No. 09-

IN THE

Supreme Court of the United States

FUSHENG LIU,

Petitioner,

v.

KONINKLIJKE PHILIPS ELECTRONICS, N.V.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a party contesting the jurisdiction of the district court must first move to vacate or set aside a default judgment pursuant to either Rule 55(c) or Rule 60(b) of the Federal Rules of Civil Procedure in the District Court as a prerequisite to appealing the default judgment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Fusheng Liu ("Liu"), respectfully petitions the Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra.*, 1a-3a) has not been selected for publication in the Federal Reporter but can be found at 2009 WL 2030120 (9th Cir. 2009) and 328 Fed. Appx. 455. The opinion of the District Court on which Liu's appeal is based (App., *infra*, 4a-11a) is unreported.

BASIS FOR JURISDICTION

Judgment was entered in the United States Court of Appeals for the Ninth Circuit on July 1, 2009. This Court has jurisdiction to review the judgment of the Ninth Circuit pursuant to U.S.C. Const., Art. III, § 2, cl. 2 and 28 U.S.C. § 1254(1).

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

A. 28 U.S.C. § 1291

> "The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District

Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

B. Federal Rule of Civil Procedure ("FRCP") 55(c).

"**Setting Aside a Default or a Default Judgment.** The court may set aside an entry of default for good cause, and it may set aside a default judgment under Rule 60(b)."

C. FRCP 60(b).

"**Grounds for Relief from a Final Judgment, Order, or Proceeding.** On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief."

D. FRCP 60(c)

"Timing and Effect of the Motion.

(1) ***Timing.*** A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) ***Effect on Finality.*** The motion does not affect the judgment's finality or suspend its operation."

E. Federal Rule of Appellate Procedure ("FRAP") 4(a)(1).

"(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

> (A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered."

STATEMENT OF THE CASE

The instant matter presents a narrow question that bears broad implications. The Petitioner, Liu, challenges the dismissal of his appeal by the Ninth Circuit Court of Appeal which erroneously held that a party who contests the jurisdiction of the District Court must first bring a motion to set aside a default judgment under FRCP 55(c) and 60(b) as a prerequisite to challenging the judgment on appeal.

In the underlying District Court proceedings, Liu, a Chinese citizen domiciled in China, claimed that he was not properly served with a summons and complaint by reason of defective service. On special appearance, Liu moved to set aside his default pursuant to FRCP 55(c). The District Court granted Liu's motion but took the additional unprecedented step of laying out for the Respondent specific directions for effecting service of the complaint and summons through publication and mail.

Respondent Koninklijke Philips Electronics N.V. (hereinafter "Philips"), after following the District Court's directions, sought a subsequent entry of default, which was later reduced to a default judgment. Liu appealed the final judgment to the Ninth Circuit seeking to set aside the default judgment on the grounds that

the summons and complaint were not served as required by law. The Ninth Circuit, in dismissing the appeal, held that Liu's failure to bring a second motion under Rule 55(c) or 60(b) was a bar to the prosecution of his appeal of the default judgment.

The challenge to the Ninth Circuit's decision is founded on three discrete but substantial grounds.

1. No statute or regulation requires the filing of a motion under FRCP 55(c) or 60(b) as a predicate to the appeal of a final judgment;

2. The Ninth Circuit's decision is at odds with other Circuits' decisions over the application of FRCP 55(c) and 60(b) in similar circumstances; and

3. The Ninth Circuit Court's decision creates a precedent that potentially creates impediments to a party's rights to seek protections under the Fourteenth Amendment of the United States Constitution and Executive Branch treaties, specifically, the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (the "Hague Convention").

A. THE DISTRICT COURT PROCEEDINGS

Liu is a citizen and domiciliary of the People's Republic of China. He is and was the President/CEO of a number of companies that at one time manufactured and sold consumer electronics including, among other things, DVD recorders. These companies included KXD

Digital Entertainment, Ltd. (a Singapore company), Shenzhen Kaixinda Electronics Co., Ltd. (a Chinese company), Shenzhen KXD Multimedia Co., Ltd. (a Chinese company), and KXD Technology, Inc. (a California corporation) (hereinafter, collectively, the "KXD Companies"). The KXD Companies manufactured consumer electronics on behalf of a number of international companies such as, for example, Polaroid and Coby Electronics. They also manufactured and sold their own consumer electronics under the brand name "Astar."

On December 28, 2005, Philips, a Netherlands corporation, filed suit against a number of consumer electronics manufacturers including the KXD Companies. Fusheng Liu was not named as a defendant but was personally served with a copy of the complaint on behalf of the KXD Companies while at the Consumer Electronics Show ("CES") in Las Vegas, Nevada. The complaint alleged misappropriation of trade secrets, violation of the Lanham Act Unfair Competition, False Advertising, California Business & Professions Code Unfair Competition violations, and Conversion. The thrust of the complaint was Philips' allegation that the defendants infringed Philips' DVD+ReWritable ("DVD+RW") logo design (hereinafter, the "Trademark-In-Suit") by placing an identical or similar design on their products.

The complaint and first amended complaint allege three federal causes of action under 15 U.S.C. §§ 1114 and 1125 seeking both monetary and injunctive relief. The district court has original subject matter jurisdiction over these federal claims pursuant to

15 U.S.C. §§ 1116(a) and 1121(a) and 28 U.S.C. §§ 1331 and 1338(a). The complaint and first amended complaint also allege two pendent state law claims which arise from the same controversy and derive from a common nucleus of operative facts. The district court has jurisdiction over these pendent claims pursuant to 28 U.S.C. § 1367(a).

Liu was not added as a defendant in the case until September 2007. On October 2, 2007, Philips purportedly delivered a copy of the summons and first amended complaint to property Liu owned in San Marino, California (hereinafter, the "San Marino House"). The process server left copies of the summons and complaint with a person who answered the door named Annie An. They also purportedly mailed the papers the following day. Annie An was not a relative of Mr. Liu and did not reside at the home. Mr. Liu was not in the United States at the time and had only visited the house sporadically in the previous 3 years. His L1 visa expired in January 2008 and he had not been to the United States since July 2007.

On November 8, 2007, Philips moved for entry of clerk's default against Liu for failure to answer the complaint served on Ms. An. Less than a day later, the Clerk entered default against Liu. On December 17, 2007, Liu specially appeared through his counsel and moved to set aside the default on the ground that the service of the summons and complaint was defective. Liu argued that, though he had notice of the action, such notice was insufficient to cure defective service of process. He argued that service was defective because the San Marino House was not his dwelling house or

usual place of abode and that, even if it had been, Ms. An was not a resident of the San Marino House or otherwise authorized to accept service as required by FRCP 4(e) and Nevada Rule of Civil Procedure 4(d). Liu further argued that, because he was domiciled and residing in China, service was required to be effected pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents (the "Hague Convention") or otherwise through personal service upon his entry into the United States.

The District Court granted Liu's motion on February 4, 2008 and set aside the default. The District Court agreed that service was improper. The Court, although finding the San Marino House was Liu's dwelling or usual place of abode and that his wife and children resided there, found there was no admissible evidence that Ms. An resided at the San Marino House.

Upon setting aside Liu's default, the Court stated, "Given the difficulty presented in serving Defendant, the Court *will allow* Plaintiff to serve Defendant by publication." [Italics added.] The Court then ordered that a copy of the summons and complaint be mailed to the San Marino House and that service could be made by publication in a local Nevada newspaper "because Defendants already have actual notice of these proceedings." Liu's answer was due twenty (20) days after completion of service.

Following the District Court's directions, Philips' service on Liu was purportedly completed on March 15, 2008. Liu, who contests service was proper, did not answer. On April 9, 2008, Philips filed a request for entry of default and Liu's default was entered the next day.

Philips filed a motion for default judgment against Liu on May 2, 2008. Liu, still contesting service of the summons and complaint, did not oppose the motion. On May 9, 2008, the Court set a hearing on Philips' motion for June 11, 2008. A hearing on default judgment damages was held on June 11 and 12, 2008.

On July 2, 2008, the District Court entered judgment in favor of Philips and against the KXD Companies and Liu, jointly and severally, in the amount of $112,152,659.40 in damages, and $5,000,000.00 in punitive damages. The Court also granted Philips' motion for attorney's fees in the amount of $3,389,723.08.

Liu did not move to set aside the default under FRCP 55(c) and did not move to set aside the default judgment under FRCP 60(b) because the findings on which the District Court based its instructions to serve Liu – that Liu was domiciled at the San Marino House and that Liu had actual notice of the proceedings – had already been addressed by Liu in his first Rule 55(c) motion. Rearguing positions that were already addressed in the previous motion and rejected by the District Court would have been futile. In addition, Liu would have had to further argue to the very District Court that issued the Order that its specific directions for serving the summons and complaint were erroneous.

B. THE PROCEEDINGS IN THE NINTH CIRCUIT

Liu appealed the District Court's judgment entered against him on August 1, 2008. Liu argued that the District Court's February 4, 2008 Order authorizing service upon him by publication in a Nevada newspaper and by mail to the San Marino House was improper in that:

(1) the Court's finding that the San Marino House was Liu's domicile or usual place of abode was erroneous and not supported by the evidence;

(2) service as directed by the court in the February 4 Order was not permitted under FRCP 4(f)(3);

(3) that the allowance of service by publication in a Nevada newspaper failed to comport with the due process clause of the Fourteenth Amendment of the United States Constitution; and

(4) that service by publication was not authorized by either Nevada law (where the case was pending) or California law (where the San Marino House was located).

Though FRAP 27 and Ninth Circuit rules provide a vehicle for dismissing an appeal through a formal motion procedure, Philips requested dismissal of Liu's appeal in its answering brief. Relying on *Consorzio Del Prosciutto Di Parma v. Domain Name Clearing Co.*,

LLC, 346 F.3d 1193, 1195 (9th Cir. 2003) (hereinafter, "*Consorzio*") and *In re Lam*, 192 F.3d 1309, 1311 (9th Cir. 1999) (hereinafter, "*Lam*"). Philips argued that Liu's appeal must be summarily dismissed because Liu allegedly did not move under FRCP 55(c) or 60(b) to set aside the second default or the default judgment, respectively, entered against him. The Ninth Circuit, relying on these very same cases, dismissed the appeal.[1]

First and foremost, nothing in the plain language of Rules 55(c) or 60(b)[2] supports the opinions of the Ninth Circuit in *Consorzio* and *Lam*. These case precedents therefore amount to the creation of procedural requirements not otherwise required by the Federal Rules of Civil Procedure. The panels in *Consorzio* and *Lam* based their opinions not on the language of the Rules but on the gamesmanship of the appealing parties who as the District Courts in those cases found treated the Federal courts "like a casino game" and entered the

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[1] But *see Ackra Direct Marketing Corp. v. Fingerhut Corp.*, 86 F.3d 852, 855, fn. 3 (8th Cir. 1996) ["Appellants' decision not to file a Rule 60(b) motion does not hinder their appeal to this Court because a Rule 55(b) default judgment is a final judgment and may be appealed immediately"]; *Pecarsky v. Galaxiworld.com Ltd.*, 249 F.3d 167, 170-171 (2nd Cir. 2001) [defendant has option of moving to vacate default judgment under FRCP 55(c) or 60(b) or, because default judgment is final, appealable order, skipping motion to vacate and appealing]; *U.S. v. Sang Woo Kim*, 242 Fed. Appx. 355, 357-358 (7th Cir. 2007) [defendant "was not required to challenge in the district court the entry of default before appealing the default judgment"].

[2] All subsequent references to "Rules" in this Petition refer to the Federal Rules of Civil Procedure unless otherwise indicated.

litigation "on sheer caprice." *See Lam*, *supra*, 192 F.3d at 1311 and *Consorzio*, *supra*, 346 F.3d at 1195 (*quoting Lam*).

In his reply brief and oral argument, Liu pointed out that Liu *did* successfully move to set aside the first default entered against him which addressed nearly all of the issues raised on the present appeal. For example, Liu moved to set aside the default pursuant to FRCP 55(c) on the ground, among other things, that the San Marino House was not Liu's "domicile" or "place of abode" and that, since Liu was domiciled and resided solely in China, the only available means of service was personal service in the United States or service under the Hague Convention.

Though Liu did not move to set aside the second default on the ground that service by publication was improper, his appellate argument underlying this issue — that Liu was not domiciled at the San Marino House — was already presented and ruled upon on his first Rule 55(c) motion. Furthermore, though Liu had argued in his first Rule 55(c) motion that actual notice of litigation is insufficient to cure defective service, the District Court nevertheless authorized service by publication in a Nevada newspaper on the ground that Liu had actual notice of the proceedings. These arguments had therefore already been made to the District Court. Presenting the same arguments again would not only have been improper, but futile and a waste of time and resources for all parties and the Court. Such an exercise in futility is not required under the plain language of either FRCP 55(c) or 60(b). *See Ackra Direct Marketing Corp. v. Fingerhut Corp.*, *supra*, 86

F.3d at 855, fn. 3. In *Ackra*, the Court held that an appellant's failure to make a motion to vacate a default judgment under Rule 60(b) was not a bar to the filing of an appeal of the judgment since the same arguments were duplicative of those made in response to a magistrates report and recommendation.

Liu also pointed out to the Ninth Circuit that the idea of requiring a party to make a Rule 60(b) motion prior to bringing an appeal is not supported by the plain language of the statute as Rule 60(c) makes clear that a Rule 60(b) motion, which may be made as much as a year after judgment is entered, does not affect the finality of the judgment. Accordingly, an aggrieved party would still be required to file an appeal within the time prescribed by FRAP 4 or otherwise lose his or her right to appeal the judgment. *See Browder v. Director, Dept. of Corrections of Illinois*, 434 U.S. 257, 263, fn. 7 ["A motion for relief from judgment under Rule 60(b) . . . does not toll the time for appeal from, or affect the finality of, the original judgment"].

In other words, because that judgment is deemed final, even if a defendant moves to set aside a judgment under Rule 60(b), the time to appeal continues to tick. Under the rule advocated by Philips and the 9th Circuit, a party would be required to move to vacate a default judgment before filing an appeal. In many cases, as here, the time to appeal is 30 days after entry of judgment. FRAP 4(a)(1)(A). If the Court does not decide the motion within 30 days, the aggrieved party will have lost his or her right to appeal the final judgment.

In addition, none of the grounds raised on this appeal fit within the conditions for relief set forth in Rule 55(c) or 60(b). Liu does not appeal on the grounds of (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party; (4) the judgment is void; or (5) the judgment has been satisfied, released or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable. FRCP 60(b). Nor do the grounds for appeal raised here fit into the catchall category of "any other reason that justifies relief" (FRCP 60(b)(6)) or "good cause" (FRCP 55(c)). *See Wagner v. U.S.*, 316 F.2d 871, 872 (2nd Cir. 1963) ["The catch-all clause of Rule 60(b)(6) . . . cannot be read to encompass a claim of error for which appeal is the proper remedy"].

The Ninth Circuit therefore mistakes the nature of the present appeal. The basis for Liu's appeal has little to do with the default judgment or even the default itself. Yes, Liu is seeking to overturn the default judgment, but the basis for Liu's appeal arose long before default and default judgment were entered. The bases for his appeal are the erroneous findings and defective instructions made by the District Court in its February 4, 2008 Order which was not ripe for appeal until after entry of judgment.

Liu was therefore left with the following choices after entry of that order: (1) appear even though he was

not properly brought under the Court's jurisdiction through proper service, (2) move to set aside the default on issues which were already decided by the Court which would have therefore been futile and a waste of judicial resources, or (3) wait until entry of the default judgment and appeal. Liu logically chose the last option. As set forth below, his election is consistent with the applicable statutes and rules of civil procedure.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI TO DECIDE WHETHER A PARTY MUST FIRST MOVE TO SET ASIDE OR VACATE A DEFAULT JUDGMENT IN THE DISTRICT COURT BEFORE HE OR SHE IS PERMITTED TO APPEAL THE JUDGMENT

A. THE NINTH CIRCUIT DECISION IS AN UNWARRANTED ACT OF JUDICIAL LAWMAKING THAT IS UNSUPPORTED BY THE PLAIN LANGUAGE OF RULES 55(c) AND 60(b) AND THE POLICIES AND PURPOSES OF SAID RULES

The issue presented centers on the proper interpretation of existing statutes or rules by the District and Circuit courts. When interpreting a statute or rule, a Court must start with the language of the statute. *Knight v. C.I.R.*, 552 U.S. 181 (2008). In doing so, a Court should "resist reading words or elements into a statute that do not appear on its face." *Bates v. U.S.*, 522 U.S. 23, 29 (1997). Abandoning these principals, the Ninth Circuit, has infused into Rules 55(c)

and 60(b) a procedural hurdle that does not otherwise exist within the four corners of these Rules. In the process, the Ninth Circuit has established a group of precedents that conflict with decades of appellate practice.

Both Rule 55(c) and 60(b) specify the grounds by which a District Court may set aside an order or judgment. They do not prescribe any procedural prerequisites or requirements that are not articulated therein. Nothing in the plain language of either Rule, including their subsections, requires a party to make a motion in the District Court to set aside or vacate an order or judgment as a prerequisite to appeal. Through its case precedent (*see Consorzio, supra* 346 F.3d at 1195 and *Lam, supra,* 192 F.3d at 1311), the Ninth Circuit has created an extra-statutory procedural construct that was not otherwise authorized or intended by the Supreme Court.

28 U.S.C. § 1291 is clear that the "courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States." While the primary policy behind the statute is to avoid piecemeal appeals, one cannot ignore the clear effect of this provision in conferring jurisdiction upon the Federal Courts of Appeals over all appeals from final decisions of the District Courts. *See, e.g., Ackra Direct Marketing Corp. v. Fingerhut Corp., supra,* 86 F.3d at 855, fn. 3.

The Ninth Circuit's decisions in *Consorzio, Lam* and the present case, however, have the undesired effect of divesting the Federal Courts of Appeals of appellate

jurisdiction over certain final decisions. Read in conjunction with the filing deadlines of FRAP 4(a) and FRCP 60(c), the Ninth Circuit decisions compound the problem by potentially foreclosing a party's right to appeal the judgment. This happens in cases where, as here, the appellant is the unlucky recipient of default judgment and, though Rule 60(c) allows him as much as a year to move to vacate the judgment, he is denied the right to an appeal if he does not first file the Rule 60(b) motion and obtain a decision within the thirty (30) day appeal deadline of FRAP 4(a). The window for appealing the final default judgment is therefore closed. By establishing this so called exhaustion of remedies requirement into Rules 55(c) and 60(b), the Circuit Court of Appeals is effectively divesting itself of appellate jurisdiction in these cases. Clearly, however, these rules were not intended to create an exhaustion requirement in advance of a right to appeal.

It is generally accepted that Rule 60 was created to codify and simplify common law methods of gaining equitable relief from unfair judgments *after* the time for appeal has expired — not to establish a perquisite to filing an appeal of a final judgment. *Lafferty v. District of Columbia*, 277 F.2d 348, 351, fn. 6 (D.C.Cir. 1960) (*citing* 3 Barron & Holtzoff, *Federal Practice and Procedure* § 1321 (1958)), *accord Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693, 696 (5th Cir. 1983).

The Supreme Court adopted Rule 60 in 1938 to provide the District Courts with some "flexibility" to set aside or alter their own final judgments. *See* Moore &

Rogers, *Federal Relief from Civil Judgments*, 55 Yale L.J. 623, 626, *et seq.* (1946). At the time the rule was promulgated:

> "the term of court was the critical factor in the district court's power over its final judgments at law and in equity. While the district court had plenary power over such judgments during the term, it was in general without power to reconsider its final judgments at law and in equity after the expiration of the term, unless (1) the proceeding seeking relief was begun within the term, or (2) the court, during the term, reserved control over the judgment and the proceeding seeking relief was begun within that extended period." *Id.* at 627; *see also U.S. v. Mayer*, 35 U.S. 55 (1914) [illustrating the effect of the so-called "term rule"].

Due to the harshness of the term rule and its unequal application, Rule 60 was adopted among other rules to set definite time limits for challenging judgments and orders and to codify the grounds under which such motions may be brought for reconsidering them (formerly embodied in archaic and confusing equitable writs, *e.g.*, *coram nobis*, *coram vobis*, *audita querela*, etc.). Moore & Rogers, *Federal Relief from Civil Judgments*, *supra*, 55 Yale L.J. at 627, 630, *et seq.*

Like the "ancient" writs that it replaced, Rule 60(b) was designed to provide a party with equitable relief from a judgment after the expiration of the time for appeal. *Lafferty*, *supra*, 277 F.2d at 351, fn. 6. It is clear

then that Rule 60 was not intended to set up a prerequisite to the prosecution of an appeal but rather to give a party a chance to seek the District Court's correction of an otherwise erroneous decision where the time to appeal had already expired.

As with all Rules of Civil Procedure, Rule 55(c) was adopted to promote a public policy in favor of decisions on the merits, a policy that certainly applies to this petition. *See, e.g., Kennerly v. Aro, Inc.*, 447 F.Supp. 1083, 1089 (D.Tenn. 1977) (*citing Foman v. Davis*, 371 U.S. 178, 181-182 (1962)). The rule and the policy behind it are designed to protect the defaulting party. Nothing in the rule suggests that a party must make a motion under Rule 55(c) to set aside a default or forever lose the right to challenge, as here, the sufficiency of service. Such a rule as adopted by the Ninth Circuit fails to comport with the public policy behind Rule 55(c).

The decision of the Ninth Circuit in the case at bar is an unjustifiable act of legislating from the bench which is not supported by the Federal Rules of Civil Procedure. Such judicial lawmaking represents a substantial digression from the accepted and usual course of judicial proceedings and justifies the granting of the instant petition.

B. THE RULE FASHIONED IN THIS CASE BY THE NINTH CIRCUIT IS AT ODDS WITH THE DECISIONS OF AT LEAST THREE OTHER CIRCUITS

Certainly, to say that a statute or rule *authorizes* a certain act is not to say that the same statute or rule *mandates* such an act. The Ninth Circuit apparently stands alone in applying an exhaustion requirement in cases involving appeals of default judgments. The Second Circuit holds that a defendant against whom a default judgment has been entered has the option of either moving to vacate the default judgment pursuant to Rule 55(c) or 60(b) or, since a default judgment is a final appealable order, skipping the motion to vacate and appealing.[3] *See Pecarsky v. Galaxiworld.com Ltd.*, *supra*, 249 F.3d at 170-171. Similarly, the Seventh Circuit holds that a defendant is "not required to challenge in the district court the entry of default before appealing the default judgment." *U.S. v. Sang Woo Kim*, *supra*, 242 Fed. Appx. at 357-358. Finally, the Eighth Circuit has held that a party may appeal the entry of default judgment without having first brought a motion to vacate pursuant to Rule 60(b) because default judgment is a final judgment subject to appeal pursuant to

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[3] This option is also evidenced from the California law on which Rule 60(b) is based. *See Federal Relief from Civil Judgments*, *supra*, 55 Yale L.J. at 644 ["the California decisions are helpful to the extent that they show that Section 473 of the California Code (from which Rule 60(b) was adopted) is not exclusive . . . [¶] Judicial error may be remedied by motion for new trial; by motion to vacate a judgment or decree . . . ; and by appeal].

28 U.S.C.§ 1291. *Ackra Direct Marketing Corp. v. Fingerhut Corp., supra,* 86 F.3d at 855, fn. 3.

The holdings in *Pecarsky*, *Kim*, and *Ackra* stand for the proposition that a right to set aside a default or a final judgment under Rules 55(c) and 60(b) and the right to appeal a final judgment are mutually exclusive. These holdings are consistent with a slew of other Circuit and District Court authority holding that Rule 60(b) was not intended to supersede the normal and ordinary channels of relief, namely appeal to the Circuit Courts of Appeal. *See, e.g., In re SDDS, Inc.*, 225 F.3d 970 (8th Cir. 2000), *cert. denied* 532 U.S. 1007, [motion for relief from judgment cannot be used to relitigate the merits of a district court's prior judgment in lieu of a timely appeal]; *McKnight v. U.S. Steel Corp.*, 726 F.2d 333 (7th Cir. 1984) [Rule 60(b) is not intended to correct errors of law made by district court in the underlying decision which resulted in final judgment, and thus the appropriate way to seek review of trial court's alleged error was by timely appeal]; *Swam v. U.S.*, 327 F.2d 431 (7th Cir. 1964), *cert. denied* 379 U.S. 852, [this rule was not intended to be an alternative method to obtain review by appeal or as means of enlarging by indirection time for appeal]; *Loucke v. U.S.*, 21 F.R.D. 305 (S.D.N.Y.1957) [Rule 60(b) was not designed to supersede the normal and ordinary channels of relief]; *Selkridge v. United of Omaha Life Ins. Co.*, 237 F.Supp.2d 600 (D.Virgin Islands 2002), *aff'd* 360 F.3d 155 [motion for relief from judgment due to mistakes, inadvertence, excusable neglect, newly discovered evidence, or fraud, may not be used as substitute for appeal]; *Martin v. Chemical Bank*, 940 F.Supp. 56 (S.D.N.Y.1996), *aff'd* 129 F.3d 114 [rule governing relief

from judgment may not be used as a substitute for a timely appeal]; *U.S. v. Johnson*, 934 F.Supp. 383 (D.Kan.1996) [Not substitute for direct appeal; it is *not opportunity for court to revisit issues already addressed in underlying order* or to consider arguments and facts that were available for presentation in underlying proceedings].

The decision of the Ninth Circuit in this case conflicts with current case law in the Second Circuit, Seventh Circuit and Eighth Circuit. Such conflict will necessarily lead to confusion amongst litigants within those Circuits and particularly outside those Circuits as to the proper procedure for challenging a default judgment. The Supreme Court should therefore grant this Petition in order to resolve these conflicts.

C. GIVEN THE FACTS OF THIS CASE, THE NINTH CIRCUIT'S DECISION CREATES A PRECEDENT WHICH POTENTIALLY CREATES IMPEDIMENTS TO A PARTY'S RIGHTS TO SEEK PROTECTIONS UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND EXECUTIVE BRANCH TREATIES, SPECIFICALLY, THE HAGUE CONVENTION

There is an erosion factor at work here - erosion in the principals of due process and Executive authority. The law is simply that "before a court may exercise personal jurisdiction over a defendant, there must be *more than* notice to the defendant . . . [t]here also must be a *basis* for the defendant's amenability to service of

summons. Absent consent, this means there must be *authorization* for service of summons on the defendant." *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104, (1987) (emphasis added). An individual or entity "is not obliged to engage in litigation unless [officially] notified of the action . . . under a court's authority, by formal process." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999).

This Petition on its surface concerns the procedural question of whether a defendant must move to set aside a default or default judgment in a District Court pursuant to Rule 55(c) or 60(b). Nonetheless, deeper and far more significant issues of due process are unavoidably intertwined. In addition, this case also implicates the integrity of the Hague Convention which the District Court conspicuously attempted to circumvent by authorizing service by mail and by publication in a newspaper in Nevada where Liu had never resided. By sidestepping the appeal in the way it did, the Ninth Circuit avoided having to deal with the trampling of Mr. Liu's rights and privileges under the United States Constitution and The Hague Convention Treaty.

The District Court in this case appeared to be driven by a perceived difficulty, unsupported by the evidence, in serving Liu with the summons and complaint. It is unclear from the District Court's conclusory findings whether this perceived difficulty was rooted in Liu being domiciled in China or in a belief, again unsupported by any evidence that Liu was attempting to avoid service. In either case, the applicable rules of civil procedure provide relief to a Plaintiff: in the former circumstance,

Philips could have attempted to personally serve Liu or to otherwise serve him in accordance with the Hague Convention and in the latter circumstance, Philips could have made a showing to the District Court that Liu was evading service and the District Court could have fashioned an appropriate remedy in accordance with the service statutes. However, there was no attempt by Philips to personally serve Liu (other than the one defective attempt to serve his children's babysitter) or to serve him in accordance with the Hague Convention. Likewise, Philips made no attempt to show that Liu had been attempting to evade service nor could it have.

By dismissing Liu's appeal and forcing other foreign defendants like him who challenge a District Court's jurisdiction, who seek to vindicate their due process rights under the Fourteenth Amendment, and/or who are subject to executive branch treaties such as the Hague Convention, to jump through the additional hurdle of making a Rule 55(c) or 60(b) motion is an unnecessary and burdensome impediment to a party's rights to enforce those privileges and protections. The rule fashioned by the Ninth Circuit in the instant case is therefore inconsistent with these rights as well as with the applicable statutory scheme for appealing final judgments and with the law of at least three other Circuits.

The Court should therefore grant certiorari to vindicate civil defendants' due process rights under the Fourteenth Amendment of the Constitution and to resolve the obvious conflicts caused by the Ninth Circuit decisions challenged herein.

CONCLUSION

Based on the foregoing, Liu respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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