

No. 18-1560

In The Supreme Court of the United States

RICHARD LELAND NEAL,

Petitioner,

v.

B. MARC NEAL, RICHARD WAYNE NEAL,
MICHAEL KENNETH NEAL,

Respondents.

**On Petition for Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit**

BRIEF IN OPPOSITION

Robert Sirianni, Jr., Esq.

[Brownstone Law Firm](#)

PO Box 2047

Winter Park, Florida 32790

(407) 388-1900

robertsirianni@brownstonelaw.com

Counsel for Respondents

QUESTION PRESENTED

Whether the Arizona District Court and the Ninth Circuit Court of Appeals created a split by holding that [Respondent's]/[D]efendant's timely responded to Plaintiff's Amended Complaint by filing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6)?

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OBJECTIONS TO JURISDICTION

There is no substantial federal question involved which would require this Court to review this case. The question herein presented were decided in the Ninth Circuit Court of Appeals. The Court of Appeals affirmed in an unreported opinion under Ninth Circuit Rule 36-3.

The Ninth Circuit refused a petition for rehearing en banc and decided this case in accordance with the Constitution of the United States and the applicable decisions of this Court. There is therefore no substantial federal question involved.

COUNTERSTATEMENT OF THE CASE

This case concerns the Claude K. Neal Family Trust ("Trust"), a revocable trust created by Plaintiff Richard Leland Neal's parents, Claude and Rita Neal (individually, "Claude" and "Rita," and collectively "Trustors") on August 15, 1972. The Trust established that, at the death of either Trustor, the Trust estate would be divided into two sub-trusts: Trust A and Trust B. These subtrusts both were amendable and revocable while the Trustors were living. The beneficiaries of the Trust were the Trustors' two sons, Petitioner and Respondent B. Marc Neal ("Marc"), but only upon the death of the surviving Trustor. (Appx. 1a).

In this litigation, Petitioner accused Marc and Marc's two sons, Respondents Richard Wayne Neal ("Richard") and Michael Kenneth Neal ("Michael"),

of violating the federal Racketeer Influenced and Corrupt Organizations (“RICO”) Act through their management of Trust assets. He also accuses Marc and Richard of breaching their fiduciary duties under the Trust. Petitioner initiated the civil action in December 2016. (Appx. 3a).

On April 6, 2017, Respondents moved the District Court of Arizona to dismiss Petitioner’s Complaint, arguing that Petitioner’s breach of fiduciary duty claim is barred by the statute of limitations, the Complaint failed to state plausible RICO claims, and Petitioner lacks standing to assert any claim related to the Trust. Nonetheless, instead of responding to Respondent’s motion to dismiss, Petitioner filed his Amended Complaint as a matter of course. (Appx. 22a).

Equally important and central to reviewing the merits of the Petition, on April 26, 2017, the District Court extended Respondents deadline for filing a reply in support of their motion to dismiss. The District Court also extended Respondent’s deadline for responding to Appellant’s Amended Complaint until fourteen days after the District Court ruled on the motion to dismiss. Later, on May 2, 2017, the District Court denied Respondent’s first motion to dismiss as moot in light of the filing of Appellant’s Amended Complaint. (Appx. 19a).

On May 15, 2017, Respondent’s timely lodged a proposed enlarged motion to dismiss the Amended Complaint and concurrently moved for leave to exceed the page limits. The District Court granted

Respondent's motion to exceed the page limits two days later and directed the Clerk of the Court to file the lodged motion. Instead of responding to Respondent's motion to dismiss, however, Petitioner moved for leave to file yet another amended complaint.

The crux of this matter culminated on July 24, 2017 when Petitioner filed a motion for default judgment, arguing that Appellees should be defaulted because they did not file an answer to the amended complaint. (Appx. 6a).

On July 26, 2017, the District Court denied Appellant's motion for default judgment. The District Court explained that Respondent's timely responded to the Amended Complaint by filing a motion to dismiss, and that Appellees would be required to file an answer only if their motion to dismiss is denied. (Appx. 6a).

On March 15, 2018, the District Court granted Respondent's motion to dismiss the Amended Complaint, denied Petitioner's motion for leave to file a second amended complaint, and denied as moot Petitioner's motion for leave to file a second motion for default judgment. (Appx. 17a).

Petitioner appealed to the United States Court of Appeals for the Ninth Circuit. During the Appeal before the United States Court of Appeals for the Ninth Circuit, Petitioner framed the argument on appeal as follows: Whether Rule 12(a)(4)(A) and/or Rule 15(a)(3), Federal Rules of Civil Procedure, tolls

the time to answer when there is a pending motion to dismiss such that the District Court properly considered Defendants' motion to dismiss the Amended Complaint? (Pet. Appx. 4).

Petitioner, however, frames the argument before this Court as to whether a 12(b)(6) motion is a responsive pleading.

REASONS TO DENY THE PETITION

I. The Decision in the Court Below is Correct.

The Petitioner's case is far from an ideal vehicle for granting a certiorari petition as the case law is quite settled as to whether a 12(b)(6) motion tolls the time for a defendant to file a responsive pleading. Three flaws in particular are apparent which merit a denial from this Court.

A. Petitioner Failed to Raise the Issues Before the United States Court of Appeals for the Ninth Circuit and the Question Presented in this Petition Was Not Before the Court Below.

Throughout the proceedings below, Petitioner did not address the question Petitioner now asks the Court to answer. During the Ninth Circuit proceedings, Petitioner framed the argument as follows: Petitioner was denied a fair trial when the District Court abused its discretion by determining the Appellees/Respondents timely responded to the Petitioner's Amended Complaint. Petitioner now

frames the argument as to whether the Arizona District Court and the United States Court of Appeal for the Ninth Circuit created a split by holding that the Respondents/Defendants timely responded to Plaintiff's amended complaint by filing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Pet. App. 2).

The problem with this question is that the issue was never presented below. At no time while the case was pending in the Ninth Circuit did Petitioner argue that the court needed to apply a new standard for interpreting Federal Rule of Civil Procedure 12(b)(6). Ordinarily, “this Court does not decide questions not raised or resolved in the lower court.” *Youakim v. Miller*, 425 U.S. 231, 234 (1976). *See also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 379 n.5 (1996) (Court “generally do[es] not address arguments that were not the basis for the decision below.”); *Duignan v. United States*, 274 U.S. 195, 200 (1927) (same).

While this limitation on issues eligible for review comprises a prudential consideration, rather than a restriction on jurisdiction, this Court has made plain that it will not depart from that general rule absent a showing of “unusual circumstances.” *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (citation omitted). *Cf.* 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure: Civil 2D* § 2805, at 57-58 (“A principle that strikes very deep is that a new trial will not be granted on grounds not called to the court’s attention

during the trial unless the error was so fundamental that gross injustice would result.”).

Petitioner’s only argument on appeal before the Ninth Circuit center on whether the District Court erroneously granted Respondent’s motion to dismiss the Amended Complaint because the motion to dismiss did not toll the time in which to file an Answer, and as such, Petitioner’s default judgment should have been granted. Petitioner did not argue that the District Court erred in considering whether or not to grant the motion to dismiss, but instead argued that the District Court erred because it abused its discretion in granting the motion to dismiss when an Answer had not been filed. (Pet. App. 4).

As the Ninth Circuit held: “The district court did not abuse its discretion in denying Neal’s motion for default judgment because defendants served a timely responsive motion to the amended complaint. *See* Fed. R. Civ. Pro. 55(a) (authorizing entry of default when defendant “has failed to plead or otherwise defend”).” (Pet. App. 4).

The absence of briefing on the incorporation question below would significantly impede the Court’s consideration of the issue, for it would not have the benefit of arguments tested and refined in lower courts. *United States v. Bestfoods*, 524 U.S. 51, 72–73 (1998) (declining to entertain an issue on which the courts below did not focus). *See also Sykes v. United States*, 564 U.S. 1, 31 (2011) (Scalia, J. dissenting) (“Supreme Court briefs are an

inappropriate place to develop the key facts in a case. We normally ... leav[e] important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery.”), *overruled by Johnson v. United States*, 135 S. Ct. 2551 (2015). The Court would be better served to wait for a case where the incorporation issue was litigated from the beginning of the proceedings, rather than raised sua sponte by the lower court.

Petitioner having thus failed to carry their burden of showing that the claim Petitioner now raises here was properly presented to the Ninth Circuit, this Court should not reach the question presented. This Court need not decide in this case whether the requirement that a federal claim be addressed or properly presented in a Federal Court of Appeals is jurisdictional or prudential. *Yee v. Escondido*, 503 U.S. 519, 533 (1992).

B. The Lower Court’s Decision Was Limited to the Facts of this Case and Does Not Implicate State or National Interests.

The Petition has no greater application outside the factual parameters of this case and factual pattern. The United States Court of Appeals applied the correct law as to the record on appeal and there is no misapplication of federal law as applied to 12(b)(6) rules of interpretation. The Ninth Circuit Opinion is not in conflict with any precedent from this Court. To the contrary the Ninth Circuit accurately cited Federal Rule of Civil Procedure

55(a) authorizing entry of default when a defendant “has failed to plead or otherwise defend”. Such is not the case here.

The Ninth Circuit made clear that its holding was limited to the facts of the present case when it stated in the Opinion: “This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3”. (Pet. App. 6a). Because the court's holding was restricted to the facts and circumstances of this case it has little to no application to any other case, much less to any fundamental principles and interests at the heart of this Court's jurisprudence. In arguing for certiorari, Petitioner also erroneously suggests that the Ninth Circuit imposed a new and unduly high burden for plaintiffs to prove the adequacy of their case and proceed to a trial on the merits. But the court of appeals did no such thing -- not in this case.

The Ninth Circuit holding, the court was clear that it had not imposed any new burdens on plaintiffs. The Petitioner has overstated the ruling from the Ninth Circuit. This overstatement pervades the petition for certiorari. The Petitioner suggests that the Ninth Circuit reinterpreted the Federal Rules of Civil Procedure, denying Petitioner access to the Courts.

This is perhaps why no jurist on the Ninth Circuit Court of Appeals objected in any way to this decision or sought its reconsideration. The panel decision was unanimous and no judge dissented from denial of en-banc review. No jurist even requested a

vote on the petition for the rehearing. (Pet. App. 12a.) If, as is alleged by Petitioner, this opinion truly had major potential consequences for Arizona, the rest of the Ninth Circuit states, and all other states, it is likely that at least one Ninth Circuit jurist would have called for en-banc review. But the panel that decided the case clearly limited its holding to the facts of this case, without in any way foreclosing further attempts to establish the adequacy of 12(b)(6) in other cases. Thus, the holding below does not provide the opportunity for this Court to reach the broad question presented by the Petitioner, nor does it merit certiorari review.

C. There is No Circuit Split as the Lower Court's Decision Properly Interpreted Rule 12(b)(6).

Petitioner's question presented asks whether 12(b)(6) tolls the time for a responsive pleading. There is no split among the Circuit Courts of Appeal as to this issue. Thus, certiorari review is not warranted. (Pet. 2).

The Petitioner is endeavoring to create a conflict where, in fact, none exists. This is especially so where the court of appeals certainly has not departed far from the accepted and usual course of judicial proceedings. At most, any alleged error merely consists of the misapplication of a properly stated rule of law. Supreme Court Rule 10 states: "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual

findings or the misapplication of a properly stated rule of law".

Here, there is no constitutional violation that seriously affected Petitioner's substantial rights to proceed to trial, or undermines the fairness of the judicial proceedings. As a consequence, the petition for certiorari should be denied.

Accordingly, the only issue before the Court of Appeals was whether a timely motion to dismiss was filed which tolled the time in which to file an Answer, and therefore a motion for default judgment was improper. On March 13, 2017, the District Court granted Respondent's motion for extension of time to answer or otherwise respond to the Complaint. (Pet. 6). The District Court granted Respondents until April 6, 2017 to respond to the Complaint. On April 6, 2017, Respondents filed a timely motion to dismiss the Complaint. On April 21, 2017, Appellant filed an Amended Complaint. On April 25, 2017, Appellees moved the District Court for extension of time to file a Reply to Defendants' Motion to Dismiss or otherwise respond to the First Amended Complaint. On April 26, 2017, the District Court granted Appellees' Motion to Extend Time to File a Reply in Support of Defendants' Motion to Dismiss and to Answer to Otherwise Respond to the First Amended Complaint. The District Court denied as moot Appellees' Motion to Dismiss in light of Petitioner's filing of an Amended Complaint. Pursuant to the District Court's April 26, 2017 Order, the response to the Amended Complaint was 14 days after the Court's ruling on the motion—May 16, 2017. (Pet. App. 4a).

On May 15, 2017, Appellees timely filed their Motion to Dismiss Amended Complaint. As outlined in this Brief in Opposition, Rule 15(a)(3) and Rule 12(a)(4)(A), and the legal authority cited therein, support affirming the Ninth Court's ruling and the District Court's Order dismissing the Amended Complaint. Contrary to Appellant's assertions, a timely motion to dismiss was filed responding to the Complaint. Appellant having filed an Amended Complaint, the District Court granted Appellees 14 days after the District Court ruled on the pending motion to dismiss to file an Answer or response to the Amended Complaint. (Pet. App. 20a). On May 2, 2017, the District Court denied the motion to dismiss as moot in light of Appellant having filed an Amended Complaint, thus triggering the 14-day deadline to file a response to the Amended Complaint. A timely motion to dismiss the Amended Complaint was filed on May 15, 2017. *Id.*

Petitioner misinterprets Rule 12(a)(4)(A) and Rule 15(a)(3), and Petitioner has not cited legal authority to that factually supports Petitioner's position. Indeed, a timely response to the Complaint and Amended Complaint was filed by Appellees pursuant to Rule 12, Federal Rules of Civil Procedure, and pursuant to the Court's orders for filing an answer or response to the Amended Complaint. Appellees' filed a motion to dismiss the original Complaint and when an Amended Complaint was subsequently filed a timely motion to dismiss the Amended Complaint was filed. As such, the District Court did not abuse its discretion in considering the motion to dismiss the Amended

Complaint and thereafter granting the motion, nor error as a matter of law in granting such motion pursuant to the Federal Rules of Civil Procedure and legal authority addressing the issue. As no answer was yet due, the motion for default judgment was properly denied.

The Petitioner contends that the Ninth Circuit's approach to the motion for default review is at odds with authority from other circuits (Pet. 12). However, the Ninth Circuit's approach is fully aligned with decisions from other circuits.

Federal Rule of Civil Procedure 12(a)(4) states that a Rule 12 motion tolls the time period within which a defendant must file a responsive pleading. Cases cited below also conclude that Rule 12(a)(4) also applies to a partial Rule 12(b) motion, tolling the time period for filing an answer to all claims contained in the Complaint— not just the claims for which the motion seeks dismissal. The majority of courts have expressly held that even though a pending motion to dismiss may only address some of the claims alleged, the motion to dismiss tolls the time to respond to all claims. This is more significant, as here, when the motions to dismiss sought dismissal of all claims. Pursuant to Rule 12(a)(1)(A), “A defendant must serve an answer within 21 days after being served with the summons and complaint.” If an amended complaint is filed, an answer “must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is

later.” Rule 15(a)(3), Federal Rules of Civil Procedure.

Pursuant to Rule 15(a)(3), “Unless the court orders otherwise, any required response to an amended pleading must be made within the time remaining to respond to the original pleading or within 14 days after service of the amended pleading, whichever is later.” Here, the Court ordered when the response to the Amended Complaint was to be made, which was timely. ER 29; ER 30. In addition, the motion to dismiss the Amended Complaint was timely pursuant to the express language of Rule 15(a)(3), Federal Rules of Civil Procedure. Pursuant to Rule 12(a)(4)(A), if a defendant files a motion under Rule 12 and “the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court’s action.”

Rule 12(a)(4), Federal Rules of Civil Procedure, provides in relevant part:

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

Rule 12(a)(4)(A), Federal Rules of Civil Procedure. A proper method of attacking a complaint under Rule 12 is by filing a motion to dismiss. *Flanigan v. Sec.-First Nat. Bank of Los Angeles*, 41 F. Supp. 77, 79 (S.D. Cal. 1941). Simply, Rule 12(b), provides the procedural vehicle to test the legal sufficiency of a complaint. *Id.*; *Abbasi v. Herzfeld & Rubin, P.C.*, 863 F. Supp. 144, 146 (S.D.N.Y. 1994). As alluded to above, in the context of partial motions to dismiss, the majority of courts interpreting Rule 12(a)(4) have held that “filing a partial motion to dismiss will suspend the time to answer those claims or counterclaims that are not subject to the motion.” *See ThermoLife Int’l, LLC v. Gaspari Nutrition, Inc.*, No. CV 11- 01056-PHX-NVW, 2011 WL 6296833 (D. Ariz. Dec. 16, 2011) (even when a pending motion to dismiss may only address some of the alleged claims, the motion to dismiss tolls the time to respond to all claims under Rule 12(a)(4)); see also *Gortat v. Capala Bros.*, 257 F.R.D. 353, 366 (E.D.N.Y. 2009) (finding that requiring a party to reply to claims not the subject of a partial motion to dismiss would result in a “procedural thicket of piecemeal answers that would poorly serve judicial economy”); *Kent v. Geren*, No. CIV.A. 07-CV-02202-Z, 2008 WL 150060 (D. Colo. Jan. 11, 2008) (finding that partially dispositive Rule 12 motion altered responsive pleading date under Rule 12(a)(4); *Beaulieu v. Bd. of*

Trustees of Univ. of W. Fla., No. 3:07CV30 RVEMT, 2007 WL 2020161 (N.D. Fla. July 9, 2007) (holding that a partial motion to dismiss “automatically extends” the time to file a responsive pleading on unchallenged claims pursuant to Rule 12(a)(4)); *Shah v. KIK Int'l LLC*, No. 3:06-CV-712RLM, 2007 WL 1876449 (N.D. Ind. June 26, 2007) (holding that Rule 12(a)(4) applies “by operation of law” to claims not challenged in partial motion to dismiss); *Bertaut v. Par. of Jefferson*, No. CIV.A. 02-2104, 2002 WL 31528468 (E.D. La. Nov. 8, 2002) (“[e]ven the filing of a partial motion to dismiss extends the defendant's time to answer the entire complaint” under Rule 12(a)(4)); *Finnegan v. Univ. of Rochester Med. Ctr.*, 180 F.R.D. 247, 250 (W.D.N.Y. 1998) (holding that the plain language of Rule 12(a)(4) contemplates suspending the time to response to the entire complaint, not just to claims that are the subject of a partial motion to dismiss); *Oil Express Nat., Inc. v. D'Alessandro*, 173 F.R.D. 219, 220 (N.D. Ill. 1997) (“The majority of courts that have considered this question ... have concluded that a party does not need to file an answer while a partial motion to dismiss is pending”); *Brocksopp Eng'g, Inc. v. Bach-Simpson Ltd.*, 136 F.R.D. 485, 486–87 (E.D. Wis. 1991).

Here, Respondent’s motion to dismiss the Amended Complaint challenged all claims. Moreover, the District Court issued an Order that provided Respondents with a definitive date upon which to file an Answer, which was only after the District Court ruled on the pending motion to dismiss. Since the action was dismissed there was no

necessity to file an Answer. Simply, Petitioner's arguments are contrary to established law and the District Court's express orders which do not abuse its discretion or otherwise misapply the law

CONCLUSION

The Petition should be denied.

Respectfully submitted,

Robert Sirianni, Jr.
Brownstone, P.A.
PO Box 2047
Winter Park, Florida 32790
(407) 388-1900
robertsirianni@brownstonelaw.com

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