff were to allege that he was poisoned by a product, then the shipment of that product to the plaintiff's forum would suffice to show that the defendant knew that the harm "is likely to be suffered in the forum state." *Will Co.*, 47 F.4th at 922 (citation and internal quotation mark omitted).

websites, where "users can exchange information with the host computer when the site is interactive." *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997). It is well settled that "[m]ere passive operation of a website is insufficient to demonstrate express aiming." *Will Co.*, 47 F.4th at 922; *see Mavrix*, 647 F.3d at 1231 ("Not all material placed on the Internet is, solely by virtue of its universal accessibility, expressly aimed at every state in which it is accessed.").

Similarly, operation of an interactive website does not, by itself, establish express aiming. Otherwise, every time a seller offered a product for sale through an interactive website, the seller would be subjecting itself to specific jurisdiction in every forum in which the website was visible, whether or not the seller actually consummated a sale. That result would be too broad to comport with due process. *See CollegeSource, Inc. v. AcademyOne, Inc.*, 653 F.3d 1066, 1075-76 (9th Cir. 2011) ("If the maintenance of an interactive website were sufficient to support general jurisdiction in every forum in which users interacted with the website, the eventual demise of all restrictions on the personal jurisdiction of state courts would be the inevitable result." (citation and internal quotation marks omitted)).

But operating a website "in conjunction with 'something more'—conduct directly targeting the forum—is sufficient" to satisfy the express aiming prong. *Mavrix*, 647 F.3d at 1229 (quoting *Rio Props., Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2002)). The interactivity of the website is one of several factors that

can be relevant to the question whether a defendant has done "something more." [3] *Id.* In some cases, the operators of a website "can be said to have 'expressly aimed' at a forum where a website 'with national viewership and scope appeals to, and profits from, an audience in a particular state.'" *AMA Multimedia, LLC v. Wanat*, 970 F.3d 1201, 1210 (9th Cir. 2020) (quoting *Mavrix*, 647 F.3d at 1231). When the website itself is the only jurisdictional contact, our analysis turns on whether the site had a forum-specific focus or the defendant exhibited an intent to cultivate an audience in the forum. *See, e.g.*, *Mavrix*, 647 F.3d at 1222, 1229-31 (holding that the defendant expressly aimed the content of "celebrity-gossip.net" at California because the site had a specific focus on the California-centric entertainment industry); *AMA*, 970 F.3d at 1210 (concluding that the defendant's website "lack[ed] a forum-specific focus" because "the market for adult content is global"); *Will Co.*, 47 F.4th at 924-26 (ruling that the defendant's website hosting and legal compliance documents showed that the defendant intentionally "appealed to and profited from" a specific forum).

Here, it is undisputed that Defendants' Amazon storefronts are interactive websites: visitors can exchange information with the host computer by inputting data directly. But that fact alone does not establish "express aiming," and Plaintiff does not allege that Defendants specifically directed their website (or their products) at

3. We have acknowledged that there is a "sliding scale" of how interactive a website is, and a higher degree of interactivity provides greater support for the exercise of specific jurisdiction. *See Mavrix*, 647 F.3d at 1226-27.

Arizona. Instead, Plaintiff argues that jurisdiction exists because Defendants actually sold infringing products via an interactive website and caused them to be delivered to forum residents. [4]

2. Defendants' Sales of Products to Arizona Residents are the Requisite "Something More."

We have not squarely addressed the question whether sales of a product to forum residents through an interactive website constitute "something more" to establish express aiming when there is no evidence that the seller specifically targeted that forum. We now hold

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4. The fact that Defendants used Amazon storefronts instead of proprietary websites does not change our analysis in this instance. As a participant in the "Fulfillment by Amazon" service, Defendants store their products in Amazon fulfillment centers, and Amazon processes, packs, and ships orders from customers without direct seller involvement. Defendants retain ownership of the goods and can choose to end their relationship with Amazon at any time. Although Defendants are removed from the process of handling orders, the use of Amazon's fulfillment service to handle shipping logistics does not alter our jurisdictional analysis any more than a seller's use of the post office to ship its products would affect the inquiry. *See Boschetto v. Hansing*, 539 F.3d 1011, 1018-19 (9th Cir. 2008) (discussing how the use of eBay as a means for establishing regular business with a remote forum could generate contacts sufficient to support jurisdiction). To be clear, that determination could change if the details of Defendants' relationship with Amazon were different. *See Yamashita*, 62 F.4th at 504 (concluding that the defendant's alleged sale of batteries to a third-party website would not amount to purposeful availment without an indication that the defendant targeted the forum).

that if a defendant, in its regular course of business, sells a physical product via an interactive website and causes that product to be delivered to the forum, the defendant "expressly aimed" its conduct at that forum. [5] Though the emergence of the internet presents new fact patterns, it does not require a wholesale departure from our approach to personal jurisdiction before the internet age.

The personal jurisdiction inquiry rests on the concept of "fair play and substantial justice." *Int'l Shoe*, 326 U.S. at 316 (citation and internal quotation mark omitted). If a defendant chooses to conduct "a part of its general business" in a particular forum, it is fair to subject that defendant to personal jurisdiction in that forum. *See Keeton v. Hustler Mag., Inc.*, 465 U.S. 770, 779-80, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984) (holding that, because the defendant was "carrying on a part of its general business" in the state, it was fair to subject the defendant to jurisdiction for a claim arising out of that activity (internal quotation marks omitted)). Pre-internet, the "distribution in the forum state of goods originating elsewhere" was a paradigmatic example of conduct purposefully directed

5. We are careful to emphasize that our jurisdictional inquiry is concerned with the actions of the defendant. *Walden*, 571 U.S. at 289. The conduct purposefully directed at the forum is the seller's action of accepting the order and causing the product to be delivered to the forum. In this case, the allegations do not suggest that Arizona residents purchased products to be shipped to other states. But if an Arizona resident ordered a product for delivery to a friend in California, a seller's fulfillment of that hypothetical order in the regular course of its business would be conduct purposefully directed at California (the location of the delivery), not Arizona (the residence of the purchaser).

at the forum state. *Schwarzenegger*, 374 F.3d at 803; *see Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 927, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) ("[W]here 'the sale of a product . . . arises from the efforts of the manufacturer or distributor to serve . . . the market for its product in [several] States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others.'" (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)) (first and second alterations added) (emphasis omitted)); *Plant Food Co-Op v. Wolfkill Feed & Fertilizer Corp.*, 633 F.2d 155, 159 (9th Cir. 1980) (holding that the exercise of personal jurisdiction in Montana is consistent with due process when it is based on the sale of fertilizer to a customer in Montana); *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 899 (9th Cir. 2002) (concluding that the defendants' conduct was expressly aimed at California where there was a plan to distribute a song throughout the United States and the defendants sent promotional copies to the United States, including California).

The fact that Defendants generated their business by creating an Amazon storefront instead of by placing ads in a nationwide print publication does not necessarily dictate a different outcome. Although the internet can be dizzyingly complex, for jurisdictional purposes, the act of selling physical products over the internet to a forum resident is substantially the same as selling those same products to a forum resident through a mail-order catalog.

Thus, we conclude that the sales of physical products into a forum via an interactive website can be sufficient to establish that a defendant expressly aimed its conduct at the forum, provided that two key elements are present. *First*, the sales must occur as part of the defendant's regular course of business instead of being "random, isolated, or fortuitous." *Keeton*, 465 U.S. at 774; *see Boschetto*, 539 F.3d at 1017, 1019 (holding that "the lone transaction for the sale of one item" did not create personal jurisdiction over the defendants in California because there were no allegations that the seller was a regular user of eBay to sell cars or "as a broader vehicle for commercial activity"). [6] When an online sale occurs as part of a defendant's regular course of business, it "arises from the efforts of the [seller] to serve directly or indirectly[] the market for its product . . . ," and the defendant "should reasonably anticipate being haled into court" where the product is sold. *See World-Wide Volkswagen Corp.*, 444 U.S. at 297. Whether a sale occurs in a defendant's regular course of business is a case-specific question that may

6. Although *Boschetto* is not binding because we conducted that analysis under the "purposeful availment" framework, its rationale is still instructive. Because our court's distinction between "purposeful direction" and "purposeful availment" is quite narrow, similar principles underlie both tests. *See, e.g., Holland Am. Line*, 485 F.3d at 459-60 (concluding that the plaintiff failed to satisfy the purposeful availment test and relying, in part, on *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1322 (9th Cir. 1998), and *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1158 (9th Cir. 2006), both of which employed the purposeful direction test); *cf. Davis v. Cranfield Aerospace Sols., Ltd.*, No. 22-35099, 2023 U.S. App. LEXIS 15794, *12 (9th Cir. June 23, 2023) (suggesting that a rigid dividing line between the two inquiries does not serve the purposes of due process).

turn on factors such as the seller's identity (individual or a business entity), the nature of the website used, the defendant's total volume of online sales including sales outside the forum, the number or variety of products offered on the defendant's website, and the defendant's online advertising. Because Defendants do not contend that the alleged sales to Arizona residents occurred outside of their regular course of business, we leave the precise contours of that inquiry for another day.

Second, the defendant must exercise some level of control over the ultimate distribution of its products beyond simply placing its products into the stream of commerce. *See Ayla*, 11 F.4th at 981-82 (concluding that the defendant's offering of products for sale through its website and third-party websites was evidence that the defendant's contacts with the forum were not "random, isolated, or fortuitous"); *Holland Am. Line*, 485 F.3d at 459 ("The placement of a product into the stream of commerce, without more, is not an act purposefully directed toward a forum state."). Although other factors may be relevant in certain circumstances, the express aiming inquiry does not require a showing that the defendant targeted its advertising or operations at the forum.

Plaintiff's allegations meet this standard. First, Defendants allegedly used their Amazon storefronts—their means of conducting regular business—to make product sales to Arizona residents. Plaintiffs specifically allege that Defendants operated their storefronts under the names of business entities, offered a variety of Herbal Brands products on their storefronts, and conducted a

high volume of sales throughout the country. Second, Defendants exercised control over distribution: they created and maintained a distribution network that reached the relevant forum by choosing to operate on a universally accessible website that accepts orders from residents of all fifty states and delivers products to all fifty states. *See NBA Props., Inc. v. HANWJH*, 46 F.4th 614, 625 (7th Cir. 2022) (reasoning that, when a defendant "structured its sales activity in such a manner as to invite orders from [a forum] and developed the capacity to fill them[,] [i]t cannot now point to its customers in [that forum] and tell us, 'It was all their idea.'" (citation and some quotation marks omitted)), *cert. denied*, 143 S. Ct. 577, 214 L. Ed. 2d 341 (2023). Accordingly, we hold that Defendants expressly aimed their conduct at Arizona because they allegedly sold products to Arizona residents via an interactive website in their regular course of business and caused those products to be delivered to the forum.

The outcome of the express-aiming inquiry does not depend on the number of sales made to customers in the forum. Drawing a line based on the number of sales would require an arbitrary distinction that is not preferred in this area of the law. *See Burger King*, 471 U.S. at 485-86 (emphasizing that, in determining whether to exercise personal jurisdiction, courts must weigh the facts of each case instead of relying on "talismanic jurisdictional formulas"). If one sale were not enough to establish that a defendant expressly aimed its conduct at a forum, we would face the difficult question of how many sales would suffice. The same challenges would exist if we were to

attempt to craft a rule based on sales to the forum as a percentage of a defendant's total sales.

Instead of taking on an arbitrary line-drawing task, we require only that the sale must occur in the defendant's regular course of business. Consistent with *Keeton*, our holding distinguishes between a truly isolated sale and a genuine attempt to serve the market. *See Ayla*, 11 F.4th at 981 ("As *Keeton* demonstrates, there is no 'small percentage of sales' exception to the purposeful direction principles discussed herein."); *Plant Food Co-Op*, 633 F.2d at 159 (distinguishing between a product sale that is "an isolated occurrence" and a sale that "arises from the efforts of the distributor to serve, directly or indirectly, the market for its products in other states"). Any concerns that this rule will have negative effects on small online sellers are best addressed as part of the third prong of the specific jurisdiction inquiry; the exercise of jurisdiction always "must be reasonable." *Schwarzenegger*, 374 F.3d at 802.

To reiterate, our holding answers only the narrow question whether a defendant's sale of a physical product to a consumer in the forum state via an interactive website constitutes conduct expressly aimed at a forum. If other internet activity is allegedly the source of personal jurisdiction, cases such as *Mavrix, AMA*, and *Will Co.* would continue to apply. We also need not and do not answer the question whether the outcome would be different if a defendant did not sell directly to consumers but instead sold its products to a third party with no knowledge of that third party's intent to sell into a particular forum. *Cf. Yamashita*, 62 F.4th at 504.

We recognize that other circuits have adopted a range of approaches in response to similar questions. *See, e.g.*, *Chloe v. Queen Bee of Beverly Hills, LLC*, 616 F.3d 158, 165, 171-72 (2d Cir. 2010) (holding that a defendant's conduct was purposefully directed toward New York because the defendant offered bags for sale on its website to New York customers and shipped at least one bag to a New York customer); *NBA Props.*, 46 F.4th at 624-25, 627 (holding that the defendant purposefully directed its conduct at Illinois where it sold a single infringing product to an agent of the plaintiff who was an Illinois resident); *Bros. & Sisters in Christ, LLC v. Zazzle, Inc.*, 42 F.4th 948, 953-55 (8th Cir. 2022) (holding that the defendant's sale of a single t-shirt to a Missouri resident did not create sufficient contacts to support the exercise of jurisdiction); *Admar Int'l, Inc. v. Eastrock, LLC*, 18 F.4th 783, 787-88, 788 n.1 (5th Cir. 2021) (suggesting that the isolated sale of a single product to a forum resident would be insufficient to support the exercise of jurisdiction when the defendant did not solicit business through targeted advertising).

Given the fact-intensive nature of the inquiry and the wide range of potential analytical approaches, we do not attempt to reconcile the split among the circuits. We look only at the facts before us and put forward the test that makes the most sense in this particular context. The ubiquity of internet commerce creates a myriad of jurisdictional questions. We answer only the one question before us and leave the remainder for another day.

B. Plaintiff's Harm Arises Out of Defendants' Contacts With the Forum State.

The second prong of the specific jurisdiction inquiry requires that a plaintiff's claims "'arise out of or relate to the defendant's contacts' with the forum." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025, 209 L. Ed. 2d 225 (2021) (quoting *Bristol-Myers Squibb Co. v. Superior Ct.*, 582 U.S. 255, 262, 137 S. Ct. 1773, 198 L. Ed. 2d 395 (2017)). "The first half of that standard asks about causation; but the back half, after the 'or,' contemplates that some relationships will support jurisdiction without a causal showing." *Id.* at 1026. Plaintiff's claims—which allege harm caused by Defendants' sales of products—clearly arise out of and relate to Defendants' conduct of selling those same products to Arizona residents. *See Ayla*, 11 F. 4th at 983 (holding that the defendant's promotion, sale, and distribution of products in the forum relate to the plaintiff's trademark claims).

C. The Exercise of Jurisdiction Over Defendants Would Be Reasonable.

Once Plaintiff satisfies the first two prongs, "the burden then shifts to the defendant to 'present a compelling case' that the exercise of jurisdiction would not be reasonable." *Schwarzenegger*, 374 F.3d at 802 (quoting *Burger King*, 471 U.S. at 476-78). To evaluate reasonableness, we employ a balancing test that weighs seven factors:

> (1) the extent of the defendant's purposeful interjection into the forum state's affairs;

> (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the defendant's state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum.

Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp., 905 F.3d 597, 607 (9th Cir. 2018). Defendants contend that the exercise of jurisdiction would be unreasonable, but they fail to address any of those factors.

That said, we do acknowledge that Defendants' larger concerns—the ability of plaintiffs to manufacture jurisdiction and the potential for negative effects on e-commerce—are legitimate. Although Defendants fail to meet their burden here, a defendant in a future case could argue that the exercise of personal jurisdiction would be unreasonable, even if that defendant has "expressly aimed" its conduct at the forum consistent with the test that we adopt in this opinion. Many of the concerns that courts have considered as part of the "express aiming" analysis are, in our view, better addressed under the reasonableness prong.

For instance, we recognize that a plaintiff's contacts alone should not be enough to create jurisdiction over a defendant in a forum. *See Axiom Foods*, 874 F.3d at 1070 ("[W]e must look to the defendant's 'own contacts' with the forum, not to the defendant's knowledge of a plaintiff's

connections to a forum." (quoting *Walden*, 571 U.S. at 289)). Other circuits have reached different conclusions regarding whether sales to a plaintiff or its agents can be a source of jurisdiction. *Compare NBA Props.*, 46 F.4th at 625, 627 (holding that a single sale to an agent of the plaintiff can create personal jurisdiction), *with Toys "R" Us, Inc. v. Step Two, S.A.*, 318 F.3d 446, 454-55 (3d Cir. 2003) (holding that two sales initiated by the plaintiff cannot establish personal jurisdiction). Depending on the particular facts of a future case, jurisdiction might not exist if a plaintiff purchased a product solely in an attempt to manufacture jurisdiction. But the identity of the purchaser is not relevant to whether the defendant expressly aimed its conduct at the forum. And, in any event, Defendants do not make that argument here.

The fairness prong also allows for the argument that the exercise of jurisdiction is not appropriate because a defendant sold only a small number of products to forum residents. If, for example, a Maine resident ran a small business selling New England-themed keychains and made a sale to an Arizona resident, the seller may be able to argue successfully that it would not be reasonable to hale him into court in Arizona because of the limited nature of his purposeful interjection into Arizona's affairs or the excessive burden associated with defending himself in the forum. *See Freestream Aircraft*, 905 F.3d at 607-08. But those hypothetical facts are not the facts of this case and, once again, Defendants do not advance that argument here.

In sum, we hold that the district court has personal jurisdiction over Defendants. Taking Plaintiff's uncontroverted allegations as true, Defendants' sales of products via an interactive website occurred in their regular course of business, Defendants caused those products to be shipped to the forum, and Defendants were aware that harm was occurring in the forum. Defendants have not met their burden of showing that the exercise of personal jurisdiction would be unreasonable. Thus, we conclude that Defendants have sufficient minimum contacts with Arizona, Plaintiff's harm arises out of those contacts, and the exercise of personal jurisdiction would be reasonable in the circumstances.

REVERSED AND REMANDED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA, FILED NOVEMBER 15, 2021

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-21-00577-PHX-SMB

HERBAL BRANDS INCORPORATED,

Plaintiff,

v.

PHOTOPLAZA INCORPORATED, *et al.*,

Defendants.

November 15, 2021, Decided
November 15, 2021, Filed

ORDER

Pending before the Court is Defendants' Motion to Dismiss. (Doc. 18.) Plaintiff filed a Response, (Doc. 19), and Plaintiff filed a Reply, (Doc. 20). Oral argument was scheduled for November 16, 2021, but the Court now vacates oral argument, finding that it is unnecessary. *See* LRCiv 7.2(f). The Court has reviewed the pleadings and the applicable law and now issues the following Order.

Appendix B

I. BACKGROUND

Plaintiff, Herbal Brands, Inc. ("HBI"), is a Delaware corporation with its principal place of business in Tempe, Arizona. (Doc. 1 ¶ 1.) All Defendants are either New York corporations with their principal place of business in New York, or individuals who reside in New York. (*Id.* ¶¶ 3-15.) Plaintiff sells a wide range of «premium-quality health, wellness, fitness and nutritional products" through authorized sellers. (*Id.* ¶¶ 36-37.) Plaintiff alleges that Defendants are not authorized sellers of its products and are selling their products illegally using two online storefronts on Amazon.com, damaging its business reputation. (*Id.* ¶¶ 136-150.) The Complaint also alleges that Defendants have purposefully directed and expressly «aimed their tortious activities at the State of Arizona and established sufficient minimum contacts with Arizona by, among other things, advertising and selling infringing products bearing Herbal Brands' trademarks to consumers within Arizona through a highly interactive commercial website, through the regular course of business, with knowledge that Herbal Brands is located in Arizona and is harmed in Arizona." (*Id.* ¶ 33.) Plaintiff alleges that Defendants knew that Plaintiff was located in Arizona because they sent them cease-and-desist correspondence. (*Id.*) Plaintiff alleges that Defendants continued to sell their products on Amazon despite the receipt of the cease-and-desist letter. (*Id.* ¶ 219.) Although Plaintiff alleges that Defendants sold their products to consumers in Arizona, (*Id.* ¶ 33), Plaintiff states that it cannot specify Defendants' sales volume in Arizona without discovery. (Doc. 19 at 6.)

Plaintiff brings claims against Defendants for (1) trademark infringement and unfair competition under the Lanham Act and Arizona law; (2) false advertising under the Lanham Act; and (3) tortious interference with contracts and business relationships under Arizona law. (Doc. 19 at 4.)

II. LEGAL STANDARD

Prior to trial, a defendant may move to dismiss the complaint for lack of personal jurisdiction. *Data Disc, Inc. v. Systems Tech. Assocs., Inc.*, 557 F.2d 1280, 1285 (9th Cir. 1977); Fed. R. Civ. P. 12(b)(2). Plaintiffs bear the burden of establishing personal jurisdiction. *Ziegler v. Indian River Cty.*, 64 F.3d 470, 473 (9th Cir. 1995). Where the motion is based on written materials rather than an evidentiary hearing, "the plaintiff need only make a prima facie showing of jurisdictional facts." *Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). In determining whether the plaintiff has met this burden, uncontroverted allegations in the plaintiff's complaint must be taken as true, and "conflicts between the facts contained in the parties' affidavits must be resolved in [the plaintiff's] favor for purposes of deciding whether a prima facie case for personal jurisdiction exists." *AT & T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996).

"When no federal statute governs personal jurisdiction, the district court applies the law of the forum state." *Freestream Aircraft (Bermuda) Ltd. v. Aero Law Grp.*, 905 F.3d 597, 602 (9th Cir. 2018). Arizona exerts personal jurisdiction to the "maximum extent permitted by the

Arizona Constitution and the United States Constitution." Ariz. R. Civ. P. 4.2(a); *see also A. Uberti and C. v. Leonardo*, 181 Ariz. 565, 892 P.2d 1354, 1358 (Ariz. 1995) (analyzing personal jurisdiction in Arizona under federal law). Therefore, the analysis of personal jurisdiction under Arizona law and federal due process is the same. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800-01 (9th Cir. 2004).

Under the Due Process Clause, "[a]lthough a nonresident's physical presence within the territorial jurisdiction of the court is not required, the nonresident generally must have certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Walden v. Fiore*, 571 U.S. 277, 283, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014) (citations and internal quotations omitted). Courts "employ a three-part test to assess whether a defendant has sufficient contacts with the forum state to be subject to specific personal jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and

> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Picot v. Weston, 780 F.3d 1206, 1211 (9th Cir. 2015). Where a case sounds in tort, as it does here, federal courts employ the "purposeful direction test" spelled out by *Calder v. Jones*, 465 U.S. 783, 788-89, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984), in order to determine whether defendant has sufficient contacts with the forum state.[1] *Axiom Foods, Inc. v. Acerchem Int'l, Inc.*, 874 F.3d 1064, 1069 (9th Cir. 2017). Under this test, the defendants must have "(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state." *Id.* (quoting *Washington Shoe Co. v. A-Z Sporting Goods Inc.*, 704 F.3d 668, 673 (9th Cir. 2012)).

III. ANALYSIS

Defendants argue that they are not subject to general or specific jurisdiction in Arizona. (Doc. 18 at 4, 6.) Plaintiff does not argue that the Court has general jurisdiction over Defendants, but only that it has specific jurisdiction over them because Defendants have sold products bearing Plaintiff's trademarks to consumers in Arizona through Amazon "with knowledge that Plaintiff is located and

1. All of Plaintiff's claims, including those brought under the Lanham Act, sound in tort. (Doc. 1 ¶¶ 248-358); *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1228 (9th Cir. 2011) (noting that copyright infringement is a "tort-like" cause of action and applying the purposeful direction test outlined by *Calder*).

harmed in Arizona by Defendants' sales." (Doc. 19 at 1.) Thus, only specific jurisdiction will be considered by the Court.

A. Specific Personal Jurisdiction

Maintenance of a passive website alone cannot satisfy the express aiming prong. *v. Brand Techs, Inc.*, 647 F.3d 1218, 1229 (9th Cir. 2011). However, the operation of a passive website with "something more"—conduct directly targeting the forum—is sufficient. *Id.* In determining whether defendant has done "something more," the Ninth Circuit considers the interactivity of the defendant's website, among other factors. *Id.* A website is considered "interactive"—as opposed to passive—when "users can exchange information with the host computer." *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 418 (9th Cir. 1997).

Plaintiff characterizes Amazon as a "highly interactive online website." (Doc. 19 at 5.) Indeed, Amazon appears to constitute an interactive website under Ninth Circuit caselaw in that it collects information from consumers and allows them to buy merchandise for delivery to their home. *See id.* Even with an interactive website, plaintiffs must show "something more" to establish personal jurisdiction over defendants. *ThermoLife Int'l LLC v. NetNutri.com LLC*, 813 F. App'x 316, 318 (9th Cir. 2020) (citing *Mavrix Photo*, 647 F.3d at 1229-31.

Here, application of the purposeful direction test shows that Defendants do not have sufficient contacts with Arizona. Defendants clearly committed an intentional

act by listing Plaintiff's products for sale on Amazon, satisfying the first prong. However, those activities were not expressly directed at the forum state. While Defendants likely knew that it was possible—perhaps even probable—that consumers in Arizona would purchase Plaintiff's products listed by Defendants on Amazon, as alleged, they took no further action besides listing the products for sale on the Amazon marketplace. The Complaint alleges that Plaintiff's advertised Plaintiff's products in Arizona through the Amazon website, (Doc. 1 ¶ 33), but this allegation is conclusory and does not provide any details about how Defendants specifically advertised the product in Arizona besides listing the products for sale on Amazon. Further, contrary to Plaintiff's claims, Defendants' sales of products in Arizona are completely unconnected to Plaintiff's claims. (Doc. 19 at 13.) That is, Plaintiff's claims did not arise solely as a result of sales of their products to Arizona consumers, but rather, due to the fact that Defendants sold their products illegally as an unauthorized seller nationwide on Amazon. Thus, as alleged in the Complaint, Defendants have not expressly aimed their activities at Arizona.

The fact that Plaintiff is located in Arizona and suffered harm from Defendants' conduct is insufficient to satisfy the purposeful direction test. *See Walden*, 571 U.S. at 289-90 ("Petitioner's actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections."); *Axiom Foods, Inc.*, 874 F.3d at 1070. "Since *Axiom*, courts in this circuit have agreed that 'infringement of a plaintiff's intellectual property rights

with knowledge that plaintiff's operations are based in the forum and that the harm will be felt there, is insufficient to establish personal jurisdiction without a further showing that the defendant otherwise expressly aimed its activities at the forum.'" *Modulus Fin. Eng'g Inc. v. Modulus Data USA Inc.*, No. CV-19-04685-PHX-SMB, 2020 U.S. Dist. LEXIS 85735, 2020 WL 2512785, at *4 (D. Ariz. May 15, 2020) (quoting *Theos Med. Sys. v. Nytone Med. Prods.*, No. 19-cv-01092-VKD, 2020 U.S. Dist. LEXIS 16395, 2020 WL 500511, at *7 (N.D. Cal. Jan. 31, 2020)). Although Plaintiff makes much of the fact that it sent Defendants a cease-and-desist letter and Defendants continued to sell Plaintiff's products, Plaintiff ignores the fact that there are no allegations that Defendants conduct had anything to do with Arizona. Therefore, these allegations are insufficient to show conduct expressly aimed at Arizona.

The Court's decision accords with other cases decided in the Ninth Circuit. For example, in *ThermoLife Int'l LLC*, 813 F. App'x at 318, the Ninth Circuit affirmed the dismissal of an action for the lack of personal jurisdiction for similar reasons. In that case, the defendant was a New Jersey based online retailer who ran a website through which it sold numerous products nationwide. *ThermoLife Int'l LLC v. NetNutri.com LLC*, No. CV-18-04248-PHX-JJT, 2019 U.S. Dist. LEXIS 118966, 2019 WL 3220547, at *1 (D. Ariz. July 17, 2019). Plaintiff—an Arizona company—brought claims under the Lanham Act, unfair competition, and civil conspiracy. *Id.* The district court dismissed the case for lack of personal jurisdiction because the plaintiff did not "identify a single fact or allegation that would constitute 'something more' than

Defendant's online sales to customers who happen to be in Arizona." 2019 U.S. Dist. LEXIS 118966, [WL] at *3. The Ninth Circuit affirmed the ruling. 813 Fed. App'x 316. The court reasoned that, although a small percentage of the defendant's sales had been to Arizona consumers, the plaintiff could not establish specific personal jurisdiction through nonspecific, nationwide sales because any contact with Arizona would be "random, fortuitous, or attenuated." 2020 U.S. Dist. LEXIS 85735, [WL] at *318 (quoting *Walden*, 571 U.S. at 286).

Plaintiff has failed to meet its burden of demonstrating that the Court has personal jurisdiction over Defendants. If Defendants can be haled into Arizona courts, then virtually any seller who places products for sale on Amazon can be haled into Arizona courts as well. However, the law in this circuit requires "something more." *See Mavrix Photo, Inc.*, 647 F.3d at 1229.

B. Jurisdictional Discovery

Plaintiff asks—in the event that the Court finds its allegations insufficient to show personal jurisdiction over Defendants—to be allowed to take jurisdictional discovery to find out how much product Defendants have sold in Arizona. A trial court has broad discretion as to whether to permit limited jurisdictional discovery. *Data Disc*, 557 F.2d at 1285 n. 1 (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n. 24 (9th Cir. 1977)). The Court finds that jurisdictional discovery is unnecessary and would be a waste of time and resources. Nothing in Plaintiff's allegations or supporting declarations give

the Court reason to believe that discovery would turn up anything more than a record of a sporadic smattering of sales to consumers in Arizona, which would be "random, fortuitous, and attenuated." *Walden*, 571 U.S. at 286. Accordingly, the Court denies Plaintiff's request for jurisdictional discovery.

IV. CONCLUSION

Having found that Plaintiff has failed to carry its burden to establish personal jurisdiction, the Court need not address the remaining arguments in Defendants' Motion to Dismiss. Accordingly,

IT IS ORDERED granting Defendants' Motion to Dismiss.

IT IS FURTHER ORDERED vacating the oral argument scheduled for November 16, 2021.

IT IS FURTHER ORDERED directing the Clerk of the Court to enter judgment accordingly and terminate this case.

Dated this 15th day of November, 2021.

/s/ Susan M. Brnovich
Honorable Susan M. Brnovich
United States District Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED AUGUST 11, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 21-17001

D.C. No. 2:21-cv-00577-SMB
District of Arizona, Phoenix

HERBAL BRANDS, INC.,

Plaintiff-Appellant,

v.

PHOTOPLAZA, INC.; *et al.*,

Defendants-Appellees.

ORDER

Before: GRABER, CLIFTON, and CHRISTEN, Circuit Judges.

Judge Christen has voted to deny the petition for rehearing en banc, and

Judges Graber and Clifton have so recommended.

Appendix C

The full court has been advised of Appellees' petition for rehearing en banc, and no judge of the court has requested a vote on it.

Appellees' petition for rehearing en banc, Docket No. 63, is DENIED.