

To Be Argued By:
Gary D. Friedman

No. 06-60255

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

——
JACK KOEGEL; WILLIAM FIELDS,

Plaintiffs-Appellants,

v.

BAUGUR GROUP, HF; JÓN ÁSGEIR JÓHANNESSON;
JÓHANNES JÓNSSON; JOHN DOES,

Defendants-Appellees.

—
*On Appeal from the United States District Court
for the Southern District of Mississippi, Jackson*

BRIEF FOR DEFENDANTS-APPELLEES

Robert M. Frey
BUTLER, SNOW, O'MARA,
STEVENS & CANNADA
P.O. Box 22567
Jackson, Mississippi 39225
601-948-5711

Gary D. Friedman
Jonathan A. Shiffman
Scott A. Chesin
Jonathan Sokotch
MAYER, BROWN, ROWE & MAW LLP
1675 Broadway
New York, New York 10019
212-506-2500

Attorneys for Defendants-Appellees

**CERTIFICATE OF INTERESTED PERSONS
NO. 06-60255**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

Plaintiffs-Appellants

Jack Koegel
William Fields

Counsel for Plaintiffs-Appellants

William L. Smith
Spence Flatgard
Alan Windham
Smith, Reeves & Yarborough, PLLC

Defendants-Appellees

Jón Ásgeir Jóhannesson
Jóhannes Jónsson
Baugur Group, HF

European and UK Affiliates of Baugur Group, HF

Baugur UK, Ltd.
Baugur Denmark
Mosaic Fashions Ltd.
Hamleys
MK One
Julian Graves
Goldsmiths
Iceland
Booker
Jane Norman
Woodward Foodservice
LXB II


Mappin & Webb
Oasis Stores
Karen Millen
Coast and Whistles
The Shoe Studio Group
Whittard of Chelsea
Wyevale Garden Centers
Hagar hf.
Stodir hf.
Húsasmiðjan hf.
Smáralind
SMS
Magasin Du Nord
Thyrping hf
Keops A/S
Illum
Merlin
FL GROUP
Atlas Ejendomme A/S
Hagkaup
Bónus
Debenhams
Topshop
Miss Selfidge
Zara
Utilif
Dagsbrún
365 Media
Og Vodafone
P/F Kall
365 Media Scandinavia
Sko
Sena
D3
Securitas
Wyndeham Press Group

Counsel for Defendants-Appellees

Gary D. Friedman

Jonathan A. Shiffman
Scott A. Chesin
Jonathan Sokotch
Mayer, Brown, Rowe & Maw LLP

Robert M. Frey
Chad R. Hutchinson
Butler Snow O'Mara Stevens & Cannada, PLLC



Gary D. Friedman
Attorney of record for Defendants-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Although Defendants-Appellees believe that the issue on appeal can readily be determined on the basis of the parties' submissions, Defendants-Appellees, of course, would welcome the opportunity to have their position heard at oral argument, if the Court deems it appropriate.

TABLE OF CONTENTS

	<u>Page</u>
CERTIFICATE OF INTERESTED PERSONS	i
STATEMENT REGARDING ORAL ARGUMENT	iv
TABLE OF AUTHORITIES	vii
COUNTERSTATEMENT OF THE ISSUES.....	1
PRELIMINARY STATEMENT	2
COUNTERSTATEMENT OF FACTS	3
SUMMARY OF THE ARGUMENT	10
ARGUMENT	13
I. PLAINTIFFS HAVE WAIVED OR ABANDONED CERTAIN CLAIMS	13
A. Fields has waived all arguments in favor of personal jurisdiction	13
B. Plaintiffs have abandoned their equitable estoppel and breach of contract claims	14
II. MISSISSIPPI’S LONG-ARM STATUTE DOES NOT AUTHORIZE THE EXERCISE OF PERSONAL JURISDICTION OVER THESE DEFENDANTS	15
A. There were no damages in Mississippi	18
1. Fields	18
2. Koegel	19
B. Damage sustained (or discovered) in Mississippi is legally distinct from injury that takes place in Mississippi.....	23

TABLE OF CONTENTS

	<u>Page</u>
III. THE DUE PROCESS CLAUSE FORBIDS THE EXERCISE OF PERSONAL JURISDICTION IN THIS CASE.....	28
A. No defendant had “minimum contacts” with Mississippi.....	29
B. It would be fundamentally unfair to subject the defendants to suit in Mississippi	35
CONCLUSION.....	37

TABLE OF AUTHORITIES

Page

Cases

<i>Allred v. Moore & Peterson</i> , 117 F.3d 278 (5th Cir. 1997)	29, 34, 36
<i>Asahi Metal Indus. Co. v. Super. Ct. of California</i> , 480 U.S. 102 (1987).....	35-36
<i>Bankplus v. Toyota of New Orleans</i> , 851 So.2d 439 (Miss. Ct. App. 2003)	16, 26
<i>Browder v. Williams</i> , 765 So.2d 1281 (Miss. 2000).....	21
<i>Burger King Corp. v. Rudzewicz</i> , 471 U.S. 462 (1985).....	29, 35-36
<i>Calder v. Jones</i> , 465 U.S. 783 (1984).....	34
<i>Cole v. Alton</i> , 567 F.Supp. 1081 (N.D. Miss. 1983).....	17, 32
<i>Dale v. First Am. Nat'l Bank</i> , 395 F.Supp.2d 451 (S.D. Miss. 2005)	13
<i>Davidson v. Rogers</i> , 431 So.2d 483 (Miss. 1983).....	21
<i>Denmark v. Tzimas</i> , 871 F.Supp. 261 (E.D. La. 1994).....	15
<i>Dickson Marine, Inc. v. Panalpina, Inc.</i> , 179 F.3d 331 (5th Cir. 1999)	17, 30-31
<i>Dunn v. Dent</i> , 169 Miss. 574 (1934)	20, 27

TABLE OF AUTHORITIES

	<u>Page</u>
<i>East River S.S. Corp. v. Transamerica Delaval</i> , 476 U.S. 858 (1986).....	20
<i>Estate of Portnoy v. Cessna Aircraft Co.</i> , 730 F.2d 286 (5th Cir. 1984)	26
<i>Evergreen Presbyterian Ministries, Inc. v. Hood</i> , 235 F.3d 908 (5th Cir. 2000)	14, 15
<i>Freudensprung v. Offshore Tech. Servs.</i> , 379 F.3d 327 (5th Cir. 2004)	31, 33-34
<i>Frierson v. Delta Outdoor, Inc.</i> , 794 So.2d 220 (Miss. 2001).....	22
<i>Hanson v. Denckla</i> , 357 U.S. 235 (1958).....	35
<i>Hargrave v. Fibreboard Co.</i> , 710 F.2d 1154 (5th Cir. 1983)	17
<i>Horne v. Mobile Area Water & Sewer Sys.</i> , 897 So.2d 972 (Miss. 2004).....	23-25
<i>Hudson v. Parvin</i> , 582 So.2d 403 (Miss. 1991).....	20
<i>Hunt v. Sherrill</i> , 195 Miss. 688 (1943)	21
<i>Int'l Shoe Co. v. Washington Office of Unemployment</i> , 326 U.S. 310 (1945).....	29
<i>Jobe v. ATR Mktg., Inc.</i> , 87 F.3d 751 (5th Cir. 1996)	15, 25-27
<i>Kaplan v. Harco Nat'l Ins. Co.</i> , 716 So.2d 673 (Miss. Ct. App. 1998)	7

TABLE OF AUTHORITIES

	<u>Page</u>
<i>McKethan v. Tex. Farm Bureau</i> , 996 F.2d 734 (5th Cir. 1993)	14
<i>Milltronics, Inc. v. Hawk America, Inc.</i> , Civ. A. No. 3:92-CV-761-X, 1993 WL 719554 (N.D. Tex. Nov. 23, 1993).....	17
<i>Moore Video Distrib., Inc. v. Quest Entm't, Inc.</i> , 823 F.Supp.1332 (S.D. Miss. 1993)	32
<i>Remick v. Manfredy</i> , 238 F.3d 248 (3d Cir. 2001)	15
<i>Rittenhouse v. Mabry</i> , 832 F.2d 1380 (5th Cir. 1987)	26
<i>Roxco, Ltd. v. Harris Specialty Chems., Inc.</i> , 133 F.Supp.2d 911 (S.D. Miss. 2000)	26
<i>Sanderson Farms, Inc. (Prod. Div.) v. Ballard</i> , 917 So.2d 783 (Miss. 2005).....	19, 27
<i>Shaffer v. Heitner</i> , 433 U.S. 186 (1977).....	31
<i>Sorrells v. R & R Custom Coach Works, Inc.</i> , 636 So.2d 668 (Miss. 1994).....	23-25
<i>Temple-Inland Mortgage Corp. v. Jones</i> , 749 So.2d 1161 (Miss. Ct. App. 1999).....	7
<i>Tupelo Mfg. Co. v. Cope Indus.</i> , 2006 WL 924036 (N.D. Miss. Apr. 6, 2006).....	26, 28
<i>United States v. Garcia-Pillado</i> , 898 F.2d 36 (5th Cir. 1990)	14
<i>United States v. Prince</i> , 868 F.2d 1379 (5th Cir. 1989)	17, 31

TABLE OF AUTHORITIES

Page

<i>Walker v. World Ins. Co.</i> , 289 F.Supp.2d 786 (S.D. Miss. 2003)	26
<i>Webb v. Culberson, Heller & Norton</i> , 357 F.Supp. 923 (N.D. Miss. 1973).....	32
<i>Willow Creek Exploration Ltd. v. Tadlock Pipe & Equip., Inc.</i> , 186 F.Supp.2d 675 (S.D. Miss. 2002)	24
<i>World-Wide Volkswagen Corp. v. Woodson</i> , 444 U.S. 286 (1980).....	35-36
<i>Yatham v. Young</i> , 912 So.2d 467 (Miss. 2005).....	28
<i>Yohey v. Collins</i> , 985 F.2d 222 (5th Cir. 1993).....	14

Statutes

Miss. Code Ann. § 13-3-57 (Supp. 1995).....	2, 16
---	-------

Rules

5th Cir. R. 28.2.3	3
S.D. Miss. Uniform Local Rule 7.2(D).....	13

Other Authorities

4A Wright and Miller, Federal Practice & Procedure: Civil 3d § 1069.77 (2004).....	15
8A Thompson on Real Property § 4468 (1963).....	21
Miss. Model Jury Instr.: Civil § 11:3 (1986)	21
Miss. Model Jury Instr.: Civil § 11:42 (1986)	21

TABLE OF AUTHORITIES

Page

Prosser, “The Borderland of Tort and Contract,” <i>in</i> Selected Topics on the Law of Torts (Thomas M. Cooley Lectures, Fourth Series 1953)	20
---	----

COUNTERSTATEMENT OF THE ISSUES

Does the Mississippi long-arm statute permit a Mississippi court to assert personal jurisdiction over foreign defendants who have never done business in Mississippi or entered into contracts with Mississippi residents, if the defendants are alleged to have fraudulently induced plaintiffs, who at the time of the alleged fraud were non-Mississippi residents, to forego business opportunities outside of Mississippi?

PRELIMINARY STATEMENT

The original complaint in this action alleged fraud, equitable estoppel, breach of contract, and punitive damages. However, plaintiffs' sole focus on appeal is their fraud claim. The case was brought in Mississippi state court against three Icelandic defendants by two plaintiffs who, at the time of the events allegedly giving rise to liability, were citizens of New Jersey and Texas, respectively. The plaintiffs do not assert that any of the defendants reside in Mississippi, nor do they assert that the defendants regularly do business there or have ever entered into a contract with a Mississippi resident. The *sole* asserted basis for jurisdiction is the "tort prong" of Mississippi's long-arm statute, which grants Mississippi courts personal jurisdiction over non-resident defendants "who *** commit a tort in whole or in part in this state." Miss. Code Ann. § 13-3-57. However, as the district court held, only one of the torts alleged in the complaint, if it occurred at all, was even arguably committed in Mississippi. And the plaintiffs *voluntarily dismissed* that claim, *with prejudice*, prior to filing this appeal. The remaining fraud claim – i.e., the only claim that is the subject of plaintiffs' instant appeal – simply does not allege any tort that was committed in Mississippi.

In the district court, the plaintiffs asserted that jurisdiction was proper because the defendants had traveled to Mississippi and while there, had allegedly made fraudulent statements to plaintiff Jack Koegel, wrongfully inducing him to

remain employed by Bonus Stores. This Mississippi contact, the plaintiffs argued, was enough to render the defendants' entire course of conduct – the rest of which indisputably took place outside the state – actionable in Mississippi. The district court disagreed and dismissed all of plaintiffs' claims *except* Koegel's claim for "fraudulent inducement to remain employed by Bonus Stores," which was based on the alleged Mississippi contact. R-437; RE-12.¹ After the final judgment, however, and prior to filing this appeal, the plaintiffs voluntarily dismissed this one remaining viable claim, with prejudice.

Now, on appeal, plaintiffs continue to point to these purported Mississippi acts as a basis for establishing jurisdiction over the defendants. But those allegations are *no longer at issue in this case*. All that is left is the plaintiffs' allegation that the defendants' purported out-of-state acts caused "damages" that "manifested" within Mississippi. But such an allegation, even if true, is clearly not enough to satisfy either Mississippi's long-arm statute or federal due process. This court should affirm.

COUNTERSTATEMENT OF FACTS

Baugur Group, HF, is an Icelandic corporation with its principal place of business in Reykjavik, Iceland. R-135. Baugur was named as a defendant in this

¹ Pursuant to 5th Cir. R. 28.2.3, assertions "regarding matter in the record" are supported in this brief "by a reference to the page number of the original record where the matter is found." To assist the panel, and because Plaintiffs have chosen to support record assertions with citations to the Record Excerpts, we also provide parallel citations, where they exist, to the Record Excerpts.

action along with two Icelandic citizens: Jón Ásgeir Jóhannesson, who was Chairman of Baugur's Board of Directors during the period relevant to this appeal and who now serves as its Chief Executive Officer (R-138), and Jóhannes Jónsson, who has been a member of the Board of Directors since 1998 (R-231). The plaintiffs are William Fields, a resident of Texas and a former employee of Wal-Mart Stores, Inc. (R-89; RE-17), and Jack Koegel, who at the time of the alleged fraud was a resident of New Jersey and the Vice-Chairman and Chief Operating Officer of a company called Sel-Leb Marketing (R-89; RE-17).

The amended complaint (which is the relevant pleading for purposes of this appeal) alleges that in 2002, Baugur purchased the assets of a Mississippi-based company called Bonus Stores, Inc., intending to establish it as a U.S. subsidiary of Baugur. R-88; RE-16. Fields and Koegel allege that later that year, representatives of Baugur fraudulently induced each of them to accept positions working for Bonus Stores. The crux of the fraud claim is a series of allegedly false representations about the financial condition of Bonus Stores and about Baugur's plans to provide financial support to that company.

These allegedly fraudulent representations were purportedly made during separate meetings held in London, Reykjavik, and New York between Baugur's representatives and each of the two plaintiffs. Plaintiffs do not allege that any purportedly fraudulent representations were made in Mississippi. Specifically,

Koegel claims that he was interviewed in New York City on September 18, 2002, by Tryggvi Jónsson, who was Baugur's Chief Operating Officer. R-91; RE-19. At this meeting, Koegel alleges, Jónsson claimed that Bonus Stores was a healthy company and that Baugur planned to invest more money in it, to expand its chain of stores, and to support its credit. *Id.* For his part, Fields claims to have met with Tryggvi Jónsson and one of the defendants (Jón Ásgeir Jóhannesson) on two separate occasions in late 2002 – once in London and later in Reykjavik. R-89-90; RE-17-18. Fields alleges that at the London meeting, Jónsson and Jóhannesson made rosy representations about the financial condition of Bonus Stores and their plans to infuse it with cash. *Id.* At the Reykjavik meeting, Fields allegedly was offered the chairmanship of Bonus Stores and a two-year “consulting” contract with Baugur. R-91; RE-19.

Plaintiffs allege that they separately accepted positions with Bonus Stores based on the representations made by Baugur's agents at these three meetings. Koegel accepted an offer to become Bonus Stores's CEO after meeting with Tryggvi Jónsson in New York (R-91; RE 19), and Fields agreed to become Chairman of the Board after his second meeting with non-party Tryggvi Jónsson and Jóhannesson in Reykjavik (*Id.*). According to the complaint, both plaintiffs were to be paid by Bonus Stores (not Baugur), pursuant to contracts each plaintiff signed with that entity. (Koegel was hired as an employee of Bonus Stores, and

Fields was named Chairman of the Board and retained as an independent contractor.) Each plaintiff was also purportedly promised an equity stake in Bonus Stores (5% for Koegel and 3% for Fields) (R-90; RE-18), and Fields was allegedly offered \$500,000 per year for each of the two years he was to spend as a “consultant” to Baugur (R-91; RE 19).

Koegel subsequently left his job in New Jersey and moved (at Bonus Stores’s expense) to Mississippi, in order to assume his new post. R-289; RE-33. Fields remained in Texas and did not move to Mississippi; his only contacts with the state were a few visits there (made on a private plane owned by Bonus Stores) in order to preside over board meetings and to visit individual stores. R-435; RE-39.

The plaintiffs allege that they were defrauded by Baugur’s representatives into accepting their positions with Bonus Stores. Specifically, the complaint alleges that Baugur’s representations regarding the financial health of Bonus Stores and its Icelandic shareholder’s plans to infuse it with cash were false. Within 12 months, Bonus Stores had been “liquidat[ed],” and the plaintiffs had “work[ed] themselves out of jobs.” R-95; RE-23.

The amended complaint also alleged a second set of facts relating to Baugur’s alleged fraud: After Koegel had moved to Mississippi, he was allegedly induced by Baugur to *remain* at the helm of Bonus Stores longer than he otherwise

would have. The complaint alleged that in mid-2003, Koegel was visited in Mississippi by Jon Scheving Thorsteinsson, Baugur's Managing Director of International Investments. Mr. Thorsteinsson, Koegel claimed, "reassured and promised" him that the defendants would "honor their commitments to him regarding his compensation" if he remained in Mississippi and oversaw the liquidation of Bonus Stores. R-95; RE-23. Fields made no similar allegation. As discussed below, these particular allegations by Koegel have been voluntarily dismissed with prejudice and are not part of this appeal.

Procedural History

The two plaintiffs in this case originally brought separate actions in Mississippi state court. Koegel sued all three defendants, alleging fraud, equitable estoppel, and punitive damages.² R-18-27. As damages, he sought to recover both what he believed he might have earned as CEO of Bonus Stores had the business been successful *and* what he might have earned at his prior job had he remained in New Jersey. (These damages were not sought in the alternative.) R-26. Meanwhile, Fields brought a separate suit against Baugur and one of the individual defendants, alleging fraud, equitable estoppel, breach of contract, and punitive

² Of course, "punitive damages" is not a cause of action itself. Such damages can only be recovered upon proof of actual damages stemming from a separate, substantive claim. *Temple-Inland Mortg. Corp. v. Jones*, 749 So.2d 1161, 1169 (Miss. App. 1999) ("[D]espite the language used in the pleadings, a claim for punitive damages is not 'free-standing;' that is, 'if there are no actual damages, then there is no right to sue for punitive damages.'" (quoting *Kaplan v. Harco National Insurance Co.*, 716 So.2d 673, 680 (Miss. Ct. App. 1998))).

damages. R-123-131. Fields sought to recover what he claimed he was owed under his purported “consulting” agreement with Baugur, what he believed he might have earned as Chairman of Bonus Stores had the business been successful. R-130. Both cases were removed separately to the United States District Court for the Southern District of Mississippi and were assigned to separate judges. R-12; R-102.

Soon after removal, the defendants in the Fields action moved to dismiss Fields’s complaint for lack of personal jurisdiction. R-132-33. That complaint, the defendants argued, alleged virtually *no* connection to Mississippi. Fields had not alleged that he had ever lived in Mississippi, and there was no allegation of any fraudulent activities that took place in Mississippi. Rather than respond to this motion and risk certain dismissal, Fields voluntarily dismissed his complaint. R-153. Four days later, Koegel filed an amended complaint that added Fields as a plaintiff and grafted Fields’s recently-withdrawn allegations onto Koegel’s original complaint. R-84-85. (From this point forward, we will refer to the Koegel/Fields complaint as the “Amended Complaint.”)

The defendants moved to dismiss the Amended Complaint, also for lack of personal jurisdiction. R-198. They argued that a Mississippi court could not assert jurisdiction over these foreign defendants under that state’s long-arm statute because the complaint did not allege that they had either (a) breached a contract

with a citizen of Mississippi; (b) regularly done business in Mississippi, or (c) committed a tort in Mississippi. R-215-221.

The plaintiffs responded by arguing at great length that the complaint *did* allege a tort committed in Mississippi – against Koegel. When Mr. Thorsteinsson visited Koegel in Mississippi and reaffirmed Baugur’s supposedly false promises, he converted Baugur’s out-of-state fraud into an in-state fraud. Because the long-arm statute permits jurisdiction when any “part” of a fraud is committed in Mississippi, the plaintiffs argued, Mr. Thorsteinsson’s false statements – made in Mississippi to Koegel, who was then living in Mississippi – were enough to render the defendants’ entire course of conduct amenable to suit in that state. R-271-277. Notably, this argument was based *entirely* on *Koegel’s* allegations; the plaintiffs failed to advance *any argument whatsoever* in support of personal jurisdiction over defendants based on Fields’ claims. Indeed, in the 15 pages of briefing the plaintiffs dedicated to their argument in favor of personal jurisdiction, there was not one mention of Fields’s name. R-269-84.

In response to defendants’ motion, the district court dismissed all but one of Koegel’s and Fields’s claims, concluding that they simply had no connection to Mississippi and therefore could not satisfy the requirements under Mississippi’s long arm statute. The one claim not dismissed by the district court was “Koegel’s claim of fraudulent inducement to remain employed by Bonus Stores,” (R-437), a

claim that had not been pled in Koegel's original complaint but that materialized after and apparently in response to defendants' motion to dismiss for lack of personal jurisdiction. See R-95, ¶ 47.

After the district court's order became final but before the plaintiffs noticed their appeal to this court, Koegel voluntarily dismissed with prejudice (R-629-30) the sole claim that the district court found to be subject to the personal jurisdiction of the Mississippi courts, because, in plaintiffs' own words, the claim was merely a "small remnant" of the original case, too much on the "periphery" to justify its solo existence. R-497.³ Therefore, the allegations regarding Mr. Thorsteinsson's activities within Mississippi after Koegel had begun working for Bonus Stores are no longer part of this case and are not part of this appeal.

SUMMARY OF THE ARGUMENT

Despite Fields's attempt to piggyback his claims (which have no connection to Mississippi) on those of Jack Koegel (whose only Mississippi-based allegations have been dismissed with prejudice), he cannot escape the fact that in the district court, he failed to offer any argument whatsoever for why his allegations support personal jurisdiction over these defendants. Fields's arguments, therefore, in addition to being meritless, have also not been properly preserved for presentation

³ It is not surprising that Koegel had such a low opinion of his "inducement-to-remain" claim. The allegations supporting it did not even appear in his original complaint; they were only added after the defendants had pointed out in their motion to dismiss that the complaint, as originally filed, offered no proper basis for personal jurisdiction.

to this Court. Moreover, plaintiffs have clearly abandoned their contract, equitable estoppel, and punitive damages claims by failing to address them in their brief to this Court.

As for the merits, plaintiffs' arguments on appeal can be summarized quite simply: Even though the fraud and contract claims that remain in the case involve actions that took place entirely outside the state of Mississippi, the plaintiffs *discovered* that they had been injured after they had begun working for a Mississippi-based company. Therefore, the plaintiffs claim they were "injured" inside Mississippi. Thus, "part" of the alleged torts were committed in Mississippi, and the defendants are subject to suit in that state. Plaintiffs offer no argument whatsoever explaining why the defendants should be subject to a contract claim in Mississippi (in fact, they do not even assert that jurisdiction is proper under the contract prong of Mississippi long-arm statute).

The district court correctly rejected the argument plaintiffs advance, which fails for at least two reasons. First, neither of the plaintiffs sustained any tort damages in Mississippi. Their tort claims rest on the contention that while living in *other states*, they were fraudulently induced to take jobs with Bonus Stores, thereby forgoing income and other business opportunities. The closest the plaintiffs come to asserting Mississippi-based damages is to complain that defendants did not follow through on alleged promises to pay them for work that

was to be done in Mississippi. But that claim, if it were valid at all, would sound in contract, not in tort. A broken promise is not a tort, and the plaintiffs do not even assert on this appeal (because they cannot, under the law) that personal jurisdiction would be proper under the “contract” prong of the Mississippi long arm statute, or otherwise assert that a breach of contract (if one occurred) would be enough to grant jurisdiction to a Mississippi court in these circumstances.

Second, even if the defendants *had* suffered some “damage” while working in Mississippi, that clearly would not be enough to satisfy the tort prong of Mississippi’s long-arm statute, which requires that an actual “injury” take place in that state in order for jurisdiction to be proper. A plaintiff who is injured by a tort outside of Mississippi, and then moves to Mississippi and continues to suffer the economic consequence of that tort, cannot establish personal jurisdiction over the alleged tortfeasor under the Mississippi long arm statute.

In any case, were Mississippi to allow its courts to assert jurisdiction over foreign defendants under circumstances like these, such a regime would violate the due process clause of the United States Constitution – both because plaintiffs failed to show “minimum contacts” and because subjecting these Icelandic defendants to personal jurisdiction in Mississippi would be fundamentally unfair. This Court should affirm the district court’s order dismissing the plaintiffs’ complaint.

ARGUMENT

I. PLAINTIFFS HAVE WAIVED OR ABANDONED CERTAIN CLAIMS.

A. Fields has waived all arguments in favor of personal jurisdiction.

Plaintiff Fields's appeal should be dismissed because he failed to make any argument whatsoever before the district court as to why personal jurisdiction was appropriate over defendants with respect to his claims. Fields never lived in Mississippi; his only contacts with the state were occasional visits from his home in Texas. When defendants argued as much to the district court, Fields offered *no response whatsoever*. Indeed, plaintiffs' 15 pages of briefing on personal jurisdiction in the district court did not even contain one mention of Fields's *name*. R-269-84. Defendants highlighted this failure in their reply brief in support of their motion to dismiss to the district court, arguing that Fields's claims had been waived (R-400-01). In the three months between the filing of this reply and oral argument before Chief Judge Wingate, plaintiffs did not so much as even request a sur-reply, or attempt to dispute the waiver charge in any other manner.⁴

⁴ Four months after oral argument (during which the district court had indicated that it was inclined to consider Fields's claims abandoned), Fields submitted a two-page document he dubbed a "supplement" to his response to the motion to dismiss. R-431-32. This "supplement," which was submitted without the required permission of the district court (see S.D. Miss. Uniform Local Rule 7.2(D) (not recognizing a right to a sur-reply); *Dale v. First Am. Nat'l. Bank*, 395 F.Supp.2d 451, 456 n.8 (S.D. Miss. 2005) (granting permission to party to file a sur-reply)), to which the defendants never had an opportunity to respond, and which the court never ultimately permitted, contained a four-sentence argument asserting that jurisdiction was proper with respect to Fields's claims. R-432 ¶ 4. This 11th-hour hail-mary pass is certainly not sufficient to preserve Fields's claims for appeal.

As a result, Fields has waived his claims for personal jurisdiction and failed to preserve error. The case law in this jurisdiction is clear that Fields is prohibited from reviving his claims on appeal. *See, e.g., Evergreen Presbyterian Ministries, Inc. v. Hood*, 235 F.3d 908, 918 (5th Cir. 2000) (failure to brief issue results in abandonment of that issue warranting dismissal) (collecting cases); *McKethan v. Tex. Farm Bureau*, 996 F.2d 734, 739 n.9 (5th Cir. 1993) (same); *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993) (“As a general rule, this Court does not review issues raised for the first time on appeal.”) (citing *United States v. Garcia-Pillado*, 898 F.2d 36, 39 (5th Cir.1990)). Accordingly, this Court should affirm the District Court’s order dismissing Fields’s claims without any further analysis.

B. Plaintiffs have abandoned their equitable estoppel and breach of contract claims.

As stated above, the Amended Complaint contains four separate claims. Both plaintiffs assert claims for fraud, equitable estoppel, and punitive damages; and Fields asserts a claim for breach of contract. In their brief to this Court, plaintiffs assert that the district court erred by failing to assert personal jurisdiction over the fraud claim, but they present *no argument whatsoever* asserting that the court erred in dismissing the three other claims. *See, e.g., Br. 3* (“This is an appeal from the Rule 12(b)(2) order of dismissal of the appellants’ (the plaintiffs below) fraud claims.”). As plaintiffs are no doubt aware, jurisdictional “determination[s] are] claim specific because a conclusion that the District Court has personal

jurisdiction over one of the defendants as to a particular claim asserted by [the plaintiff] does not necessarily mean that it has personal jurisdiction over the same defendant as to [the plaintiff's] other claims.” *Remick v. Manfredy*, 238 F.3d 248, 255 (3d Cir. 2001); see also *Denmark v. Tzimas*, 871 F. Supp. 261 (E.D. La. 1994) (“In a multiple claim action, the court must scrutinize each claim being asserted to make certain that the defendant is within its reach for purposes of adjudicating that claim.”) (internal quotes omitted), *aff’d*, 78 F.3d 582 (5th Cir. 1996); 4A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1069.77 (3d ed. 2004) (“[I]t is important to remember that a plaintiff also must secure personal jurisdiction over a defendant with respect to each claim she asserts.”).

Because plaintiffs have not offered any argument in favor of jurisdiction over any claims other than their fraud claims, they have abandoned those claims on appeal. See, e.g., *Evergreen Presbyterian Ministries, supra*, 235 F.3d at 918.

II. MISSISSIPPI’S LONG-ARM STATUTE DOES NOT AUTHORIZE THE EXERCISE OF PERSONAL JURISDICTION OVER THESE DEFENDANTS.

Plaintiffs acknowledge that in order to establish a *prima facie* case for jurisdiction, they must show two things: (1) that the defendants are subject to suit under Mississippi’s long-arm statute, and (2) that jurisdiction over the defendants would be consistent with due process. See, e.g., *Jobe v. ATR Marketing, Inc.*, 87 F.3d 751, 753 (5th Cir. 1996). They cannot satisfy either of these requirements.

To begin, Mississippi's long-arm statute authorizes jurisdiction over a nonresident defendant under only three circumstances: (1) when the nonresident makes a contract with a Mississippi resident "to be performed in whole or in part" in Mississippi; (2) when the nonresident commits a tort "in whole or in part" in Mississippi; or (3) when the nonresident does business or "perform[s] any character of work or service" in Mississippi. See Miss. Code Ann. § 13-3-57 (Supp. 1995); *Bankplus v. Toyota of New Orleans*, 851 So.2d 439, 443 (Miss. Ct. App. 2003).

The plaintiffs do not assert on appeal that the defendants are subject to suit in Mississippi under the "contract" or "doing business" prongs of the long-arm statute. It is not difficult to see why: The "contract" prong only authorizes jurisdiction when a nonresident defendant makes a contract with a *Mississippi resident*, and neither Fields nor Koegel lived in Mississippi at the time they allegedly contracted to work for Baugur or Bonus Stores. (Indeed, Fields has *never* been a Mississippi resident, and Koegel does not even assert a claim for breach of contract.) As for the "doing business" prong, there are no allegations in the Amended Complaint that Baugur or either of the individual defendants has ever conducted business in Mississippi. Bonus Stores, of course, was based in Mississippi, but as the plaintiffs are no doubt aware, Mississippi courts cannot

exercise jurisdiction over a nonresident corporation merely because it is a shareholder of a company that has done business within the state.⁵

The *only* argument plaintiffs assert on appeal is that the defendants committed a tort, “in part,” in Mississippi. This argument is based on two assertions. First, plaintiffs state that as a result of the defendants’ out-of-state fraud, they “suffered actual economic loss” (Br. 14) while working (and, in Koegel’s case, living) in Mississippi. Next, they assert that because their “damages manifested in Mississippi” (Br. 16), they were therefore “injured” in Mississippi. Because the long-arm statute permits suits against nonresident defendants who commit out-of-state torts that cause injury in Mississippi, the plaintiffs conclude that they have satisfied their burden.

⁵ *Cole v. Alton*, 567 F.Supp. 1081, 1083 (N.D. Miss. 1983) (“[T]hat jurisdiction exists over the corporate entity cannot, without more, confer jurisdiction over the *** shareholders.”); *Milltronics, Inc. v. Hawk America, Inc.*, Civ. A. No. 3:92-CV-761-X, 1993 WL 719554, at *5 (N.D. Tex. Nov. 23, 1993) (“[S]tock ownership, without more, is not a contact subjecting a shareholder to personal jurisdiction.”). Even a formal corporate affiliation, such as a parent/subsidiary relationship, is insufficient to establish personal jurisdiction over the parent through the contacts of the subsidiary. See, e.g., *Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 338 (5th Cir. 1999) (“Courts have long presumed the institutional independence of related corporations...when determining if one corporation’s contacts with a forum can be the basis of a related corporation’s contacts.”); *Hargrave v. Fibreboard Corporation*, 710 F.2d 1154, 1159 (5th Cir. 1983) (“[A] foreign parent corporation is not subject to the jurisdiction of a forum state merely because its subsidiary is present or doing business there; the mere existence of a parent-subsubsidiary relationship is not sufficient to warrant the assertion of jurisdiction over the foreign parent.”). Of course, “this presumption of corporate separateness *** may be overcome by clear evidence *** of one corporation asserting sufficient control to make the other its agent or alter ego.” *Dickson Marine*, 179 F.3d at 338. But “the burden of making a *prima facie* showing of such symbiotic corporate relatedness is on the proponent of the agency/alter ego theory.” *Id.* Needless to say, the plaintiffs here have made no attempt to make such a showing, and they are not permitted to do so in their reply brief. *United States v. Prince*, 868 F.2d 1379, 1386 (5th Cir. 1989) (“This Court will not consider a new claim raised for the first time in an appellate reply brief.”). In any event, such an argument would be completely frivolous.

Both of plaintiffs' assertions fail. First, neither of the plaintiffs has alleged any "damages" suffered in Mississippi. Second, even if the plaintiffs *did* suffer damages while living in (or passing through) Mississippi, that is not the same as being "injured" in Mississippi for purposes of the long-arm statute and, therefore, there is no personal jurisdiction over defendants under that statute.

A. There were no damages in Mississippi.

Contrary to the plaintiffs' elastic characterizations on appeal, the Amended Complaint does not allege that either of the defendants suffered any tort damages in Mississippi. The appellants are somewhat differently situated for purposes of this analysis, and we therefore consider them separately:

1. *Fields*

To begin, Fields does not allege that he ever even moved to Mississippi. At all times before, during, and after his relationship with Bonus Stores, Fields lived in Texas. The only "damage" he claims to have suffered is the loss of both his expected income from his "consulting" contract with Baugur and the profits he believes he would have earned from selling the 3% equity stake in Bonus Stores he claims he was promised by Baugur employees. As we explain below (at 20-22), such "benefit of the bargain" damages are not even available in tort cases. One way or another, however, there is no question that these purportedly lost profits, had they ever been earned, would have been delivered to Fields at his home in

Texas. There is no allegation that Fields maintained an office in Mississippi or kept a bank account there, let alone lived there. Had the alleged fraud not occurred, and had Fields earned all the money to which he believes he was entitled, he would have been enriched in *Texas*, not in Mississippi. Accordingly, Fields's claimed damages, even if they are recoverable in tort (which they are not), certainly did not "manifest" in Mississippi, as he argues.

2. *Koegel*

Koegel likewise can allege no Mississippi-based damages. Koegel claims to have been injured when, as a result of the defendants' fraudulent promises (made in New York, when Koegel was living in New Jersey), he was "induced to leave a highly successful career with his previous employer, leaving his salary and stock options behind." R-95-96; RE-23-24. His claimed damages from this purported fraud are the "value of any and all wages and stock options that would have been earned at [his] previous place of employment." R-99; RE-27. These are economic losses that Koegel allegedly suffered in New Jersey, while he was living in that state, as a result of representations purportedly made at a meeting in New York. They have nothing to do with Mississippi. As we discuss *infra* (at 27-28), Mississippi law is clear that a fraudulent inducement takes place at the time when the plaintiff is induced to enter into the contract. See, e.g., *Sanderson Farms, Inc. (Prod. Div.) v. Ballard*, 917 So. 2d 783, 789 (Miss. 2005) (in case involving claim

that defendant “fraudulently induced [plaintiffs] into [a] contract,” holding that “[a] fraud claim ‘accrues upon the completion of the sale induced by such false representation, or upon the consummation of the fraud.’”) (quoting *Dunn v. Dent*, 169 Miss. 574 (1934)).

Like Fields, Koegel also claims to have been “damaged” when the profits he hoped to earn from the Bonus Stores venture never materialized. Specifically, the Amended Complaint seeks compensation for the income Koegel claims he was due under a contract he executed with Bonus Stores (not with Baugur) and for the profits he hoped to earn from the 5% equity stake he claims he was promised in Bonus Stores. Koegel claims that because he was living in Mississippi, albeit briefly, during a portion of his employment with Bonus Stores, these sums would have been paid to him in that state. Koegel, however, cannot use those damages as a basis for personal jurisdiction because those damages would only be recoverable in an action for breach of contract and are *not* recoverable in an action for fraud. See *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 874 n.9 (1986) (“[T]ort damages generally compensate the plaintiff for loss and return him to the position he occupied before the injury.”) (citing, e.g., Prosser, *The Borderland of Tort and Contract*, in *Selected Topics on the Law of Torts* 380, 424-427 (Thomas M. Cooley Lectures, Fourth Series 1953)); *Hudson v. Parvin*, 582 So. 2d 403, 410 (Miss. 1991), *overruled on other grounds*, *Whittington v. Mason*, 905 So.2d 1261

(Miss. 2005) (distinguishing tort damages from contract damages, which are “intended to give the injured parties the benefit of their bargain by awarding a sum of money that would, to the extent possible, put them in the same position as they would have been if the contract had been performed”); *compare* Miss. Model Jury Instr. (Civil) § 11.3 (defining “Actual Economic Damages,” which would be used in a fraud case, as “damages arising from *** loss of income, *** loss of employment, loss of business or employment opportunities, and other objectively verifiable monetary losses”) *with* *Id.* § 11.42 (defining “Breach of Contract – Actual Damages” as “damages in an amount that will put [plaintiff] in as good a position as he/she would have been had [defendant] not failed to fulfill his/her part of the contract.”).⁶ Koegel does not assert a breach of contract claim against Baugur in this action and does not seek to assert personal jurisdiction under the

⁶ There is a line of Mississippi cases that make a type of “benefit of the bargain” damages available to plaintiffs who assert that they have been defrauded when purchasing real property. See, e.g., *Browder v. Williams*, 765 So. 2d 1281 (Miss. 2000); *Davidson v. Rogers*, 431 So. 2d 483, 485 (Miss. 1983); *Hunt v. Sherrill*, 15 So. 2d 426 (1943). But those cases involved plaintiffs who, unlike the plaintiffs here, alleged valid *contracts* with the defendants and chose to *affirm* those contracts and seek to recover contractual damages. See, e.g., *Browder*, 765 So. 2d at 1285 (“One induced to purchase land for fraudulent misrepresentation may either *** affirm the contract, and sue for damages, or disaffirm it and be reinstated in the position in which he was before it was consummated.”) (quoting 8A Thompson on Real Property § 4468, at 387-88 (1963)); *Id.* (“This Court said much the same thing in *Laurel Auto Supply Co. v. Sumrall*, 184 Miss. 88, 185 So. 566 (1939). We held that a buyer who has been deceived by material false representations in the procurement of a contract may elect to rescind and to be restored to the position he occupied at the time of sale.”). Neither Fields nor Koegel has alleged a Mississippi-based contract with any of the defendants here: Koegel does not allege any breach of contract at all, and Fields, as discussed above (at 11-12), does not allege that his contract with the defendants had any connection to Mississippi. In any case, this case certainly has nothing to do with the sale of real property.

“contract” prong of the Mississippi long-arm statute.⁷ In short, despite his legally defective allegations to the contrary, none of Koegel’s remaining claims (for injuries suffered when he was induced to leave New Jersey and move to Mississippi) involve damages suffered in Mississippi.

The Amended Complaint does include an allegation that Koegel was damaged when he continued working for Bonus Stores in Mississippi after receiving assurances that he would be fairly compensated. The district court found that *that* allegation of fraud *did* subject the defendants to personal jurisdiction in Mississippi *with respect to that allegation only*. But, as stated above, Koegel abandoned that claim by voluntarily dismissing it with prejudice after the district court’s decision. Now, on appeal, plaintiffs have attempted to conflate the allegations remaining in the case with those that have been dismissed.⁸ But if the references to injuries no longer in the case are stripped away, as they must be, there are simply no allegations of tort damages sustained in Mississippi.

⁷ In addition, most of the lost profit damages he seeks are so speculative they would not be recoverable even in a contract action. See, e.g., *Frierson v. Delta Outdoor, Inc.*, 794 So. 2d 220, 222 (Miss. 2001) (“[A]lthough a valid contract existed, the damages awarded were too speculative based upon the evidence presented at trial.”). As a typical example of these wholly speculative damages, Koegel alleges that he “could have reasonably expected to continue such employment and compensation for a minimum period of ten years.” RE 12.

⁸ See, e.g., Br. 5-6 (“After Koegel moved to Mississippi, defendant Jóhannes Jónsson visited Koegel in Mississippi and re-affirmed that Baugur would honor all of the commitments that Baugur had authorized Tryggvi Jónsson to make to Koegel and Fields. On separate occasions by telephone, defendant Jón Asgeir Jóhannesson also stated to Koegel that Baugur would honor its commitments to him.”).

B. Damage sustained (or discovered) in Mississippi is legally distinct from injury that takes place in Mississippi.

In any case, even if Koegel or Fields *were* able to establish, as they claim, that their “damages manifested in Mississippi” (Br. 16), that would not be enough to transform the defendants’ alleged out-of-state activity into a tort committed, even “in part,” in Mississippi.

With respect to this issue, plaintiffs argue (at 13 n.3) that defendants have ignored Mississippi Supreme Court cases which, in this diversity action, this Court is bound to follow because Mississippi courts are the “final arbiter[s]” of Mississippi law. We agree, of course, that Mississippi courts are the authoritative sources for questions of Mississippi law. However, the Mississippi decisions discussed by plaintiffs do not support personal jurisdiction in this case, and they are perfectly consistent with the federal and state decisions we cited below and discuss in this brief.

The plaintiffs claim that *Horne v. Mobile Area Water & Sewer System*, 897 So.2d 972, 977 (Miss. 2004) and *Sorrells v. R & R Custom Coach Works, Inc.*, 636 So.2d 668, 672 (Miss. 1994) stand for the proposition that damages felt in Mississippi are enough to allow a Mississippi court to assert personal jurisdiction over a nonresident defendant under the long-arm statute, even if the defendant’s tortious conduct occurred outside the state. See Br. 12-16. But that is not what those cases hold. *Horne* and *Sorrells* stand for the uncontroversial principle that

jurisdiction under the “tort” prong of the long-arm statute is proper when out-of-state behavior causes damage to *property located in Mississippi*. In *Horne*, for example, the defendants were municipal agencies located in Mobile, Alabama, approximately 12 miles from the Mississippi border. The plaintiffs claimed that the defendants negligently released a large amount of water from a reservoir into a river that crossed the state line. The large release caused a flood in Mississippi, which damaged the plaintiffs’ homes. The court held that jurisdiction was proper, because the injury took place inside Mississippi. Similarly, in *Sorrells*, the plaintiff was a Mississippi resident who purchased a motor home from a Nevada manufacturer and drove it home to Mississippi. Back in Mississippi, the vehicle suffered defects, and plaintiff sued for negligent manufacture. The Mississippi Supreme Court held that jurisdiction was proper under the long-arm statute (but nonetheless prohibited by federal due process) because the defendants’ actions had allegedly injured property that was owned by Mississippi residents and *located within Mississippi*. *Sorrells*, 636 So.2d at 672. *See also Willow Creek Exploration Ltd. v. Tadlock Pipe & Equipment Inc.*, 186 F.Supp.2d 675, 682-83 (S.D. Miss. 2002) (“[t]he court [in *Sorrells*] concluded that the tort prong of Mississippi’s long arm statute was satisfied because the plaintiffs’ motor home malfunctioned in Mississippi.”).

Thus, these cases simply do not support the plaintiffs' position. Neither Koegel nor Fields were "injured" while in Mississippi, and the plaintiffs certainly do not claim injury to any property located in Mississippi. At best, their complaint alleges that they *discovered* that they had been damaged while they were living in (or in Fields's case, passing through) Mississippi. That is not enough to satisfy the long-arm statute.

As plaintiffs recognize (see Br. 17-18), this court has previously addressed the question whether damages felt in Mississippi are the same as an "injury" suffered in Mississippi for purposes of that state's long-arm statute. In *Jobe v. ATR Marketing, Inc.*, 87 F.3d 751 (5th Cir. 1996), this court held that

[i]n determining where the injury occurred for jurisdictional purposes, actual injury must be distinguished from its resultant consequences, such as pain and suffering, economic effects or other collateral consequences that often stem from the actual injury.

Id. at 753. "Injury," this Court explained, is "the invasion of any legally protected interest of another," whereas "damage" is "the harm, detriment or loss sustained by reason of an injury." *Id.* at 754 n.2. When an *injury* takes place in Mississippi, as it did in *Horne* and *Sorrells*, jurisdiction is proper under the long-arm statute, even if the tortious conduct occurred in another state. But when the injury *and* the tortious conduct take place outside of Mississippi, the mere suffering of consequential damages while located in Mississippi is insufficient to satisfy the

statute. See, e.g., *Rittenhouse v. Mabry*, 832 F.2d 1380, 1384 (5th Cir. 1987) (under the tort prong of the long-arm statute, “[a] tort occurs when and where the actual injury *** takes place, and not at the place of the economic consequences of that injury.”) (citing *Estate of Portnoy v. Cessna Aircraft Co.*, 730 F.2d 286, 290 (5th Cir. 1984)); *BankPlus v. Toyota of New Orleans*, 851 So. 2d 439, 443 (Miss. Ct. App. 2003) (“A tort is considered to have been committed in part in Mississippi where the injury results in the state. It must be an actual injury, not economic collateral consequences.”); *Tupelo Mfg. Co. v. Cope Indus.*, 2006 WL 924036, *3 (N.D. Miss. Apr. 6, 2006) (“In the case at bar, the injury flowing from the alleged tort occurred in North Carolina – the location of non-payment – and not in Mississippi. The alleged economic damages may have occurred in Mississippi, but the location of the injury – not the damages flowing therefrom – is the test for personal jurisdiction in this state.”); *Walker v. World Ins. Co.*, 289 F.Supp.2d 786, 789 (S.D.Miss. 2003) (“[p]laintiffs may not rely on the location of the resulting *consequence* of the tort to establish personal jurisdiction”) (emphasis in original); *Roxco, Ltd. v. Harris Specialty Chems., Inc.*, 133 F. Supp. 2d 911, 914 (S.D. Miss. 2000) (“Since [plaintiff] is merely describing the alleged consequences of an injury, under the dictates of *Jobe v. ATR Marketing, Inc.*, [plaintiff] cannot

establish personal jurisdiction under the tort prong of Mississippi’s Long-Arm Statute.”).⁹

The plaintiffs address this argument in their appellate brief by stating that “an injury cannot occur in a vacuum without damage.” Br. 18. How could the plaintiffs have been injured prior to taking over Bonus Stores when “neither had suffered any damages at that time”? The answer, of course, is that Mississippi law is clear that the tort of fraudulent inducement is complete at the time of the inducement. *Sanderson Farms, Inc. (Prod. Div.) v. Ballard*, 917 So. 2d 783, 789 (Miss. 2005) (in case involving claim that defendant “fraudulently induced [plaintiffs] into [a] contract,” holding that “[a] fraud claim ‘accrues upon the completion of the sale induced by such false representation, or upon the consummation of the fraud.’”) (quoting *Dunn v. Dent*, 169 Miss. 574, 153 So. 798 (1934)). As for the “damages” suffered as a result of the alleged out-of-state inducement, the amended complaint asserts that Koegel lost his New Jersey job and that Fields lost income he allegedly would have earned while living in Texas.

⁹ Plaintiffs attempt to distinguish *Jobe* by arguing that the injury in that case “did not occur when the original agreement to purchase the planes was consummated, but when defendants failed to follow through and the plaintiff actually suffered damages.” Br. 18. This is simply wrong. As this Court expressly stated, the “injury occurred and was completed *** when defendant ATR sold a fleet of approximately fifty-five aircraft to Continental with the *alleged intent* of breaching its agreement for the sale of six aircraft to ANO.” *Jobe*, 87 F.3d at 754 (emphasis added). The situation here is the same: plaintiffs’ purported injury occurred and was completed when defendants allegedly promised plaintiffs that they would provide financial support to Bonus Stores with the alleged intent of breaching that promise. These acts, of course, as discussed *supra*, all occurred outside the State of Mississippi.

Personal jurisdiction is not permitted under the Mississippi long arm statute when an injury occurs outside of Mississippi, even if the injured party then moves to Mississippi and continues to accumulate either economic or physical damages. See, e.g., *Yatham v. Young*, 912 So. 2d 467 (Miss. 2005) (jurisdiction improper under tort prong of long-arm statute when defendant, an Illinois resident, caused a car accident in Illinois that injured five Mississippi residents); *Tupelo Mfg. Co. v. Cope Indus.*, 2006 WL 924036, *3 (N.D. Miss. Apr. 6, 2006) (“[T]he injury flowing from the alleged tort occurred in North Carolina – the location of non-payment -- and not in Mississippi. The alleged economic damages may have occurred in Mississippi, but the location of the injury -- not the damages flowing therefrom – is the test for personal jurisdiction in this state.”). To hold otherwise would allow any plaintiff who had been injured by a tort in another state to then subsequently move to Mississippi and allege personal jurisdiction on the grounds that damages were accruing. No court in Mississippi or the Fifth Circuit has ever permitted such a suit to proceed.

III. THE DUE PROCESS CLAUSE FORBIDS THE EXERCISE OF PERSONAL JURISDICTION IN THIS CASE.

Finally, even if the Mississippi long arm statute purported to authorize jurisdiction over the defendants here, that result would nonetheless be precluded as a matter of federal constitutional law. “The exercise of personal jurisdiction over a nonresident defendant comports with due process principles only when two

requirements are met.” *Allred v. Moore & Peterson*, 117 F.3d 278, 285 (5th Cir. 1997). “First, the nonresident defendant must have purposefully availed himself of the benefits and protections of the forum state by establishing ‘minimum contacts’ with that forum state.” *Id.* (internal citations omitted). “Second, the exercise of personal jurisdiction over the nonresident defendant must not offend traditional notions of fair play and substantial justice.” *Id.* (internal citations omitted). Based on the allegations in the Amended Complaint, the due process clause would bar any attempt by Mississippi courts to assert jurisdiction over these defendants.

A. No defendant had “minimum contacts” with Mississippi.

The due process clause of the fourteenth amendment to the United States Constitution permits a defendant to be sued in a state only if it has established minimum contacts there and has “purposefully avail[ed] itself of the privilege of conducting activities within the forum State.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) (internal quotes omitted); see also *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). The Due Process Clause precludes the assertion of jurisdiction over the defendants in this case, because it “does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties or relations.” *International Shoe*, 326 U.S. at 319.

Plaintiffs clearly have not shown that Baegur ever established minimum contacts with Mississippi. Baegur is an Icelandic corporation with its principal place of business in Iceland. R-135. Baegur has never conducted any business in Mississippi, and it is not authorized to do so; it has not transacted or solicited any business in Mississippi, or performed any work or service there. It has never had offices or employees in Mississippi, it has never owned or leased property there, it has never had any bank accounts or phone numbers there, and it has never derived any revenue from Mississippi. R-135-36. All of these facts are undisputed. There is therefore no Constitutional basis for the assertion of personal jurisdiction over Baegur in Mississippi.

Appellants appear to attempt to establish minimum contacts for Baegur via the Mississippi contacts of Bonus stores, a subsidiary that was only partly owned by Baegur. R-136. That attempt fails. As this Court has clearly held, a plaintiff may not establish personal jurisdiction over a corporate defendant by attributing to that defendant contacts that an *affiliated* company may have with the forum state, unless the plaintiff establishes that the affiliate is the alter ego or agent of the defendant. *See Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 338 (5th Cir. 1999) (“Courts have long presumed the institutional independence of related corporations *** when determining if one corporation’s contacts with a forum can be the basis of a related corporation’s contacts.” In order to “overcome” this

presumption, plaintiffs “must [provide] evidence of one corporation asserting sufficient control to make the other its agent or alter ego.”). *See also Freudensprung v. Offshore Tech. Servs.*, 379 F.3d 327, 346 (5th Cir. 2004) (“[T]he proper exercise of personal jurisdiction over a nonresident corporation may not be based solely upon the contacts with the forum state of another corporate entity with which the defendant may be affiliated.”). Appellants do not attempt to make such a showing, and they could not succeed if they tried, as there is nothing in the record that remotely supports it. Moreover, having failed to make this argument in their opening brief, they are prohibited from doing so in reply. *See United States v. Prince*, 868 F.2d 1379, 1386 (5th Cir. 1989) (cited *supra* at n.5).¹⁰

The jurisdictional case against the individual defendants is even more strained. Both of the individual defendants are citizens and residents of Iceland. See R-138, 231. Neither of the individual defendants has ever owned or leased any real, personal, or tangible property in Mississippi; maintained a bank account or telephone number in Mississippi; transacted or solicited any personal business in

¹⁰ At pages 21-22 of their brief, plaintiffs list a number of purported contacts between Baugur and Mississippi which they claim support their due process argument. However, those contacts have nothing to do with the alleged fraud and, therefore, because plaintiffs are making a case for “specific” as opposed to “general” jurisdiction, they are utterly irrelevant to the due process analysis. *See Dickson Marine Inc. v. Panalpina, Inc.*, 179 F.3d 331, 337 (5th Cir. 1999) (“[W]hen the litigation ‘arises out of’ a defendant’s contacts with the forum, a ‘relationship among the defendant, the forum, **and the litigation**’ is the essential foundation of specific jurisdiction.”) (quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)) (emphasis added).

Mississippi; or performed any work or services there. See R-138, 231. All of these facts are undisputed.

The assertion of jurisdiction over the individual defendants is so far fetched that plaintiffs do not even bother to assert anywhere in their brief that either defendant had the required minimum contacts with Mississippi. They do, however, proffer a list of Baugur's purported contacts with the forum (Br. 21-22), in which they mention the individual defendants' ownership interest in the corporation. Apparently, this is an effort to establish jurisdiction over the individual corporate officers through the contacts of the corporation. But jurisdiction over a corporate defendant is not sufficient to confer jurisdiction over its officers. *Moore Video Distrib., Inc. v. Quest Entertainment, Inc.*, 823 F. Supp. 1332, 1340 (S.D. Miss. 1993) ("The existence of jurisdiction, pursuant to the Mississippi long-arm statute, over a corporate defendant does not, in and of itself, confer jurisdiction over the corporation's officers. 'Some independent, individualized contacts must exist between the nonresident defendants and the forum.'") (quoting *Cole v. Alton*, 567 F. Supp. 1081, 1083 (N.D. Miss. 1983); *Webb v. Culberson, Heller & Norton*, 357 F. Supp. 923, 925 (N.D. Miss. 1973)). In any case, as discussed above, the court does not have jurisdiction over the corporate defendant in the first place.

Moreover, the individual defendants do not have sufficient connection to either plaintiff's claims in this case. Neither of the individual defendants ever negotiated with Koegel in any way. See R-139, 232. Indeed, nowhere in the complaint does Koegel assert the legal conclusion that either of the individual defendants has had minimum contacts with Mississippi, let alone any *facts* supporting that notion.

Fields's claims are similarly deficient. Fields makes no allegations at all against Jóhannes Jónsson; indeed, Jónsson was not even named as a defendant by Fields in his original (separate) complaint. Furthermore, the only actions Jón Ásgeir Jóhannesson is alleged to have performed were certain employment negotiations with Fields, and those were conducted outside of the United States in Jóhannesson's capacity as Chairman of Baugur's board of directors. See R-139. Like Koegel, Fields does not even assert in the complaint that either of the individual defendants have minimum contacts with Mississippi.

This Court routinely forbids the exercise of jurisdiction over defendants who have had far more extensive contact with the forum than defendants here. *See, e.g., Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327 (5th Cir. 2004). Indeed, this Court recently confirmed that it "has repeatedly held that the combination of mailing payments to the forum state, engaging in communications related to the execution and performance of the contract, and the existence of a

contract between the nonresident defendant and a resident of the forum are insufficient to establish the minimum contacts necessary to support the exercise of specific personal jurisdiction over the nonresident defendant.” *Id.* at 344. If those contacts are not adequate, defendants’ contacts here are not even close to being sufficient.

On appeal, the plaintiffs cite *Calder v. Jones*, 465 U.S. 783 (1984) for the proposition that a single, out-of-state tortious act can be sufficient to establish minimum contacts, if that act caused injury within the forum state. But in *Calder*, an injury actually *occurred* in the forum state: The claim was based on alleged libel in hundreds of magazines that were delivered into the forum state, at which point the injury occurred. *Id.* at 789-790 (defendants “knew that the brunt of [plaintiff’s] injury would be felt by [her] in the State in which she lives and works”). Here, for the reasons discussed *supra*, there was no injury in Mississippi. Rather, the injuries occurred in New Jersey and Texas – the States where the plaintiffs would have earned income had they not been subject to the purported fraud.

In addition, as this Court has made clear, the *Calder* “effects” test “is not a substitute for a nonresident’s minimum contacts that demonstrate purposeful availment of the laws of the forum state before being subject to suit there.” *Allred v. Moore & Peterson*, 117 F.3d 278, 286 (5th Cir. 1997). Indeed, to establish

minimum contacts, “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) (emphasis added); *see also Burger King v. Rudzewicz*, 471 U.S. 462, 471-475 (1985). In this case, that necessary element is lacking. The Amended Complaint fails to allege any act by which any defendant purposefully availed itself of the privilege of conducting activities within Mississippi, thus invoking the benefits and protections of Mississippi’s laws. In the absence of such purposeful availment, due process will not permit defendants to be sued here.

B. It would be fundamentally unfair to subject the defendants to suit in Mississippi.

Even if a defendant has established minimum contacts with the forum, the Due Process Clause will nevertheless forbid assertion of jurisdiction over that defendant if doing so would offend traditional notions of fair play and substantial justice. *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987). In evaluating the fairness of an assertion of jurisdiction, courts evaluate factors such as (1) the burden on the nonresident defendant, (2) the interests of the forum state, (3) the plaintiff’s interest in securing relief, (4) the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and (5) fundamental social policies. *See, e.g., World-Wide Volkswagen Corp. v. Woodson*,

444 U.S. 286, 288-290 (1980); *Allred*, 117 F.3d at 286 n.7. The Due Process clause mandates that courts refuse personal jurisdiction when the assertion of such jurisdiction over defendant would be fundamentally unfair, regardless of whether the plaintiff has established minimum contacts. *See Asahi*, 480 U.S. at 116 (Brennan, J., concurring) (case was one where the “‘minimum requirements inherent in the concept of “fair play and substantial justice” . . . defeat the reasonableness of jurisdiction even [though] the defendant has purposefully engaged in forum activities.’”) (*quoting Burger King*, 471 U.S. at 477-478).

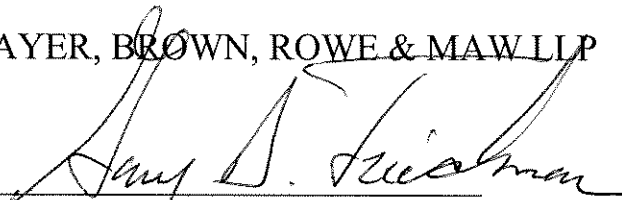
No complex Constitutional analysis is required in this case. Plaintiffs are asking the Court to subject an Icelandic corporation and individual Icelandic citizens to the massive expense and inconvenience of defending a lawsuit in Mississippi when none of the defendants, nor any aspect of the plaintiffs’ alleged causes of action, has anything to do with Mississippi. Indeed, even the *plaintiffs* no longer live in the forum state. In sum, this case presents a paradigmatic example of the type of fundamental unfairness the Due Process Clause is designed to prohibit.

CONCLUSION

The district court's order should be affirmed.

Dated: New York, New York
October 27, 2006

MAYER, BROWN, ROWE & MAW LLP



Gary D. Friedman

Jonathan A. Shiffman

Scott A. Chesin

Jonathan Sokotch

1675 Broadway

New York, N.Y. 10019

(212) 506-2500

Robert M. Frey

BUTLER, SNOW, O'MARA,

STEVENS & CANNADA

P.O. Box 22567

Jackson, MS 39225-2567

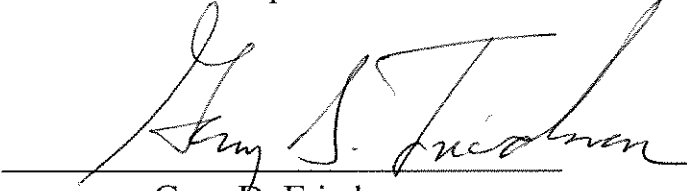
(601) 948-5711

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 9059 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using MS Word in Times New Roman 14-point font. Footnotes are in Times New Roman 12-point font.



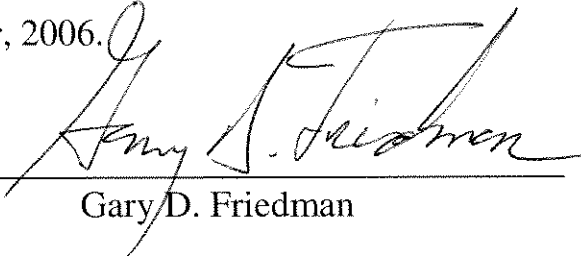
Gary D. Friedman

CERTIFICATE OF SERVICE

I, Gary D. Friedman, one of the attorneys for Defendants-Appellees, do hereby certify that I have this day served a true and correct copy of the foregoing Brief for Defendants-Appellees, in hardcopy and electronic form, as well as the Record on Appeal for the foregoing litigation, by overnight mail, postage prepaid, on the following counsel of record:

Alan Windham
SMITH, REEVES & YARBOROUGH, PLLC
6360 I-55 North, Suite 201
Jackson, MS 39211

So certified, this 27th day of October, 2006.



Gary D. Friedman