No. 23-1061

IN THE

Supreme Court of the United States

HAWKEYE GOLD, LLC,

Petitioner,

v.

CHINA NATIONAL MATERIALS INDUSTRY IMPORT AND EXPORT CORPORATION, DBA SINOMA,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MATTHEW D. CALLANAN
BELIN MCCORMICK, P.C.
666 Walnut Street,
Suite 2000
Des Moines, IA 50309
(515) 283-4639

KELIANG (CLAY) ZHU
Counsel of Record
DEHENG LAW OFFICES PC
7901 Stoneridge Drive,
Suite 208
Pleasanton, CA 94588
(925) 399-5856
czhu@dehengsv.com

Attorneys for Respondent

116698

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Respondent ("Sinoma") was successful in having two defaults set aside: one based on improper service and another based on collective good cause. Petitioner ("Hawkeye Gold") suggests although Sinoma was not yet validly served, it was nonetheless barred from raising a meritorious minimum-contacts personal jurisdiction defense in its Answer and subsequent motion to dismiss because Sinoma did not argue personal jurisdiction in its initial motion to set aside a clerk's entry of default. Hawkeye Gold ignores the plain language of Federal Rule of Civil Procedure 12 and instead suggests that even a meritorious Rule 55(c) motion—in which entry of default is set aside based on improper service—must include all Rule 12(b)(2)-(5) defenses or a party waives them. No federal appellate court has ever held this to be true, but Hawkeye Gold nonetheless asserts there is a circuit split requiring further guidance from this Court.

The question presented is: Can a party who, prior to filing an Answer or other responsive pleading, is successful in setting aside an entry of default under Rule 55(c) based on a plaintiff's failure to properly serve it raise a minimum-contacts personal jurisdiction defense in a subsequent Answer and a corresponding Motion to Dismiss under Rule 12(b)(2) once service is completed?

RULE 29.6 STATEMENT

Respondent China National Materials Industry Import and Export Corporation d/b/a Sinoma is solely owned by China National Building Material Group Co., Ltd. No publicly held company owns more than 10% of its stock.

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The Eighth Circuit Court of Appeals' published Opinion unanimously affirming Respondent's Motion to Dismiss, and rejecting Petitioner's waiver argument, can be found at 89 F.4th 1023 (8th Cir. 2023) (App. 1). The unpublished Southern District of Iowa Opinion dismissing the case is available at *Hawkeye Gold, LLC v. China National Materials Industry Import & Export Corp. d/b/a Sinoma*, Civ. No. 4:15-cv-00355-SBJ, 2022 WL 2961897 (S.D. Iowa July 25, 2022) (App. 25).

JURISDICTIONAL STATEMENT

Respondent does not dispute this Court's jurisdiction over this case under 28 U.S.C. § 1254(1). Respondent denies, however, that this case satisfies the standards set forth in Supreme Court Rule 10(a) because there is no circuit split as discussed below.

COUNTERSTATEMENT OF THE CASE

Despite defining the issue simply and asserting it is a simple issue for this Court, Petitioner attempts to distract the Court with sideshows and irrelevant facts and circumstances. Respondent adopts and incorporates the background of the Eighth Circuit's unanimous panel opinion, but it also identifies and clarifies certain misleading statements in Petitioner's statement.

A. Petitioner misrepresents the plain language and import of Rule 12.

The Rules of Civil Procedure are guideposts to an orderly, efficient, and just process. *See, e.g.*, Fed. R. Civ.

P. 1 ("Th[e Rules] should be construed, administered, and employed … to secure the just, speedy, and inexpensive determination of every action and proceeding."). The Rules should be interpreted consistently, appropriately, and according to their plain language and the intent of the drafters who painstakingly created them after significant input and research. *See Business Guides, Inc. v. Chromatic Comm'ns Enters., Inc.*, 498 U.S. 533, 540-41 (1991) ("We give the Federal Rules of Civil Procedure their plain meaning. … [O]ur inquiry is complete if we find the text of the Rule to be clear and unambiguous." (internal citation and quotation marks omitted)); *Harris v. Nelson*, 394 U.S. 286, 298 (1969) (rejecting interpretation arguments unless the interpretation "was within the purpose of the draftsmen or the congressional understanding" and explaining "[w]e have no power to rewrite the Rules by judicial interpretations"); *Mississippi Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946) (emphasizing weight of advisory committee's construction).

Petitioner's attempt to rewrite the rules based on a non-existent circuit split should be rejected. The cases cited by Hawkeye Gold to support an alleged circuit split do the opposite; they demonstrate no split exists. The Eighth Circuit properly applied Rule 12(h). There is no need for clarification from this Court.

Petitioner ignores the plain language of Rule 12 by excising words or phrases and inserting others. It does so to deprive parties of meritorious personal jurisdiction defenses where parties do not have minimum contacts with the forum. When reviewing Rule 12, Hawkeye Gold frequently suggests other motions are inherently covered. But, as the Eighth Circuit found, this is not the case. (Pet. App. 6-8).

Petitioner argues, "Rule 12 specifically identifies four defenses … that a party is found to waive if available but omitted in the **first motion** filed by a party." (Pet. 9 (emphasis added)). Rule 12 includes no language about a general "first motion" but instead states certain defenses are waived if "omit[ed] from a motion in the circumstances described in Rule 12(g)(2)" or when a party fails "to either: (i) make it by motion under this rule; or (ii) include it in a responsive pleading." Fed. R. Civ. P. 12(h)(1). Hawkeye Gold avoids Rule 12's language. It summarizes Rule 12(h)(1)(A) as being disconnected from the remainder of Rule 12 and instead "refers to any type of 'motion,'" such that it does not matter under what rule a motion was brought or what remedy was sought. In doing so, Petitioner neglects a key portion of Rule 12(h)(1)A): that the rule applies "in the circumstances **described in Rule 12(g)(2)**." (emphasis added).

In reality, under Rule 12, a party may waive certain defenses only if the defenses are not asserted in its first responsive pleading, which can be either a Rule 12 motion or an Answer.[1]

This proper reading of 12(h)(1)(A)—requiring a motion under Rule 12 for waiver, as expressed by the drafters referencing "the circumstances described in rule 12(g)(2)"—does *not* create the redundancy Hawkeye Gold argues. Rule 12(h)(B)(i) states that a party can waive

1. Put simply: "[T]he plain language of Rule 12 provides that the defense of lack of personal jurisdiction is waived where a party files a Rule 12 motion or responsive pleading but fails to assert it, or where a party fails to file a Rule 12 motion at all." *Exchange Centre, LLC v. Chen*, Civ. A. No. 20-2532, 2021 WL 2438794, at *2 (E.D. La. June 15, 2021).

an objection by not filing a pre-answer motion (if it also does not raise the objection in its Answer). Rule 12(h)(1)(A), incorporating Rule 12(g)(2), on the other hand, states that **if** a party makes a Rule 12 motion, it must include all defenses. These are separate bases for waiver; none are superfluous.

B. Petitioner includes unnecessary and extraneous background information, which also misstates certain facts.

Sinoma does not address the several irrelevant facts included in Hawkeye Gold's Petition, nor does it address every misstatement. A few relevant items require correction.

The clerk entered a default against Sinoma on December 9, 2016. (R. Doc. 12). Sinoma moved to set aside the clerk's entry of default on February 17, 2017. (R. Doc. 14). Hawkeye Gold misleadingly suggests Sinoma's 2017 motion was a Rule 60 motion. Although Sinoma cited Federal Rule of Civil Procedure 60(b)(1) and (4) in its motion, the citations were a mistake. Rule 60(b) contemplates "Relief from a Final Judgment," but no such judgment was entered. (*See* R. Doc. 13 (clerk's entry of default)). The parties and the district court appropriately understood and analyzed the motion as a Rule 55(c) motion. Sinoma argued it was not properly served, but it did not ask for the case to be dismissed, only the default to be set aside.

In its Resistance, Hawkeye Gold highlighted Sinoma's oversight, explaining "Rule 60(b) applies to setting aside a ***judgment***, not a clerk's default, the latter of which is

controlled by 55(c)." (R. Doc. 15 at 4 (emphasis in original)). Hawkeye Gold resisted under Rule 55(c). (*See id.*) Sinoma's Reply acknowledged its mistake, stating "the motion is governed by [] Rule 55(c)." (R. Doc. 16 at 1). And the district court ruled under Rule 55(c). (R. Doc. 23). Hawkeye Gold's attempt to revise history to characterize the underlying motion as a "Rule 60" motion should be ignored.

On May 3, 2017, the district court found service was insufficient, and it required Hawkeye Gold to serve Sinoma properly. (R. Doc. 23). Over the next several years, Hawkeye Gold failed to accomplish proper service. Eventually, in October 2020, Hawkeye Gold moved for obtained another entry of default. (R. Doc. 85). Sinoma again moved to set aside the default under Rule 55(c). (R. Doc. 87). Within Sinoma's motion, Sinoma expressly stated it "has the right to assert whether it has sufficient contacts with the forum for the Court to exercise jurisdiction over Sinoma." (R. Doc. 88-2 at 7).

The Court granted the motion to set aside default on April 6, 2021, finding good cause existed to do so. (R. Doc. 97). In its Petition to this Court, Hawkeye Gold again engages in revisionist history and misleads the Court as to the district court's rationale setting aside default. (*See* Pet. 15). Hawkeye Gold asserts the district court set aside the default primarily based on Sinoma's desire to defend the case on the merits. (*See* Pet. 15 (emphasizing merits-related language)). Hawkeye Gold claims this is part of Sinoma's effort to engage in "Continuing Misrepresentation." (Pet. 15).

This is incorrect. Sinoma was clear about its defense clear about its jurisdictional defense, and the district court agreed. The district court stated in its order:

> Last, but not least, Sinoma argues that it has a meritorious defense to the court's jurisdiction based on Sinoma's lack of contacts with this forum. … Contrary to Hawkeye Gold's assertions, Sinoma's jurisdictional defense is not one of sovereign immunity, but one of sufficient contacts with the forum to satisfy due process … . Thus, Hawkeye Gold is not so certain to succeed on its claims that a result after trial on the merits is unlikely to be different from the result of a default judgment.

(R. Doc. 97 at 5).

After entry of default was set aside, Sinoma filed an Answer. It raised, *inter alia,* the following defense: "Sinoma alleges that the Court lacks personal jurisdiction over Sinoma because Sinoma did not have the minimum contacts with the forum state, and the Complaint should therefore be dismissed against [] Sinoma under Rule 12(b)(2) of the Federal Rules of Civil Procedure." (R. Doc. 98 at 5).

Hawkeye Gold amended its Complaint for the first time on September 3, 2021. (R. Doc. 111). Sinoma answered the same day, reasserting its personal jurisdiction defense. (R. Doc. 112 at 5).

On October 12, 2021, Plaintiff moved to file a second amended complaint. (R. Doc. 116). The same day, Sinoma

moved for judgment on the pleadings, citing (among other bases) a lack of personal jurisdiction under Rule 12(b)(2). (R. Doc. 119). The district court granted Hawkeye Gold's second motion to amend and denied Sinoma's motion for judgment on the pleadings as moot. (R. Doc. 156).

Sinoma moved to dismiss the second amended complaint under Rule 12(b)(2) just fifteen days later. (R. Doc. 164). The district court granted Sinoma's motion to dismiss on July 25, 2022, finding insufficient minimum contacts with Iowa to support personal jurisdiction and rejecting Hawkeye Gold's waiver claims. (App. 43-45, 61-70).

Hawkeye Gold appealed, and the Eighth Circuit unanimously affirmed, rejecting Hawkeye Gold's waiver argument, finding the plain language of Rule 12 requires waiver only when a specified defense is not raised in a Rule 12 motion (or not raised in a responsive pleading). (App. 6-7). It rightly concluded that a Rule 55(c) motion is **not** a Rule 12 motion and thus no waiver applied. (App. 6-8). Hawkeye Gold moved for rehearing, which was denied. (App. 72).

REASONS FOR DENYING THE PETITION

The Eighth Circuit properly addressed a straightforward question: does a party who succeeds in a Rule 55(c) motion to set aside entry of default based on insufficient service of process waive its right to later assert a minimum-contacts personal jurisdiction defense under Rule 12(b)(2)? The answer must be no.

The Eighth Circuit correctly concluded a Rule 55(c) motion is not a Rule 12 motion and therefore the waiver provisions in Rule 12(h) do not apply to a successful Rule 55(c) motion. Specifically, it found a party does not waive personal jurisdiction when the party successfully moves to set aside entry of default because it was not properly served. Any contrary holding would upset the cardinal rule that no person needs to defend an action and raise all applicable defenses unless he has been served with process and properly brought before the court.[2]

Despite the plain language of the rules of civil procedure, the procedural history of this matter, and Sinoma's successful Rule 55(c) motion, Hawkeye Gold nonetheless asserts the Eighth Circuit was wrong and its ruling conflicts with that of several other circuits. Not so. No circuit split exists on this issue.

A circuit split exists only where different courts of appeals have come to *different* conclusions on the same important legal question, which inherently means similarly situated parties were treated differently. *See* Sup. Ct. R. 10(a). Indeed:

> A 'circuit split' occurs when two or more of the thirteen federal courts of appeals reach **different** conclusions on **the same question** of federal law, for example by applying different interpretations of the same statutory term. This

2. *See, e.g.*, *Rogers v. Hartford Life & Acc. Ins. Co.*, 167 F.3d 933, 937 (5th Cir. 1999) ("Until the plaintiff serves the defendant, the defendant has no duty to answer the complaint … . Once the plaintiff effects service of process, however, Rule 12 is triggered … .")

> difference results in the non-uniform treatment of **similarly situated litigants**, depending on the circuit that hears their case … .[3]

The cases cited by Petitioner to support its purported circuit split are separate and distinct from the present matter, and no circuit split exists. There are no "similarly situated litigants" that are being treated in a "non-uniform" matter. This is true for three main reasons.

First, Hawkeye Gold omits a citation to any case in which a party successfully set aside a clerk's entry for default based on improper service and was later prohibited from defending based on a lack of minimum contacts. The parties here are not similarly situated with those in the purported circuit split cases.

Second, the Eighth Circuit specifically took no position on whether this matter would have resulted in the same outcome if Sinoma had moved to set aside a default judgment under Rule 60(b) instead an entry of default under Rule 55(c).

Third, the cases cited by Hawkeye Gold finding personal jurisdiction waived when not raised in a motion-to-set-aside setting deal only with improper-service-

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3. Michael John Garcia, et al., CONG. RESEARCH SERV. R47899, *The United States Courts of Appeals: Background and Circuit Splits from 2023* (Apr. 1, 2024) at 7, *available at* https://crsreports.congress.gov/product/pdf/R/R47899 (emphasis added) (footnotes and internal citations omitted). The Congressional Research Service did not identify the present matter as a circuit split. *See id.* at 13-56.

related cases, *not* minimum-contacts issues.[4] Although a party "that ignores faulty service of process might be found to have waived one component of personal jurisdiction: the defense of improper service of process," this does not mean "a defendant waives the personal jurisdiction defense when it receives notice but does not meet the constitutional test of minimum contacts making it amenable to jurisdiction." *Baragona*, 594 F.3d at 855. The cases relied on by Hawkeye Gold do not contemplate waiver of a due process claim relating to personal jurisdiction based on a lack of minimum contacts like Sinoma asserted in its successful defense.

In sum, the cases upon which Hawkeye Gold relies do not demonstrate similarly situated parties are being treated in a non-uniform manner. Accordingly, the Eighth Circuit's decision here does not "conflict with the decision of another United States court of appeals [decision] on the same important matter." Sup. Ct. R. 10(a).[5]

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4. *See Baragona v. Kuwait Gulf Link Transp. Co.*, 594 F.3d 852, 854-55 (11th Cir. 2010) (finding cases relied on by the plaintiff relate to a party's challenges to service of process, they do not relate to minimum-contacts arguments); *Sugar v. Tackett*, No. CV 20-331 JAP/LF, 2020 WL 6508859, at *4 (D.N.M. Nov. 5, 2020) (rejecting *Roswell, Hayhurst*, and *O'Brien* in favor of *Baragona* and finding a party did not waive personal jurisdiction arguments where it successfully moved to set aside a default, did not "substantially participate[] in the litigation without actively pursuing its Rule 12(b)(2) defense," and made the argument in its first Rule 12 motion); *see also Miss. Pub. Corp.*, 326 U.S. 438, 444-45 (explaining "the service of summons is the procedure by which a court … asserts jurisdiction over the person of the party served.").

5. Sinoma does not address other arguments contained in Hawkeye Gold's petition. The arguments relate to the merits of

A. Preliminarily, Sinoma's motion to set aside default was a Rule 55(c) motion, *not* a motion to set a default judgment under Rule 60(b).

Hawkeye Gold unashamedly argues in its Petition that the Eighth Circuit "transformed" Sinoma's original motion to set aside entry of default and "declared Sinoma's motion to be a Rule 55(c) motion instead [of a Rule 60(b) motion]." (Pet. 25). Hawkeye Gold's chameleonic argument in the Petition directly contradicts (1) its own resistance to the original 55(c) motion (R. Doc. 15); (2) Sinoma's acknowledgement of an improper citation to Rule 60 (R. Doc. 16); and (3) the district court's opinion (R. Doc. 23).

Hawkeye Gold chastised Sinoma for mistakenly citing Rule 60(b) in its motion:

> Sinoma argues the Court should set aside the entry of default "pursuant to Rule[] 60(b)[."] Sinoma's argument is misplaced. Rule 60(b) applies to setting aside a ***judgment***, not a clerk's default, the latter of which is controlled by Rule 55(c). … The Clerk entered a ***clerk's default*** against Sinoma on December 13, 2016. … Sinoma has failed to demonstrate good cause under Rule 55(c).

(R. Doc. 15 at 4-5 (emphasis in original)). Sinoma admitted the mistake: "[Hawkeye Gold] is correct in stating … the motion is governed by Federal Rule of Civil Procedure 55(c)." (R. Doc. 16 at 1). The district court then analyzed and decided the motion under Rule 55(c). (R. Doc. 23 at 2).

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the action, not whether it is appropriate for certiorari. If the Court decides to take the case, Sinoma will address such arguments.

Any suggestion the Eighth Circuit "transformed" or "declared" the Motion to be under Rule 55(c) is simply revisionist history and should be ignored. (*See* Pet. 25). Hawkeye Gold appears to renege on its prior arguments because such head-in-the-sand tactics help its arguments—i.e., its waiver argument may be stronger if a default judgment had been entered. Reality trumps Hawkeye Gold's desires.

The Eighth Circuit emphasized (1) that the cases relied on by Hawkeye Gold "involved prior attacks on final default judgments"; and (2) that the Eighth Circuit "express[es] no views on that issue." (App. 7-8). No such default judgment was entered here.

Hawkeye Gold's arguments notwithstanding, the difference between the types of motions is important.[6] Setting aside an entry of default requires merely showing "good cause." *See* Fed. R. Civ. P. 55(c). When a default judgment is entered, however, a party must show one of the grounds in Rule 60(b) applies. *See id.*; Fed. R. Civ. P. 60(b). This distinction matters; Courts are more likely to view Rule 60(b) motions as Rule 12 motions. *See, e.g.*, *Swaim v. Molton Co.*, 73 F.3d 711, 717 (7th Cir. 1996) ("These concerns have prompted this circuit to conclude that *in personam* jurisdictional challenges to **default judgments** are forfeited if not asserted in a Rule

6. *See, e.g.*, *United Coin Meter Co. v. Seaboard Coastline RR*, 705 F.2d 839, 843-46 (6th Cir. 1983) (discussing procedure and process regarding setting aside entry of default and default judgment); *Advanced Communication Design, Inc. v. Premier Retail Networks, Inc.*, 46 Fed. App'x 964, 969-75 (Fed. Cir. 2002) (discussing motion-to-set-aside standards). Rule 55(b) also makes clear the differences in obtaining a clerk's entry of default and a default judgment.

60(b) motion … . A motion to vacate under Rule 60(b) for lack of jurisdiction is essentially equivalent to a Rule 12(b)(2) motion to dismiss for lack of jurisdiction. The moving party is not asking that it be given a chance to defend on the merits; it is questioning the court's ability to require it to do so." (emphasis added) (citations omitted)).

In any event, this is a red herring. Default judgment was never entered, and meeting Rule 60(b)'s standards was not necessary. The lack of any default judgment against Sinoma is another factor distinguishing Hawkeye Gold's support for an alleged circuit split. The parties are not similarly situated.

B. In the present matter, an entry of default was set aside due to improper service, no default judgment was entered, and Sinoma raised its personal jurisdiction defense in its Answer.[7]

The present case involved a court finding there was insufficient service. (R. Doc. 23 at 2-3, 5). A court "lacks jurisdiction over the defendant" until a party is served, even where a party "had actual notice of the lawsuit."[8] It took years until Sinoma was served, at which time Sinoma immediately raised the personal jurisdiction defense –first in a motion to set aside a default—and then again in its answer.[9] (R. Doc. 88, 98).

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7. Sinoma also raised the defense in its motion to set aside a second default judgment after purported service. (R. Doc. 88-2).

8. *Printed Media Servs., Inc. v. Solna Web, Inc.*, 11 F.3d 838, 843 (8th Cir. 1993).

9. When setting aside default, the district court found a lack of due process due to a lack of minimum contacts might be a "meritorious defense." (R. Doc. 97 at 5).

When a second motion to amend was granted, Sinoma immediately moved to dismiss. (R. Doc. 164). Sinoma decided not to "risk a default judgment[] and then challenge that judgment on jurisdictional grounds in a collateral proceeding." *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982). Instead, it elected to raise the issue in a motion to dismiss, as is appropriate and standard. *See Broadcast Music, Inc. v. M.T.S. Enters., Inc.*, 811 F.2d 278, 281 (5th Cir. 1987) ("There are two ways ordinarily to contest personal jurisdiction and the mode of service: a party may file a Rule 12(b) motion to dismiss, or he may suffer a default judgment to be entered and may collaterally attack it in defense of actions to enforce that judgment."). Because there was no default, Sinoma did exactly what the rules suggest: it filed a Rule 12(b) motion.

C. The cases upon which Hawkeye Gold bases its purported "circuit split" are distinguishable and do not conflict with the present matter.[10]

Hawkeye Gold asserts there is a "4-2 circuit split," with the Fifth, Seventh, Ninth, and Tenth Circuits disagreeing with the Sixth and Eighth Circuits.[11] (Pet.

10. Because Hawkeye Gold asserts the Sixth Circuit is consistent with the ruling in this matter, Sinoma does not address the Sixth Circuit cases. If a split exists between the Sixth and other Circuits, this case is not the appropriate avenue to resolve such split.

11. Hawkeye Gold attempts to claim that if default judgments are included, the Eleventh Circuit makes the split 5-2. (Pet. 28). In support, it cites *In re Worldwide Web Sys., Inc. v. Worldstar Comm'ns Corp.*, 328 F.3d 1291, 1300 (11th Cir. 2003). Again, the party in *Worldwide Web Systems* is not similarly situated such that

18-19). As discussed below, however, the four cases are distinguishable such that there is not a scenario in which similarly situated parties are being treated differently.[12]

1. The Fifth Circuit's *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*[13] relied on counsel's participation in litigation before moving to set aside a default judgment.

"[U]nder the facts of this case, counsel's involvement in the litigation on appellants' behalf constituted an appearance, thereby waiving any defect relating to personal jurisdiction." *Broadcast Music*, 811 F.2d at 279. This sentence alone highlights a distinction between the present case and *Broadcast Music*. But other differences and distinctions abound.

In *Broadcast Music*, counsel was the brother and son of the individual defendants, who also represented the family-owned business that was actively participating in the case. *See id.* at 280. The attorney was served with several pleadings indicating the attorney's mother and brother were brought into the case. *Id.* He filed motions on behalf of *all* defendants, negotiated a settlement on their behalf, and engaged in other conduct consistent with service having been accomplished. *Id.*

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it is a fair comparison. Here, no default judgment issued, and, far from *not raising* insufficient service of process like in *Worldwide Web*, Sinoma not only did so but was successful in doing so. *See* 328 F.3d at 1300. It cannot be said *Worldwide Web* is an appropriate comparator upon which to support the existence of a circuit split.

12. It also should be noted the various cases on which Hawkeye Gold relies are all decades old.

13. 811 F.2d 278, 281 (5th Cir. 1987).

When a default judgment was entered against the individual appellants, however, the appellants moved for relief under Rule 60(b), suggesting they had not been served. *Id.* On appeal, however, they "assert[ed] for the first time … that the judgment entered against them was void for lack of personal jurisdiction, inasmuch as service of process was never properly made upon them." *Id.*

The Court noted "[t]here are two ways ordinarily to contest personal jurisdiction and the mode of service: a party may file a Rule 12(b) motion to dismiss, or he may suffer a default judgment to be entered and may collaterally attack it in defense of actions to enforce that judgment." *Id.* at 281. The Fifth Circuit took issue, however, the Appellants' attempt to "pull failure of service out of the hat like a rabbit in order to escape default judgment." *Id.* The case simply never addressed minimum contacts.[14]

The background in this matter is entirely different. Sinoma filed an appearance only when contesting an entry of default, not a default judgment. (R. Doc. 13). Sinoma was successful in demonstrating it had not been properly served. (R. Doc. 23). Once service was arguably completed, Sinoma raised its minimum-contact personal jurisdiction defense in a second motion to set aside as well as its first responsive pleading—an Answer. (R. Doc. 88, 98).

It cannot be said Sinoma, like the Appellants in *Broadcast Music*, had "waived the defense of insufficiency

14. *Broadcast Music* addressed only "one component of personal jurisdiction: the defense of improper service of process." *See Baragona*, 594 F.3d at 855.

or failure of service of process," through its participation in the case. *Id.* at 281. And, as the Fifth Circuit recognized, "No person need defend an action nor suffer judgment against him unless he has been served with process and properly brought before the Court." *Id.* at 282. *Broadcast Music* does not conflict with this matter.

2. The Seventh Circuit's *O'Brien v. RJ O'Brien & Associates, Inc.*[15] involved an unsuccessful challenge to a default judgment based on service of process and a failure to raise an issue with a defect in form of summons.

In *O'Brien*, the defendant attempted to resist a motion for entry of default due to a failure of proper service. 998 F.2d at 1397. The district court rejected the contention, entered default, and ordered a hearing on damages. *Id.* The defendant then moved to set aside the entry of default, again citing process-related issues. *Id.* The Court again rejected the argument, and it entered a default judgment. *Id.*

After the contested default judgment was entered, the defendant moved to set aside the judgment, this time asserting "the court lacked personal jurisdiction due to defects in the form of the summons."[16] *Id.* at 1398. The Court understandably found the summons-related issue should have been raised, at a minimum, in the initial motion to set aside the entry of default, and it denied the

15. 998 F.2d 1394 (7th Cir. 1993).

16. This is a far cry from the minimum-contacts claim present here. *See Baragona*, 594 F.3d at 855.

motion to set aside the default judgment. *Id.* at 1398-99. Notably, the Court relied on the party's resisting two motions of default, as well as the party's motion to set aside entry of default, in determining that the party had "submitted generally to the jurisdiction of the court." *Id.* at 1399.

Under the circumstances, the district court found the motion to set aside "was in essence, a Rule 12 motion," a finding the appellant did not contest on appeal, instead opting to argue his prior insufficiency-of-process defense encompassed the summons-related issue. *Id.*

Here, Sinoma would deeply contest its motion to set aside was "in essence a Rule 12 Motion." Moreover, Sinoma was successful in its claim to set aside the entry of default. Nor did Sinoma resist the motion for entry of default; it merely moved to set it aside. In short, distinctions abound, and it can hardly be said Sinoma is similarly situated to the appellant in *O'Brien*. *O'Brien*, like several other opinions relied on by Hawkeye Gold turned on the participation of a party prior to the motion to set aside. The distinction between those cases and this matter is stark. Sinoma did not participate in the same manner as several parties in Hawkeye Gold's preferred cases.

3. The Ninth Circuit's *American Association of Naturopathic Physicians v. Hayhurst*[17] does not conflict with the present matter because the moving party failed to succeed on his motion to vacate and the case involved a default judgment, not a default.

Unsurprisingly, in *Hayhurst*, the moving party again was unsuccessful in its motion to set aside a default judgment based on lack of service.[18] 227 F.3d at 1108-09. And again, the motion at issue was filed after a default judgment, not merely an entry of default. *See id.*

It simply cannot be said that a party who raises a service-related motion to set aside and is unsuccessful in its motion is similarly situated to one that succeeds on such a motion; a party cannot be subject to the court's jurisdiction unless service occurred. *Adams v. AlliedSignal Gen. Aviation Avionics*, 74 F.3d 882, 885-86 (8th Cir. 1996); *see Ins. Corp. of Ireland*, 456 U.S. at 715, n.6 (Powell, J., concurring) (discussing personal jurisdiction relating to "service of process," and stating "jurisdiction may not be obtained unless process is served in compliance with applicable law"); *Zenith Radio Corp. v. Hazeltine Rsch., Inc.*, 395 U.S. 100, 110 (1969). And Hawkeye Gold makes no argument as to why a party over whom a court does not maintain jurisdiction can somehow waive arguments *before* the court obtains jurisdiction. *See Zenith*, 395 U.S. at 110 (finding a court cannot "adjudicate a personal claim

17. 227 F.3d 1104 (9th Cir. 2000).

18. Although somewhat unclear, it appears Appellant in *Hayhurst* raised the personal jurisdiction issue for the first time on appeal. *See* 227 F.3d at 1106-08.

or obligation unless it has jurisdiction over the person," and finding that a party is "not bound" unless he has "been made a party by service of process").

Like the cases described above, the parties in *Hayhurst* are not similarly situated to Sinoma in this matter such that it may be said that the similarly situated parties obtained different outcomes based only on the circuit in which they found themselves.

4. The Tenth Circuit's *United States v. 51 Pieces of Real Property Roswell, New Mexico,*[19] also can be distinguished based on the unique civil *in rem* forfeiture proceedings.

"[S]everal courts have held that a claimant may submit itself to the personal jurisdiction of the court by appearing in an *in rem* civil forfeiture action." 17 F.3d at 1313.[20] Although the Tenth Circuit went on to explain that a claimant "can appear in a forfeiture action and object to the court's exercise of personal jurisdiction if the claimant makes an objection in a timely fashion," it is clear from the

19. 17 F.3d 1306 (10th Cir. 1994).

20. Forfeiture actions present interesting questions regarding jurisdiction. *See, e.g.*, *United States v. Obaid*, 971 F. 3d 1095, 1098-100 (9th Cir. 2020). The cases involve questions regarding "in personam jurisdiction," "the power of a court to enter judgment against a person"; and "*in rem* jurisdiction," "the court's power to adjudicate rights over property." *See id.* Forfeiture actions are *in rem* actions, in which the claim is brought against *property*, not a person, *see id.*, and therefore "jurisdiction is dependent upon seizure of a physical object," such that "the focus is on the district court's jurisdiction over the property in dispute." *Id.* (cleaned up).

context of this matter that the Tenth Circuit (and other courts) treat waiver different in the unique circumstances of being a claimant in an *in rem* civil forfeiture action. *See id.*[21]

In *Roswell*, the Court found the party had submitted to the Court's jurisdiction by filing a general appearance, filing motions within the action, and requesting additional time to file its answer, and, it appears most importantly, participating in the default proceedings. *Id.* at 1314 (discussing the role of "Nitsua's response to the government's motion for default," and further explaining that because the party did not make an "in personam jurisdiction" objection, such an objection was waived). There was no suggestion the party in *Roswell* sought to defend on the basis of a lack of minimum contacts but instead the purported objection appeared to be limited to service. *See id.* ("The government did not establish that Nitsua was served with the civil forfeiture complaint in accordance with Fed. R. Civ. P. 4. Nonetheless, several courts have held that a claimant may submit itself to the personal jurisdiction of the court by appearing in an *in rem* civil forfeiture action."); *id.* at 1313-14 (proceeding to discuss only service of process and the party's participation in the case).[22]

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21. There is question whether *Roswell* remains good law. *See, e.g.*, *PPEX, LLC v. Buttonwood, Inc.*, No. 21-cv-53-F, 2021 WL 7210650, at *3-5 (D. Wyo. July 13, 2021) (calling into question *Roswell*'s continued viability). Hawkeye Gold does not discuss how this *in rem* civil forfeiture action is applicable to the present circumstances.

22. Indeed, the Ninth Circuit has gone so far as to hold that "constitutional due process requirements set forth in *International Shoe* were inapplicable to [an] *in rem* [civil forfeiture] action." *Obaid*, 971 F.3d at 1106.

Unlike in *Roswell*, here, Sinoma moved to set aside the entry of default based on insufficient service immediately upon appearing, and it was successful in its motion. Once service was finally deemed appropriate, Sinoma raised its personal jurisdiction defense.

CONCLUSION

No circuit split exists. Indeed, Hawkeye Gold did not cite a single case (appellate or district court) in which a party set aside a clerk's entry of default due to insufficient service of process and *later* was prohibited from raising a personal jurisdiction defense. This makes sense—a Court does not maintain jurisdiction over a party until service is complete, and a party should not be allowed to waive any claims unless and until service is complete. When service was made in this matter, Sinoma immediately raised its 12(b)(2) defense. There is no waiver, and the Eighth Circuit's unanimous opinion does not conflict with any other courts' opinions. There is no question this Court needs to address, and certiorari is inappropriate.

Respectfully submitted,

Matthew D. Callanan
Belin McCormick, P.C.
666 Walnut Street,
Suite 2000
Des Moines, IA 50309
(515) 283-4639

Keliang (Clay) Zhu
Counsel of Record
DeHeng Law Offices PC
7901 Stoneridge Drive,
Suite 208
Pleasanton, CA 94588
(925) 399-5856
czhu@dehengsv.com

Attorneys for Respondent