

In The
Supreme Court of the United States

FITCH RATINGS, INC. F/K/A FITCH, INC.,

Petitioner,

vs.

FIRST COMMUNITY BANK, N.A., et al.,

Respondents.

**On Petition For A Writ Of Certiorari
To The Supreme Court Of Tennessee,
Eastern Division**

**BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI**

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RESTATEMENT OF QUESTION PRESENTED

Should this Court grant certiorari as to the issue of the constitutionality of “conspiracy jurisdiction,” *i.e.*, whether the exercise of “conspiracy jurisdiction” violates Due Process, *per se*, where:

- (1) Petitioner failed to raise the constitutionality of “conspiracy jurisdiction” before the Tennessee Supreme Court and in fact presented an argument contrary to the one it urges upon this Court; and
- (2) The decision from which Petitioner seeks review is not final and remains subject to further review in state-court proceedings.

CORPORATE DISCLOSURE STATEMENT

In accordance with United States Supreme Court Rule 29.6, Respondent First Community Bank makes the following disclosures:

- (1) The parent corporation of Respondent First Community Bank is First Community Bancshares, Inc.
- (2) First Community Bancshares, Inc. owns 100% of Respondent First Community Bank's stock.

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INTRODUCTION

Fitch's petition should be denied because it seeks review of an issue that Fitch did not raise before the Tennessee Supreme Court in the first instance. As a result, the state court was denied an opportunity to address the question itself, depriving this Court of the aid of a reasoned decision from the Tennessee Supreme Court and making the petition a poor vehicle for review. Further, the judgment from which Fitch seeks review is not final and is subject to further review or correction in state court.

COUNTERSTATEMENT OF THE CASE

A. Background

Respondent, First Community Bank f/k/a First Community Bank, N.A. (“FCB”), is a regional banking and financial services company headquartered in Bluefield, Virginia. FCB operates in Virginia, West Virginia, North Carolina, and Tennessee.

In order to generate revenues to support and expand its mission, FCB maintains a portfolio of investments that has included at times, since at least 2003, collateralized debt obligations (“CDOs”). CDOs are structured asset-backed securities, whose value and payments are derived from portfolios of fixed-income underlying assets, such as corporate bonds or residential mortgages.

This action arises from the near-complete failure of ten CDOs in which FCB purchased notes,¹ eight of which were created, marketed, and/or sold to FCB by Tennessee investment banks. As part of the structuring, marketing, and sale process, the issuer of the CDOs paid the “big three” rating agencies, including Fitch, Inc. d/b/a Fitch Ratings (“Fitch”), to assign ratings to the products.² After Fitch assigned ratings, the CDOs were then marketed and sold to FCB by “placement agents,” including First Tennessee Bank, N.A.; Morgan Keegan & Co., Inc.; and SunTrust Robinson Humphrey, Inc., each of which is a Tennessee corporation.

As alleged by FCB, Fitch engaged in a conspiracy with the placement agent defendants to sell investment products to FCB and others bearing investment-grade ratings that were not legitimate. Fitch’s part in the conspiracy involved knowingly assigning ratings in a conflict of interest situation when it knew or should have known that its rating models were outdated and inadequate, and the assumptions it made to provide the ratings were not supported by the facts.

¹ The CDOs rated by Fitch, as alleged in FCB’s amended complaint, are products named “Trapeza,” “Soloso,” and seven Preferred Term Securities, Ltd. (“PreTSL”) products: PreTSL X, PreTSL XII, PreTSL XIV, PreTSL XVI, PreTSL XXII, PreTSL XXIII, and PreTSL XXVI. Fitch’s Petition further identifies “RAST” as being “among the products Fitch has rated.” Pet. at 4.

² The other rating agency defendants are Moody’s Investors Service, Inc. (“Moody’s”) and The McGraw-Hill Companies, Inc. (“McGraw-Hill”).

Despite the inadequacy of its models and assumptions, Fitch fraudulently or negligently represented that the CDOs were investment grade quality by assigning them at least A ratings and notifying the placement agents of such ratings to be communicated to potential investors, such as FCB. FCB was not informed that the rating process was rife with conflicts of interest that encouraged artificially high ratings for investment products. As FCB alleges, Fitch knew – or should have known – that the ratings it gave the CDOs were inflated and, therefore, provided investors with an inaccurate and illegitimate indication of the risk associated with the CDOs.

The Tennessee Court of Appeals found that FCB had pled a *prima facie* case of conspiracy against the Tennessee placement agents, which FCB alleged had conspired with the rating agencies to misrepresent the quality and liquidity of the CDOs. As FCB alleged, it relied on Fitch's ratings as evidence of the risk and quality associated with the products, unaware that the ratings were provided under the circumstances described above. FCB sustained losses in excess of \$100 million on its investments in the CDOs.

B. Procedural History

FCB commenced this action by filing a Complaint on September 15, 2011 in the Knox County Circuit Court of Tennessee.

In response to FCB's Complaint, Fitch filed a motion to dismiss on the basis of the trial court's alleged

lack of personal jurisdiction over it. In support of its motion, Fitch submitted affidavits outlining the purportedly modest nature and extent of its contacts with Tennessee.³

FCB moved for leave to take limited discovery on Fitch's contacts in Tennessee in order to more fully respond to its challenge to personal jurisdiction. While the trial court initially had indicated an inclination to permit such discovery, FCB sought leave in order to avoid anticipated objections to such discovery by Fitch and the other defendants. Following oral argument on the matter, the trial court denied FCB's motion.

Following denial of its motion, FCB filed an amended complaint with additional factual allegations that more fully established the trial court's jurisdiction over Fitch. FCB reasserted its claims for fraud, negligent misrepresentation, violation of the Tennessee Securities Act of 1980, and unjust enrichment, and added new claims for constructive fraud and civil conspiracy. Contemporaneous with the filing of its amended complaint, FCB also served written discovery requests and notices of deposition, seeking further information and documents regarding Fitch's contacts with Tennessee.

Once again, Fitch, Moody's, and McGraw-Hill filed motions to dismiss FCB's amended complaint, again challenging jurisdiction and attaching affidavits regarding their purportedly limited contacts with Tennessee. Fitch also filed a motion for protective order

³ Moody's and McGraw-Hill filed similar motions.

and motion to quash, and otherwise objected to FCB's discovery without serving any substantive discovery responses. FCB filed briefs in opposition to the motions and attached its own affidavits, attesting to the jurisdictional facts set forth in its amended complaint.

The trial court granted Fitch's motion for protective order, motion to quash, and motion to dismiss for lack of personal jurisdiction, issuing its ruling from the bench.⁴ The trial court ruled that FCB had not established the *prima facie* case that was necessary in order to permit discovery regarding Fitch's personal jurisdiction defense.

On appeal, the Court of Appeals affirmed the trial court's ruling that FCB had not established a *prima facie* case for the exercise of personal jurisdiction over Fitch and was not entitled to take limited jurisdictional discovery from Fitch, and therefore affirmed the trial court's dismissal of Fitch from the case on the basis of lack of personal jurisdiction.⁵

FCB filed an application to the Tennessee Supreme Court for permission to appeal the Court of Appeals' decision to affirm the dismissal of the claims

⁴ The trial court granted all of the defendants' motions to dismiss, including the other rating agencies' motions to dismiss for lack of personal jurisdiction.

⁵ The Tennessee Court of Appeals ruled similarly as to the other two rating agencies. However, it reversed the dismissal of all claims against the placement agent defendants, finding that FCB had pled sufficient facts to survive their motions to dismiss on failure to state a claim grounds, *i.e.*, FCB met its *prima facie* burden as to each claim as to each such defendant.

against Fitch (and the other rating agencies) for lack of personal jurisdiction and to affirm the denial of leave to take limited jurisdictional discovery. In January 2015, the Tennessee Supreme Court granted FCB's application regarding the exercise of personal jurisdiction and the denial of leave to take jurisdictional discovery.

C. The Decision Below

The Tennessee Supreme Court affirmed the Court of Appeals' decision that there was no general or specific jurisdiction over Fitch and the other rating agencies. The Tennessee Supreme Court also ruled that FCB had not established a *prima facie* case of conspiracy jurisdiction over Fitch and the other rating agencies, despite the Court of Appeals' prior determination that FCB had established a *prima facie* case of conspiracy as to the placement agents' participation in a conspiracy (presumably with the rating agencies), a decision as to which the Tennessee Supreme Court denied allowance to appeal.

However, in addressing the jurisdictional discovery issue, the Tennessee Supreme Court ruled that the trial court and Court of Appeals had applied the wrong standard in assessing whether to permit the taking of jurisdictional discovery. *See Pet. App.* 69a at n.14. The Tennessee Supreme Court cited a number of other jurisdictions in support of its conclusion that the lower courts should have only required FCB to make out a "colorable claim" of conspiracy jurisdiction instead of

demanding a *prima facie* showing prior to allowing jurisdictional discovery. *See Pet. App.* 69a. In so holding, it noted that conspiracy claims are particularly difficult to prove without the benefit of some discovery. *See Pet. App.* 70a at n.15.

The Tennessee Supreme Court held that FCB had established a colorable claim for personal jurisdiction under the conspiracy theory, based on its review of the allegations in FCB’s amended complaint and the entire record. *See Pet. App.* 71a. The court then remanded to the trial court for consideration of four additional factors to determine whether FCB should be permitted to engage in limited jurisdictional discovery on the issue of conspiracy jurisdiction.⁶

D. Misstatements of Fact and Law in Fitch’s Petition

As discussed in more detail below, Fitch’s Petition for a Writ of Certiorari (“Petition”) mischaracterizes the decision it seeks to challenge and the arguments it presented in the state-court proceedings. *See Section I, infra.*

In addition, Fitch’s Petition misrepresents the state of development of the doctrine of conspiracy jurisdiction, its application in state courts, and the status of the several states’ rulings on the issue. First,

⁶ The Tennessee Supreme Court found that FCB had not made out a colorable claim of either general or specific personal jurisdiction as to Fitch or the other rating agencies and so only remanded on the issue of conspiracy jurisdiction.

Fitch describes conspiracy jurisdiction as a “manufactured . . . third category foreign to this Court’s jurisprudence.” Pet. at 2. However, Tennessee’s conspiracy jurisdiction appears to simply be a form of specific jurisdiction exercised pursuant to the state’s long arm statute. *Chenault v. Walker*, 36 S.W.3d 45, 53 (Tenn. 2001) (explaining that two different sections of Tennessee’s long arm statute could be used to impute jurisdictional contacts between co-conspirators and that “whichever section of the long-arm statute is employed, the exercise of jurisdiction must comport with the United States Constitution.”).

The use of long arm statutes in the exercise of specific jurisdiction is not foreign to this Court. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 916 (2011) (“Many state long-arm statutes authorize courts to exercise specific jurisdiction over manufacturers when the events in suit, or some of them, occurred within the forum State.”); *Rosenblatt v. Am. Cyanamid Co.*, 86 S. Ct. 1 (1965) (holding that an Italian citizen was subject to jurisdiction under New York’s long arm statute, and the constitutionality of exercising jurisdiction was not affected by the fact that the plaintiff was a Maine corporation, appellant was in a foreign country, and the “center of gravity” of the alleged conspiracy was in Italy). Nor is conspiracy jurisdiction a novel doctrine. See, e.g., *Textor v. Bd. of Regents*, 711 F.2d 1387, 1392 (7th Cir. 1983) (“There does not seem to be any question that if plaintiff’s complaint alleges an actionable conspiracy then the minimum contacts test has been met. The ‘conspiracy

theory’ of personal jurisdiction is based on the time honored notion that the acts of [a] conspirator in furtherance of a conspiracy may be attributed to the other members of the conspiracy.”) (internal quotations and citations omitted).

Fitch asserts that there are seven “outlier States that have authorized conspiracy jurisdiction.” Pet. at 2. Characterizing these states as outliers implies that a majority of other states have ruled contrarily, which is simply not the case. In fact, while Fitch identifies Arkansas, Florida, Delaware, Kansas, Maryland, Minnesota, and Tennessee as the seven states (Pet. at 14), Fitch failed to inform this Court of several additional states that have adopted conspiracy jurisdiction, bellying such outlier status. These additional states include Georgia, Colorado, South Carolina, New Mexico, Illinois, and New York.⁷ See *Stubblefield v. Stubblefield*, 296 Ga. 481, 484 n.4, 769 S.E.2d 78, 82 (2015) (“Even if it can be said that only one of the sisters undertook these activities in Georgia, or that each sister performed some, but not all of these activities in Georgia, Long Arm jurisdiction would still apply to both sisters under the theory of conspiracy jurisdiction.”); *Hyperdynamics Corp. v. Southridge Capital Mgmt., LLC*, 305 Ga. App. 283, 293, 699 S.E.2d 456, 466 (2010) (“Georgia recognizes, and this Court has expressly adopted, the

⁷ Conspiracy jurisdiction has been adopted or recognized by the highest courts of Georgia and South Carolina. In Colorado, New Mexico, Illinois, and New York, conspiracy jurisdiction has been adopted by an appellate court, but the issue has not been passed upon by the highest court.

concept of conspiracy jurisdiction.”); *Nat'l Union Fire Ins. Co. v. Kozeny*, 115 F. Supp. 2d 1231, 1237 (D. Colo. 2000) (“[T]his Court may exercise jurisdiction over Turnstar based on conspiracy jurisdiction. Where, as here, Plaintiffs plead with particularity a conspiracy and overt acts taken in furtherance of the conspiracy, a co-conspirator’s contacts with the forum may be attributed to other conspirators for jurisdictional purposes.”) (citing *Pace v. D&D Fuller CATV Construction, Inc.*, 748 P.2d 1314 (Colo. App. 1987)); *Hammond v. Butler, Means, Evans & Brown*, 300 S.C. 458, 463, 388 S.E.2d 796, 798 (1990), cert. denied, 498 U.S. 952, 111 S. Ct. 373, 112 L. Ed. 2d 335 (1990) (“In certain instances, an out-of-state defendant may be subject to jurisdiction under a long-arm statute on the theory that his co-conspirator conducted activities in a particular state pursuant to the conspiracy.”); *Santa Fe Techs., Inc. v. Argus Networks, Inc.*, 131 N.M. 772, 784-85, 42 P.3d 1221, 1233-34 (Ct. App. 2001) (“We believe that the elements of knowledge and voluntary participation can create ‘minimum contacts’ with the forum state such that personal jurisdiction based on a conspiracy can be constitutionally sound . . . the substantial contact with New Mexico through the actions of conspirators in furtherance of a conspiracy can make the exercise of jurisdiction by our courts reasonable and fair.”); *Cameron v. Owens-Corning Fiberglas Corp.*, 296 Ill. App. 3d 978, 986, 231 Ill. Dec. 55, 695 N.E.2d 572, 577 (1998) (“The Illinois long-arm statute encompasses the conspiracy theory of jurisdiction.”); *Lawati v. Montague Morgan Slade Ltd.*, 102 A.D.3d 427, 428, 961

N.Y.S.2d 5, 7 (App. Div. 2013) (“The complaint sufficiently alleges jurisdiction over Rigby under CPLR 302(a)(2) insofar as the complaint pleads that Rigby was a part of a conspiracy involving the commission of several overt tortious acts in New York.”).

Accordingly, 26% of the states, including both Fitch’s state of incorporation (Delaware) and principal place of business (New York), have expressly adopted conspiracy jurisdiction. Thus, there is no basis for Fitch’s characterization of Tennessee as an “outlier” simply because the state’s long arm statute permits the imputation of jurisdictional contacts from one co-conspirator to another.

Meanwhile, only two states have explicitly refused to authorize the exercise of conspiracy jurisdiction. *See* Pet. at 15. This further belies Fitch’s contention that a significant split exists between several states’ supreme courts. In fact, if there are “outliers,” they are the two states that have barred the exercise of conspiracy jurisdiction.

Finally, Fitch also argues that conspiracy jurisdiction threatens to subject it and other defendants to discovery that runs contrary to Federal Rule of Civil Procedure 26(b)(1), which “cautions that discovery should be ‘proportional to the needs of the case, considering . . . the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.’” *See* Pet. 21. Fitch fails to mention, however, that one of the factors the Tennessee Supreme Court set forth for the

trial court to consider on remand is “whether the plaintiff’s interest in discovery outweighs the policy concerns of subjecting a nonresident defendant to burdensome discovery at such an early stage and seeking to avoid allowing the plaintiff to conduct a fishing expedition.” Pet. App. 69a. Not only did the court incorporate the burden to Fitch as a factor, it specifically emphasized that consideration a second time in its instructions to the trial court, stating that “we emphasize that the trial court should consider whether it is possible to limit discovery solely to the conspiracy jurisdiction issue. If not, the discovery may be particularly burdensome to the Defendants under the balancing analysis we have laid out.” *Id.* at 71a.



REASONS FOR DENYING THE PETITION

I. FITCH FAILED TO PRESENT IN STATE COURT THE ARGUMENT IT NOW RAISES IN ITS PETITION FOR CERTIORARI

Fitch’s Petition states that: “The question presented by this case is: Whether the Due Process Clause of the Fourteenth Amendment is violated when a court, in the absence of specific or general jurisdiction, nevertheless exercises personal jurisdiction over an out-of-state defendant under a theory of ‘conspiracy jurisdiction.’” Pet. at *i*, Question Presented. Fitch further contends it argued to the Tennessee Supreme Court that “it would be unconstitutional for courts to exercise personal jurisdiction on a ‘conspiracy’ theory where

specific jurisdiction was lacking” and that the court rejected its argument to that effect. Pet. at 7. However, as set forth below, neither contention is accurate.

A. Fitch Cannot Meet its Burden to Show that the Question Presented was Properly Presented to the Tennessee Supreme Court

This Court should deny certiorari because the Question Presented in Fitch’s Petition was not raised before the Tennessee Supreme Court in the first instance, making it a poor vehicle for review because the state court was denied an opportunity to address the question itself. This Court’s jurisdiction to review state court decisions is set forth in 28 U.S.C. § 1257(a):

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

Because Fitch did not raise the *per se* constitutionality of conspiracy jurisdiction to the Tennessee Supreme Court, the state court could not have considered the issue and rendered a “final judgment or decree,” as required by 28 U.S.C. § 1257(a), and, in fact, did not do so. As a result, the Tennessee Supreme Court opinion contains no discussion whatsoever on the issue of whether conspiracy jurisdiction, as adopted by the court in *Chenault v. Walker*, 36 S.W.3d 45 (Tenn. 2001) (“*Chenault*”), *per se* violates Due Process. Because the Tennessee Supreme Court did not address the Question Presented in Fitch’s Petition, Fitch bears the burden of showing that the issue was properly raised in the state court. *Street v. New York*, 394 U.S. 576, 582 (1969) (when “the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary.”). Although Fitch’s Petition asserts that it “argued that it would be unconstitutional for courts to exercise personal jurisdiction on a ‘conspiracy’ theory where specific jurisdiction was lacking,” Fitch fails to cite any support for that assertion.⁸ See Pet. at 7. Thus, Fitch has failed to

⁸ Pursuant to this Court’s Rules, the Statement of the Case section of Fitch’s Petition must specifically set forth:

the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts; and pertinent quotations of specific portions of the record or summary thereof, with specific reference to the places

satisfy its burden to establish that it properly presented an argument based on the constitutionality, *per se*, of conspiracy jurisdiction in the state court proceedings.

While Fitch attempts to recast its state court argument as a federal question about the constitutionality of conspiracy jurisdiction, *per se*, in actuality, Fitch made no such argument to the Tennessee Supreme Court. Instead, Fitch merely argued that it should not be subject to conspiracy jurisdiction based on the facts alleged by FCB. Here is what Fitch said in its brief to the Tennessee Supreme Court on the issue: “The Supreme Court’s decision in *Walden v. Fiore* makes it even clearer that the exercise of conspiracy jurisdiction would be unconstitutional **as applied to the facts of this case.**” See Resp. App. A at App. 7 (emphasis added). In fact, Fitch’s Tennessee Supreme Court brief appears to concede that the seminal Tennessee Supreme Court case authorizing the application of conspiracy jurisdiction got it right. *Id.* at App. 6, n.14 (“The

in the record where the matter appears (e.g., court opinion, ruling on exception, portion of court’s charge and exception thereto, assignment of error).

Sup. Ct. R. 14(1)(g)(i) (imposing requirements where Petitioner seeks review of a state court judgment, “so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari.”).

Fitch’s Petition does not include the information required by this Court’s Rule 14(1)(g)(i).

Court of Appeals **correctly** focused on the fourth prong of the *Chenault* analysis. . . .") (emphasis added); *Id.* at App. 7 ("In fact, this limitation is evidenced by the facts of *Chenault* itself where, unlike here, the alleged conspiracy was actually aimed at a Tennessee resident.") (arguing that conspiracy jurisdiction does not exist under *Chenault*, not because it is unconstitutional, *per se*, but rather because FCB is not a Tennessee resident).

When the Tennessee Supreme Court first formally adopted a "conspiracy" theory of jurisdiction in *Chenault*, the court undertook a careful legal analysis of due process issues before holding that when a party to a conspiracy acts in furtherance of that conspiracy in Tennessee, that act is attributable to the co-conspirators for purposes of establishing personal jurisdiction under Tennessee's long arm statute. *Chenault v. Walker*, 36 S.W.3d 45 (Tenn. 2001). Although Fitch's Petition describes the doctrine of conspiracy theory as "flatly incompatible with the Due Process Clause" (Pet. at 2), *Chenault* carefully explained exactly how it reconciled the two. In fact, when *Chenault* set forth its test for establishing conspiracy jurisdiction, it expressly asked the question "Is this test constitutional?" *Chenault*, 36 S.W.3d at 51. Then the court explained in detail why the answer is "yes."

By describing conspiracy jurisdiction as irreconcilable with due process, Fitch's Petition takes a position completely at odds with the arguments it raised to the Tennessee Supreme Court. In its briefing to the state

court, Fitch cited *Chenault* for the principle that “the conspiracy jurisdiction doctrine does **not** obviate the need to satisfy the requirements of the Due Process Clause.” See Resp. App. at App. 2 (emphasis added). Fitch raised no objection to the constitutionality of conspiracy jurisdiction, *per se*, but merely urged that the Tennessee Supreme Court apply it in a manner that would allow Fitch to evade Tennessee’s jurisdiction in this instance. *Id.* at App. 3 (“The Supreme Court’s recent decision in *Walden v. Fiore* makes it even clearer that the exercise of conspiracy jurisdiction would be unconstitutional **as applied to the facts of this case.**”) (emphasis added).

Instead of arguing that Tennessee’s exercise of conspiracy jurisdiction under *Chenault* would be a *per se* violation of due process, Fitch took the position before the Tennessee Supreme Court that conspiracy jurisdiction and due process could – and should – be reconciled precisely as *Chenault* did. Resp. App. A at App. 7 (citing *Chenault*’s recognition that “the exercise of jurisdiction must comport with the United States Constitution.”).

Moreover, at oral argument, Fitch repeated its endorsement of the jurisdictional analysis in *Chenault*, arguing that *Chenault* handled the due process issue correctly:

FEMALE JUSTICE:

How is that – how is that an appropriate distinction? I mean, do they have to target Tennessee in order to impute, if there is – if the

complaint is sufficient to allege a conspiracy between the nonresident and the Placement Agents, how is it unfair?

MR. FLUMENBAUM:⁹

I actually think it's a Fourteenth Amendment, it is a due process issue under the Fourteenth Amendment, because what the Court did in *Chenault*, and I think it did it correctly, was say there's no personal general jurisdiction, there's no specific jurisdiction, but we're going to find this conspiracy jurisdiction because of the targeting of an in-state defendant, and the state has an interest in make – in giving a remedy to our citizen for that kind of conspiracy. I think the state's interest is very different when you're dealing with an out of state plaintiff.

Resp. App. B at App. 11-12 (emphasis added).¹⁰

⁹ Attorney Martin Flumenbaum represented Fitch in oral argument before the Tennessee Supreme Court.

¹⁰ The Tennessee Supreme Court created an audio recording of the oral argument and maintains a copy of the recording on its website. However, the oral argument was not contemporaneously transcribed. FCB obtained from the Tennessee Supreme Court a certified copy of the audio recording, which a court reporter transcribed at FCB's request. The transcript is the source of the oral argument excerpted in Appendix B. A full copy of the transcript has not been appended hereto in the interest of brevity, however, FCB will provide one if it would aid this Court. The audio recording is available online from the Tennessee Supreme Court at: <https://www.tncourts.gov/courts/supreme-court/arguments/2015/05/06/first-community-bank-na-v-first-tennessee-bank-na-et-al>.

Fitch did not argue that Tennessee's long arm statute itself was unconstitutional. Nor did Fitch argue that *Chenault*'s exercise of conspiracy jurisdiction under the statute violated due process.

MR. FLUMENBAUM:

I think the state's interest is very different when you're dealing with an out of state plaintiff, who is buying securities from numerous entities, some of whom happen to be in Tennessee, and providing a forum where you're somewhat extending the protections for the defendants of the Fourteenth Amendment and due process.

And I think this Court was very concerned about that – that extension when they approved the *Chenault* thing. And *I think the Court had just the right attitude toward that*, because the *Chenault* allegations were very specific, there were conversations, there were calls made back and forth. None of that specificity exists here in this case.

Id. at App. 12 (emphasis added).

In this case, then, Fitch merely argued that the outcome of the *Chenault* analysis should be different because FCB is not a Tennessee resident,¹¹ and

¹¹ As this Court has held, a plaintiff's residence in the forum state is not required to exercise jurisdiction over a defendant. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 780 (1984) ("[P]laintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts.").

perhaps because the allegations of conspiracy in FCB's amended complaint were not sufficiently specific. Fitch argued that these factors are somehow the difference between a constitutional assertion of conspiracy jurisdiction, as in *Chenault*, and an unconstitutional assertion of conspiracy jurisdiction in the instant case.

MR. FLUMENBAUM:

They are – if you look at the – at the amended complaint, they are just pure conclusory allegations that these parties conspired together to unlawfully sell securities to this Virginia plaintiff.

And I think under those circumstances and under Tennessee law, this is not a *Chenault* case where you had specific out of state defendant – out of state defendants and in-state defendants conspiring against an in-state Tennessee plaintiff, which I think is an important jurisdiction issue, because *Chenault* was very concerned about the due process issues in extending conspiracy jurisdiction where there was no specific jurisdiction. And they said in this case where these allegations were very specific and very clear, and in that sense, where the in-state people were acting as agents, I think *Chenault* talks a lot about agency theory, in a different way, that's not what this case is about.

Id. at App. 10-11.

B. Because Fitch Failed to Raise the Question Presented, the Tennessee Supreme Court was Denied an Opportunity to Address the Issue

In light of the foregoing concessions by Fitch, Fitch is now essentially urging this Court to reject Tennessee's doctrine of conspiracy jurisdiction, as adopted in *Chenault*, without providing the Tennessee Supreme Court any notice that the constitutionality of the doctrine itself was even in question. This explains the Tennessee Supreme Court's failure to address the *per se* constitutionality of the doctrine anywhere in its opinion. In effect, Fitch is now challenging the decision in *Chenault*, not the decision in this case, without having given the Tennessee Supreme Court the opportunity to consider the matter. Principles of comity urge that a state be afforded, at the very least, an opportunity to address an argument that one of its laws is unconstitutional:

As we have explained, "it would be unseemly in our dual system of government" to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider. Thus, the rule affords state courts "an opportunity to consider the constitutionality of the actions of state officials, and, equally important, proposed changes" that could obviate any challenges to state action in federal court. Here, the Alabama Supreme Court has an undeniable interest in having the opportunity to determine in the first instance whether its existing rules governing

class action settlements satisfy the requirements of due process, and whether to exercise its power to amend those rules to avoid potential constitutional challenges.

Our traditional standard also reflects “practical considerations” relating to this Court’s capacity to decide issues. Requiring parties to raise issues below not only avoids unnecessary adjudication in this Court by allowing state courts to resolve issues on state law grounds, but also assists us in our deliberations by promoting the creation of an adequate factual and legal record. Here, even if the state court’s construction of its class action rules would not obviate the due process challenge, it would undoubtedly aid our understanding of those rules as a predicate to our assessment of their constitutional adequacy. And not incidentally, the parties would enjoy the opportunity to test and refine their positions before reaching this Court.

Adams v. Robertson, 520 U.S. 83, 86-92 (1997) (citations omitted); see also *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) (“In determining whether to exercise jurisdiction over questions not properly raised below, the Court has focused on the policies that animate the ‘not pressed or passed upon below’ rule. These policies are first, comity to the States, and second, a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal.”) (citations omitted).

Historically, this Court has consistently treated a party's failure to present its federal claim in state court as a jurisdictional bar to review. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) ("It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions . . . the Judiciary Act of 1789 vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. If both of these do not appear on the record, the appellate jurisdiction fails.") (internal quotations and citations omitted).

Admittedly, more recent cases treat the issue slightly differently, suggesting that it is unclear whether a party's failure to present its federal claim is a jurisdictional bar or simply a "prudential" consideration that weighs against this Court reviewing the case. *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) ("Whether appellant's failure to raise these claims in the Mississippi courts deprives us of all power to review them under our certiorari jurisdiction is an unsettled question . . . the cases have been somewhat inconsistent in their characterization of the 'not pressed or passed upon below' rule. Early opinions seemed to treat the requirement as jurisdictional, whereas more recent cases clearly view the rule as merely a prudential restriction that does not pose an insuperable bar to our review. We are not called on today to conclusively characterize the 'not pressed or passed upon below' rule, however, because assuming that the rule is merely prudential, we believe that the

more prudent course in this case is to decline to review appellant's claims.") (internal quotations and citations omitted); *Howell v. Mississippi*, 543 U.S. 440, 445-46 (2005) ("Petitioner suggests that we need not treat his failure to present his federal claim in state court as jurisdictional. Notwithstanding the long line of cases clearly stating that the presentation requirement is jurisdictional, a handful of exceptions have previously led us to conclude that this is 'an unsettled question.' As in prior cases, however, we need not decide today whether our requirement that a federal claim be addressed or properly presented in state court is jurisdictional or prudential, because even treating the rule as purely prudential, the circumstances here justify no exception.") (dismissing the writ of certiorari as improvidently granted) (internal quotations and citations omitted).

Regardless of whether the rule is jurisdictional or prudential, Fitch's Petition presents an unusually compelling argument in favor of denial. Not only did Fitch fail to make an argument that conspiracy jurisdiction is a *per se* violation of the Due Process Clause, Fitch expressly endorsed the Tennessee Supreme Court's legal analysis in the seminal Tennessee case that adopted conspiracy jurisdiction. Fitch should not now be allowed to bypass Tennessee's judiciary in seeking review of state law. *Ford Motor Co. v. United States*, 134 S. Ct. 510 (2013) ("This Court is one of final review, not of first view."). Accordingly, Fitch's Petition should be denied.

II. THE DECISION FROM WHICH FITCH SEEKS REVIEW IS INTERLOCUTORY AND NOT FINAL IN NATURE OR EFFECT

Because this Court’s jurisdiction is limited to “final judgments or decrees,” Fitch’s Petition should be denied because the decision it seeks to appeal is not final. 28 U.S.C. § 1257(a). The Tennessee Supreme Court did not rule that Fitch is subject to conspiracy jurisdiction or even subject to the taking of jurisdictional discovery. It merely remanded the issue to the trial court to determine whether limited jurisdictional discovery is warranted solely on the issue of conspiracy jurisdiction. Pet. App. 71a.

Consequently, even if Fitch had properly presented a federal issue to the Tennessee Supreme Court, there is no final judgment or decree for this Court to review. *Jefferson v. City of Tarrant*, 522 U.S. 75, 80-84 (1997) (“To be reviewable by this Court, a state-court judgment must be final in two senses: it must be subject to no further review or correction in any other state tribunal; it must also be final as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein. It must be the final word of a final court.”) (citations and internal quotations omitted).

A. Exceptions to the Finality Requirement Do Not Apply to this Case

This Court has repeatedly held that it lacks jurisdiction to review interlocutory orders, except in limited

circumstances that do not apply here. *Id.* at 81-82 (“Petitioners contend that this case comes within the ‘limited set of situations in which we have found finality as to the federal issue despite the ordering of further proceedings in the lower state courts.’ We do not agree. This is not a case in which ‘the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings.’ Resolution of the state-law claims could effectively moot the federal-law question raised here.”) (quoting *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975)).

In *Cox Broadcasting Corp. v. Cohn*, this Court set forth four exceptions to the jurisdictional requirement that review may only be granted in cases where a final decision has been rendered by the highest court of a state. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479-83 (1975). Those exceptions are cases in which:

1. there are further proceedings – even entire trials – yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained;
2. the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of future state-court proceedings;
3. the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which

- later review of the federal issue cannot be had, whatever the ultimate outcome of the case; or
4. the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds.

Id. at 479-82.

The last three exceptions require that the federal issue has been finally decided in the state courts. *Id.* The first exception requires that the federal issue is effectively decided, despite the fact that additional proceedings remain. *Id.* at 479 (illustrating the first exception with the example of a case where “[t]his Court took jurisdiction on the reasoning that the appellant had no defense other than his federal claim and could not prevail at trial on the facts or any nonfederal ground.”) (citing *Mills v. Alabama*, 384 U.S. 214 (1966)). None of these exceptions apply to this case.

This case is not subject to any of the last three exceptions because the Tennessee Supreme Court did not render a final decision on the constitutionality of conspiracy jurisdiction; instead it merely determined that FCB had satisfied one prong – namely, the assertion of a colorable claim for conspiracy jurisdiction – of a five-prong test for granting limited jurisdictional discovery. The Court then remanded to the trial court for consideration of the remaining four prongs. See Pet. App. 71a. Such a judgment is not final. See *Jefferson v. City of*

Tarrant, 522 U.S. 75, 81-82, 118 S. Ct. 481, 485-87 (1997) (“The Alabama Supreme Court’s decision was not a ‘final judgment.’ It was avowedly interlocutory. Far from terminating the litigation, the court answered a single certified question that affected only two of the four counts in petitioners’ complaint. The court then remanded the case for further proceedings. Absent settlement or further dispositive motions, the proceedings on remand will include a trial on the merits of the state-law claims. In the relevant respect, this case is identical to *O’Dell v. Espinoza*, where we dismissed the writ of certiorari for want of jurisdiction.”) (citing *O’Dell v. Espinoza*, 456 U.S. 430, 72 L. Ed. 2d 237, 102 S. Ct. 1865 (1982) (per curiam) for the principle that a decision is not final as an effective determination of the litigation when the case is remanded for trial).

The first *Cox* exception is inapplicable as well. The purported federal issue is not conclusive and the outcome of further proceedings is far from preordained. Ultimately, the trial court may determine that FCB is not entitled to jurisdictional discovery, mootng the issue. Even if the trial court grants limited jurisdictional discovery, it may nevertheless conclude that conspiracy jurisdiction does not lie against Fitch. Even if the trial court ultimately determines that Fitch is subject to conspiracy jurisdiction under the state’s long arm statute, Fitch would ultimately have a right to appeal

that ruling in the Tennessee state courts.¹² In addition, Fitch would still have an opportunity to prevail on the merits. This case does not resemble the case cited by Cox as illustrative of the first exception, where “the appellant had no defense other than his federal claim and could not prevail at trial on the facts or any nonfederal ground.” *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975).

Further, the decision from which Fitch seeks review is essentially a discovery ruling and such rulings are generally not final. *See Mohawk Indus. v. Carpenter*, 558 U.S. 100, 108 (2009) (“[W]e have generally denied review of pretrial discovery orders.”) (quoting C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3914.23, p 123 (2d ed. 1992) for the principle that “the rule remains settled that most discovery rulings are not final”). Fitch’s assertions regarding the potential burden of discovery are also unavailing. *Id.* at 107 (“That a ruling may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . has never sufficed. Instead, the decisive consideration is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order.”) (internal citations and quotations omitted).

¹² However, having waived the *per se* unconstitutionality argument previously, as discussed in this brief, Fitch should be barred from raising that issue in future state court appeals.

Although the lack of finality in the Tennessee Supreme Court’s decision is an independent basis for denial of Fitch’s Petition, this Court has also recognized that it would be particularly improvident to grant review of an interlocutory petition where it lacks the aid of a reasoned state appellate court decision. *DTD Enters. v. Wells*, 558 U.S. 964, 964-65 (2009) (“First, the petition is interlocutory; the state appellate courts denied petitioner leave to appeal the trial court’s action. . . . If we were to grant the petition we would be required to construe New Jersey law without the aid of a reasoned state appellate court decision and to confront a procedural obstacle unrelated to the question presented. Under these circumstances, it is best to deny the petition.”) (statement respecting the denial of certiorari, Kennedy, J., joined by Roberts, C.J., and Sotomayor, J.); *Wrotten v. New York*, 560 U.S. 959, 960 (2010) (“Moreover, even if we found the judgment final, in reviewing the case at this stage we would not have the benefit of the state courts’ full consideration.”) (statement respecting the denial of certiorari, Sotomayor, J.). As discussed in Section I.B, *supra*, this Court lacks the benefit of a reasoned decision regarding the question presented in Fitch’s Petition because Fitch failed to properly raise the issue before the Tennessee Supreme Court. The absence of such a decision, coupled with the interlocutory nature of the ruling, should be fatal to Fitch’s Petition. Fitch has certainly provided no rationale for this Court to ignore its own prior jurisdictional precedent or deviate from its well-established practices for exercising that jurisdiction. Accordingly, Fitch’s Petition should be denied because

it failed to raise the issue presented before the Tennessee Supreme Court and seeks review of a state-court judgment that remains subject to further review or correction in the state court. *See Jefferson v. City of Tarrant*, 522 U.S. 75, 80-84 (1997).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF TENNESSEE AT KNOXVILLE

First Community Bank	:	Supreme Court
f/k/a First Community	:	No. E2012-01422-
Bank, N.A.,	:	SC-R11-CV
 	:	
Plaintiff-Appellant,	:	Court of Appeals
 	:	
v.	:	No. E2012-01422-
 	:	
First Tennessee Bank,	:	COA-R3-CV
N.A. d/b/a FTN Financial	:	
Capital Markets, et al.,	:	Knox County
 	:	
Defendants-Appellees.	:	Circuit Court
 	:	
	:	Case No. 3-475-11
	:	
	:	Hon. Wheeler A.
	:	
	:	Rosenbalm

APPEAL FROM THE COURT OF APPEALS, EASTERN DIVISION

BRIEF OF DEFENDANT-APPELLEE FITCH RATINGS, INC.

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APPENDIX A

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* * *

[11] Argument

* * *

[31] III. Fitch Is Not Subject To Conspiracy Jurisdiction

Plaintiff has also failed to allege facts sufficient to sustain a finding of conspiracy jurisdiction. As the lower court rightly held, Plaintiff's "allegations of conspiracy jurisdiction are generally vague and really are little more than the kind of group pleading that the [P]laintiff employs in the remainder of this action against all of the parties . . . [and so] [P]laintiff has not established an entitlement to proceed against the rating agencies." [65:183]; *see also First Cnty. Bank*, 2013 WL 4472514 at *16. Moreover, the conspiracy jurisdiction doctrine does not obviate the need to satisfy the requirements of the Due Process Clause. *Chenault*, 36

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S.W.3d at 53 (“But whichever section of the long-arm statute is employed, the exercise of jurisdiction must comport with the United States Constitution.”).

A. The Complaint Does Not Allege Any Activities that Show that a Conspiracy Existed

Plaintiff has completely failed to allege facts that support the exercise of conspiracy jurisdiction over Fitch, in large part because Plaintiff has failed to allege facts sufficient to demonstrate the existence of a conspiracy. In Tennessee, for conspiracy jurisdiction to apply, a plaintiff must show that:

- (1) two or more individuals conspire to do something, (2) that they could reasonably expect to lead to consequences in a particular forum, if (3) one co-conspirator commits overt acts in furtherance of the conspiracy, and (4) those acts are of a type which, if committed by a non-resident, would [32] subject the non-resident to personal jurisdiction under the long-arm statute of the forum state.

Chenault, 36 S.W.3d at 53. The burden of sufficiently alleging the facts that would justify the exercise of conspiracy jurisdiction rests soundly with the Plaintiff. *Id.* at 56 (“It is clear that the plaintiff bears the ultimate burden of demonstrating that jurisdiction exists.”).

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Courts in Tennessee have repeatedly held that a “bare allegation of a conspiracy between the defendant and a person within the personal jurisdiction of the court is not enough.” *Id.* at 55 (citation omitted); *see also Beal Bank, SSB v. Prince*, No. M2011-02744-COA-R3-CV, 2013 WL 411452, at *3 (Tenn. Ct. App. Jan. 31, 2013) (“Conspiracy claims must be pled with some degree of specificity, and conclusory allegations unsupported by material facts will not be sufficient to state such a claim.”). Thus, in the context of alleging a “conspiracy” among the parties to a lawsuit, generalized group pleading is not acceptable. *Strategic Capital Res., Inc. v. Dylan Tire Indus., LLC*, 102 S.W.3d 603, 611 (Tenn. Ct. App. 2002) (“An inspection of the complaint shows that the allegations are only general and that *no particular defendant is identified* as the one making the false and misleading statements. At a minimum *the actors should be identified* and the substance of each statement should be pled.” (emphasis added)).

Here, Plaintiff has clearly failed to properly allege the existence of a conspiracy between Fitch and the Tennessee Placement Agents. While Plaintiff references several paragraphs in its Amended Complaint to support the existence of a conspiracy, (Pl. Br. at 40-41), those allegations are woefully inadequate. Plaintiff does not make any factual allegations of any agreements between Fitch and any of the Tennessee Placement Agents that would form the basis of a conspiracy. *See State v. Vasques*, 221 S.W.3d 514, 522 [33] (Tenn.

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2007) (“A conspiracy is ‘an agreement to accomplish a criminal or unlawful act.’” (citation omitted)); *see also State v. Warner*, Nos. 326, 328, 1991 WL 134499, at *7 (Tenn. Ct. Crim. App. July 23, 1991) (“The mere knowledge, acquiescence, or approval of the act, without cooperation or agreement to cooperate, is not sufficient to constitute one a party to a conspiracy.”). Most of the allegations do not even identify the specific defendant alleged to have entered into any such agreement, and none of the allegations identify any specific action committed by anyone that would establish the existence of a conspiracy. *See Strategic Capital*, 102 S.W.3d at 611.

In effect, Plaintiff’s conspiracy allegations consist of nothing more than vague, collective “group pleading” allegations concerning the various defendants, including that “Defendants’ omissions were part of the concerted action and their silence was calculated to further the goals of the conspiracy” and that “[u]pon information and belief, the Defendants listed in this Count agreed to act in concert to fraudulently market the [securities].” [28:4094-95 (¶¶ 285, 293).] None of these allegations sufficiently establish and support the exercise of jurisdiction over Fitch, as these are precisely the type of “bare allegations” that courts have found insufficient to support the exercise of conspiracy jurisdiction in the first place. *Chenault*, 36 S.W.3d at 55-56; *see, e.g., Beal Bank*, 2013 WL 411452, at *3-4 (allegations of conspiracy were insufficient where

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plaintiff pled, *inter alia*, that the defendants “worked together” to coordinate a title transfer); *Am. Copper & Brass, Inc. v. Mueller Europe, Ltd.*, 452 F. Supp. 2d 821, 830 (W.D. Tenn. 2006) (courts have declined to exercise jurisdiction where “unsupported [34] allegations in the complaint” and “legal argument and speculation” served as the foundation for a conspiracy-based claim of personal jurisdiction).¹⁴

B. Conspiracy Jurisdiction Cannot Be Used to Evade the Requirements of Due Process

Finally, it is well settled that specific jurisdiction can only exist when the cause of action arises out of activities “purposely direct[ed] . . . toward citizens of the forum state,” so that it satisfies due process.

¹⁴ The Court of Appeals correctly focused on the fourth prong of the *Chenault* analysis whether the acts were of a type which, “if committed by a non-resident, would subject the non-resident to personal jurisdiction under the long-arm statute of the forum state” in refusing to apply conspiracy jurisdiction in this case. *First Cnty. Bank*, 2013 WL 4472514, at *16 (“The fourth prong of the conspiracy jurisdiction test was ‘designed to meet the strictures of the ‘minimum contacts’ test.’” (citing *Chenault*, 36 S.W.3d at 56 57)). Thus, in other words, if Fitch, from its New York office, had done what the Tennessee Placement Agents are alleged to have done marketed and sold the securities to the Plaintiff in Virginia under *Daimler* and *Walden*, there would still not be jurisdiction over Fitch in Tennessee. *See also Chenault*, 36 S.W.3d at 53 (the second prong is whether “they could reasonably expect” the activity to “lead to consequences in a particular forum”).

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Chenault, 36 S.W.3d at 53 (“But whichever section of the long-arm statute is employed, the exercise of jurisdiction *must comport* with the United States Constitution.” (emphasis added)); *accord Rudo v. Stubbs*, 472 S.E.2d 515, 517 (Ga. 1996) (“This court has rejected a ‘conspiracy theory’ of jurisdiction where the plaintiff tried to rely on imputed acts to bypass the requirements of due process.”). Plaintiff’s allegations in no way support the proposition that any of Fitch’s activities were “purposely directed” toward citizens of Tennessee. In fact, this limitation is evidenced by the facts of *Chenault* itself where, unlike here, the alleged conspiracy was actually aimed at a Tennessee resident. *Id.* at 47, 56-59 (imputing resident’s contacts to nonresidents where the alleged civil conspiracy targeted a Tennessee resident); *see also Mfrs. Consolidation Serv., Inc. v. Rodell*, 42 S.W.3d 846, 858 (Tenn. Ct. App. 2000) (applying conspiracy jurisdiction where the “Defendants have conspired with a [35] Tennessee resident to commit one or more intentional torts against a Tennessee corporation.” (emphasis added)).

The Supreme Court’s recent decision in *Walden v. Fiore* makes it even clearer that the exercise of conspiracy jurisdiction would be unconstitutional as applied to the facts of this case. 134 S. Ct. 1115 (2014). As the Supreme Court emphasized in *Walden*, a “defendant’s relationship with a plaintiff or *third party*, standing alone, is an insufficient basis for jurisdiction” as “it is the defendant, not the plaintiff or *third parties*, who

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must create contacts with the forum State.” *Id.* at 1123, 1126 (emphases added); *see also Brown v. Kerkhoff*, 504 F. Supp. 2d 464, 517 (S.D. Iowa 2007) (rejecting the theory of conspiracy jurisdiction because the “key inquiry is whether there has been a sufficient showing of a deliberate connection between the defendant and the forum” (emphasis in original)); *In re New Motor Vehicles Canadian Exp.*, 307 F. Supp. 2d 145, 157-58 (D. Me. 2004) (same); *Insolia v. Philip Morris Inc.*, 31 F. Supp. 2d 660, 672-73 (W.D. Wis. 1998) (noting that Supreme Court precedents do not support the exercise of conspiracy jurisdiction because the “constitutional touchstone remains whether the defendant purposefully established ‘minimum contacts’ in the forum State” (quoting *Burger King*, 471 U.S. at 474)).

* * *

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[39] Dated: March 16, 2015

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APPENDIX B

BEFORE THE TENNESSEE SUPREME COURT
FIRST COMMUNITY BANK,

Plaintiff,

v.

FIRST TENNESSEE BANK, et al,

Defendants.

* * * * *

ORAL ARGUMENTS

May 6th, 2015

* * *

[38] MR. FLUMENBAUM: Okay. Let me make a brief comment on *Chenault*. I think the conspiracy jurisdiction allegations were not in the original complaint and they were only added in the amended complaint. And they weren't added so that there's one overarching conspiracy. There's not one count of conspiracy, there are four counts of conspiracy, and each of the counts relates to each of the securities.

They are – if you look at the – at the amended complaint, they are just pure conclusory allegations that these parties conspired together to unlawfully sell securities to this Virginia plaintiff.

And I think under those circumstances, and under Tennessee law, this [39] is not a *Chenault* case where you had specific out of state defendant – out of state defendants and in-state defendants conspiring against

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an in-state Tennessee plaintiff, which I think is an important jurisdiction issue, because *Chenault* was very concerned about the due process issues in extending conspiracy jurisdiction where there was no specific jurisdiction. And they said in this case where these allegations were very specific and very clear, and in that sense, where the in-state people were acting as agents, I think *Chenault* talks a lot about agency theory in a different way, that's not what this case is about.

When the Rating – the Rating Agencies have nothing to do with the sale or marketing of these securities. The Rating Agencies –

FEMALE JUSTICE: How is that – how is that an appropriate distinction? I mean, do they have to target Tennessee in order to impute, if there is – if the complaint is sufficient to allege a conspiracy between [40] the nonresident and the Placement Agents, how is it unfair?

MR. FLUMENBAUM: I actually think it's a Fourteenth Amendment, it is a due process issue under the Fourteenth Amendment, because what the Court did in *Chenault*, and I think it did it correctly, was say there's no personal general jurisdiction, there's no specific jurisdiction, but we're going to find this conspiracy jurisdiction because of the targeting of an in-state defendant, and the state has an interest in make – in giving a remedy to our citizen for that kind of conspiracy.

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I think the state's interest is very different when you're dealing with an out of state plaintiff, who is buying securities from numerous entities, some of whom happen to be in Tennessee, and providing a forum where you're somewhat extending the protections for the defendants of the Fourteenth Amendment and due process.

And I think this Court was very concerned about that – that extension when [41] they approved the *Chenault* thing. And I think the Court had just the right attitude towards that, because the *Chenault* allegations were very specific, there were conversations, there were calls made back and forth. None of that specificity exists here in this case.

* * *

STATE OF TENNESSEE)

COUNTY OF KNOX)

I, JAMES M. HIVNER, Clerk of the Supreme Court of Tennessee, do hereby certify that the attached compact disc contains a copy of the audio recording of the oral arguments held before the Tennessee Supreme Court on May 6, 2015 in Case Number E2012-01422-SC-R11-CV styled as follows:

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*FIRST COMMUNITY BANK, N.A. v. FIRST
TENNESSEE BANK, N.A., ET AL.*

In witness whereof I have hereunto set my hand
and affixed the seal of said Court at my aforesaid office
in the City of Knoxville.

This the 4th day of May, 2016.

JAMES M. HIVNER, Clerk

By: /s/ Joanne Newsome
Deputy Clerk

CERTIFICATE

STATE OF TENNESSEE:

COUNTY OF KNOX:

I, Virginia B. Truesdel, Notary Public and Licensed Court Reporter in the State of Tennessee, do hereby certify that I transcribed the foregoing proceedings from a CD; that the foregoing pages, numbered 1 to 59, inclusive, were typed by me using computer-aided transcription, and constitute a true and accurate record of said proceedings to the best of my ability.

I further certify that I am not an attorney or counsel of any attorney or counsel connected with the action, nor financially interested in the action.

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Witness my hand and official seal this the 10th day of May, 2016.

[SEAL]

/s/ Virginia Truesdel

Virginia B. Truesdel
LCR #003; Expiration: 6/30/2016.
My commission expires: 7/16/2016.
