No. 23-1061

In The
Supreme Court of the United States

HAWKEYE GOLD, LLC,

Petitioner,

v.

CHINA NATIONAL MATERIALS INDUSTRY IMPORT AND EXPORT CORPORATION, DOING BUSINESS AS SINOMA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Sinoma's opposition is misdirected. It does not alter the definitive 4-2 circuit split identified by Hawkeye Gold and, indeed, its new arguments fortify a 6-2 split based on the claims it makes. In short, the split is real, the question is narrow, and the confusion in the lower courts is disconcerting.

Sinoma does not deny the petition presents a question about a vital procedural matter regularly addressed by federal courts across the country. The Eighth and Sixth Circuits' recent jurisprudence show they are manifestly in conflict with longstanding opinions of multiple federal courts of appeals. As the petition explains, these wayward opinions are expected to rapidly cause new battles on closely intertwined issues of personal jurisdiction, waiver, and default confronted by lower courts every day. Pet. 29.

Sinoma acknowledges Hawkeye Gold presents the petition "defining the issue simply and asserting it is a simple issue for this Court." BIO 1. But Sinoma remakes the carefully framed issue to undermine a circuit split. Sinoma's effort is unavailing.

Sinoma does not mention the basic underlying split in authority subsumed in the petition—and directly applicable in a default setting—whether a general appearance results in waiver of personal jurisdiction. Pet. 16. *See*, *e.g.*, *Gerber v. Riordan*, 649 F.3d 514, 519 (6th Cir. 2011) ("There is a dearth of caselaw both in this Circuit, and in our sister circuits, defining precisely what types of appearances and

filings qualify as 'a [defendant's] legal submission to the jurisdiction of the court' ").

Sinoma's motion, as defined in the petition, alone and in conjunction with other associated filings, conclusively shows Sinoma agreed to appear in the case and has waived personal jurisdiction by appearance. Pet. 30-31.

Sinoma strains to suggest the petition does not present a conflict on the question presented, but its logic is faulty. The split is addressed in detail below. The conclusion is unmistakable. There is a wide and definitive split on the question presented. And only this Court can resolve the issue.

The petition should be granted.

ARGUMENT

A. Sinoma Misapprehends "Circuit Split"

1. Treatment is Not Uniform.

Sinoma argues "[n]o circuit split exists on th[e] issue" in the petition. BIO 9-10 n.3. Sinoma relies on a legal commentator's views in addressing the standard. Sinoma's reliance is misplaced.

Rule 10(a) sets forth the governing standard for a circuit split and the petition easily meets its conditions. S. Ct. R. 10(a). Assuming the factors identified by Sinoma are relevant, Hawkeye Gold also meets those terms. The petition demonstrates there is different

"treatment" of "similarly situated" litigants shown in "non-uniform" rulings of two or more federal courts of appeals. BIO 8-9, 9 n.3 (citing S. Ct. R. 10(a)). An incisive circuit split is revealed under Sinoma's test.

2. Sinoma's First Motion

Sinoma argues Hawkeye Gold attempts to "rewrite the rules" contrary to "the intent of the drafters," stating there is "no language about a general 'first motion'" in Rule 12. BIO 2. Sinoma's argument is misinformed.

Sinoma overlooks that Rule 12 drafters expressly use the term "first motion" in the same way as Hawkeye Gold and that multiple circuit courts and other legal authorities do the same with only slight variations. *See* Fed. R. Civ. P. 12 notes of advisory committee on rules—1966 Amendment ("first motion"); *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir. 1983) ("first defensive move"); *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1107 (9th Cir. 2000) ("first filing"); 5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1391 (1990) ("first significant defensive move").

The various labels refer to a defense raised in a party's first motion or first "move." Sinoma does not deny Rule 12 identifies four specified defenses which, if omitted from an earlier motion, are waived. Fed. R. Civ. P. 12(h)(1)(A); BIO 3. Sinoma also does not deny its first defensive move was to file Sinoma's motion based on one of the four Rule 12 specified defenses, i.e.,

insufficient service of process. BIO 4, 6. It is incontrovertible Sinoma's motion was Sinoma's first defensive move.

3. Personal Jurisdiction Does Not Depend on Service of Process

Sinoma argues Hawkeye Gold seeks to "upset the cardinal rule that no person needs to defend an action . . . unless he has been served." BIO 8. Sinoma's argument is misguided.

This Court's decision in *York v. Texas*, 137 U.S. 15 (1890), cited in *Mallory v. Norfolk S. Ry. Co*., 600 U.S. 122 (2023) (Gorsuch, J.), presented a question on this subject and the Court rejected an identical argument advanced by Sinoma when answering the question:

> And the question is, whether under the constitution of the United States the defendant has an inviolable right to have this question of the sufficiency of the service decided **in the first instance and alone** . . . It certainly is **more convenient** that a defendant be permitted to object to the service, and raise the question of jurisdiction, in the first instance, in the court in which suit is pending. But mere **convenience is not** substance of right.

York, 137 U.S. at 20-21 (emphasis added).

4. Sinoma Made an Appearance

Sinoma argues Hawkeye Gold "engages in revisionist history" in referring to "Sinoma's desire to defend the case on the merits." BIO 5. Sinoma, not Hawkeye Gold, misrepresents the record.

Sinoma does not deny the district court expressly found "Sinoma . . . **agreed to appear**, . . . demonstrating **its** wish to defend the case on the merits" and further that Sinoma represented its appearance would provide "Hawkeye Gold with a full and fair chance to prove its claims." Pet. 30-31 (emphasis added).

The record reveals Sinoma acted in full accord with the district court's ruling. R.Doc.98. Sinoma does not deny it voluntarily appeared in the case—even beyond the appearance made by failing to include lack of personal jurisdiction in Sinoma's motion—when it filed an answer before service was completed. BIO 16 (service only "arguably completed"); R.Doc.97-98.[1]

Sinoma's appearance in the district court by virtue of Sinoma's motion and later associated filings waived personal jurisdiction. R.Doc.14, R.Doc.14-1; R.Doc.16; R.Doc.20-1; R.Doc.95 at 4-5.

5. Appearance is Substitute for Service

Sinoma argues it did not waive personal jurisdiction because the Eighth Circuit found "a party does

[1] Respondent falsely suggests it raised personal jurisdiction earlier, but it merely claimed "the right to assert whether" personal jurisdiction exists. BIO 5 (R.Doc.88-2 at 7).

not waive" it when "not **properly** served." BIO 8 (emphasis added). Sinoma's argument and, respectfully, the Eighth Circuit decision, are flawed under this Court's jurisprudence.

This Court reaffirmed a party is required to defend an action based on appearance alone **regardless** of whether service of process was lawful:

> Because the requirement of personal jurisdiction represents . . . an individual right, it can . . . be waived. In *McDonald v. Mabee*, *supra*, the Court indicated that **regardless** of the power of the State to serve process, an individual may submit to the jurisdiction of the court by appearance.

Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 703 (1982) (emphasis added).

6. First Motion's "Success" Is Irrelevant

Sinoma argues "[i]t simply cannot be said that a party who . . . is unsuccessful in its motion [on insufficient service of process] is similarly situated to one that succeeds on such a motion." BIO 8. Sinoma's argument is not only new to jurisprudence on this topic, it also is unfounded.

Rule 12(h) does not make any exception for piecemeal presentation of Rule 12 specified defenses based on whether a party is "successful" in overcoming one of the defenses in the first motion. Fed. R. Civ. P. 12(h)(1)(A). This suggestion contravenes language in

the rule itself. Fed. R. Civ. P. 12(h)(1)(A) ("A party waives any defense . . . by . . . omitting it from a motion."). It also is contrary to the notes of the advisory committee ("[C]onsolidation of defenses . . . in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case.").

Mallory reminds litigants there are "a variety of 'actions of the defendant' that may seem like technicalities." *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 146 (2023) (quoting *Ins. Corp. of Ireland*, 456 U.S. at 704). "The expression of legal rights is often subject to certain procedural rules: . . . [T]he failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection." *Ins. Corp. of Ireland*, 456 U.S. at 705.

Sinoma's newly framed argument impels inclusion of yet another court, the D.C. Circuit, to the majority side of the circuit split. *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 843 F.3d 958 (D.C. Cir. 2016). *Gilmore* was decided under strikingly similar circumstances. *Id.* at 966. Appellees—Palestinian entities—filed a "pre-answer motion" (not a motion under Rule 12(b)(2)-(5)) seeking to dismiss the complaint based on sovereign immunity (FSIA), which appellees argued incorporated personal jurisdiction. *Id.* at 964.

Appellees were twice found to be in default, but also were successful in vacating the default orders. *Id.* The district court denied dismissal based on lack of personal jurisdiction, finding appellees waived the defense. *Id.* at 962. On appeal, the D.C. Circuit, citing

Rule 12, affirmed: "Appellees waived their personal-jurisdiction defense by failing to assert it in their pre-answer motion." *Id.* at 965.

Like the pre-answer motion and "successful" vacation of default orders in *Gilmore*, Sinoma's motion and success in defeating default in this case are immaterial to the operation of Rule 12(h).

7. Waiver Is Not Avoided by Filing Motion Under Different Title

In advocating for the Eighth Circuit's ruling, Sinoma argues "a party may waive certain defenses only if . . . not asserted in . . . a **Rule 12 motion** or an Answer." BIO 3 (emphasis added); App. 8-9. Sinoma's advocacy is misconceived, but it does highlight the considerable split here.

"A party need not actually file an answer or motion before waiver is found." *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732-33 (7th Cir. 1991) (defendants "waived their claim" of "lack of jurisdiction" through "voluntarily appear[ance]") (citing *Broad. Music, Inc. v. M.T.S. Enters., Inc.*, 811 F.2d 278, 280-81 (5th Cir. 1987)); *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1107 (9th Cir. 2000) (that "first filing was not dubbed a 'Rule 12' motion is of no significance").

8. Difference of Default and Default Judgment Is Meaningless for Waiver Purposes

Sinoma argues "lack of any default judgment against Sinoma is another factor" showing the absence of a circuit split. BIO 9, 13. Sinoma's argument is easy to disprove.

The Sixth Circuit readily declares waiver is not considered even when a "default judgment" is entered. BIO 14 n.10. *Gerber v. Riordan*, 649 F.3d 514, 520 (6th Cir. 2011). On the other side of the split from the Eighth Circuit, the D.C. Circuit finds waiver under Rule 12(h) applies to a "default" decided under Rule 55(c). *Gilmore*, 843 F.3d at 965-66. Sinoma also does not dispute waiver is determined before default judgment factors are even considered. Pet. 33 n.29.

9. *Baragona* Has No Application

Sinoma relies on the Eleventh Circuit's decision in *Baragona v. Kuwait Gulf Link Transport Co.*, 594 F.3d 852 (11th Cir. 2010), contending waiver of service "does not mean a defendant waives the personal jurisdiction defense." *Id.* at 855. *Baragona* is inapplicable.

Rule 12(h) waiver is not at issue in *Baragona*. *Id.* The Eleventh Circuit applies a different precedent in that circumstance. *Id.* at 854. *See Sanderford v. Prudential Ins. Co. of Am.*, 902 F.2d 897, 900 (11th Cir. 1990) (applying "mandatory waiver" under "Rule 12(h)"). *Baragona* applies when a party is willing to

"risk a default judgment" as described in *Ins. Corp. of Ireland*, 456 U.S. at 706. Sinoma admits it deliberately did not invoke this procedure. BIO 14.

B. The Split Is Real

1. Eighth and Sixth Circuits

The petition identifies multiple differences, on one hand, between the Eighth Circuit below and the Sixth Circuit and, on the other hand, the Fifth, Seventh, Ninth, and Tenth Circuits. Pet. 19-23. Sinoma also recognizes the petition demonstrates the split expands to 5-2 with the Eleventh Circuit once the faux distinction between default and default judgment is considered. BIO 14 n.11. Sinoma's additional argument in this Court—that Rule 12(h) does "not apply" because Sinoma's motion was "successful"—adds the D.C. Circuit to the list for a definitive 6-2 split. BIO 8.

The Eighth Circuit's headline contention is waiver applies only if a "prior" motion is identified as a Rule 12 motion.[2] This position invites a determination of the split based on how Sinoma's motion would fare in other circuit courts outside of the Eighth Circuit below and the Sixth Circuit.

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[2] App. 8-9 ("prior motions 'made under *this rule,*" meaning Rule 12 motions").

2. Sinoma's Motion Would Be Denied in Six Circuits

a. Ninth Circuit

Sinoma seeks to distinguish *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104 (9th Cir. 2000), but the Ninth Circuit leaves no doubt "[t]he essence of Rule 12 . . . is that a party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses . . . [and] [t]he rule applies with equal effect no matter what is the title of the pleading." *Id.* at 1107 (internal quotation marks omitted). It also rejects any distinction due to service of process or default. *Id.* ("[Defendant] argues . . . he did raise personal jurisdiction in his first filing . . . because . . . his Rule 55 motion [argued] . . . he 'had not been properly served' [but] [t]his confuses two separate defenses" and no difference should be applied to "post-default pleadings") (citing Seventh Circuit). *See also Boston Telecomms. Grp., Inc. v. Deloitte Touche Tohmatsu*, 249 F. App'x 534, 537 (9th Cir. 2007) ("imperfect service" did not "foreclose[ ]" seeking "dismissal under Rule 12(b)(2) at the same time"). Sinoma's motion would be denied in the Ninth Circuit.

b. Seventh Circuit

Sinoma seeks to distinguish *O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1400-01 (7th Cir. 1993) stating "Sinoma would deeply contest its motion . . . was 'in essence a Rule 12 Motion' " and further "Sinoma was successful" in setting aside "default." BIO

18. But Sinoma admits the district court in *O'Brien* concluded otherwise and the Seventh Circuit found waiver and ruled defendant's Rule 12 defense "should have been raised . . . in the initial motion to set aside the entry of default." BIO 17. Sinoma's motion would be denied in the Seventh Circuit.

c. Tenth Circuit

Sinoma seeks to distinguish *United States v. 51 Pieces of Real Prop. Roswell, N.M.*, 17 F.3d 1306, 1314 (10th Cir. 1994) ("*51 Pieces*"), arguing it was an "in rem" action and "[t]here was no suggestion the party [there] sought to defend on the basis of a lack of minimum contacts." *Id.* at 21. Sinoma is wrong. Citing the Seventh Circuit in *O'Brien*, the Tenth Circuit in *51 Pieces* applied Rule 12(h)(1) after determining "the district court[] . . . lacked *in rem* jurisdiction." *51 Pieces*, 17 F.3d at 1309. It then held: "[Defendant's] response to the . . . amended motion for default was a defensive move that triggered the provisions of Rule 12(h) [and defendant] should have included its objection to . . . personal jurisdiction in its response . . . [and] failure . . . waived the defense." *Id.* at 1314. Sinoma's motion would be denied in the Tenth Circuit.

d. Fifth Circuit

Sinoma seeks to distinguish *Broad. Music, Inc. v. M.T.S. Enters., Inc.*, 811 F.2d 278 (5th Cir. 1987), arguing "it cannot be said Sinoma, like . . . *Broadcast Music*, had 'waived the [Rule 12] defense' . . . through

its participation in the case." BIO 16-17. Sinoma misapplies *Broadcast Music*.

The litigants in *Broadcast Music* were found to "waive[] their claim of . . . lack of jurisdiction . . . through the actions of their counsel, [who] voluntarily appeared in th[e] case." 811 F.2d at 281. Nearly identically, Sinoma **admits** it "filed an appearance" through its counsel for "contesting an entry of default" on the ground (only) it was "not properly served and thereafter [it] raised . . . **personal jurisdiction** . . . in a **second** motion to set aside as well as . . . an Answer." BIO 16 (emphasis added). Sinoma's motion would be denied in the Fifth Circuit.

e. Eleventh Circuit

Sinoma seeks to distinguish *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1300 (11th Cir. 2003), stating defendant "is not similarly situated" because "no default judgment issued." BIO 13. But Sinoma then switched positions stating the "never entered" default judgment was a "red herring." BIO 13. Summarized, *Worldwide Web* holds: "We . . . conclude that when a party asserts a . . . challenge to a default judgment . . . [Rule 12] challenges . . . on insufficient service of process grounds are waived if not squarely raised." 328 F.3d at 1300. Sinoma's motion would be denied in the Eleventh Circuit.

f. D.C. Circuit

Sinoma argues anew in this Court that it did not waive personal jurisdiction under Rule 12(h) because it was "successful" in setting aside default, thus springing an immediate comparison to the D.C. Circuit decision in *Gilmore*. BIO 8.

Like Sinoma, appellees in *Gilmore* claimed FSIA sovereign immunity and argued they did not waive personal jurisdiction in their "pre-answer motion." *Gilmore*, 843 F.3d at 965. But, unlike the Eighth Circuit, the D.C. Circuit in *Gilmore* rejected the argument. Importantly for these purposes, appellees in *Gilmore* prevailed in setting aside entry of default (not default judgment) and this fact had no relevance to the decision. *Id.* at 964-65. Sinoma's motion would be denied in the D.C. Circuit.

C. This Case Warrants Review

Sinoma does not dispute the question presented is narrow and it does not comment on the petition's claim to be a positive vehicle for resolution of the issue. The Eighth Circuit and Sixth Circuit opinions are the most recent decisions in this jurisprudence and they depart markedly from decades of uniform caselaw. They should not be allowed to proliferate beyond the already substantial split.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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