From *Calder* to *Walden* and Beyond: The Proper Application of the "Effects Test" in Personal Jurisdiction Cases

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I. INTRODUCTION

Consider the facts of a modern day identity theft case. If John Jones, a citizen of Ohio, pretends to be Samantha Smith, a New York citizen, and orders electronic equipment off the internet from a Texas seller, should Smith be able to sue Jones in New York when her credit card is billed for the sale? In 1984, in *Calder v. Jones*,[1] the Supreme Court held that defendants engaging in intentional tortious conduct out-of-state, calculated to cause injury to a plaintiff in-state, were subject to jurisdiction in the state in which the effects of their intentional conduct were felt.[2] However, under the gloss of the majority of Circuit Courts of Appeals[3] and the recent Supreme Court decision in *Walden v. Fiore*,[4] absent additional facts, Samantha probably would have to travel to Ohio to bring suit against John.

Not until relatively recently has *Calder* become a major focus of personal jurisdiction analysis.[5] With the advent of the Internet and the explosion of new technology, individuals are accused of causing injury in distant states in which they have had no direct contacts on a daily basis. Trademark, copyright and defamation cases are regularly brought where the defendant's primary contacts with the forum are internet related.[6]

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1. 465 U.S. 783 (1984).
2. *Id.* at 789–90.
3. *See infra* notes 54–61.
4. 134 S. Ct. 1115 (2014).
5. *See* Charles W. "Rocky" Rhodes & Cassandra B. Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. DAVIS L. REV. 207, 227 (2014) ("The number of effects-test cases has more than tripled in the last decade and there are roughly twice as many effects-test cases as there are stream-of-commerce cases now").
6. *See, e.g.*, Schrader v. Biddinger, 633 F.3d 1235 (10th Cir. 2011); Johnson v. Arden, 614 F.3d 785 (8th Cir. 2010); Revell v. Lidov, 317 F.3d 467 (5th Cir. 2002); Mor-Dall Enters. Inc., v. Dark Horse Distillery, LLC, No. 1:13-CV-915, 2014 WL 1463906 (W.D. Mich. Apr. 15, 2014); Telemedicine Solutions LLC v. WoundRight Techs., LLC, No.13-CV-3431, 2014 WL 1020936 (N.D. Ill. Mar. 14, 2014); High Tech Pet Prods., Inc. v. Shenzhen Jianfeng Electronic Pet Prod. Co., No. 1:13-CV-00242, AWI MJS., 2014 WL 897002 (E.D. Cal. Mar. 6, 2014); GoFit LLC v. GoFit LLC, No. 12-CV-622-JED-FHM, 2013 WL 1566908 (N.D. Okla. Apr. 12, 2013); Tuteur v. Crosley-Corcoran, 961 F. Supp. 2d 329 (D. Mass. 2013); Parlant Tech. v. Bd. of Educ. of the City School District of N.Y., No. 2:12-CV-417-BCW, 2013 WL 1438726 (D. Utah Apr. 9, 2013); 808 Holdings LLC

Lower courts have generally interpreted the *Calder's* "effects test" to impose three requirements in intentional tort cases: (1) the defendant must have committed an intentional act, (2) the act must have been expressly aimed at the forum state, and (3) the defendant must have known that the harm—some say the brunt of the harm—to the plaintiff would be suffered in the forum state.[7] Unfortunately, these requirements have not been interpreted consistently.[8] The greatest disagreement concerns the second requirement. Many courts, fearing the reach of *Calder*, interpreted the second requirement restrictively. For such courts, it is not enough that the defendant knows its intentional conduct will affect a forum resident. Rather, the defendant's conduct must target the forum itself.[9] By contrast, other courts have found intentional conduct knowingly targeting a forum resident to be "expressly aimed at the forum state."[10] To complicate matters, not only are there differing tests among the circuit courts, there are differing tests within the same circuit.[11]

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v. Collective of January 3, 2012 Sharing Hash, No. CV 12-2078-CAS, 2013 WL 1390384 (C.D. Cal. Apr. 3, 2013); Minelab Americas, Inc. v. UKR Trade, Inc., No. 212-CV-00827-GMN-NJK, 2013 WL 1314991 (D. Nev. Mar. 28, 2013).

7. *See, e.g.*, Wash. Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 673 (9th Cir. 2012); LaSala v. Marfin Popular Bank Pub. Co., 410 Fed. App'x 474, 477 (3d Cir. 2011); Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A., 623 F.3d 440, 444–45 (7th Cir. 2010); *Johnson*, 614 F.3d at 796; Stroman Realty, Inc. v. Wercinski, 513 F.3d 476, 485–86 (5th Cir. 2008), *cert. denied*, 555 U.S. 816 (2008); Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1072 (10th Cir. 2008); Young v. New Haven Advocate, 315 F.3d 256, 262–63 (4th Cir. 2002), *cert. denied*, 538 U.S. 1035 (2003).

8. *See infra* notes 51–54 and accompanying text.

9. *See, e.g.*, Wolstenholme v. Bartels, 511 Fed. App'x 215, 219 (3d Cir. 2013); Grynberg v. Ivanhoe Energy Inc., 490 Fed. App'x 86, 97 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 941 (2013); *Mobile Anesthesiologists Chi., LLC*, 623 F.3d at 445–46; Clemens v. McNamee, 615 F.3d 374, 379 (5th Cir. 2010); *Johnson*, 614 F.3d at 796; *Young*, 315 F.3d at 262–63.

10. *See, e.g.*, *Wash. Shoe Co.*, 704 F.3d at 675; Licciardello v. Lovelady, 544 F.3d 1280, 1288 (11th Cir. 2008); N. Laminate Sales, Inc. v. Davis, 403 F.3d 14, 26 (1st Cir. 2005).

11. *See, e.g.*, Fiore v. Walden, 688 F.3d 558, 565–66 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 1493 (2013), *rev'd*, Walden v. Fiore, 134 S. Ct. 1115 (2014); Tamburo v. Dworkin, 601 F.3d 693, 704 (7th Cir. 2010); Daniels Agrosciences, LLC v. Ball DPF, LLC, No. CA 13-268 ML., 2013 WL 5310208, at *9–10 (D.R.I. Sept. 20, 2013); *compare Grynberg*, 490 Fed. App'x at 97 ("Although '[s]ome courts have held that the "expressly aimed" portion of *Calder* is satisfied when the defendant "individually target[s] a known forum resident,". . . "we have taken a somewhat more restrictive approach, holding that the forum state itself must be the 'focal point of the tort."' (citations omitted)), *with* Newsome v. Gallacher, 722 F.3d 1257, 1269 (10th Cir. 2013) ("[T]he individual defendants

The Supreme Court granted certiorari in *Fiore v. Walden*,[12] ostensibly to decide the proper interpretation of the second requirement of *Calder's* three-part test. Although the Court's opinion seemed to adopt the restrictive interpretation of the "target forum" requirement, the Court's limitations on the scope of its opinion and the fact that jurisdiction was lacking in *Walden* under any test constrains the precedential value of the case.[13] However, the purpose of this Article is not to critique *Walden*. Rather, it is to fill the void left by *Walden* and lower courts by providing and justifying a comprehensive approach to applying *Calder*—an approach under which Samantha would be able to sue John in New York as fairness seems to dictate. This Article argues that the critical element of *Calder's* three-part test is the finding of intentional conduct. It should not be enough that the defendant intended to engage in the conduct that is later found to be tortious.[14] Rather, the defendant's intentional conduct must have been willfully wrongful. This should require some element of bad faith on the part of the defendant. Where willful misconduct affects a known resident of the forum, the defendant can reasonably foresee being haled into the forum and jurisdiction would not be unfair. The defendant should therefore be found to have expressly aimed its conduct at the forum. On the other hand, where conduct is not willful, the narrower targeting the forum test should apply, not as an application of *Calder*, but as an application of traditional jurisdictional analysis requiring purposeful availment. On a motion to dismiss for lack of personal jurisdiction, willfulness should be decided under a preliminary injunction type standard. That is, the court should require plaintiff to show that she has a likelihood of success in proving willfulness. If that standard is met, the court should uphold personal jurisdiction in the plaintiff's home state as long as the defendant has knowledge of the plaintiff's *primary* residence and plaintiff is *proximately* harmed in that state.

Part II of this Article discusses basic personal jurisdiction principles. Part III describes the Court's decision in *Calder v. Jones*.[15] Part IV addresses lower court decisions interpreting *Calder*, highlighting the conflicts among and within Circuit Courts of Appeals concerning *Calder's* "targeting the forum" requirement. Part V reviews *Walden v. Fiore* and explains why the case should have limited significance. Part VI presents the recommended approach to applying *Calder's* "effects test" and explains

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do not contest that they knew Mahalo USA operated exclusively in Oklahoma, making Oklahoma the focal point of any tort against Mahalo USA they may have committed.").

12. 688 F.3d 558 (9th Cir. 2012), *cert. granted*, 133 S. Ct. 1493 (2013).
13. *See infra* notes 143–72 and accompanying text.
14. *Wash. Shoe Co.*, 704 F.3d at 674.
15. 465 U.S. 783 (1984).

why a defendant who acts in bad faith, with knowledge of the plaintiff's residence, should be considered to have targeted the plaintiff's home state. This part also discusses the proper standard of review of motions to dismiss for lack of personal jurisdiction in *Calder*-based cases. Bad faith or willfulness should not be based solely on allegations in the pleading. Rather, the plaintiff should be required to demonstrate "a likelihood of success" in proving that the defendant's conduct was willful or in bad faith. Part VI concludes by briefly addressing the remaining requirements of *Calder*'s "effects test," explaining why the test should only justify jurisdiction in the plaintiff's home state when the defendant has knowledge of the plaintiff's *primary* residence and plaintiff is *proximately* harmed in that state.

II. BASIC PERSONAL JURISDICTION PRINCIPLES

For a forum to exercise personal jurisdiction over a non-resident defendant, the forum must have a long-arm statute that authorizes jurisdiction and jurisdiction over the defendant must be constitutional.[16] The plaintiff bears the burden of establishing jurisdiction.[17] The plaintiff generally needs only to establish a prima facie case of jurisdiction in the absence of a hearing.[18] If there is a hearing, and ultimately at trial, the plaintiff must prove jurisdiction by a preponderance of the evidence.[19]

16. Daimler AG v. Bauman, 134 S. Ct. 746, 753 (2014); Omni Capital Int'l., Ltd. v. Rudolf Wolff & Co., 484 U.S. 97, 105 (1987); Conn v. Zakharov, 667 F.3d 705, 711 (6th Cir. 2012) (quoting Int'l Techs. Consultants v. Euroglas S.A., 107 F.3d 386, 391 (6th Cir. 1997)); Licci v. Lebanese Canadian Bank, SAL, 673 F.3d 50, 59–60 (2d Cir. 2012).

17. *See* Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 708 (1982); *In re* Chinese-Manufactured Drywall Prods. Liab. Litig., 753 F.3d 521, 529 (5th Cir. 2014); Advanced Tactical Ordnance Sys. v. Real Action Paintball, Inc., 751 F.3d 796, 799 (7th Cir. 2014).

18. *See Conn*, 667 F.3d at 711; Grynberg v. Ivanhoe Energy, 490 Fed. App'x 86, 90 (10th Cir. 2012); *Wash. Shoe Co.*, 704 F.3d at 671–72; Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 330 (3d Cir. 2009); Air Prods. & Controls, Inc. v. Safetech Int'l., Inc., 503 F.3d 544, 549 (6th Cir. 2007); Cent. Va. Aviation, Inc. v. N. Am. Flight Servs., Inc., No. 3:14CV265-HEH, 2014 WL 2002247, at *2 (E.D. Va. May 15, 2014).

19. *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d at 549–50; *Advanced Tactical Ordnance Sys., LLC*, 751 F.3d at 799 (citing Purdue Research Found. v. Sanofi-Synthelabo, S.A., 338 F.3d 773, 782 (7th Cir. 2003)); *Conn*, 667 F.3d at 711; LaSala v. Marfin Popular Bank Pub. Co., 410 Fed. App'x 474, 476 (3d Cir. 2011) (citing Carteret Sav. Bank, FA v. Shushan, 954 F.2d 141, 146 (3d Cir. 1992)); Mwani v. Bin Laden, 417 F.3d 1, 6–7 (D.C. Cir. 2005); *Cent. Va. Aviation, Inc.*, 2014 WL 2002247, at *2 n.2 (citing Mylan Labs, Inc. v. Akzo, N.V., 2 F.3d 56, 59–60 (4th Cir. 1993)); Conway

The Due Process Clause of the Fourteenth Amendment[20] sets the constitutional limits of a sovereign's judicial power over a defendant.[21] A court has lawful authority to adjudicate only when the defendant has minimum contacts with the sovereign "such that the maintenance of suit does not offend 'traditional notions of fair play and substantial justice.'"[22] As a general matter, "minimum contacts" requires that the defendant "purposefully avail itself of the privilege of conducting activities within the forum State."[23] The "purposeful availment" requirement provides "a degree of predictability to the legal system" and is designed to allow potential defendants to structure their relationships to avoid the hardships of suit in an inconvenient forum.[24] It follows that "random, fortuitous, or attenuated contacts" with the forum state do not support jurisdiction.[25]

To assist in its analysis of adjudicatory authority, the Supreme Court has distinguished between two types of jurisdiction: general jurisdiction and specific jurisdiction.[26] General jurisdiction is based upon continuous and systematic contacts with a state that are so substantial as to justify suit on any claim, whether or not related to the defendant's forum activities.[27] For an individual, general jurisdiction can be based on the individual's citizenship or domicile or presence in the state when served.[28] For a corporation, general jurisdiction is satisfied when the corporation can fairly be regarded as "at home" in the forum.[29] A corporation's place of incorporation and principal place of business are paradigm bases for the exercise of general jurisdiction.[30]

Steel Fabrication, Inc., v. Stabridg Constr. Co., No. 4:12-CV-00616-KGB, 2013 WL 1947601, at *2 (E.D. Ark., May 10, 2013); Bixby v. KBR, Inc., No. 3:09-CV-632-PK, 2013 WL 1789792, at *6 (D. Or. Apr. 26, 2013).

20. U.S. CONST. amend. XIV, § 1.

21. *See* Goodyear Dunlop Tires Operations, S.A., v. Brown, 131 S. Ct. 2846, 2853 (2011).

22. J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011) (plurality opinion) (quoting Int'l Shoe Co. v. Wash., 326 U.S. 310, 316 (1945)).

23. *Id.* (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

24. *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) ("When a corporation 'purposefully avails itself of the privilege of conducting activities within the forum State,' it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State." (citation omitted)).

25. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1983); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 299 (1980)).

26. *See Goodyear Dunlop Tires Operations, S.A.*, 131 S. Ct. at 2853.

27. *See id.*

28. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011).

29. *Goodyear Dunlop Tires Operations, S.A.*, 131 S. Ct. at 2853–54.

30. *Id.* at 2854.

Specific jurisdiction permits a forum to exercise adjudicatory authority over a defendant solely with respect to actions that "arise out of or are connected to activities within the forum state."[31] Traditionally, specific jurisdiction requires: (1) the defendant to have purposefully availed itself of the benefits and privileges of conducting activities in the forum, and (2) that the cause of action arose from or is related to the defendant's forum activities.[32] If both requirements are met, the defendant may still object that jurisdiction would violate its Due Process rights if it meets the burden of demonstrating that jurisdiction would be unfair or unreasonable.[33] To determine fairness and reasonableness, a court considers

> the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It must also weigh in its determination 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.'[34]

Where a defendant has committed an intentional tort, the Court has modified its minimum contacts analysis, and in such cases, traditional notions of purposeful availment are not required.[35] The leading case discussing adjudicatory authority in the case of intentional torts is *Calder v. Jones.*[36]

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31. *J. McIntyre Mach., Ltd.*, 131 S. Ct. at 2787 (quoting Int'l. Shoe Co. v. Wash., 326 U.S. 310, 319 (1945)).

32. *See id.* at 2787–88.

33. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476–78 (1985).

34. Asahi Metal Indus. Co., v. Superior Court Solano County, 480 U.S. 102, 113 (1987) (plurality opinion) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)).

35. *See J. McIntyre Mach., Ltd*, 131 S. Ct. at 2787; Calder v. Jones, 465 U.S. 783 (1984); Cassandra B. Robertson, *The Inextricable Merits Problem in Personal Jurisdiction*, 45 U.C. DAVIS L. REV. 1301, 1309 (2012). In the Eighth Circuit, the effects test does not substitute for or prove purposeful availment, but is just an additional factor to consider under the five part test for minimum contacts established by that Circuit in *Aftanase v. Econ. Baler Co.*, 343 F.2d 187, 197 (8th Cir. 1965). *See* Johnson v. Arden, 614 F.3d 785, 797 (8th Cir. 2010). The Eighth Circuit factors are "(1) the nature and quality of the contacts with the forum state; (2) the quantity of the contacts; (3) the relationship of the cause of action to the contacts; (4) the interest of [the state] in providing a forum for its residents; and (5) the convenience or inconvenience to the parties." *Id.* at 794.

36. *See* 465 U.S. 783 (1984).

III. *CALDER V. JONES*

In *Calder*, Shirley Jones, best known for playing the mom in the Partridge Family,[37] sued the National Enquirer, for libel, invasion of privacy and intentional infliction of emotional distress[38] following an article portraying her as frequently drunk during taping.[39] In addition to naming the Enquirer in her California suit, she named, in their individual capacities, the reporter and editor responsible for the article.[40] The Enquirer, which had its biggest circulation in California, did not object to jurisdiction in the California court.[41] However, the reporter, South, and the editor, Calder, both claimed that jurisdiction in California would violate their Due Process rights.[42] The Supreme Court recognized that South and Calder had limited contacts with California[43] and could not be charged with their employer's activity in the state.[44] Nonetheless, the Court held jurisdiction over both "proper because of their intentional conduct in Florida calculated to cause injury to respondent [Ms. Jones] in California."[45]

Despite this simple formulation of its holding, lower courts have focused on earlier language in the Court's opinion to define the effects test from *Calder*.[46] The Court noted that the story concerned the California activities of a California resident.[47] California was therefore "the focal point both of the story and of the harm suffered."[48] In response to the arguments of petitioners South and Calder that they should no more be subject to suit in California than a welder employed in Florida who works on a boiler that subsequently explodes in California, the Court stated "petitioners are not charged with mere untargeted negligence, but rather their intentional, and allegedly tortious, actions were expressly aimed at CaliforniaFalseAnd they

37. *Shirley Jones Biography*, BIO.COM, http://www.biography.com/people/shirley-jones-9542159 [http://perma.cc/CGK6-2ACM] (last visited Feb. 2, 2015).
38. *See Calder*, 465 U.S. at 785.
39. Aljean Harmetz, *National Enquirer Agrees To Settle with Shirley Jones in Libel Suit*, N.Y. TIMES, Apr. 27, 1984, *available at* http://www.nytimes.com/1984/04/27/us/national-enquirer-agrees-to-settle-with-shirley-jones-in-libel-suit.html [http://perma.cc/24YL-NEKN]. The article claimed that Ms. Jones was driven to drink by her husband's maniacal behavior. Her husband, Marty Ingalls, joined as a plaintiff in the suit against the National Enquirer and its employees. *Id.*
40. *See Calder*, 465 U.S. at 785–86.
41. *Id.* at 785.
42. *Id.* at 784–86.
43. *Id.* at 785–86.
44. *Id.* at 790.
45. *Id.* at 791.
46. *Id.* at 789–90.
47. *Id.* at 788.
48. *Id.* at 789.

knew that the brunt of that injury would be felt by respondent in the state in which she lives and works. . ."[49]

IV. APPLICATION OF *CALDER* IN THE LOWER COURTS

As indicated earlier, lower courts have derived from the above language some variation of a three-part effects test for personal jurisdiction in intentional tort cases: (1) the defendant must have committed an intentional act; (2) the act must have been expressly aimed at the forum state; and (3) the defendant must have known that the harm—some say the brunt of the harm—to the plaintiff would be suffered in the forum state.[50] The courts' interpretations of the first and third requirements are rarely dispositive,[51] and are therefore not a focus of this section. Although the interpretation of the critical second requirement has been riddled with

49. *Id.* at 789–90.

50. *See supra* note 7.

51. *See* N.C.C. Motorsports, Inc. v. K-VA-T Food Stores, Inc., 975 F. Supp. 2d. 993, 1003–04 (E.D. Mo. 2013) (citing Baldwin v. Fischer-Smith, 315 S.W.3d 389, 394 (Mo. Ct. App. 2010)) (explaining surveyed state and federal cases). Given that *Calder's* three-part test "applies only to intentional torts," the first requirement is largely redundant. Holland Am. Line, Inc. v. Wartsila N. Am., Inc., 485 F.3d 450, 460 (9th Cir. 2007). *See also* Tamburo v. Dworkin, 601 F.3d 693, 703 n.7 (7th Cir. 2010) ("*Calder* speaks directly to personal jurisdiction in intentional-tort cases; the principles articulated there can be applied to cases involving tortious conduct committed over the Internet."); Oldfield v. Pueblo De Bahia Lora, S.A., 558 F.3d 1210, 1220 n.28 (11th Cir. 2009) (holding the same); Cognigen Networks, Inc. v. Cognigen Corp., 174 F. Supp. 2d 1134, 1139 (W.D. Wash. 2001) (same). Whether the court requires intentional and allegedly tortious or wrongful acts, see *Marten v. Goodwin*, 499 F.3d 290, 297 (3d. Cir. 2007); *Tamburo*, *supra*, at 703, or merely "an intent to perform an actual physical act in the real world," *see* Washington Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 674 (9th Cir. 2012); Pan-Am Prods. & Holdings, LLC. v. R.T.G. Furniture Corp., 825 F. Supp. 2d 664, 684 (M.D. N.C. 2011) (explaining a plaintiff's allegations of an intentional tort should satisfy either standard). *See, e.g.*, Grynberg v. Ivanhoe Energy Inc., 490 Fed. App'x 86, 96 (10th Cir. 2012); *Tamburo*, *supra* at 703. The interpretative differences with respect to the third requirement, whether the plaintiff must show harm, *see Washington Shoe Co.*, *supra*, at 673; *Tamburo*, *supra*, at 703, or "the brunt of the injury," *see Grynberg*, *supra*, at 96; Johnson v. Arden, 614 F.3d 785, 796–97 (8th Cir. 2010), was known to be felt in the forum state, also do not typically form the sole basis for decision. The third requirement, however, is sometimes factually dispositive where the plaintiff cannot show that the defendant knew where the plaintiff resided and therefore could not know that the harm would be felt in the forum state. *See, e.g.*, *Tamburo*, *supra*, at 708; Harp v. Koury, No. 13-2470, 2013 WL 3153780, at *3 (E.D. Pa. June 21, 2013); Pavlovich v. Superior Court, 58 P.3d 2, 8 (Cal. 2002).

inconsistencies both among[52] and within individual circuits,[53] two primary tests have emerged. The First,[54] Third,[55] Fourth,[56] Fifth,[57] Sixth,[58] Seventh,[59] Eighth,[60] and Tenth Circuit[61] Courts of Appeals all require that the defendant target the forum state, not merely a forum resident, which is the *restrictive view*. By contrast, the Ninth[62] and Eleventh Circuit[63] Courts of Appeals and some district courts in the Second Circuit[64] simply require that the defendant target a plaintiff known to reside in the forum state, which is the *broad view*. Strangely, the lower court decisions are devoid of reasoning justifying adoption of either view, other than citations to parts of the *Calder* opinion.

The difference between the two views can be demonstrated by comparing two defamation cases and two intellectual property cases, areas in which the parties frequently cite *Calder* to support their personal jurisdiction arguments.[65]

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52. *See infra* notes 54–64.

53. S*ee supra* note 11.

54. *See* United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 624 (1st Cir. 2001); Noonan v. Winston Co., 135 F.3d 85, 91 (1st Cir. 1998).

55. *See* LaSala v. Martin Popular Bank Pub. Co., Ltd., 410 Fed. App'x 474, 477 (3d. Cir. 2011).

56. *See* Young v. New Haven Advocate, 315 F.3d 256, 262–63 (4th Cir. 2002); Imo Indus., Inc. v. Kiekert AG, 155 F.3d 254, 265 (3d Cir. 1998).

57. *See* Herman v. Cataphora, Inc., 730 F.3d 460, 465–66 (5th Cir. 2013); Clemens v. McNamee, 615 F.3d 374, 379–80 (5th Cir. 2010), *cert. denied*, 131 S. Ct. 3091 (2011); Revell v. Lidov, 317 F.3d 467, 473 (5th Cir. 2002).

58. *See* Air Prods. & Controls, Inc. v. Safetech Int'l., Inc., 503 F.3d 544, 55 –53 (6th Cir. 2007); Reynolds v. Int'l. Amateur Athletic Fed'n, 23 F.3d 1110, 1120 (6th Cir. 1994).

59. Mobile Anesthesiologists Chi., LLC v. Anesthesia Assocs. of Hous. Metroplex, P.A., 623 F.3d 440, 444 (7th Cir. 2010).

60. *See* Johnson v. Arden, 614 F.3d 785, 796 (8th Cir. 2010); Wood v. Kapustin, 992 F. Supp. 2d 942, 946 (D. Minn. 2014).

61. *See* Grynberg v. Ivanhoe Energy, Inc., 490 Fed. App'x 86, 97–98 (10th Cir. 2012); Schrader v. Biddinger, 633 F.3d 1235, 1240–41 (10th Cir. 2011); Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063, 1074–75 (10th Cir. 2008).

62. *See In re* W. States Wholesale Natural Gas Antitrust Litig., 715 F.3d 716, 744 (9th Cir. 2013); Wash. Shoe Co. v A-Z Sporting Goods, Inc., 704 F.3d 668, 675 (9th Cir. 2012); Fiore v. Walden, 688 F.3d 558, 577 (9th Cir. 2012).

63. *See* Brennan v. Roman Catholic Diocese of Syracuse N.Y., Inc., 322 Fed. App'x 852, 855–66 (11th Cir. 2009); Licciardello v. Lovelady, 544 F.3d 1280, 1288 (11th Cir. 2008).

64. *See* Carrabba v. Morgat, No. 2:12-CV-6342(KM), 2014 WL 229280, at *8–9 (D. N.J. Jan. 17, 2014); Jenkins v. Miller, 983 F. Supp. 2d 423, 442–43 (D. Vt. 2013); Audsley v. RBS Citizens, N.A., No. 5:10-CV-208, 2011 WL 1397312, at *4, n.1 (D. Vt. Apr. 11, 2011); Mashantucket Pequot Tribe v. Redican, 309 F. Supp. 2d 309, 317–18 (D. Conn. 2004); Simon v. Phillip Morris, Inc., 86 F. Supp. 2d 95, 132 (E.D.N.Y. 2000).

65. *See* Cassandra Robertson, *supra* note 35, at 1348 (citing Jeffrey H. Moon, *New Wine, Old Wineskins: Emerging Interests in Internet-Based Personal Jurisdiction*, 42 CATH. LAW. 67, 67 (2002)).

The restrictive view in the defamation area is exemplified by *Johnson v. Arden*.[66] In *Johnson* the plaintiffs, cat breeders, sued a number of defendants, including Kathleen Heineman, for defamation.[67] The plaintiffs alleged that Heineman stated on ComplaintBoards.com that the plaintiffs "killed cats, sold infected kittens, brutally killed and tortured unwanted cats and operated a 'kitten mill' in Unionville, Missouri."[68] Heineman, a resident of Colorado, had a limited business relationship with the plaintiffs.[69] Although not a salaried employee, Heineman provided administrative services for the plaintiffs from her Colorado office.[70] Heineman also purchased advertising space from the plaintiffs for a fee of one hundred dollars per kitten advertised.[71] The plaintiffs, in turn, shipped a number of cats to Heineman, charging her only out of pocket expenses.[72] The court, accepting the plaintiff's allegations as true, found that the statements posted were aimed at the plaintiffs, Missouri residents, and assumed the effects of the statements were felt in Missouri.[73] Nonetheless, the court concluded that Missouri lacked personal jurisdiction over Ms. Heineman because there was "no evidence that the www.ComplaintsBoard.com website specifically targets Missouri, or that the content of Heineman's alleged postings specifically targeted Missouri."[74]

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66. 614 F.3d 785 (8th Cir. 2010).
67. *Id.* at 788.
68. *Id.* at 796.
69. *Id.* at 788.
70. *Id.*
71. *Id.* at 789.
72. *Id.* at 788–89.
73. *Id* at 796.
74. *Id*. *Clemens v. McNamee*, 615 F.3d 374, 380 (5th Cir. 2010), is to similar effect. In *Clemens*, the plaintiff, famous pitcher Roger Clemens, a Texas resident, sued his former trainer Brian McNamee for statements made to former Senator George Mitchell as part of baseball's investigation into performance enhancing drugs and later to a senior writer for the internet site, SI.com. *Id.* at 377. McNamee's claims that Clemens used performance enhancing drugs were published by every national news service and every major newspaper in Texas, as well as on the Sports Illustrated internet site. *Id.* As in *Johnson*, *Clemens* involved a pre-existing relationship between the plaintiff and the defendant, allegedly defamatory comments targeting a known forum resident, and injury in the forum state. *Id.* Moreover, in *Clemens*, the defendant had made several trips to the forum in the past and there was no doubt that many forum residents read the defendant's allegations about Clemens. *Id.* Still, the court found that Texas courts lacked personal jurisdiction over the defendant. *Id.* at 380. The court stated that Texas was not the focal point of the defendant's comments: "the statements did not concern activity in Texas; nor were they made in Texas or directed to Texas residents any more than residents of any state." *Id. See also*, Young v. New Haven Advocate, 315 F.3d 256, 264 (4th Cir. 2002) (holding that

Contrast that with the broad view adopted by the Ninth Circuit in *Gordy v. Daily News*.[75] In *Gordy*, the plaintiff, the renowned founder of Motown Records and a twenty-four year resident of California, sued The Daily News and reporter George Rush, a New York resident, for defamation.[76] Rush's offending article discussed a book written by a Florida resident about Gordy's Motown activities.[77] The primary source of the article was the Florida author,[78] the events described did not occur in California, and the article did not mention California.[79] Although the Daily News sold thirteen copies of its' daily edition and eighteen copies of its' Sunday edition in California,[80] the benefits from those sales could not be attributed to the defendant Rush.[81] Thus, the Daily News, much less reporter Rush, did not specifically target a California audience and the alleged libelous article did not focus on California events.[82] Nonetheless, the court found jurisdiction proper because the Daily News and Rush published and wrote their allegedly defamatory column intentionally directing it at a known California resident.[83]

The restrictive view in the intellectual property area is illustrated by *Wood v. Kapustin*,[84] a case involving intellectual property claims in addition to allegations of defamation.[85] Wood, a Minnesota attorney, had earlier represented clients who claimed that they paid the Kasputin defendants for a car that was never delivered.[86] Wood sent a demand letter and thereafter negotiated for delivery of the vehicle or a refund of the purchase price.[87] After the clients learned of other people who shared similar

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Defendant did not have the manifest intent of targeting the forum state, and therefore did not have sufficient contacts with the forum state to allow the district court to exercise jurisdiction).

75. 95 F.3d 829 (9th Cir. 1996).

76. *Id.* at 831. The challenged statements were sufficiently offensive that the court chose not to republish them, but noted that they were of a nature "that clearly would have a severe impact on Gordy as an individual." *Id.* at 833.

77. *See* Appellate Brief for Defendants-Appellees at 2, 6, Gordy v. Daily News, 95 F.3d 829 (No. 95-55102), 1995 WL 17017311 at *2, *6.

78. *Id.* at 6.

79. *See Gordy*, 95 F.3d at 831. Presumably, the events occurred in Michigan, where Motown Records was located. *The Story of Motown Records*, CLASSIC MOTOWN, http://classic.motown.com/history/ [http://perma.cc/WVS2-BAQU] (last visited Feb. 2, 2015).

80. *See Gordy*, 95 F.3d at 831. The California sales represented approximately .0017% of the Daily News' total circulation. *Id.*

81. *Id.* at 832 (citing Calder v. Jones, 465 U.S. 783, 790 (1984)).

82. *See supra* note 74 and accompanying text.

83. *See Gordy*, 95 F.3d at 833.

84. *See* Wood v. Kapustin, 992 F. Supp. 2d 942, 946 (D. Minn. 2014) (quoting Johnson v. Arden, 614 F.3d 785, 796 (8th Cir. 2010)).

85. *See id.* at 944.

86. *Id.* at 943.

87. *Id.*

negative experiences at the hands of the defendants, Wood registered a website, KasputinCars.com to hear from all those who had problems with the defendants.[88] To retaliate, the defendants registered the domain names NadiaWoodBlackmailer.com and NadiaWoodLaw.com, both of which redirected users to NadiaWood.net, an anonymously registered domain.[89] That site displayed Wood's logo and Minnesota address and included the header "InvestigateNadiaWood@gmail.com" under which was the suggestion that Ms. Wood was a blackmailer.[90] Wood then brought suit for, among other things, copyright, trade dress and service mark infringement, violations of the Anti-Cybersquatting Consumer Protection Act, and defamation.[91] The court dismissed the case for lack of personal jurisdiction even though defendants' websites: (1) were accessible in Minnesota; (2) used the plaintiff's trademark protected service mark; (3) contained links to the plaintiff's copyrighted logo; and (4) were created to harm the reputation of Wood, a known Minnesota attorney, whose client base ostensibly was from Minnesota.[92] The court concluded that the website could not create personal jurisdiction by itself because it was a passive website and jurisdiction was not proper under *Calder* because the plaintiff's allegations were insufficient to demonstrate that the defendants' conduct was "uniquely or expressly" aimed at Minnesota.[93]

Wood contrasts sharply with the broad view applied in *Boyd Gaming Corp. v. B Hotel Group, LLC*.[94] In *Boyd Gaming Corp.*, the plaintiff, a Nevada corporation, owned twenty-two casinos throughout the United States.[95] Boyd advertised its services with trademark terms including "B CONNECTED, B RELAXED, B ENTERTAINED, B REWARDED, B SATISFIED and B RECOGNIZED."[96] Despite notice of the plaintiff's marks, the defendant, a Florida casino, began marketing its goods and services with terms such as "B HAPPY, B OUR GUEST, B IN TOWN, B IN THE CITY, and B ON THE BEACH."[97] The plaintiff filed suit in

88. *Id.*
89. *Id.* at 944.
90. *Id.*
91. *Id.*
92. *Id.* at 944.
93. *Id*.
94. *See* No. 2:13-CV-00981(GMN), 2014 WL 643790 (D. Nev. Feb. 18, 2014).
95. Complaint at 2, Boyd Gaming Corp. v. B Hotel Group, LLC, No. 2:13-CV-00981-GMN, 2014 WL 643790 (D. Nev. 2014) (No. 2:13CV00981), 2013 WL 2728423.
96. *Id.* at 4–6.
97. *Id.* at 10–13.

its home state of Nevada alleging that the defendant willfully infringed its "B family" of marks.[98] The defendant had no physical presence of any kind and did not solicit business in Nevada.[99] Although the defendant had a website that was accessible to Nevada residents, it in no way targeted them.[100] Nonetheless, the court found that the defendant was subject to the jurisdiction of the Nevada courts, holding that acts of willful infringement are expressly aimed at the forum when the defendant knows the trademark holder is a resident of that forum.[101]

In short, the restrictive view demands that the defendants target the specific forum, not a multitude of states, and generally focuses on the defendants' audience or the location of events to determine whether that requirement is met. The broad view simply requires that the defendants target a known forum resident and focuses on the ultimate effects of the defendants' conduct.

V. *WALDEN V. FIORE* AND ITS LIMITATIONS

In *Walden v. Fiore*, the Supreme Court had the opportunity to clarify the proper approach for applying *Calder*'s "effects test," but chose to issue a narrow opinion that fails to provide a framework for analysis under *Calder*.[102]

A. The Facts

In *Walden*, professional gamblers Gina Fiore and Keith Gibson, the plaintiffs, were traveling from Puerto Rico to Las Vegas with a connecting stop in Atlanta, Georgia.[103] The defendant, Anthony Walden, serving as a deputized agent of the Drug Enforcement Administration (DEA), together with another DEA agent, conducted an investigative stop at the Atlanta Hartsfield-Jackson Airport.[104] In response to the defendant's questioning, the plaintiffs showed the defendant California driver's licenses as identification[105] and explained that they were carrying large amounts of cash because they were professional gamblers.[106] The agents then used

98. *Id.* at 3.
99. *Boyd*, 2014 WL 643790 at *1.
100. *Id.*
101. *Id.* at *3.
102. 134 S. Ct. 1115 (2014).
103. *Id.* at 1119.
104. *Id.* The Atlanta DEA agents had been forewarned by DEA agents in San Juan that the plaintiffs were travelling with almost $97,000 in cash. *Id.*
105. Fiore v. Walden, 688 F.3d 558, 562–63 (9th Cir. 2012) (O'Scannlain, J., dissenting from denial of rehearing en banc).
106. *Walden*, 134 S. Ct. at 1119.

a trained dog to perform a drug-sniff test and, after allegedly inconclusive results, seized the plaintiffs' cash on suspicion that the cash was involved in drug transactions.[107] The defendant advised the plaintiffs that their funds would be returned if they later proved a legitimate source for the cash.[108]

The plaintiffs returned to Las Vegas and through their attorney provided documentation to establish the legitimacy of their funds.[109] Meanwhile, the defendant turned the money seized over to the DEA and allegedly filed a false and misleading affidavit, designed to support probable cause for the seizure, to the United States Attorney's Office in Virginia.[110] Ultimately, the U.S. Attorney in charge of the case concluded that the government lacked probable cause for the seizure and the DEA returned the money to the plaintiff's approximately seven months after the seizure.[111]

The plaintiffs maintained residences in both California and Las Vegas.[112] The flight they boarded in Atlanta was destined for Las Vegas and the communications between their attorney and the defendant originated from Las Vegas.[113] However, the identification provided by the plaintiffs indicated a California address. The defendant, on the other hand, "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada."[114]

B. The Lower Court Litigation

The plaintiffs filed a *Bivens*[115] action in the United States District Court for the District of Nevada alleging that Walden and others violated their Fourth Amendment rights by, *inter alia*, improperly seizing their funds

107. *Id.*, n.1. The defendant's statement of the case asserted that the dog pawed at Gibson's bag. *See* Brief for Petitioner at 2, Walden v. Fiore, 134 S. Ct. 1115 (2014) (No.12-574), 2013 WL 2390244 at *3.

108. *Walden*, 134 S. Ct. at 1119.

109. *Id.*

110. *Id.* at 1119–20. The alleged misleading affidavit was not part of the record. *Id.* at 1119, n.2. In a phone call between the author's research assistant, Katherine Beres, and Robert A. Nersesian, the plaintiffs' attorney admitted that he had never seen the affidavit alleged to be misleading. Telephone Interview by Katherine Beres with Robert A. Nersesian (May 29, 2014).

111. *Id.* at 1119-20.

112. Fiore v. Walden, 688 F.3d 558, 568 (9th Cir. 2012) (McKeown, J., dissenting from denial of rehearing en banc).

113. *Walden*, 134 S. Ct. at 1119.

114. *Id.* at 1124.

115. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). *Bivens* authorizes constitutional tort claims against individual government officials. *Id.* at 389.

and filing a false and misleading affidavit that led to the continued withholding of those funds.[116] Walden responded by filing a motion to dismiss for lack of personal jurisdiction and venue.[117] The district court granted the motion to dismiss for lack of jurisdiction.[118] The court analyzed personal jurisdiction using *Calder*'s effects test and concluded that because all of Walden's acts took place in Georgia, Walden did not expressly aim his acts at Nevada.[119]

On appeal, a divided panel of the Court of Appeals for the Ninth Circuit reversed and remanded.[120] The court assumed that the district court was correct that the seizure of funds in Georgia alone could not support a finding of personal jurisdiction in Nevada. However, the court faulted the district court for failing to consider the probable cause affidavit "aspect of the case."[121] The court found that the defendant expressly targeted Nevada because he filed the allegedly false affidavit with the purpose of having its consequences felt by parties with a "significant connection" to Nevada.[122] The court specifically stated that for purposes of personal jurisdiction, it did not matter whether the plaintiffs were legal residents of Nevada.[123] The defendant's knowledge that the plaintiffs' had significant connections with the forum and intent to have the consequences of his actions felt in the forum was sufficient under *Calder* to establish purposeful direction.[124] The court then found that the cause of action would not have arisen "but for" Walden's allegedly false probable cause affidavit[125] and the defendant did not prove that jurisdiction in Nevada would be unreasonable.[126] After finding jurisdiction over the false affidavit claim, the court remanded the case for the district court to exercise its

116. *Fiore*, 688 F.3d at 572.

117. *Walden*, 134 S. Ct. at 1120. This Article focuses on personal jurisdiction and will not discuss the venue issues. The Supreme Court also did not address the motion to dismiss for lack of venue, finding that the case could be dismissed on jurisdictional grounds. *Id.* at 1121 n.5.

118. Fiore v. Walden, No. 2:07-CV-01674-ECR, 2008 WL 9833854, at *5 (D. Nev. Oct. 17, 2008), *rev'd*, 688 F.3d 558 (9th Cir. 2012), *rev'd*, Walden v. Fiore, 134 S. Ct. 1115 (2014).

119. *Id.* at *3–4. The court also stated, that "Walden's intentional acts committed in Georgia eventually caused harm to Plaintiffs in Nevada, and Walden may have known that Plaintiffs lived in Nevada" was insufficient to confer jurisdiction. *Id.* at *3.

120. *Fiore*, 688 F.3d at 588.

121. *Id.* at 577.

122. *Id.* at 579.

123. *Id.*

124. *Id.* at 580.

125. *Id.* at 582.

126. *Id.* at 585. The court found that when federal employees are sued under *Bivens*, "the government, as a rule, provides for their defense, and ultimately indemnifies them." *Id.* at 584.

discretion with regard to whether the search and seizure claim, which arose out of a common nucleus of facts, should be heard as pendent to the false affidavit claim.[127]

C. The Supreme Court Decision

The Supreme Court, in a unanimous opinion written by Justice Thomas, reversed the Court of Appeals decision.[128] According to the Court, "the Court of Appeals impermissibly allow[ed] a plaintiff's contacts with the defendant and the forum to drive the jurisdictional analysis."[129] Because the "minimum contacts" inquiry is designed to protect the liberty interests of the defendant, not the interests of the plaintiff,[130] the Court said the proper focus of the minimum contacts analysis is "the relationship among the defendant, the forum, and the litigation."[131] As such, mere harm to a forum resident was not sufficient to justify jurisdiction in a forum with which the defendant had no contacts.[132]

The Court cited *Calder* approvingly, but distinguished *Calder* from the case before it.[133] In *Calder*, the forum contacts were ample[134] and, most importantly, the reputation-based injury in California, necessary for the alleged libel to be actionable, connected the defendants to California, not just to the plaintiff.[135] In contrast, all of Walden's relevant conduct occurred in Georgia.[136] He seized the cash in Georgia and wrote the affidavit in Georgia.[137] Even if the Court considered the continuation of the seizure to be a distinct injury, the Court said "it was not tethered to

127. *Id.* at 588. Judge Ikuta dissented, finding "no claim that Walden's preparation of the allegedly fraudulent affidavit violated plaintiffs' Fourth Amendment rights," and doubting "that such a constitutional tort even exists." *Id.* at 593. Eight judges, in two separate opinions, dissented from the denial of rehearing en banc. *Id.* at 562, 568.

128. Walden v. Fiore, 134 S. Ct. 1115, 1126 (2014).

129. *Id.* at 1125 (emphasis added).

130. *Id.* at 1125 n.9.

131. *Id.* at 1123, (citing Calder v. Jones, 465 U.S. 783, 788 (1984) (emphasis added)).

132. *Id.* at 1125.

133. *Id.* at 1123, 1125.

134. "The defendants relied on phone calls to 'California sources' for the information in their article; they wrote the story about the plaintiff's activities in California; they caused reputational injury in California by writing an allegedly libelous article that was widely circulated in the State; and the 'brunt' of that injury was suffered by the plaintiff in that State." *Id.* at 1123.

135. *Id.* at 1123–24.

136. *Id.* at 1126.

137. *Id.* at 1125 n.9.

Nevada in any meaningful way."[138] The funds were not being withheld in Nevada and the plaintiff's lack of access to the funds would occur anywhere the plaintiff's chose to be at the time they desired the funds.[139] Furthermore, Walden "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to Nevada."[140] That Walden's conduct ultimately affected a person with connections to the forum state was not, according to the Court, a jurisdictionally relevant contact.[141] In the absence of any contacts with Nevada, "well-established principles" of personal jurisdiction required the lower court to grant the defendant's motion to dismiss.[142]

D. Limitations on the Scope of the Court's Decision in Walden

Although the language in *Walden* appears to favor the restrictive view of *Calder*'s second requirement, and courts preferring that view have already cited *Walden* to support their decisions,[143] the scope and significance of the Court's opinion may not be as broad as first appears. The opinion does not adopt the restrictive approach, it contains express limitations on the scope of the Court's opinion and emphasizes facts that lower courts preferring the broad view of *Calder* can use to distinguish *Walden*.[144]

The Court's decision in *Walden* neither broke new ground nor explicitly or implicitly adopted the restrictive view of *Calder's* second requirement.[145] The Court unequivocally said, "well-established principles of personal jurisdiction are sufficient to decide this case."[146] The opinion also did not

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138. *Id.* at 1125.
139. *Id.*
140. *Id.* at 1124.
141. *Id.* at 1125.
142. *Id.* at 1126.
143. *See, e.g.*, Advanced Tactical Ordnance Sys., LLC v. Real Action Paintball, Inc., 751 F.3d 796, 800 (7th Cir. 2014); Rockwood Select Asset Fund XI (6)-1, LLC v. Devine, Millimet & Branch, 750 F.3d 1178, 1180 (10th Cir. 2014); Pelican Communications, Inc. v. Schneider, No. C-14-4371-EMC, 2015 WL 527472 at *3 (N.D. Cal., Feb. 6, 2015); Enutroff, LLC v. EPIC Emergent Energy, Inc., No. 14-CV-2389-EFM-GLR, 2015 WL 419797 at *7 (D. Kan., Feb. 2, 2015); Bank of America, N.A. v. Corporex Cos., No. 3:13-CV-691-RJC, 2014 WL 3731778, at *4–5 (W.D.N.C., July 28 2014); Conex Energy-Canada, LLC v. Mann Engineering, Ltd., No. CIV 13-4123-KES, 2014 WL 3732571, at *4–5 (S. S.D., July 25, 2014); Private Capital Group, v. Dareus, No. 2:13-CV-18TS, 2014 WL 3394662, at *4 (D. Utah July 10, 2014).
144. *See, e.g.*, Jenkins v. Miller, No. 2:12-CV-184, 2014 WL 3530365, at *4–5 (D. Vt. July 15, 2014); Edozien v. XS Micro, LLC, No. MICV201305066F, 2014 WL 1260516, at *1–2 (Mass. Super. Ct. Mar. 14, 2014).
145. *See Walden*, 134 S. Ct. at 1126.
146. *Id.* at 1126; *see also Jenkins*, 2014 WL 3530365, at *5 (*Walden* "left undisturbed established Supreme Court precedent . . . .").

require a defendant to *uniquely* target the forum state as generally required under the restrictive view of *Calder*.[147] Rather, it just required some meaningful contact with that state.[148] Thus, the Court ostensibly would find the contacts in a case like *Clemens*[149] sufficient to support jurisdiction, despite the contrary ruling under the Eleventh Circuit's restrictive approach. Just as in the Court's description of *Calder*, in *Clemens*, "the reputation-based 'effects' of the alleged libel connected the defendant[ ] to [the forum state], not just to the plaintiff."[150]

Perhaps the Court did not adopt either standard for applying *Calder* because a choice was unnecessary. The result in *Walden* should have been to dismiss for lack of personal jurisdiction under either approach to *Calder's* second prong. Even under the broad view, defendants do not target the forum unless they aim their conduct at a known forum resident.[151] There was no evidence that the defendant in Walden knew that the plaintiffs resided in Nevada.[152] Although the defendant received correspondence from Las Vegas,[153] Walden could have reasonably believed the plaintiffs were in Las Vegas to gamble. Indeed, there was cause to believe the plaintiffs were from California given that the driver's licenses produced by the plaintiffs for identification had California addresses.[154] Even the Ninth Circuit could not find that the plaintiffs were residents of Nevada.[155] It merely found that the plaintiffs were "connected to" Nevada.[156]

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147. *See supra* notes 66–74, 84–93 and accompanying text.
148. *Walden*, 134 S. Ct. at 1125.
149. *See supra* note 74.
150. *Walden*, 134 S. Ct. at 1123–24. The defendant in *Clemens*, as did the defendants in *Calder*, had ample additional contacts with the forum state. *See* Clemens v. McNamee, 615 F.3d 374, 377 (5th Cir. 2010).
151. *See supra* notes 62–64 and accompanying text.
152. *Walden*, 134 S. Ct. at 1119.
153. *Id.*
154. Fiore v. Walden, 688 F.3d 558, 562–63 (9th Cir. 2012) (O'Scannlain, J., dissenting from denial of rehearing en banc).
155. *Walden*, 134 S. Ct. at 1124.
156. *Id.* at 580. *Walden* also could have been dismissed under either view because it failed *Calder*'s third requirement. That requirement demands that the "harm" to the plaintiff be in the forum state. *See supra* notes 7, 51 and accompanying text. The harm from the seizure occurred in Georgia and the harm from the false affidavit was the continued withholding of funds in either Georgia or Washington, D.C. Even if one considered where the plaintiff was affected, rather than where the harm occurred, the plaintiffs were affected by the seizure in Georgia, which is where they were at the time of the seizure. *Id.* at 571. Although plaintiffs were affected by the false affidavit claim in Las Vegas, where they were living at the time the affidavit was filed, the false affidavit claim should not even

The Court, besides not choosing or needing to break new ground, carefully limited its decision to the facts of the case. Specifically, the Court said its opinion did not address the very different question of when a defendant's virtual presence in a forum, through the internet or other electronic means, should translate into "contacts" for purposes of jurisdictional analysis.[157] That limitation is significant given that today most companies have websites on the internet.[158] One case has already distinguished *Walden* on this basis.[159]

Lower courts can also distinguish *Walden* based upon the language the Court used to distinguish *Calder*. The Court emphasized that publication to third persons is a necessary element of libel and therefore the intentional tort in *Calder* actually occurred in California where the libel was read.[160] In fact, the Court found, "the crux of *Calder* was that the reputation-based 'effects' of the alleged libel connected the defendants to California, not just to the plaintiff."[161] Obviously, this language can be used to distinguish *Walden* from most defamation and libel cases.[162] When an alleged false statement reaches the plaintiff's home state, the effect of the libel or defamation will connect the defendant to the forum state. In many of the other more common cases raising *Calder* issues, defendants similarly can be connected to the forum state. For example, a necessary element of a trademark infringement claim is to demonstrate a likelihood of confusion between plaintiff's and defendant's mark.[163] That would connect the defendant to plaintiff's home state whenever their mark is accessible to

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have been considered by the courts. Not only is it unclear whether such a claim exists, *see Fiore*, 688 F.3d at 595 n.6 (Ikuta, J., dissenting), the claim was not sufficiently pled under *Bell Atl. Corp. v. Twombley*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). The complaint merely alleged on information and belief that the affidavit contained misrepresentations and omitted exculpatory facts without indicating the nature of either. *Fiore*, 688 F.3d at 591 (Ikuta, J., dissenting). This is not surprising given that the plaintiffs had not seen the affidavit. *See supra* note 110. It appears that the Ninth Circuit's decision to reject all bases for dismissal in *Walden* was greatly influenced by the fact that in *Bivens* actions, "the government, as a rule, provides for their defense, and ultimately indemnifies them." *Fiore*, 688 F.3d at 584.

157. *Walden*, 134 S. Ct. at 1125 n.9.

158. *See* Nat'l Small Bus. Ass'n, *2013 Small Business Technology Survey*, NSBA 6 (Aug. 2013), http://www.nsba.biz/wp-content/uploads/2013/09/Technology-Survey-2013.pdf [http://perma.cc/8ESS-MFBD].

159. *See* Edozien v. XS Micro, LLC, No. MICV201305066F, 2014 WL 1260516, at *1–2 (Mass. Super. Ct. Mar. 14, 2014).

160. *Walden*, 134 S. Ct. at 1124; *see also* GT Securities, Inc. v. Klestech GmbH, No. C-13-03090 JCS, 2014 WL 2928013, at *14 (N.D. Cal. June 27, 2014) (finding injury in the state was the "key" to *Walden*).

161. *Walden*, 134 S. Ct. at 1123–24.

162. *See, e.g.*, *Edozien*, 2014 WL 1260516, at *1–2 (Mass. Super. Ct. Mar. 14, 2014).

163. *See* Lanham Act, 15 U.S.C. § 1114(1)(a) (2012); KP Permanent Make-Up, Inc. v. Lasting Impressions I, Inc., 543 U.S. 111, 117 (2004).

consumers there.[164] A number of courts go further and say that the injury in a trademark action occurs wherever the trademark holder resides.[165] That injury would connect the defendant to the plaintiff's home state even if the defendant didn't use the mark in that state. Similarly, some courts say that a copyright injury occurs where the copyright is held.[166] Therefore, the defendant would be connected to the plaintiff's home state even if the defendant does not publish the copyrighted work in that state. Moreover, many copyright violations occur on the internet so access by anyone in the plaintiff's home state would cause the defendant to have republished the copyrighted work in that state, thus connecting the defendant to that state.[167] Even in fraud or misrepresentation cases, the misrepresentation is often by phone calls to, or access to the internet in the plaintiff's home state.[168] This too would connect the defendant to the forum state similar to *Calder* and contrary to *Walden.*

Finally, in *Walden*, the defendant appeared to have no contacts at all with Nevada.[169] The Court said the defendant "never traveled to, conducted activities within, contacted anyone in, or sent anything or anyone to" the forum state.[170] The defendants in many cases invoking *Calder* have such contacts with the forum state.[171] Whether it is phone calls or mail to, internet

164. *See* Louis Vuitton Malletier, S.A. v. Mosseri, 736 F.3d 1339, 1354 (11th Cir. 2013).

165. *See, e.g.*, Boyd Gaming Corp. v. B Hotel Group, LLC, No. 2:13-CV-00981-GMN, 2014 WL 643790, at *3 (D. Nev. Feb. 18, 2014); Dearborn Tree Serv. Inc. v. Gray's Outdoorservices, LLC, No. 13-CV-12584, 2013 WL 6552837, at *4 (E.D. Mich. Dec. 13, 2013).

166. *See* Wash. Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 678 (9th Cir. 2012); *cf.* N.C.C. Motorsports, Inc. v. K-VA-T Food Stores, Inc., 975 F. Supp. 2d. 993, 1003 n.6 (E.D. Mo. 2013) (citing cases that "seem to support this proposition," but finding it unnecessary to "decide conclusively" whether the harm from copyright infringement is felt in the copyright holder's forum state).

167. *See, e.g.*, Ben Sisario, *Judge Rules Against Grooveshark in Copyright Infringement Case*, N.Y. TIMES, Sept. 29, 2014, *available at* http://www.nytimes.com/2014/09/30/business/media/judge-rules-against-grooveshark-in-copyright-infringement-case.html?_r=0 [http://perma.cc/XK7J-UHGN].

168. *See, e.g.*, Boschetto v. Hansing, 539 F.3d 1011 (9th Cir. 2008); Wysnoski v. Miller, 759 F. Supp. 439 (N.D. Ill. 1991).

169. *Walden*, 134 S. Ct. at 1124.

170. *Id.*

171. *See, e.g.*, Wolstenholme v. Bartels, 511 Fed. App'x 215 (3d Cir. 2013); Grynberg v. Ivanhoe Energy, Inc., 490 Fed. App'x 86 (10th Cir. 2012); LaSala v. Marfin Popular Bank Pub. Co., 410 Fed. App'x 474 (3d Cir. 2011); Schrader v. Biddinger, 633 F.3d 1235 (10th Cir. 2011); Panagea, Inc. v. Flying Burrito LLC, 647 F.3d 741 (8th Cir. 2011); United States v. Swiss Am. Bank, Ltd., 274 F.3d 610 (1st Cir. 2001).

access from, or a pre-existing relationship with someone residing in the forum state, those contacts can be used to distinguish *Walden* and find jurisdiction under either the broad view of *Calder* or traditional personal jurisdiction principles.[172]

Thus, explicit and implicit limitations in the Court's opinion leave lower courts free to apply whatever approach to *Calder* they prefer. Although the Supreme Court reversed the Ninth Circuit in *Walden*, it did not make new law or resolve the conflict among the lower courts concerning the proper application of *Calder*. The following section, recommends a comprehensive approach to *Calder*-based cases to fill the void understandably left by the Court's opinion.

VI. A RECOMMENDED APPROACH TO *CALDER*

This Article recommends that *Calder* be interpreted to require:

1. The defendant must have committed a tortious and willful act that targeted the plaintiff; and
2. The defendant knew plaintiff's primary residence and that the plaintiff would be proximately harmed in that state

These requirements will be explained and justified below. The recommendation is designed to harmonize the two divergent standards in the lower courts, provide the optimal result in terms of fairness and efficiency, and remain substantially consistent with existing law.

A. Willful Targeting of the Plaintiff

The key component of this Article's recommended approach to effects test cases is the requirement of willful misconduct as part of *Calder*'s "intentional act" requirement.[173] Where willfulness is present, traditional

172. *See* Tresona Multimedia, LLC v. Legg, No. CV-14-02141-PHX-DGC, 2015 WL 470228 at *4 (D. Ariz., Feb. 4, 2015); Havel v. Honda Motor Europe, Ltd., No. H-13-1291, 2014 WL 4967229 at *10 (S.D. Tex., Sept. 30, 2014); Defense Training Sys. v. Int'l Charter Inc. of Wyo., No. 3:13-CV-172 JWS, 2014 WL 3051217, at *11 (D. Alaska July 3, 2014); Failla v. Futureone Corp., 181 Wash. 2d 642, 653 n.2 (Wash. 2014, en banc).

173. The Seventh Circuit in *uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 435 (7th Cir. 2010) (quoting Tamburo v. Dworkin, 601 F.3d 693, 703 (7th Cir. 2010)), appears to have agreed that the intentional act requirement should be interpreted to demand a willfully wrongful act. Also, the Ninth Circuit recently has expressly recognized the significance of willfulness in an effects test analysis, albeit as part of the targeted the forum, and not the "intentional act," requirement of *Calder*. *See* Wash. Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d at 674–75 (9th Cir. 2012); *accord* D. Brutke's Victory Hills, LLC v. Tutera, No. 3:12-CV-019510-SI, 2013 WL 3818146, at (D. Or. July 22, 2013); Trade West, Inc. v. Dollar Tree, Inc., No. 12-00606 ACK-BMK, 2013 WL 1856302, at (D. Haw. Apr. 30, 2013); Aoki v. Gilbert, No. 2:11-CV-02797-MCE-CKD, 2013 WL

personal jurisdiction principles and sound policy justify jurisdiction over a defendant who targets and causes proximate harm to a known forum resident. Yet, where willfulness is lacking, those same principles and policy recommend rejection of the broad view of *Calder*. Under those circumstances, *Calder* should be interpreted as requiring a more specific targeting of the forum, similar to the restrictive view of *Calder*. However, the higher standard would be the result of traditional personal jurisdiction principles requiring purposeful availment rather than *Calder*'s effects test.[174] It is the presence, not the mere allegation of willfulness that should be determinative. Accordingly, on a motion to dismiss for lack of personal jurisdiction, the plaintiff should be required to prove willfulness under a preliminary injunction type standard. That is, the court should require a plaintiff to establish that she has a "likelihood of success" in proving willfulness.[175]

1. Defining Willfulness

Willfulness, for the purposes of this Article, follows the definition of intent in the Restatement (Third) of Torts. That is, a person acts willfully when: "(a) the person acts with the purpose of producing [resulting] consequence; or (b) the person acts knowing that the producing or before

1324267 (E.D. Cal. Apr. 2, 2013) (all quoting *Wash. Shoe Co.*). Courts in other circuits have not similarly expressly required a showing of willfulness. Nonetheless, the presence or absence of willfulness appears to affect the outcome in some effects test cases that do not expressly require willfulness. *See*, *e.g.*, Pebble Beach Co. v. Caddy, 453 F.3d 1151 (9th Cir. 2006) (finding where there was no basis for finding willfulness, the Ninth Circuit, which follows the *broad view* and had not yet recognized the importance of a willfulness determination, found jurisdiction was improper even though the plaintiff sued in its home state for trademark injuries allegedly occurring there); CitiMortgage, Inc. v. Chi. Bancorp., Inc., No. 4:12CV246 CDP, 2014 WL 1315563, at (E.D. Mo. Mar. 31, 2014), *vacated*, 2014 WL 4415261 (E.D. Mo. Sept. 8, 2014). The Eighth Circuit, which follows the *restrictive view*, found jurisdiction was proper where there was an apparent willful fraudulent transfer, despite that the transfer occurred and involved funds which were out of state. This Article's recommendation only would make explicit what such courts, without any reasoning, seem to do implicitly.

174. *See* J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2788 (2011) (Kennedy, J., plurality); Asahi Metal Indus. Co. v. Superior Court of Cal., Solano Cnty., 480 U.S. 102, 112 (1987) (O'Connor, J., plurality); Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984).

175. *See* Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987); Doran v. Salem Inn, Inc., 422 U.S. 922, 932 (1975).

resulting consequence is substantially certain to result."[176] This definition incorporates bad faith conduct and conduct taken with "reckless disregard" of their consequences.[177] Willfulness, however, generally requires more than violating a statute or common law obligation. For example, in a trademark infringement claim willfulness would require not merely that there was a likelihood of confusion between the plaintiff's and defendant's mark,[178] but either that the defendant purposefully created confusion or any reasonable person would have known there would be likely confusion.[179] A good faith argument that the challenged mark was not infringing should negate a finding of willfulness.[180] That would be true even if the defendant knew of the plaintiff's mark and received a cease and desist letter from the plaintiff's attorney.[181] Knowledge that the plaintiff's attorney thinks or asserts a mark is infringing does not establish that any reasonable person would know the mark was infringing. The paradigm case of willful trademark infringement would be selling counterfeit goods.[182] Willfulness could also be established in the trademark context when the defendant is selling competing goods in the same geographic market as the plaintiff and has adopted a mark virtually identical to that of the plaintiff.[183] In cases such as *Calder*, where libel or defamation is alleged by a public figure—actual malice, which includes a reckless disregard as to the veracity of the challenged statement—is a necessary element of the claim.[184] Therefore, substantive liability for such claims simultaneously satisfies the requirement of willfulness.

Although this definition of willful depends upon the defendant's subjective intent or knowledge, those subjective elements can be proven with objective factors to avoid "the epistemological and practical proof objections raised by subjective standards."[185]

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176. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 1 (2010).

177. *See* Wash. Shoe Co. v. A-Z Sporting Goods Inc., 704 F.3d 668, 674 (9th Cir. 2012).

178. *See supra* note 163 and accompanying text.

179. *See, e.g.*, SecuraComm Consulting, Inc. v. Securacom, Inc., 166 F.3d 182, 187 (3d Cir. 2000); Thomsen v. United States, 887 F.2d 12, 17 (1st Cir. 1989).

180. *See SecuraComm Consulting, Inc.*, 166 F.3d at 189.

181. *Id.*

182. *See* 15 U.S.C. § 1116(d) (2012).

183. *See, e.g.*, Louis Vuitton Malletier v. Artex Creative Int'l. Corp., 687 F. Supp. 2d 347, 353 (S.D.N.Y. 2009).

184. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964). In the defamation and libel context, an author is guilty of reckless disregard when he "'in fact entertained serious doubts as to the truth of his publication,' or acted with a 'high degree of awareness of . . . probable falsity.'" *See* Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991) (citations omitted).

185. Kevin C. McMunigal, *Desert, Utility and Minimum Contacts: Toward a Mixed Theory of Personal Jurisdiction*, 108 YALE L. J. 189, 219–20 (1998).

2. Support for the Broad View of Calder*'s "Targeting Forum" Requirement Where There Is Willfulness*

If a plaintiff can prove that the defendant's tortious conduct was willful, traditional personal jurisdiction principles[186] warrant adoption of the broad view of the targeting forum requirement. When a defendant willfully targets a known resident plaintiff it is not merely foreseeable that the plaintiff will be injured in that state, but the defendant, in a very real sense, has purposefully directed his actions to cause injury in that state. The plaintiff can be expected to sue in the state in which she resides and the injury occurred; and the state has a very strong regulatory interest in protecting its residents from willfully caused injury within its borders.[187] It is therefore foreseeable that the defendant might be haled into court in that state.[188] Moreover, in the case of willful misconduct, it is very easy to structure one's activities to avoid suit in the chosen forum.[189] Simply do not engage in conduct you know or should know violates the law. Finally, in no sense can it be said that suit was the result of the defendant's "random, fortuitous, or attenuated contacts" with the forum state.[190] The defendant purposefully chose to cause the plaintiff injury in the forum state.

Policy considerations also warrant adoption of the broad view of the targeting forum requirement when the defendant has willfully injured the plaintiff. The two policies traditionally identified to support the Court's personal jurisdiction doctrine are avoiding state overreaching[191] and

186. *See supra* notes 16–34 and accompanying text.

187. *See* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984); Brennan v. Roman Catholic Diocese of Syracuse N.Y., Inc., 322 F. App'x 852, 857 (11th Cir. 2009); D'Onofrio v. Il Mattino, 430 F. Supp. 2d 431, 441 (E.D. Pa. 2006).

188. *Cf. Brennan*, 322 F. App'x at 855–56 ("Where a forum seeks to assert specific personal jurisdiction over a nonresident defendant, due process requires that the defendant have 'fair warning' that a particular activity may subject him to the jurisdiction of a foreign sovereign. 'This "fair warning" requirement is satisfied if the defendant has "purposefully directed" his activities at residents of the forum . . . .'") (citations omitted).

189. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

190. Walden v. Fiore, 134 S. Ct. 1115, 1123 (2014) (quoting *Burger King*, 471 U.S. at 475).

191. *See World-Wide Volkswagen*, 444 U.S. at 292 (explaining personal jurisdiction requirements "act to ensure States, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system."). The Court has subsequently said that the state overreaching concern (sometimes labeled a federalism interest) "must be seen as ultimately a function of the individual liberty interest preserved

fairness to the defendant.[192] The forum state has a strong regulatory interest in preventing injury to residents from intentional misconduct,[193] and no state has an interest in encouraging willful misconduct. Therefore the plaintiff's home state would not be overreaching or encroaching upon other states' regulatory interests when it requires the defendant to answer for the actions that caused willful injury within the state.[194] It is also not unfair to the defendant to ask him to defend in the forum in which he purposefully targets and injures a plaintiff. Common sense dictates as much. The defendant has "fair warning"[195] of the possibility of suit in that forum and can easily avoid suit there by not willfully causing injury to a known forum resident. Remember too, even if willfulness justifies a court finding purposeful direction under the broad view of *Calder*, the defendant might still avoid litigating in the challenged forum if proceeding there would actually hamper her defense.[196] Significant inconvenience also could justify the court transferring venue to a more convenient forum.[197]

Moreover, in today's world of modern transportation and communication, objections to personal jurisdiction are rarely motivated by the defendant's actual ability to defend or fairness concerns. Rather, motions to dismiss for lack of personal jurisdiction typically are strategic motions seeking to

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by the Due Process Clause rather than as a function of federalism concerns." *Burger King Corp.*, 471 U.S. at 472 n.13; McMunigal, *supra* note 185, at 211.

192. *See* Int'l. Shoe Co. v. Wash., 326 U.S. 310, 316 (1945) (explaining due process requires certain minimum contacts "so as not to offend traditional notions of fair play and substantial justice"); *World-Wide Volkswagen*, 444 U.S. at 292 (stating personal jurisdiction requirements are designed, in part, to protect "the defendant against the burdens of litigating in a distant or inconvenient forum.").

193. *See supra* note 187.

194. *See* Allan R. Stein, *Personal Jurisdiction and the Internet: Seeing Due Process Through the Lens of Regulatory Precision*, 98 NW. U. L. REV. 411, 425–26 (2004); s*ee also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 776 (1984).

195. *Burger King Corp.*, 471 U.S. at 472.

196. If purposeful direction is found, the defendant still has the opportunity to demonstrate that litigation in the chosen forum would be unfair or unreasonable. *See Burger King Corp.*, 471 U.S. at 476–77; Shrader v. Biddinger, 633 F.3d 1235, 1240 (10th Cir. 2011); Tamburo v. Dworkin, 601 F.3d 693, 709 (7th Cir. 2010); Chaiken v. VV Publ'g Corp., 119 F.3d 1018, 1029 (2d Cir. 1997). However, plaintiffs have a legitimate interest in suing in their home state, and the forum has a strong interest in protecting its residents from intentional injury. *See Keeton*, 471 U.S. at 776. Thus, it would require an unusual fact pattern for a defendant to be able to meet the heavy burden of demonstrating that jurisdiction would be unreasonable when the defendant willfully injures the plaintiff in the forum state. *See* Kauffman Racing Equip., LLC. v. Roberts, 126 Ohio St. 3d 81, 2010-Ohio-2551, 930 N.E.2d 784, at ¶ 72 ("The United States Supreme Court has indicated that a high degree of unfairness is required to erect a constitutional barrier to jurisdiction. * * * This is especially true in a case (such as the one herein) in which the defendant has intentionally directed his activity at forum residents * * * and the "effects" of the activity occur in the forum state.'" (citations omitted)).

197. *See* 28 U.S.C. § 1404(a) (2012).

shift the costs of travel from the defendant to the plaintiff. Not only may costs of travel be significant in absolute terms, they also can have substantial effect on the terms of any settlement agreement. Simple justice dictates that travel costs should be borne by the intentional wrongdoer rather than the innocent victim. Obviously, imposing the travel costs on the defendant will also help deter willful misconduct. Additionally, if plaintiffs have to travel, they may effectively be deprived of access to the courts. Regulatory interests may suffer from under-enforcement as a result.[198] In brief, individual-focused corrective justice interests and societal interests in general deterrence and efficient enforcement[199] also support placing the costs of travel on the defendant in the case of willful misconduct.[200]

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198. *See* Robertson, *supra* note 35, at 1301, 1346 nn.236–37, (citing Megan M. La Belle, *Patent Litigation, Personal Jurisdiction and the Public Good*, 18 GEO. MASON L. REV. 43, 62 (2010)) (unavailability of the home forum, "causes alleged [patent] infringers to forego declaratory relief and allows many bad patents to go unchallenged.").

199. Individual corrective justice interests and future focused societal interests correspond to what one commentator has labeled desert and utility principles—ideologies that, he argues, motivate much of criminal and tort law and underlie the factors in the Supreme Court's personal jurisdiction jurisprudence. *See* McMunigal, *supra* note 185, at 199–209. Desert principles use both moral criteria and a retrospective perspective to achieve what is just and to prevent what is unjust. *Id.* at 199–200. Utility theory "focuses on the interests of society rather than on the rights or responsibilities of individuals" and uses instrumental norms such as deterrence or cost-spreading rather than moral criteria. *Id.* at 200.

200. One might suggest that these same principles and arguments could support a suit in any jurisdiction, whether or not the plaintiff resides in that forum. That is, where the defendant engages in willful misconduct, he is a bad guy and should not be heard to complain about any inconvenience. Rather, he should be punished and thereby deterred from engaging in similar conduct in the future. Such an argument would not be valid. First, it is clearly inconsistent with existing law. Finding jurisdiction in any and all forums would violate *Walden*'s requirement that the defendant have some contact with the forum and also be irreconcilable with *Walden*'s apparent desire to limit the number of forums in which a defendant can be sued. *See* Walden v. Fiore, 134 S. Ct. 1115, 1122, 1125 (2014). There also would be no reasonable basis for saying that the defendant targeted the chosen forum as required by *Calder*. *See supra* notes 7, 51 and accompanying text. Second, policy interests are different when suit is in a random forum as opposed to the plaintiff's home state. When the defendant has no connection to the forum, the randomly chosen forum, by upholding jurisdiction, would be guilty of violating its obligation to other states as co-equal sovereigns in the federal system. Therefore the state would be overreaching. Although subjecting a defendant guilty of willful misconduct to jurisdiction in any state might increase deterrence, it would sacrifice efficiency, which is also an important interest under utility theory. *See* McMunigal, *supra* note 185, at 207. Not only would the defendant have to travel, but the plaintiff and witnesses also would likely have to travel. This would result in an increase, not a mere shifting of, travel costs. The randomly chosen forum also would probably have to apply the law of the state in which the injury occurred. *See*

3. Reasons to Reject the Broad View of Calder*'s "Targeting Forum" Requirement in the Absence of Willfulness*

Just as the presence of willfulness justifies following the broad view of *Calder*, the absence of willfulness warrants rejection of that view. When willfulness is lacking, unless additional facts supporting jurisdiction exist, it can no longer be said that the defendant *purposefully* directed his actions at the forum state. Similarly, where the defendant does not willfully violate the law, he does not have "fair warning"[201] that he will be subject to jurisdiction in the chosen forum and cannot as easily structure his activities to avoid suit in that forum. For example, consider a defendant in a trademark case, that knowing of the plaintiff's mark, uses a similar but non-identical mark for non-competing goods.[202] The defendant, assuming there could not be any confusion between the two marks, would not have fair warning that suit could occur in plaintiff's home state and would not know to structure its activities differently until it was too late.

Policy interests also recommend rejection of the broad view when willfulness cannot be shown. In the absence of willful misconduct, the state's interest in protecting its citizens is reduced and interference with other states' regulatory interests can increase. For example, without willfulness, defamation actions in unexpected forums may chill valuable speech that many States, as well as society, would want to encourage.[203] Fearing suit in a distant forum, consumers may not share on the internet their negative experiences with a disreputable seller and print media may forego critical commentary of parties residing out of state. Adopting the *broad view* without imposing a willfulness requirement also could compromise important state and societal interests in economic competition. For example, generic brands often copy the packaging of the leading brand and add clear disclaimers to avoid consumer confusion. Such packaging is not designed to confuse consumers, but to easily and cheaply inform them that a less expensive substitute exists for the leading brand. If those generic

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RESTATEMENT (SECOND) OF CONFLICT OF LAWS: PERSONAL INJURIES § 146 (1971). Obviously, the state where the injury occurred can more efficiently interpret and apply their law. Finally, remedies under the substantive law are designed to provide the optimal deterrence for any violation of the law. Increasing the defendant's travel costs as punishment, rather than in an effort to save the plaintiff additional expenses, could lead to undesirable and needless over-deterrence. Quite simply, the arguments for adopting the broad view of *Calder* in the case of willful misconduct do not similarly justify plaintiff suing in any random forum.

201. *See supra* notes 186, 195.

202. *See e.g.*, Mead Data Cent., Inc. v. Toyota Motor Sales, U.S.A., Inc., 875 F.2d 1026, 1027 (2d Cir. 1989), where a legal research company claimed that automaker's "Lexus" brand diluted its "Lexis" trademark.

203. *See* Stein, *supra* note 194, at 422.

brands could be sued in a distant forum merely because the leading brand resided there, they might be discouraged from using such informative packaging or even from entering the market at all. The result would be higher prices market-wide.

In the absence of willfulness, the defendant cannot be characterized as a bad guy, and therefore, there would be no reason to prefer plaintiff over the defendant in allocating travel costs. In fact, in many cases, it might be the plaintiff who is the bad guy, using claims in far-off forums to harass the defendant. Such plaintiffs could file weak or even frivolous suits and a number of defendants might have to default rather than defend in the inconvenient forum.[204] Permitting jurisdiction based upon effects in the plaintiff's home state, without demanding a showing of willfulness, would be so overbroad that plaintiffs might be able to file suit in their home state on almost any action. A plaintiff could claim effects-based jurisdiction in their home state even in contract or negligence actions.[205] Obviously, in the absence of additional contacts between the defendant and the forum, this would be contrary to existing case law, unfair to the defendant, and the antithesis of due process.[206]

Thus, individual-focused corrective justice interests and societal interests in general deterrence and efficient enforcement favor rejecting the broad view of *Calder* when willfulness is absent. Rather, under the restrictive view of *Calder* or under non-effects-based personal jurisdiction principles, a plaintiff should have to prove that the defendant directed her activities to the forum itself to sustain personal jurisdiction.

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204. Of course, plaintiffs always may file non-meritorious suits in distant forums to harass a defendant. However, in most such cases the defendant can default and challenge the finding of jurisdiction when the plaintiff seeks to enforce the judgment in the defendant's home state. In the absence of a willfulness requirement, the broad view of *Calder* may support the finding of jurisdiction in the original forum, and therefore the default judgment might be enforceable in other states, including defendant's home state.

205. Such actions would literally fall within the oft-cited three-prong *Calder* effects test. *See supra* note 7 and accompanying text. Even if one limited *Calder* to intentional torts, as was the Court's apparent intent, it would often be easy to allege an intentional tort with effects in the state and justify jurisdiction in the non-intentional tort actions under the courts' pendent personal jurisdiction powers. *See supra* note 51; Fiore v. Walden, 688 F.3d 558, 567 (9th Cir. 2012); Action Embroidery Corp. v. Atl. Embroidery Inc., 368 F.3d 1174, 1180 (9th Cir. 2004).

206. *Cf.* Walden v. Fiore, 134 S. Ct. 1115, 1122 (2014) (the "limits on the State's adjudicative authority principally protect the liberty of the non-resident defendant—not the convenience of plaintiffs . . . .").

4. The Standard of Review for Determining Willfulness

This Article's recommended focus on willfulness is easily justified. However determining willfulness at the pleading stage under the traditional prima facie standard of proof[207] would prove problematic. Accordingly, this Article recommends adoption of a "likelihood of success" standard for determining willfulness on a motion to dismiss for lack of personal jurisdiction. This section explains why the prima facie standard of proof should be rejected, provides legal support for the likelihood of success model, and responds to possible criticisms of that standard.

a. Why the Prima Facie Standard of Review Should Be Rejected

The prima facie standard is inadequate for determining willfulness at the pleading stage because in too many cases it is too easy to make a prima case of willfulness, especially when plaintiff's allegations are taken as true and all conflicts are resolved in plaintiff's favor.[208] The result would be to allow too many cases to go forward where willfulness was lacking. This would create the same problems that result from adoption of the broad view of *Calder* in the absence of willfulness.[209] Despite the plaintiff's allegations, defendant may not truly have purposefully targeted the forum or known that he could be haled into court in the forum state. The forum might not really have a strong interest in the litigation and adjudication in the chosen forum might infringe upon other state's regulatory interests. Alleging that the defendant is a bad guy doesn't make it so. It is just as likely that the plaintiff's claims cannot be proven or that the plaintiff is using suit in a forum unfavorable to the defendant as a tool for harassment.

If a prima facie standard of proof is used at the pleading stage, plaintiff does ultimately have to prove willfulness by a preponderance of the evidence at trial.[210] However, having to litigate a full trial in an inconvenient forum to get a dismissal for lack of personal jurisdiction would make due process rights largely illusory.

The prima facie standard of proof on motions to dismiss for lack of personal jurisdiction derives, in part, from use of the identical standard on motions to dismiss for failure to state a claim.[211] However, there is reason

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207. *See supra* note 18 and accompanying text.

208. *See* Stampone v. Fopma, No. 13-4436, 2014 WL 2024995, at *1 (3d Cir. May 19, 2014) (citing Metcalfe v. Renaissance Marine, Inc., 566 F.3d 324, 330 (3d Cir. 2009)); Clemens v. McNamee, 615 F.3d 374, 378 (5th Cir. 2010); Fraser v. Smith, 594 F.3d 842, 846 (11th Cir. 2010); GCIU-Emp'r Ret. Fund v. Goldfarb Corp., 565 F.3d 1018, 1020 n.1 (7th Cir. 2009).

209. *See supra* notes 201–05 and accompanying text.

210. *See supra* note 19.

211. Robertson, *supra* note 35, at 1328.

to distinguish the two motions. The standard of review under motions to dismiss for failure to state a claim is deferential to the plaintiff to protect the plaintiff's Seventh Amendment rights.[212] An erroneous dismissal on a motion to dismiss for failure to state a claim results in res judicata and may violate the plaintiff's right to a jury trial.[213] An erroneous denial of the motion, on the other hand, does not violate any Constitutional right.[214] In contrast, personal jurisdiction is designed to protect the defendant's due process rights under the Fifth or Fourteenth Amendments, not any right of the plaintiff.[215] An erroneous denial of the motion can infringe upon the defendant's constitutional right to be free from litigation in a forum with which it does not have minimum contacts.[216] An erroneous grant of the motion, however, does not result in res judicata and does not violate any constitutional mandate. Thus, there is reason to adopt a less plaintiff-deferential standard of review on motions to dismiss for lack of personal jurisdiction.

b. Support for the "Likelihood of Success" Standard

The likelihood of success standard is such a less plaintiff-deferential standard that avoids the problems created by the prima facie standard.[217] Under the proposed standard, few cases will go forward where willfulness ultimately is found lacking. The likelihood of success standard also has the advantage of familiarity as it is the standard routinely applied on motions for a preliminary injunction.[218] Courts have even required that personal jurisdiction be established under that standard in cases where preliminary relief is sought.[219] Although in effect test cases the court will be forced to make preliminary judgments about the merits of the case under the likelihood of success standard, it is not unusual for courts to make pre-trial decisions about the strength of a party's case. For example,

212. *Id.* at 1329.
213. *Id.* at 1329, 1330 n.159.
214. *Id.* at 1330.
215. *Id.* at 1329.
216. *See supra* notes 20–22.
217. *See supra* notes 208–216 and accompanying text.
218. *See* Lam Yeen Leng v. Pinnacle Performance Ltd., 474 Fed. App'x 810, 813 (2d Cir. 2012); Enter. Int'l., Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 471 (5th Cir. 1985); Indus. Elecs. Corp. v. Cline, 330 F.2d 480, 482 (3d Cir. 1964).
219. *See* Visual Scis., Inc. v. Integrated Commc'ns, Inc., 660 F.2d 56, 59 (2d Cir. 1981); *Indus. Elecs. Corp.*, 330 F.2d at 482.

in criminal cases, courts necessarily consider the power of the government's case when determining whether to grant bail.[220] Courts in England also consider the merits of a party's case to determine the propriety of service on a defendant outside the jurisdiction under their "service out" procedures.[221]

The First Circuit has explicitly authorized lower courts to adopt the likelihood of success standard for motions to dismiss for lack of personal jurisdiction when, like in effects test cases, the facts required to decide personal jurisdiction overlap with those necessary to decide the merits of the action.[222] In *Foster-Miller, Inc.*, the First Circuit found that the prima facie standard was inadequate to screen cases with conflicting versions of the facts and could allow "a dubious case to proceed beyond the pleading stage, and even to trial, though the court eventually will be found to lack jurisdiction."[223] The court rejected the more rigorous preponderance standard, in part, because that standard requires a full-blown evidentiary hearing that can squander judicial resources.[224] The court further reasoned that because the preponderance standard contemplates a binding adjudication,

> the court's factual determinations ordinarily will have preclusive effect, and, thus, at least in situations in which the facts pertinent to jurisdiction and the facts pertinent to the merits are identical, or nearly so . . . the preponderance method can all too easily verge on a deprivation of the right to trial by jury.[225]

The court recommended the intermediate "likelihood" standard because that standard provided some "assurance that the circumstances justify imposing on a foreign defendant the burdens of trial in a strange forum, but leaves to the time of trial a binding resolution of the factual disputes common to both the jurisdictional issue and the merits of the claim," thereby avoiding troublesome preclusion or law of the case issues.[226]

At least in part because burden of proof issues are rarely litigated,[227] when personal jurisdiction questions overlap with the merits, other Circuit

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220. *See* 18 U.S.C. § 3142(g) (2012).

221. *See* S.I. Strong, *Jurisdictional Discovery in United States Federal Courts*, 67 WASH. & LEE L. REV. 489, 516 & nn.110, 119 (2010); Patrick J. Borchers, *Internet Libel: The Consequences of a Non-Rule Approach to Personal Jurisdiction*, 98 NW. U. L. REV. 473, 491 & n.117.

222. *See* Foster-Miller, Inc. v. Babcock & Wilcox Can., 46 F.3d 138, 146 (1st Cir. 1995); Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 678 (1st Cir. 1992); Yordan v. Am. Postal Workers Union, AFL-CIO, 293 F.R.D. 91, 94 (D.P.R. 2013).

223. 46 F.3d at 146.

224. *Id.*

225. *Id.*

226. *Id.*

227. *See* Robertson, *supra* note 35, at 1327.

Courts of Appeals have neither explicitly rejected nor adopted the recommended standard.[228]

Those circuits typically apply either the prima facie or preponderance standards. The former already has been shown to be an unsatisfactory standard for judging willfulness. The preponderance standard, used when there is an evidentiary hearing,[229] often produces the same result as the likelihood of success standard. In those cases where the results from the two standards differ, the likelihood of success model appears to be the preferable standard and adoption of that standard should be within the courts' broad discretion.[230]

When there is a full-blown hearing in a judge-tried case, there is no effective difference between the likelihood of success and preponderance standards. If the court finds that it is more likely than not that there is jurisdiction, it would find a reasonable likelihood that the plaintiff would be able to succeed in proving personal jurisdiction. Conversely, if the court thinks jurisdiction is less likely than not, it would find that the plaintiff does not have a reasonable probability of success in proving personal jurisdiction.

The two standards could produce different outcomes if the court, in a jury-tried case, believes there is not a preponderance of evidence establishing jurisdiction, but that a reasonable jury might evaluate the evidence differently. Judges normally determine factual issues on personal jurisdiction issues and juries determine factual issues on the merits. When the two issues overlap, as in effects test cases, the likelihood of success test leaves the ultimate findings of fact to the jury.[231] That approach seems to be most consistent with the Seventh Amendment and avoids any preclusion or law

228. A district court in Maryland, however, has adopted the First Circuit approach. *See* Burns & Russell Co. of Baltimore v. Oldcastle Inc., 198 F. Supp. 2d 687, 689 (D. Md. 2002).

229. *See supra* note 19 and accompanying text.

230. District courts have broad discretion to decide both whether to hold a hearing and to determine the nature of that hearing. *See* Boit v. Gar-Tec Prods., Inc., 967 F.2d 671, 676–78 (1st Cir. 1992); Visual Scis., Inc. v. Integrated Commc'ns, Inc., 660 F.2d 56, 58 (2d Cir. 1981); Mach 1 Air Servs., Inc. v. Bustillos, No. CV-12-026160PHX-GMS, 2013 WL 1222567, at *4 (D. Ariz. Mar. 25, 2013); Int'l Customs Assocs., Inc. v. Ford Motor Co., 893 F. Supp. 1251, 1258–59 (S.D.N.Y. 1995) *aff'd.*, 201 F.3d 431 (2d Cir. 1999).

231. Of course, decisions under the prima facie standard also leave the ultimate fact-finding to the jury. Thus, the law does not compel a court to make all factual findings on a motion to dismiss for lack of personal jurisdiction.

of case issues.[232] Accordingly, a district court should have the discretion to adopt that standard.[233]

When there is a preliminary, as opposed to a full-blown hearing, a court might find that the plaintiff had not established jurisdiction by a preponderance of the evidence, but that there is a reasonable likelihood that they could after a more complete hearing on the issue. However, if the court held that belief, it would make little sense to apply the preponderance standard and dismiss the case. Either the court should order discovery and hold a more complete evidentiary hearing[234] or view its decision as tentative with the final decision left to the jury. The latter approach, which is essentially just application of the likelihood of success standard, would be consistent with courts' treatment of factual findings on a motion for a preliminary injunction,[235] or on a motion to dismiss under the prima facie standard. Also, as the court in *Foster-Miller, Inc.*, found,[236] when the facts alleged to prove personal jurisdiction overlap with the facts necessary for liability, as they do in effects test cases,[237] a dismissal after a full-blown hearing under the preponderance standard can either effectively deprive the plaintiff of the right to jury trial or be very inefficient. If the factual findings of the first court are found to have preclusive effects in the forum that had proper jurisdiction, the defendant essentially would be deprived of her right to jury trial on the merits. If the first court's findings would not have preclusive effects, the parties and court system would have to shoulder the costs of two full litigations of the same issues. Thus, holding a preliminary hearing and applying the recommended standard of proof is preferable to holding a full-blown hearing and applying the preponderance standard. The result that is preferable should be within the sound discretion of the trial court even in jurisdictions that have not yet followed the First Circuit.

In sum, application of the prima facie standard to determine willfulness would raise the same problems that are created by following the broad view of *Calder* without any showing of willfulness. There is reason to question importing the prima facie standard from motions to dismiss for

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232. *See supra* note 230.

233. *Id.*

234. *See* United States v. Swiss Am. Bank, Ltd., 274 F.3d 610, 637–38 (1st Cir. 2001). Courts have broad discretion to allow and manage jurisdictional discovery. *See* Grynberg v. Ivanhoe Energy, Inc., 490 Fed. Appx. 86, 104 (10th Cir. 2012); LaSala v. Marfin Popular Bank Pub. Co., 410 Fed. App'x 474, 476 (3d Cir. 2011); Carefirst of Md., Inc. v. Carefirst Pregnancy Ctrs., Inc., 334 F.3d 390, 402 (4th Cir. 2003).

235. Univ. of Tex. v. Camenisch, 451 U.S. 390, 395 (1981); Jonibach Mgmt. Trust v. Wartburg Enters., Inc., 750 F.3d 486, 491 (5th Cir. 2014).

236. Foster-Miller, Inc. v. Babcock & Wilcox Can., 46 F.3d 138, 146 (1st Cir. 1995).

237. *See* Calder v. Jones, 465 U.S. 783, 786–787 (1984).

failure to state a claim to the personal jurisdiction area. The likelihood of success model avoids the problems created by the prima facie test, it has some support in the case law, and is not too different from, but is preferable to, the preponderance standard traditionally used when courts hold evidentiary hearings. Lastly, because district courts have broad discretion to hold and manage evidentiary hearings, courts should have the power to hold preliminary hearings and adopt the likelihood of success standard in jurisdictions that have not explicitly authorized application of that test.

c. Responses to Criticisms of the "Likelihood of Success" Standard

A number of criticisms can be or have been made about applying a higher standard of review than the prima facie standard to jurisdictional issues.[238] Most such criticisms are based upon a comparison to the preponderance standard.[239] The critics argue that use of the preponderance standard can raise preclusion or law of the case issues or create an incentive to default so that the factual issues common to personal jurisdiction and the merits can be tried in a more convenient forum.[240] These are not valid criticisms of an intermediate standard of review. The likelihood of success standard is easier to meet than the preponderance standard so findings under that standard could not be used to preclude litigation of facts on the merits that are needed to be proved under the higher preponderance standard.[241] Adoption of this Article's recommendations would also leave defendants with the incentive to try the merits in the original forum rather than default. By appearing, the defendant would have the opportunity to contest plaintiff's damage claims if the defendant lost on liability and virtually all plaintiffs would bring claims for damages, often including punitive damages, in actions alleging willfulness. One possible criticism of the likelihood of success model, however, does deserve greater discussion.

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238. *See supra* note 223.

239. *See* Nelson v. Miller, 143 N.E.2d 673, 680–81 (Ill. 1957); Kevin M. Clermont, *Jurisdictional Fact*, 91 CORNELL L. REV. 973, 976–77 (2006). A defendant is "always free to ignore . . . judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." Ins. Corp. of Ireland, Ltd., v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 706 (1982).

240. *See Nelson*, 143 N.E.2d at 680–81; Clermont, *supra* note 239, at 976–77; Robertson, *supra* note 35, at 1337.

241. *See* Cobb v. Pozzi, 363 F.3d 89, 113–14 (2d Cir. 2004); Littlejohn v. United States, 321 F.3d 915, 924 (9th Cir. 2003); 18 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4422 (4th ed. 2014).

A person unsympathetic to this Article's recommendation can reasonably argue that the likelihood of success standard will impose greater discovery and hearing costs on the parties and the courts than are incurred under the prima facie standard.[242] Although there could be an increase in such costs, the increase should not be as great as it first appears, particularly given this Article's requirement of willfulness, and could be more than offset by the costs of trials that would be avoided under the higher standard of review.

In many cases it will not be necessary to have discovery or a hearing to determine whether the plaintiff can show willfulness under the likelihood of success standard—it will be clear from the pleadings that the plaintiff will not be able to prove willfulness. In cases in which liability is reasonably contested or doubtful, proving willful misconduct, as defined by this Article,[243] would be almost impossible. For example, in a trademark infringement suit, if the defendant uses a non-identical mark on non-competing goods, a court, without ordering discovery or conducting a hearing, can easily find an absence of willfulness. In other cases, the plaintiff will not even allege willfulness or will be unable to do so with the factual specificity required by *Twombley*[244] and *Iqbal*.[245] Conversely, in some cases, such as in the identity theft situation described in the introduction or in counterfeiting cases, the defendant will not be able to deny willfulness.

Even if discovery is ordered under the likelihood of success model, there is no guarantee that it wouldn't be ordered under any standard of proof. Courts have broad discretion to order discovery under the prima facie standard as well.[246] For that matter, this Article's recommended requirement of willfulness may actually reduce the number of cases in which the court needs to order discovery or conduct evidentiary hearings regardless of the standard of proof the court applies. As suggested above, there will be many cases where it will be clear from the pleadings that willfulness is lacking.

If the higher standard of proof required more discovery and evidentiary hearings, the percentage of cases in which there would be an increase

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242. The additional discovery costs may be of particular concern because jurisdictional discovery costs tend to be imposed asymmetrically. *See* Strong, *supra* note 221, at 539 & n.44. It is the defendant's contacts with the forum that is most relevant to personal jurisdiction issues and evidence of such contacts will be almost exclusively in the hands of the defendant.

243. *See supra* notes 175–84 and accompanying text.

244. Bell Atlantic Corp. v. Twombley, 550 U.S. 544, 545 (2007).

245. Ashcroft v. Iqbal, 556 U.S. 662 (2009).

246. *See* Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351 & n.13 (1978); Me. Med. Ctr. v. United States, 675 F.3d 110, 118–19 (1st Cir. 2012); Edmond v. U.S. Postal Serv. Gen. Counsel, 949 F.2d 415, 425 (D.C. Cir. 1991).

would be very small, if only because there are relatively few cases in which the plaintiff argues that the *Calder* effects test supports jurisdiction. The court also has the power to limit discovery under the federal rules[247] and can sanction frivolous allegations of willfulness.[248] Moreover, the recommended higher standard of proof would result in more dismissals for lack of personal jurisdiction thereby offsetting, at least in part, the additional pre-trial costs by the costs saved by avoiding unnecessary trials.[249]

Finally, and perhaps most persuasively, the First Circuit has authorized application of the recommended intermediate standard of proof and there is no evidence that this has resulted in any significant increase in discovery or hearing costs in that circuit. Thus, although the effects of adoption of this Article's proposals on discovery and hearing costs may be a reasonable concern, there are many reasons to believe that in reality total costs of litigation will increase negligibly, if at all, under the recommended approach.

Although this section has explained why a finding of willful misconduct should be the central focus of *Calder*'s effects test and justified the likelihood of success standard of proof to determine that fact, it is still necessary to briefly address the remaining requirement of this Article's proposed approach to *Calder*.

B. The Defendant Knew Plaintiff's Primary Residence and That the Plaintiff Would Be Proximately Harmed In That State

This last requirement closely tracks existing case law,[250] but makes explicit that the effects test should provide jurisdiction only when both the defendant knew of plaintiff's *primary* state of residence and the harm from the defendant's willful misconduct *proximately* resulted in that state.

247. *See* FED. R. CIV. P. 26(b)(2)(C).
248. *See* FED. R. CIV. P. 11.
249. Costs would be avoided in cases in which the court found a prima facie case of jurisdiction and the jury determines that the plaintiff has not shown jurisdiction by a preponderance of the evidence. Presumably, if the defendants won on the merits, they would waive the personal jurisdiction challenge. However, if the plaintiff won in a case where the jury found liability, but not willfulness, the trial would have been for naught.
250. *See supra* notes 7, 51 and accompanying text.

1. Primary Residence

In many cases, a plaintiff may be said to reside in multiple locations. For example, an individual may have a summer and winter home and a corporation can have multiple plants. Limiting application of the effects test to the plaintiff's primary residence provides predictability and is consistent with *Walden*'s desire to limit the number of forums that can have personal jurisdiction under *Calder*.[251] Unless the defendant has knowledge of the plaintiff's primary residence, it could not foresee being haled into court there and could not be said to target that forum.

This Article would define the *primary residence* of an individual to be the place where that person currently lives and is expected to remain for the period of time in which suit normally would be brought. This definition ensures that the defendant could foresee being haled into court in the state of plaintiff's primary residence. Although there will be some difficult line drawing as to what is a sufficient length of time to satisfy this definition, it is clear that a short vacation does not[252] and a period of time longer than the statute of limitations for the action does.

The primary residence of a corporation should be considered its headquarters. That is the single location that a defendant generally would most expect to be haled into court. When a corporation's headquarters and principle place of business are in different states, if the defendant harmed the plaintiff in the state in which the principle place of business was located, suit could likely be brought in that state under traditional personal jurisdiction principles, but not under the "effects test."

2. Proximate Harm in the Plaintiff's Primary Residence

For the purposes of this Article, the state(s) in which a plaintiff is proximately harmed is the one(s) in which the plaintiff first experiences direct harm from the defendant's willful misconduct. This requires that the actual tort or injury, not just its consequences, occur in the state.[253] When there is direct harm in the state of plaintiff's primary residence the defendant should be able to foresee suit in that state and the defendant, in contrast to *Walden*, can be said to have contacts with that forum.[254] The

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251. *See* Walden v. Fiore, 134 S. Ct. 1115, 1125 (2014).

252. A person on vacation should not even be considered to "live" in the state in which they are vacationing. Of course, a vacationing plaintiff still might be able to sue in the state in which they were injured under traditional personal jurisdiction principles.

253. *See* Precision IBC, Inc. v. Wagner Ink, Inc., No. CA 1:12-00671-C, 2013 WL 1728563, at *12 (S.D. Ala. Apr. 22, 2013).

254. *See supra* notes 145–47, 160–66, and accompanying text. If direct harm did not constitute a contact, then when (1) the defendant put a bomb on an airline going to California; (2) the flight was rerouted to Texas due to bad weather; and (3) the bomb

same cannot be said, absent additional contacts, in the absence of direct harm.

In many cases, the plaintiff first experiences harm from the defendant's misconduct in a multitude of states. For example, a deliberately false statement about Sears published in a national publication would be first experienced simultaneously in every state. In such circumstances, Sears should be considered to be proximately harmed in every state. Similarly, a trademark violation would cause direct harm to the mark holder in every state in which the infringing mark created a likelihood of confusion.[255] Nonetheless, in such cases, the effects test could only support personal jurisdiction in the state of plaintiff's primary residence.[256]

This definition of proximate harm eliminates use of the effects test in cases where the plaintiff is directly harmed in a non-primary place of residence and only indirect harm occurs in the primary place of residence. For example, if an Arizona corporation sues a Texas corporation for inducing an employee at the plaintiff's Texas plant to breach their employment contract and join the defendant's Texas operations, suit in Arizona would not be proper under this Article's proposed test absent additional contacts. Under such circumstances, the defendant would expect to be sued in Texas, it would be difficult to say that in any meaningful sense that the defendant targeted Arizona, and the convenience of the witnesses and parties would seem to favor Texas.[257]

The requirement of proximate harm in the plaintiff's primary residence will also exclude use of effects test jurisdiction in cases where a person is harmed in a face-to-face transaction outside the state of the plaintiff's primary residence. This would be true even if indirect harm ultimately occurs in the plaintiff's home state. For example, if a Mississippi resident travels to New York and is defrauded by a New York seller, the facts that the seller knows plaintiff is from Mississippi and her bank balance in Mississippi will be wiped out does not justify suit in Mississippi. Under such circumstances, it is not reasonable to say that the cause of action

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exploded on the runway at the Texas airport causing injuries to Texas workers, the workers would not be able to sue the defendant in Texas. That result seems unacceptable.

255. In jurisdictions that find that a trademark violation occurs wherever the mark holder resides, the plaintiff also would be proximately harmed in that state. *See supra* note 164 and accompanying text.

256. *See supra* § VI(B)(1).

257. *But see* Mach 1 Air Servs., Inc. v. Bustillos, No. CV-12-026160PHX-GMS, 2013 WL 1222567, at *4 (D. Ariz. Mar. 25, 2013) (finding jurisdiction proper under identical facts).

arose in Mississippi or that the defendant directed her action to that state. Also requiring suit to be in New York does not unfairly impose travel costs on the plaintiff based upon circumstances outside their control. Plaintiff should know that traveling to New York could result in a suit there and it is within plaintiff's power to avoid suit by not traveling to New York. Compare Shirley Jones' situation in the *Calder* case. If suit had to be in Florida, Ms. Jones couldn't have done anything to avoid suit there. There would seem to be no basis for imposing travel costs on such a plaintiff other than to favor the defendant, which, in the case of a defendant who is likely to have engaged in willful misconduct, does not seem fair. Finally, the state where the face-to-face transaction occurred has the greatest interest in regulating that transaction and is in the best position to apply its law.

Thus, this Article's requirement that the defendant's willful misconduct proximately harms the plaintiff in the state of its primary residence ensures that: (1) the defendant can both foresee being sued in that state and be said to have contacts with that state; (2) the defendant truly targeted that state; (3) suit cannot be brought in more than one state under the effects test; and (4) travel costs are allocated fairly, not simply as a form of punishment.

VII. CONCLUSION

In *Walden v. Fiore*, the Court granted certiorari ostensibly to resolve the split among Circuit Courts of Appeals about the proper interpretation of *Calder*'s "effects test." Unfortunately, the case was not a good vehicle to do so because jurisdiction should have been found lacking under any view of *Calder*. For that reason, as well as because the opinion contains both express limitations on its scope and language that can be used to distinguish *Walden*, the decision should have limited significance. To fill the void left by the *Walden* opinion, this Article has presented a recommended approach to *Calder* that to a large extent harmonizes the conflicting lower court decisions, best furthers sound policy and is generally consistent with existing case law. The suggested approach focuses on whether the defendant's alleged misconduct was willful or in bad faith. Where willfulness can be shown under a likelihood of success standard, the defendant should be considered to have targeted the forum state when the defendant knew that plaintiff's primary residence was in that state and plaintiff was proximately harmed in that state. When defendants have engaged in willful misconduct, they should foresee being haled into court in the plaintiff's home state and can structure their relationships to avoid suit there. Fairness also dictates that travel costs be imposed on the willful violator of the law, rather than the innocent victim of their misconduct.

On the other hand, when willfulness is absent, the opposite is true. Absent additional facts, the defendant may neither foresee being haled into court in the plaintiff's home state nor have the ability to structure its relationships to avoid suit there. When willfulness is lacking, there also is no reason to prefer the plaintiff over the defendant in allocating travel costs. Rather, under traditional personal jurisdiction principles that focus on the rights of the defendant, the plaintiff should be required to bear the costs of travel unless it could show that the defendant targeted the forum state, not merely a plaintiff residing there.

This Article recommends that on a motion to dismiss willfulness should be determined under the likelihood of success standard applied in preliminary injunction actions, rather than the prima facie or preponderance standards. In effects test cases, where jurisdiction facts overlap with the facts necessary to determine the merits, the likelihood of success standard prevents cases with dubious allegations of willfulness from proceeding to trial and thereby interfering with defendant's due process rights—as can happen under the prima facie standard—yet avoids significant inefficiencies or troubling law of the case or preclusion issues that may effectively deprive a party of its right to a jury trial, which can occur under the preponderance standard. Under this Article's recommended approach, Samantha Smith would not have to travel to Ohio to sue John Jones in the identity theft hypothetical described in the Introduction. That is how it should be.