No. 14-1205

IN THE

Supreme Court of the United States

KORO AR, S.A.,

Petitioner,

v.

UNIVERSAL LEATHER, LLC,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE FEDERATION OF DEFENSE AND CORPORATE COUNSEL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MATTHEW W. SAWCHAK
Counsel of Record
STEPHEN D. FELDMAN
ELLIS & WINTERS LLP
4131 Parklake Avenue, Suite 400
Raleigh, NC 27612
(919) 865-7004
matt.sawchak@elliswinters.com

Counsel for Amicus Curiae

May 22, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES Page(s)

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

The Federation of Defense and Corporate Counsel (FDCC) was formed in 1936. It has an international membership of over 1400 defense and corporate counsel. FDCC members work in private practice, as general counsel, and as insurance claims executives. The FDCC is committed to promoting knowledge and professionalism in its ranks. Its members have a legacy of representing the interests of civil defendants. The FDCC regularly files amicus curiae briefs in cases that involve issues significant to the legal system.

STATEMENT OF THE CASE

The petitioner, Koro AR, S.A., is an Argentinian company that sells leather. The respondent, Universal Leather, LLC, is a North Carolina company that supplies leather to the furniture industry. This case involves Universal's purchase of leather from Koro in Argentina. Universal sued Koro for breach of contract in North Carolina. Koro moved to dismiss the case for lack of personal jurisdiction.

To support Koro's motion to dismiss, Koro's manager submitted a sworn declaration. The manager stated that Koro had no property or operations in the United States and had never advertised or solicited sales in the United States. He also stated that none of

---

[1] No part of this brief was composed by counsel for any party to this case. No person other than the *amicus curiae*, its members, and its counsel contributed money intended for this brief's preparation or submission. Counsel of record for both parties received notice, over ten days before the filing of this brief, of the amicus curiae's intention to file this brief. Both parties have consented to the filing of this amicus brief.

Koro's employees, agents, or representatives had traveled to the United States on Koro's behalf.

Universal responded to the Koro declaration with an affidavit from a Universal employee. That employee claimed that two men once came to North Carolina and solicited business from Universal. According to the affidavit, the two men told the Universal employee that they worked for Koro. These statements of hearsay were Universal's only evidence that the two men worked for Koro.

Koro then submitted declarations from the two men mentioned in the Universal affidavit. They declared that they worked for a Brazilian company and that they had never been employees or agents of Koro. In addition to submitting these rebuttal declarations, Koro objected to the admissibility of the hearsay statements in the Universal affidavit.

In response, Universal did not ask for an evidentiary hearing or to take jurisdictional discovery.

Based on this record, the district court granted Koro's motion to dismiss.

The court of appeals, however, vacated the district court's ruling. *Universal Leather, LLC v. Koro AR, S.A.*, 773 F.3d 553, 563 (4th Cir. 2014). The court of appeals held that the law under Rule 12(b)(2) required the district court to accept "Universal's version of the facts" as true. *Id.* at 560. The court of appeals also stated that the same law barred the district court from considering the admissibility of any statements in affidavits or declarations. *Id.* at 560–61. Under this reasoning, Universal's statement about the facts, admissible or not, became the court's version of the facts.

That version of facts, the Fourth Circuit concluded, showed that Koro had pursued Universal's business by having Koro personnel attend "a series of in-person solicitations and business meetings" in North Carolina. *Id.* at 562. Based on this critical factual assumption, the court held that Koro had purposefully availed itself of North Carolina, the forum state. *Id.*

The court of appeals remanded the case to the district court to decide whether exercising personal jurisdiction over Koro would be constitutionally reasonable. *Id.* at 563. The court of appeals wrote that the district court could assess evidentiary concerns with Universal's affidavits "at an evidentiary hearing or at trial." *Id.*

SUMMARY OF ARGUMENT

This Court, in recent decisions, has stressed the constitutional limits on personal jurisdiction. As the Court has recognized, these constitutional limits have special importance when, as here, foreign nationals are sued in the United States.

Koro's petition raises an important issue related to these constitutional limits: Will defendants continue to be able to use Rule 12(b)(2) of the Federal Rules of Civil Procedure to invoke the constitutional limits on personal jurisdiction, or will plaintiffs be able to use inadmissible evidence to sap the strength of Rule 12(b)(2) motions?

Granting Rule 12(b)(2) motions is the main way that courts enforce the constitutional limits on personal jurisdiction. Those motions often reduce expenses and burdens for litigants and district courts.

Koro's petition addresses a regrettably common evasive maneuver with Rule 12(b)(2) motions: trying to defeat a Rule 12(b)(2) motion by filing affidavits that state inadmissible evidence.

Most of the courts of appeals have rejected these evasive tactics. Those courts have tested the admissibility of evidence in connection with Rule 12(b)(2) motions. *See, e.g., Beydoun v. Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 506 (6th Cir. 2014); *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1277 (11th Cir. 2009); *J.S. ex rel. N.S. v. Attica Cent. Sch.*, 386 F.3d 107, 110 (2d Cir. 2004); *Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 683 (1st Cir. 1992); *FDIC v. Oaklawn Apartments*, 959 F.2d 170, 175 n.6 (10th Cir. 1992).

The Fourth and D.C. Circuits, however, have expressly allowed plaintiffs to use inadmissible evidence to make a prima facie showing of jurisdictional contacts—an approach that drastically reduces the potency of Rule 12(b)(2) motions. *See Universal Leather*, 773 F.3d at 560–61; *Mwani v. Bin Laden*, 417 F.3d 1, 7 (D.C. Cir. 2005).

This circuit split creates inconsistent evidentiary standards for Rule 12(b)(2) motions. The inconsistency undermines predictability in the law of personal jurisdiction. It also reduces the benefits of this Court's recent teachings on personal jurisdiction.

The decisions of the Fourth and D.C. Circuits have these effects because those decisions curtail a district court's ability to grant threshold Rule 12(b)(2) motions. That weakening of Rule 12(b)(2) clashes with a primary purpose of the minimum-contacts doctrine: protecting "the defendant against the burdens of litigating in a distant or inconvenient forum." *World-*

Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

These burdens can be especially severe when a defendant is from a foreign country. Imposing these burdens on foreign defendants threatens international comity—a principle that, this Court has held, has considerable weight.

The Fourth Circuit's and D.C. Circuit's frustration of Rule 12(b)(2) motions has another flaw as well: It conflicts with other aspects of the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Rule 56(c)(4) of the Federal Rules of Civil Procedure requires that affidavits or declarations in connection with summary-judgment motions contain admissible evidence and reflect the affiant's personal knowledge. There is no apparent reason—especially in view of the purpose of a Rule 12(b)(2) motion—why evidence on a Rule 12(b)(2) motion should deviate from this standard.

Likewise, Rule 1101 of the Federal Rules of Evidence states that the Rules of Evidence apply to civil proceedings. The standard applied by the Fourth and D.C. Circuits implies one or both of two untenable conclusions: Either a Rule 12(b)(2) motion is not a civil proceeding, or a non-rule-based exception to Rule 1101 exists.

Parties file supporting materials with pretrial motions in thousands of federal cases every year. Because of this widespread practice, clarifying the relationship among the rules that govern these supporting materials would benefit all federal courts.

In sum, Koro's petition gives the Court an opportunity to resolve a troubling circuit split and to settle the evidentiary standards that govern Rule 12(b)(2) motions. The FDCC urges the Court to accept that opportunity.

ARGUMENT

I. FEDERAL COURTS AND LITIGANTS NEED A UNIFORM EVIDENTIARY STANDARD FOR RULE 12(b)(2) MOTIONS.

Because of the circuit split that Koro's petition describes, the evidentiary standards that govern a Rule 12(b)(2) motion differ based on whether a foreign defendant is sued in one circuit or in another. This inconsistency undermines this Court's directive that the law on personal jurisdiction must be consistent, fair, and predictable. By granting Koro's petition, the Court can ensure that the evidentiary tests that govern Rule 12(b)(2) motions comply—on a nationwide basis—with this Court's teachings.

A. Unless This Court Grants Koro's Petition, Federal Courts Will Continue to Apply Inconsistent Evidentiary Standards to Rule 12(b)(2) Motions.

Due process requires that prospective defendants know where in the United States they are likely to face lawsuits. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–75 (1985). Indeed, predictability about where a company is subject to litigation can influence a company's "business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94–95 (2010).

Predictability in the law of personal jurisdiction is especially important for foreign corporations, for whom American litigation is generally an unfamiliar and unwelcome experience. *See Daimler AG v. Bauman*, 134 S. Ct. 746, 761–62 (2014) (noting that defendants, including a foreign corporation, must have "some minimum assurance" where they will be subject to suit (quoting *Burger King Corp.*, 471 U.S. at 472)).

The circuit split documented in Koro's petition undermines this predictability. Because of this circuit split, a foreign defendant who is sued in two different U.S. federal courts could, depending on where the courts are located, face opposite outcomes on identical Rule 12(b)(2) motions. These unpredictable outcomes would deny defendants even "minimum assurance" on where they could face litigation. *Id.*

This unpredictability is especially harmful in the context of Rule 12(b)(2) motions. A Rule 12(b)(2) motion, after all, is the main mechanism by which a foreign defendant can avoid "the burdens of litigating in a distant or inconvenient forum." *World-Wide Volkswagen*, 444 U.S. at 292. Courts usually decide these critical threshold motions by receiving affidavits on a defendant's forum contacts (or the lack of those contacts). 1 Steven S. Gensler, *Federal Rules of Civil Procedure: Rules and Commentary* 241 (2015 ed.). This efficient procedure allows federal courts to decide whether there is a reasonable basis for requiring a foreign defendant to spend significant resources on further litigation. *See* Jayne S. Ressler, *Plausibly Pleading Personal Jurisdiction*, 82 Temp. L. Rev. 627, 631 (2009).

The Fourth Circuit's decision destroys these efficiencies. Although, on a Rule 12(b)(2) motion, pleadings and affidavits are construed in the light most favorable to the plaintiff, that latitude does not—and should not—allow federal courts to decide motions on a basis divorced from admissible evidence.

In recent years, this Court has taken pains to clarify the law on personal jurisdiction. *See, e.g., Walden v. Fiore*, 134 S. Ct. 1115 (2014); *Daimler AG*, 134 S. Ct. 746; *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011); *J. McIntyre Mach., Ltd. v. Nicastro*, 131 S. Ct. 2780 (2011). Clarifying the law on the materials that parties can use to litigate personal jurisdiction is the logical next step.

B. The Evidentiary Standards for Rule 12(b)(2) Motions Are Especially Important in Cases with Foreign Defendants.

The circuit split described in Koro's petition has especially serious consequences for foreign defendants. These consequences, too, weigh in favor of granting Koro's petition.

This Court has been especially careful in its personal-jurisdiction analysis when foreign defendants are haled into United States courts. The Court has exercised this care because other countries have "procedural and substantive interests" in cross-border litigation. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115 (1987). Although other countries' interests "will differ from case to case," respecting those interests reflects the "care and reserve" that courts must show when they exercise jurisdiction over foreign nationals. *Id.* (quoting *United States v. First*

Nat'l City Bank, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

Indeed, cross-border litigation can pose "risks to international comity." *Daimler AG*, 134 S. Ct. at 763. Comity is the spirit of cooperation between countries that should influence how "a domestic tribunal approaches . . . cases touching the laws and interests of other sovereign states." *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, 482 U.S. 522, 543 n.27 (1987). Unpredictable exercises of personal jurisdiction over foreign defendants offend this comity. Such an affront can "invite retaliatory action from other nations." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). It can also disturb international agreements on reciprocal enforcement of judgments. *Daimler AG*, 134 S. Ct. at 763.

These considerations are becoming even more pressing over time. The increasingly global economy increases the number of foreign defendants who are being sued in our federal courts. Austen L. Parrish, *Sovereignty, Not Due Process: Personal Jurisdiction Over Nonresident Alien Defendants*, 41 Wake Forest L. Rev. 1, 42 (2006). Indeed, three out of the last four personal-jurisdiction cases decided by this Court have involved non-U.S. defendants. *See Daimler AG*, 134 S. Ct. at 750–51; *Goodyear Dunlop Tires*, 131 S. Ct. at 2850; *J. McIntyre Mach.*, 131 S. Ct. at 2785.

Koro's petition continues these trends. Koro is an Argentinian company that has no employees, no offices, and no property anywhere in the United States. Although the district court dismissed Universal's lawsuit against Koro, the Fourth Circuit revived that lawsuit by applying an evidentiary analysis that most other courts of appeals have rejected.

In sum, the Fourth Circuit's and the D.C. Circuit's approach to Rule 12(b)(2) motions fuels international concerns that United States courts unfairly assert broad jurisdiction over foreign defendants and subject those defendants to burdensome and costly pretrial procedures. *See* Parrish, *supra*, at 5–6. These concerns reinforce Koro's petition.

C. The Fourth Circuit's Evidentiary Standard Imposes Burdens on Litigants and District Courts.

The Fourth and D.C. Circuit's approach to Rule 12(b)(2) motions merits this Court's review for an additional reason: That approach ignores the burdens that Rule 12(b)(2) motions help courts avoid.

A court cannot issue a valid judgment against a defendant over whom it lacks personal jurisdiction. *See, e.g., Pennoyer v. Neff*, 95 U.S. 714, 732 (1877). Courts and parties therefore have a strong incentive, at the outset of a case, to identify any defendants over whom the court cannot exercise personal jurisdiction. A court does not want to consume its resources on a case in which no valid judgment is possible. Parties, likewise, do not want to spend their resources on a useless lawsuit.

The burdens of discovery are a critical concern of this type. This Court's decisions show careful attention to the burdens of discovery—and to crafting reasonable standards that guard against prematurely "unlock[ing] the doors of discovery." *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

Even discovery that is limited to personal-jurisdiction issues raises these concerns. As this Court has noted, discovery on personal jurisdiction would burden a non-U.S. defendant "with expense and delay." *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 435 (2007). In view of the expense and delay of jurisdictional discovery, several courts of appeals have recognized that international defendants "should not be subjected to extensive discovery in order to determine whether personal jurisdiction over them exists." *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 946 (7th Cir. 2000); *accord United States v. Swiss Am. Bank, Ltd.*, 274 F.3d 610, 639–40 (1st Cir. 2001); *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185–86 (2d Cir. 1998).

Rule 12(b)(2) motions are especially well-suited to address these concerns. *See Manual for Complex Litigation (Fourth)* § 31.71, at 556 (2004) (explaining that a successful Rule 12(b)(2) motion can "reduce or eliminate the need for discovery"). An early conclusion that a district court lacks personal jurisdiction over a defendant can expose a "basic deficiency" in a case, reducing the "expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (quoting 5 Charles Alan Wright et al., *Federal Practice and Procedure* § 1216, at 233–34 (3d ed. 2007)) (addressing Rule 12(b)(6) motions).

The Fourth Circuit's decision in this case overlooks these important purposes of Rule 12 motions. The decision requires district courts to accept hearsay and other inadmissible materials as "facts" that can establish a prima facie case for personal jurisdiction. *Universal Leather*, 773 F.3d at 560–61. Under the

Fourth Circuit's decision, a court can test jurisdictional evidence for admissibility only *after* the court leaves the threshold—that is, only if the court holds an evidentiary hearing on personal jurisdiction or defers the issue to trial. *Id.* at 563. These alternatives are far more expensive than deciding a Rule 12(b)(2) motion based on the papers before the court.

This case shows the uselessness of deferring evidentiary inquiries until later in a case. The jurisdictional dispute here turns on whether the two men who visited Universal were Koro's agents. If so, their activities in and contacts with North Carolina would be imputed to Koro. If not, this case would involve no contacts at all between Koro and North Carolina.

On this critical factual issue, the only evidence that Universal submitted was the declaration of a Universal employee. He said that the two men told him that they worked for Koro. Koro, however, provided direct evidence from those two men that contradicted the employee's statement. In response to this evidence, Universal did not request an evidentiary hearing or the opportunity to take jurisdictional discovery. Neither the magistrate judge nor the district court, moreover, saw any need for those proceedings. Instead, those judges decided Koro's 12(b)(2) motion on the papers.

Thus, when the Fourth Circuit held that the district court could decide the admissibility of the Universal employee's affidavit only after "an evidentiary hearing or at trial," *id.*, it ordered further proceedings that neither the parties nor the district court found necessary. This holding deprives Koro of the main benefit of Rule 12(b)(2): to spare it from the burden and expense of defending a lawsuit in another country.

By granting Koro's petition, this Court can clarify whether the Federal Rules of Civil Procedure call for this surprising and unjust result.

II. CONCERNS BEYOND RULE 12(b)(2) ADD SUPPORT TO KORO'S PETITION.

The issue raised by Koro's petition—the evidentiary standards for materials filed in connection with a Rule 12(b)(2) motion—does not exist in a vacuum. Federal courts consider a wide variety of pretrial motions in civil cases. Koro's petition raises important questions about the interplay among Civil Rules 12(b)(2), 43(c), and 56(c)(4) and Evidence Rule 1101.

Rule 43(c) of the Federal Rules of Civil Procedure expressly authorizes district courts to decide motions based on affidavits. *See* Fed. R. Civ. P. 43(c). Like Rule 12, however, Rule 43(c) is silent on the evidentiary standards that govern affidavits that courts use to decide motions.

The evidentiary standards for these affidavits, however, *are* addressed by a different rule: Rule 56(c), which governs summary-judgment motions. Rule 56(c)(4) creates three standards for any "affidavit or declaration used to support or oppose a motion." Fed. R. Civ. P. 56(c)(4). First, the affidavit or declaration "must be made on personal knowledge." *Id.* Second, it must present "facts that would be admissible in evidence." *Id.* Finally, it must demonstrate "that the affiant or declarant is competent to testify on" its contents. *Id.*

Koro's petition gives the Court an opportunity to decide whether these same standards govern other types of pretrial motions, including Rule 12(b)(2) motions. There are good reasons for applying the

standards in Rule 56(c)(4) to affidavits filed in connection with a Rule 12(b)(2) motion. After all, the purposes of the two motions are similar: to end a lawsuit that has no basis for proceeding further before that lawsuit creates additional burdens for the court and the parties. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (holding that Rule 56 prevents trial of issues with "no factual basis").

At the summary-judgment stage, a plaintiff is required to show, on paper, that it can support its claims *with admissible evidence*. *See* Fed. R. Civ. P. 56(c). When a plaintiff relies on written materials to establish personal jurisdiction, courts should demand, likewise, that those materials forecast admissible evidence. As shown above, the aggregate burdens imposed on a foreign defendant after a court denies a Rule 12(b)(2) motion are serious indeed. *See supra* p. 10–12. In view of these burdens, it makes perfect sense to demand that a plaintiff oppose a Rule 12(b)(2) motion by forecasting admissible evidence. It makes no sense, in contrast, to require a district court to credit *inadmissible* evidence, as the Fourth Circuit did here. *Universal Leather*, 773 F.3d at 560–61.

For these reasons, applying the standards in Rule 56(c)(4) to Rule 12(b)(2) motions fits the context and purpose of Rule 12(b)(2) motions. This harmonization of Rule 12, 43, and 56 would promote "the just, speedy and inexpensive" resolution of cases. Fed. R. Civ. P. 1.

Testing the admissibility of materials submitted in connection with a Rule 12(b)(2) motion would also harmonize Rule 12(b)(2) procedure with the Federal Rules of Evidence. The Rules of Evidence apply not just to trials, but to "civil cases and proceedings." Fed. R. Evid. 1101(b). This Court has recently signaled that the Rules of Evidence govern the evidence filed in

connection with significant pretrial motions. In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), the Court expressed doubt about a district court's conclusion that expert testimony submitted with a class-certification motion need not satisfy Rule 702 and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *Wal-Mart*, 131 S. Ct. at 2553–54.

On a motion to dismiss for lack of personal jurisdiction, this same analysis applies with even greater force. District courts have cited Rule 1101 for this conclusion. For example, one district court, citing Rule 1101, rejected hearsay and matters beyond the affiant's personal knowledge in an affidavit that was submitted with a Rule 12(b)(2) motion. *Ames v. Whitman's Chocolates*, No. 91-3271, 1991 WL 281798, at *2–3 (E.D. Pa. Dec. 30, 1991). Similarly, another district court, citing Rule 1101, applied Rule 601 of the Federal Rules of Evidence when the court evaluated the admissibility of statements in an affidavit that was submitted with a Rule 12(b)(2) motion. *Mann v. Mann*, No. 1:05CV687 (JCC), 2005 WL 3157571, at *2–3 (E.D. Va. Nov. 22, 2005).

The Fourth Circuit's decision in this case overlooks these principles. That decision requires courts to *disregard* admissibility when courts evaluate affidavits submitted with a Rule 12(b)(2) motion. The court held directly that in this setting, a court may not "address any questions regarding the ultimate admissibility of evidence." *Universal Leather*, 773 F.3d at 561.

As shown above, the Fourth Circuit's evidentiary analysis overlooks the fact that a Rule 12(b)(2) motion is a civil proceeding governed by the Rules of Evidence. *See* Fed. R. Evid. 1101(b). By granting certiorari, this Court can clarify and restore the relationship between pretrial motions and the Rules of Evidence.

CONCLUSION

For the foregoing reasons, the FDCC urges the Court to grant Koro's petition.

Respectfully submitted,

MATTHEW W. SAWCHAK
Counsel of Record
STEPHEN D. FELDMAN
ELLIS & WINTERS LLP
4131 Parklake Avenue, Suite 400
Raleigh, NC 27612
(919) 865-7004
matt.sawchak@elliswinters.com

Counsel for Amicus Curiae

May 22, 2015