No. __________

IN THE

Supreme Court of the United States

ANTON SHIFCHIK, ZHANNA SHIFCHIK,
AND SLAVA SHIFCHIK,

Petitioners,

v.

WYNDHAM WORLDWIDE CORP., WYNDHAM WORLDWIDE OPERATIONS, INC., WYNDHAM HOTEL GROUP, LLC, WYNDHAM HOTEL AND RESORTS, LLC, WYNDHAM VACATION RESORTS, INC., WYNDHAM VACATION OWNERSHIP INC., EAST PASS INVESTORS, LLC, HARBOR WALK HOLDING, LLC, AND EMERALD GRANDE LLC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Internet reservations are the lifeblood of the hospitality industry. Like many global businesses that heavily rely upon the internet to conduct business, respondents have elected to avail themselves of the commercial benefits that are available in every state in this country. This Court has never directly addressed what role internet commerce plays in determining the personal jurisdiction of foreign corporations with a global reach, stating not long ago that "[w]e leave questions about virtual contacts for another day." *Walden v. Fiore,* 571 U.S. 277, 290 n.9 (2014). Recently, in *Ford Motor Co. v. Mont. Eighth Judicial Dist.*, 141 S. Ct. 1017 (2021), three Justices signaled that the day has come, questioning the continued effectiveness of the distinction between general and specific personal jurisdiction developed in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny. As Justice Alito stated "there are [] reasons to wonder whether the case law we have developed since [*International Shoe*] is well suited for the way in which business is now conducted." *Ford Motor Co.*, 141 S. Ct. at 1032 (Alito, J., concurring in the judgment). Justice Gorsuch also questioned the continuing validity of this distinction, asserting that it "ha[s] begun to look a little battered." *Id*. at 1034 (Gorsuch, J., with whom Thomas, J., joined, concurring in the judgment). Alternatively, should this Court not address the continued viability of *International Shoe* in the context of internet commerce, it should grant certiorari and remand this matter in light of *Ford Motor Co.*

The questions presented are:

1. Whether it is consistent with the Due Process Clause of the Fourteenth Amendment for a state to

exercise personal jurisdiction over a foreign corporation based solely on its virtual contacts with that state.

2. Where the New Jersey Appellate Division ruled that defendants were not subject to specific personal jurisdiction in the absence of a "but for" causal relationship between defendants' contacts with New Jersey and plaintiff's injuries, whether this Court should grant certiorari, vacate the judgment of the New Jersey Appellate Division, and remand the case in light of its recent decision in *Ford Motor Co. v. Mont. Eighth Judicial Dist.*, 141 S. Ct. 1017, 1026 (2021), where it ruled that "[n]one of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do."

LIST OF PARTIES

The following list provides the names of all the parties to the proceeding below:

Petitioners Anton Shifchik, Zhanna Shifchik, and Slava Shifchik were named plaintiffs in the trial court proceedings, and appellants in the proceedings before the New Jersey Appellate Division and the New Jersey Supreme Court.

Respondents East Pass Investors, LLC, Harbor Walk Holding, LLC, and Emerald Grande LLC were named defendants in the trial court proceedings, respondents and cross-appellants in the proceedings before the New Jersey Appellate Division, and respondents in the proceedings before the New Jersey Supreme Court.

Respondents Wyndham Worldwide Corp.[1], Wyndham Worldwide Operations, Inc., Wyndham Hotel Group, LLC, Wyndham Hotel and Resorts, LLC, Wyndham Vacation Resorts, Inc., and Wyndham Vacation Ownership Inc. were named defendants in the trial court proceedings, and respondents in the proceedings before the New Jersey Appellate Division and the New Jersey Supreme Court.

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1. Wyndham Worldwide Corp. subsequently changed its name to Wyndham Destinations, Inc., and moved its corporate headquarters to Orlando, Florida. *See* App. 7a n.1. It is now known as Travel & Leisure Co. Additionally, on May 31, 2018, Wyndham Hotels and Resorts, Inc. was spun-off from Wyndham Worldwide and became a separate, publicly-traded company. *See id.* As noted by the New Jersey Appellate Division, "[n]onetheless, the Wyndham Defendants acknowledged that for purposes of this appeal, Wyndham Worldwide is the relevant direct or indirect parent corporation of all Wyndham defendants." *Id.* (internal quotation marks omitted). *See also* App. 11a.

RELATED CASES

New Jersey Supreme Court:

Shifchik v. Wyndham Worldwide Corp., No. 084437 (N.J. Jan. 29, 2021) (reported at 245 N.J. 138) (granting Petitioners' motion to file for reconsideration of denial of certification as within time, and denying motion for reconsideration)

Shifchik v. Wyndham Worldwide Corp., No. 084437 (N.J. Nov. 20, 2020) (reported at 244 N.J. 397) (denying Petitioner's petition for certification)

New Jersey Superior Court, Appellate Division:

Shifchik v. Wyndham Worldwide Corp., Nos. A-5692-17T4 and A-0246-18T4, 2020 WL 1866942 (N.J. Super. Ct. App. Div. Apr. 14, 2020) (affirming both rulings of the trial court)

New Jersey Superior Court, Law Division:

Shifchik v. Wyndham Worldwide Corp., et als., BER-L-9314-14, Trans ID: LCV20181136213 (N.J. Sup. Ct. L. Div. June 28, 2018) (granting East Pass Investors, LLC, Harbor Walk Holding, LLC, and Emerald Grande, LLC's motion to dismiss for lack of personal jurisdiction)

Shifchik v. Wyndham Worldwide Corp., et als., BER-L-9314-14, Trans ID: LCV20181136239 (N.J. Sup. Ct. L. Div. June 28, 2018) (granting Wyndham Vacation Resorts, Inc. and Wyndham Vacation Ownership, Inc.'s cross-motion to dismiss for lack of personal jurisdiction)

Florida Ninth Judicial Circuit Court:

Shifchik v. East Pass Investors, LLC, Case No. 2018-CA-012675-O (Fl. Cir. Ct. May 20, 2019) (granting East Pass Investors, LLC, Harbor Walk Holding, LLC, and Emerald Grande, LLC's motion to dismiss for failure to timely commence an action)

Shifchik v. East Pass Investors, LLC, Case No. 2018-CA-012675-O (Fl. Cir. Ct. September 25, 2019) (granting Wyndham Vacation Resorts, Inc. and Wyndham Vacation Ownership, Inc.'s motion to dismiss for failure to timely commence an action)

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OPINIONS BELOW

The order and decision of the New Jersey trial court granting defendants East Pass Investors, LLC, Emerald Grande, LLC, and Harborwalk Holding, LLC's motion to dismiss for lack of personal jurisdiction, *Shifchik v. Wyndham Worldwide Corp., et als.*, BER-L-9314-14, Trans ID: LCV20181136213 (N.J. Sup. Ct. L. Div. June 28, 2018), is unreported, and is reproduced at App. 28a-45a. The order and decision of the New Jersey trial court granting defendants Wyndham Vacation Resorts, Inc. and Wyndham Vacation Ownership, Inc.'s cross-motion to dismiss for lack of personal jurisdiction, *Shifchik v. Wyndham Worldwide Corp., et als.*, BER-L-9314-14, Trans ID: LCV20181136239 (N.J. Sup. Ct. L. Div. June 28, 2018), is unreported, and is reproduced at App. 46a-60a. The opinion of the New Jersey Appellate Division affirming the rulings of the trial court, *Shifchik v. Wyndham Worldwide Corp.*, Nos. A-5692-17T4 and A-0246-18T4, 2020 WL 1866942 (N.J. Super. Ct. App. Div. Apr. 14, 2020), is unreported, and is reproduced at App. 3a-27a. The order of the New Jersey Supreme Court denying Petitioners' motion for certification is reported at 244 N.J. 397, and is reproduced at App. 1a-2a. The order of the New Jersey Supreme Court denying Petitioners' motion for reconsideration is reported at 245 N.J. 138, and is reproduced at App. 61a-63a.

STATEMENT OF JURISDICTION

The decision of the New Jersey Appellate Division was rendered on April 14, 2020. The order of the New Jersey Supreme Court denying Petitioners' petition for certification was entered on November 20, 2020. The order

of the New Jersey Supreme Court denying Petitioners' motion for reconsideration was entered on January 29, 2021. On March 19, 2020, this Court entered an order extending the deadline to file any petition for a writ of certiorari by 150 days. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

This case presents an ideal and timely opportunity to reexamine the continued viability of current personal jurisdiction standards, and more particularly the distinction between general and specific jurisdiction, in light of present day commercial norms. Anton Shifchik ("Shifchik"), and his parents, Zhanna Shifchik and Slava Shifchik (collectively, "Petitioners"), seek review of a decision of the New Jersey Appellate Division, which affirmed two decisions of a New Jersey trial court, both of which ruled that New Jersey courts may not, consistent with the Due Process Clause of the Fourteenth Amendment, exercise general personal jurisdiction or specific personal jurisdiction over defendants East Pass Investors, LLC, Harbor Walk Holding, LLC, and Emerald Grande LLC (collectively, the "Emerald Grande Defendants"), Wyndham Vacation Resorts, Inc. ("Wyndham Vacation"), or Wyndham Vacation Ownership

Inc. (Wyndham Ownership"), despite them having a significant virtual presence within the state.

In 2013, Shifchik, a New Jersey resident, travelled to Florida to attend the wedding of two New Jersey residents at the Emerald Grande Hotel (the "Hotel"), a Wyndham Worldwide Corp. ("Wyndham Worldwide") affiliated timeshare in Destin, Florida. App. 6a-7a. At the time the events of this case took place, Wyndham Worldwide was a global hospitality company with hundreds of subsidiaries and affiliates and allowed consumers to make reservations for all Wyndham properties throughout the world via the internet. Wyndham Worldwide had its principal place of business in New Jersey and employed over 22,000 people in New Jersey. New Jersey served as the command post for global internet reservations at all Wyndham properties throughout the world. One of its subsidiaries, Wyndham Vacation owns and operates a huge hotel in Atlantic City, New Jersey, and employs hundreds at that hotel.

Shifchik was not staying at the Hotel, but was invited there by friends – the couple getting married – who were staying at the Hotel. App. 6a-7a, 42a. The bride and her parents found the Emerald Grande online and were attracted to it as the wedding venue by the description of the Hotel as a marvelous venue for a destination wedding. App. 42a. While at the Hotel, Shifchik suffered catastrophic and permanent injuries when he dove into the Hotel's defectively designed pool that misleadingly gave the appearance that its shallow end was in fact the deep part of the pool. App. 6a-7a. Petitioners filed an action in New Jersey against the Hotel, Wyndham Worldwide and numerous other subsidiaries in the Wyndham corporate chain who have ownership and/or managerial control of the

Emerald Grande, as well as multiple Wyndham affiliates. App. 5a-8a. New Jersey is the only place Shifchik could reasonably participate in the prosecution of his case due to his paralyzing injuries and his inability to travel.

In 2014, the Emerald Grande Defendants filed a motion to dismiss based on lack of personal jurisdiction. App. 8a-9a. The trial court denied the motion without prejudice, and directed the parties to engage in discovery. *Id.*

In 2018, the Emerald Grande Defendants filed a motion for summary judgment for lack of personal jurisdiction. App. 11a.[1] Shortly thereafter, Wyndham Ownership and Wyndham Vacation filed a cross-motion to dismiss for lack of personal jurisdiction. *Id.*[2] The record on the motions demonstrated that many of the entities in the Wyndham corporate chain, as well as affiliated entities, are involved in the control and management of the Hotel, and that the Hotel's internet reservations are routed automatically to the website and reservation control center of Wyndham

1. While the New Jersey Appellate Division referred to this as a motion for summary judgment, *see* App. 11a, the trial court treated this motion as one to dismiss for lack of personal jurisdiction. App. 29a, 31a.

2. The remaining four Wyndham entities – Wyndham Worldwide Corp., Wyndham Worldwide Operations, Inc., Wyndham Hotel Group, LLC, and Wyndham Hotel and Resorts, LLC – did not join in this portion of the cross-motion, and only sought dismissal based on a failure to state a claim. App. 49a. Each one of these four entities conceded that they were subject to general personal jurisdiction in New Jersey, and Petitioners' claims against them were dismissed with prejudice because Petitioners failed to allege facts to provide the court a basis to impose a duty on those entities. App. 60a.

Worldwide – the ultimate parent of all the Wyndham defendants – which is located in New Jersey. *See* App. 4a, 9a-10a, 23a, 36a-37a. *See also* Petitioners' Feb. 1, 2019 appendix in support of their appeal before the New Jersey Appellate Division (hereinafter, "Pa") at Pa327, Pa333-Pa334, Pa337, Pa538-Pa544, Pa757, Pa820, Pa822-Pa823, Pa919, Pa1178-Pa1189, Pa1332-Pa1333, Pa1398-Pa1402, Pa1411-Pa1418.

The trial court granted the Emerald Grande Defendants' motion and dismissed plaintiffs' pleading, *see* App. 29a-30a, ruling that Petitioners failed to demonstrate that their contacts with New Jersey were sufficient to subject them to general or specific personal jurisdiction. App. 40a-45a. The trial court also granted Wyndham Ownership and Wyndham Vacation's cross-motion and dismissed plaintiffs' pleading, *see* App. 47a-48a, ruling that Petitioners failed to demonstrate that their contacts with New Jersey were sufficient to subject them to general or specific personal jurisdiction. App. 55a-60a.

Petitioners timely appealed, and the New Jersey Appellate Division affirmed both of the trial court's rulings. However, the court never addressed the jurisdictional arguments based upon the global promotion of the company through the internet, the centralized internet reservation center located in New Jersey, or that Wyndham Worldwide provided support services and direction to the Hotel. It held that neither the Emerald Grande Defendants, Wyndham Vacation, nor Wyndham Ownership are subject to general personal jurisdiction in New Jersey. App. 18a-20a. It further held that none of these entities is subject to specific personal jurisdiction in New Jersey. *Id.*

Petitioners petitioned the Supreme Court of New Jersey for certification, which was denied on November 20, 2020. App 1a-2a. On January 29, 2021, the Supreme Court of New Jersey denied Petitioners' motion for reconsideration. App 62a-63a.

Petitioners filed a separate action in Florida, which was dismissed on May 20, 2019 as to the Emerald Grande Defendants, and on September 25, 2019 as to defendants Wyndham Vacation and Wyndham Ownership, as untimely. *See Shifchik v. East Pass Investors, LLC*, Case No. 2018-CA-012675-O (Fl. Cir. Ct. May 20, 2019 and September 25, 2019) (both granting motion to dismiss for failure to timely commence the action).

REASONS FOR GRANTING THE WRIT

Over 75 years ago the seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) set the standard for personal jurisdiction based upon the simple test of "minimum contacts." The time is ripe for this Court to examine the Fourteenth Amendment's Due Process Clause limitation on a state court's power to exercise jurisdiction over a foreign corporation. Since *International Shoe* and its progeny, federal courts have attempted to balance the need to treat defendants fairly while at the same time protecting "interstate federalism." *World Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293-94 (1980). By giving parties ""fair warning"" of the standards that will govern the exercise of jurisdiction, defendants could take steps "to lessen or avoid exposure to a given State's courts." *Ford Motor Co.*, 141 S. Ct. at 1025 (internal citation omitted). Our current understanding of personal jurisdiction arose from a "strict territorial

approach [which] yielded to a less rigid understanding, spurred by "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity."" *Daimler AG v. Bauman*, 571 U.S. 117, 126 (2014) (internal citation omitted). During oral argument in *Ford Motor Co.*, the Chief Justice posed this hypothetical, which raised the question of whether the broad use of internet commerce has altered the jurisdictional standards established 75 years ago:

> [There's a] retired guy in a small town up in Maine who carves decoys. And friends say: These are great, you ought to sell them on the Internet. And so he gets a site on the Internet, and it has a little thing that links to it that says, you know, buy my decoys. Can he be sued in any state if some harm arises from the decoy?

Oral Arg. Tr., *Ford Motor Co. v. Mont. Eighth Judicial Dist.*, Nos. 19-368 and 19-369 (Oct. 7, 2020), at 39:2 – 7.

Tellingly, three Justices saw fit to include in their concurring opinions the need to reexamine the *International Shoe* line of cases in view of the modern realties of global corporations using the internet to promote their worldwide business. *See Ford Motor Co.*, 141 S. Ct. at 1032 (Alito, J., concurring in the judgment); *id.* at 1034, 1038-39 (Gorsuch, J., with whom Thomas, J., joined, concurring in the judgment). This case now presents the perfect opportunity to reexamine and redefine personal jurisdiction standards in the era of global business activities conducted through the internet. The Court can answer the question raised in *Walden v. Fiore*, 571 U.S. 277, 290 n.9 (2014): "whether and how a defendant's

virtual "presence" and conduct translate into "contacts" with a particular State." As suggested by Justice Gorsuch, perhaps the internet has so changed the way that business is conducted that any nationwide company that uses the internet for business purposes will be subject to suit in any jurisdiction, thus rejecting the need to establish that the suit must arise out of or relate to the defendants' contacts with the forum. *See Ford Motor Co.*, 141 S. Ct. at 1037-39 and n.5 (Gorsuch, J., with whom Thomas, J., joined, concurring in the judgment). Should this Court decide not to reexamine personal jurisdiction in light of virtual contacts, it should grant certiorari based on the second question presented. The New Jersey Appellate Division's ruling that New Jersey may not exercise specific personal jurisdiction over the Emerald Grande Defendants, Wyndham Vacation, or Wyndham Ownership in the absence of a "but for" causal relationship between their contacts with New Jersey and Shifchik's injuries is inconsistent with the holding in *Ford Motor Co. See* 141 S. Ct. at 1026-27. In view of the inconsistency, this Court should grant certiorari, vacate the judgment below, and remand in light of this intervening precedent to reexamine whether these defendants' contacts with New Jersey related to Shifchik's accident and injuries. If given the opportunity to reconsider its decision, the New Jersey Appellate Division likely will find that New Jersey may exercise specific personal jurisdiction over all or some of these defendants and reverse its decision.

I. REVIEW IS WARRANTED TO DETERMINE WHETHER THE EXTENSIVE USE OF THE INTERNET BY GLOBAL CORPORATIONS SUBJECTS THEM TO THE JURISDICTION OF NEW JERSEY COURTS.

International Shoe and its progeny defined the standards applicable to a state court's power to exercise jurisdiction over a foreign corporation consistent with the Due Process Clause of the Fourteenth Amendment. *International Shoe* requires "minimum contacts" with the forum state where the corporation is subjected to suit, so long as that "does not offend 'traditional notions of fair play and substantial justice.'" 326 U.S. at 316-17 (internal citation omitted).

Over the 75 years since *International Shoe* was decided, this notion of fair play and substantial justice arising from contacts with the forum has morphed into different tests for general jurisdiction and specific jurisdiction. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011). If a corporation was "at home" in the forum, it could be sued even though the claim was not related to the forum state or to its activity in the state. *Id*. Because this was a more inclusive concept of jurisdiction, only limited circumstances or "affiliations" with the forum state would subject the defendant to jurisdiction. *See Daimler*, 571 U.S. at 137.

Specific jurisdiction rests on a corporation's "purposeful availment" of the forum state. *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985) (internal quotation marks and citation omitted). The focus is on the corporation's choice to avail itself of the benefits of

the forum state, like "exploi[ting] a market" or "entering a contractual relationship centered there." *Ford Motor Co.*, 141 S. Ct. at 1025 (quoting *Walden*, 571 U.S. at 285). These decisions rested upon giving a company "fair warning," *see Burger King Corp.*, 471 U.S. at 472 (internal quotation marks and citation omitted), and "clear notice" that an activity or undertaking would give rise to suit in the forum. *World-Wide Volkswagen*, 444 U.S. at 297.

The internet has radically changed 75 years of jurisdictional jurisprudence. Now, global companies routinely rely upon the internet to market their goods and services and reach into every home and business in America. The intrusive and all-present reach of the internet to penetrate every business and every family now gives rise to a new analytic: the minimum contacts test of *International Shoe* is satisfied if a company uses the internet for business purposes, and that company may be sued in every state where citizens can access the company's online presence. The prior distinctions between general and specific jurisdiction are no longer applicable, as the use of the monolithic internet has radically extended the company's reach into every nook and cranny of American society. The deliberate use of the internet to promote the business of the company now satisfies all tests for "purposeful availment" or "minimum contacts" that have evolved since *International Shoe*. *See, e.g.,* M. Margaret McKeown, *The Internet and the Constitution: A Selective Retrospective,* 9 Wash. J.L. Tech. & Arts 133, 146 (2014) ("In some respects, we are approaching universal personal jurisdiction depending on how the court characterizes a certain website and its effect").

This Court, however, has never directly addressed personal jurisdiction based on an entity's virtual presence, an issue of significant importance in the legal community and which has been the subject of a large body of legal commentary.[3] In light of these monumental changes, and the absence of guidance from this Court, our courts have struggled to adapt personal jurisdiction to cyberspace for more than a generation. It is undisputed that the lack of direct precedent and specific guidance from this Court concerning virtual contacts to establish personal jurisdiction has left the lower courts in disarray, resulting in the adoption of divergent analyses. This vacuum has resulted in the lower courts being "desperate ... for some path markers." Patrick J. Borchers, *Extending Federal Rule of Civil Procedure 4(K)(2): A Way to (Partially) Clean Up the Personal Jurisdiction Mess,* 67 Am. U.L. Rev. 413, 437 (2017).[4]

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3. *See*, *e.g.*, Raymond T. Nimmer, *Law of Computer Technology*, § 19:7 (Jan. 2020 update); Zainab R. Qureshi, *If the Shoe Fits: Applying Personal Jurisdiction's Stream of Commerce Analysis to E-Commerce--A Value Test*, 21 N.Y.U. J. Legis. & Pub. Pol'y 727, 728, 732 (2019); Jayci Noble, *Personal Jurisdiction and the Internet: A Shift in the International Shoe Analysis for Users of E-Commerce and Peer-to-Peer Websites*, 42 S. Ill. U. L.J. 521, 522-23 (2018); B. Travis Brown, *Salvaging General Jurisdiction: Satisfying Daimler and Proposing a New Framework*, 3 Belmont L. Rev. 187, 223-24 (2016).

4. *See also, e.g., XMission, L.C. v. Fluent LLC,* 955 F.3d 833, 844 (10th Cir. 2020) (internal quotation marks and citation omitted) ("The Supreme Court has only alluded to these issues, leav[ing] questions about virtual contacts [via the Internet] for another day. ... Thus, for now, development of personal-law in the Internet context has been left to the lower courts"); *Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc.,* 751 F.3d 796, 802 (7th Cir. 2014) ("The Supreme Court has not definitively answered

By way of example, amongst the divergent approaches adopted by the lower courts, the standard set forth in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) – that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet," and that "[t]his sliding scale is consistent with well-developed personal jurisdiction principles" – has been adopted by multiple courts. *See, e.g., Cybersell, Inc. v. Cybersell, Inc.,*

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how a defendant's online activity translates into "contacts" for purposes of the "minimum contacts" analysis …We have faced that problem on several occasions ...."); *Plixer Int'l, Inc. v. Scrutinizer GmbH*, 905 F.3d 1, 7-8 (1st Cir. 2018) ("The Supreme Court has not definitively answered how a defendant's online activities translate into contacts for purposes of the minimum contacts analysis.... In the absence of Supreme Court guidance, we are extremely reluctant to fashion any general guidelines beyond those that exist in law, so we emphasize that our ruling is specific to the facts of this case"); *Brightwell Dispensers Ltd. v. Dongguan ISCE Sanitary Ware. Indus. Co. Ltd.*, 2019 WL 7037493, at *6 (D.D.C. Dec. 20, 2019) (internal citation omitted) ("Although the Supreme Court has written extensively on minimum contacts, it left "questions about virtual contacts for another day." ... In that silence, courts have used different approaches to evaluate whether website activity provides the requisite minimum contacts with a forum"); McKeown, *supra* at 146 ("The Supreme Court has not yet considered an Internet case …The closest insight came from Justice Breyer's comment in his concurrence that [*J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. 873 (2011)], albeit an international case, wasn't the case to rework personal jurisdiction "without a better understanding of the relevant contemporary commercial circumstances""); Borchers, *supra* at 437 ("All of the Supreme Court's decisions, including the recent ones, are decidedly old school .... The possibility that virtual contacts might raise different considerations earned a brief mention in *Walden.* But these asides give lower courts no guidance").

130 F.3d 414, 418 (9th Cir. 1997); *Mink v. AAAA Dev. LLC,* 190 F.3d 333, 336 (5th Cir. 1999); *ALS Scan, Inc. v. Digital Serv. Consultants, Inc.,* 293 F.3d 707, 714 (4th Cir. 2002); *Lakin v. Prudential Sec.,* 348 F.3d 704, 710-11 (8th Cir. 2003) (all adopting, to some degree, the *Zippo* standard).

However, while *Zippo* has been adopted by some courts, it has also been rejected by multiple courts – in whole or in part – which favor differing standards. *See, e.g., Illinois v. Hemi Grp. LLC,* 622 F.3d 754,758 (7th Cir. 2010) ("We wish to point out that we have done the entire minimum contacts analysis without resorting to the sliding scale approach first developed in *Zippo....* This was not by mistake. Although several other circuits have explicitly adopted the sliding scale approach ... our court has expressly declined to do so"); *Tamburo v. Dworkin,* 601 F.3d 693, 703 n.7 (7th Cir. 2010), *cert. den.* 562 U.S. 1029 (2010) (declining to adopt the *Zippo* test because "*Calder [v. Jones,* 465 U.S. 783 (1984)] speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there can be applied to cases involving tortious conduct committed over the Internet"); *Shrader v. Biddinger,* 633 F.3d 1235, 1242 n.5 (10th Cir. 2011) (declining to either adopt or reject *Zippo* and deciding case on traditional factors, noting that "even th[o]se courts [that adopt the *Zippo* standard] tend to employ it more as a heuristic adjunct to, rather than a substitute for, traditional jurisdictional analysis").

The result of all the foregoing has been inconsistency and a lack of predictability, where the outcome of a jurisdictional challenge is more dependent on the forum in which the case is brought (and the particular panel hearing an appeal) and less on the facts of the case.

See, e.g., Max D. Lovrin, *Virtual Pretrial Jurisdiction for Virtual Contacts,* 85 Brook. L. Rev. 943, 945 (2020) (footnote omitted) ("Cases involving assertions of personal jurisdiction predicated on internet-based contacts have become especially unpredictable"); Elma Delic, *Cloudy Jurisdiction: Foggy Skies in Traditional Jurisdiction Create Unclear Legal Standards for Cloud Computing and Technology,* 50 Suffolk U. L. Rev. 471, 488 (2017) (footnote omitted) ("Courts have added ambiguity through vague decisions, making it challenging for businesses to develop strategies for technological advancement because they do not know where they could be open to litigation"); McKeown, *supra* at 146 ("In my view, there is no coherent theme in [internet] jurisdiction cases...."); Jonathan Spencer Barnard, *A Brave New Borderless World: Standardization Would End Decades of Inconsistency in Determining Proper Personal Jurisdiction in Cyberspace Cases,* 40 Seattle U. L. Rev. 249, 257 (2016) (footnote omitted) ("Although the Internet is no longer a new phenomenon, and the concept of claims arising out of conduct performed in cyberspace is no longer novel, there remains no consistent standard for how to apply traditional notions of personal jurisdiction to cyberspace cases").

These pressing issues are reflected in this matter. The record is replete with the pervasive use of the internet by the Wyndham parent entity and its subsidiaries and affiliates, as well as managerial control of the Hotel where the accident occurred:

(i) Reservations for Wyndham Worldwide and its subsidiaries and affiliates, including the site of the accident, can be, and are usually, made on the

internet. *See* App. 4a, 9a-10a, 23a, 36a-37a. *See also* Pa327, Pa333-Pa334, Pa337, Pa538-Pa544, Pa820, Pa822-Pa823, Pa919, Pa1178-Pa1189, Pa1332-Pa1333, Pa1398-Pa1402, Pa1411-Pa1418.

(ii) Wyndham Worldwide, the global parent, maintained a principal place of business in New Jersey and employed 22,000 people in New Jersey. The situs of the internet reservation headquarters is in New Jersey. *See id.*

(iii) Both Wyndham Worldwide and its subsidiary, Wyndham Vacation, had managerial control of and connection to the Resort where the accident occurred, including setting safety standards for the pool area, and shared accounting, legal and other management services. Wyndham Vacation also owns 41% of the timeshare units of the Resort and owns an easement on the pool where the accident occurred. *See id.*

The New Jersey Appellate Division never addressed the core issues raised below: whether the use of the internet by the Hotel where the accident occurred and the centralized business location of the internet reservation headquarters in New Jersey satisfy the jurisdictional requirements of minimum contacts and/or purposeful availment of the forum state. The finding of the Appellate Division that there was neither general nor specific jurisdiction was patently erroneous, and the refusal of the New Jersey Supreme Court to grant the petition for certification was also in error. This Court should grant this petition in order to address for the first time how the use of the internet by global companies has altered the law

of personal jurisdiction first enunciated in *International Shoe*, and now rule that these standards have been replaced by the realities of the current marketplace which is dominated by the internet.

II. THIS COURT SHOULD GRANT REVIEW TO ISSUE A GVR ORDER IN LIGHT OF ITS RECENT DECISION IN *FORD MOTOR CO.*

Where a decision of an appellate court is called into question by an intervening development, such as a recent decision of this Court, it has been "an integral part of this Court's practice" to exercise its discretionary certiorari jurisdiction and grant certiorari, vacate the decision of the appellate court, and remand the case to the appellate court for reconsideration in light of the intervening precedent. *See Lawrence v. Chater,* 516 U.S. 163, 166-68 (1996); 28 U.S.C. § 2106. This practice sometimes referred to as "GVR" ("grant, vacate, remand") is "potentially appropriate" where, in light of an intervening development that "the court below did not fully consider," there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration" and "it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence*, 516 U.S.at 167.

GVR is appropriate in this matter. In its recent decision of *Ford Motor Co.*, this Court held that "[n]one of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do" in order to establish personal specific jurisdiction, and that "some relationships will support jurisdiction without a causal showing." 141 S. Ct. at 1026. Yet the New Jersey Appellate Division held that Wyndham

Vacation, Wyndham Ownership, and the Emerald Grande Defendants are not subject to specific personal jurisdiction because Petitioners could not establish "but for" causation. With regard to Wyndham Vacation, the court stated that:

> Wyndham Vacation [] is not subject to specific jurisdiction in New Jersey **in relationship to plaintiff's accident. Its connections to New Jersey are entirely unrelated to plaintiff's accident.** Plaintiff did not book a room at the Resort through Wyndham Vacation. Indeed, as already pointed out, the plaintiff did not have a room at the Resort. Furthermore, there is no evidence that plaintiff went to the Resort because of any action or solicitation of Wyndham Vacation… Wyndham Vacation [] **did not bring plaintiff to the resort or cause him to dive into the pool.**

App. 19a-20a (emphasis added). With regard to the Emerald Grande Defendants, the court stated that there was no specific jurisdiction because the Hotel is located in Florida, and "[t]here is no evidence that the Emerald Grande Defendants had any contact with plaintiff **or solicited him to come to the Resort**." App. 18a (emphasis added). The court's decision is therefore inconsistent with *Ford Motor Co.*

If given an opportunity to reexamine its decision, it is likely that the Appellate Division would find that these entities' contacts with New Jersey would subject them to specific personal jurisdiction. By way of example, Wyndham Vacation is registered to and does do business in New Jersey, has twenty-three employees who work in New Jersey, and also owns and manages a resort in

Atlantic City. App. 9a, 19a. Wyndham Vacation has a sales and marketing agreement with Emerald Grande, LLC – which is wholly owned by Harborwalk, LLC, which operates the Resort, *see* App. 31a – and also owns forty-one percent of the Resort's timeshare units, eight condominiums at the Resort, and has an easement to use its common areas and pool. App. 7a, 10a. Additionally, through a separate agreement between these two entities, owners of suites at the Hotel can timeshare their suites through Wyndham Vacation. App. 9a-10a. These contacts are more than sufficient to satisfy *Ford Motor Co.'s* standard for a relationship between Shifchik's injuries and the forum state. Accordingly, this Court should grant the second question presented, and vacate the decision of the New Jersey Appellate Division, and remand the case for further proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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June 28, 2021

APPENDIX

APPENDIX A — DENIAL OF CERTIFICATION OF THE SUPREME COURT OF NEW JERSEY, FILED NOVEMBER 20, 2020

SUPREME COURT OF NEW JERSEY

C-292 September Term 2020
084437

ANTON SHIFCHIK, ZHANNA SHIFCHIK
AND SLAVA SHIFCHIK,

Plaintiffs-Petitioners,

v.

WYNDHAM WORLDWIDE CORPORATION, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, EAST PASS INVESTORS, LLC, D/B/A THE EMERALD GRANDE AND/OR HARBORWALK HOLDING, LLC, AND/OR EMERALD GRANDE LLC, AND ITS AGENTS, SERVANTS AND/OR EMPLOYEES, *et al.*,

Defendants-Respondents.

ANTON SHIKCHIK, ZHANNA SHIFCHIK
AND SLAVA SHIFCHIK,

Plaintiffs,

v.

WYNDHAM WORLDWIDE CORPORATION, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, *et al.*,

Defendants,

EAST PASS INVESTORS, LLC, D/B/A THE EMERALD GRANDE AND/OR HARBORWALK HOLDING, LLC AND/OR EMERALD GRANDE LLC, AND ITS AGENTS, SERVANTS AND/OR EMPLOYEES,

Defendants.

ORDER

A petition for certification of the judgment in A-5692-17 and A-0246-18 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 17th day of November, 2020.

/s/______________________
CLERK OF THE SUPREME COURT

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, DATED APRIL 14, 2020

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NOS. A-5692-17T4, A-0246-18T4

ANTON SHIFCHIK, ZHANNA SHIFCHIK, AND SLAVA SHIFCHIK,

Plaintiffs-Appellants,

v.

WYNDHAM WORLDWIDE CORPORATION, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM WORLDWIDE OPERATIONS, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM HOTEL GROUP, LLC, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM HOTEL AND RESORTS, LLC, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM VACATION RESORTS, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM VACATION OWNERSHIP, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES, EAST PASS INVESTORS, LLC, D/B/A THE EMERALD GRANDE AND/OR HARBORWALK HOLDING, LLC, AND/OR EMERALD GRANDE LLC, AND ITS AGENTS, SERVANTS AND/OR EMPLOYEES,

Defendants-Respondents.

ANTON SHIFCHIK, ZHANNA SHIFCHIK,
AND SLAVA SHIFCHIK,

Plaintiffs-Respondents,

v.

WYNDHAM WORLDWIDE CORPORATION, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM WORLDWIDE OPERATIONS, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM HOTEL GROUP, LLC, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM HOTEL AND RESORTS, LLC, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM VACATION RESORTS, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES, AND WYNDHAM VACATION OWNERSHIP, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES,

Defendants,

and

EAST PASS INVESTORS, LLC, D/B/A THE EMERALD GRANDE AND/OR HARBORWALK HOLDING, LLC, AND/OR EMERALD GRANDE LLC, AND ITS AGENTS, SERVANTS AND/OR EMPLOYEES,

Defendants-Appellants.

Appendix B

February 11, 2020, Argued
April 14, 2020, Decided

Before Judges Fisher, Gilson and Rose.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-9314-14.

PER CURIAM

Plaintiff Anton Shifchik, a New Jersey resident, was injured at a Florida resort. He filed his personal injury action in New Jersey, suing companies that developed and managed the Florida resort. All those companies were incorporated and have their principal places of business in Florida. Plaintiff also sued a corporation that had a sales and marketing agreement with the Florida resort. That corporation was incorporated in Delaware and principally operated in Florida. Finally, plaintiff sued the parent and affiliated companies of the corporation that had the sales and marketing agreement; the ultimate parent corporation had its principal place of business in New Jersey.

Plaintiff appeals from an order granting summary judgment in favor of the Florida companies that developed and managed the Florida resort. He also appeals from an order dismissing his claims against the corporation with the sales and marketing agreement and its corporate parents and affiliates. In addition, plaintiff appeals from several orders that limited the scope of discovery.

The trial court ruled that the Florida companies and the corporation with the sales and marketing agreement were not subject to personal jurisdiction in New Jersey. The court also ruled that the parent and affiliated companies of the corporation with the sales and marketing agreement were not responsible for the alleged actions of their affiliated company and therefore could not be liable for plaintiff's injuries. We agree and affirm.

The Florida companies filed a separate appeal, challenging the trial court's order denying their request for frivolous-litigation sanctions against plaintiff and his counsel. We consolidate both appeals for purposes of this opinion, and we also affirm the order denying sanctions.

I.

We derive the facts from the record developed on the motions for summary judgment and dismissal. We view those facts in the light most favorable to plaintiff, the non-moving party. *Globe Motor Co. v. Igdalev*, 225 N.J. 469, 479, 139 A.3d 57 (2016) (citing *Brill v. Guardian Life Ins. Co of Am.*, 142 N.J. 520, 541-42, 666 A.2d 146 (1995)).

In the early morning hours of October 19, 2013, plaintiff was injured when he dove headfirst into a pool at the Emerald Grande Hotel, located in Destin, Florida (the Resort). At the time of the accident, plaintiff was an adult, lived in New Jersey, and was in Florida to attend a wedding. Plaintiff was not staying at the Resort. Instead plaintiff had been invited to the Resort by friends who were staying there and who were also attending the wedding.

As a result of his accident, plaintiff was severely injured and significant parts of his body have been paralyzed.

Approximately one year after the accident, on October 3, 2014, plaintiff filed a personal injury action in New Jersey. Plaintiff sued three groups of defendants. First, he sued three Florida companies that developed and managed the Resort. Those defendants are Emerald Grande, LLC (Emerald), East Pass Investors, LLC (East Pass), and Harborwalk Holding, LLC (collectively the Emerald Grande Defendants). Second, plaintiff sued Wyndham Vacation Resorts (Wyndham Vacation), which has a sales and marketing agreement with the Resort. Under that agreement, Wyndham Vacation marketed some of the rooms and suites at the Resort and it also owned portions of some of the rooms and suites. Finally, plaintiff sued the parent and affiliated corporations of Wyndham Vacation, including Wyndham Vacation Ownership, Inc. (Wyndham Ownership), Wyndham Hotel and Resorts, LLC (Wyndham Hotel), Wyndham Hotel Group, LLC (Wyndham Group), Wyndham Worldwide Operations, Inc (Wyndham Operations), and Wyndham Worldwide Corporation (Wyndham Worldwide). The Wyndham entities will sometimes be referred to collectively as the Wyndham Defendants.[1]

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1. In their brief, the Wyndham Defendants point out that on May 31, 2018, Wyndham Hotels was spun-off from Wyndham Worldwide and became a separate, publicly traded corporation. Wyndham Worldwide also changed its name to Wyndham Destinations, Inc. Nonetheless, the Wyndham Defendants acknowledged that for purposes of this appeal, Wyndham Worldwide "is the relevant direct or indirect parent corporation of all Wyndham Defendants."

In his complaint, plaintiff alleged that his injuries were caused by defendants' negligent operation, maintenance, and design of the Resort's pool. Specifically, plaintiff contended that the defendants breached duties owed to him by failing to properly design the pool, failing to properly maintain signage and lighting at the pool, failing to supervise, guard, and inspect the pool, failing to warn and give notice of the danger of using the pool, and failing to maintain the pool in a safe condition. Plaintiff sought compensatory and punitive damages for the severe and permanent injuries he suffered. Plaintiff's parents also asserted claims, seeking damages for the costs they had incurred and will incur in caring for plaintiff's medical needs.[2]

On November 20, 2014, the Emerald Grande Defendants filed an answer, in which they asserted that they "are Florida entities and are not subject to the personal jurisdiction of a New Jersey court." One month later, those defendants moved to dismiss the complaint for lack of personal jurisdiction. Shortly thereafter, the trial court denied that motion without prejudice and directed the parties to engage in discovery.

On May 11, 2015, the Wyndham Defendants filed a motion to dismiss plaintiff's complaint as to all Wyndham Defendants, except Wyndham Vacation, arguing that the other Wyndham Defendants had no connection to the Resort or plaintiff's accident. The court denied

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2. Although the parents are named as plaintiffs in the complaint, we refer to plaintiff because he is an adult and is the individual who suffered the injuries.

that motion, and thereafter the Wyndham Defendants filed their answer, asserting that the New Jersey court "lack[ed] personal jurisdiction over" them.

The parties then engaged in discovery, including discovery focused on whether defendants were subject to personal jurisdiction in New Jersey. That discovery established that the Emerald Grande Defendants are all limited liability companies established in Florida. In 2007, Emerald developed the Resort, which consists of 290 suites that are individually owned. East Pass manages and operates the Resort, and Harborwalk Holding is the parent company of Emerald and East Pass. None of the Emerald Grande Defendants had ever been organized in or registered to do business in New Jersey. Instead, all the operations and facilities of the Emerald Grande Defendants are located in Florida, and all of their employees work in Florida.

Wyndham Vacation is in the business of developing, marketing, and financing the sale of vacation ownership interests to individual consumers. Wyndham Vacation is a Delaware corporation with its principal operations based in Florida. Wyndham Vacation is registered to do business in New Jersey, and it has at least twenty-three employees who work in New Jersey. Wyndham Vacation also owns and manages the Wyndham Skyline Resort in Atlantic City.

Effective January 2011, Wyndham Vacation and Emerald entered into a sales and marketing agreement (the Agreement), which granted Wyndham Vacation the

exclusive right to market the Resort's timeshare units. Under the Agreement, ownership shares in certain condominium units at the Resort were conveyed to a trust for the benefit of an association of owners of timeshares. Wyndham Vacation agreed to sell and market those ownership shares through the Club Wyndham Access plan, which was developed and managed by Wyndham Vacation. Wyndham Vacation owns approximately forty-one percent of the Resort's timeshare units, eight three-bedroom condominiums at the Resort, and has an easement to use the Resort's common areas, including the pool.

The Agreement further provided that individual vacation ownership interests could be exchanged through Club Wyndham Plus, which is an exchange program managed by Wyndham Vacation. In a separate affiliation agreement, Emerald, Wyndham Vacation, and the homeowner's associations of the Resort agreed that the Resort would become affiliated with Club Wyndham Plus to allow for the exchange of individual vacation ownership interests. Under that arrangement owners of suites at the Resort can timeshare their suites through Wyndham Vacation.

The Agreement states that it is not a partnership agreement. Moreover, both the Agreement and the affiliation agreement provide that all notices should be given in Florida, that Florida law applies to the agreements, and that disputes should be brought in a Florida court.

Wyndham Vacation is owned by Wyndham Ownership, which in turn is owned by Wyndham Worldwide. Wyndham Ownership is a Delaware corporation, with its principal operations in Florida. Wyndham Worldwide, the ultimate parent company of all Wyndham entities, is a publicly traded corporation with its principal place of business in New Jersey. The other Wyndham Defendants were all affiliated companies of Wyndham Vacation.

Discovery closed in February 2018, however, not all the scheduled depositions were completed by that time. On March 1, 2018, the Emerald Grande Defendants filed a motion for summary judgment. On April 19, 2018, the Wyndham Defendants filed a "cross-motion" seeking dismissal of plaintiff's complaint under *Rule* 4:6-2(b) and (e).

One week later, the trial court heard oral argument on all those motions. Two months later, on June 28, 2018, the court issued two orders accompanied by written decisions. In one order, the court granted summary judgment and dismissed the claim against the Emerald Grande Defendants without prejudice. In the other order, the court granted the motion to dismiss plaintiff's complaint as to the Wyndham Defendants. Specifically, the trial court found that the Emerald Grande Defendants, Wyndham Vacation, and Wyndham Ownership were not subject to personal jurisdiction in New Jersey. The court also found that the other Wyndham Defendants had no direct relationship with the Resort and therefore could not be responsible for plaintiff's injuries. In making that

latter ruling, the trial court effectively rejected plaintiff's arguments that Wyndham Worldwide and its affiliated companies were alter egos of or otherwise responsible for the actions of Wyndham Vacation and Wyndham Ownership.

After oral argument, but before the trial court issued its decisions, the Emerald Grande Defendants filed a motion for frivolous litigation sanctions against plaintiff and his counsel. The trial court denied that motion in an order dated August 31, 2018.

Meanwhile, on August 10, 2018, plaintiff filed his appeal. Specifically, plaintiff appeals from nine orders: the two June 28, 2018 orders, which dismissed the claims against all defendants, and six orders that limited the scope of discovery and which were dated May 25, 2018; April 13, 2018; March 6, 2018; February 2, 2018; December 15, 2017; and October 4, 2017.[3]

Thereafter, in November 2018, plaintiff filed suit in Florida against the Emerald Grande Defendants, Wyndham Vacation, and Wyndham Ownership. At oral argument, counsel for the parties informed us that the suit in Florida had been dismissed based on Florida's four-year

3. Plaintiff also listed a September 7, 2017 order in his notice of appeal; that order denied his request to file a third amended complaint. Plaintiff, however, did not brief any issues regarding the denial of the motion to amend the complaint. Accordingly, we deem that issue to be waived. *Sklodowsky v. Lushis*, 417 N.J. Super. 648, 657, 11 A.3d 420 (App. Div. 2011) (citations omitted).

statute of limitations for personal injury actions. *See Fla. Stat.* § 95.11(3) (2018).[4]

II.

We first address plaintiff's appeal. The central issue raised in that appeal is whether defendants are subject to personal jurisdiction in New Jersey. Specifically, plaintiff argues (1) the Wyndham Defendants waived their personal jurisdiction defense; (2) all defendants are subject to personal jurisdiction in New Jersey; (3) Wyndham Worldwide and Wyndham Operations are responsible for plaintiff's injuries; and (4) plaintiff was denied access to material discovery. We are not persuaded by any of these arguments and address each argument in turn.

A. Waiver

Plaintiff contends that the Wyndham Defendants waited too long to file their motion to dismiss his claims based on a lack of personal jurisdiction. Accordingly, plaintiff argues that the Wyndham defendants waived that affirmative defense.

Plaintiff, however, did not raise the waiver issue before the trial court. Consequently, we decline to address that issue on this appeal. *R.* 2:10-2; *State v. Robinson*, 200

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4. Plaintiff argues that we should find personal jurisdiction over defendants because he would have no recourse otherwise. The procedural history establishes that plaintiff was on notice of defendants' jurisdiction al defenses and could have filed an action in Florida before the Florida statute of limitations elapsed.

N.J. 1, 20, 974 A.2d 1057 (2009) ("[C]ourts will decline to consider questions or issues not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest."); *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234, 300 A.2d 142 (1973).

Although plaintiff seeks to raise the issue of waiver in connection with personal jurisdiction, that issue is not the type of jurisdictional question we will address for the first time on appeal. *See ibid.*; *Byrnes v. Landrau*, 326 N.J. Super. 187, 193, 740 A.2d 1113 (App. Div. 1999) (holding that personal jurisdiction is a waivable defense). Here, the trial court had jurisdiction to decide the personal jurisdiction issues and plaintiff could have raised, but failed to raise, the waiver argument before the trial court.

Moreover, even if we were to consider the waiver argument, that argument lacks merit. *Rule* 4:6-2(b) requires the defense of lack of personal jurisdiction to be asserted in a defendant's answer. *Rule* 4:6-3 then requires that a motion to dismiss based on the lack of personal jurisdiction "shall be raised by motion within [ninety] days after service of the answer . . . ." *Rule* 4:6-7 goes on to state that the defense of personal jurisdiction is "waived if not raised by motion pursuant to [*Rule*] 4:6-3 . . . ." Nevertheless, all those rules are subject to *Rule* 1:1-2, which states that the trial court can relax or dispense with any rule "if adherence to it would result in an injustice." *See also R.* 1:3-4(a) (allowing a court to enlarge the time for taking an action).

Before filing their answer, the Wyndham Defendants moved to dismiss plaintiff's claims. At the time they filed their motion, the Emerald Grande Defendants had already moved to dismiss plaintiff's claims on personal jurisdiction grounds, but that motion had been denied and the parties were directed to engage in discovery, including jurisdictional discovery. The Wyndham Defendants' initial motion to dismiss was also denied without prejudice. Thereafter, the Wyndham Defendants filed an answer and asserted the affirmative defense of lack of personal jurisdiction. Consequently, the issue of personal jurisdiction was identified in the initial stages of the litigation and thereafter that defense was not waived by any defendant.

B. Personal Jurisdiction

The question of personal jurisdiction involves a mixed question of law and fact. *Rippon v. Smigel*, 449 N.J. Super. 344, 359, 158 A.3d 23 (App. Div. 2017) (citing *Citibank, N.A. v. Estate of Simpson*, 290 N.J. Super. 519, 532, 676 A.2d 172 (App. Div. 1996)). We will not disturb a trial court's factual findings concerning jurisdiction if they are supported by substantial credible evidence. *Id.* at 358. We review de novo the legal aspects of personal jurisdiction. *Ibid.* (citing *Mastondrea v. Occidental Hotels Mgmt. S.A.*, 391 N.J. Super. 261, 268, 918 A.2d 27 (App. Div. 2007)). Moreover, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference [on appeal]." *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378, 658 A.2d 1230 (1995); *see also State v.*

Hubbard, 222 N.J. 249, 263, 118 A.3d 314 (2015) (citing *State v. Gandhi*, 201 N.J. 161, 176, 989 A.2d 256 (2010)).

New Jersey courts "may exercise in personam jurisdiction over a non-resident defendant ‹consistent with due process of law.'" *Bayway Refining Co. v. State Utils., Inc.*, 333 N.J. Super. 420, 428, 755 A.2d 1204 (App. Div. 2000) (alterations in original omitted) (quoting *R.* 4:4-4(b)(1)). Our courts exercise jurisdiction over nonresident defendants "to the uttermost limits permitted by the United States Constitution." *Avdel Corp. v. Mecure*, 58 N.J. 264, 268, 277 A.2d 207 (1971); *Jardim v. Overley*, 461 N.J. Super. 367, 377, 221 A.3d 593 (App. Div. 2019).

A two-part test governs the analysis of personal jurisdiction: (1) defendant must have "certain minimum contacts" with the forum state, and (2) maintaining the suit in that state cannot 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) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)). "[T]he requisite quality and quantum of contacts is dependent on whether general or specific jurisdiction is asserted . . . ." *Citibank, N.A.*, 290 N.J. Super. at 526.

General jurisdiction exists when the plaintiff's claims arise out of the defendant's "continuous and systematic" contacts with the forum state. *Helicopteros Nacionales de Columbia, S.A. v. Hall*, 466 U.S. 408, 416 (1984); *Baanyan Software Servs., Inc. v. Kuncha*, 433 N.J. Super. 466, 474, 81 A.3d 672 (App. Div. 2013). For general jurisdiction to

attach, a defendant's activities must be "so continuous and systematic as to render [it] essentially at home in the forum State." *FDASmart, Inc. v. Dishman Pharm. & Chems., Ltd.*, 448 N.J. Super. 195, 202, 152 A.3d 948 (App. Div. 2016) (alteration in original) (citation omitted) (quoting *Daimler AG v. Bauman*, 571 U.S. 117, 127, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014)).

Specific jurisdiction is available when the "cause of action arises directly out of defendant's contacts with the forum state . . . ." *Waste Mgmt., Inc. v. Admiral Ins. Co.*, 138 N.J. 106, 119, 649 A.2d 379 (1994), *cert. denied*, 513 U.S. 1183 (1995). In examining specific jurisdiction, the "minimum contacts inquiry must focus on ‹the relationship among the defendant, the forum, and the litigation.'" *Lebel v. Everglades Marina, Inc.*, 115 N.J. 317, 323, 558 A.2d 1252 (1989) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977)). The minimum contacts requirement is satisfied if "the contacts resulted from the defendant's purposeful conduct and not the unilateral activities of the plaintiff." *Ibid.* (citing *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980)). "In determining whether the defendant's contacts are purposeful, a court must examine the defendant's 'conduct and connection' with the forum state and determine whether the defendant should 'reasonably anticipate being haled into court [in the forum state].'" *Bayway Refining Co.*, 333 N.J. Super. at 429 (alteration in original) (quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297).

We apply the well-established standards for personal jurisdiction to the three different types of defendants sued by plaintiff: (1) the Emerald Grande Defendants; (2) Wyndham Vacation; and (3) the other Wyndham Defendants. We distinguish Wyndham Vacation from the other Wyndham entities because only Wyndham Vacation had agreements with, and any direct relation to, the Resort.

1. The Emerald Grande Defendants

As already summarized, the Emerald Grande Defendants are all Florida companies with their principal place of business in Florida. Those defendants developed and managed the Resort, which is located in Florida. The Emerald Grande Defendants are not registered to do business in New Jersey and have no employees or physical facilities in New Jersey. Consequently, the Emerald Grande Defendants are not subject to general jurisdiction in New Jersey.

Furthermore, those defendants are not subject to specific jurisdiction in New Jersey for plaintiff's injuries. Plaintiff was injured at the Resort in Florida. There is no evidence that the Emerald Grande Defendants had any contact with plaintiff or solicited him to come to the Resort. Indeed, in discovery plaintiff acknowledged that he was not staying at the Resort and had no contact with the Resort before visiting as a guest of other people attending the wedding.

2. Wyndham Vacation

Wyndham Vacation is a Delaware corporation with its principal operations in Florida. It operates worldwide in developing and marketing vacation ownership interests to individual consumers. It has relationships with over 200 resorts and over 800,000 owners of vacation ownership interests. Accordingly, Wyndham Vacation is registered to and does business in New Jersey. Moreover, it has over twenty employees in New Jersey.

Those connections to New Jersey, however, do not establish general jurisdiction over Wyndham Vacation in New Jersey. Wyndham Vacation does not have the type of "continuous and systematic" contact with New Jersey that would make it "at home" in New Jersey. The resorts that Wyndham Vacations owns or deals with are located in numerous states and foreign countries. Nevertheless, Wyndham Vacation is not at home in all those multiple jurisdictions. Instead, it is principally a Delaware corporation doing business in Florida. *See BNSF Railway Co. v. Tyrell*, _U.S. __, 137 S. Ct. 1549, 1559, 198 L. Ed. 2d 36 (2017); *Dutch Run-Mays Draft, LLC v. Wolf Block, LLP*, 450 N.J. Super. 590, 608, 164 A.3d 435 (App. Div. 2017) (holding that registration to do business in New Jersey does not constitute consent to submit to the general jurisdiction of courts in this state).

Wyndham Vacation also is not subject to specific jurisdiction in New Jersey in relationship to plaintiff's accident. Its connections to New Jersey are entirely unrelated to plaintiff's accident. Plaintiff did not book a

room at the Resort through Wyndham Vacation. Indeed, as already pointed out, plaintiff did not have a room at the Resort. Furthermore, there is no evidence that plaintiff went to the Resort because of any action or solicitation by Wyndham Vacation.

The undisputed facts established in discovery are that plaintiff visited the Resort as a guest of other people who were staying at the Resort. At approximately 2 a.m., plaintiff decided to dive into the pool. He unfortunately suffered a debilitating injury when he struck his head on the bottom of the pool. Wyndham Vacation, however, did not bring plaintiff to the resort or cause him to dive into the pool.

3. The Other Wyndham Defendants

We need not address whether the other Wyndham Defendants are subject to personal jurisdiction in New Jersey. Instead, we will analyze their lack of responsibility under a duty analysis in subsection C of this opinion. We recognize that the trial court dismissed the claims against Wyndham Ownership on the basis of a lack of personal jurisdiction in New Jersey. We agree with that ruling. The record also establishes, moreover, that Wyndham Ownership had no direct agreement, contract, or relationship with the Resort. Thus, like the other Wyndham entities, it is a distinct corporate entity from Wyndham Vacation.

C. The Other Wyndham Defendants Had No Duty to Plaintiff

All of plaintiff's claims are based on theories of negligence. A plaintiff bears the burden of proving negligence, which is never presumed. *Khan v. Singh*, 200 N.J. 82, 91, 975 A.2d 389 (2009). To establish a claim of negligence, plaintiff must prove that: (1) defendants owed him a duty of care; (2) defendants breached that duty; (3) the breach was a proximate cause of his injury; and (4) plaintiff sustained actual damages. *Townsend v. Pierre*, 221 N.J. 36, 51, 110 A.3d 52 (2015) (citing *Polzo v. Cty. of Essex*, 196 N.J. 569, 584, 960 A.2d 375 (2008)). In that regard, businesses owe invitees "a duty of reasonable or due care to provide a safe environment for doing that which is within the scope of the invitation." *Nisivoccia v. Glass Gardens, Inc.*, 175 N.J. 559, 563, 818 A.2d 314 (2003) (citing *Hopkins v. Fox & Lazo Realtors*, 132 N.J. 426, 433, 625 A.2d 1110 (1993)). That duty "requires a business owner to discover and eliminate dangerous conditions" as well as "maintain the premises in safe condition." *Ibid.* (citing *O'Shea v. K. Mart Corp.*, 304 N.J. Super. 489, 492-93, 701 A.2d 475 (App. Div. 1997)).

The material facts established that none of the other Wyndham Defendants had agreements or relationships with the Resort. None of those defendants owned, operated, or had any control over the operations or management of the Resort, or its pool. Consequently, there is no basis for imposing a legal duty on any of the other Wyndham Defendants for injuries plaintiff sustained when he dove into the pool at the Resort. Accordingly, we affirm

the trial court's order dismissing the claims against the Wyndham Defendants.

1. Plaintiff's Contentions Regarding the Responsibility of the Wyndham Defendants

Plaintiff argues that the relationship among the Wyndham Defendants is such that they essentially should be treated as closely related entities and should be subject to general or specific jurisdiction because Wyndham Worldwide has its principal place of business in New Jersey. We reject this argument.

In essence, plaintiff argues for an alter ego theory of jurisdiction that would effectively pierce the corporate veils of the various Wyndham companies. "We have held that the 'forum contacts of a subsidiary corporation will not be imputed to a parent corporation for jurisdictional purposes without a showing of something more than mere ownership.'" *FDASmart*, 448 N.J. Super. at 203 (quoting *Pfundstein v. Omnicom Grp. Inc*, 285 N.J. Super. 245, 252, 666 A.2d 1013 (App. Div. 1995)). To pierce the corporate veil of a parent corporation a party must establish two elements: (1) the subsidiary was dominated by the parent corporation, and (2) adherence to the fiction of a separate corporate existence would perpetrate a fraud or injustice, or otherwise circumvent the law. *Id.* at 204 (citing *State Dept. of Envtl. Prot. v. Ventron Corp.*, 94 N.J. 473, 500-01, 468 A.2d 150 (1983)).

Here, the record contains no evidence that supports piercing the corporate veils among the Wyndham

Defendants or otherwise imposing some form of alter ego responsibility among the separate Wyndham Defendants. Plaintiff places particular reliance on two Wyndham trusts, Club Wyndham Access (CWA) and Club Wyndham Plus (CWP). Plaintiff then argues that through those trusts Wyndham Vacation and the other Wyndham Defendants exercised significant control over the Resort. At best, the trusts supported Wyndham Vacation's efforts to market rooms at the Resort. Their activities did not create specific jurisdiction over Wyndham Vacation. Moreover, the activities of CWA or CWP did not create a basis for imposing alter ego responsibility on the other Wyndham Defendants. In that regard, plaintiff made no showing that there was anything illegal or fraudulent in the corporate structure of the Wyndham Defendants or the operations of CWA and CWP.[5]

We also reject plaintiff's arguments that because the Wyndham Defendants use related websites, we should not treat them as separate corporations. Integrated websites, and even communications via the internet in New Jersey, do not by themselves establish sufficient contacts to subject a defendant to personal jurisdiction in New Jersey. *See Jardim*, 461 N.J. Super. at 381. The Wyndham Defendants' websites are insufficient contacts for creating either general or specific jurisdiction.

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5. The parties dispute whether CWA and CWP are New Jersey based trusts. We do not deem that issue to be material to the question of personal jurisdiction.

D. Discovery

Finally, plaintiff argues that the trial court erred by not permitting him to take certain additional discovery. Specifically, he contends that he should have been permitted to take three additional depositions: the Chief Executive Officer (CEO) of Wyndham Vacation, the CEO of Wyndham Worldwide, and the officer who signed the sale and affiliation agreement between Wyndham Vacation and the Resort. He also asserts that the Emerald Grande Defendants should have been compelled to produce additional documents and materials, including a PowerPoint webinar on how to respond to reviews on TripAdvisor.

We review discovery orders for abuses of discretion. *See Estate of Lagano v. Bergen Cty. Prosecutor's Office*, 454 N.J. Super. 59, 80, 184 A.3d 126 (App. Div. 2018). Here, we discern no abuse. The record establishes that plaintiff was permitted to take discovery and that discovery was open for several years. During that time, plaintiff engaged in significant discovery including taking multiple depositions and receiving responses to comprehensive document demands, interrogatories, and requests for admissions. The discovery that plaintiff now seeks is discovery that he sought just before or after the close of discovery.

Plaintiff argues that the additional discovery he sought may have provided relevant information on the question of personal jurisdiction. Plaintiff, however, has not identified the factual basis to suggest that additional discovery

would have been relevant to personal jurisdiction. The material facts concerning the places of incorporation and the business operations of all the defendants were established in discovery. None of that discovery gave rise to a legitimate argument that the Wyndham Defendants operated as one economic entity and should be treated as one entity for purposes of personal jurisdiction. Consequently, we discern no basis to reverse any of the discovery orders plaintiff challenges on this appeal.

To the extent not addressed, plaintiff's other arguments lack sufficient merit to warrant discussion in a written opinion. *R.* 2:11-3(e)(1)(E).

III.

In their separate appeal, the Emerald Grande Defendant's challenge the order denying their motion for sanctions under N.J.S.A. 2A:15-59.1 and *Rule* 1:4-8. We review a trial court's decision on an application for fees or sanctions under an abuse of discretion standard. *United Hearts v. Zahabian*, 407 N.J. Super. 379, 390, 971 A.2d 434 (App. Div. 2009) (citing *Masone v. Levine*, 382 N.J. Super. 181, 193, 887 A.2d 1191 (App. Div. 2005)).

N.J.S.A. 2A:15-59.1 provides that a prevailing party in a civil action may be awarded reasonable costs and attorney's fees if the court finds that the complaint or defense of the non-prevailing party was frivolous. To be considered frivolous, the filing must be found to have been made in "bad faith, solely for the purpose of harassment, delay or malicious injury,» or made «without

any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law." N.J.S.A. 2A:15-59.1(b).

Rule 1:4-8(b) provides that a party may make a motion for sanctions against an attorney or pro se party that has filed a paper with a court for a frivolous purpose. The rule goes on to provide certain procedures that must be followed to qualify. The rule also imposes limitations on the amount that can be imposed as a sanction. *R.* 1:4-8(b), (d). The conduct warranting sanctions under *Rule* 1:4-8 or fees under N.J.S.A. 2A:15-59.1 has been strictly construed and narrowly applied. *McKeown-Brand v. Trump Castle Hotel & Casino*, 132 N.J. 546, 561, 626 A.2d 425 (1993); *Tagayun v. AmeriChoice of N.J., Inc.*, 446 N.J. Super. 570, 578-81, 144 A.3d 909 (App. Div. 2016) (holding that movants bear the burden of proving bad faith and that honest attempts to pursue "marginal" claims do not warrant sanctions); *Wyche v. Unsatisfied Claims & Judgment Fund of N.J.*, 383 N.J. Super. 554, 560, 892 A.2d 761 (App. Div. 2006).

Here, we discern no abuse of discretion. In that regard, the trial court found that the Emerald Grande Defendants did not meet their burden to demonstrate that plaintiff continued to litigate in bad faith after jurisdictional discovery clarified the relationship among the Emerald Grande and Wyndham Defendants. *See Tagayun*, 446 N.J. Super. at 579-80. Although plaintiff's allegations were arguably "of marginal merit," *id.* at 580 (quoting *Iannone v. McHale*, 245 N.J. Super. 17, 28, 583 A.2d 770 (1990)), they were not entirely "without any

reasonable basis in law or equity." N.J.S.A. 2A:15-59.1(b). A review of the trial court's findings does not establish that it erred in evaluating the merits of plaintiff's claims. *See United Hearts*, 407 N.J. Super. at 390. Consequently, we affirm the trial court's denial of the request for sanctions.

Affirmed.

APPENDIX C — ORDER OF THE SUPERIOR COURT OF NEW JERSEY LAW DIVISION, BERGEN COUNTY, FILED JUNE 28, 2018

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION
BERGEN COUNTY

DOCKET NO.: BER-L-9314-14

ANTON SHIFCHIK, ZHANNA SHIFCHIK, SLAVA SHIFCHIK,

Plaintiffs,

v.

WYNDHAM WORLDWIDE CORPORATION, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM WORLDWIDE OPERATIONS, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM HOTEL GROUP, LLC, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM HOTEL AND RESORTS, LLC, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM VACATION RESORTS, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM VACATION OWNERSHIP, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES, EAST PASS INVESTORS, LLC D/B/A THE EMERALD GRANDE AND/OR HARBORWALK HOLDING, LLC AND/OR EMERALD GRANDE AT HARBORWALK VILLAGE, ITS AGENTS, SERVANTS AND/OR

EMPLOYEES, EMERALD GRANDE, LLC, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, “XYZ MAINTENANCE COMPANY 1-10”, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, “LMN POOL COMPANY 1-10”, ITS AGENTS, SERVANTS AND/ OR EMPLOYEES, “ABC CORPORATION 1-10”, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, “EFG CORPORATION 1-10”, ITS AGENTS, SERVANTS AND/OR EMPLOYEES (THE LAST BEING FICTITIOUS DESIGNATIONS),

Defendants.

ORDER

This matter having been opened to the Court by Porzio, Bromberg & Newman, P.C., and Gass Weber Mullins LLC, attorneys for Defendants East Pass Investors, LLC, Emerald Grande, LLC and Harborwalk Holding, LLC (“Emerald Grande Defendants”), for entry of an order of summary judgment dismissing the claims against the Emerald Grande Defendants for lack of personal jurisdiction; and the Court having reviewed the moving papers and opposition thereto, if any; and the Court having heard oral argument; and good cause having been shown,

IT IS on this 28th day of June, 2018,

ORDERED that the Emerald Grande Defendants’ motion to dismiss Plaintiffs’ complaint for lack of personal jurisdiction is hereby GRANTED*; and it is further

ORDERED that Plaintiffs' Complaint is dismissed against the Emerald Grande Defendants without prejudice*; and it is further

ORDERED that a copy of the Order shall be served upon all counsel of record and/or parties in this action within 7 days from the date of entry who do not have e-courts access. E-court uploading is service

/s/
WALTER F. SKROD, J.S.C.

Appendix C

Shifchik v. Wyndham Worldwide Corp, et als.
L-9314-14
Rider to order dated 6/28/18

The defendants Harborwalk Holding, LLC, East Pass Investors, LLC, and Emerald Grande, LLC (collectively, the "Emerald Grande defendants") filed this motion to dismiss for lack of personal jurisdiction. The plaintiffs Anton Shifchik, Zhanna Shifchik, and Slava Shifchik (collectively, the "plaintiffs") opposed, and the Emerald Grande defendants replied.

Harborwalk Holding, LLC ("Harborwalk Holding"), East Pass Investors, LLC ("East Pass Investors"), and Emerald Grande, LLC are limited liability companies formed under the laws of the state of Florida. Harborwalk Holding owns and operates the Emerald Grande resort. East Pass Investors controls the hotel and restaurant operations at the Emerald Grande resort. Harborwalk Holding is the sole member and manager of East Pass Investors. Emerald Grande, LLC is the developer of the Emerald Grande resort. Harborwalk Holding is also the sole member and manager of Emerald Grande, LLC.

A cross-motion to dismiss was filed by co-defendants Wyndham Worldwide Corporation ("WWC"), Wyndham Worldwide Operations, Inc. ("WWO"), Wyndham Hotel Group, LLC ("WHG"), Wyndham Hotel and Resorts, LLC ("WRG"), Wyndham Vacation Resorts, Inc. ("WHR"), and Wyndham Vacation Ownership, Inc. ("WVO") (collectively, the "Wyndham defendants"). WVR and WVO, like the Emerald Grande defendants, allege a lack of personal

jurisdiction. The other four Wyndham defendants allege that the plaintiffs fail to offer prima facie evidence of liability.

New Jersey courts may exercise personal jurisdiction over a non-resident defendant "consistent with due process of law." *R*. 4:4-4(b)(l); *Bayway Ref. Co. v. State Utils., Inc.*, 333 N.J. Super. 420, 428 (App. Div.), *certif. denied*, 165 N.J. 605 (2000). New Jersey's long arm jurisdiction extends "to the uttermost limits permitted by the United States Constitution." *Avdel Corp. v. Mecure*, 58 N.J. 264, 268 (1971).

A two-part test has consistently been applied in determining the extent to which courts can assert personal jurisdiction over out-of-state residents. *Baanyan Software Services, Inc. v. Kuncha*, 433 N.J. Super. 466, 473 (App. Div. 2013). First, "due process requires only that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he have certain minimum contacts with it." *Ibid*. Second, the minimum contacts must be of a nature and extent "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id*. at 473-74. When a defendant asserts lack of personal jurisdiction, "the plaintiff bears the burden of demonstrating that the defendant's contacts with the forum state are sufficient to confer personal jurisdiction on the court." *Jacobs v. Walt Disney World, Co.,* 309 N.J. Super. 443, 454 (App. Div. 1998).

A court's personal jurisdiction may arise over a defendant in one of two ways, referred to as general and specific jurisdiction.

A corporation may be subject to "general" personal jurisdiction in a forum where it is incorporated or has its principal place of business. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). In this case, each of the Emerald Grande defendants were incorporated in Florida, with their principal place of business in Florida – Florida is the "paradigm forum" for the Emerald Grande defendants. *Ibid*. However, the exercise of general jurisdiction is not limited to the paradigm forum.

General jurisdiction also exists where the foreign corporation's operation in another forum (NJ) are so "continuous and systematic" as to render each essentially "at home" in this state. *Id*. at 919. This standard of establishing general jurisdiction "is a difficult one to meet, requiring extensive contacts between a defendant and a forum." *Mische v. Bracey's Supermarket*, 420 N.J. Super. 487, 492 (App. Div. 2011).

The Emerald Grande defendants state that all of its employees work in Florida, have never worked in New Jersey, nor been sent to New Jersey for a business purpose. The Emerald Grande defendants state that they have never maintained an office space in New Jersey. The Emerald Grande defendants state that they have never maintained a telephone listing or mailing address in New Jersey and own no property in New Jersey. The Emerald

Grande defendants state that their files are stored in Florida. The plaintiffs did not present any evidence that contradict these statements made by the Emerald Grande defendants.

However the plaintiffs maintain that personal jurisdiction exists based on the Emerald Grande defendants' connections with various New Jersey businesses: re:think, RCI, Mike Kogan Consulting, ADP, and KHS & S Contractors. Plaintiffs allege that re:think (a New Jersey business) was hired to "take care of all phases of its [Emerald Grande resort] internet marketing." The Emerald Grande defendants state that re:think was hired to help develop the website for the Emerald Grande resort, the work was limited to website development assistance, and that John Hall, General Manager of Harborwalk Village, LLC, maintained the website after its launch. Plaintiffs allege that the Emerald Grande defendants do business with RCI (a New Jersey business), a company that exchanges timeshares at the Emerald Grande resort, and offers "the world's largest vacation exchange network and provides unrivaled products and services to enhance the vacation ownership experience." Yet plaintiffs have not offered sufficient facts to show the extent of RCI's New Jersey business with the Emerald Grande defendants, and/or that RCI was hired by the Emerald Grande defendants to specifically target and/or market to New Jersey residents. Plaintiffs further allege that Mike Kogan Consulting (a New Jersey business) painted the outside of the Emerald Grande resort; also, that the Emerald Grande defendants handle their payroll and retirement plans through ADP (a New Jersey business).

Additionally, plaintiffs assert that KHS & S Contractors is located in New Jersey and lists the Emerald Grande resort as a customer on the KHS & S website. However discovery reveals KHS & S Contractors is incorporated in Florida with its headquarters in Tampa, Florida. KHS & S Contractors has one location in New Jersey. Even if these "contacts" could be described as "continuous," which one or more might not be, they are not "substantial" and could not be said to "approximate physical presence" (by the Emerald Grande defendants) in New Jersey. *Wilson v. Paradise Village Beach Resort & Spa*, 395 N.J. Super. 520, 528 (App. Div. 2007) (citing *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)).

Plaintiffs also argue that personal jurisdiction can be asserted over the Emerald Grande defendants by the online advertising and marketing of the resort to New Jersey residents, and through the Emerald Grande resort's presence on the Wyndham website, hosted by the Wyndham Worldwide Corporation, LLC ("WWC") defendant, a New Jersey business. The Emerald Grande resort's general advertising is not sufficient to establish general jurisdiction under *Wilson*. 395 N.J. Super. at 531. Plaintiffs have not shown that the Emerald Grande defendants target "New Jersey for advertising, the extent of advertising in New Jersey, or the amount of patronage this advertising produces." *Id.* at 531-32. Also, "the mere accessibility of a foreign business's website through which customers may obtain information and place orders is an insufficient contact by itself to support general jurisdiction." *Id.* at 532. These activities do not establish that the Emerald Grande defendants are so heavily engaged in New Jersey as to render it essentially at home

in this state. *Collins v. Sandals Resort Int'l, Ltd.*, No. A-0924-16T4 (App. Div. Feb. 12, 2018) (defendant foreign resort not "at home" in New Jersey where the resort was affiliated with New Jersey travel agents, and the resort was generally advertised on New Jersey websites).

Plaintiffs' main argument for personal jurisdiction rests on an alleged "partnership" and/or "co-ownership" of the Florida resort, where the accident occurred, between the Emerald Grande defendants and the Wyndham defendants. Plaintiffs rely on *Star Video Entertainment, L.P. v. Video USA Associates 1 L.P.*, 253 N.J. Super. 216 (App. Div. 1992), to argue that jurisdiction over one partner confers jurisdiction on the other. Plaintiffs contend a "partnership" exists, because Wyndham Vacation Resorts, Inc. ("WVR" – a Delaware corporation with a principal place of business in Florida) allegedly owns 41% of the timeshares at the Emerald Grande resort, and also own eight (8) units in fee simple, called the Captain's Court Condominium Association ("Captain's Court"). WVR owns the Captain's Court, and representatives of WVR sits on three of the four homeowner's associations at the Emerald Grande resort. WVR contributes a share of expense for the pool budget. WVR pays maintenance fees, which go towards the pool budget and towards the security of the resort. WVR also entered into a Sales & Marketing Agreement with Emerald Grande, LLC whereby Emerald Grande, LLC agreed to convey ownership shares in certain individual condominium units in the Emerald Grande resort to a trust and engage WVR to market and sell the interests through the Club Wyndham Access program. Furthermore, plaintiffs assert that WVR

has control over the Emerald Grande resort by virtue of a contract between Emerald Grande, LLC, WVR, Emerald Grande East Condominium Association, Inc. (a Florida corporation), and Fairshare Vacation Owners Association (an Arkansas corporation). That contract - the Club Wyndham Plus Affiliation Agreement (the "affiliation agreement") - requires the Emerald Grande resort to meet certain standards or be subject to losing its designation as a Club Wyndham affiliated resort. Through the affiliation agreement, WVR inspects the Emerald Grande resort twice a year, including the pool.

Plaintiffs' reading of *Star Video* is misplaced. That Appellate Division panel noted the special relationship between limited partnerships, and stated that jurisdiction may be predicated on an alter ego theory, where the plaintiff demonstrates the entities' common ownership, one entity's financial dependence, the other's domination/control, or either's failure to observe corporate formalities. *Id*. at 225. At oral argument, plaintiffs admitted that an alter ego theory does not apply in this case. Also, plaintiffs do not offer any facts to show that either entity was financially dependent on the other or that one either exercises dominance over or abuses the other. No evidence demonstrates that WVR shares in the profits and/or losses of any of the Emerald Grande defendants. WVR's alleged "control" pursuant to the affiliation agreement is illusory. If the Emerald Grande resort fails to meet the standards under the affiliation agreement, the consequence is that its agreement with WVR is terminated. The Emerald Grande resort would continue to operate, under Emerald's control, just without the "Wyndham" name association. Furthermore, whether Emerald, or WVR, or both, has

a duty to maintain the pool, or exercises control over the pool, is irrelevant on the jurisdictional issue presented. The fact that a defendant would be liable if personal jurisdiction over it could be obtained is irrelevant to the question of whether such jurisdiction can be exercised. *Witt v. Scully*, 539 F.2d 950 (3d Cir. 1976).

Plaintiffs further assert that several employees of the Emerald Grande defendants and the Wyndham defendants have referred to the relationship between the entities as a "partnership." Extrinsic evidence of one party's alleged contractual intent is not admissible to alter or contradict the express and unambiguous terms of a written agreement. *Saul v. Midlantic Nat'l Bank/South*, 240 N.J. Super. 62, 77 (App. Div. 1990). The Sales & Marketing Agreement provides that it does not create "any agency, partnership, joint venture relationship or other arrangement" between Emerald Grande, LLC and WVR. There is no partnership according to the unambiguous terms of the agreement, including any analysis of post-contractual activity. The fact that Emerald Grande, LLC is a party to the Sales & Marketing Agreement and the Club Wyndham Plus Program Affiliation Agreement is not the kind of "continuous and systematic" contact with New Jersey that renders the Emerald Grande, LLC "at home" in New Jersey.

Plaintiffs further argue *Boe v. EFCA*, BER-L-8839-12 (Mar. 1, 2017), establishes the Emerald Grande defendants are subject to general jurisdiction in New Jersey. In *Boe*, the Honorable John J. Langan, J.S.C., found this court had general jurisdiction over the foreign defendant,

because among the many factors, the foreign defendant has twenty-eight (28) member churches in New Jersey, recommends each member of the church donate 1% of its budget to them, directly solicits money from New Jersey residents and churches by sending pamphlets and brochures seeking donations, calling pastors of New Jersey member churches seeking donations, has the power to remove New Jersey churches from its membership, and the authority to hire and terminate pastors from New Jersey member churches. *Id*. at 37-38. *Boe* is far from the facts of the current case. Here, the Emerald Grande defendants work with a few New Jersey businesses, but plaintiffs fail to offer any facts to show that the Emerald Grande defendants directly solicit business from, and/or market to, New Jersey residents. Additionally, the Emerald Grande defendants have no control or authority over the four Wyndham defendant entities based in New Jersey.

Plaintiffs maintain that NJ based defendant WWC has a relationship with defendant Emerald Grande through WWC's Delaware subsidiary WVO and WVO's Delaware subsidiary WVR (the two non-NJ based Wyndham defendants), and the Club Wyndham Plus trust (non-defendant alleged by plaintiffs to be in NJ) and Club Wyndham Access trust (non-defendant alleged by plaintiffs to be in NJ). Where multiple defendants are named, "their individual contacts to the forum state cannot be aggregated to find minimum contacts for a single defendant." *Waste Management v. Admiral Ins. Co.*, 138 N.J. 106, 127 (1994). The NJ contacts of WWC and its foreign (to NJ) and in-state (NJ) subsidiaries cannot

be aggregated to find New Jersey contacts for Emerald Grande.

This court finds that the plaintiffs failed to show the Emerald Grande defendants each have "continuous and systematic" connections as to render them "at home" in New Jersey to support a finding of general jurisdiction. The court finds it has no general jurisdiction over any of the three (3) Emerald Grande defendants. The Emerald Grande LLC defendant has two (2) contacts with WVR which do not sustain plaintiffs' burden. The Emerald Grande East Pass defendant and the Emerald Grande Harbor Holdings defendant have no agreement or connection with any Wyndham defendant and thus plaintiffs' burden is not sustained as to them.

To establish "specific" personal jurisdiction, plaintiffs must show that the Emerald Grande defendants had minimum contacts with New Jersey, defined as "purposeful acts," that make it reasonable for the Emerald Grande defendants to "anticipate being haled into court" here. *Waste Management*, 138 N.J. at 119-20. When the defendant is not present in the forum state, "it is essential that there be some act by which the defendant purposefully avails [itself] of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws." *Id.* at 120. This "purposeful availment" requirement ensures that an out-of-state defendant will not be haled into court based on "random, fortuitous, or attenuated contacts or as a result of the unilateral activity of some other party." *Id.* at 121. "There must be an affiliation between the forum

(NJ) and the underlying controversy, principally, an activity or an occurrence that takes place in the forum (NJ). *Bristol-Meyers Sguibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the state (NJ). *Id.* at 1781.

The Appellate Division in *Baanyan* declined to confer personal jurisdiction where the foreign defendant entered into a consulting agreement with the plaintiff, a New Jersey corporation, but never lived or did business in New Jersey. 433 N.J. Super. at 476-78. The *Baanyan* court also recognized that payments the defendant received from the New Jersey corporation did not support a finding of personal jurisdiction "as this . ... did not require any contact with New Jersey." *Id.* at 478. In this case Emerald Grande, LLC entered into the Sales & Marketing Agreement with WVR, a Delaware corporation (a subsidiary of WVO, another Delaware corporation, which in turn is a subsidiary of WWO, a New Jersey corporation). The "NJ" connection in this case is thus more attenuated than the "NJ" connection in the *Baanyan* matter. Even if Emerald Grande, LLC, or any of the other Emerald Grande defendants, received payments from or paid any New Jersey businesses, there is no evidence that the transactions required any contact with New Jersey. Even if the Emerald Grand LLC / WVR relationship were considered to be a de facto partnership, and NJ properly exercised jurisdiction over WVR (notwithstanding that WVR is a Delaware corporation with a principal place of business in Florida), New Jersey jurisdiction over

Emerald Grande may not be based on the contacts of WVR with New Jersey.

Plaintiffs allege that the Emerald Grande defendants (and WVR) negligently operated, maintained, supervised, or designed the pool and surrounding area at the Emerald Florida resort. The alleged negligence did not happen in New Jersey, and plaintiff was not injured in New Jersey. *See Collins*, No. A-0924-16T4 (no specific jurisdiction where consumption of contaminated food was prepared, served and consumed in Turks and Caicos).

Plaintiffs also argue this court could exercise personal jurisdiction over the Emerald Grande defendants, because the wedding that plaintiff attended was between two New Jersey residents (Rozenbaums) who found the resort online while in their home in New Jersey. The advertising and other marketing activities in New Jersey by a hotel or resort located in another state or country may be sufficient to establish specific jurisdiction over a claim by a New Jersey resident who is enticed by that marketing activity to go to the hotel or resort. *Wilson*, 395 N.J. Super. at 531 (citing *Mastondrea v. Occidental Hotels Management S.A.*, 391 N.J. Super. 261 (App. Div. 2007)) (plaintiff would not have been present at the non-resident hotel in the absence of the hotel's advertisement in New Jersey by a New Jersey business). Plaintiffs argue that the Rozenbaums, not plaintiff, were the ones who found the resort through a google search in their home in New Jersey. Discovery revealed that the Rozenbaums lived in New York when they selected the Emerald Grande's Florida resort for their wedding as a result of a Google

search. Their selection was not as a result of the Emerald Grand resort's advertisement in New Jersey by WVR. "Contacts with a state's citizens that take place outside the state are not purposeful contacts with the state itself." *Collins*, No. A-0924-16T4 (citing *O'Connor v. Sandy Lane Hotel Co.,* 496 F.3d 312, 317 (3d Cir. 2007)). Plaintiffs also offer no evidence to show it was the Emerald Grande resort NJ advertisement of RCI, a New Jersey business, directed at New Jersey residents, which led to plaintiff's presence at the resort on the day of the injury. Plaintiff, personally, was not directly enticed by the Emerald Grande defendants' marketing activities to go to the resort. Plaintiff was merely a guest of the Rozenbaums, registered guests, at the Emerald Grande resort. Thus jurisdiction does not attach. *See Wilson*, 395 N.J. Super. at 528 (no personal jurisdiction where plaintiff went to the resort as a guest of her daughter, rather than as a result of any advertising or other marketing activity by defendants in New Jersey). It is irrelevant, even if true, that Todd B. from Livingston, New Jersey was directly solicited by an Emerald Grande resort employee, Mark Pzinski, Director of Rooms Services, online through TripAdvisor to go to the resort.

Plaintiffs do not offer any evidence tending to suggest that the Wyndham website or any other website that advertise the Emerald Grande resort is more than a "mere inclusion of an advertisement in a publication." *Blessing v. Prosser*, 141 N.J. Super. 548, 550 (App. Div. 1976) (court had personal jurisdiction where the advertisement was substantially more than a solicitation of business, it was enhanced by the affirmative endorsement and guarantee of the "prestigious" American Automobile Association);

Mastondrea, 391 N.J. Super. at 269-70 (court had personal jurisdiction where the hotel advertisement was both in the Star Ledger and television through a New Jersey business seeking to attract New Jersey residents). Plaintiffs do not mention any other advertisement and/or marketing efforts specifically directed at the residents of the State of New Jersey that directly enticed plaintiff to go to the Emerald Grande resort.

This court will not give dispositive weight to the Emerald Grande LLC's connections with Club Wyndham Plus and Club Wyndham Access, alleged New Jersey trusts, to confer specific jurisdiction, because the injured plaintiff was not enticed by any Wyndham entities to go to the resort and was not a guest of a Wyndham unit owner.

Accordingly, this court does not have specific jurisdiction over any of the three (3) Emerald Grande defendants.

Plaintiffs also argue that dismissing the current case would be seriously inconvenient to the plaintiff. The inconvenience to plaintiff of litigating in another forum does not justify the exercise of personal jurisdiction over Florida entities that lack sufficient minimum contacts with New Jersey. *Goodyear*, 564 U.S. at 929 (jurisdiction to adjudicate has in practice never been based on the plaintiffs relationship to the forum); *see also Bristol-Myers*, 137 S. Ct. at 1780-81.

In a proposed sur-reply, four weeks after oral argument, and without leave of court, plaintiffs assert that

the 2017 *BNSF* and *Bristol-Meyers* U.S. Supreme Court cases represent a change in jurisdictional law, and these cases should not be applied retroactively to the current case. The court's reading of those 2017 cases is that the principles set forth therein affi1m established precedent that a plaintiff cannot sue a defendant in a state court jurisdiction that is unconnected to the defendant's alleged wrongful conduct and/or where the defendant is not "at home." *Goodyear*, 564 U.S. at 919; *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

This court finds, that after a significant multi-year period of jurisdictional discovery, the plaintiffs have failed to satisfy their burden of demonstrating that the Emerald Grande defendants' contacts are sufficient for this court to confer personal jurisdiction. The Emerald Grande defendants' motion to dismiss for lack of personal jurisdiction is GRANTED, and the plaintiffs' complaint is dismissed without prejudice against each of the Emerald Grande defendants.

The plaintiffs may refile their complaint in any appropriate foreign jurisdiction, if such filing has not been done already. This court does not offer any opinion on the merits or non-merits of any future (or past) foreign filing.

APPENDIX D — ORDER OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY, FILED JUNE 28, 2018

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — BERGEN COUNTY

DOCKET NO: BER-L-9314-14

ANTON SHIFCHIK, ZHANNA SHIFCHIK AND SLAVA SHIFCHIK,

Plaintiffs,

vs.

WYNDHAM WORLDWIDE CORPORATION, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM WORLDWIDE OPERATIONS, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM HOTEL GROUP, LLC, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM HOTEL AND RESORTS, LLC, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM VACATION RESORTS, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES, WYNDHAM VACATION OWNERSHIP, INC., ITS AGENTS, SERVANTS AND/OR EMPLOYEES, EAST PASS INVESTORS, LLC D/B/A THE EMERALD GRANDE AND/OR HARBORWALK HOLDING, LLC AND/OR EMERALD GRANDE AT HARBOR WALK VILLAGE, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, EMERALD GRANDE, LLC, ITS

AGENTS, SERVANTS AND/OR EMPLOYEES, "XYZ MAINTENANCE COMPANY 1-10", ITS AGENTS, SERVANTS AND/OR EMPLOYEES, "LMN POOL COMPANY 1-10", ITS AGENTS, SERVANTS AND/OR EMPLOYEES, "ABC CORPORATION 1-10", ITS AGENTS, SERVANTS AND/OR EMPLOYEES "EFG CORPORATION 1-10", ITS AGENTS, SERVANTS AND/OR EMPLOYEES (THE LAST BEING FICTITIOUS DESIGNATIONS),

Defendants.

ORDER GRANTING CROSS-MOTION TO DISMISS PLAINTIFFS' COMPLAINT PURSUANT TO *RULES* 4:6-2(b) AND (e)

THIS MATTER having been opened to the Court by McElroy, Deutsch, Mulvaney & Carpenter, LLP, attorneys for Defendants, Wyndham Worldwide Corporation, Wyndham Worldwide Operations, Inc., Wyndham Hotel Group, LLC, Wyndham Hotel and Resorts, LLC, Wyndham Vacation Resorts, Inc., and Wyndham Vacation Ownership, Inc., by way of a Cross-Motion to Dismiss Plaintiffs' Complaint Pursuant to *Rules* 4:6-2(b) and (e); and the Court having reviewed all of the papers submitted, and for good cause having been shown;

IT IS on this 28th day of June, 2018,

ORDERED that the Motion of Defendants, Wyndham Vacation Resorts, Inc., and Wyndham Vacation Ownership, Inc., to dismiss Plaintiffs' Complaint pursuant to *Rule* 4:6-

2(b) for lack of personal jurisdiction is hereby granted*, and it is further

ORDERED that Plaintiffs' Complaint is hereby dismissed without prejudice with respect to Wyndham Vacation Resorts, Inc., and Wyndham Vacation Ownership, Inc., and it is further

ORDERED that the Motion of Defendants, Wyndham Worldwide Corporation, Wyndham Worldwide Operations, Inc., Wyndham Hotel Group, LLC, and Wyndham Hotel and Resorts, LLC, to dismiss Plaintiffs' Complaint pursuant to *Rule* 4:6-2(e) is hereby granted*; and it is further

ORDERED that Plaintiffs' Complaint is hereby dismissed with prejudice as to Defendants, Wyndham Worldwide Corporation, Wyndham Worldwide Operations, Inc., Wyndham Hotel Group, LLC, and Wyndham Hotel and Resorts, LLC.

/s/ ______________________________
WALTER F. SKROD, J.S.C.

__X__ Opposed

______ Unopposed

Appendix D

Shifchik v. Wyndham Worldwide Corp, et als.
L-9314-14
Rider to order dated 6/28/18

The defendants Wyndham Worldwide Corporation ("WWC"), Wyndham Worldwide Operations, Inc. ("WWO"), Wyndham Hotel Group, LLC ("WHG"), Wyndham Hotel and Resorts, LLC ("WHR"), Wyndham Vacation Resorts, Inc. ("WVR"), and Wyndham Vacation Ownership, Inc. ("WVO") (collectively, the "Wyndham defendants") filed a cross-motion to dismiss WVR and WVO for lack of personal jurisdiction. The plaintiffs Anton Shifchik, Zhanna Shifchik, and Slava Shifchik (collectively, "plaintiffs") opposed.

WVR and WVO are both corporations incorporated in the State of Delaware, both having a principal place of business in Florida. WVO is a wholly-owned subsidiary of WWC. WVO is a worldwide timeshare business that develops and markets vacation ownership interests ("VOI") to consumers and provide consumer financing in the sale of VOIs. WVR is a wholly-owned subsidiary of WVO that develops, markets, and sells VOIs.

The other Wyndham defendants, WWC, WWO, WHG, and WHR are entities based in New Jersey and this jurisdictional motion is not made on their behalf. These four (4) Wyndham defendants argue that plaintiffs' claims should be dismissed against them because plaintiffs failed to offer any evidence to show these Wyndham entities have any connection to the Emerald Grande resort, the Emerald Grand defendants, or the Sales & Marketing agreement between WVR and Emerald Grande, LLC.

New Jersey courts have determined that a parent corporation's contacts with the forum state (NJ) may justify exercise of personal jurisdiction over its wholly-owned non-resident subsidiary. *Moon Carrier v. Reliance Ins. Co.*, 153 N.J. Super. 312, 321 (App. Div. 1977); *Genesis Bio-Pharmaceuticals, Inc. v. Chiron Corp.*, 27 Fed. Appx. 94, 98 (3d Cir. 2002). The relevant jurisdictional inquiry is whether the subsidiary and the parent so operate as single entity, or unified and cohesive economic unit, that when the parent is within venue of court, the subsidiary is also within court's jurisdiction. *Moon Carrier*, 153 N.J. Super. at 321-22. This single entity test requires that a parent over which the court has jurisdiction so control and dominate a subsidiary as in effect to disregard the latter's independent corporate existence. *Id.* at 323.

In *Genesis-Bio*, defendant Chiron Corporation, a California company, was a multi-national health care company that did business within the forum state, New Jersey. 27 Fed. Appx. at 98. Chiron Behring, a German company, was a wholly-owned subsidiary of Chiron Corporation. *Ibid.* The NJ court found it had personal jurisdiction over Chiron Behring under the single entity test, because Chiron had ultimate decision making power with regard to all business decisions concerning Chiron Behring and both shared the same legal counsel in this litigation. *Ibid.*

Applying the single entity test, plaintiffs argue that NJ based WWC, Delaware based WVR, and Delaware based WVO so operate as a single entity, or cohesive economic unit, such that NJ personal jurisdiction over WWC

imputes NJ personal jurisdiction over WVR and WVO. Like *Genesis-Bio*, plaintiffs assert that the Wyndham defendants are represented by the same attorney, and that Jennifer Giampietro, Esq., Group Vice President of Legal at WWC, provides legal and financial services for WVO and WVR from her New Jersey office. Plaintiffs allege that WWC realizes all the profits and losses of its subsidiaries, WVR and WVO. Plaintiffs also assert that the CEO of WWC sits on the Board of Directors of WVO and WVR to ensure the oversight of these entities. Plaintiffs argue that NJ based WWO and NJ based WHR further supports the "cohesiveness" of the Wyndham entities, because WWO does payroll and perform other financial services for WVO and WVR, and WHR licensed the "Wyndham" name to WVR.

Plaintiffs provide no evidence of the financial connections between WWC, WVR and WVO other than merely asserting WWC realizes the profits and losses of WVR and WVO. Without any additional material evidence, the court cannot assess the level of WWC's alleged control over WVR and WVO.

This court observes that "[a] parent's domination or control of its subsidiary cannot be established by overlapping board of directors." *Seltzer v. I.C. Optics, Ltd.*, 339 F.Supp.2d 601, 610 (D.N.J. 2004) (citing *United States v. Bestfoods*, 524 U.S. 51, 69 (1998) ("It is a well-established principle [of corporate law] that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership")). Plaintiffs

do not offer any evidence to show that the CEO of WWC controls the decision making of WVR and WVO. Under *Seltzer* and *Bestfoods*, the simple fact that the CEO sits on the Board of WVO and WVR is insufficient to establish WWC's domination of WVO and WVR.

The court questions why WVR pays WHR for a license to use the "Wyndham" name if the named Wyndham entities so operate as a single entity. The mere facts that WWO does payroll for WVO and WVR, and that Giampietro provides legal and/or financial advice to WVO and WVR are insufficient to demonstrate that WWC controls the decision making power of WVR and WVO. WVR and WVO operate in multiple states and foreign countries, and their principal operations are based in Florida.

Accepting as true all of the facts identified by the plaintiffs which detail the relationship between the Wyndham defendants, plaintiffs fail to offer evidence to show specifically how NJ corporation WWC controls the business decision making power of its Delaware corporation subsidiaries WVO and WVR. *Genesis Bio*, 27 Fed. Appx. at 98.

This court finds that plaintiffs failed to establish the Wyndham defendants so operate as a single entity or a cohesive economic unit to exercise (NJ) personal jurisdiction over WVR and WVO. Plaintiffs failed to show how WWC so dominates WVR and WVO as to obliterate the latters' independent corporate existence

Finding that this court has no personal jurisdiction based on the single entity test, this court must assess if it can exercise personal jurisdiction over the WVR and WVO defendants without reference to WWC, the parent corporation.

A court's personal jurisdiction may arise over a defendant in one of two ways, referred to as specific and general jurisdiction. When a defendant asserts lack of personal jurisdiction, "the plaintiff bears the burden of demonstrating that the defendant's contacts with the forum state are sufficient to confer personal jurisdiction on the court." *Jacobs v. Walt Disney World, Co.*, 309 N.J. Super. 443, 454 (App. Div. 1998).

A corporation may be subject to "general" personal jurisdiction in a forum where it is incorporated or has its principal place of business. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011). WVR was incorporated in Delaware with its principal place of business in Florida - not New Jersey. However, the exercise of general jurisdiction is not limited to the paradigm forum. *Ibid*.

General jurisdiction also exists where the foreign corporation's operation in another forum (NJ) are so "continuous and systematic" as to render each essentially "at home" in this state. *Id*. at 919. This standard of establishing general jurisdiction "is a difficult one to meet, requiring extensive contacts between a defendant and a forum." *Mische*, 420 N.J. Super. 487, 492 (App. Div. 2011).

Plaintiffs allege jurisdiction is proper because of WVR's contacts with New Jersey. WVR manages a hotel in Atlantic City, New Jersey, and has an accounting office in New Jersey, with approximately twenty (20) employees. However, "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts." *BNSF Ry. V. Tynell*, 137 S. Ct. 1549, 1559 (2017). Rather, the inquiry "calls for an appraisal of a corporation's activities in their entirety." *Ibid.* In *BNSF*, the Supreme Court found no general jurisdiction where the defendant foreign railroad company's in-state business included over 2,000 miles of railroad tracks (6% of its total tracks) and 2,000 employees (5% of its workforce). *Id.* at 1554. The Court explained that while the business the railroad company does in Montana is sufficient to subject the company to specific jurisdiction in Montana on claims related to the business it does in Montana, an in-state business does not suffice to permit the assertion of general jurisdiction over the plaintiffs' claims that are unrelated to any activity occurring in Montana. *Id.* at 1559.

WVR allegedly operates, manages, and/or does business with/as a hotel in Atlantic City, NJ. WVR has an accounting office in Parsippany, New Jersey with twenty (20) employees. Plaintiffs do not offer any other facts that could further evaluate WVR's corporate activities in its entirety. WVR operates in multiple states and foreign countries, and their principal operations are based in Florida. WVR's stated NJ hotel ownership/management and accounting office operations are insufficient to convey general jurisdiction. Plaintiffs have failed to carry their burden on this issue as the court does not know

what percentage of WVR's total corporate holdings, management responsibilities, and corporate employees are in NJ.

Likewise, this court cannot assert general jurisdiction over WVO under *BNSF*. WVO owns WVR. WVO was incorporated in Delaware and has its principal place of business in Florida. WVO is stated as the world's largest timeshare business based on the number of resorts, units, owners, and revenues, with 221 resorts and over 878,000 owners. WVO operates in multiple states and foreign countries, but its principal operations are based in Florida. "[S]imply operating a business location within one state for a national corporation is insufficient basis, in and of itself, for the exercise of general jurisdiction." *Fairfax Financial Holdings Ltd. v. S.A.C. Capital Management, LLC*, MRSL-2032-06 (N.J. Super. Mar. 29, 2018) (citing *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 n. 20 (2014)). Other than WVO's ownership of WVR, and WVO being owned by its New Jersey parent company, WWC, plaintiffs do not allege any other facts to show WVO is "at home" in New Jersey. WVO's alleged operations in New Jersey are insufficient to convey general jurisdiction.

Plaintiffs further argue *Boe v. EFCA*, BER-L-8839-12 (Mar. 1, 2017) establishes the Wyndham defendants are subject to general jurisdiction in New Jersey. In *Boe*, the Honorable John J. Langan, J.S.C., found this court had general jurisdiction over the foreign defendant, because among the many factors, the foreign defendant has twenty-eight (28) member churches in New Jersey, recommends each member of the church donate 1% of its budget to

them, directly solicits money from New Jersey residents and churches by sending pamphlets and brochures seeking donations, calling pastors of New Jersey member churches seeking donations, has the power to remove New Jersey churches from its membership, and the authority to hire and terminate pastors from New Jersey member churches. *Id.* 37-38. *Boe* is far from the facts of the current case. Plaintiffs argue there are approximately twenty (20) WVO employees who work in a sales office at the Emerald Grande resort, WVO also has employees in New Jersey, and WVO employees work for WVR. Plaintiffs have not shown what, if any, businesses or activities WVO owns, maintains, or conducts in the state of New Jersey. There is no comparison of WVO's New Jersey activity to WVO's entire worldwide activity. Likewise, there is no comparison of WVR's alleged ownership of a hotel and operation of an office in New Jersey to its overall corporate activities. Even if geographically, WVR and WVO have activities in multiple states, such facts do not automatically render WVR and WVO subject to the general personal jurisdiction in each of those states. *BNSF Ry v. Tyrrell*, 137 S. Ct. at 1559 ("a corporation that operates in many places can scarcely be deemed at home in all of them").

Plaintiffs also argue that WVR has filed suit in New Jersey and both WVR and WVO have been sued here. The mere fact that there is/are (a) prior suit(s) is/are not germane to this jurisdictional analysis, specifically because this court does not know the circumstances surrounding that (those) prior suit(s).

This NJ court does not have general personal jurisdiction over WVR and/or WVO.

To establish specific jurisdiction, plaintiffs must show that WVR and WVO had minimum contacts with New Jersey, defined as "purposeful acts," that make it reasonable for the Emerald Grande defendants to "anticipate being haled into court" here. *Waste Management v. Admiral Ins. Co.*, 138 N.J. 106, 119-20 (1994). When the defendant is not present in the forum state, "it is essential that there be some act by which the defendant purposefully avails [itself] of the privilege of conducting activities within the forum state, thus invoking the benefit and protection of its laws." *Id.* at 120. This "purposeful availment" requirement ensures that an out-of-state defendant will not be haled into court based on "random, fortuitous, or attenuated contacts or as a result of the unilateral activity of some other party." *Id.* at 121. "There must be an affiliation between the forum (NJ) and the underlying controversy, principally, an activity or an occurrence that takes place in the forum (NJ). *Bristol-Meyers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780 (2017). When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the state (NJ). *Ibid.*

From *BNSF*, WVR and WVO's in-state business(es) in New Jersey, if any, is/are sufficient to assert specific jurisdiction if plaintiff's injuries occurred as a result of those activities in New Jersey. That is not the case here. The alleged negligence in operating and maintaining the resort's pool occurred in Florida, and plaintiff

was injured in Florida. Whatever business WVR and WVO have in New Jersey did not give rise to plaintiffs accident in Florida. When there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the state (NJ). *Bristol-Meyers*, 137 S. Ct. at 1781 (no specific jurisdiction in California where non-resident plaintiffs did not sustain their injuries in California); *see also Collins v. Sandals Resort Int'l, Ltd.*, No. A-0924-16T4 (N.J. App. Div., Feb. 12, 2018) (no specific jurisdiction where consumption of contaminated food was prepared, served and consumed in Turks and Caicos).

Plaintiffs further argue the online reservation and/or marketing of the Emerald Grande resort on the Wyndham website, where a specific search for WVR and WVO would lead someone directly to the Wyndham website which is operated in New Jersey, is sufficient to exercise specific jurisdiction. However specific jurisdiction requires WVR and WVO's alleged marketing and advertising in New Jersey to have directly enticed plaintiff to go to the resort. *Wilson v. Paradise Village Beach Resort & Spa*, 395 N.J. Super. 520, 531 (App. Div. 2007) (citing *Mastondrea v. Occidental Hotels Management S.A.*, 391 N.J. Super. 261 (App. Div. 2007) (plaintiff would not have been present at the non-resident hotel in the absence of the hotel's advertisement in New Jersey by a New Jersey business)). The plaintiffs argue the Rozenbaums learned of the resort through a google search in their home in New Jersey, but discovery showed the Rozenbaums lived in New York when they selected the resort for their wedding through a google search. "Contacts with a state's citizens that take place

outside the state are not purposeful contacts with the state itself." *Collins*, No. A-0924-16T4 (citing *O'Connor v. Sandy Lane Hotel Co.*, 496 F.3d 312, 317 (3d Cir. 2007)). Plaintiff was merely a guest of a registered guest (Rozenbaums) at the Emerald Grande resort. *See Wilson*, 359 N.J. Super. at 528 (no personal jurisdiction where plaintiff went to the resort as a guest of her daughter, rather than as a result of any advertising or other marketing activity by defendants in New Jersey). It is irrelevant, even if true, that Todd B. from Livingston, New Jersey was directly solicited by an Emerald Grande resort employee, Mark Pzinski, Director of Rooms Services, online through Trip Advisor to go to the resort.

The fact that the Delaware incorporated and Florida-based WVR inspects the Emerald Grande resort property twice a year, including the pool, has nothing to do with plaintiffs injuries occurring in Florida and WVR's alleged negligence in Florida. Furthermore, even if it did, those activities have nothing to do with the State of New Jersey.

Accordingly, this NJ court does not have specific jurisdiction over WVR and WVO.

This court finds, that after a significant period of jurisdictional discovery, the plaintiffs have failed to satisfy their burden of demonstrating WVR and WVO's contacts with NJ are sufficient for this court to confer personal jurisdiction. The motion to dismiss for lack of personal jurisdiction is GRANTED as to WVR and WVO, and the plaintiffs' complaint is dismissed without prejudice against WVR and WVO.

The plaintiffs may refile their complaint against WVR and WVO in any appropriate foreign jurisdiction, if such filing has not been done already. This court does not offer any opinion on the merits or non-merits of any future (or past) foreign filing.

Finally, the court notes that while WWC, WWO, WHG, and WHR concede there is New Jersey general jurisdiction as to them, there are no ascertainable facts alleged which in any way provide the court with a basis to impose a duty on those entities in this case. *Kelly v. Gwinnell*, 96 N.J. 538, 544 (1984). Quite simply, those entities had nothing to do with the accident, the cause of it, or the sales and marketing agreement between WVR and Emerald Grande LLC. Plaintiffs' only basis for naming WHR and WWO as defendants is that WHR licensed the "Wyndham" name to WVR, and WWO does payroll and performs financial services for WVO and WVR. Plaintiffs do not address in what way WHG is involved in this litigation. The court does not have any admissible, prima facie proof of these four (4) entities' potential responsibility.

WWC, WWO, WHG, and WHR's motion for dismissal/ summary judgment is GRANTED, and plaintiffs' complaint is dismissed with prejudice as to those Wyndham entities.

APPENDIX E — DENIAL OF MOTION FOR RECONSIDERATION OF THE SUPREME COURT OF NEW JERSEY, FILED JANUARY 29, 2021

SUPREME COURT OF NEW JERSEY

M-618/619 September Term 2020, 084437

ANTON SHIFCHIK, ZHANNA SHIFCHIK,
AND SLAVA SHIFCHIK,

Plaintiffs-Movants,

v.

WYNDHAM WORLDWIDE CORPORATION, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, EAST PASS INVESTORS, LLC, D/B/A THE EMERALD GRANDE AND/OR HARBORWALK HOLDING, LLC, AND/OR EMERALD GRANDE LLC, AND ITS AGENTS, SERVANTS AND/OR EMPLOYEES, *et al.*,

Defendants.

ANTON SHIKCHIK, ZHANNA SHIFCHIK,
AND SLAVA SHIFCHIK,

Plaintiffs,

v.

WYNDHAM WORLDWIDE CORPORATION, ITS AGENTS, SERVANTS AND/OR EMPLOYEES, *et al.*,

Defendants,

and

EAST PASS INVESTORS, LLC, D/B/A THE EMERALD GRANDE AND/OR HARBORWALK HOLDING, LLC, AND/OR EMERALD GRANDE LLC, AND ITS AGENTS, SERVANTS AND/OR EMPLOYEES, *et al.*,

Defendants.

January 26, 2021, Decided
January 29, 2021, Filed

Honorable Stuart Rabner, Chief Justice.

ORDER

It is ORDERED that the motion for leave to file a motion for reconsideration as within time (M-618) is granted; and it is further

ORDERED that the motion for reconsideration of the Court's order denying the petition for certification (M-619) is denied.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 26th day of January, 2021.

/s/______________________________
CLERK OF THE SUPREME COURT