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FILED

STATE OF MINNESOTA
COURT OF APPEALS
A-14-1307

MoneyMutual, LLC ,

Appellant,

Court of Appeals

vs.

APPELLATE COURT CASE
NUMBER: A14-1307

Scott Rilley, Michelle Kunza, Linda Gonzales
and Michael Gonzales, individually and on
behalf of the putative classes ,

TRIAL COURT CASE NUMBER:
19HA-CV-14-858

DATE OF ORDER FILED:
July 17, 2014

Respondents.

APPELLANT'S BRIEF AND ADDENDUM

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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I. STATEMENT OF THE LEGAL ISSUES.

A. Issue No. 1.

Whether the District Court correctly asserted personal jurisdiction over Appellant MoneyMutual, LLC (“MoneyMutual”) based upon Minnesota residents having submitted information to a generally-accessible interactive website and having been exposed to national, not locally-targeted radio and television advertising.

The District Court, by and through the Honorable Martha M. Simonett, denied MoneyMutual’s motion to dismiss pursuant to Minn R. Civ. P. 12.02(b) for lack of personal jurisdiction. Add. at 1-8.

Apposite Authority:

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

Griffis v. Luban, 646 N.W.2d 527 (Minn. 2002)

Trivedi LLC v. Lang, No. A13-2087, 2014 WL 2807981 (Minn. Ct. App. June 23, 2014)

B. Issue No. 2.

Whether the District Court correctly refused to join third-party lenders as necessary and indispensable parties, or to dismiss Plaintiffs’ action for failure to join necessary and indispensable parties, when virtually all of Plaintiffs’ claims against MoneyMutual are premised upon the alleged illegality of contracts between Minnesota consumers and third-party lenders.

The District Court, by and through the Honorable Martha M. Simonett, denied MoneyMutual’s motion to dismiss pursuant to Minn R. Civ. P. 12.02(f) for failure to join a party pursuant to Rule 19. Add. at 1, 8-9.

Apposite Authority:

Minn. R. Civ. P. 19

Potter v. Engel, 153 N.W. 1088 (1915)

II. INTRODUCTION

Although this case purports to be about so-called payday loans and lenders, strangely enough the only Defendant, MoneyMutual, LLC, is *not* a payday lender and does not make payday loans.

MoneyMutual is a Nevada limited liability located in Las Vegas, Nevada. Its sole function is to maintain a website, moneymutual.com, through which individuals interested in potentially obtaining payday loans can apply for such a loan by submitting personal information and requesting that their application be offered to prospective lenders who have contracted with PartnerWeekly. Through MoneyMutual's affiliate, PartnerWeekly, LLC, applications are then circulated, via an electronic system in real-time, for review by prospective lenders. If a lender buys the 'lead,' MoneyMutual then automatically communicates with the applicant to advise they have been matched with a lender. It provides the lender's contact phone and website information, and also informs the applicant, among other things, that the applicant is under no obligation to enter into a loan agreement if they are dissatisfied with the terms.

From that point on, neither MoneyMutual nor PartnerWeekly has anything further to do with whatever loan transaction may result from the match of applicant to lender. Not only do MoneyMutual and PartnerWeekly not make loans of any kind, they own no interest in any lender and no lender owns any interest in them. Neither entity enters into any agreement for goods or services with any applicant, and neither is paid anything by any applicant. PartnerWeekly is compensated by lenders on the basis of "leads" accepted, without regard for whether a loan is or is not consummated. Neither MoneyMutual nor PartnerWeekly are informed concerning agreement negotiations, whether a loan agreement is completed, the terms of any loan agreement, or what later happens with the loan.

Nonetheless, Plaintiffs herein seek to pin responsibility on MoneyMutual as a surrogate for the payday lenders, not one of which is named as a Defendant. This appeal

tests whether MoneyMutual can be haled before a Minnesota court based upon what is ultimately a theory of guilt by association.

III. STATEMENT OF THE CASE AND FACTS.

A. Statement of the Case.

On or about March 18, 2014, Plaintiffs commenced a purported class action lawsuit against MoneyMutual in the Dakota County District Court. *See* Class Action Complaint (“CAC”). Plaintiffs purported to represent “a class of all Minnesotans” allegedly affected by violations of Minnesota statutes regarding payday loans, consumer fraud, deceptive trade practices, and false advertising, and also asserted common law claims for breach of duty, unjust enrichment, civil conspiracy, and aiding and abetting. CAC ¶¶ 7-8, Counts 1-8. MoneyMutual moved to dismiss the Plaintiffs’ action for lack of personal jurisdiction and for failure to join necessary and indispensable parties. MoneyMutual’s Motion to Dismiss was argued before the Honorable Martha M. Simonett on June 20, 2014.

The District Court issued its order denying MoneyMutual’s Motion to Dismiss on July 16, 2014. In rejecting MoneyMutual’s contention that it lacked personal jurisdiction over MoneyMutual, the Court found it was appropriate to exercise jurisdiction over MoneyMutual based on several different tests. ADD:6. The Court pointed to MoneyMutual having advertised on television since 2009, having “arranged” loans to over one thousand Minnesotans, and having communicated with Minnesota loan applicants by email. *Id.* at 6-7. “The Court also conclude[d] that by the aforementioned contacts with Minnesota, and by generating profits by selling leads consisting of Minnesota residents *seeking* loans, MoneyMutual ‘purposefully availed itself of the

benefits and protections of Minnesota' such that exercising personal jurisdiction comports with due process." *Id.* at 7 (emphasis added). Moreover, according to the Court, MoneyMutual's "prominent" role in attracting borrowers to lenders in its network "is sufficient to refer to it as an entity that arranges loans under Minnesota law." *Id.* The Court opined that MoneyMutual "targeted Minnesotans in a manner that would fairly subject it to jurisdiction here." *Id.* (citing *State by Humphrey v. Granite Gate Resort, Inc.*, 568 N.W.2d 715 (Minn. Ct. App. 1997), *aff'd sub nom.*, 576 N.W.2d 747 (Minn. 1998) and *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119 (W.D. Pa. 1997)). Moreover, the Court stated, "there is a direct connection between MoneyMutual's contacts with Minnesota and the payday loans MoneyMutual 'arranged' Minnesotans [sic]." *Id.*

The District Court also found jurisdiction based upon what it characterized as the "Calder/Griffis" effects test. ADD:6-7. MoneyMutual argued in the Motion that the Minnesota Supreme Court's decision in *Griffis v. Luban*, 646 N.W.2d 527 (Minn. 2002), required "that the exercise of personal jurisdiction over non-residents accused of committing intentional torts over the internet is legitimate only when the website, posting or other communication is shown to be 'expressly aimed' at Minnesota. The forum must be shown to be the discrete 'focus' of the website by more than just the impact on a forum resident to distinguish to distinguish the forum from any other jurisdiction in which the communication might be read." ADD:4. The Court described *Griffis* as "focus[ing]" on *Calder v. Jones*, 465 U.S. 783 (1984), which "established the so-called 'effects' test which allowed long-arm jurisdiction for intentional torts based on the 'effect within the forum of tortious conduct outside the forum.'" ADD:4. The Court credited

Griffis as adopting the view held by other courts that the “*Calder* effects test was not satisfied by merely alleging that a plaintiff located in the forum state felt the effects of a defendant’s conduct, but that the plaintiff “felt the brunt of the harm caused by that tort in the forum [and] defendant expressly aimed the tortious conduct at the forum such that the forum state was the focal point of the tortious activity.” ADD:4-5. However, the District Court then construed *Griffis*’ application as limited to cases where jurisdiction is based solely upon the “effects” in the forum, distinguishable from the case herein because “this particular case is not an ‘effects only’ case but rather, MoneyMutual has significant direct contacts with Minnesota and its residents. . . . MoneyMutual expressly aimed its conduct at Minnesota and Minnesotans by targeting advertising here, communicating with and soliciting people who lived in Minnesota, and profiting from Minnesotans’ personal information, including address information.” ADD:8.

The District Court also denied MoneyMutual’s Motion to Dismiss under Rule 19 for Plaintiffs’ failure to join necessary and indispensable parties. The Court determined that “it appears that complete relief can be afforded without the presence of the payday lenders in Defendant’s network.” ADD:9. The Court further stated that Plaintiffs’ claims were probably “more analogous to tort rather than breach of contract claims, and it is well established that a plaintiff is not required to join every tortfeasor if it chooses to bring suit against one.” *Id.* Finally, the Court determined that Plaintiffs’ statutory claims related to duties and acts on the part of MoneyMutual that were separate from the lenders’ duties and actions.

B. Statement of Allegations and Facts.

The allegations and evidence concerning “minimum contacts,” and the reasonable inferences to be drawn from such evidence, can be distilled to the following:

1. MoneyMutual is a Nevada limited liability corporation, which maintains the www.moneymutual.com website. ADD:10, ¶ 2. PartnerWeekly is also a Nevada limited liability corporation. *Id.* ¶ 3. When “leads” are generated through the MoneyMutual website, they are presented to short-term lenders that have contractual relationships with PartnerWeekly. *Id.* ¶ 2.

2. The named Plaintiffs (Kunza, Riley, and Gonzales), as well as two additional affiants offered in support of Plaintiffs’ claims (Olson and Grostyan), are all Minnesota residents who saw MoneyMutual advertisements on various television stations at their homes in Minnesota. Kunza Aff. ¶ 1; Riley Aff. ¶ 2; Gonzales Aff. ¶ 1; Olson Aff. ¶ 1; Grostyan Aff. ¶ 4. However, from 2009 to the present, MoneyMutual has not contracted for or placed advertising with any Minnesota-based television station, or any television station in a surrounding state which specifically serves any Minnesota market. ADD:11, ¶ 4. No advertising of any kind is targeted specifically to Minnesota or Minnesotans. *Id.*

3. MoneyMutual has not targeted any advertising content whether over television, radio, printing, or the internet, specifically at Minnesota or Minnesotans. ADD:11, ¶ 4. Plaintiffs have not stated that any of the television advertising viewed by them included content specifically targeting Minnesota or Minnesotans. Plaintiffs actually have not testified at all concerning the content of the television advertising they witnessed, except that it included Montel Williams. *See generally* CAC; Kunza Aff.;

Rilley Aff.; Gonzales Aff. Plaintiffs have not alleged, testified or submitted any exhibit showing that the MoneyMutual website itself included any content targeting Minnesota or Minnesotans. *See generally* CAC; Kunza Aff.; Rilley Aff.; Gonzales Aff.

4. According to Eleanor Frisch, a law clerk employed by Plaintiffs' counsel, in June, 2014, entering the search phrases "payday loans Minnesota" and "payday loans Minneapolis" brought up a Google AdWords MoneyMutual advertisement which linked to the MoneyMutual website. Frisch Aff. ¶¶ 1-6, 10-11. The advertisement simply states: "Apply Online Now www.moneymutual.com/ 4.2 [four stars out of five] advertiser rating Fast Payday Loan – Apply Online! Safe & Bad Credit OK. Up to \$1000[.]" Frisch Aff., Ex. B. No mention is made of Minnesota. *See id.* Using the Google tool called Ads Setting generates a statement that the MoneyMutual advertisement "matches the exact search you entered: 'payday loans Minnesota.' or 'payday loans Minneapolis.'" Frisch Aff., ¶¶ 5-10, Exs. A, B. There is no evidence concerning when such Google AdWords advertisements started or for how long they have been posted in response to keyword searches. *See id.* The Plaintiffs do not testify that any of them conducted a Google search using those keywords (or any Google search at all, for that matter). *See generally* CAC; Kunza Aff.; Rilley Aff.; Gonzales Aff. Indeed, there is no evidence that any of the Plaintiffs learned of MoneyMutual through the internet or otherwise were aware of any alleged MoneyMutual internet advertising. *See generally* CAC; Kunza Aff.; Rilley Aff.; Gonzales Aff.

5. The only connection between MoneyMutual's website and Plaintiffs' allegations is that the Plaintiffs' affiants submitted applications through the MoneyMutual interactive website (in Kunza's case, twice) from Minnesota. Kunza Aff.

¶¶ 4, 8; Riley Aff. ¶¶ 2-3; Gonzales Aff. ¶ 2; Olson Aff. ¶ 2; Grostyan Aff. ¶¶ 5-6. The applications included information showing that they lived in Minnesota. *See id.* Plaintiff Kunza first called MoneyMutual from her Minnesota phone and was told to apply through the website. Kunza Aff., ¶ 3. Affiant Grostyan (Plaintiffs' private investigator) declined to provide bank information and therefore did not submit a completed application. Grostyan Aff. ¶ 6.

6. Plaintiffs' affiants do not deny that they decided to fill out the applications and "push the button" to submit the applications to MoneyMutual. *See* Kunza Aff. ¶¶ 4, 8; Riley Aff. ¶¶ 2-3; Gonzales Aff. ¶ 2; Olson Aff. ¶ 2. Plaintiffs' affiants do not deny that at all times it was within their complete control to decide whether or not to submit the application. *See id.* Plaintiffs have not alleged that any Minnesota consumer was ever contacted by MoneyMutual *before* the consumer chose to initiate a potential loan transaction by submitting an application through the website. *See* CAC.

7. Plaintiffs' affiants who submitted a completed application received a communication back from MoneyMutual informing them that they had been matched with a payday lender. Kunza Aff. ¶¶ 5, 8; Riley Aff. ¶ 3; Gonzales Aff. ¶ 3; Olson Aff. ¶ 2. The communication provided contact information for the lender with which the affiants had been matched. *See, e.g.,* Riley Aff., Ex. 1; ADD:12-13, ¶ 8. Plaintiffs have not testified or alleged that the identified lender contacted them before they contacted the lender. Kunza Aff. ¶ 5; Riley Aff. ¶ 4; Gonzales Aff. ¶¶ 2-3; Olson Aff. ¶ 2.

8. While Grostyan did not submit his application, he received two emails in one day from MoneyMutual advising him that he could still submit his application. Grostyan Aff. ¶¶ 7-8 & Exs. D, E. After repaying her loan, Olson received a number of

emails from MoneyMutual over a three-month period soliciting her to apply for a new loan. Olson Aff. ¶ 3 & Exs. 1-42. However, none of the named Plaintiffs—Kunza, Riley, or Gonzales—testified that they received such emails, even though Kunza did apply for a second loan through the MoneyMutual website. *See* Kunza Aff., ¶ 8; *see generally* Kunza Aff.; Riley Aff.; Gonzales Aff. Olson did not testify that she applied for and obtained another loan in response to the emails she received. *See* Olson Aff.

9. MoneyMutual’s website by definition is accessible anywhere the internet is received, other than in Pennsylvania, as MoneyMutual entered into a consent decree with the State of Pennsylvania in which it agreed to block access to the website in Pennsylvania. CAC ¶ 26, Ex. D.

10. Plaintiffs allege that the payday loans obtained by Plaintiffs from the lenders with which they were matched were illegal and that the lenders themselves were unlicensed to market payday loans in Minnesota. Kunza Aff., ¶¶ 6-7; Riley Aff., ¶ 5; Gonzales Aff., ¶¶ 4, 6. The affiants paid exorbitant and illegal interest and fees, which were debited from their Minnesota bank accounts by the payday lenders. *See id.*

11. MoneyMutual, LLC and its affiliate PartnerWeekly, LLC are both Nevada limited liability companies. ADD:10-11, ¶3. ADD:10, ¶ 2. “Leads” generated through the MoneyMutual website are offered by PartnerWeekly to lenders with which it has contracts for that purpose. *Id.* Neither MoneyMutual nor PartnerWeekly has any physical presence in Minnesota. *Id.* ¶ 3. Neither entity has entered into any contract relating to their business with any Minnesota consumer. *Id.* ¶ 3.

12. Neither MoneyMutual nor its affiliate PartnerWeekly makes any consumer loans of any kind. ADD:11-12, ¶ 6. Neither is a lender, and neither “brokers” loans on

behalf of individual consumers. *Id.* Neither entity receives payment of any kind from any consumer. *Id.* Neither MoneyMutual nor PartnerWeekly owns a financial interest in any lender, and no lender owns a financial interest in either PartnerWeekly or MoneyMutual. *Id.* Plaintiffs have not alleged or testified that either MoneyMutual or PartnerWeekly loaned them any money. *See generally* CAC; Kunza Aff.; Rilley Aff.; Gonzales Aff.

13. MoneyMutual has no officers or employees, and exists only to maintain the www.moneymutual.com website. ADD:10, ¶ 2. Prospective borrowers provide their information through the MoneyMutual website and request that it be submitted to the lenders with which PartnerWeekly contracts (“Network”). ADD:12-13, ¶ 8. PartnerWeekly then offers such “leads” in real-time through an electronic system to Network lenders. When “leads” are presented to prospective lenders in real-time through PartnerWeekly’s electronic system, it is entirely within the prospective lender’s discretion to decide which “leads” to accept. ADD:12-13, ¶ 8. The riders which PartnerWeekly enters into with the Network lenders have not specifically requested “leads” targeting Minnesota or Minnesotans. *Id.*

14. After notifying the loan applicant that he or she has been matched with a lender, and providing the lender’s contact information so that the applicant may contact the lender if he or she chooses, neither MoneyMutual nor PartnerWeekly have any insight, control or involvement with the loan process or prospective loan. ADD:12-13, ¶¶ 7-8. Neither participates in any negotiations or agreement, and neither is informed of the course of content of any negotiation or agreement. *Id.* ¶ 8. Neither is aware of any specific term of any loan ultimately consummated between buyer and lender. *Id.* Neither

MoneyMutual nor PartnerWeekly has any insight into whether a specific lead results in a funded loan, or the terms and rates of such loans. *Id.*

15. The only payment received by PartnerWeekly is from lenders on the basis of “leads” accepted by each lender, regardless of the terms of any loan resulting from an agreement between borrower and lender. ADD:13, ¶ 9. Neither MoneyMutual nor PartnerWeekly is ever informed of the terms of any such contract, whether the loan has been paid off, how much money has been paid to the lender, or about any bank arrangements between the borrower or lender. *Id.* Neither MoneyMutual nor PartnerWeekly receives payment of any kind based upon any of the foregoing. *Id.* Plaintiffs have not alleged or testified that they paid anything to MoneyMutual or PartnerWeekly. *See generally* CAC; Kunza Aff.; Rilley Aff.; Gonzales Aff.

16. Neither MoneyMutual nor PartnerWeekly is involved with any lender’s loan contract forms, and is not informed of the terms (including fees and interest) being offered at any time by any specific lender. ADD:13-14, ¶ 10. They have only general information about the range of interest rates and other terms offered within the industry, which are disclosed on the MoneyMutual website. *Id.* The MoneyMutual website cautions consumers about the need to review any loan agreement carefully, to be sure they understand the terms and ask questions of the lender, warns consumers of the importance of paying off their loans to avoid potential fees and penalties, and encourages consumers to use short-term loans responsibly. *Id.*; CAC, Ex. H. Likewise, the e-mail received by Plaintiff Rilley advising him that he had been matched with a lender included the same warnings, urged that borrowers not take on “more than you can handle” and

expressly stated: “If you aren’t comfortable with the terms of the loan, you are not obligated to accept them.” Riley Aff., ¶ 4 & Ex. 1.

17. According to Plaintiffs, payday loans are highly regulated in Minnesota. CAC ¶ 15. Minnesota’s regulatory scheme was amended in 2009 to assure that its laws applied to payday loans consummated online and to allow private causes of action. Additionally, Minnesota law was recently amended to cap interest and fees, and require licensing of payday lenders by the Department of Commerce. *Id.* ¶¶ 16-21. Plaintiffs allege that MoneyMutual knows or should have known about Minnesota’s laws and regulatory actions, and that MoneyMutual sells “leads” to lenders unlicensed to make loans in Minnesota. *Id.* ¶¶ 24-25. Some of those lenders are subject to cease and desist orders. *Id.*

18. However, no state has ever required that either MoneyMutual or PartnerWeekly obtain a license pursuant to that state’s laws governing payday lending, and neither entity has ever applied for such a license. ADD:11, ¶ 5. Neither the Minnesota Attorney General nor the Minnesota Department of Commerce has ever taken any action against either MoneyMutual or PartnerWeekly in connection with any loan made by a consumer, short-term lender or MoneyMutual’s own operations. *Id.*

IV. ARGUMENT

A. Standard of Review.

The existence of personal jurisdiction is a question of law which is reviewed *de novo* on appeal. *Juelich v. Yamazaki Mazak Optonics Corp.*, 682 N.W.2d 565, 569 (Minn. 2004). “Before a court can constitutionally exercise jurisdiction over a nonresident defendant, the plaintiff must make a prima facie showing that defendants

have sufficient contacts with a state so that requiring them to defend in the state does not violate traditional notions of fair play and substantial justice.” *Dent-Air, Inc. v. Beech Mountain Air Serv., Inc.*, 332 N.W.2d 904, 906-07 (Minn. 1983) (footnote omitted). At the pre-trial stage, the plaintiff’s allegations and additional evidence are to be taken as true. *Juelich*, 682 N.W.2d at 570. Once the defendant challenges personal jurisdiction, “the burden is on the plaintiff to prove the minimum contacts necessary for due process.” *NFD, Inc. v. Stratford Leasing Co.*, 433 N.W.2d 905, 908 (Minn. Ct. App. 1988). “Furthermore, if a motion to dismiss is supported by affidavits, the nonmoving party cannot rely on general statements in his pleading” *Hoff v. Kempton*, 317 N.W.2d 361, 363 n.2 (Minn. 1982) (quoting *Sausser v. Republic Mortg. Investors*, 269 N.W.2d 758, 761 (Minn. 1978)). The plaintiff must make an evidentiary showing via affidavits and exhibits sufficient to show prima facie evidence of the existence of jurisdiction. *Lexion Med., LLC v. SurgiQuest, Inc.*, 8 F. Supp. 3d 1122, 1126 (D. Minn. 2014).

The Appellate Court reviews a district court’s denial of a motion to dismiss for failure to join indispensable parties under an abuse-of-discretion standard. *Hoyt Props., Inc. v. Prod. Resource Group, LLC*, 716 N.W.2d 366, 377 (Minn. Ct. App. 2006).

B. The District Court Erred in Holding that Minnesota Can Exercise Personal Jurisdiction over MoneyMutual.

This case involves the significant and rapidly evolving issue of when a forum state may assert personal jurisdiction over a non-resident based upon forum contacts which are primarily or entirely through the internet. The special consideration this issue requires is reflected in the United States Supreme Court’s opinion in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), the Court’s most recent personal jurisdiction decision:

Respondents warn that if we decide petitioner lacks minimum contacts in this case, it will bring about unfairness in cases where intentional torts are committed via the Internet or other electronic means (*e.g.*, fraudulent access of financial accounts or “phishing” schemes). As an initial matter, we reiterate that the “minimum contacts” inquiry principally protects the liberty of the nonresident defendant, not the interests of the plaintiff. In any event, this case does not present the very different questions whether and how a defendant’s virtual “presence” and conduct translate into “contacts” with a particular State. . . . We leave questions about virtual contacts for another day.

Id. at 1125 n.9 (internal citation omitted); *see also Advanced Tactical Ordnance Systems, LLC v. Real Action Paintball, Inc.*, 751 F.3d 796, 803 (7th Cir. 2014) *as corrected* (May 12, 2014) (“We have warned that ‘[c]ourts should be careful in resolving questions about personal jurisdiction involving online contacts to ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum state, even if that site is ‘interactive.’”)¹

Indeed, even in *Granite Gate Resort*, relied upon by Plaintiffs and the District Court, this Court conceded it was sailing in uncharted waters as the first Minnesota case to address the issue of personal jurisdiction over non-residents in connection with internet advertising. *Granite Gate Resort*, 568 N.W.2d at 718. The Court emphasized that its decision was likely to be revisited, and that it therefore was only deciding the specific case before it:

¹ In a similar vein, in *Riley v. California*, 134 S. Ct. 2473 (2014), the Supreme Court confronted the government’s argument that searching a cell phone’s data “is ‘materially indistinguishable’ from searches of such personal items as a wallet, purse, billfold, or address book.” In response, the Court stated: “[t]hat is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together.” *Id.* at 2488.

We are mindful that the Internet is a communication medium that lacks historical parallel in the potential extent of its reach and that regulation across jurisdictions may implicate fundamental First Amendment concerns. It will undoubtedly take some time to determine the precise balance between the rights of those who use the Internet to disseminate information and the powers of the jurisdictions in which receiving computers are located to regulate for the general welfare. But our task here is limited to deciding the question of personal jurisdiction *in the instant case*, and on the facts before us, we are satisfied that *established legal principles* provide adequate guidance.

Id. at 718 (emphasis added). The Court’s comment was prescient; although “established legal principles provide adequate guidance,” those principles have been significantly clarified since *Granite Gate Resort* was decided, and they compel reversal of the District Court’s decision below.

1. Historical Standards in Establishing Personal Jurisdiction

Dating back to the “canonical” opinion of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), the touchstone governing a state’s exercise of specific jurisdiction is that the Fourteenth Amendment’s Due Process clause bars jurisdiction over a non-resident unless the non-resident has “certain minimum contacts . . . such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Id.* (quoted in *Daimler AG v. Bauman*, 134 S. Ct. 746, 754 (2014)). (internal quotations and citations omitted). Therefore, “it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.” *Hanson v. Denckla*, 357 U.S. 235, 253 (1958); *see also Dent-Air, Inc.*, 332 N.W.2d at 907 (adopting the same standard). The requirement that a defendant have “minimum contacts” with the forum ensures that a non-resident defendant will not be forced to

litigate in a jurisdiction as a result of “random, fortuitous, or attenuated contacts” with the forum or the unilateral activity of the plaintiff or a third-party; the defendant “should reasonably anticipate being haled into court” there. *Walden*, 134 S. Ct. at 1123; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474–75 (1985); *Griffis*, 646 N.W.2d at 532.

The Minnesota Supreme Court in 1983 recognized that the trend in United States Supreme Court decisions on personal jurisdiction favored “attempt[ing] to slow the inexorable expansion of jurisdiction in state courts by underlining the significance of territoriality and de-emphasizing the relative importance of ‘fairness’ to the defendant,” describing this move as “evidenc[ing] a dramatic shift in the constitutional theoretical underpinnings of personal jurisdiction.” *W. Am. Ins. Co. v. Westin, Inc.*, 337 N.W.2d 676, 678-79 (Minn. 1983) (internal citations omitted). Consequently, the inquiry concerning minimum contacts must always focus on the “relationship among the defendant, the forum and the litigation. This tripartite relationship is defined by the defendant’s contacts with the forum *state*, not by the defendant’s contacts with *residents* of the forum.” *W. Am. Ins. Co.*, 337 N.W.2d at 679 (emphasis in original) (internal citations and quotations omitted); *see also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-16 (1984) (describing the relationship between forum, defendant, and the litigation as the “essential foundation” of in personam jurisdiction); *Griffis*, 646 N.W.2d at 532 (emphasizing the “tripartite” relationship as fundamental to establishing the minimum contacts necessary to exercise personal jurisdiction).

To assess whether sufficient minimum contacts exist to warrant an exercise of specific jurisdiction, Minnesota has used a five-factor test, considering “(1) the quantity of contacts, (2) the nature and quality of contacts, (3) the source and connection of those

contacts to the cause of action, (4) the interest of the forum state, and (5) the convenience of the parties.” *Dent-Air, Inc.*, 332 N.W.2d at 907. The first three factors are given the most weight. *Id.* In fact, the Minnesota Supreme Court has gone so far as to label both Minnesota’s potential interest in providing a forum and the convenience of the parties to be essentially “irrelevant,” because they cannot justify jurisdiction unless minimum contacts already have been established. *W. Am. Ins. Co.*, 337 N.W.2d at 679-80. Even the fact that plaintiff might have no remedy at all if Minnesota does not exercise jurisdiction cannot overcome a lack of minimum contacts. *Id.* at 681.

2. The Impact of *Walden* and *Griffis* on the Requirements for Exercising Specific Jurisdiction.

Respondents’ emphasis on their own specific contacts with MoneyMutual as a basis for jurisdiction brings to the fore two leading cases which ultimately should be dispositive of the issue of specific jurisdiction: the United States Supreme Court’s very recent decision in *Walden v. Fiore*, and the earlier Minnesota Supreme Court decision anticipating *Walden*, *Griffis v. Luban*.

In *Walden*, the Supreme Court considered whether Nevada could exercise personal jurisdiction over a Georgia law enforcement officer who confiscated plaintiffs’ funds at the Atlanta airport and later allegedly prepared a false affidavit to justify forfeiture of the funds, knowing the plaintiffs were Nevada residents and that it was foreseeable that his alleged misconduct would therefore cause harm in Nevada. *Walden*, 134 S. Ct. at 1119-21. The Ninth Circuit ruled that jurisdiction in Nevada was proper, because the officer “‘expressly aimed’ his submission of the allegedly false affidavit at Nevada by submitting the affidavit with knowledge that it would affect persons with a ‘significant

connection' to Nevada.” *Id.* “Because the defendant had no other contacts with Nevada, and because a plaintiff’s contact with the forum state cannot be decisive in determining whether the defendant’s due process rights are violated,” the Supreme Court reversed and held that Nevada could not exercise personal jurisdiction in these circumstances. *Id.* at 1119. (internal citations and quotations omitted).

The Court began its analysis by re-emphasizing that the minimum-contacts inquiry required by the Due Process Clause of the Fourteenth Amendment focused on the “relationship among the defendant, the forum and the litigation,” so that for a state to exercise jurisdiction, “the defendant’s suit-related conduct must create a substantial connection with the forum State.” *Id.* at 1121-22. From this fundamental rule, two principles followed:

First, the relationship must arise out of contacts that the “defendant *himself*” creates with the forum State. . . . Due process limits on the State’s adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties. . . . *Put simply, however significant the plaintiff’s contacts with the forum may be, those contacts cannot be “decisive in determining whether the defendant’s due process rights are violated.”* . . .

Second, our “minimum contacts” analysis looks to the defendant’s contacts with the forum State itself, not the defendant’s contacts with persons who reside there. . . .

To be sure, a defendant’s contacts with the forum State may be intertwined with his transactions or interactions with the plaintiff or other parties. But a defendant’s relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction. . . .

A forum State’s exercise of jurisdiction over an out-of-state intentional tortfeasor must be based on intentional conduct by the defendant that creates the necessary contacts with the forum.

Id. at 1122-23 (internal citations omitted) (emphasis on “himself” in original; remaining emphasis added).

Given *Walden*, the District Court’s reliance on the so-called “effects” test from *Calder* is in error. In *Walden*, the Supreme Court clarified that although in *Calder* it had “recognized that the defendants’ activities ‘focus[ed]’ on the plaintiff, our jurisdictional inquiry ‘focus[ed]’ on “the relationship among the defendant, the forum and the litigation”” by “examin[ing] the various contacts the defendants had created with California (and not just with the plaintiff) by writing the allegedly libelous story.” *Walden*, 134 S. Ct. at 1123 (quoting *Calder*, 465 U.S. at 788). Those contacts included defendants’ reliance on phone calls to sources in California, the writing of the story in California, and the causing of reputational injury in California by writing an allegedly libelous article that was widely circulated in California. *Id.* The “brunt” of the injury was suffered by the plaintiff in California and “California [wa]s the focal point of both the story and of the harm suffered.” *Id.* (internal quotations and citations omitted). However, the Court distinguished *Calder* on its facts, noting that “because publication to third persons is a necessary element of libel, . . . the defendants’ intentional tort occurred *in California.*” *Id.* at 1123-24 (internal citation omitted) (emphasis in original).

In sum, under the guise of harmonizing *Calder* with the fundamental jurisdictional principle that minimum contacts must be based upon the defendant’s own conduct that substantially connected it with the *forum*, and not merely forum residents or other third parties having connections with the forum, *Walden* actually limited *Calder* to its particular tort (defamation) and its unique facts. See *Streamline Bus. Servs, LLC v. Visible, Inc.*, No. CIV. A 14-1433, 2014 WL 4209550, at *12 (E.D. Pa. 2014), (“It

appears that [*Walden*] could limit the *Calder* effects test.”) In doing so, however, and refocusing the jurisdictional inquiry in cases involving intentional torts on the defendant’s own ties with the forum itself, and not with plaintiffs’ or third-parties’ relationships with the forum, *Walden* in substance put its imprimatur on what the Minnesota Supreme Court in *Griffis* already had done over a decade prior.

The *Griffis* case is especially pertinent here because it involved the issue of alleged tortious conduct committed over the internet. In *Griffis*, the plaintiff sought to enforce an Alabama judgment for defamation against a Minnesota resident. *Griffis*, 646 N.W.2d at 530. In that case, the Minnesota resident participated in an internet chat room, as did an Alabama resident. *Id.* The Minnesota resident posted numerous statements in the chat room attacking the Alabama resident. *Id.* The chat room was public and messages could be accessed anywhere reached by the internet. *Id.* When the Alabama resident sued in Alabama, the Minnesota resident declined to appear and a default judgment was entered, which the Alabama resident then sought to enforce in Minnesota. *Id.*

The District Court held that the Alabama judgment was enforceable, and the Court of Appeals affirmed, on the grounds that Alabama had jurisdiction “because [the Minnesota resident] made potentially defamatory statements that were being read in Alabama and had knowledge of the effect of those statements in Alabama.” *Id.* at 531.

The Minnesota Supreme Court concluded that Alabama did not have personal jurisdiction over the Minnesota resident, and reversed. *Id.* at 537. As in *Walden*, the Court’s analysis focused on “the relationship among the defendant, the forum and the litigation.” *Griffis*, 646 N.W.2d at 532-33 (internal quotations omitted). The Court

distinguished *Calder* as involving a libel purportedly “expressly aimed” at California because it was published in a national publication whose largest circulation was in California, and attacked a California entertainer for her activities in California, which was the center of the entertainment industry, so that the publication’s effects would be primarily felt in California, thereby justifying specific jurisdiction. *Id.* at 532-33.

However, after noting that most courts had limited *Calder* to its specific facts and refusing to find jurisdiction merely because the plaintiff was located in the forum state, the Court in *Griffis* found that *Calder* was not applicable. *Id.* at 533-34. The best analysis, the Court concluded, was that of the Third Circuit Court of Appeals in *IMO Industries, Inc. v. Kiekert AG*, 155 F. 3d 254 (3d Cir. 1998), which held that the “*Calder* ‘effects’ test was not satisfied by the ‘mere allegation that the plaintiff feels the effect of the defendant’s conduct in the forum because the plaintiff is located there.’” *Griffis*, 646 N.W. 2d at 534 (*quoting IMO Industries*, 155 F.3d at 263). *Griffis* described and adopted as Minnesota law the *IMO Industries* test as follows:

The test requires the plaintiff to show that: (1) the defendant committed an intentional tort; (2) the plaintiff felt the brunt of the harm caused by that tort in the forum such that the forum state was the focal point of the plaintiff’s injury; and (3) the defendant expressly aimed the tortious conduct at the forum such that the forum state was the focal point of the tortious activity. Significantly, the court emphasized that to satisfy the third prong, the plaintiff must show that “the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum, and *point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum.*” . . .

We adopt the three-prong analysis articulated by the Third Circuit in *IMO Industries*, as it properly synthesizes the bases of the Court’s decision in *Calder* without effecting an overly broad application.

Griffis, 646 N.W. 2d at 534-35 (internal citations omitted) (emphasis in original).

Applying the *IMO Industries* test, the Court determined that the defamatory statements did not qualify as “expressly aimed” at Alabama and therefore did not satisfy the test’s third prong. *Id.* at 535. Although they were published on the internet, they did not revolve around the state of Alabama. *Id.* at 535-36. “The mere fact that Luban knew that Griffis resided and worked in Alabama is not sufficient to extend personal jurisdiction over Luban in Alabama, because that knowledge does not demonstrate targeting of Alabama as the *focal point* of the allegedly defamatory statements.” *Id.* at 536 (emphasis added). Therefore, Alabama did not have personal jurisdiction over the Minnesota resident and the judgment would not be enforced. *Id.* at 537.

Griffis thereby arrived at the same point reached only this year by *Walden*, rejecting reliance on the *plaintiff’s* contacts with the forum and thus the notion that specific jurisdiction could be premised solely on the facts that “the plaintiff was located in the forum state and therefore felt the effects of the alleged intentional tortious conduct there.” *Id.* at 533. The *Griffis* court thus followed the Supreme Court precedents which made it clear that “foreseeability of effects in the forum is not itself enough to justify long-arm jurisdiction.” *Id.* at 534.

That *Walden* and *Griffis* establish the current “effects test” has been confirmed by this Court in *Trivedi LLC v. Lang*, No. A13-2087, 2014 WL 2807981 (Minn. Ct. App. June 23, 2014), a case which like *Griffis* involved enforcement of a foreign judgment in Minnesota which was rejected by this Court. *Trivedi* cites to *Walden* for the proposition that “we look to the defendant’s contacts with the forum state itself, not simply with persons who reside there.” *Id.* at *4 (citing *Walden*, 134 S. Ct. at 1124). Thereafter,

Triveda, when discussing *Griffis* as the controlling Minnesota case, quotes *Griffis* for the principle “that the ‘constitutional touchstone remains whether the defendant purposefully established “minimum contacts” in the forum.’” *Id.*; see also *Advanced Tactical Ordinance Sys., LLC v. Real Action Paintball, Inc.*, 751 F.3d 796 at 802 (7th Cir. 2014), *as corrected* (May 12, 2014) (“[A]fter *Walden* there can be no doubt that the plaintiff cannot be the only link between the defendant and the forum. Any decision that implies otherwise can no longer be considered authoritative.” (internal citation and quotation omitted)). “Contacts between the plaintiff or other third parties and the forum do not satisfy” the requirement that the relationship between the defendant and the forum “must arise out of contacts that the ‘defendant *himself*’ creates with the forum. . . .” *Advanced Tactical Ordinance Sys., LLC*, 751 F.3d at 801 (quoting *Burger King Corp.*, 471 U.S. at 475) (emphasis in original).

The District Court wrongly dismissed *Griffis* as applicable only to a separate “effects” test, and inexplicably ignored *Walden*, *Advanced Tactical* and similar cases cited by MoneyMutual in its Reply Memorandum and at oral argument. ADD:7-8; see Reply Mem. at 3-6; Hr’g. Tr. 4:17-6:10. As stated by the Seventh Circuit: “Nearly 70 years ago, the Supreme Court held that due process is satisfied for this purpose so long as the defendant had certain minimum contacts with the forum state such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.” . . . *Walden* serves as a reminder that the inquiry has not changed over the years, and that it applies to intentional tort cases as well as others.” *Advanced Tactical*, 751 F.3d at 800-01 (internal citations and quotations omitted). *Walden* and *Griffis* rely on and reemphasize fundamental jurisdictional principles that apply to *all*

“minimum contacts” analyses, by making explicit that those principles cannot be avoided by focusing on the plaintiff’s contacts with the forum, as opposed to defendant’s contacts. Therefore, personal jurisdiction over a defendant cannot be premised upon the defendant’s contacts with, and conduct aimed or targeted at, specific *residents* of the forum, as opposed to those contacts directly aimed or targeted at the *forum state* itself. In addition to *Advanced Tactical*, as discussed in the sections immediately following, numerous other post-*Walden* cases so hold.

3. Plaintiffs cannot rely on their own alleged contacts with MoneyMutual.

Reviewing Plaintiffs’ evidence in light of *Walden* and *Griffis* makes it immediately clear that Plaintiffs are attempting to do just what they are prohibited from doing: asserting personal jurisdiction over MoneyMutual based not upon contacts created by MoneyMutual’s own conduct in “reaching into” and targeting the forum state, Minnesota, but by the “fortuitous” presence in the forum and “unilateral activities” of Plaintiffs and third-parties, the payday lenders themselves. Since it is undisputed that MoneyMutual and its affiliate PartnerWeekly have not had any physical presence in Minnesota, Plaintiffs’ arguments rest largely on (a) their own presence in Minnesota, their *initiation* from Minnesota of communications with MoneyMutual and their ultimate transactions with the payday lenders by “hitting the button” to submit their applications to MoneyMutual, and whatever further incidental communications may have occurred with MoneyMutual, and (b) the Plaintiffs’ contacts and loan agreements with *third-parties*, the payday lenders and the latter’s own contacts with the Plaintiffs. These arguments are without merit.

Under *Griffis* and *Walden*, Plaintiffs' own residency and actions in Minnesota are not a basis for jurisdiction since it not their conduct, but that of MoneyMutual, which is needed for personal jurisdiction. Plaintiffs communicated with MoneyMutual and supplied information to MoneyMutual from Minnesota. Those communications do not support jurisdiction for several reasons. First, the only communications that any of the named Plaintiffs had with MoneyMutual were the *Plaintiffs'* initial internet communication to MoneyMutual submitting their application (preceded in Kunza's case by a call to MoneyMutual), and the automated response they received over the internet confirming that they had been matched with a lender. See Statement of Allegations and Facts ("SAF"), above, Nos. 5-6; see SAF, Nos. 13-14. It is undisputed that it was Plaintiffs' decision to go to the MoneyMutual website (which they do not claim to have previously viewed), submit their applications and hit "Send" to *initiate* their communication with MoneyMutual; similarly, Kunza initiated her first communication with MoneyMutual by telephone. SAF, Nos. 4, 6. Indeed, Plaintiffs have not alleged that any Minnesota consumer was ever contacted by MoneyMutual *before* the consumer chose to initiate a potential loan transaction by submitting an application through the website. *Id.* Thereafter, in *response* to Plaintiffs' initial communications, MoneyMutual transmitted automated communications over the internet that advised the applicants that they had been matched with a lender and provided contact information. SAF, Nos. 7; see SAF Nos. 13-14.²

² Plaintiffs have not testified or alleged that the matched lender contacted them before Plaintiffs initiated contact with the lender, so there is no claim that MoneyMutual or PartnerWeekly indirectly initiated lender communications with Plaintiffs. *Id.*

Even prior to *Walden*, telephone, mail and email correspondence between a plaintiff in the forum state and a non-resident defendant typically could not be the basis for finding specific jurisdiction over the defendant, especially when the communications were initiated by plaintiff. *E.g.*, *Wheeler v. Teufel*, 443 N.W.2d 555, 557 (Minn. Ct. App. 1989) (“In Minnesota, telephone conversations and mail exchanges alone have generally not been found sufficient for the assertion of personal jurisdiction.”); *Juppru v. Rousher*, No. A10-1482, 2011 WL 1546149 at *2 (Minn. Ct. App. Apr. 26, 2011); *Mountaire Feeds, Inc. v. Agro Impex, S.A.*, 677 F.2d 651, 656 (8th Cir. 1982) (“Although the parties did make telephone calls, exchange correspondence and use banks to arrange payments, ‘the use of arteries of interstate mail, telephone, railway and banking facilities is insufficient, standing alone, to satisfy due process.’”); *see IMO Industries, Inc.*, 155 F.3d at 259 n.3 (noting, *inter alia*, that “[t]he weight of authority among the courts of appeal is that minimal communication between the defendant and the plaintiff in the forum state, without more, will not subject the defendant to the jurisdiction of that state’s court system”).

Post-*Walden* cases are even more emphatic in discounting the jurisdictional materiality of communications between plaintiff and defendant, even when actively initiated by the defendant, based upon *Walden*’s reemphasis on the irrelevancy of plaintiff’s or a third party’s contacts with the forum state. *See, e.g.*, *Fastpath, Inc. v. Arbela Techs. Corp.*, 760 F.3d 816, 822-823 (8th Cir. 2014) (citing *Walden*, holding even aggressive solicitation and pursuit in defendant’s emails and telephone calls to plaintiff not a basis for jurisdiction); *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 433-34 (5th Cir. 2014) (citing *Walden*, and holding communications and wire transfers not initiated

by defendant were insufficient to confer jurisdiction); *Conex Energy-Canada, LLC v. Mann Eng'g, Ltd.*, No. CIV 13-4123-KES, 2014 WL 3732571, at *4-5 (D.S.D. July 25, 2014) (citing to *Walden* and *Fastpath*, holding that *Fastpath*'s facts, on which no jurisdiction was found, "arguably create[d] a closer call" than in this case, where the communications were initiated by plaintiff).

Recently, in *Trivedi LLC*, this Court cited *Walden* and relied on *Griffis* to reject communications as a basis for jurisdiction in the absence of evidence they were aimed at the forum as opposed to an individual. Significantly, the Court also questioned the reliability of e-mails for establishing forum contact at all: "E-mail communications are particularly untethered to a geographic location because they may be reviewed from locations other than where the recipient resides. It was fortuitous that [two present or former employees of plaintiff] lived in Arizona at the time of their communications with [defendant]." *Trivedi LLC*, 2014 WL 2807981, *7; see also *Advanced Tactical Ordnance Sys.*, 751 F.3d at 803 ("As a practical matter, email does not exist in any location at all; it bounces from one server to another, it starts wherever the account-holder is sitting when she clicks the 'send' button, and it winds up wherever the recipient happens to be at that instant. The connection between the place where an email is opened and a lawsuit is entirely fortuitous.").

The automated communications received in response to Plaintiffs' submission of their applications through the MoneyMutual website are also not helpful to Plaintiffs. As automated responses, properly speaking they still occurred at the initiation of Plaintiffs. More important, they were aimed at the Plaintiffs and not at the forum state; that analysis does not change even when considering the "1000+" alleged class members, since in each

instance the consumer initiated the procedure which led to the automated e-mail. These remain individual contacts with individual residents of the forum, not with the forum itself. Particularly absent evidence that MoneyMutual's television advertising or website itself expressly aimed at or targeted Minnesota (see discussion below), the location of individuals who submit applications through a website and receive automated website or email responses is the epitome of "fortuitous" in the *Walden* analysis.

The emails testified to by Affiants Olson and Grostyan run afoul of the requirement for specific jurisdiction that the contacts must be related to or give rise to the litigation itself. *Volkman v. Hanover Investments, Inc.*, 843 N.W.2d 789, 796 (Minn. Ct. App. 2014). This requirement is one of the three primary prongs of the five-factor test used in Minnesota to analyze jurisdiction. *Juelich*, 682 N.W.2d at 570; *Dent-Air*, 332 N.W.2d at 907. While Olson described 42 emails she received over a three-month period soliciting her to apply for another loan, she did not testify that she thereafter did so and received a loan. SAF, No. 8. None of the other Affiants, including Kunza who did go apply for a second loan through the MoneyMutual website, testified to receiving such emails and thereafter taking new loans. *Id.* Consequently (and leaving aside the issue that these were not contacts with the *forum* rather than a *forum resident*), there is no nexus between these purported contacts and Plaintiffs' claims. Likewise, Grostyan's testimony concerning two emails he received when he did not complete his application are irrelevant. Without having obtained a loan, Grostyan is not even a putative class member. No evidence was presented that any person in Minnesota failed to complete the application, received these or similar emails, and thereafter completed the application and obtained a payday loan. *See, e.g. Advanced Tactical Ordnance Sys*, 751 F.3d at 801

(citing *Walden* to emphasize that the “defendant’s *suit-related* conduct must create a substantial connection with the forum State,” and that “[s]pecific jurisdiction must rest on the *litigation-specific* conduct of the defendant in the proposed forum state” (emphasis in original) and holding that absence of any evidence connecting the fulfilling of a few orders received from the forum with two misleading email “blasts” precluded premising jurisdiction on such contacts); *Lexion Med., LLC v. SurgiQuest, Inc.*, 8 F. Supp. 3d 1122, 1127-28 (D. Minn. 2014) (repeated purchases of supplies by third-party customer in forum state not linked to alleged misrepresentations); *Cavanaugh v. Norton*, No. 3:13-CV-1162, 2014 WL 980815 (M.D. Pa. Mar. 13, 2014) (holding that because visits by the defendant to plaintiff’s home were not alleged to be connected to improper bank withdrawals, bad faith and fraudulent conversion at issue, such visits could not supply minimum contacts).

Further, jurisdiction over MoneyMutual cannot be premised on whatever connection the *third-party* payday lenders may have had with Minnesota or Minnesotans. Jurisdiction can no more be based upon a third-party’s contacts with the forum state than on the plaintiff’s contacts with the forum state. *Walden*, 134 S. Ct. at 1122 (“We have consistently rejected attempts to satisfy the defendant-focused ‘minimum contacts’ inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State. . . . [The] unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum state to justify an assertion of jurisdiction.” (internal quotations and citations omitted)); *Lexion Med., LLC*, 8 F. Supp. 3d at 1128-29 (a defendant’s relationship with a third party in the forum state is an insufficient basis for jurisdiction). Moreover, each party’s contact

with the forum state must be assessed separately. *Calder*, 465 U.S. at 784; *Conex Energy-Canada*, 2014 WL 3732571, at *7.

These restrictions on leveraging the activities and forum contacts of the payday lenders (such as they may be) to assert jurisdiction over MoneyMutual is supported by MoneyMutual's and PartnerWeekly's undisputed evidence. Once a "lead" was accepted by a Network lender, and MoneyMutual's automated system advised the loan applicant of that fact and the lender's contact information, MoneyMutual and PartnerWeekly had no further involvement whatever with regard to the loan agreement, the loan or the relationship between lender and borrower. Nor did they have any knowledge whatsoever concerning the loan agreement, the loan, anything pertaining to the loan or relationship between borrower and lender, or even if a loan agreement even had been reached. SAF, Nos. 12-16.

4. MoneyMutual's advertising is not "expressly aimed" at Minnesota.

As already described above, *Walden* mandates that conduct claimed to constitute "minimum contacts" must be not only the defendant's own conduct, but it must be directed at the forum state, and not merely at individual residents of the forum. Anticipating *Walden*, *Griffis* required that the defendant "*expressly aimed its tortious conduct at the forum.*" *Griffis*, 646 N.W.2d at 534 (emphasis in original; internal quotations omitted). Indeed, pre-dating both *Griffis* and *Walden*, this Court already has applied this distinction when considering whether advertising constituted 'minimum contacts' for purposes of personal jurisdiction.

In *BLC Insurance Co. v. Westin, Inc.*, 359 N.W. 2d 752 (Minn. Ct. App. 1985), the Court imposed personal jurisdiction over a Wisconsin bar at which the victim of a fatal automobile accident had been drinking, based upon the bar's heavy advertising through a Twin Cities radio station, the target market of which included the decedent. *Id.*, at 754-55. The Court distinguished *Janssen v. Johnson*, 358 N.W.2d 117 (Minn. Ct. App. 1984), where the defendant was held not to be subject to personal jurisdiction in Minnesota, on the "decisive fact" that the Wisconsin bar owner in *Janssen* did not advertise through Minnesota media. *Id.* at 754.

There is no evidence here that MoneyMutual's advertising was "expressly aimed" at Minnesota. Although the named Plaintiffs, and Olson and Grostyan, testified that they saw MoneyMutual advertisements on various television stations at their homes in Minnesota, nobody testified to any of the contents of these ads, except for remembering that they featured celebrity Montel Williams. From 2009 to the present, MoneyMutual has not contracted for or placed advertising with any Minnesota-based television station, or any television station in a surrounding state which specifically serves any Minnesota market.³ No advertising of any kind is targeted specifically to Minnesota or Minnesotans. Moreover, MoneyMutual has not targeted any advertising *content*, whether over television, radio, printing, or the internet, specifically at Minnesota or Minnesotans. Plaintiffs have not stated that any of the television advertising viewed by

³ This statement is not contradicted by Plaintiffs' evidence. None of the affiants identified specific channels, except that Grostyan identified a cable country music channel. However, since he did not complete an application and obtain a loan, and also engaged in this exercise long after any of the named Plaintiffs, his testimony is irrelevant. Riley saw the ad on "either a network *or* local station." Riley Aff. ¶ 2 (emphasis added). Gonzales referred only to "multiple channels." Gonzales Aff. ¶ 1. Kunza did not identify any channel. Kunza Aff. ¶ 1.

them included content specifically targeting Minnesota or Minnesotans. Plaintiffs have not alleged, testified or submitted any exhibit showing that the MoneyMutual website itself included any content targeting Minnesota or Minnesotans. SAF, Nos. 2-3. Without MoneyMutual having “expressly aimed” its advertising at Minnesota, it is insufficient that Plaintiffs saw advertising at their homes in Minnesota. *See, e.g., Telemedicine Solutions LLC v. Woundright Techs., LLC*, ___ F. Supp. 2d ___, 2014 WL 1020936, at *11 (N.D. Ill. 2014) (*citing Walden* and applying Seventh Circuit’s “expressly aimed” test, holding that defendant’s Google ad, which included plaintiff’s trade name and mark and disparaged and defamed plaintiff, had nothing to do with Illinois, and plaintiff did not allege the ad was specifically aimed at Illinois or even viewed by customers or potential customers in Illinois); *Lexion Med., LLC*, 8 F. Supp. 3d 1122 (in false advertising case, plaintiff claimed to have defendant’s marketing material containing alleged misrepresentation, but no jurisdiction because, *inter alia*, defendant did not direct advertisements of any kind concerning its products to Minnesota); *High Tech Pet Prods., Inc. v. Shenzhen Jianfeng Elec. Pet Prod. Co.*, No. 1:13-Cv-00242 AWI, 2014 WL 897002, at *7 (E.D. Cal. Mar. 6, 2014) (no allegations or evidence of advertising “substantially directed” at California).

Plaintiffs tried to circumvent the lack of targeting through the Frisch Affidavit, in which Plaintiffs’ counsel’s law clerk testifies to three Google searches she made in June of 2014 using the search terms “payday loan Minnesota” and “payday loan Minneapolis.” According to Frisch, these searches brought up a Google AdWords MoneyMutual advertisement which linked to the MoneyMutual website. Frisch Aff. ¶¶ 1-6, 10-11. The advertisement itself simply states: “Apply Online Now www.moneymutual.com/ 4.2

[four stars out of five] advertiser rating Fast Payday Loan – Apply Online! Safe & Bad Credit OK. Up to \$1000[.]” No mention is made of Minnesota. Further investigation by Frisch ultimately led to her (speculative) conclusion that MoneyMutual paid to obtain specific matches on search terms. However, there is no evidence concerning when such Google AdWords advertisements started or for how long they have been posted in response to keyword searches. The Plaintiffs (and the other affiants) do not testify that any of them conducted a Google search using those keywords (or any Google search at all, for that matter). Indeed, there is no evidence that any of the Plaintiffs learned of MoneyMutual through the internet or otherwise were aware of any alleged MoneyMutual internet advertising until directed to the website by the television advertising they viewed. SAF, No. 4.

Frisch’s affidavit is valueless and does not establish personal jurisdiction over MoneyMutual. First, it is common knowledge that companies engage search engines to jockey for the maximum exposure, including at the top of searches (which is why the “exact match” designation referenced by Frisch is valuable). Although Frisch apparently did not search using other state and city keywords to determine if in fact Minnesota really was targeted, as opposed to there being the same result with similar search phrases incorporating other states and cities, it is safe to assume that Frisch (or anybody else) would discover that this was a national, not a local, strategy. That conclusion is further supported by the neutrality of the MoneyMutual advertisement itself, which makes no direct or indirect mention of Minnesota or any other state. *See Telemedicine Solutions LLC*, 2014 WL 1020936, at *11 (N.D. Ill. 2014) (discussing the lack of state reference in a Google AdWords ad).

In addition, Plaintiffs do not demonstrate any nexus between Frisch's work and the actual litigation. In particular, as in *Telemedicine*, no evidence is offered indicating that anybody in Minnesota ever used these search terms or viewed this ad, or when the Google advertisement first started being used and how long it has been available. None of the named Plaintiffs testified to having made this or any other Google search seeking information on the availability of payday loans in Minnesota and bringing up the MoneyMutual advertisement. In fact, the inference to be drawn from the testimony submitted by Plaintiffs is that it is far more likely that Minnesotans would have learned about MoneyMutual from television than from Google. The lack of any connection between the Google ad and the litigation means that the Google search and advertisement do not support the existence of 'minimum contacts' qualified to create jurisdiction.

5. MoneyMutual's website is not "expressly aimed" at Minnesota and therefore does not provide a basis for personal jurisdiction.

Plaintiffs did not and cannot dispute that MoneyMutual's website does not refer to Minnesota in any way. Instead, they and the Court relied on the so-called *Zippo* test first published in *Zippo Mfg. Co. v. Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997), which established that whether the existence of a website will support jurisdiction over a nonresident is measured by a sliding scale of the website's interactivity. If the website is completely passive, *e.g.*, it only posts information for interested viewers, it does not provide a basis for jurisdiction. At the other end of the spectrum, if the website is interactive and the site's owner and operator can and does engage in the "knowing and repeated transmission of computer files over the Internet" to persons in the forum, then

jurisdiction is appropriate. *See, e.g., Streamline Bus. Servs., LLC*, 2014 WL 4209550, at *6.

However, even before *Walden* and certainly after it, the *Zippo* test has been *de facto* eviscerated in its home state as a result of the courts' perception and addressing of technological advances. As with the impact of *Walden* on the "quality" component of the five-factor test, courts have concluded that it is constitutionally inappropriate to assume jurisdiction based upon the interactivity of a website accessible everywhere reached by the internet, without imposing on the plaintiff an additional obligation to submit evidence that even a highly interactive site through which files are exchanged with forum residents, as a separate matter *is also "expressly aimed" at the forum*. *E.g., Streamline Business Services, LLC*, 2014 WL 4209550, at *6; *Henning v. Suarez Corp.*, 713 F. Supp. 2d 459, 469-70 (E.D. Pa. 2010); *Brown v. AST Sports Science, Inc.*, No. CIV. A. 02-1682, 2002 WL 32345935, at *8-9 (E.D. Pa. June 28, 2002).

Without specifically naming *Zippo*, after publication of *Walden*, the Seventh Circuit presented a comprehensive and compelling argument for applying standard jurisdictional analysis rather than any special tests to determine whether jurisdiction over a nonresident can be premised upon an interactive website, as follows:

The interactivity of a website is also a poor proxy for adequate in-state contacts. We have warned that "[c]ourts should be careful in resolving questions about personal jurisdiction involving online contacts to ensure that a defendant is not haled into court simply because the defendant owns or operates a website that is accessible in the forum state, even if that site is 'interactive.' " . . . This makes sense; the operation of an interactive website does not show that the *defendant* has formed a contact with the forum state. And, without the defendant's creating a sufficient connection

(or “minimum contacts”) with the forum state itself, personal jurisdiction is not proper.

Even if we assume that interactivity matters at least in an evidentiary way, it is unclear how any interactivity of the website here affected the alleged trademark infringement. Real Action posted a notice (by itself not interactive) on its website; that notice allegedly infringed Advanced Tactical’s trademark. But whether the notice amounted to infringement has nothing to do with interactivity. We need not belabor the point: if having an interactive website were enough in situations like this one, there is no limiting principle—a plaintiff could sue everywhere. Such a result would violate the principles on which *Walden* and *Daimler* rest. Having an “interactive website” (which hardly rules out anything in 2014) should not open a defendant up to personal jurisdiction in every spot of the planet where that interactive website is accessible. To hold otherwise would offend “traditional notions of fair play and substantial justice.”

Advanced Tactical Ordnance Sys., 751 F.3d at 803 (internal citations omitted) (emphasis in the original).

MoneyMutual respectfully submits that this Court should acknowledge the trend reflected in the foregoing cases, and adopt Chief Judge Wood’s reasoning and conclusion in *Advanced Tactical* as compelled by the authority of both *Walden* and *Griffis*. The District Court did not analyze MoneyMutual’s website from the perspective of determining whether it was “expressly aimed” at Minnesota, and its failure to do so was error.

6. *Granite Gate Resorts* is no longer good law.

The District Court erred when it relied on *State by Humphrey v. Granite Gate Resort, Inc.* 568 N.W.2d 715 (Minn. Ct. App. 1997) *aff’d sub nom.*, 576 N.W.2d 747 (Minn. 1998)). It should no longer be treated as good law.

In *Granite Gate Resorts*, the Minnesota Attorney General sued defendants for deceptive trade practices, false advertising and consumer fraud via internet conduct. *Granite Gate Resorts*, 568 N.W.2d at 716-18. The defendants included a Nevada resident who was president of a Nevada corporation which, on an internet site promoting Nevada tourism, advertised an internet betting site based in Belize called WagerNet. *Id* at 717. The site told internet viewers that WagerNet would be a legal way to place bets from anywhere, described how WagerNet worked, advised viewers to put themselves on a mailing list for WagerNet and linked the site directly to a webpage which described WagerNet's terms and conditions of service. *Id*. Among other things, those terms and conditions provided that a customer could only sue WagerNet in a Belizian court, but that WagerNet itself could sue a consumer in his or her home state. *Id*.

Upon investigation, it was discovered that when the advertised betting site was contacted, the caller was told to call a different number; however, that number was the same as the number given for WagerNet. *Id*. When called, the individual defendant explained how to access WagerNet and again stated it was legal. *Id*. When an investigator subscribed to WagerNet using a fictitious name, he received confirmation he would be on a WagerNet mailing list. *Id*. The trial court later ruled (as a discovery sanction) that the mailing list included the name of at least one Minnesotan. *Id*. at 717-18.

This Court affirmed the trial court's determination that the defendants were subject to personal jurisdiction in Minnesota, but emphasized that its ruling was based on the specific facts presented. *Id*. at 718. Employing Minnesota's five-factor test as described above, the court held that the quantity of contacts showed the defendants had

“purposefully availed themselves of the privilege of conducting activities in Minnesota” because computers throughout the U.S. could access the website, a number of computers in Minnesota had accessed the website, computers in Minnesota were among those most frequently accessing the website, persons located throughout the U.S. called the defendants at the advertised numbers, and the WagerNet mailing list included the name of at least one Minnesota resident. *Id.* at 718-19.

The Court then determined that the “quality” of defendants’ contacts with Minnesota likewise justified an exercise of jurisdiction. *Id.* at 719-20. By advertising in Minnesota through the internet, the defendants indicated an intent to serve Minnesotans, and that by sending images over the internet generally, the defendants invited downloading, thereby causing distribution in Minnesota. *Id.* Further, the defendants intentionally transmitted information to internet users, knowing such information would be accessible globally, including in Minnesota. *Id.* at 719. The Court analogized internet advertising to broadcasting, noting that Minnesota courts had previously concluded that defendants who know their message will be broadcast in Minnesota would be subject to suit in Minnesota. *Id.* at 719-20.

Next, the Court held that if the connection between the cause of action and the contacts is that the cause of action actually arises from the contacts, even a single transaction can be sufficient to establish personal jurisdiction. *Id.* at 720. Advertising contacts such as those in the case at bar, therefore, were sufficient contacts when the basis of the claim is that the advertisements were unlawful or misleading and, as the Court had stated, the allegedly offending advertising was “*directed towards Minnesota.*” *Id.* at 720 (emphasis added).

Based upon the foregoing, the Court carefully circumscribed its finding of specific jurisdiction by holding “that appellants are subject to personal jurisdiction in Minnesota because, through their Internet activities, they purposefully availed themselves of the privilege of doing business in Minnesota to the extent that the maintenance of an action based on consumer protection statutes does not offend traditional notions of fair play and substantial justice.”

Id. at 721.

Granite Gate Resorts can be distinguished from this case. Of particular importance, in *Granite Gate Resorts*, the Court emphasized that the advertisements showed an intent to enter the Minnesota market by having WagerNet contract with Minnesotans, and thus to ultimately profit from Minnesotans – a traditional ground for the exercise of jurisdiction. *Id.* at 719-20.⁴ MoneyMutual does not contract with Minnesotans and does not sell goods or services to Minnesota residents, nor is it being paid by Minnesota residents for goods or services. *Cf. id.* at 719. Consequently, the *Granite Gate Resorts* defendants arguably were doing, and proposing to do far more in Minnesota than MoneyMutual is doing or has ever done. Regardless of the CAC’s refrain that the loans between Minnesota residents and third-party payday lenders are “*MoneyMutual’s loans*,” the loans are not and never have been MoneyMutual’s loans. That distinction is critical.

Granite Gate Resorts is utterly inconsistent with current jurisprudence as reflected in *Walden* and *Griffis*. The website in question was accessible everywhere, and in fact the argument that it was somehow “expressly aimed” at Minnesota because it sought to

⁴ Importantly, the Court also noted that the individual defendant controlled all decisions for WagerNet. *Id.* at 721.

attract subscribers from *everywhere*, including Minnesota, is facially ineffective to establish personal jurisdiction. There is no evidence that any conduct by the defendants was “expressly aimed” at Minnesota. For that reason, MoneyMutual respectfully submits that *Granite Gate Resorts* should no longer be treated as the law of Minnesota, and the District Court’s decision reversed.

C. The District Court Erred By Denying MoneyMutual’s Motion To Dismiss For Failure To Join Indispensable Parties.

MoneyMutual also moved for dismissal of this action pursuant to Rule 19 for failure to join indispensable parties because although the Plaintiffs concede that the loans about which they complain were *not* with MoneyMutual, but instead were with third-party short-term lenders, the Plaintiffs inexplicably failed to name any lenders as defendants. The district court denied the motion because it determined that MoneyMutual had separate statutory and common law duties to the Plaintiffs and that the Plaintiffs could be afforded complete relief in the absence of the lenders. *See* ADD:8-9. The Appellate Court reviews a district court’s denial of a motion to dismiss for failure to join indispensable parties under an abuse-of-discretion standard. *Hoyt Props., Inc. v. Prod. Resource Group, LLC*, 716 N.W.2d 366, 377 (Minn. Ct. App. 2006). Here, the Court should determine that district court’s decision is in error.

Plaintiffs’ action is based on claims that they, and the class they purport to represent, entered into consumer short-term loan contracts which are illegal and void under Minnesota law. *See generally* CAC. As Plaintiffs themselves concede, however, the complained-of loans were between Plaintiffs and third-party payday lenders—MoneyMutual was *not* a party to the loans. *See, e.g.*, CAC, ¶¶ 37-40. Plaintiffs seek

relief based on a judicial determination that the payday loan contracts are illegal and void without naming the other parties to the contracts.

“An indispensable party is a party ‘without whom the action could not proceed in equity and good conscience.’” *Hoyt Props., Inc.*, 716 N.W.2d at 377 (quoting *Murray v. Harvey Hansen-Lake Nokomis, Inc.*, 360 N.W.2d 658, 661 (Minn. Ct. App. 1985)). To determine “whether a party is indispensable, a court must balance several factors, including whether it can render an adequate judgment without the absent party and whether relief can be crafted that would not prejudice the absent party’s rights. *Id.* (citations omitted). An action involving the rights of the parties to a contract requires that all parties to the contract be joined in the action. *See, e.g., Potter v. Engel*, 153 N.W. 1088, 1089 (1915).

The district court determined that Plaintiffs’ claims are “*probably* more analogous to tort than breach of contract claims.” ADD:8(emphasis added). Importantly, the district court did not determine that Plaintiffs’ claims are grounded in tort rather than contract. It is plain that the Plaintiffs’ claims all arise from the loan contracts that they contend were illegal and void; it is clear, then, that Plaintiffs’ claims revolve around the contracts at issue, making the parties to those contracts necessary parties to this action. The district court therefore erred in finding that complete relief could be granted in the absence of the lenders.

The district court also erred in finding that Plaintiffs had sufficiently alleged violations of Minnesota law based on duties imposed on MoneyMutual that are separate from the duties imposed on the lenders. ADD:8-9. Leaving aside whether, as a factual matter, MoneyMutual is properly subject to the statutes that Plaintiffs claim were

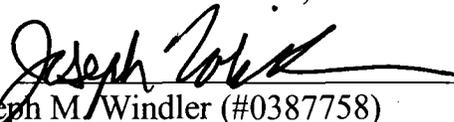
violated, there can be no doubt that if MoneyMutual can be subject to Plaintiffs' claims, it is only by virtue of the loans that Plaintiffs entered into with the lenders. In other words, whether MoneyMutual engaged in the conduct alleged in the CAC hinges entirely on whether the payday lenders were required to be licensed and whether their agreements actually violated Minnesota law. Plaintiffs' claims against MoneyMutual are inextricably intertwined with Plaintiffs' complaints about their loan. An inquiry into the legality of Plaintiffs' loans requires that the parties to the loans be before the court. MoneyMutual is not a party to any of the loans, and indeed, has never even seen the contracts. Because the payday lenders are necessary and indispensable parties to this action, the Court should reverse the district court's denial of MoneyMutual's motion to dismiss for failure to join indispensable parties.

V. CONCLUSION

MoneyMutual does not have sufficient, cognizable "minimum contacts" with Minnesota to be subject to personal jurisdiction in Minnesota. Similarly, Plaintiffs failed to name necessary and indispensable parties as Defendants. As a result, MoneyMutual therefore respectfully requests that the decision of the District Court be reversed, and the CAC dismissed.

Dated: November 12, 2014

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NOV 13 2014

FILED

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VIA U.S. MAIL

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Re: *MoneyMutual, LLC v. Scott Rilley, et al.*
Court File No.: A14-1307

Dear Ms. O'Neill:

Enclosed for filing in the above-referenced matter, please find the following:

1. Appellant's original unbound Brief and Addendum and four (4) bound copies of Appellant's Brief and Addendum;
2. Affidavit of Joseph M. Windler (original unbound and four (4) bound copies);
3. Notice Regarding Oral Argument in the Court of Appeals on behalf of Appellant MoneyMutual, LLC; and
4. Affidavit of Service.

By copy of this letter, service is made upon all counsel of record.

Very truly yours,

WINTHROP & WEINSTINE, P.A.


Joseph M. Windler

JMW/gy

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Enclosures

cc: E. Michelle Drake (w/encls. Via U.S. Mail)
Mark Heaney (w/encls. via U.S. Mail)

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FILED

STATE OF MINNESOTA
COURT OF APPEALS
A-14-1307

MoneyMutual, LLC ,

Appellant,

**AFFIDAVIT OF
SERVICE**

vs.

Court of Appeals

Scott Rilley, Michelle Kunza, Linda Gonzales
and Michael Gonzales, individually and on
behalf of the putative classes ,

APPELLATE COURT CASE
NUMBER: A14-1307

Respondents.

TRIAL COURT CASE NUMBER:
19HA-CV-14-858

DATE OF ORDER FILED:
July 17, 2014

STATE OF MINNESOTA)

) ss

COUNTY OF HENNEPIN)

Gaosheng M. Yang, being first duly sworn upon oath, states that on the 12th day of November, 2014, she served two copies of the following:

- 1. Appellant's Brief and Addendum; and**
- 2. Affidavit of Joseph M. Windler**

Upon:

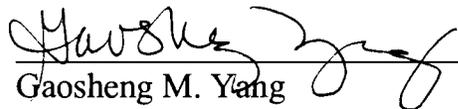
Attorneys for Plaintiffs/Respondents:

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-and-

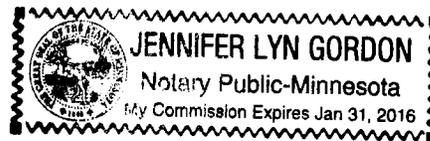
Mark Heaney (#0333219)
HEANEY LAW FIRM, LLC
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Minnetonka, MN 55305

by mailing copies thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at Minneapolis, Minnesota directed to said person, at the addresses given above.


Gaosheng M. Yang

Subscribed and sworn to
before me this 12th day
of November, 2014


Notary Public



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