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2016 IL App (4th) 150436-U

NO. 4-15-0436

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
June 15, 2016
Carla Bender
4th District Appellate Court, IL

SHAHID R. KHAN; ANN C. KHAN; SRK WILSHIRE INVESTMENTS LLC; SRK WILSHIRE PARTNERS; SRK WILSHIRE INVESTORS, INC.; THERMOSPHERE FX PARTNERS LLC; and KPASA LLC, Plaintiffs-Appellees, v. GRAMERCY ADVISORS, LLC; and JAY A. JOHNSTON, Defendants-Appellants.	Appeal from Circuit Court of Champaign County No. 09L140 Honorable Jeffrey B. Ford, Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: Defendants have made minimum contacts with Illinois, and exercising personal jurisdiction over them in Illinois is fair and reasonable under the circumstances of this case.

¶ 2 The plaintiffs are Shahid R. Khan (Khan); his spouse, Ann C. Khan; and some business entities in which, pursuant to the "2001 Foreign Currency Derivative Strategy," he bought majority interests. As it turned out, the strategy was an abusive tax shelter, although the Khans claim not to have known that at the time. The business entities generated losses, which the Khans claimed in their individual income tax returns so as to reduce their taxable income. After an audit, however, the Internal Revenue Service (IRS) disallowed the losses as contrived or artificial, and consequently, the Khans incurred genuine financial losses in the form of interest, penalties, and the amounts they had paid for the creation and implementation of the tax shelter.

Now plaintiffs seek damages from defendants, Gramercy Advisors, LLC (Gramercy), and Jay A. Johnston, among others, for peddling the tax shelter to them.

¶ 3 Neither defendant is domiciled in Illinois. Gramercy has its principal place of business in Connecticut, and Johnston resides in Puerto Rico. For that reason, they filed a motion for dismissal in the trial court, arguing that exercising personal jurisdiction over them in Illinois would violate due process. Without an evidentiary hearing, the court denied their motions, finding, on the basis of the documentary submissions, that it would be consistent with due process to subject defendants to the specific jurisdiction of Illinois. We granted defendants leave to appeal. See Ill. S. Ct. R. 306(a)(3) (eff. July 1, 2014).

¶ 4 In our *de novo* review, we find no violation of due process in the exercise of personal jurisdiction over defendants. Therefore, we affirm the trial court's denial of their motion for dismissal.

¶ 5 I. BACKGROUND

¶ 6 A. The Fee-Sharing Agreement Between BDO Seidman, LLP and Gramercy

¶ 7 In an affidavit of April 21, 2015, Paul Shanbrom states the following. From July 1987 to December 2008, he was a partner at BDO Seidman, LLP (BDO), and a member of its tax solutions group. (According to the complaint, BDO has its principal place of business in Chicago.) As a member of the tax solutions group, Shanbrom "was specifically charged with the task of negotiating the terms of BDO's arrangement with Gramercy with regard to their joint efforts in offering tax-advantaged transactions to potential clients, including those at issue in the instant proceedings." The person at Gramercy he negotiated with was Johnston. (Johnston states, in his own affidavit of April 21, 2015, that he is a co-managing member of Gramercy.)

¶ 8 On January 10, 2001, Shanbrom and Johnston reached a "[n]ew deal," under which BDO and Gramercy would split the fees "charged to clients in connection with the tax-advantaged transactions jointly promoted by BDO and Gramercy beginning in the year 2001, which included *** the so-called 'Gramercy II' transaction involving investments in foreign currency (engaged in by the Khans in tax year 2001)." The term "[n]ew deal" is in a note, handwritten by Shanbrom at the time of the negotiation and attached to his affidavit. According to the note, the "[o]ld deal" between BDO and Gramercy was 50/50 of net fees," but the "[n]ew deal" would be 66% for BDO and 34% for Gramercy, although, when it came to "[p]erformance," the split would be 20% for BDO and 80% for Gramercy.

¶ 9 Shanbrom describes the contemplated joint efforts of BDO and Gramercy as follows:

> "As part of this fee-splitting agreement between BDO and Gramercy, it was understood and agreed to that BDO had primary responsibility for, among other things, identifying potential clients and assisting in the marketing of the Transactions and that Gramercy had primary responsibility for, among other things, handling all aspects of the investments and transactional documents necessary to implement the [t]ransactions, in addition to assisting in marketing the [t]ransactions to clients identified by BDO. It was on this basis of BDO's and Gramercy's joint efforts that BDO and Gramercy orally agreed to the division of fees and profits as outlined in my January 10, 2001, notes."

¶ 10 The record contains the printout of an e-mail, dated January 22, 2001, from Robert Jones to Judy Geiselhart, both of BDO. The subject line is "Bonus for Paul Shanbrom," and the text of the e-mail reads: "Please process a $100,000 bonus for Paul Shanbrom in recognition of his achievement in re-negotiating the joint venture between Gramercy and Tax Solutions." (An affidavit of Todd Simmens, BDO's national managing partner of tax risk management, authenticates this e-mail as a business record of BDO.)

¶ 11 The record also contains a printout of an e-mail, dated December 12, 2001, in which Johnston requests Gramercy's share of Khan's fee. The e-mail is addressed to Jones, and it lists "the clients and fees for 2001." One of the listed clients is "Shahid Khan," and next to his name is the amount $250,000.

¶ 12 B. The 2001 Foreign Currency Derivative Strategy

¶ 13 1. *Selling the Strategy to Khan*

¶ 14 In his affidavit, dated April 1, 2014, Khan states the following. Around June 2001, Shanbrom, a partner at BDO—a firm that Khan describes as his and his wife's "longtime accountants"—solicited the Khans to participate in a "new Foreign Currency Derivative Strategy." Shanbrom told them that, regardless of whether they received a profit or a loss on any investments they made pursuant to this strategy, they would realize "substantial tax benefits" in a "completely legal" way.

¶ 15 In order that Khan could learn more about this strategy, Shanbrom referred him to Gramercy. Shanbrom even arranged for a representative from Gramercy to meet with Khan at his executive office in Urbana, Illinois, in summer 2001 (according to Khan's affidavit). Khan could not remember the name of the person Shanbrom brought along to the meeting in Urbana, but he remembered that Shanbrom introduced him as an "operating partner" of Gramercy.

During the meeting, which lasted 45 minutes to an hour, the partner from Gramercy "solicited [Khan's] investment with Gramercy." Both Shanbrom and the Gramercy partner "represented that *** that the product was bullet-proof " and "backed up" by "prominent law firm opinions."

¶ 16 Defendants, on the other hand, dispute that anyone from Gramercy visited Khan in Urbana. All eight persons who were employed by Gramercy in summer 2001—Robert Lanava, Jay A. Johnston, Robert Young, Rodd Kauffman, Robert S. Koenigsberger, Marc Hélie, Robert Rauch, and Renato Mazzuchelli—have signed affidavits stating that they never met with Khan in Illinois and that, as far as they know, no one else at Gramercy did, either.

¶ 17 After this meeting in Urbana (Khan continues in his affidavit), the "Gramercy operating partner" followed up with two or three telephone calls to Khan in Illinois. This Gramercy operating partner recommended that Khan "invest additional cash (several millions) to lend further legitimacy to the investment and enhance the return on the investment, and further [assured Khan] that a prominent law firm opinion on the transaction would issue." (According to the complaint, Proskauer Rose, LLP (Proskauer), later issued an opinion letter to the effect that the 2001 Foreign Currency Derivative Strategy generated legitimate tax losses. But the opinion letter, plaintiffs allege, did not represent the independent opinion of an independent law firm; rather, BDO and Proskauer were in cahoots, as evidenced by the fact that Shanbrom "reviewed the opinion letter and made certain revisions.")

¶ 18 In August 2001, Shanbrom arranged for a conference call between Khan, himself, and Johnston "to further discuss the 2001 Foreign Currency Derivative Strategy." Khan recounts this conference call as follows:

> "12. *** Shanbrom initiated the call, Johnston joined in, and I participated in the call from my office in Illinois. During the

call, I introduced myself to Johnston and told him about my Illinois-based businesses and residency. During the call, Johnston explained the steps of the 2001 Foreign Currency Derivative Strategy and reiterated Shanbrom's claims regarding the 2001 Foreign Currency Derivative Strategy's potential to provide tax benefits. Johnston further touted what he described as Gramercy's special expertise with distressed debt investments and its long history of achieving high rates of return. Johnston promised me that Gramercy could achieve results for my wife and me (and the other Plaintiffs) that few, if any, other investment firms could provide. Gramercy, through Johnston, confirmed to me that it had a history of working with BDO and reiterated that the 2001 Foreign Currency Derivative Strategy was a completely legal way to make above average returns, while simultaneously achieving substantial tax benefits, regardless of the investments' losses or gains.

***

14. Again, before Plaintiffs ever entered into any agreements with Gramercy, during the call referenced in paragraph 12, BDO's Shanbrom and Gramercy's Johnston advised me that the 2001 Foreign Currency Derivative Strategy could yield a substantial profit and at the same time, regardless of whether we made or lost money on the investments, legally reduce Plaintiffs'

> capital gains and income tax burden. Both men also told me that Plaintiffs should invest additional sums of money with Gramercy, aside from the investments directly involved in the strategies, because these other investments would diversify Plaintiffs' portfolio, provide [plaintiffs] with a chance to achieve even higher rates of return, and provide even more economic substance for the 2001 Foreign Currency Derivative Strategy. ***
>
> 15. My wife and I lacked any prior knowledge in the area of these types of sophisticated investments and tax reduction strategies. We therefore relied heavily on BDO, our longtime accountants in whom we placed significant trust, and, by extension, Gramercy and their professed expertise and experience, in electing to participate in the 2001 Foreign Currency Derivative Strategy."

¶ 19 In his affidavit of November 13, 2014, Johnston denies that, in the telephone conversation of August 2001, he "made statements to Khan regarding the legality and tax implications of Khan and BDO's tax strategies." But he does not deny the telephone conversation took place; nor does he otherwise contradict Khan's account of the telephone conversation.

¶ 20 2. *The Investment Management Agreement of 2001*

¶ 21 In November 2001, Gramercy sent a proposed "Investment Management Agreement" to Khan in Illinois. After reviewing the agreement and signing it in Illinois, Khan sent it back to Gramercy in Connecticut.

¶ 22 Under the agreement, which contained a New York choice-of-law clause, but not a forum-selection clause, Khan designated Gramercy as his "attorney-in-fact," authorizing Gramercy to do various things on his behalf, *i.e.*, entering into investments; selecting, maintaining, and closing accounts with brokers; opening, maintaining, and closing bank accounts in the course of effecting trading and investment transactions; and executing all documents and taking all other actions that Gramercy considered to be necessary or appropriate to carry out its duties. The agreement further stated that all correspondence was to be mailed to Khan at his Illinois address and that his initial capital allocation to Gramercy would be $2.5 million.

¶ 23 Under the heading "Limitation of Liability, Exculpation[,] and Indemnification," the investment management agreement provided as follows:

> "(c) The Investment Manager [(defined as Gramercy)] is not required to inquire into or take into account the effect of any tax laws or the tax position of the Client [(defined as Khan)] in connection with managing the Account. To the fullest extent permitted by law, neither the Investment Manager, its members[,] [n]or any of their respective affiliates and their respective partners, members, officers, directors, employees, shareholders[,] and agents shall be liable in any manner to the Client with respect to the effect of any U.S. federal, state, local[,] or any other taxes of any nature whatsoever on the Account or the Client in connection with managing the Account or in connection with this Agreement or otherwise. The Client agrees that it has consulted its own tax advisor regarding the possible tax consequences of establishing the

> Account or entering into any investment made under or in connection with this Agreement."

(In their brief, defendants quote section 7(c) as further saying: "[Plaintiff] represents and agrees that it has consulted its own tax advisor, and that neither [Gramercy] nor any of its affiliates has made any oral or written statement to [Plaintiff], regarding the possible tax consequences of establishing the Account or entering into any investment made under or in connection with this Agreement. [Plaintiff] further represents and agrees that it has not relied on [Gramercy] or any of its affiliates in connection with any tax advice." (Emphasis omitted.) Actually, that language is not in section 7(c) of the 2001 investment management agreement, although, as we later will discuss, it was in section 7(c) of a subsequent investment management agreement, the one Khan entered into in 2003.)

¶ 24 On November 5, 2001, the same day he signed the 2001 investment management agreement, Khan signed a letter addressed to Gramercy, in which he repeatedly referred to himself as "it" (suggesting, perhaps, that this was a form letter). The second paragraph of this letter, which defendants call a "side letter," reads as follows:

> "The undersigned further acknowledges that: (a) it has consulted with its own financial, tax[,] and legal advisors with respect to the Transactions and, in particular, the effect of the tax laws and regulations and the impact of any notices or announcements issued by the IRS, (b) it has not relied on the Investment Manager for any financial, tax[,] or legal advice with respect to the Transactions, and (c) it shall not have any claim against the Investment Manager in the event that any tax liability,

> problem[,] or issue should arise in connection with the Transactions other than as a direct result of any negligence of the Investment Manager in effecting the investments pursuant to the Agreement."

¶ 25 3. *Khan Buys a Share of KPASA LLC*

¶ 26 On December 4, 2001, Johnston, as managing director of Gramercy, sent to Khan, in Illinois, a proposed agreement whereby, for $200,000, Khan would purchase a membership interest in KPASA LLC (KPASA). Johnson requested that Khan sign the agreement and send it back to him. Khan did so and paid the purchase price of $200,000. Thereafter, according to Khan's affidavit, "Gramercy sent monthly KPASA account statements to Plaintiffs in Illinois for many years."

¶ 27 Gramercy explains, in footnote 12 of its brief: "[KPASA] was a partnership formed to purchase and sell assets in connection with Khan's 2001 options-based tax shelter."

¶ 28 4. *The Implementation of the 2001 Foreign Currency Derivative Strategy*

¶ 29 According to the complaint, Khan followed the 2001 Foreign Currency Derivative Strategy on November 20, 2011, by simultaneously buying and writing call options, none of which were sourced from Illinois. (He also entered into put options (a put option is the right to sell an asset at a specified price by a certain date), but for the sake of simplicity, we will confine our discussion to the call options.)

¶ 30 A call option is the right, but not the obligation, to buy a certain quantity of an asset—say, currency or a security—at a certain price (the strike price) within a certain time (before the expiration). A call option can be purchased, in which case it is called a "long option." Or, alternatively, a call option can be "written," or sold, in which case it is called a "short option." The holder of a call option has a right: a right to buy the asset at the strike price (or not to buy it). The writer of a call option has an obligation: an obligation to sell the asset at the strike price if the holder exercises the option according to its terms.

¶ 31 On November 20, 2001, Khan *bought* a call option on Russian bonds, for which he paid a premium, and he simultaneously *wrote* an offsetting call option on Russian bonds, for which he was paid a premium in roughly the same amount. Also, he *bought* a call option on Brazilian bonds, for which he paid a premium, and he simultaneously *wrote* an offsetting call option on Brazilian bonds, for which he received a premium in roughly the same amount. All these options had the same expiration date, November 20, 2002.

¶ 32 On December 11, 2001, Khan contributed these option positions to KPASA as a contribution to capital. A couple of weeks later, KPASA terminated the option positions and paid Khan 1,168.83 euros. (According to the complaint, there were other steps to the 2001 Foreign Currency Derivative Strategy, steps calculated to increase Khan's basis in KPASA so that he could claim the full amount of the generated losses. In this part of the discussion, however, we are aiming for simplicity because, given the issues in this appeal, it is necessary only to convey a general idea of how the tax shelter was supposed to work.)

¶ 33 As a limited liability company, KPASA was treated as a partnership for income tax purposes. See 26 C.F.R. § 301.7701-3(a) (1999). The income and losses of a partnership were deemed to flow through to the partners. See 26 U.S.C. §§ 701 to 704, 6031 (2000). By contributing the pairs of options to KPASA, Khan acquired an interest in KPASA. See 26 U.S.C. §§ 721(a), 722 (2000). A partner's contribution to a partnership (or limited liability company) is equal to the value of the property the partner contributed to the partnership, less the value of any "liabilities" of the partner that the partnership assumed. 26 U.S.C. §§ 752(a) to (b)

(2000). In *Helmer v. Commissioner*, 34 T.C.M. (CCH) 727 (1975), the United States Tax Court had held that contingent obligations, such as options, were not "liabilities" within the meaning of section 752 because a partnership's obligation to sell the underlying asset (currency, securities, pork bellies, or whatever the underlying asset was) did not become fixed until the option was exercised. Thus, when KPASA disposed of the contributed options, Khan claimed a tax loss in the amount of the premium he had paid for the long options, which was his tax basis in KPASA (see 33 Am. Jur. 2d *Federal Taxation* ¶ 2465 (2016)); but, presumably on the authority of *Helmer*, he disregarded the offsetting premium he had received for the short options—which greatly reduced the economic significance of the long options—because the short options were contingent and hence were not "liabilities" within the meaning of section 752.

¶ 34 The trouble was that, the year before, on August 13, 2000, the IRS had released Notice 2000-44, entitled "Tax Avoidance Using Artificially High Basis," which, according to the complaint, had sent a "clear message" to BDO and Gramercy "that purported losses arising from the 2001 Foreign Currency Derivative Strategy [were] not properly allowable, for Federal income tax purposes."

¶ 35 Indeed, according to the complaint, the IRS had made basically the same announcement even earlier, in 1999. IRS Notice 2000-44 was basically a reiteration of the warning in IRS Notice 99-59, released on December 10, 1999, that "a loss [was] allowable as a deduction for federal income tax purposes only if it [was] bona fide and reflect[ed] actual economic consequences." IRS Notice 99-59, "Tax Avoidance Using Distribution of Encumbered Property."

¶ 36 IRS Notice 2000-44 gave a couple of examples of "artificial loss[es] lacking economic substance," losses that were "not allowable" for purposes of reducing taxable income. One of the examples had to do with options trading:

> "[A] taxpayer purchases and writes options and purports to create substantial positive basis in a partnership interest by transferring those option positions to a partnership. For example, a taxpayer might purchase call options for a cost of $1,000X and simultaneously write offsetting call options, with a slightly higher strike price but the same expiration date, for a premium of slightly less than $1,000X. Those option positions are then transferred to a partnership which, using additional amounts contributed to the partnership, may engage in investment activities.
>
> Under the position advanced by the promoters of this arrangement, the taxpayer claims that the basis in the taxpayer's partnership interest is increased by the cost of the purchased call options but is not reduced under [section 752 of the Internal Revenue Code (26 U.S.C. § 752) (2000)] as a result of the partnership's assumption of the taxpayer's obligation with respect to the written call options. Therefore, disregarding additional amounts contributed to the partnership, transaction costs, and any income realized and expenses incurred at the partnership level, the taxpayer purports to have a basis in the partnership interest equal to the cost of the purchased call options ($1,000X in this example),

> even though the taxpayer's net economic outlay to acquire the partnership interest and the value of the partnership interest are nominal or zero. On the disposition of the partnership interest, the taxpayer claims a tax loss ($1,000X in this example), even though the taxpayer has incurred no corresponding economic loss.
>
> The purported losses resulting from the transaction described above do not represent bona fide losses reflecting actual economic consequences as required for purposes of [section 165 of the Internal Revenue Code (26 U.S.C. § 165) (2000)]. The purported losses from these transactions (and from any similar arrangements designed to produce noneconomic tax losses by artificially overstating basis in partnership interests) are not allowable as deductions for federal income tax purposes."

¶ 37 As the complaint notes, this type of tax shelter, designed to create artificial tax losses, is known as a "Son-of-BOSS." *AD Global FX Fund, LLC v. United States*, No. 05 Civ. 00223(RKE), 2014 WL 1285502, at *2 n.6 (S.D.N.Y. 2014). It is a variation, a "son," of an older tax shelter known by the initials "BOSS," standing for "bond and options sales strategy." *Id.* The Southern District of New York gives the following nutshell description of this type of tax shelter:

> "Son-of-BOSS shelters function by the transfer of assets encumbered by significant liabilities to a partnership, with the goal of increasing basis in that partnership. [Citation.] Because the exact value of the liabilities may not be fixed when the assets are

> transferred to the partnership[,] [t]his may let the partnership treat the liabilities as uncertain, which may let the partnership ignore them in computing basis. [Citation.] In that situation, the partners will have a basis in the partnership so great as to provide for large—but not out-of-pocket—losses on their individual tax returns. [Citation.]" (Internal quotation marks omitted.) *Id.*

5. *The Khans' Use of a Schedule K-1 for 2001, Prepared By BDO and Sent to Them By Gramercy, and the Resulting Back Taxes, Penalties, and Interest*

¶ 38 BDO, in Illinois, prepared the tax returns for KPASA for 2001 and the corresponding Schedule K-1 for the Khans. Gramercy provided BDO the information necessary to complete those tasks. The Schedule K-1 represented that Khan had incurred an ordinary loss of $25,946,340 for the tax year 2001. This was, theoretically, the deductible loss from the 2001 Foreign Currency Derivative Strategy, which was supposed to reduce the Khans' taxable income.

¶ 39 According to Khan's affidavit, Gramercy sent to him, at his Illinois address, KPASA's partnership tax return, including his Schedule K-1, which "reflect[ed] the shares of the income, credits, and deductions that were distributed to him and, by extension, [his] wife pursuant to [their] KPASA ownership interests." He further states:

> "Plaintiffs relied on this tax return and, in particular, the corresponding [Schedule] K-1 in claiming the losses purportedly generated by the 2001 Foreign Currency Derivative Strategy on our Illinois state and our federal income tax returns. The KPASA [Schedule] K-1 which Gramercy sent to us claimed substantial losses on our income tax returns; the losses led to our tax returns

ultimately being audited[,] and the outcome of those audits was the IRS'[s] imposition of significant back-taxes, penalties, and interest."

¶ 40 C. The Splitting of Khan's Fee Between BDO and Gramercy

¶ 41 On December 14, 2001, Johnston faxed to Jones an invoice, with a courtesy copy to Shanbrom. The invoice, signed by Johnston as "Managing Director," bears the icon of "Gramercy Advisors," and it requests that BDO, "per our agreement," remit $250,000 for "[KPASA] (Shahid Khan)." Specifically, the invoice requests that the funds be transferred by wire to Boston Safe Deposit Bank & Trust "[f]or Gramercy Financial Products LLC."

¶ 42 In his affidavit of November 17, 2014, Robert Lanava, a partner at Gramercy, states: "For the transactions at issue in this litigation, BDO collected a fee from Plaintiffs that covered both BDO's and Gramercy's services. BDO then wired Gramercy the fees owed for it[s] services." (The affidavit defines "Gramercy" as Gramercy Advisors, LLC; Gramercy Asset Management LLC; Gramercy Financial Services LLC; and Tall Ships Capital Management LLC, "together with each of their affiliates.")

¶ 43 II. ANALYSIS

¶ 44 A. General Jurisdiction and Specific Jurisdiction

¶ 45 General or all-purpose jurisdiction is "jurisdiction over a defendant based on a forum connection unrelated to the underlying suit (*e.g.*, domicile)." *Walden v. Fiore*, _____ U.S. _____, _____, 134 S. Ct. 1115, 1121 n.6 (2014). The forum state has general jurisdiction over a foreign corporation if its "affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." (Internal quotation marks omitted.) *Daimler AG v. Bauman*, _____ U.S. _____, _____, 134 S. Ct. 746, 749 (2014).

¶ 46 Specific or case-linked jurisdiction, by contrast, "depends on an affiliatio[n] between the forum and the underlying controversy (*i.e.*, an activity or occurrence that takes place in the forum State and is therefore subject to the State's regulation)." (Internal quotation marks omitted.) *Walden*, ___ U.S. at ___, 134 S. Ct. at 1115. As our supreme court said:

> "Specific jurisdiction requires a showing that the defendant purposefully directed its activities at the forum state and the cause of action arose out of or relates to the defendant's contacts with the forum state. [Citation.] Under specific jurisdiction, a nonresident defendant may be subjected to a forum state's jurisdiction based on certain single or occasional acts in the state but only with respect to matters related to those acts. [Citation.]" (Internal quotation marks omitted.) *Russell v. SNFA*, 2013 IL 113909, ¶ 40.

¶ 47 The parties agree there is no general jurisdiction over defendants in this case. The dispute is whether there is specific jurisdiction.

¶ 48 B. The Illinois Long-Arm Statute and Constitutional Due Process

¶ 49 The Illinois long-arm statute, section 2-209 of the Code of Civil Procedure (735 ILCS 5/2-209 (West 2014)), governs the exercise of personal jurisdiction by an Illinois court over a nonresident. *Russell*, 2013 IL 113909, ¶ 29. In the past, Illinois courts used a two-step analysis when deciding whether to exercise personal jurisdiction over a nonresident: they first decided whether a specific provision of section 2-209 was satisfied, and if it was, only then did they proceed to the further question of whether exercising personal jurisdiction over the nonresident would be consistent with the due process clauses of the United States and Illinois

Constitutions (U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2). *Russell*, 2013 IL 113909, ¶ 29.

¶ 50 On September 17, 1989, however, a statutory amendment went into effect that added a catchall provision, subsection (c) (Ill. Rev. Stat. 1991, ch. 110, ¶ 2-209(c))), to section 2-209. *Russell*, 2013 IL 113909, ¶ 30. Under the catchall provision, a court "may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution and the Constitution of the United States." Ill. Rev. Stat. 1991, ch. 110, ¶ 2-209(c) (now 735 ILCS 5/2-209(c) (West 2014)). Thus, the catchall provision makes the long-arm statute coextensive with the federal and Illinois constitutions, "collaps[ing] the jurisdictional inquiry into the single issue of whether a defendant's Illinois contacts are sufficient to satisfy federal and Illinois due process." *Russell*, 2013 IL 113909, ¶ 30.

¶ 51 C. The Fiduciary Shield Doctrine

¶ 52 Johnston invokes the fiduciary shield doctrine, arguing it would be unfair and unreasonable, under Illinois law, to exercise personal jurisdiction over him, considering that the contacts he allegedly made with Illinois were in his capacity as an agent of Gramercy, not in his individual capacity.

¶ 53 The fiduciary shield doctrine is inapplicable to Johnston. The reason is that, under *Rollins v. Ellwood*, 141 Ill. 2d 244, 280 (1990), Illinois courts lack personal jurisdiction over any "individual who seeks the protection and benefits of Illinois law, not to serve his personal interests, but to serve those of his employer or principal." As a co-managing member of Gramercy, Johnston presumably was entitled to share in its profits, as a partner would be entitled to share in the profits of a partnership (see Conn. Gen. Stat. § 34-152), and consequently he must have been acting in his own personal interest, as much as in the interest of Gramercy, when he helped to promote the 2001 Foreign Currency Derivative Strategy. See *Rollins*, 141 Ill. 2d at 279-80 ("Because Ellwood's conduct in Illinois was a product of, and was motivated by, his employment situation and not his personal interests, we conclude that it would be unfair to use this conduct to assert personal jurisdiction over him as an individual."). Johnston's personal interest was greater than the personal interest of an employee in continuing to receive his or her salary, *i.e.*, not being fired; Johnston's personal interest was in maximizing his own profit as a co-managing member. In that respect, he is unlike the police sergeant in *Rollins*.

¶ 54 Illinois courts created the fiduciary shield to protect employees, not co-proprietors. See *id.* at 280 ("[W]e are not persuaded by the argument, raised by various sources, that asserting personal jurisdiction over an *employee* who acted in the scope of his employment is justified because the *employee* is serving his own financial interests when he performs the *tasks imposed upon him by his employer*." (Emphases added.)). We are aware of no evidence that Johnston was an "employee" and that Gramercy was his "employer," with "the right to control the manner and method" of his work performance (*Kouba v. East Joliet Bank*, 135 Ill. App. 3d 264, 267 (1985)). *Cf. Rollins*, 141 Ill. 2d at 280 ("[W]e see no reason to fashion an exception to the fiduciary shield doctrine that will expose *employees* who engage in tortious conduct within the scope of their employment to the personal jurisdiction of Illinois courts." (Emphasis added.)). We see no evidence that Johnston had a boss at Gramercy who ordered him to seal the deal with Khan on pain of being fired. *Cf. id*. ("In practical terms, an employee, especially one in Ellwood's position, has little or no alternative besides unemployment when ordered to enter another State to carry out the wishes of his employer."). We see no evidence that Johnston had any boss at all. The rationale behind the fiduciary shield doctrine does not apply to Johnston.

¶ 55 D. The Procedure for Adjudicating Disputes Over Personal Jurisdiction

¶ 56 Because the trial court decided the jurisdictional question solely on the basis of the documentary submissions, our standard of review is *de novo*. See *Aasonn, LLC v. Delaney*, 2011 IL App (2d) 101125, ¶ 10. *De novo* review means using the same analysis a trial court would use (*Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011)); therefore, we should be clear on the burden of coming forward and other procedural rules governing the determination of personal jurisdiction in the trial court.

¶ 57 The procedure begins with the complaint. If, on its face, a complaint lacks factual allegations on the basis of which an Illinois court could legitimately exercise personal jurisdiction over the defendant, the complaint is subject to dismissal upon the defendant's motion, even if the motion is unaccompanied by any supporting affidavit. *Heller Financial, Inc. v. Conagra, Inc.*, 166 Ill. App. 3d 1, 5 (1988). Unless the record—such as the facial deficiency of the complaint—already supports the defendant's objection to personal jurisdiction, the defendant must do so by an affidavit (735 ILCS 5/2-301(a) (West 2014)) "made on the personal knowledge of the [affiant]" (Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013)). The trial court should accept as true any facts in the defendant's affidavit that the plaintiff does not contradict by a counteraffidavit (*TCA International, Inc. v. B & B Custom Auto, Inc.*, 299 Ill. App. 3d 522, 531 (1998); *Johnson v. Ortiz*, 244 Ill. App. 3d 384, 388 (1993)), which likewise must be "made on the personal knowledge of the [affiant]" (Ill. S. Ct. R. 191(a) (eff. Jan. 4, 2013)).

¶ 58 But what if the plaintiff's affidavit and the defendant's affidavit clash on a material issue of fact? The supreme court says: "Any conflicts in the pleadings and affidavits must be resolved in the plaintiff's favor ***." *Russell*, 2013 IL 113090, ¶ 28. Defendants question the fairness of a procedure by which the plaintiff's affidavit automatically trumps the defendant's affidavit. See *TCA International, Inc.*, 299 Ill. App. 3d at 533 ("Such a rule would allow a plaintiff to hale any defendant into court simply by filing one perjurious affidavit, which cannot be condoned.").

¶ 59 The short answer is that we have no power to review decisions by the supreme court. Perhaps, however, we can somewhat allay defendants' concerns about procedural fairness by observing that the relevant factual issues on which the affidavits clash really are not dispositive; that is, they do not *have* to be resolved in this appeal; the jurisdictional question does not *turn* on their resolution.

¶ 60 What are the factual issues that emerge from the competing affidavits? We see two relevant issues, neither of which is critical to the outcome in this appeal.

¶ 61 Khan claims, in his affidavit, that a partner from Gramercy visited him in Urbana in the summer of 2001. On the other hand, all eight persons who worked for Gramercy in the summer of 2001 say, in their affidavits, that they never met with Khan in Illinois and that they know of no one else from Gramercy who did so, either.

¶ 62 Also, Khan claims, in his affidavit, that during a telephone conversation in August 2001, Johnston represented to him that the *2001 Foreign Currency Derivative Strategy* could "legally reduce Plaintiffs' capital gains and income tax burden." But further down in the same paragraph of his affidavit, Khan states: "They [(Shanbrom and Johnston)] later repeated these statements with respect to the Distressed Debt Strategies (sometimes collectively referred to as the 'Strategies')." We assume that, by "later," Khan means later in the conference call. On the other hand, Johnston, in his affidavit of November 13, 2014, denies that, in the conference call, he "made statements to Khan regarding the legality and tax implications of Khan and BDO's tax strategies."

¶ 63 *Russell* would require us to hold that Khan's affidavit automatically prevails. See *Russell*, 2013 IL 113909, ¶ 28. Actually, however, we can sidestep these two factual issues because, as it happens, personal jurisdiction does not turn on their resolution. In a moment, we will discuss the other minimum contacts.

¶ 64 E. The Most Recent Decision by the Supreme Court on Personal Jurisdiction, *Walden*

¶ 65 Defendants repeatedly invoke the holding of *Walden*, _____ U.S. at _____, 134 S. Ct. at 1125, that when deciding whether to exercise personal jurisdiction over a nonresident defendant, a court must not "[attribute] a plaintiff's forum connections to the defendant and [make] those connections decisive in the jurisdictional analysis." (Internal quotation marks omitted.) Defendants criticize the trial court in this case for "*not [addressing] Walden at all*, even though it is the most recent authority from the U.S. Supreme Court addressing the minimum contacts standard for specific jurisdiction." (Emphasis in original.)

¶ 66 Let us consider, then, the Supreme Court's decision in *Walden* and see what light it sheds on this appeal. In *Walden*, _____ U.S. at _____, 134 S. Ct. at 1119, the respondents, Gina Fiore and Keith Gipson, were at the airport in San Juan, Puerto Rico, getting ready to fly back to Nevada, where they lived, when agents of the Transportation Security Administration searched their carry-on bags and found $97,000 in cash. The respondents explained to the agents that they had been gambling at the El San Juan, a casino in San Juan. *Id.* The respondents were cleared for departure, but a law enforcement officer at the San Juan airport alerted the Drug Enforcement Administration (DEA) in Atlanta, Georgia, that the respondents were on their way to Atlanta to catch a connecting flight to Las Vegas, Nevada, and that they were carrying $97,000 in cash. *Id.*

¶ 67 When the respondents arrived at the airport in Atlanta, the petitioner, Anthony Walden, an agent of the DEA, approached them and questioned them about the large amount of cash they were carrying. *Id.* The respondents explained to him that they were professional gamblers and that the cash consisted of their winnings and the reserve out of which they gambled. *Id.* After using a drug-sniffing dog, the petitioner seized the cash and told the respondents it would be returned to them if they later proved they had obtained it from a legitimate source. *Id.* The respondents boarded their flight to Nevada. *Id.*

¶ 68 The next day, the petitioner received a phone call from the respondent's attorney in Nevada, requesting the return of the cash. *Id.* Also, on two occasions over the next month, the petitioner received documentation from the attorney regarding the legitimate origin of the cash. *Id.*

¶ 69 Sometime after seizing the cash, the petitioner helped draft a probable-cause affidavit in support of a proposal that the respondents forfeit the cash to the federal government as ill-gotten gains, and he forwarded the affidavit to a United States Attorney in Georgia. *Id.* Ultimately, no forfeiture complaint ever was filed, and the DEA returned the cash to the respondents some six months after the petitioner seized it. *Id*. at _____, 134 S. Ct. at 1120.

¶ 70 The respondents then sued the petitioner in the federal district court of Nevada, alleging he had violated their rights under the fourth amendment (U.S. Const., amend. IV) by seizing their cash without probable cause, writing a false affidavit, keeping their cash after concluding it had not come from drug-related activity, and withholding exculpatory information from the United States Attorney. *Id.*

¶ 71 The district court granted the petitioner's motion for dismissal, concluding that his seizure of the cash in Georgia did not justify the exercise of personal jurisdiction over him in

Nevada. *Id.* "The court concluded that even if [the] petitioner [had] caused harm to [the] respondents in Nevada while knowing they lived in Nevada, that fact alone did not confer jurisdiction." *Id.*

¶ 72 The federal court of appeals disagreed with the district court. It reasoned that the petitioner had " 'expressly aimed' his submission of the allegedly false affidavit at Nevada by submitting the affidavit with knowledge that it would affect persons with a 'significant connection' to Nevada." *Id.* (quoting *Fiore v. Walden*, 688 F.3d 558, 581 (9th Cir. 2011)). Delaying the return of the cash had caused " 'foreseeable harm' " to the respondents in Nevada (*id.* (quoting *Fiore*, 688 F.3d at 582)), and in the opinion of the court of appeals, it would be "otherwise reasonable" of the district court in Nevada to exercise personal jurisdiction over the petitioner (*id.*) Therefore, the court of appeals reversed the district court's judgment and held that the district court "could properly exercise jurisdiction over 'the false probable cause affidavit aspect of the case.' " *Id.* (quoting *Fiore,* 688 F.3d at 577)).

¶ 73 The Supreme Court disagreed with the court of appeals and agreed with the district court. *Id*. 134 S. Ct. at 1121. Exercising personal jurisdiction over a nonresident had to be consistent with due process, the Supreme Court explained, and although due process did not require the nonresident's physical presence in the forum state, the nonresident had to have made "minimum contacts" with the forum state "such that the maintenance of the suit [would] not offend traditional notions of fair play and substantial justice." (Internal quotation marks omitted.) *Id.* The exercise of specific jurisdiction was consistent with due process only if "the defendant's suit-related conduct [had] create[d] a substantial connection with the forum State." *Id.*

¶ 74 The Supreme Court emphasized two points about this substantial connection with the forum state. "First, the relationship [had to] arise out of contacts that the 'defendant *himself*' create[d] with the forum State." (Emphasis in original.) *Id.* at _____, 134 S. Ct. at 1122 (quoting *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985)). The communications, *i.e.*, the telephone call and the letters, that the respondents' attorney, in Nevada, had directed to the petitioner, in Georgia, did not count as minimum contacts, because they were not contacts by the petitioner himself with Nevada. *Id*. at _____, 134 S. Ct. at 1125.

¶ 75 "Second, [the Supreme Court's] 'minimum contacts' analysis look[ed] to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside[d] there." *Id*. at _____, 134 S. Ct. at 1122. Although the petitioner knew that the respondents were Nevada residents and that his actions in Georgia probably would affect them financially in Nevada (just as it would have affected them financially in whatever state where they happened to reside), it did not follow that he had contact with *Nevada*. *Id*. at _____, 134 S. Ct. at 1124-25. All of his suit-specific conduct occurred in Georgia. *Id*. at _____, 134 S. Ct. at 1124. He "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada." *Id.* He did things exclusively in Georgia that harmed the respondents, who happened to reside in Nevada. *Id.* To have based the exercise of personal jurisdiction merely on the foreseeability of harm to Nevada residents, without requiring any minimum contacts with Nevada itself, would have "improperly attribute[d] a plaintiff's forum connections to the defendant and [would have made] those connections decisive in the jurisdictional analysis." (Internal quotation marks omitted.) *Id*. at _____, 134 S. Ct. at 1125.

¶ 76 This was not to say that effects felt within the forum state were necessarily irrelevant; it was just that these effects had to arise from the defendant's contacts with the forum state. *Id.* If you get harmed while visiting a forum state, you could carry the harm with you wherever you go. For example, A could pick B's pocket while B is visiting Florida, and after B returns home to South Carolina, he might well, as a consequence, suffer a paucity of funds there—he might default on his cell phone contract—but that does not mean that A had any contact with South Carolina. That hypothetical is *Walden* stripped to its essentials. As the Supreme Court put it:

> "[M]ere injury to a forum resident is not a sufficient connection to the forum. Regardless of where a plaintiff lives or works, an injury is jurisdictionally relevant only insofar as it shows that the defendant has formed a contact with the forum State. The proper question is not where the plaintiff experienced a particular injury or effect but whether the defendant's conduct connects him to the forum in a meaningful way." *Id.*

¶ 77 In the present case, we have more than the Khans' experience of a particular injury or effect in Illinois; defendants made contact with this state. We are unconvinced by defendants' comparison of themselves to the DEA agent in *Walden*, who never, in any way, reached out beyond the borders of Georgia. It is not that defendants in this case engaged in a course of conduct that was hermetically sealed in Connecticut or some other non-forum state, the effect of which the Khans just happened to feel in Illinois because of the fortuitous fact that they reside here. Defendants reached out to Illinois.

¶ 78 For one thing, BDO, by agreement with Gramercy, served as Gramercy's advertiser in Illinois. Also, Johnston made a tortious misrepresentation to Khan in Illinois, namely, that the 2001 Foreign Currency Derivative Strategy had economic substance.

¶ 79 Let us discuss those minimum contacts one at a time.

¶ 80 F. Minimum Contacts

¶ 81 1. *The Agreement Between BDO and Gramercy To Jointly Promote and Implement the 2001 Foreign Currency Derivative Strategy and To Split the Fees From It*

¶ 82 a. Defendants' Claim of Forfeiture

¶ 83 Defendants complain that, "[o]n April 23, 2015, more than five months after briefing on Gramercy's Motion to Dismiss for Lack of Personal Jurisdiction closed," plaintiffs submitted documentary evidence "that BDO and Gramercy were engaged in a joint venture." The evidence, specifically, was Shanbrom's affidavit of April 21, 2015, and Jones's e-mail of January 22, 2001. Defendants assert that this " 'new' evidence is cumulative and waived" (by which they evidently mean "forfeited" (see *Pinske v. Allstate Property & Casualty Insurance Co.*, 2015 IL App (1st) 150537, ¶ 18 (explaining the difference between waiver and forfeiture)).

¶ 84 Defendants do not cite the pages of the record where the briefing schedule may be found, but we note that in a docket entry for November 12, 2014, the trial court extended the deadline for the reply brief to November 17, 2014. Because the reply brief typically is the final brief to be filed, we infer that briefing closed on November 17, 2014—and April 23, 2015, would have been, as defendants say, "more than five months after" that date.

¶ 85 On April 23, 2015, plaintiffs filed a document entitled "Plaintiffs' Motion For Leave To Supplement Their Responses in Opposition to Gramercy's Motions To Dismiss For Lack of Personal Jurisdiction." In that motion, plaintiffs told the trial court they still were reviewing more than 800,000 pages of documents produced to them in November 2014 by a former defendant, Morgan, Lewis & Bockius, LLP (Morgan), and that, among these documents, they had found the e-mail of January 22, 2001, from Jones approving a bonus of $100,000 for

Shanbrom in recognition of "his achievement in re-negotiating the joint venture between Gramercy and Tax Solutions." Also in the production from Morgan, plaintiffs had found the e-mail of December 12, 2001, from Johnston to Jones, billing BDO $250,000 as Gramercy's share of the fee for "Shahid Khan." Finally, according to this motion, plaintiffs' counsel had been conducting discovery in a case against BDO in Arkansas, and on February 5, 2015, in that Arkansas case, BDO produced the handwritten note by Shanbrom in which he memorialized the fee-splitting agreement with Johnston.

¶ 86 On the basis of this additional evidence, plaintiffs invoked the joint-venture theory of personal jurisdiction, under which "the minimum contacts of one co-venturer" (in this case, BDO) "[were] attributable to other co-venturers" (Gramercy) "such that personal jurisdiction over one [meant] personal jurisdiction over all." *Hill v. Shell Oil Co.*, 149 F. Supp. 2d 416, 418 (N.D. Ill. 2001).

¶ 87 On May 1, 2015, in response to plaintiffs' motion, defendants sent a letter to the trial court, in which they requested the entry of an order that would have done the following (we quote from defendant's letter): "(i) require Plaintiffs to provide Gramercy with the [Morgan] document production referenced in their motion; and (ii) grant Gramercy 90 days to review the nearly 800,000 pages of documents therein, and an additional 30 days to respond to Plaintiffs' motion (without prejudice to Gramercy's right to request additional time.)" Noting that plaintiffs had previously refused to turn over to them these 800,000 pages of documents, defendants argued: "Without such relief, Gramercy will undoubtedly be prejudiced by Plaintiffs' motion, which references documents withheld from Gramercy in violation of the law, and raises new arguments against Gramercy's motion to dismiss to which it is entitled to respond with the benefit of the same discovery materials available to Plaintiffs."

¶ 88 It does not appear that the trial court ever ruled on this motion to compel production. Instead, on May 15, 2015, the trial court denied defendants' motion for dismissal. In its order, the court remarked: "In the Gramercy matter, after time for briefing had expired[,] counsel has sent the Court letters and e-mails regarding trial court decisions across the country and most recently, beginning April 23, 2015[,] correspondence regarding Plaintiffs' Request for Leave to Supplement Responses to Defendants' motions. The Court felt obligated to at least review all of this documentation, none of which will be relied on for this order."

¶ 89 Now that we are clear on what happened in the trial court, we are in a position to observe that, in their letter to the trial court, defendants did not take the position that they take now, namely, that plaintiffs should be barred from presenting the additional documentary evidence because they did not present it within the time limits of the briefing schedule. Instead, defendants sought to compel plaintiffs to turn over the documents they had obtained from Morgan, and defendants sought additional time to review those documents once plaintiffs turned them over. Thus, in the proceedings below, the ground for defendants' objection was not a violation of the briefing schedule but, rather, the withholding of the documents that Morgan had produced to plaintiffs; and the remedy Gramercy requested was not plaintiffs' forfeiture of the additional evidence but, rather, the production of the documents from Morgan and time to review them. Instead of claiming forfeiture in the trial court, Gramercy moved to compel discovery. Defendants cannot, for the first time on appeal, request a remedy they did not request below. See *Feeley v. Michigan Avenue National Bank*, 141 Ill. App. 3d 187, 188 (1986); *Bell v. Yale Development Co.*, 102 Ill. App. 3d 108, 112 (1981). We could not reasonably fault the trial court for omitting to declare a forfeiture that defendants never sought.

¶ 90 Setting aside the problem that defendants are requesting a new remedy, they cite no authority for this new remedy: they cite no case holding that the expiration of a briefing schedule precludes the presentation of additional documentary evidence. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Argument, *** with citation of the authorities *** relied on."). As a matter of English, a "briefing schedule" applies to briefs, not evidence. We are aware of no decision holding otherwise.

¶ 91 The only authority that defendants offer in support of their claim of forfeiture is a decision by the circuit court of Cook County in Kaufman v. BDO Seidman, LLP, No. 12-L-13292, a copy of which they have attached as an appendix to their reply brief. We note that, first of all, decisions of a circuit court have no precedential value (*Delgado v. Board of Election Commissioners of City of Chicago*, 224 Ill. 2d 481, 488 (2007)), and, second, even if the circuit court's decision in Kaufman had any precedential value, the decision is inapposite: when refusing to consider Shanbrom's affidavit regarding the "joint venture," the circuit court in Kaufman was ruling on a petition for relief from judgment (735 ILCS 5/2-1401 (West 2014)), which required a showing that, in the exercise of due diligence, the plaintiff could not have presented Shanbrom's affidavit before the entry of the judgment. But plaintiffs in this case filed no section 2-1401 petition. They did not seek to vacate a judgment that was more than 30 days old. Rather, they submitted their additional evidence *before* the trial court made its decision.

¶ 92 When reviewing the record *de novo* (see *McNally v. Morrison*, 408 Ill. App. 3d 248, 254 (2011)), we do not see how defendants suffered any prejudice from the additional evidence, considering that, as they themselves claim, the additional evidence was merely cumulative, and considering that defendants had ample time to file a counteraffidavit if they had seen fit to do so. Plaintiffs filed the additional evidence on April 23, 2015, and the trial court made its decision on May 15, 2015. Thus, if Shanbrom was inaccurate in his recollection of the deal he had struck with Johnston, Gramercy had three weeks to obtain an affidavit to that effect from Johnston. No such counteraffidavit was forthcoming.

¶ 93 It is unclear why defendants would have needed to review the 800,000 pages of documents from Morgan to determine (1) the terms of the oral agreement that Johnston had reached with Shanbrom and (2) the amount that BDO had paid to Gramercy as Gramercy's share of Khan's fee. In sum, we see no reason to disregard evidence of the preexisting fee-sharing agreement between BDO and Gramercy, an agreement that defendants apparently do not dispute.

¶ 94 It is true that, after "review[ing]" the additional evidence, the trial court chose not to "rel[y]" on it as a basis for its ruling. But "this court reviews the determination of the trial court, not its reasoning, and therefore we may affirm on any basis in the record[,] [regardless of] whether *** the trial court relied on that basis or its reasoning was correct." *Antonacci v. Seyfarth Shaw, LLP*, 2015 IL App (1st) 142372, ¶ 21. (We hasten to add that we imply no criticism of the trial court. We can see that Judge Ford has labored heroically in these complicated cases, and we commend him for his work.)

¶ 95 b. Gramercy's Availment, Through BDO, of the Privilege of Conducting Activities in Illinois

¶ 96 In federal case law, there is such a thing as the joint-venture theory of personal jurisdiction, whereby the actions of one co-venturer in the forum state are automatically imputed to another co-venturer (*Gross v. GGNSC Southaven, LLC*, No. 3:14CV00037-M-A, 2014 WL 4418051, at *3 (N.D. Miss. 2014); *Wendt v. Handler, Thayer & Duggan, LLC*, 613 F. Supp. 2d 1021, 1030 (N.D. Ill. 2009)), but defendants dispute that Gramercy's relationship with BDO met all the elements of a joint venture as defined by Illinois case law.

¶ 97 We are leery of using a checklist of common-law elements to decide whether the exercise of personal jurisdiction comports with constitutional due process. That, basically, is what the joint-venture theory of jurisdiction would do. Such an approach is too mechanical. See *Burger King*, 471 U.S. at 478-79 (personal jurisdiction does not turn on "mechanical tests"). Even if, technically, Gramercy's relationship with BDO "[fell] slightly outside the confines" of a "joint venture" as defined by Illinois law, "the question for us is whether a sufficient relationship exist[ed] under the Due Process Clause to permit the exercise of jurisdiction, not whether a partnership, joint venture, or other particular agency relationship between [them] exist[ed]." *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 56-57 (1st Cir. 2002).

¶ 98 Two parties can have a relationship or contractual understanding that contemplates one party's acting for the benefit of them both in the forum state. A nondomiciliary can take advantage of legal rights and protections in the forum state by arranging for a domiciliary to act there on his behalf or for his benefit. *Burger King*, 471 U.S. at 479 n.22. "[I]t is essential in each case that there be some act by which the defendant purposefully avail[ed] himself of the privilege of conducting activities within the foreign[s] state, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). This purposeful availment need not be direct; it can be through someone else, as long as this someone else makes contact with the forum state bilaterally rather than unilaterally. See *Burger King*, 471 U.S. at 479 n.22 ("We have previously noted that when commercial activities are carried on in behalf of an out-of-state party[,] those activities may sometimes be ascribed to the party [citation], at least where he is a primary participant in the enterprise and has acted purposefully in directing those activities [citation]." (Internal quotations marks omitted.)); *Helicopteros*

Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 417 (1984) ("[The] *unilateral* activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state to justify an assertion of jurisdiction. (Emphasis added.)"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) ("Petitioners carry on no activity whatsoever in Oklahoma; they close no sales and perform no services there, avail themselves of none of the privileges and benefits of Oklahoma law, *and solicit no business there either through salespersons or through advertising reasonably calculated to reach the State*. Nor does the record show that they regularly sell cars to Oklahoma residents or that they *indirectly, through others*, serve or seek to serve the Oklahoma market." (Emphases added.)); *Itel Containers International Corp. v. Atlanttrafik Express Service, Ltd.*, 116 F.R.D. 477, 480 (S.D.N.Y. 1987).

¶ 99 In the plurality decision of *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987), Justice O'Connor set forth various relationships between a resident and nonresident by which the nonresident could purposefully make minimum contacts with the forum state. *Id*. at 112 (opinion of O'Connor, J.). But first, let us recount the facts of *Asahi*.

¶ 100 Gary Zurcher lost control of his motorcycle and crashed when the tube in the rear tire of his motorcycle blew out. *Id*. at 106. He filed a product-liability action in California, where the accident occurred, naming, among others, Cheng Shin Rubber Industrial Co., Ltd. (Cheng Shin), the Taiwanese manufacturer of the tube. *Id.* at 105-06. Cheng Shin in turn brought an action for indemnification against the manufacturer of the tube's valve assembly, a Japanese corporation, Asahi Metal Industry Co., Ltd. (Asahi). *Id.* at 106. Asahi moved to quash Cheng Shin's service of summons, arguing that the due process clause of the fourteenth amendment (U.S. Const., amend. XIV) forbade California to exercise personal jurisdiction over Asahi. *Id.*

¶ 101 The Supreme Court agreed that "the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair" and, hence, a violation of due process. *Id.* at 116 (opinion of O'Conner, J., joined by Rehnquist, C.J., and Brennan, White, Marshall, Blackman, Powell, and Stevens, JJ.). Due process required not only minimum contacts but also fair play and substantial justice. *Id.* at 1028-29. Haling a Japanese corporation, Asahi, into a California court would have been, in the circumstances of this case, unjust.

¶ 102 The Supreme Court was divided, though, on whether the mere act of placing a product in the stream of commerce, with the expectation that it would be purchased in the forum state, qualified as a minimum contact with the forum state for purposes of *International Shoe*. Justice Brennan thought it did, and Justices White, Marshall, and Blackmun agreed with him. *Asahi*, 480 U.S. at 121 (Brennan, J., concurring in part and concurring in the judgment, joined by White, Marshall, and Blackmun, JJ.).

¶ 103 Justice O'Connor thought, however, that, to make minimum contact with the forum state, the nonresident defendant had to do something "more purposefully directed at the forum State than the mere act of placing a product in the stream of commerce," and Chief Justice Rehnquist and Justices Powell and Scalia agreed with her. *Id.* at 110 (opinion of O'Connor, J.). Justice O'Connor wrote:

> "The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. Additional conduct of the defendant may indicate

> an intent or purpose to serve the market in the forum State, for example, designing the product for the market in the forum State, advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State." *Id.* at 112 (opinion of O'Connor, J.).

Asahi, Justice O'Connor observed, did no business in California; nor did it have any agents or property there. *Id.* (opinion of O'Connor, J.). Nor did Asahi "advertise or otherwise solicit business in California." *Id.* (opinion of O'Connor, J.).

¶ 104 Thus, in *Asahi*, there are two competing standards: the broad stream-of-commerce standard and the narrow stream-of-commerce standard. Under the broad stream-of-commerce standard, championed by Justice Brennan, the exercise of personal jurisdiction comports with due process if the defendant was aware that the product was being marketed in the forum state. *Russell*, 2013 IL 113909, ¶ 68. But under the narrow stream-of-commerce standard, championed by Justice O'Connor, such awareness is not enough: the defendant must do something more, such as advertising in the forum state, marketing the product in the forum state through a distributor, or establishing channels for regularly providing advice to customers in the forum state. *Id.* ¶ 47. (Subsequently, in *J. McIntyre Machinery, Ltd. v. Nicastro*, _____ U.S. _____, 131 S. Ct. 2780 (2011), another plurality decision, a majority of the Supreme Court did not come down clearly in favor of either the broad or the narrow stream-of-commerce standard in *Asahi*. *Russell*, 2013 IL 113909, ¶¶ 59, 70.)

¶ 105 We conclude, in our *de novo* review (*Innovative Garage Door Co. v. High Ranking Domains, LLC*, 2012 IL App (2d) 120117, ¶ 11), that the undisputed facts in this case satisfy Justice O'Connor's narrow stream-of-commerce standard. *Ipso facto*, they satisfy Justice Brennan's broad stream-of-commerce standard. *Russell*, 2013 IL 113909, ¶ 78.

¶ 106 For one thing, defendants entered into an agreement with BDO, an Illinois partnership, to jointly promote "investment strategies," such as the 2002 and 2003 Distressed Debt Strategies. "By engaging a business entity located in Illinois, defendant[s] undoubtedly benefitted from Illinois' system of laws, infrastructure, and business climate." *Id.* ¶ 81. See *Burger King*, 471 U.S. at 475 (explaining that, for specific jurisdiction, " 'it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws' " (quoting *Hanson*, 357 U.S. at 253)). Because BDO was headquartered in Chicago, it would have been reasonable to suppose that many of BDO's clients resided in Illinois. Gramercy's agreement with BDO enabled Gramercy to tap into BDO's client base in Illinois, a client base established by virtue of the benefits and protections of Illinois law.

¶ 107 Second, defendants engaged BDO to act as Gramercy's advertiser, and the target audience was BDO's wealthy accounting clients. Under the agreement between BDO and Gramercy, BDO, in return for a share of the client's fee, was to refer the client to Gramercy for the investment and transactional aspects of the tax shelter. See *Asahi*, 480 U.S. at 112 (opinion of O'Connor, J.) (the something "more—the "act[s] of the defendant purposefully directed toward the forum State"—may include "advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State"). Because BDO was headquartered in Chicago, defendants no doubt expected and intended that many of the accounting clients whom BDO referred to Gramercy would be Illinois residents. Through BDO, Gramercy "solicit[ed] business in" Illinois. *Id.*

¶ 108 It is true that "the *unilateral* activity of *** a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction (emphasis added)," but BDO did not approach the Khans unilaterally; rather, BDO approached them pursuant to its agreement with Gramercy. *Helicopteros*, 466 U.S. at 417. Through BDO, which is an Illinois partnership, Gramercy "purposefully reach[ed] out beyond [its] State and into" Illinois, "deliberately exploit[ing] a market in" Illinois, namely, BDO's accounting clients in Illinois. (Internal quotation marks omitted.) *Walden*, _____ U.S. at _____, 134 S. Ct. at 1122. Therefore, Gramercy's contacts with Illinois were not "random, fortuitous, or attenuated." (Internal quotation marks omitted.) *Burger King*, 471 U.S. at 475.

¶ 109 Far from it. Not only did Gramercy have a fee-sharing agreement with BDO, under which BDO was to steer Illinois clients, such as the Khans, in Gramercy's direction, but once BDO did the steering, Gramercy was to establish a fiduciary relationship with these clients and give them "regular advice" on how to accomplish the various transactional steps of the tax shelters. *Asahi*, 480 U.S. at 112 (opinion of O'Connor, J.). These were minimum contacts with Illinois.

¶ 110 Gramercy disputes that it made contact with Illinois through BDO. To hold that it did so would be inconsistent, Gramercy argues, with our decision in *Estate of Isringhausen v. Prime Contractors & Associates, Inc.*, 378 Ill. App. 3d 1059 (2008). It is true that, as in the present case, Isringhausen involved a go-between. In *Isringhausen*, though, it is unclear that when the go-between reached out to Illinois, he did so at the behest of the Florida defendant.

The go-between in Isringhausen was Dan Wilmath, who wore two hats, so to speak: he was an employee of the defendant, APM Custom Homes (APM), a Florida corporation; and at the same time, he was the realtor of Lee Isringhausen, an Illinois resident. *Id*. at 1060-61. More precisely, Wilmath was the realtor who assisted Isringhausen with buying property in Marco Island, Florida. *Id.* at 1061. "Wilmath put Isringhausen in contact with APM" (*id.*); and then Isringhausen hired APM to build a house on Marco Island (*id.*); and then Isringhausen died (*id.* at 1062); and then the executor of his estate sued APM, in Illinois, for breach of contract (*id.*). In affirming the dismissal of the case for lack of personal jurisdiction (*id.* at 1068), we remarked that "Isringhausen [had been] put into contact with APM through a third party, Dan Wilmath" (*id.* at 1067), and we concluded that this was not a minimum contact of APM with Illinois (*id.* at 1068). Judging, however, from the facts recounted in the decision, there was no evidence that soliciting clients in Illinois had been part of Wilmath's job description or that he and his employer, APM, had agreed that he would reach out to Illinois on APM's behalf. In other words, the record contained no evidence that APM had purposefully reached out to Illinois through Wilmath.

¶ 111 By contrast, in the present case, BDO and Gramercy had a contractual agreement that BDO would solicit its clients to approach Gramercy—including, necessarily, BDO's Illinois clients. We said in *Isringhausen* at 1068: "Illinois would have a strong interest in adjudicating a dispute where an Illinois resident was specifically targeted and allegedly victimized, as compared to the situation in our case where APM did not seek out and target Isringhausen." *Id*. at 1068.

¶ 112 Gramercy tries to create the impression that it was simply minding its own business in Connecticut when, out of the blue, BDO happened to call Gramercy and refer Khan.

Gramercy presents itself as an unconnected, innocent bystander who was passively acted upon, in Connecticut, by BDO and Khan. The undisputed facts in this case tell a different story. BDO and Gramercy, in tandem, targeted Khan in Illinois, repeatedly. See Id. 3d at 1068.

¶ 113 c. The Conspiracy Theory of Jurisdiction

¶ 114 As defendants understand the complaint, plaintiffs accuse them of being in a civil conspiracy with BDO to sell and implement illegal tax shelters. Defendants argue that by exercising personal jurisdiction over them on the basis of what their alleged coconspirator, BDO, did in Illinois, we would resort to the conspiracy theory of jurisdiction, the constitutional validity of which we called into question in *Ploense v. Electrolux Home Products, Inc.*, 377 Ill. App. 3d 1091, 1106 (2007).

¶ 115 We disagree that we would thereby fall afoul of *Ploense*. As we explained in *Ploense*, the problem with the conspiracy theory of jurisdiction is that it "would allow the exercise of personal jurisdiction over a nonresident defendant who had no minimum contacts with the forum state." *Id*. For example, A and B could enter into a civil conspiracy in Indiana, and then B, unilaterally and without A's knowledge, could go to Texas and commit a wrongful act there in furtherance of the conspiracy. If the conspiracy theory of jurisdiction were valid, B's contacts with Texas would be automatically attributed to A—even if A never wanted, never intended, and never expected B to go to Texas and do anything in that state. See *id.* Attributing B's Texas contacts to A simply because they had entered into a conspiracy in Indiana, without having reached any agreement or having had any discussion regarding Texas, would dispense with the constitutional requirement that A make minimum contacts with Texas before that state exercised personal jurisdiction over him. See *Knaus v. Guidry*, 389 Ill. App. 3d 804, 824 (2009).

¶ 116 Defendants seem to reason as follows: the conspiracy theory of jurisdiction is constitutionally unsound; *ergo*, a conspirator cannot ever have minimum contacts with Illinois through a coconspirator. That is a *non sequitur*. Minimum contacts do not have to be direct. A person can purposefully make minimum contacts with the forum state through someone else. See *Asahi*, 480 U.S. at 112 (opinion of O'Connor, J.) ("advertising in the forum State *** or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State"); *Spinozzi v. ITT Sheraton Corp.*, No. 93 C 0885, 1994 WL 559110, at *5 ("The solicitation of business in Illinois is obviously completed with the intent of convincing Illinois consumers to purchase the advertised product. When ITT Sheraton caused the brochure advertising International's Acapulco Resort to appear in Illinois, it intended Illinois consumers, like the Plaintiffs, to make reservations at that resort. Therefore, International, the beneficiary of the marketing performed by ITT Sheraton, should have anticipated being haled into an Illinois court.").

¶ 117 By agreement between BDO and Gramercy, BDO acted as Gramercy's advertiser. Gramercy purposefully solicited business in Illinois through BDO. See *Asahi*, 480 U.S. at 112 (opinion of O'Connor, J.). Gramercy must have known and expected that much of this advertising would be done in Illinois, since BDO was headquartered in Chicago and inevitably had accounting clients in Illinois. Pursuant to its agreement with Gramercy, BDO referred Khan to Gramercy for the investment and transactional services necessary to the 2001 Foreign Currency Derivative Strategy. Therefore, Gramercy, the beneficiary of the marketing performed by BDO in Illinois, reasonably should have anticipated being haled into an Illinois court if the strategy caused harm to the Khans, whom BDO and Gramercy jointly targeted in Illinois. See *World-Wide Volkswagen*, 444 U.S. at 286, 297; *Spinozzi*, 1994 WL 559110, at *5.

¶ 118 2. *A Tort Purposefully Directed at the Khans, in Illinois*

¶ 119 "A State generally has a manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." (Internal quotation marks omitted.) *Burger King*, 471 U.S. at 473. One such injury is a resident's detrimental reliance on a misrepresentation that a nonresident, from outside the forum state, purposefully directed at the resident within the forum state, with the intention that the resident rely on the misrepresentation. See *Rose v. Franchetti*, 713 F. Supp. 1203, 1213 (N.D. Ill. 1989).

¶ 120 Defendants argue that "the transmission of communications and money to and from the State, even if done frequently and over an extended period of time, are insufficient to meet the federal due process requirement for specific jurisdiction," and they provide about three pages of citations for that sweeping proposition. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) ("Citation of numerous authorities in support of the same point is not favored."). If, as defendants argue, a telephone call to the forum state and a transmission of money out of the forum state could never justify the exercise of personal jurisdiction in the forum state, a con artist in Oregon, posing as the representative of an investment firm, could telephone someone in Vermont and induce him to send his life savings, and when the victim figures out he has been duped, he could not sue the con artist in Vermont but would have to sue him in Oregon. That is not a plausible account of the law.

¶ 121 None of the numerous cases that defendants cite appear to involve a fraudulent misrepresentation made over the telephone, at least as the subject of the action—not even *Marathon Oil Co. v. A.G. Ruhrgas*, 182 F.3d 291 (5th Cir. 1999). The parenthetical summary that defendants provide for that case is: "no specific jurisdiction where plaintiff alleged that ['defendant] effectuated fraud by conducting three meetings in Houston, Texas[,] and sending a great deal of correspondence to [plaintiff]' in its home state of Texas"; but, significantly, the court in *Marathon* said: "[The] mere presence of [Rurhgas] at the three meetings in Houston, together with the noted correspondence and phone calls, is not sufficient to establish the requisite minimum contacts *because the record is devoid of evidence that Ruhrgas made false statements at the meetings or that the alleged tortious conduct was aimed at activities in Texas*" (*Marathon*, 182 F.3d at 295 (emphasis added)).

¶ 122 *Marathon* is a case from the Fifth Circuit, and, in point of fact, the Fifth Circuit has held that "[a] single act" by the nonresident defendant, such as a telephone call, "can be enough to confer personal jurisdiction if that act gives rise to the claim being asserted." *Lewis v. Fresne*, 252 F.3d 352, 358-59 (5th Cir. 2001). See also *Burger King*, 471 U.S. at 475 n.18 ("So long as it creates a substantial connection with the forum [state], even a single act can support jurisdiction." (Internal quotation marks omitted.)). If the communication with someone in the forum state "did not actually give rise to a cause of action"—*e.g.*, the communication "merely solicited business from the forum [state], negotiated a contract, formed an initial attorney-client relationship, or involved services not alleged to form the basis of the complaint"—it would not justify the exercise of personal jurisdiction there. *Wien Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999); see also *Isringhausen*, 378 Ill. App. 3d at 1067. But "[i]n cases alleging the intentional tort of fraud, the defendant's participation in a single telephone call is enough to establish personal jurisdiction if the content of the call gave rise to the fraud claim." *FCA Investments Co. v. Baycorp Holdings, Ltd.*, No. 01-20717, 2002 WL 31049442, at *2 (5th Cir. 2002); see also *Cox v. Foundation Surgery Center of San Antonio, LLP*, No. 1:06CV97-D-D 2006 WL 3246390, at *3 (N.D. Miss. 2006).

¶ 123 Likewise, the First District has held: "[I]n cases of fraudulent misrepresentation, reaching out to Illinois residents, whether by mail, telephone, telex[,] or facsimile, with an intent to affect Illinois interests, can be a sufficient basis for exercising personal jurisdiction over a nonresident defendant." *Zazove v. Pelikan, Inc.*, 326 Ill. App. 3d 798, 806 (2001). Only a trivial, formalistic distinction can be made between someone who utters a fraudulent misrepresentation in person and someone who does so on the telephone. See *Burger King*, 471 U.S. at 476 ("[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are purposefully directed toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." (Internal quotation marks omitted.)); *cf. Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 802 (7th Cir. 2014) (the defendant's maintenance of an e-mail list, which consumers can sign up for online, wherever they happen to be, and which allows the defendant, *via* the Internet, to "shower past customers and other subscribers with company-related emails[,] does not show a relation between the [defendant] and Indiana" or the defendant's purposeful exploitation of the Indiana market in particular).

¶ 124 As we said, we choose not to base our analysis on the misrepresentation that Johnston allegedly made to Khan, in the telephone conference of August 2001, that the 2001 Foreign Currency Derivative Strategy was a legal way to reduce his income tax. That, however, is not the only misrepresentation by Johnston that plaintiffs allege. Plaintiffs also allege that Johnston made a misrepresentation to Khan by advising him "that the Investment Strategies had the required business purpose and economic substance" and that "there was a reasonable likelihood of making a profit on the 'investment' component of the Investment Strategies" (we quote from the complaint). Khan claims, in his affidavit, that Johnston told him "the 2001 Foreign Currency Derivative Strategy was a *** way to make above average returns" and that it "could yield a substantial profit."

¶ 125 The validity of the tax losses generated by the 2001 Foreign Currency Derivative Strategy was a misrepresentation of law, but the economic substance of the strategy—its potential to make above-average returns or yield a substantial profit—was a misrepresentation of fact; and the misrepresentation of fact was just as significant as the misrepresentation of law because a lack of economic substance was precisely why the IRS disallowed the losses generated by the strategy. As the Seventh Circuit has said: "A transaction that would make no commercial sense were it not for the opportunity it created to beat taxes doesn't beat them. Substance prevails over form. [Citations.] The question is whether the partners really and truly intended to join together for the purpose of carrying on business and sharing in the profits or losses or both." *Superior Trading, LLC v. C.I.R.*, 728 F.3d 676, 680 (7th Cir. 2013). That is why it mattered whether the 2001 Foreign Currency Derivative Strategy had a business purpose other than dodging taxes, as Johnston represented it had.

¶ 126 We acknowledge that, in a case that defendants cite in their reply brief, a federal district court held: "Defendant's telephone calls and letters to the forum, even if transmitting negligent advice, do not suffice to confer jurisdiction over Defendant." *Poole v. Sasson*, 122 F. Supp. 2d 556, 559 (E.D. Pa. 2000). In the same paragraph, however, the district court cited *Calder v. Jones*, 465 U.S. 783, 789 (1984) which, according to the district court's parenthetical explanation, "distinguish[ed] between [the] effect of negligence and intentional torts on minimum contacts analysis." *Poole*, 122 F. Supp. 2d 556. In the present case, plaintiffs accuse defendants of fraud, which is different from "untargeted negligence." *Calder*, 465 U.S. at 789.

¶ 127 G. The Choice-of-Law Clause in the Investment Management Agreement

¶ 128 Defendants emphasize that the Investment Management Agreement contains a New York choice-of-law clause: "This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to the principles of conflict of laws thereof."

¶ 129 By drafting and entering into an agreement stipulating that the agreement was to be "governed by and construed in accordance with the laws of the State of New York," Gramercy purposefully availed itself of the benefits and protections of New York laws. See *Burger King*, 471 U.S. at 482. But that in no way detracts from the fact that defendants also purposefully availed themselves of the benefits and protections of Illinois laws, as we have discussed (taking the undisputed facts to be true).

¶ 130 By agreeing, in the investment management agreements, that New York law would govern the interpretation of the agreements, Khan did not agree to refrain from seeking a remedy in Illinois courts. "The issue is personal jurisdiction, not choice of law." *Hanson*, 357 U.S. at 254; *cf. Isringhausen*, 378 Ill. App. 3d at 1066 ("[A] choice-of-law provision in a contract is a relevant, though not a determinant, factor in establishing jurisdiction."). Illinois courts are capable of applying New York law.

¶ 131 The law regards a choice-of-law clause and a forum-selection clause as two separate and distinct things. *In re Marriage of Walker*, 287 Ill. App. 3d 634, 639 (1997). If a choice-of-law clause were effectively a forum-selection clause, there would be no such thing as a forum-selection clause as distinct from a choice-of-law clause.

¶ 132 H. The Exculpatory Provisions and the Disclaimers

¶ 133 Gramercy and Johnston invoke the exculpatory clauses in the investment management agreements. But exculpatory clauses pertain to liability, not jurisdiction. "[J]urisdiction and liability are two separate inquiries." *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 944 (7th Cir. 2000); see also *Gramercy Advisors, LLC v. R.K. Lowery*, No. 01-14-00904-CV, 2015 WL 3981610, at *12 (Tex. App. 2015) (by invoking a contractual clause in which the plaintiffs disclaimed reliance on Gramercy's tax advice, the Gramercy defendants "conflate liability with jurisdiction"); Tex. R. App. Proc. 47.7(b) (eff. Sept. 30, 2002) (in Texas civil cases, all opinions issued after January 1, 2003, have precedential value).

¶ 134 Gramercy and Johnston also invoke the side letters, in which Khan disclaimed reliance on Gramercy's financial advice. But if, in fact, Khan did *not* rely on Gramercy's financial advice—if the transactional steps of the 2001 Foreign Currency Derivative Strategy were all his idea—that fact likewise would be irrelevant to jurisdiction because reliance or nonreliance is what *Khan* did in Illinois. Personal jurisdiction must be based on the *defendant's* contacts with the forum state, not on what the plaintiff did or did not do in the forum state. *Walden*, _____ U.S. at _____, 134 S. Ct. at 1122.

¶ 135 I. The Reasonableness of Requiring Defendants To Litigate in Illinois

¶ 136 Having decided that defendants have made minimum contacts with Illinois, we now must decide whether it would be reasonable to require them to litigate in Illinois. See *Russell*, 2013 IL 113909, ¶ 87. In making that decision, we consider (1) the burden imposed on defendants by requiring them to litigate in a foreign forum; (2) the forum state's interest in resolving the dispute; (3) plaintiffs' interest in obtaining relief; and (4) the interests of the other affected forums in the efficient judicial resolution of the dispute and advancement of substantive social policies. See *id.*

¶ 137 Because defendants have procured hundreds of thousands of dollars from the Khans in Illinois, requiring defendants to litigate in Illinois would not burden them excessively, especially considering that Illinois has a substantial interest in protecting its citizens from fraud. *Rose*, 713 F. Supp. at 1213.

¶ 138 More than once in their briefs, defendants refer to the Khans' wealth. "Absent compelling circumstances," however, "a defendant who has purposefully derived commercial benefit from his affiliations in a forum may not defeat jurisdiction there simply because of his adversary's greater net wealth." *Burger King*, 471 U.S. at 483 n. 25. Illinois has a substantial interest in protecting its citizens from fraud (*Rose*, 713 F. Supp. at 1213), even its wealthy citizens. Because the 2001 Foreign Currency Derivative Strategy has caused the Khans great financial loss, they have a strong interest in obtaining relief. The interest of Illinois in this case is greater than the interest of Connecticut because the fraud was perpetrated in Illinois and the tax shelter implicated Illinois tax revenues.

¶ 139 In sum, "where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. Defendants have not made that compelling case. We are unconvinced it would be unfair, oppressive, or unreasonable to require them to litigate in Illinois. The exercise of personal jurisdiction over them, here in Illinois, does not offend due process.

¶ 140 III. CONCLUSION

¶ 141 For the foregoing reasons, we affirm the trial court's judgment.

¶ 142 Affirmed.