

NO. A11-851

State of Minnesota
In Court of Appeals

In re John Ward Gillman
 Engraved June 20, 1775 Copper Printing Plate:

State of New Hampshire,

Appellant,

vs.

Gary Eldon Lea,

Respondent,

vs.

Heritage Auctions, Inc.,

Defendant.

BRIEF OF RESPONDENT GARY ELDON LEA

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STATEMENT OF FACTS

The John Ward Gilman engraved June 20, 1775 Copper Printing Plate (hereinafter “Copper Plate”) is a pre-Revolutionary item of significant value due to its historical origins. Appendix of Appellant’s Brief at 102. The Copper Plate was originally commissioned by the Colony of New Hampshire, created in June 1775 and used to print colonial currency in 1775. App. at 25. The Copper Plate is currently of interest to a number of individual and institutional collectors of numismatic antiques nationwide. App. at 56,102.

The location, possession and use of the Copper Plate after 1775 until the 1850s is unknown. App. at 102. New Hampshire declared statehood in September 1776. Brief of Appellant at 4. Therefore, it is unknown whether the Copper Plate was ever the property of the State of New Hampshire. All that is affirmatively known about the ownership of the Copper Plate post-1775 is that it reemerged in the 1850s as part of the collection of prominent coin collector Dr. Joshua Cohen of Baltimore, Maryland. App. at 28, 102. The Copper Plate next emerged in 2009 at the estate sale of a local collector in Spring Valley, Minnesota, where Respondent Gary Lea purchased it. App. at 102.

Mr. Lea, a Minnesota resident, is a school district employee and an amateur collector of rare books and coins. App. at 58, 102. On October 1, 2009, Mr. Lea purchased the Copper Plate at an estate sale in Spring Valley, Minnesota, whereupon he kept it at his residence in Peterson, Minnesota. App. at 102. Mr.

Lea contracted with Heritage Auctions, Inc. (“Heritage”), a Texas corporation, to sell the Copper Plate at an auction scheduled to take place in Boston, Massachusetts on August 11, 2010. App. at 102. The auction reserve was set at \$50,000.00, with several institutional and individual buyers expressing advance interest in the item. App. at 102. Mr. Lea arranged for the shipment of the Copper Plate to the Heritage auction site in Boston. App. at 102.

On the morning of the auction, New Hampshire, by its Assistant Attorney General, wrote a letter to Heritage’s counsel, alleging that the Copper Plate had been improperly removed at some previous time, and threatening to obtain a writ from a New Hampshire state court staying the auction, unless the item was voluntarily withdrawn from the auction. App. at 20, 102. In order to avoid this, Mr. Lea and Heritage agreed to withdraw the Copper Plate from auction, and the item was immediately withdrawn. App. at 20, 102. Upon cancellation of the auction, Heritage promptly returned the Copper Plate to Mr. Lea in Minnesota. The Copper Plate has been located in Fillmore County, Minnesota since its return. App. at 102.

On August 13, 2010, two days after the auction had been scheduled to take place, Mr. Lea filed a Petition for Declaratory Judgment in the Fillmore County, Minnesota District Court, requesting declaratory judgment establishing his exclusive ownership of the Copper Plate and naming Heritage and New Hampshire as defendants. App. at 102. Mr. Lea subsequently filed a Summons

and Amended Complaint requesting, in substance, the same declaratory relief as the original Petition. App. at 18-21. The Petition, Summons and Amended Complaint were personally served at the offices of the New Hampshire Attorney General on September 22, 2010, with Heritage admitting service of the same documents on September 21, 2010. App. at 110. This constituted the first instance that the initial pleadings were served on the parties in keeping with the provisions of Minn.R.Civ.P. 4.04 (2010) regarding service on out-of-state defendants, and thus marked the commencement of the action.

Appellant New Hampshire has admitted that it possesses no affirmative evidence as to the circumstances surrounding the Copper Plate after 1775, until approximately 75 years later, when it re-emerged in Maryland. App. at 44, 102. Appellant admits that it has no evidence of any improper transfer of the Copper Plate at any time in its history, but has asserted that the burden of proof should be placed upon Plaintiff, a buyer at an estate sale, to establish that no improper transfer was ever made after 1775. App. at 44, 102.

On November 30, 2010, Appellant filed a Motion to Dismiss, asserting the District Court's lack of jurisdiction and further asserting sovereign immunity. After an exchange of several memoranda between Mr. Lea and New Hampshire, and a hearing on the motion, the District Court denied Appellant's motion by an Order and Memorandum dated March 7, 2011. App. at 100-107. The Order included a Conclusion of Law that under Minn.R.Civ.P. 4.04(a)(4), the District

Court had *in rem* jurisdiction over the Copper Plate for the limited purposes of the declaratory action. App. at 103. New Hampshire subsequently requested leave to file a motion to reconsider the March 7, 2011 decision, which the court denied by correspondence dated March 23, 2011. App. at 114-17. In that correspondence, the court stressed the distinction between the instant case and *Shaffer* based on the fact that in this instance, the *res* itself was the subject of the action, placing this case in a different class of *in rem* from *Shaffer*. App. at 114-17. New Hampshire then filed the instant appeal from the March 7, 2011 Order. App. at 118.

Defendant Heritage Auctions, Inc. filed no pleadings on the merits or on New Hampshire's Motion to Dismiss, and was absent from the proceedings before the District Court.

ISSUE

Whether, under Minnesota Rule of Civil Procedure Rule 4.04, Minnesota Statutes Chapter 555 and the Due Process Clause of Amendment XIV of the United States Constitution, a Minnesota court may issue a declaratory judgment as to the ownership of personal property located within the state, without first establishing personal jurisdiction over adverse claimants to the real property.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED *IN REM* JURISDICTION OVER THIS ACTION.

A. This is a classic *in rem* action in which the *res* is the subject of the controversy.

In rem jurisdiction encompasses two primary classes of controversies.

Wright, Miller, Kane and Marcus, 4A Fed.Prac.& Proc.Civ. § 1072. “The first occurs when the property within the state is itself the subject matter of the dispute.” *Id.* Within this type, actions to determine the ownership of the *res* as against all potential claimants, named and unnamed, qualify as “true *in rem*,” while a case allocat[ing] property rights as against particular named persons” is called “*quasi in rem I.*” *Fleetboston Financial Corp. v. Fleetbostonfinancial.Com*, 138 F.Supp.2d 121, 132 (D.Mass.2001).

In the second class of controversy, known as *quasi in rem II*, “the claim against the person that gives rise to the action is not related to the *res* that provides jurisdiction.” *Id.*; see also *Cable News Network L.P., L.L.L.P. v. CNNews.com*, 162 F.Supp.2d 484, 490-91 (E.D.Va.2001) (*affirmed in part; vacated in part on other grounds by Cable News Network, LP, LLLP v. CNNews.com*, 66 U.S.P.Q. 1057, 2003 WL 152846 (4th Cir. January 23, 2003, *unpublished*)). Such actions are sometimes also referred to as “attachment” actions. *Fleetboston* at 132.

Thus, the fundamental distinction between classic *in rem* actions and *quasi in rem II* actions is the pertinence of the *res* to the action itself. The Supreme

Court's decision in *Shaffer v. Heitner*, on which the State of New Hampshire mainly relies, dealt with the sequestration of stock owned by the nonresident defendant, which provided a jurisdictional foothold and a potential target for attachment, but were not central to the cause of action. 433 U.S.186, 186-87 (1977). *Shaffer* was therefore a *quasi in rem II* action. *Fleetboston* at 132; *Cable News Network* at 490. In the instant case, the judgment sought pertains solely to the ownership of the *res*, placing it in the first general category of *in rem* actions. Because the plaintiff has named all known adverse claimants to the property, and any resulting judgment would only bind the named parties¹, the instant case falls into the category of a *quasi in rem I* action.

B. The District Court's quasi in rem I jurisdiction over the Copper Plate is not subject to the requirement that the defendants have minimum contacts with the forum state of Minnesota.

- 1. *Shaffer* addressed a *quasi in rem II* action, and the prevailing interpretation of *Shaffer* limits its minimum contacts requirement to such cases, leaving intact *in rem* and *quasi in rem I* jurisdiction.**

In *Shaffer v. Heitner*, the United States Supreme Court ended the exercise of *quasi in rem II* jurisdiction in the absence of *in personam* jurisdiction over defendants. 433 U.S. at 212. In fact, the broad language used in the *Shaffer*

¹As required by Minn. Stat. § 555.11, which provides: "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding." Minn. Stat § 555.11.

decision cast doubt on the continued existence of any type of *in rem* jurisdiction. *See id.* However, over the three decades since *Shaffer*, the federal courts have treated as dicta any potentially limiting effect that *Shaffer* may have had on true *in rem* and *quasi in rem I* jurisdiction. As a result, actions pertaining to ownership of property within the forum, if otherwise properly brought, have proceeded under classic *in rem* or *quasi in rem I* jurisdiction, unhindered by the absence or potential absence of *in personam* jurisdiction.

This treatment as dicta of *Shaffer*'s pronouncements regarding *in rem* and *quasi in rem I* jurisdiction in subsequent federal jurisprudence is consistent with Minnesota's own rule that "[r]egardless of the wording in a judicial opinion, including its stated holding, a court's expressions that 'go beyond the facts before the court' are dicta and are deemed to be merely 'the individual views of the author of the opinion and not binding in subsequent cases.'" *Dahlin v. Kroening*, 784 N.W.2d 406 (Minn.App.2010) (quoting *Foster v. Naftalin*, 246 Minn. 181, 208, 74 N.W.2d 249, 266 (1956)). This rule implies a recognition of the lesser degree of analysis that a court is likely to undertake with respect to issues not central to the action before it. Under this rule, the cases cited by Appellant in support of its reading of *Shaffer*, including *Shaffer* itself, are nonbinding as to the instant issue.

The United States Supreme Court signaled the limits of *Shaffer* in *Burnham v. Superior Court of California, County of Marin*, 495 U.S. 604 (1990). There, the

defendant was a transient who was served during his brief physical presence in the forum state of California, but had no minimum contacts to the state. In a plurality opinion which confirmed the survival of traditional norms of jurisdiction even in the wake of *Shaffer*, Justice Scalia cautioned that

Shaffer was saying . . . not that all bases for the assertion of *in personam* jurisdiction . . . must be treated alike and subjected to the “minimum contacts” analysis of *International Shoe*; but rather that . . . that form of *in personam* jurisdiction based upon a ‘property ownership’ contact and by definition unaccompanied by personal, in-state service, must satisfy the *litigation-relatedness* requirement of *International Shoe* . . . it is unreasonable to read *Shaffer* as casually obliterating that distinction [between defendants personally served in-state and others].”

Id. at 621 (emphasis added).

Burnham demonstrated that the true effect of *Shaffer* was more limited than its original language might suggest, and that traditional concepts of jurisdiction beyond the limited facts of *Shaffer* were still in force. The opinion also reaffirmed the importance of “litigation-relatedness,” a factor crucial to *in rem* and *quasi in rem I* jurisdiction which had not been explored in *Shaffer*, presumably because in *Shaffer*, the *res* was unrelated to the litigation. At least one commentator has read Justice Scalia’s opinion in *Burnham* to argue that “*in rem* jurisdiction was fully constitutional in cases involving a dispute in which the property acting as the *res* was itself the subject of the dispute. Andrew J. Grotto, *Due Process and In rem*

Jurisdiction under the Anti-Cybersquatting Consumer Protection Act, 2 Colum. Sci & Tech. L. Rev. 1, 12 (2001).

Since *Shaffer*, a variety of courts in a range of contexts have recognized and relied upon the viability of *in rem* and *quasi in rem I* actions, regardless of *in personam* jurisdiction. In *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, a shipping company sought, under a New York statute, the attachment of funds which had been paid by the foreign charterer of the shipment and were being held in the account of the shipping broker. 605 F.2d 648, 650-51 (2nd Cir.1979). The charterer challenged the court's *quasi in rem* jurisdiction over the funds, on the basis that *Shaffer* had eliminated all *quasi in rem* jurisdiction where the defendant lacked minimum contacts with the forum. In upholding the court's *quasi in rem* jurisdiction over the funds, the Second Circuit Court Appeals found the "[f]irst, and most notable" factor to be "the fact that here, unlike *Shaffer*, the property attached is related to the matter in controversy."² *Id.* at 655. The *Amoco* court counseled that "[t]he real 'teaching of *Shaffer* is that courts must look at realities and not be led astray by fictions.'" (quoting *O'Connor v. Lee-Hy Paving Corp.*, 579 F.2d 194, 200 (2nd Cir.), *cert. denied*, 439 U.S. 1034, 99 S.Ct. 638, 58 L.Ed.2d 696 (1978)).

² The second factor was the likelihood that no other American forum was available to the plaintiff, and the third factor was that admiralty law represented a body of law distinct from that before the *Shaffer* court. 605 F.2d at 655. These distinctions also find some analog in the instant case.

A survey of the post-*Shaffer* case law since *Amoco* reveals, as one commentator has observed, that “when property is found within the forum and the other prerequisites to *in rem* jurisdiction have been satisfied, courts have routinely (if not unanimously) exercised jurisdiction over competing claims to the property without any hint of a due process problem.” Thomas R. Lee, *In rem Jurisdiction in Cyberspace*, 75 Wash.L.Rev. 97,142 (2000). This spans a range of actions and jurisdictions. See *U.S. v. 2007 Custom Motorcycle; VIN: 1R9SM29627I423003*, slip copy, 2010 WL 2721899 (D.Ariz. July 7, 2010) (in civil forfeiture action against personal property under 18 U.S.C. § 983, upholding *in rem* jurisdiction without finding or discussion of *in personam* jurisdiction); *U.S. v. 45 Poquito Road*, 2006 WL 2233645, 6 (D.Or. Aug. 2, 2006) (Civil forfeiture case involving real property was “an *in rem* proceeding, which does not depend on *in personam* jurisdiction over a non-resident claimant.”); *John N. John, Jr., Inc. v. Brahma Petroleum Corporation*, 699 F.Supp.1220, 1222 (W.D.La.1988) (in action to attach supply of oil pitch to satisfy shipping debt, finding *quasi in rem I* jurisdiction proper, because “[i]n *Shaffer* the sequestered property was unrelated to the cause of action; in this case, the property attached is the very subject of the cause of action.”); see also *Excel Shipping Corp. v. Seatrain Intern, S.A.*, 584 F.Supp.734, 741 (E.D.NY 1984) (though not relying on the distinction for its central holding, construing *Shaffer* to hold only “that a defendant cannot be subjected to litigation in a forum on the basis of an attachment of property there

that is unrelated to the subject matter of the suit, where the defendant lacks any other significant contacts with the forum.”) (emphasis added)

The common thread to the panoply of cases proceeding under *in rem* jurisdiction (including *quasi in rem I*) has been that the *res* is the subject of the action, rather than, as in *quasi in rem II* cases such as *Shaffer*, an unrelated item of property creating a fictitious connection between the forum and the defendant. On the basis of that distinction, these courts have found *in rem* and *quasi in rem I* jurisdiction without relying on a finding of the defendants’ minimum contacts with the forum.

In its brief, Appellant cites (without discussion) one case, *Bearden v. Byerly*, 494 So.2d 59 (Ala.1986), which is on point with respect to the facts of the instant case. Brief of Appellant at 18. In *Bearden*, an Alabama resident had received a car as a gift from a Pennsylvania resident, who died shortly the following year. *Id.* at 60. The executors of the original car owner’s estate in Pennsylvania attempted to retrieve the vehicle, and plaintiff brought a declaratory action in Alabama state court to clear title to the car against this claim. *Id.* Neither the estate nor its executors had any ties to Alabama. *Id.* Relying on *Shaffer*, the Alabama Supreme Court dismissed the action due to the defendants’ lack of minimum contacts with Alabama. This is the only case cited in Appellant’s brief whose central holding supports Appellant’s position. However, in 25 years, *Bearden* has never been cited outside of Alabama at all, nor within

Alabama for its holding regarding minimum contacts in the context of *in rem* jurisdiction. It is therefore heavily outweighed by the substantial federal case law declining to apply *Shaffer* in *in rem* and *quasi in rem I* cases.

2. Federal statute similar to Minnesota Rule of Civil Procedure 4.04 authorizes, and the courts have routinely exercised, *in rem* and *quasi in rem I* jurisdiction, in order to determine the status of property located within the forum state, in the absence of *in personam* jurisdiction.

Minnesota Rules of Civil Procedure 4.04(a)(4) & (5)³ “permit the court to exercise jurisdiction over property located in Minnesota and to adjudicate the rights of all persons in that property. The rule does not permit the court to enter a personal judgment against a defendant served by publication [or personal service] in this manner.” David F. Herr and Roger S. Haydock, 1 Minn. Prac., Civil Rules Annotated R 4.04, § 4.17 (4th ed. 2010). As such, the rule authorizes *in rem* jurisdiction, subject to the traditional limits of such jurisdiction. In combination

³ Rule of Civil Procedure 4.04 (a) and (b), operating together, provide that “[w]hen the subject of the action is real or personal property within the state in or upon which the defendant has or claims a lien or interest,” publication under subsection (a) or personal service outside of the state under subsection (b) “shall be sufficient to confer jurisdiction”

(4) When the subject of the action is real or personal property within the state in or upon which the defendant has or claims a lien or interest, of the relief demanded consists wholly or partly in excluding the defendant from any such interest or lien.

with Minn.Stat. § 555.11, which requires the naming of all parties who would be affected by a requested declaratory judgment, the type of jurisdiction codified by Rule 4.04 is clearly *quasi in rem I*. Although Appellant omits any mention of Rule 4.04 from its brief, the rule's provisions for quasi in rem jurisdiction are as significant for their narrow scope and procedural requirements as they are for their similarity to actions that have repeatedly been authorized by congress and upheld by the federal courts.

The closest federal analog to Rule 4.04 exists in 28 U.S.C. § 1655 (2010), which provides for, *inter alia*, the adjudication of ownership as to personal property within the district, where adverse claimants to the property are absent from the state.⁴ “[A]n action under Section 1655 of Title 28 of the United States Code is based on the court's power over the property in dispute rather than on personal jurisdiction over the defendant.” Wright, Miller, Cooper, Freer, Steinman, Struve, and Amar, 13F Fed.Prac.& Proc.Juris. § 3635. Like Rule 4.04, § 1655 allows for judgments to be entered as to the property in question, but does not allow for personal judgments against the defendants. *Thompson v. Adams*, 685 F.Supp. 842, 843 (M.D.Fla.1988). Thus, for the limited purpose of adjudicating

⁴ “In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.” 28 U.S.C.A. § 1655 (2010).

the status of property under § 1655, a court may “obtain a jurisdiction over a thing as distinct from a person.” *GP Credit Co., LLC v. Orlando Residence, Ltd.*, 349 F.3d 976,979 (7th Cir.2003) (finding *in rem* jurisdiction and clearing plaintiff’s title to disputed funds under § 1655 without finding of *in personam* jurisdiction).

Actions brought under § 1655 can be *in rem* or *quasi in rem*, in that claims may be brought against property or against specific defendants. *See Dluhos v. Floating and Abandoned Vessel, Known as New York*, 162 F.3d 63,72 (2nd Cir.1998) (noting that § 1655 actions often name specific defendants in order to establish diversity, and therefore federal subject matter jurisdiction.) However, even if the plaintiff names specific defendants, “[t]he court in a § 1655 action does not have *in personam* jurisdiction over those nominal defendants . . .” *Id.* Commentators have observed that “the *Shaffer* opinion suggests that the Court had no intention to disturb the assertion of jurisdiction in *in rem* or *quasi-in-rem* actions of this type.” Wright, Miller, Kane and Marcus, 4A Fed.Prac.& Proc.Civ. § 1072.

Therefore, a cloud on the title to personal property may be removed by a judgment *in rem* under § 1655, even against a named foreign defendant lacking minimum contacts with the forum, without any hint of a due process concern. *See id.* Given that Appellant’s objections in the instant case are based on federal due process, this Court should recognize the District Court’s *quasi in rem I* jurisdiction

in the same manner as the federal courts have, and deny Appellant's motion to dismiss.

3. Both the passage and subsequent enforcement of the Anticybersquatting Consumer Protection Act demonstrate the viability of *quasi in rem I* jurisdiction in the absence of *in personam* jurisdiction.

The limitation of *Shaffer's* effect to *quasi in rem II* actions over the past decade is most conspicuously evidenced by the federal Anticybersquatting Consumer Protection Act ("ACPA"). *See generally* 15 U.S.C. 1125(d) (2010). The ACPA enables trademark holders to seek judgments *in rem* awarding them domain names resembling (and therefore infringing upon) their trademarks, including where those domain names have been registered by remote defendants with no minimum contacts with the forum state. § 1125(d)(2). The *res* in these cases is the domain name itself, generally "located" in a domain name registry within the court's jurisdiction. *See* §1125(d)(2)(C).

Cases brought under the *in rem* provisions of the ACPA crisply demonstrate that *quasi in rem I* jurisdiction exists independently of *in personam* factors because, by its terms, the ACPA expressly conditions *in rem* jurisdiction on the *absence* of minimum contacts. *See* 15 U.S.C.A. § 1125(d)(2)(A). A plaintiff "must convince the court that *in personam* jurisdiction over a person is unavailable before an ACPA *in rem* action may proceed." *Porsche Cars North America, Inc. v. Porsche.net*, 302 F.3d 248, 255 (4th Cir. 2002). Appellant asks

this Court to adopt a view of *Shaffer* that would render the ACPA a nullity, a dramatic step which no federal court has taken in over a decade of ACPA litigation.

Appellant's position also flies in the face of Congress' understanding of *Shaffer* in drafting the ACPA. The legislative history of the ACPA reflects that under Congress' own reading of *Shaffer*, while *quasi in rem II* "attachment" jurisdiction was subject to the minimum contacts test, *in rem* and *quasi in rem I* jurisdiction remained viable independent of *in personam* jurisdiction:

The concept of *in rem* jurisdiction has been with us since well before the Supreme Court's landmark decision in *Pennoyer v. Neff*, 95 U.S. 714 (1877). Although more recent decisions have called into question the viability of *quasi in rem* "attachment" jurisdiction, see *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court has expressly acknowledged the propriety of true *in rem* proceedings (or even type *I quasi in rem* proceedings) where "claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant." *Id.* at 207–08.

H.R. Conf. Rep. 106-464 at 101, as reported in 1999 WL 1095089.

. . . [T]his [ACPA *in rem*] jurisdiction does not offend due process, since the property and only the property is the subject of the jurisdiction, not other substantive personal rights of any individual defendant.

H.R. Rep. 106-412 at 14, as reported in 1999 WL 970519.

Congress' actions in enacting the ACPA relied squarely on this understanding of *Shaffer*. In the same vein, federal courts have upheld *in rem*

jurisdiction under the ACPA on the specific basis that *Shaffer* was limited to *quasi in rem II* cases and therefore did not apply where the *res* was the subject of the case. See *Porsche Cars North America, Inc. v. Porsche.net*, 302 F.3d 248 (4th Cir. 2002); *America Online, Inc. v. Aol.org*, 259 F.Supp.2d 449 (E.D.Va.2003); *Caesars World, Inc. v. Caesars-Palace.Com*, 112 F.Supp.2d 502, 503-04 (E.D.Va.2000); *Cable News Network L.P., L.L.L.P. v. CNNNews.com*, 162 F.Supp.2d 484, 490-91 (E.D.Va.2001) (*affirmed on jurisdictional issue; vacated in part on other grounds by Cable News Network, LP, LLLP v. CNNNews.com*, 66 U.S.P.Q. 1057, 2003 WL 152846 (4th Cir. January 23, 2003, *unpublished*); see also *Continental Airlines, Inc. v. Continentalair.Com*, 2009 WL 4884534 (E.D.Va. December 17, 2009). In each of these cases, the court allowed an ACPA action to proceed without *in personam* jurisdiction over the nonresident defendants.

In *Cable News Network*, Judge Ellis of the Eastern District of Virginia held, based on a detailed due process analysis, that a cybersquatting case brought under the ACPA could proceed *in rem* without meeting the requirements of *in personam* jurisdiction over the nonresident defendant. *Cable News Network* at 491. Judge Ellis held that “*Shaffer*, properly construed, holds only that *quasi in rem II* actions require the same minimum contacts as *in personam* jurisdiction actions. Thus, where, as here, the action is properly categorized as ‘true *in rem*,’ there is no requirement that the owner or claimant of the *res* have minimum contacts with the forum.” *Id.* at 491. The *Cable News Network* court noted that its holding adopted

the reasoning of a substantial line of cases, including that of the United States Supreme Court in *Burnham*.

Similarly, in *Porsche*, the Fourth Circuit Court of Appeals upheld *in rem* jurisdiction under the ACPA over the defendants' due process objections, specifically because the *res* was central to the litigation: "*Shaffer* only holds that '[p]roperty alone is not sufficient 'contact' to support personal jurisdiction over a non-resident *as to matters unrelated to the property.*'" (quoting as "accurate" the appellee-defendants' brief in that case) 302 F.3d at 259-60 (emphasis in original). Therefore, "in 'an *in rem* proceeding in which the property itself is the source of the underlying controversy between plaintiff and defendant . . . due process is satisfied'" *Id.* at 260 (quoting and endorsing the lower court's opinion). Specifically, "[i]n a case that directly concerns possession of the defendant domain names, *the registrant's other personal contacts with the forum are constitutionally irrelevant to the assertion of in rem jurisdiction over the domain names he registered.*" *Id.* (emphasis added)

As support for its favored interpretation of *Shaffer*, Appellant cites three ACPA cases that have been dismissed for lack of jurisdiction: *Fleetboston, supra*, *Mattel, Inc. v. Barbie-Club.com*, 2001 WL 436207 (S.D.N.Y. May 1, 2001) and *Ford Motor Co. v. Greatdomains.com, Inc.*, 177 F.Supp.2d 656 (E.D.Mich.2001) Brief of Appellant at 17. However, none of those cases turned on the due process issues for which Appellant offers them here. Instead, each of those cases

dismissed an ACPA complaint due to the plaintiff's failures to meet the ACPA's statutory requirements for *in rem* status, rather than a lack of minimum contacts or other due process concerns⁵. Thus, while these cases quote with approval some of *Shaffer*'s broadest language on the issue of *in rem* jurisdiction, none of these cases produced a holding requiring minimum contacts with defendants in a classic *in rem* action. Accordingly, they shed little light on the actual application of minimum contact requirements to *in rem* actions, and are not binding.

Even the *Fleetboston* decision, which, of the three ACPA cases cited by appellant, undertook the most extensive due process analysis, was tentative in its view of *Shaffer* as applied to classic *in rem* cases, recognizing the relevant language to be dicta: “[d]icta in *Shaffer* suggests that the Supreme Court intended its holding to extend the minimum contacts test of *International Shoe* to all *in rem* jurisdiction, not solely to the subcategory of attachment jurisdiction.” 138 F.Supp.2d at 133. The *Fleetboston* court also recognized the distinction between classic *in rem* and *quasi in rem II* actions when it observed that the ACPA House Report read *Shaffer* as “expressly acknowledg[ing] the propriety of true *in rem*

⁵ In *Fleetboston* and *Mattel*, the domain names in question were registered outside of the jurisdiction, so the courts dismissed the cases for the sole reason that the *res* was not located in the jurisdiction, and thus *in rem* jurisdiction could not obtain. *Fleetboston* at 126, 135; *Mattel* at 2-3. In *Ford*, the court dismissed a claim brought under the ACPA because most of the defendants were subject to *in personam* jurisdiction, and so the availability of *in rem* relief under the ACPA had not been triggered. 177 F.Supp.2d at 657-58.

proceedings (or even *quasi in rem I* proceedings) where 'claims to the property itself are the source of the underlying controversy between the plaintiff and the defendant.'" *Fleetboston* at 132-33 (quoting H.R. Conf. Rep. 106-464, as reported in 1999 WL 1095089.)

Although the *Fleetboston* court critiqued the *Cable News Network* at some length, it was explicit that the basis for dismissing the action before it was the registration of the domain name outside of the forum, and concluded only that "the ACPA does not provide for *in rem* jurisdiction *except in the judicial district in which the domain name registry, registrar, or other domain name authority is located . . .*" *Id.* at 135. (emphasis added) *Fleetboston* therefore did not even purport to foreclose the viability of properly brought ACPA *in rem* actions, and its opinion regarding *in rem* jurisdiction in the wake of *Shaffer* was merely advisory.

Nearly 12 years after the ACPA's passage, notwithstanding dicta in some federal district court decisions grappling with certain ambiguities in *Shaffer*'s language, the ACPA's *in rem* provisions remain in effect without abrogation or limitation based on due process concerns. Thus, that 12 years, and the substantial body of litigation brought under the ACPA's *in rem* provisions during that time, stand for the continued viability of the traditional forms of *in rem* jurisdiction.

4. The non-ACPA cases cited by Appellant are inapposite to Appellant's position that *Shaffer* eliminated *quasi in rem I* jurisdiction independent of *in personam* jurisdiction.

In addition to the three ACPA cases discussed above, Appellant relies upon *Rush v. Savchuk*, where a plaintiff, attempting to collect money damages from the nonresident driver in an automobile crash, sought to attach the defendant's liability policy with a national insurance company licensed to do business in Minnesota. 444 U.S. 320, 320-21 (1979). The plaintiff's theory was that the insurance company's contractual obligation to indemnify the actual defendant could constitute a *res* for the purposes of a *quasi in rem* attachment (*quasi in rem II*) action, and that *in personam* jurisdiction over the nonresident defendant was unnecessary. *Id.* Understandably, the United States Supreme Court relied squarely on its then-two-year-old decision in *Shaffer* to reject this attenuated *quasi in rem II* theory. *Id.* at 328-29. In reaching that conclusion, the Court also rejected the plaintiff's argument that merely having an in-state insurer deprived the defendant of the due process protections afforded *quasi in rem* attachment defendants. *Id.* That analysis, which is the central holding of *Rush*, is irrelevant to the instant case. However, to the extent that *Rush* affirmed *Shaffer's* application to *quasi in rem II* attachment actions, Respondent's position here is not inconsistent with the holdings of either case.

Appellant additionally provides string citations to a number of Minnesota and federal cases which quote *Shaffer*. Brief of Appellant at 14,17-18. However,

none of these cases (with the exception of *Bearden*, discussed in section I.B.1. above) cites *Shaffer* or otherwise addresses due process issues in the context of *in rem* or *quasi in rem I* jurisdiction. “Regardless of the wording in a judicial opinion, including its stated holding, a court's expressions that ‘go beyond the facts before the court’ are dicta and are deemed to be merely ‘the individual views of the author of the opinion and not binding in subsequent cases.’” *Dahlin v. Kroening, supra*, at 406. Under this rule, none of these cases cited by Appellant have any binding effect in the instant case. Neither, in light of the fundamental differences that distinguish them on their facts from the instant case, should they be considered persuasive.

In *Elliot & Callan, Inc. v. Luther Allan Crofton*, slip copy, 2009 WL 3297506 (D.Minn Oct.13, 2009), the court addressed a debtor’s objection to garnishment of his property. Although the court quoted *Shaffer* in a footnote, it followed the quote by acknowledging that *in rem* jurisdiction was not at issue given that the action was for enforcement of an existing judgment, which could be brought in any state irrespective of jurisdiction. *Id.* at 5. The court also recognized in the same footnote that any question of *in rem* jurisdiction under *Shaffer* was moot since the court had already obtained personal jurisdiction over the defendant. *Id.*

In *Torgelson v. Real Property known as 17138 880th Ave., Renville County*, 734 N.W.2d 279 (Minn.App.2007), the court decided whether a civil forfeiture of

real property based on illegal drug activity violated the Minnesota Constitution's protections of homestead property. *Id.* at 281. The court cited *Shaffer*, among other cases, to support its opinion that the true liability imposed by the seizure was on the owners and not the inanimate real estate, and therefore the *in rem* nature of the action could not circumvent the constitutional protection afforded homewoners. *Id.* at 284. The case did not, however, touch upon any questions of *in rem* as opposed to *in personam* jurisdiction, and is therefore inapposite.

Two other cases cited by Appellant, *West American Insurance Company v. Westin, Inc.*, 337 N.W.2d 676 (Minn.1983), and *State v. Continental Forms*, 356 N.W.2d 442 (App.1984), contain no *in rem* component whatsoever. In these cases, the Minnesota Supreme Court and Court of Appeals, respectively, analyzed personal jurisdiction analysis as to the defendants. *West American Insurance* at 678-81; *Continental Forms* at 443-44. However, neither case involved any controversy over specific property.

Of the non-Minnesota cases included in Appellant's string citation, two seem to address *quasi in rem II* claims, but undertake little *in rem* analysis to make this explicit, apart from citing *Shaffer*. In *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208 (4th Cir.2002), Plaintiff sought personal jurisdiction over foreign defendant to collect a monetary arbitration award. *Id.* at 212-13. Plaintiff sought to establish the defendant's minimum contacts with the forum state of Maryland through the fact that Defendant was the

owner of a shipment of aluminum located within the jurisdiction. *Id.* However, the aluminum was not the subject of the action, and the case does not indicate that *in rem* jurisdiction was ever claimed. *See id.* To the extent that the aluminum served as a *res*, it was in the context of a *quasi in rem II* “attachment” action unrelated to the central cause of action, and thus similar to the facts of *Shaffer* and distinguishable from the instant case. *See id.*

Next, *Applewhite v. Metro Aviation, Inc.*, 875 F.2d 491, (5th Cir.1989), like *Base Metal Trading*, qualified at most as a *quasi in rem II* action. In *Applewhite*, the widow of a helicopter passenger killed when the helicopter struck power lines brought an action for money damages against the power company, an Alabama corporation. *Id.* at 493. The widow alleged that the Mississippi court had *in personam* jurisdiction over the Alabama power company based on the presence of its power lines within the forum state, but the claim was for money damages; no interest in the power lines themselves was at issue. *Id.* at 493-94. Therefore, like *Base Metal Trading*, *Applewhite* was a *quasi in rem II* case in which jurisdiction was properly subjected to minimum contact analysis under *Shaffer*. *See id.* Therefore, both cases are inapposite here.

In *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522 (4th Cir.1987), a shareholder derivative action was brought against a nonresident corporation and two of its nonresident directors. Similar on its facts to *Shaffer*, the case at most represented a *quasi in rem II* action. The court’s analysis, however,

solely addressed *in personam* jurisdiction, and never mentioned *in rem* jurisdiction outside of a single instance in which it quoted *Shaffer*. *See id.* Even that citation to *Shaffer* flowed into the court's conclusion that *Shaffer* was applicable not for its guidance on *in rem* jurisdiction, but for "how *Shaffer* applied the minimum contacts test to the [similar] facts of that case." *Id.* at 526. Accepting *Shaffer's* holding on this issue, *i.e.* that ownership of stock in a resident corporation alone was insufficient to support personal jurisdiction, the court examined the other activities connecting the defendants to the forum, and found personal jurisdiction to exist as to the defendants. *Id.* at 525-30. Therefore, the case survived the motion to dismiss, and did not turn on any issues pertaining to *in rem* jurisdiction. *Id.* at 530.

In *Sterling Consulting Corp., Inc. v. Indian Motorcycle Trademark*, 1997 WL 827450 (D.Colo. Sept. 5, 1997), an unreported six-paragraph order to show cause touched on issues that somewhat resemble the issues here. There, the plaintiff trademark holder sought to "quiet title" to its trademark in light of perceived infringements by a number of nonresident parties. *Id.* at 1. In response, the court expressed three concerns (in order): the lack of authority for treating a trademark as property for *in rem* purposes, the availability of *in rem* jurisdiction under *Shaffer*, and the preclusion of trademark suits against foreign defendants under existing treaties and the Lanham Act. *Id.* The court reached no ultimate conclusion on any of these issues, but warned that it would not proceed "unless

plaintiff convinces the Court of the appropriateness and effectiveness of this case.”

Id. at 2. No further direct history exists for the case, suggesting that it was dismissed due to the plaintiff’s failure to further develop its position.

Finally, in *Brennan v. Roman Catholic Diocese of Syracuse, New York, Inc.*, 575 F.Supp.2d 1256 (M.D.Fla.2008), the plaintiff alleged the court’s personal jurisdiction over the defendant in an action to recover damages for sexual abuse. The case contained no *in rem* component whatsoever. *See id.* The court cited *Shaffer’s* facial holding but, having no reason to analyze *Shaffer’s* application to *in rem* actions, did not do so. *See id.* at 1264.

II. EVEN IF MINIMUM CONTACTS REQUIREMENTS APPLY TO *IN REM* ACTIONS IN GENERAL, THEY SHOULD NOT BE REQUIRED IN DECLARATORY JUDGMENT CASES.

A. Because all potential claimants must be named in a declaratory judgment action, it is likely that no one forum will be available to obtain *in personam* jurisdiction over all defendants.

The Supreme Court's opinion in *Shaffer* explicitly left open the question whether the presence of a defendant's property in a state is a sufficient basis for jurisdiction “when no other forum is available to the plaintiff.” 433 U.S. at 211. At the same time, in an action for declaratory judgment, “all persons shall be made parties who have or claim any interest which would be affected by the declaration . . .” Minn Stat. 555.11. In declaratory judgment actions in general, and specifically in the instant case, the statute required the inclusion as defendants of both Heritage Auctions, Inc., who were parties to the auction contract regarding

the possession and sale of the *res*, and New Hampshire, who had expressed an ownership claim in the *res*. However, Heritage is a Texas corporation over whom the New Hampshire courts would have no demonstrable *in personam* jurisdiction. See Amended Complaint at 1. Likewise, the Texas courts who clearly have *in personam* jurisdiction over Heritage would have no such jurisdiction over New Hampshire, based on the facts given.

Courts have placed importance on the lack of alternative forums in finding classic *in rem* (*in rem* and *quasi in rem I*) jurisdiction even without the minimum contacts. *Amoco, supra*, at 655. In *Amoco*, the Second Circuit Court of Appeals considered the lack of an alternative forum as an additional justification to allow *quasi in rem I* jurisdiction, commenting that “there are elements of ‘jurisdiction by necessity’ in this case.” *Supra*, 605 F.2d at 655. The *Excel* court, citing *Amoco*, also relied on the probable absence of any forum in allowing the *in rem* action before it to proceed. *Supra* at 741.

B. The rationale for extending *in personam* requirements to *in rem* cases is weakest when applied to declaratory judgment actions.

An important component in *Shaffer's* reasoning was that all jurisdiction, including *in rem* jurisdiction, was actually over persons rather than property, and that the premise that proceedings were ever “against” property was outmoded. *Shaffer* at 205. It is true that any exercise of jurisdiction over property is inevitably affects the defendants who have competing claims to that property.

However, any analysis based upon principles of fairness, as the *Shaffer* analysis purported to be, would need to examine the quality and nature of those competing claims. In a declaratory judgment such as the instant case, where the bona fide purchaser of property is compelled to name all parties anywhere who have made a claim to the property, even if those parties are remote and their claims are no more than unsourced expressions of doubt regarding the legitimacy of the possessor's ownership, forcing the possessor who merely wishes to remove the cloud over his ownership to litigate in the home forum of that claimant is a perversion of fairness.

Moreover, contemporary *in rem* jurisdiction, such as the district Court found here, operates under clear rules and limitations. Appellant warns in its brief that recognizing traditional norms of *in rem* jurisdiction “could lead the District Court into the bramble of *Pennoyer v. Neff* rules.” Brief of Appellant at 13. In the context of contemporary *in rem* jurisdiction, such a hazard is remote. As exemplified in the *in rem* cases discussed above, *in rem* actions are governed with a high degree of specificity by statutes and court rules as opposed to common law. *See, e.g.*, Anticybersquatting Consumer Protection Act, 15 U.S.C. 1125; 28 U.S.C. 1655 (“Lien enforcement; absent defendants”); Minn.R.Civ.P. 4.04. These codifications of *in rem* jurisdiction illustrate that the “State’s strong interests in assuring the marketability of property within its borders and in providing a procedure for peaceful resolution of disputes about the possession of that property”, recognized by the *Shaffer* court, can be advanced within specific

bounds, with sufficient notice to all interested parties, and even then, only when alternative means of jurisdiction fail. *Shaffer* at 207-08 (footnote omitted).

Therefore, the choice posed by Appellant between depriving the courts of any territorially-based mechanism for resolving such controversies or returning to irresolute, shifting standards associated with pre-*International Shoe* jurisdictional rules is a false one.

III. ANY ISSUES REGARDING THE SUFFICIENCY OF *IN PERSONAM* JURISDICTION WERE NOT ADDRESSED BY THE DISTRICT COURT, AND SHOULD BE REMANDED FOR DETERMINATION BY THE LOWER COURT IF NECESSARY.

Appellant mentions in its brief two issues pertaining to the requirements of *in personam* jurisdiction which would become relevant if this Court reverses the district court's determination that this action may proceed under *in rem* jurisdiction. The first of these is whether this action meets the requirements of the long-arm statute, Minn.Stat. § 543.19. Brief of Appellant at 8. The second is the substantive analysis as to New Hampshire's minimum contacts with Minnesota under *International Shoe*. Brief of Appellant at 8. Because the district court found the requirements of Rule 4.04 and due process to be satisfied, it did not reach these issues. App. at 101.

Where a higher court reverses the district court on an issue of law which then requires further factual determinations under the proper legal standard, the factual determinations should be left to the district court on remand. *See Paidar v.*

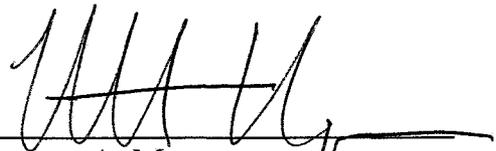
Hughes, 615 N.W.2d 276,282 (Minn.2000); *PJ Acquisition Corp. v. Skoglund*, 453 N.W.2d 1, 12 (Minn.1990) (remanding to trial court for determination of factual issues remaining due to resolution of legal issue on appeal). Therefore, should this Court find that *in rem* jurisdiction under Minn.R.Civ.P. 4.04 must meet the due process requirements of *in personam* jurisdiction, the analysis of *in personam* jurisdiction should be undertaken by the District Court on remand.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that this Court uphold the District Court's Order denying Appellant's Motion to Dismiss in all respects.

Respectfully submitted this 11th day of July, 2011.

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