No. 16-17798-EE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEONARD ROWE, ROWE ENTERTAINMENT, INC., LEE KING, AND LEE KING PRODUCTIONS, INC.,

Plaintiffs-Appellants,

v.

GARY, WILLIAMS, PARENTI, WATSON & GARY P.L.L.C., WILLIE E. GARY, SEKOU M. GARY, MARIA SPERANDO, AND LORENZO WILLIAMS,

Defendants-Appellees.

On Appeal from the United States
District Court for the Northern District of Georgia

APPELLANTS' REPLY BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LEONARD ROWE, et al., Plaintiffs-Appellants, -against - GARY, WILLIAMS, PARENTI, WATSON AND GARY, P.L.L.C., et al., Defendants-Appellees.	:	Case No. 16-17798-EE

CERTIFICATION THAT THE CIP
FILED IN APPELLANTS' OPENING BRIEF IS COMPLETE

Plaintiffs-Appellants Leonard Rowe, Rowe Entertainment, Inc., Lee King, and Lee King Productions, Inc. certify pursuant to 11th Cir. R. 26.1-2(b), through their counsel, that the Certificate of Interested Persons set forth at pages C-1 through C-8 of their opening brief filed on April 24, 2017 is complete.

Dated: September 5, 2017

/s/ Edward Griffith

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PRELIMINARY STATEMENT

The Gary Lawyers[1] correctly observe that Rowe's malpractice and fraud claims will be time-barred unless the District Court's decision dismissing this action based on personal jurisdiction is reversed. They get it backwards, however, when they accuse Rowe of "forum shopping." In fact, if any side is guilty of forum shopping, it is the Gary Lawyers: they waited for over a year, until *Rowe I* was dismissed and Rowe commenced this pared-down action, before belatedly objecting to personal jurisdiction and venue. Their motive for doing so is to eliminate the only forum in which Rowe's claims are still timely after that delay.

Ironically, but for the Gary Lawyers' fraudulent concealment of their malpractice and other misconduct, Rowe would not be facing any statute of limitations issues because he would have filed his claims years ago. When Rowe's due diligence finally penetrated Gary's fraud, and *Rowe I* was on March 13, 2015, Rowe recognized that the timeliness of his claims depends on equitable tolling. In her decision dismissing *Rowe I* on other grounds, Judge Totenberg ruled that Rowe's equitable tolling allegations raise issues of fact that preclude dismissal at the pleading stage. Appellants' Brief at 52.

Judge Totenberg's equitable tolling ruling applies equally to this action because Rowe's claims are deemed to have been commenced on the same date as

[1] Capitalized terms retain their definitions set forth in Rowe's opening brief.

Rowe I, March 13, 2015, under Georgia's "limitations savings statute," O.G.C.A. § 9-2-61. Appellant's Brief at 52 n.19. If the District Court's dismissal is affirmed, however, a new action in the only other possible jurisdiction, New York, would now be time-barred because Georgia's savings statute would not apply and New York has shorter limitations periods. *Id*. at 52-53.

Thus, this appeal is the last chance to hold the Gary Lawyers responsible for the loss of the Civil Rights Action. The importance of doing so transcends the private interests of the parties, since, as Judge Totenberg recognized, the Civil Rights Action was potentially a "landmark case." A-675. But for the Gary Lawyers' negligence, the Civil Rights Action would have resulted in a historic victory, compensated black concert promoters for decades of overt racial discrimination, and ameliorated the racial discrimination that has continued in the entertainment industry over the last decade.

The Gary Lawyers are desperate to block litigation of Rowe's substantive claims because they have no defense for their conduct. Even on a limited pleading-stage record, Judge Totenberg found that the Gary Lawyers' failure to obtain the racially derogatory emails in the Civil Rights Action was "inexplicable." A-673. And *pro se* defendant Maria Sperando concedes the Gary Firm's failure to submit proper summary judgment papers on "a secretarial problem," an unambiguous admission of negligence by the responsible lawyers. Tr. March 10, 2016, N.D.Ga.

PACER, *Rowe I*, 15-cv-0770-AT, (Doc. No. 87) ("March 10, 2016 Tr.") at 38:19 – 39:14.[2]

The Gary Lawyers' gross negligence and other misconduct is reflected not only in the Civil Rights Action, but also in the documented record of their other cases. The Michigan federal judge presiding over a malpractice and fraud action against the Gary Firm in Michigan, for example, found "probable cause" that the Firm misappropriates $51.5 million of a $67.5 million settlement in the underlying gender discrimination lawsuit. Appellants Brief at 8 n.3 (citing A-072-073 (complaint, ¶¶ 140-1430 and A-694-695 (Michigan decision)). Indeed, Willie Gary's fraud and negligent law practice have left a series of clients alleging that he destroyed potentially life-changing legal claims or stole the recovery to which they were entitled. Several of them, including Marietta Goodman, traveled long distances to attend the March 10, 2016 hearing in *Rowe I*. March 10, 2016 Tr. at 46:6-20, 50:12 – 52:5. They did so to show how strongly they feel that Gary and his firm must be brought to justice. Ms. Goodman, for example, alleges that Gary

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[2] Although the portions of the March 10, 2016 transcript cited in the text appear only in the *Rowe I* record, the Court may take judicial notice of them under Fed. R. Evid. 201 as a public record available through PACER. *See*, *e.g.*, *United States v. Smalls*, 605 F.3d 765, n.2 (10th Cir. 2010) (taking judicial notice of PACER docket entries in another federal case)).

defrauded her out of her share of an approximately $200 million race discrimination settlement with the Coca-Cola Company. *Id*. at 50:12 – 51:11.

These considerations put the lie to the Gary Lawyers' blithe assertion that this case "presents no issue of great public importance." Appellees' Brief filed by the Gary Defendants (the "Gary Brief") at 38. On the contrary, the statute of limitations issues and the importance of deciding Rowe's claims on their merits are critically important to the personal jurisdiction analysis at the center of this appeal. They are directly relevant, for example, to four of the five factors correctly identified by the District Court as determinative of whether asserting jurisdiction comports with constitutional due process. Those factors, which constitute the "fair play and substantial justice" test are:

> (1) The forum state's interest in adjudicating the dispute;
>
> (2) The plaintiff's interest in obtaining convenient and effective relief;
>
> (3) The interstate judicial system's interest in obtaining the most efficient resolution of controversies, and
>
> (4) States' shared interest in furthering fundamental social policies.

Appellants' Brief at 38-39 (citing District Court decision at A-967 and cases cited by the District Court).[3]

[3] The fifth factor is the burden on the defendant of litigating in the forum. While not directly relevant to the policy considerations set forth in the text, that

The Gary Lawyers ignore Rowe's analysis of the District Court's errors in evaluating those factors, *id*. at 39-41, probably because they cannot deny Georgia's strong interest in protecting its citizens from malpractice and fraud committed by out-of-state attorneys. Nor can they deny the strong interest shared by the state of Georgia and Rowe in securing effective relief from the fraud Gary perpetrated to prevent Rowe from discovering his misconduct until after the statute of limitations expired. In this context, the Gary Lawyers' assertion that Rowe's claims are now time-barred in New York directly supports the constitutional fairness of haling Gary and his partners in crime into Georgia court, where an efficient remedy that furthers social policies may still be obtained.

Knowing that the District Court's personal jurisdiction holding is vulnerable to reversal, the Gary Lawyers invite this Court to affirm the District Court's dismissal of this action on the alternative ground of improper venue. Gary Brief at 33-34. Yet the District Court wisely avoided that issue because the Gary Lawyers' core fraudulent representations in this case, which are inextricably entwined with

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factor weighs heavily in favor of the fairness of asserting personal jurisdiction. Part of Gary's solicitation pitch to Rowe at the Fulton County courthouse was that his firm was capable of litigating anywhere in the United States and that his jets, *Wings of Justice I* and *Wings of Justice II*, enabled him to "meet with people in *Atlanta, Chicago and Carolina* the same day and still be home for dinner." Appellant's Brief at 12-14 (describing Gary's solicitation of Rowe in Atlanta and quoting Gary's press release reprinted at A-676) (emphasis added); 23, 31-32 (describing District Court's error, *inter alia*, in overlooking Gary's marketing representations).

Rowe's malpractice claims, took place *in this district*. Indeed, Gary and his colleagues used their jet, *Wings of Justice II*, to fly to Atlanta for a major strategy meeting at the Atlanta Hilton after Rowe's New York lawyers withdrew in December 2002. Appellant's Brief at 14 (citing A-659 (¶ 38)). At that meeting, the Gary Lawyers made the fraudulent misrepresentations and omissions that lie at the core of Rowe's claims, including:

(i) The false representation that they had obtained the racially derogatory emails from William Morris and CAA employees, Appellants' Brief at 15 (citing Rowe Decl., A-664-664 (¶ 52));

(ii) The false representation that those emails constituted the "smoking gun" that would defeat summary judgment and lead to a billion-dollar plus recovery, *id*.;

(iii) The false representation that the E-Discovery Memorandum was admissible and constituted an independent smoking gun, *id*.;

(iv) The fraudulent concealment of the fact that they allowed their e-discovery firm to return the emails to William Morris and CAA in violation of the court-ordered e-discovery protocol, *id*.;

(v) The fraudulent concealment of the fact that Gary was being sued by his former gender discrimination clients and that the Michigan judge presiding over that case had found "probable cause" that Gary had stolen $51.5 million, *id*. (citing complaint, A-072-073 (¶¶ 53-55); Michigan decision, A-694-695; Rowe Dec., A-665-666 (¶¶ 53-56);

(vi) The false representation that the withdrawal of Rowe's New York lawyers was a positive development, *id*. at 14 (citing Rowe Dec., A-659 (¶ 38));

(vii) The false representation that they were capable of opposing the anticipated summary judgment motions without the New York lawyers, *id*.; and

(viii) The fraudulent representation that the forum selection clause in the original retainer had to be retained despite the withdrawal of the New York lawyers because that clause was a requirement under New York law, *id*. at 20-21 (citing Rowe Dec., A-659-663 (¶¶ 38-47).[4]

Those shocking misrepresentations and omissions, all of which were made by the Gary Lawyers while they were physically present in this district, establish that venue is proper in this district and that the fraudulently-obtained forum selection clause is unenforceable, at least at the pleading stage and prior to discovery. *See*, *e.g*., A-663-666 (¶¶ 48-56) (summary of the Gary Lawyers' misconduct in Atlanta, Georgia); A-720-721.

The Gary Lawyers' other attempts to defend the District Court's personal jurisdiction dismissal also fail, as set forth below.

[4] Forum selection clauses are unenforceable where (i) their formation was induced by fraud or overreaching; (ii) the plaintiff effectively would be deprived of its day in court because of the inconvenience or unfairness of the chosen forum; (iii) the fundamental unfairness of the chosen law would deprive the plaintiff of a remedy; or (iv) enforcement of such provisions would contravene a strong public policy. *Liles v. Ginn-La West End, Inc*., 631 F.3d 1242, 1245 (11th Cir. 2011). All of these circumstances apply in this case. A-721-724 (additional case law and analysis).

ARGUMENT

I. ROWE WAS NOT REQUIRED TO PLEAD PERSONAL JURISDICTION ALLEGATIONS IN THE COMPLAINT OR MOVE TO AMEND TO ADD THEM.

A. There is No Support for the Gary Lawyers' Argument.

Realizing that the District Court's personal jurisdiction analysis is fatally flawed, the Gary Lawyers' primary argument is that this Court should ignore that analysis and affirm on the alternative ground that

> [p]laintiffs failed to include sufficient jurisdictional allegations in their Complaint and failed to move for leave to file an amended complaint.

Gary Brief at Argument § I.A (pp. 22-23). *See also* Appellee Brief filed by Maria Sperando ("Sperando Brief) at 10-11.

That proposed alternative ground, however, lacks merit and the case law cited by the Gary Lawyers does not support it. Uniform case law confirms that Federal Rule of Civil Procedure 8(a)(1) requires plaintiffs to plead facts sufficient to establish the court's *subject matter* jurisdiction, but there is no pleading requirement that applies to *personal* jurisdiction:

> Rule 8(a)(1) applies to subject matter jurisdiction, not personal jurisdiction and therefore, [defendant's argument that the complaint should have included facts establishing personal jurisdiction] is without merit.

Enron Corp. v. Arora (In re Enron Corp.), 316 B.R. 434, 439-40 (S.D.N.Y. Bankr. 2004) (quoting *Stirling Homex Corp. v. Moasote Co*., 437 F.2d 87, 88 (2d Cir. 1971) (Rule 8(a)'s "term 'jurisdiction' . . . refers to subject matter jurisdiction rather than personal jurisdiction"), *Curran Co. v. Imedco GmbH*, 1992 U.S. Dist. LEXIS 18420, *4 (N.D. Ill. 1992) ("Rule 8(a)(1) . . . only requires allegations of subject matter jurisdiction in the complaint"), 4 Wright and Miller, *Federal Practice and Procedure* § 1067.6, at 563 (3d ed. 2002)).[5]

The Eleventh Circuit follows this uniform interpretation of the federal pleading requirements:

> [A]lthough Rule 8(a) . . . requires a complaint to include a "short and plain statement of the grounds for the court's jurisdiction," courts have saved some complaints even though they lacked a jurisdictional statement because they made references to federal law sufficient to permit the court to find § 1331 jurisdiction.

Miccosukee Tribe of Indians of Fla. v. Kraus-Anderson Constr. Co., 607 F.3d 1268, 1275-76 (11th 2010) (citing *Gardner v. First Am. Title Ins. Co*., 294 F.3d 991, 994 (8th Cir. 2002) ("Rule 8(a)(1) is satisfied if the complaint say[s] enough about jurisdiction to create some reasonable likelihood that the court is not about to hear a case that it is not supposed to have the power to hear."). *Accord Bennick v.*

[5] *Accord*, *e.g*., *Purdue Research Foundation v. Sanofi-Sythelabo, S.A*., 338 F.3d 773, 782 (7th Cir. 2003); *Levey v. Hamilton* (*In re Teknek), LLC*, 254 B.R. 181, 190 (N.D. Ill. 2006) (citing, *inter alia*, Fed.R.Civ.P. 8(a); *Purdue Research*, 338 F.3d. at 782; and *In re Enron*, 316 B.R. at 439-40).

Boeing Co., 504 Fed. Appx. 796, 797-98 (11th Cir. 2012) (citing *Miccosukee Tribe*, 607 F.3d at 1275-76); *Scarborough v. Carotex Constr., Inc*., 420 Fed. Appx. 870, 873 (11th Cir. 2011) (same).

"Only if the defendant actually challenges the federal court's personal jurisdiction must the plaintiff *establish by affidavit or hearing* that the court has personal jurisdiction over the defendant." *In re Teknek, LLC*, 354 B.R. at 190 (citing *Purdue Research*, 338 F.3d at 782; *Federalpha Steel LLC Creditors Trust*, 341 B.R. 872, 884 (N.D. Ill. Bankr. 2006)).

The Gary Lawyers' misguided argument to the contrary arises from one sentence in a 2009 case, *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009), which is an obvious misquote from an earlier Eleventh Circuit decision that *United Techs* cites in support of the misquoted sentence, *Posner v. Essex Ins. Co., Ltd*., 178 F.3d 1209, 1214 (11th Cir. 1999). The Gary Lawyers open their argument with the misquoted sentence from *United Techs*, but without disclosing that *United Techs* cites *Posner* as the supporting authority:

> A plaintiff seeking the exercise of personal jurisdiction over a nonresident defendant bears the initial burden of alleging *in the complaint* sufficient facts to make out a prima facie case of jurisdiction.

Gary Brief at 22 (citing *United Techs*, 556 F.3d at 1274) (emphasis added).

In fact, the phrase "in the complaint" does not appear in *Posner*. *Compare Posner*, 178 F.3d at 1214 (sentence does not include "in the complaint") *with*

United Techs, 556 F.3d at 1274 (sentence includes "in the complaint"). *Posner* goes on to clarify that, consistent with the uniform precedent interpreting Rule 8(a), personal jurisdiction allegations need not be included in the complaint, explaining the correct procedure as:

> The plaintiff bears the burden of proving "by affidavit the basis upon which jurisdiction may be obtained" *only if the defendant files "affidavits in support of his position."*

Posner, 178 F.3d at 1214 (emphasis added) (citing *Venetian Salami Co. v. Parthenais*, 554 So. 2d 499, 502 (Fla. 1989)).[6]

The other cases cited by the Gary Lawyers not only fail to support their position, but they establish that (i) Rowe followed the correct procedure by submitting declarations addressing the personal jurisdiction allegations; and (ii) the District Court should have summarily denied the Gary Lawyers' motions to dismiss because they failed to support their motions with such declarations. In *Snow v. DirecTV, Inc*., 450 F.3d 1314 (11th Cir. 2006), for example, the Eleventh Circuit explained that a district court confronted with a Rule 12(b)(2) motion to dismiss on personal jurisdiction grounds has the option of conducting an evidentiary hearing or considering evidence submitted in written form by the parties:

[6] Thus, *United Techs'* insertion of "in the complaint" into *Posner's* wording must be inadvertent, and was certainly not intended to upset otherwise uniform case law. The error probably arose because the *United Techs* plaintiff voluntarily included personal jurisdiction allegations in the complaint, and the defendant challenged those allegations by submitting affidavit evidence. 556 at 1274.

> When, as here, a district court does not conduct a discretionary evidentiary hearing on a Rule 12(b)(2) motion, the plaintiff must establish a prima facie case of personal jurisdiction over a nonresident defendant *by presenting enough evidence to withstand a motion for directed verdict*.

450 F.3d at 1317 (citing *Madara v. Hall*, 916 F.2d 1510, 1514 (11th Cir. 1990)).

Except for Sperando, who submitted an affidavit addressing her Georgia contacts during the Civil Rights Action with her reply papers, the other Gary Lawyers failed to submit any evidence regarding their Georgia contacts or other facts relevant to personal jurisdiction.[7]

They chose not to do so probably because they could not submit truthful declarations without disclosing their contacts with Georgia during the Civil Rights Action, which would have been more than sufficient to establish specific personal jurisdiction. Under *Posner's* holding that the plaintiff bears the burden of proving personal jurisdiction "only if the defendant files 'affidavits in support of his position,'" 178 F.3d at 1214, the District Court should have summarily denied the motions to dismiss because they were not accompanied by declarations or other evidence from the Gary Lawyers.

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[7] Sperando's personal jurisdiction allegations conflict with Rowe's allegations. *Compare*, *e.g.*, Rowe Dec., A-659 (¶ 38) *with* Sperando Affidavit, A-828 (¶ 21) (conflict over whether Sperando attended Atlanta Hilton meeting). Rowe's allegations are entitled to deference since Sperando leaves open the possibility that her recollection might be mistaken, A-828 (¶ 21). *Snow*, 450 F.3d at 1317 (where evidence conflicts, "the district court must construe all reasonable inferences in the plaintiff's favor.") (citing *Madara*, 916 F.2d at 1510).

B. The Wording of the Argument Suggests that the Gary Lawyers Have Made It in Bad Faith.

The structure and wording of the argument that Rowe's complaint failed to satisfy pleading requirements by omitting personal jurisdiction allegations suggest that the Gary Lawyers have made that argument in bad faith, knowing that it lacks support and is contrary to uniform federal precedent. First, although the Gary Defendants are usually scrupulous in their citation to case authority, their citation to *United Techs* after the quotation opening their argument is incomplete, failing to attribute *Posner* as the authority on which *United Techs* relies for the quotation. Their citation should have included, but does include, the following parenthetical:

> (citing, *inter alia*, *Posner v. Essex Ins. Co., Ltd*. , 178 F.3d 1209, 1214 (11th Cir. 1999)).

Gary Brief at 22; Sperando Brief at 10.

By omitting that parenthetical, the Gary Lawyers made it more difficult for Rowe and this Court to discover that the quotation attributed solely to *United Techs* is an inadvertent misquotation of *Posner*, which is inconsistent with not only *Posner* but with uniform federal precedent interpreting Rule 8(a).

Second the incomplete citation to *United Techs* is followed by a misleading quotation from *Snow*:

> "[V]ague and conclusory allegations . . are insufficient to establish a prima facie case of personal jurisdiction."

Gary Brief at 22 (quoting Snow, 450 F.3d at 1318). By placing that quotation immediately following the unattributed misquotation from *Posner*, the Gary Lawyers create the false impression that *Snow* is yet another case holding that personal jurisdiction allegations must be included in the plaintiff's complaint.

In fact, the plaintiff in *Snow* had voluntarily included personal jurisdiction allegations in the complaint and the defendant had responded by submitting sworn affidavits contradicting those allegations. The plaintiff then failed to submit affidavits or other evidence in reply. The point of the quotation was that the initial – and optional – allegations in the complaint were insufficient to establish a prima facie case of personal jurisdiction considering defendants' unrebutted affidavits.

Third, the misleading quotation from *Snow* is followed by an even more misleading quotation from a case that does not even address personal jurisdiction:

> And "a party cannot amend a complaint by attaching documents to a response to a motion to dismiss." *Jallali v. Nova Se. Univ., Inc.*, 486 F. App'x 765, 767 (11th Cir. 2012) (citing *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007)).

Gary Brief at 22.

The Gary Lawyers have taken this quote out of context and concealed the fact that the two supporting cases, *Jallali* and *Stephens*, do not involve motions to dismiss based on personal jurisdiction! *Jallali* involved a motion to dismiss based on the failure to plead fraud with particularity as required under Rule 9(b) in the plaintiff's third amended complaint. In affirming dismissal on that ground, this

Court explained that -- in that context -- the district court did not err in refusing to consider extraneous documents annexed to the plaintiffs' response to the motion to dismiss. The holding has no application to a motion to dismiss an initial complaint based on personal jurisdiction grounds.[8]

By quoting *Jallali* out of context and concealing the fact that neither *Jallali* or *Stephens* involved motions to dismiss based on personal jurisdiction, the Gary Lawyers make it appear that they had support for their argument that Rowe was supposed to file a motion to amend the complaint rather than submit declarations setting forth personal jurisdiction allegations in evidentiary form. In fact, neither *Jallali* nor *Stephens* support that argument. To the contrary, *Snow* and *Posner* establish that Rowe followed the correct procedure by responding to the Gary Lawyers' motions with declarations setting forth personal jurisdiction allegations in evidentiary form.

Finally, a simple Lexis or Westlaw search reveals dozens of federal cases holding that Rule 8(a) applies only to subject matter jurisdiction and that the Federal Rules do not impose any pleading requirements as to personal jurisdiction. Filing a brief with this Court without doing such basic research would be inconsistent with the Gary Defendants' prior filings.

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[8] *Stephens* is similarly inapposite as itt involved a motion to dismiss an insurer's claims for § 10(b) securities fraud, common law fraud, and negligent misrepresentation on standing grounds. 500 F.3d at 1280.

II. THE GARY LAWYERS FAIL TO DEFEND THE DISTRICT COURT'S MISTAKEN PERSONAL JURISDICTION ANALYSIS.

A. The Gary Lawyers are Subject to Specific Personal Jurisdiction.

The Gary Lawyers ignore most of Rowe's analysis of the District court's mistaken conclusion that specific personal jurisdiction comports with constitutional. They either regurgitate the District Court's errors without addressing Rowe's analysis, or they attempt to apply out-of-context case language to superficial descriptions of their Georgia contacts, which ignore their relationship with Georgia, and this litigation. *See Walden v. Fiore*, 134 S. Ct. 1115, 1126 (2014) ("The proper focus of the 'minimum contacts' inquiry ... is 'the relationship among the defendant, the forum, and the litigation.'") (citing *Calder v. Jones*, 465 U.S. 783, 788 (1984)).

1. They concede that the long-arm statute confers jurisdiction.

The Gary Lawyers do not dispute that the District Court correctly found that the Georgia long-arm statute confers jurisdiction under the "transacting business" subsection of the statute, O.G.C.A. § 9-10-91(1). Appellant's Brief at 26-28. That concession is especially significant because in reaching that conclusion, the District Court mistakenly applied the former and more-restrictive "three-factor" test to determine whether the "transacting business" prong of the long-arm statute was satisfied. Appellants' Brief at 29 (quoting District Court decision setting forth

three-factor test, A-961-962 (quoting *Imageline, Inc. v. Fotolia, LLC*, 663 F. Supp. 2d 1367, 1375 (N.D. Ga. 2009)).[9]

Nor do the Gary Lawyers dispute that the three-factor test applied by the District Court to conclude that "transacting business" long-arm jurisdiction exists is the same three-factor test properly applied by District Court properly to determine whether the Gary Lawyers' Georgia contacts constitute "minimum contacts" sufficient to satisfy constitutional due process. Appellant's Brief at 30 (quoting District Court decision setting forth three-factor test, A-964 (quoting *Francosteel Corp. v. M/V Charm*, 19 F.3d 624, 627 (11th Cir. 1994) (quoting *Vermeulen v. Renault, U.S.A., Inc*., 985 F.2d 1534, 1546 (11th Cir. 1992)).

Finally, the Gary Lawyers also do not contest that the District Court's analysis is irreconcilably inconsistent, and logically flawed, by concluding that the test is satisfied for "transacting business" long-arm jurisdiction but is not satisfied for constitutional "minimum contacts." Appellant's Brief at 30-31.

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[9] In fact, that three-factor test is no longer applied to determine whether "transacting business" long-arm jurisdiction exists since the Georgia Supreme Court mandated that the statute be interpreted literally, based on the plain meaning its wording. *Innovative Clinical & Consulting Servs., LLC v. First Nat. Bank of Ames*, 279 Ga. 672, 676 (2005). "The *Innovative Clinical* court intended to broaden the reach of the long-arm statute by stripping away certain limitations, not expressly contained in the statute, that various courts had injected into the statute over time." *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc*., 593 F.3d 1249, 1257 (11th Cir. 2010).

2. They regurgitate the District Court's error of undervaluing their Georgia contacts.

The Gary Lawyers repeat the District Court's error of undervaluing the significance of their Georgia contacts without specifically addressing Rowe's analysis set forth in the opening brief. Appellant's Brief at 31-33. When objectively considered, the Gary Lawyers' contacts with Georgia far exceed the "minimum contacts" necessary to satisfy constitutional due process.

1. They improperly discount the significance of their Georgia contacts because Rowe did not include them in the complaint. Rowe was not required to include personal jurisdiction allegations in the complaint. *See*, *supra*, at § I. Thus, the District Court erred by discounting the significance of Georgia contacts simply because they were not included in the complaint.[10]

2. They ignore Rowe's uncontroverted allegation that Gary solicited him at the Fulton County Courthouse in Altanta, and not vice-versa. The Gary Lawyers ignore the reasons why Rowe's initial telephone contact does not support the District Court's erroneous conclusion that "Plaintiffs themselves solicited

[10] Not only was including personal jurisdiction allegations in the complaint optional, there was a specific reason why Rowe's counsel did not believe doing so was necessary. Because the Gary Defendants did not challenge personal jurisdiction or venue in *Rowe I* and Judge Totenberg ignored Sperando's challenges, Rowe's counsel did not anticipate that the Gary Lawyers would raise those objections in this action.

Defendants in Georgia, rather than Defendants soliciting Plaintiffs," A-966. Appellant's Brief at 31-32.

In fact, this Court has explained that the mere fact that a "plaintiff first solicited a nonresident defendant does not nullify the significance of a defendant's initiation of subsequent transactions." *Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc*., 593 F.3d 1249, 1272 (11th Cir. 2010) (citing *Southwest Offset, Inc. v. Hudco Publishing Co*., 622 F.2d 149, 150-52 (5th Cir. 1980)). In *Diamond*, a Georgia seller "initially approached the [buyer] in California about the possibility of selling," which resulted in a "general agreement about the price and delivery terms." 593 F.3d at 1271. This Court nevertheless found that the buyer's subsequent placement of actual orders with the Georgia seller constituted a constitutionally significant contact with Georgia because they were "deliberate" and "purposeful," even though the buyer never was physically present in Georgia. *Id*. at 1272.

Here, Rowe's initial contact with Gary – a mere phone call to his office – was much more innocuous than the Georgia seller's initial solicitation of the California buyer in *Diamond*. In addition, after Gary received word of that call, his subsequent solicitation of Rowe in Georgia was much more significant that the California buyer's subsequent transactions in *Diamond*. Whereas the California buyer in *Diamond* merely sent purchase orders into Georgia from California under a prior agreement negotiated in California, Gary actively solicited Rowe and "closed the

deal" in Georgia as soon as Gary heard that Rowe was a potential client. The Gary Lawyers ignore that despite Rowe's initial call, he was still concerned about changing lawyers. Appellant's Brief at 12 (citing Rowe Dec., A-651 (¶ 20)).

Not only did Gary affirmatively arrange the meeting, he solicited Rowe's business by making representations specifically related to Gary's connections with Georgia that are central to Rowe's claims in this litigation:

(i) Unlike most lawyers, Gary and his firm maintained a national practice capable of handling complex litigation anywhere in the country, Appellant's Brief at 13 (citing Rowe Dec., A-652 (¶ 22));

(ii) Gary frequently practiced in Georgia courts, one of his best friends was Atlanta Mayor Bill Campbel, and he was at the Fulton County Courthouse trying one of his Georgia cases when Rowe called, *id*.;

(iii) Gary bragged about his prior Georgia court victories, including the race discrimination settlement in the case against Coca-Cola, *id*. (citing A-652 (¶ 23);

(iv) Gary owned two private jets, *Wings of Justice I* and *Wings of Justice II*, which enabled him and his firm lawyers to "meet with people in Atlanta, Chicago and Carolina the same day and still be home for dinner," *id*. (citing A-652-53 (¶ 24)); and

(v) Gary and his firm were more capable than Rowe's New York lawyers in winning the Civil Rights Action, asserting that the New York lawyers (a) had undervalued the case at $750 million when it was worth as much as $3.5 billion; (b) could not effectively represent black concert promoters because they were white; and (c) had conflicts with the entertainment industry, A-651 (¶ 21).

Not only do these representations lie at the core of Rowe's claims, they establish that Gary "purposefully directed his activities at residents of [Georgia] . . . and the litigation results from alleged injuries that arise out of or relate to those activities." *Diamond*, 593 F.3d at 1267 (quoting *Burger King v. Rudzewicz*, 471 U.S. 462, 472-73 (1985)).

The Gary Defendants concede that Gary's initial meeting with Rowe in Atlanta constitutes a "but for" cause of Rowe's injuries, but they discount the meeting's significance by mistakenly asserting that Rowe was soliciting Gary and Gary's presence in Georgia was fortuitous. Gary Brief at 29. Yet Gary's representations regarding his deep connections with Georgia, including his presence in Atlanta litigating one of his many Georgia cases, were part of Gary's solicitation efforts directed at Rowe, a Georgia resident.

Nor was the meeting's location in Georgia fortuitous or random. Gary represented as much to Rowe by underscoring his regular business activities in Georgia and the nationwide scope of his firm's practice, *i.e.*, it was no surprise that Gary was in Atlanta because of his deep connections with the state and the lack of territorial bounds to his law practice.

Gary's solicitation efforts in Georgia paid off. Rowe retained Gary and his firm to represent the Civil Rights Plaintiffs under a retainer agreement that guaranteed that Gary and his colleagues would have continuing contact with

Georgia, by working and communicating with Rowe. That Georgia contact alone is sufficient to satisfy the due process requirement of personal jurisdiction. *See*, *e.g.*, *Walden*, 132 S. Ct. at 1122 ("we have upheld the assertion of jurisdiction over defendants who have purposefully "reach[ed] out beyond' their State and into another by, for example, entering a contractual relationship that 'envisioned continuing and wide-reaching contacts' in the forum state") (citing *Burger King*, 471 U.S. at 479-80).

3. They mistakenly assert that the December 2002 meeting at the Atlanta Hilton is not a "but for" cause of Rowe's injuries. The Gary Lawyers do not dispute that the fraudulent misrepresentations made at the meeting lie at the core of Rowe's claims, including misrepresentations regarding:

(i) the admissibility of the E-Discovery Memorandum;

(ii) their failure to obtain the racially derogatory emails identified on that memorandum;

(iii) the necessity of the retainer agreement's forum selection clause even though the New York lawyers had withdrawn; and

(iv) their capability of opposing the upcoming summary judgment motions without the New York lawyers.

Appellant's Brief 14-16 (record citations omitted). They also do not contest that they withheld information about the Michigan lawsuit by Gary's former gender discrimination clients, including the judge's probable cause finding that Gary stole

$51.5 million in settlement funds. *Id*. at 15 (citing complaint, A-072-073 (¶¶ 140-143), and Rowe Dec., A-665-666 (¶¶ 53-55)).

The Gary Lawyers mistakenly assert that the meeting is not a "but for" cause of Rowe's injuries because it's not mentioned in the complaint and Gary also made fraudulent representations by telephone and email. *See*, *supra*, at 19-20. Indeed, the significance of Gary's fraud while physically present in Georgia is not diminished merely because he made the same fraudulent misrepresentations by phone and email directed to a Georgia citizen. Appellant's Brief at 32.

The Gary Lawyers also ignore several aspects of the Atlanta Hilton meeting that enhance its significance as a constitutionally sufficient contact. First, Gary organized the meeting to discuss strategy at a turning point in the Civil Rights Action – after Gary fraudulently advised Rowe to reject the defendants' settlement offer and the New York lawyers withdrew. Rowe was concerned about Gary's ability to carrying on without the New York lawyers, especially with respect to the Gary Firm's ability to respond to the upcoming summary judgment motions:

> At the December 2002 meeting at the Atlanta Hilton, Gary dismissed my concerns about the withdrawal of the New York lawyers since they had the responsibility of responding to the motions for judgment. Gary knew at that time that he never obtained the racially derogatory emails, yet he fraudulently stated that the emails were the "smoking gun" that guaranteed denial of the summary judgment motions and ultimate victory.

A-664-665 (¶ 52).

Second, the meeting was also called to negotiate the revised retainer agreement. The Gary Lawyers' fraudulent representations at that meeting induced Rowe to continue to retain Gary notwithstanding Rowe's concerns about the withdrawal of the New York lawyers. Rowe explains that but for the misrepresentations and omissions at the meeting,

> we would have fired the Gary Lawyers and made other arrangements to continue prosecuting the Civil Rights Action.

A-666 (¶ 56).

Finally, Gary's fraud regarding the forum selection clause took place only at the Atlanta Hilton meeting. A-659-663 (¶¶ 39-47) (detailed description of Gary's fraud regarding the forum selection clause at the Atlanta Hilton meeting).

4. They ignore the significance of the Gary Lawyers' constant telephone and email communications directed at Rowe in Georgia. In *Walden*, the Supreme Court reiterated that the critical inquiry is not the defendant's physical presence in the forum state, but whether the defendant has intentionally created contacts with the forum that justify haling her into court. 134 S. Ct. at 1123-24 (reaffirming holding in *Calder v. Jones*, 465 U.S. 783 (1984), which sustained jurisdiction over a defendant whose forum contacts were limited to telephone calls and publishing an article about a forum resident). *Accord Diamond*, 593 F.3d at 1267-74 (California buyer's conduct constituted "minimum contacts" without ever being physically present in the forum).

Here, from the moment Gary was retained, he engaged in a continuous series of fraudulent misrepresentations and omissions, both while physically present in Georgia and via telephone and email directed into Georgia. That fraud was the "but for" cause of Rowe's injuries because it was designed to induce Rowe into retaining the Gary Firm and to continue to retain the Gary Firm after the New York lawyers withdrew.

5. They ignore that the New York location of the Civil Rights Action was fortuitous. The Civil Rights Action alleged nationwide race discrimination and antitrust violation by defendants that operated globally. The case was commenced in New York only because that happened to be where the lawyers Rowe originally retained were located.

3. They improperly discount the significance of the minority view regarding personal jurisdiction over nonresident lawyers.

The Gary Lawyers miss the point about the minority view that an out-of-state lawyer subjects herself to jurisdiction by merely accepting a retainer from a forum resident. First, at least three major states, California, Colorado, and Texas, have adopted the view. Appellant's Brief at 33-38. Second, the cases adopting the view set forth compelling reasons why it is the better-reasoned view. *Id*. at 33-38. Third, the issue is ripe for decision in Georgia in light of the Georgia Supreme Court's decision in *Innovative Clinical*. *Id*. at 34-35. Finally, minority rule

underscores that asserting jurisdiction over the Gary Lawyers stands on solid ground since their contacts far exceed the minimum contacts necessary under the majority rule.

4. They improperly discount the significance of the "fair play and substantial justice" test.

While cases often consider the "minimum contacts" and "fair play and substantial justice" tests separately, doing so obscures the relationship between the tests and the due process clause from which they arise. In fact, the tests derive from a single formulation of the protection offered by the due process clause, to limit the assertion of jurisdiction to persons with

> certain minimum contacts with [the forum] such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

Diamond, 593 F.3d at 1267 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984) (quoting *International Shoe v. Washington*, 326 U.S. 310, 316 (1945)).

Here, the Gary Lawyers' uncontroverted Georgia contacts leave no room to doubt that subjecting them to personal jurisdiction in Georgia does not offend such traditional notions.

B. Willie Gary is Subject to General Personal Jurisdiction.

The Gary Lawyers ignore that Willie Gary has regularly practiced law in Georgia courts for several decades. By appearing *pro hac vice* in Georgia, he submitted "to the authority of the courts of [Georgia] . . . for all [his] conduct . . . within the state while the proceeding is pending." Ga. Sup. Ct. Rule 4.4(F)(1).

Such consent alone establishes general personal jurisdiction over Gary and any of the other Gary Lawyers who have been admitted *pro hac vice* in Georgia court. Although *Daimler* raised the bar on the requirements for general jurisdiction, it does not affect a defendant's voluntary consent to jurisdiction, which still constitutes an independent basis for the assertion of general personal jurisdiction. *See*, *e.g.*, *McCullough v. Royal Caribbean Cruises, Ltd*., 2017 U.S. Dist. LEXIS 113876, *25 (S.D. Fla. 2017) (citing *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 880 (2011)).

Thus, even if Gary's extensive contacts with Georgia are insufficient to meet the *Daimler* "at home" standard, he has consented to general jurisdiction through his admission *pro hac vice* in Georgia courts. The same analysis applies to any of the other Gary Lawyers who were admitted *pro hac vice* in Georgia courts at the time they were served in this action.

III. THE GARY LAWYERS FAIL TO DEFEND THE DISTRICT COURT'S LACK OF CONSIDERATION OF SECTION 1631(a) TRANSFER.

The Gary Lawyers do not dispute the *Cabel* court's holding that a district court's failure to consider Section 1631(a) transfer *sua sponte* is "manifest error" is based on the mandatory "shall" wording of the statute. Appellant's Brief at 48-51. The fact that courts in this circuit have not considered the issue does not detract from the *Cabel* court's solid reasoning. Moreover, the fact that Rowe did raise the request 1631(a) transfer as alternative relief below is irrelevant because the issue is whether the District Court errored by failing to consider such a transfer *sua sponte*.

For the reasons set forth, *supra*, at 1-7, such transfer is in the interest of justice if personal jurisdiction does not exist in this district. The parties agree that personal jurisdiction exists in New York, where this action would still be timely upon a 1631(a) transfer due to the continued applicability of the Georgia "limitations savings statute."

CONCLUSION

The district court's November 29, 2016 Order and Judgment should be reversed and this action should be remanded to the district court for further proceedings.

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CERTIFICATE OF
COMPLIANCE WITH RULE 32(a)(7)(B)(i)

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 6,485 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman type style.

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing has been filed with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, which will automatically send email notifications to:

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