No. 11-965

IN THE

Supreme Court of the United States

DAIMLERCHRYSLER AG,

***Petitioner*,**

v.

BARBARA BAUMAN, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED[1]

Amicus believes that the Question Presented by this case is more appropriately stated as follows:

When determining whether a court has personal jurisdiction over a corporation, does Due Process permit a court to consider the activities of the corporation's 100% owned subsidiary in the state in which the court is located, so that the subsidiary's activities are treated as if they were the activities of an unincorporated division of the parent corporation for purposes of personal jurisdiction?

[1] No person other than amicus and its counsel authored or made a monetary contribution to the preparation or submission of this brief.

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INTEREST OF AMICUS

This brief is filed with the blanket consent of all parties.

The American Association for Justice (AAJ) is a non-profit membership organization comprised of lawyers who represent plaintiffs, mainly in personal injury cases, often cases of product liability based on defects in the design and/or manufacture of potentially dangerous products. Some of those products are manufactured in the United States, but often not in the State in which the harm to the plaintiff took place. Other products are made outside the United States and sold in this country, where the injury has occurred. In many cases those products are sold through a separate company that acts as a distributor for the manufacturer, and in some of those cases, as is the case here, the distributor is a wholly-owned subsidiary of the manufacturer.

In most of the product liability cases handled by AAJ members, personal jurisdiction is based on specific, rather than general jurisdiction. This case is framed by petitioner as one involving only general jurisdiction, and even then only one where the defendant is a non-US company and the conduct at issue occurred abroad. But the principal basis on which petitioner asks this Court to hold that there is no personal jurisdiction in this case is that the courts must disregard the activities of a wholly-owned subsidiary in the forum state in assessing whether the parent can be sued there. That principle, if accepted in this case involving only general jurisdiction over a foreign parent, would enable a parent – US or foreign – regardless of whether jurisdiction was general or specific, to avoid suit in a

given state simply by conducting business through a wholly-owned subsidiary. AAJ is filing this brief because that result would cause serious harm to the clients of its members.

INTRODUCTION & SUMMARY OF ARGUMENT

1. Although amicus agrees that the District Court has personal jurisdiction over respondents' claims against petitioner, there is now a question of subject matter jurisdiction that must be addressed either in this Court or on remand. Respondents' complaint included claims under the Alien Tort Statute and the Torture Victims Act, as well as claims arising under International Law and the laws of California. JA 49-50. Because those non-federal claims are only between aliens on one side and a non-US corporation on the other, there is no basis for original alienage jurisdiction under 28 U.S.C. § 1332.

Petitioner DaimlerChrsyler AG ("Daimler") contends that respondents' claims under the two federal statutes have been extinguished by recent decisions of this Court. Pet. Br. 3, n.1. It also asserts that subject matter jurisdiction is still proper, based on supplementary jurisdiction under 28 U.S.C. § 1367. *Id.* Amicus agrees that the non-federal claims were properly before the District Court based on section 1367(a). However, if the federal claims are in fact no longer properly in court – an issue on which it takes no position – then section 1367(c) must be considered to determine whether the non-federal claims should be retained in federal court despite the lack of any remaining federal claims. Questions relating to section 1367(c) are determined in the first instance by district judges exercising their discretion

under all the facts of each case, and amicus believes that the application of section 1367 should be resolved in that manner.

In deciding whether to reach the merits of the personal jurisdiction claim, there is another factor that the Court should consider. When this case was filed, there were two federal question claims in it, and so a motion to dismiss on the ground of forum non conveniens would not have been proper. But if those claims are no longer present, such a motion would now be proper. Moreover, because forum non conveniens is a non-constitutional basis for dismissing this case, it should be preferred to petitioner's request that these claims cannot be adjudicated in California because to do so would violate the Due Process Clause of the Constitution[1]

2. To establish petitioner's connection with California, respondents rely on the fact that petitioner's wholly-owned subsidiary, Mercedes-Benz USA ("MBUSA") does substantial business there, and petitioner does not dispute that MBUSA is subject to suits based on general jurisdiction in California. The principal issue is whether the activities of MBUSA in California can be properly attributed to Daimler in determining whether Daimler is subject to suit in that state.[2]

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[1] For simplicity, and because this case was filed in California, this brief will refer to examples of other cases as if they were all filed in California and that the activities of the defendant's wholly-owned subsidiaries that are being attributed to it for personal jurisdiction purposes, were conducted in California.

[2] Further support for respondents can be found in the Addendum to this brief, which re-produces a letter from Mercedes-Benz dated September 12, 2012, to the California Energy Commission that was on the Commission's public website, http://www.energy.ca.gov/altfuels/notices/draft_

As presented by petitioner, the case involves only issues of general personal jurisdiction and only claims against a non-US corporation. But if this Court accepts Daimler's view of the proper treatment of the relation for personal jurisdiction purposes between a parent and its 100% owned, and hence by definition 100% controlled, subsidiary, the impact will extend to cases of specific jurisdiction and could be used to insulate US, as well as foreign, corporate parents from suits in jurisdictions in which they are doing business through their wholly owned subsidiaries, even from claims by US citizens of that jurisdiction.

Petitioner's defense is based on two propositions that are not disputed: MBUSA is a separate legal entity from petitioner, and all formalities regarding the separation of operations of MBUSA and petitioner have been observed. From them, petitioner argues that the courts must disregard MBUSA's activities in California in determining whether the California courts have personal jurisdiction over petitioner. That is proper, according to petitioner, even though every car that petitioner sells in the United States is initially sold to its subsidiary MBUSA, and then resold to dealers throughout the United States. Amicus and respondents, however, argue that the Court should, for purposes of determining personal jurisdiction, disregard the separate incorporation of wholly-owned

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hydrogen_pon/comments/2012-09-18_Mercedes_Benz_Research_and_Development_North_America_Comment_TN-67179.pdf, along with 70 other items that involve Mercedes-Benz and the Commission, apparently through MBUSA. The September 12 letter shows that it comes from the company's offices in Palo Alto California and that it designates itself as "A Daimler Company."

subsidiaries, such as MBUSA, and treat the two entities as if they were the equivalent of General Motors Corp. and its unincorporated Chevrolet Division.

Petitioner further argues that the corporate veil between parent and subsidiary cannot be pierced in this case and that, therefore, neither the alter ego nor agency theories permits it to be sued in California. The difficulty with that argument is that piercing the corporate veil is a question of substantive law used to determine whether one company in a parent-subsidiary relationship is substantively liable for the conduct of another, which is not the issue in this Court. Respondents do not seek to hold MBUSA liable for the actions of Daimler or to collect a judgment obtained against Daimler from MBUSA's assets, the classic uses of piercing the corporate veil. Rather, this petition raises the question of whether separate incorporation shields a parent from being sued in a jurisdiction in which its activities are carried out through a subsidiary that it completely controls.

If petitioner's view prevails, non-US corporations can avoid being sued in this country by doing all their business through a wholly-owned subsidiary, an arrangement over which they have total control and over which those whom they injure have no input or even knowledge. To allow such wholesale avoidance of personal jurisdiction would undermine the minimum contacts test as it has evolved since *International Shoe Co. v. Washington,* 326 U.S. 310 (1945) and result in great unfairness to injured persons and a significant reduction in corporate accountability. By contrast, treating the conduct of wholly-owned subsidiaries as the conduct of the parent will lead to greater predictability and

will avoid the extensive discovery that will inevitably flow from petitioner's understanding of personal jurisdiction that depends on whether the formalities of separate incorporation have been followed in each case by parent and subsidiary.

Petitioner attempts to limit the impact of its position by asserting that this case involves only a claim seeking to use general jurisdiction to benefit non-US plaintiffs involving conduct in a third country, and thus its impact will not cause harm to legitimate US interests. But that view is mistaken in several important respects. Although these respondents are not US citizens, petitioner's theory would result in identical treatment even if plaintiffs were US citizens living in Argentina when the alleged wrongdoing took place. Petitioner's theory would also insulate it from claims by US citizens based on harms caused by defective Mercedes automobiles purchased in Germany, and subsequently brought to California. Indeed, the approach advocated by petitioner would save it from being sued on the basis of specific jurisdiction even for defective automobiles purchased in California and causing personal injuries there.

If petitioner is correct that a court must accept the parent-subsidiary shield for purposes of general jurisdiction involving a non-US parent corporation, there is also no rationale that would preclude it from applying that limitation to claims against US parent corporations abased on general jurisdiction. Indeed, so broad is petitioner's position that it would also enable US corporations to set up similar subsidiaries so that the parent could avoid suit except where it is incorporated, has its principal place of business, or does business under its own name, such as where it has manufacturing facilities, even for claims based

on specific jurisdiction. Even if it is possible to sue the subsidiary for the wrongs of the parent, any such suits will be beset with problems that would not be encountered in an action against the parent, especially where the claim is that the product was defectively designed or manufactured, activities that are in the total control of the parent.

3. Petitioner also asks the Court to find a lack of personal jurisdiction over it because it was unreasonable for the lower court to find personal jurisdiction in this situation. Although this Court has discussed issues of reasonableness in determining personal jurisdiction, there is no case in which the Court has denied jurisdiction on that basis alone. It is time for this Court to reject that additional escape for defendants for three reasons: (a) unreasonableness in this context adds nothing of significance to a finding of minimum contacts; (b) the inquiry is inherently subjective: and (c) as described by petitioner, such a finding is largely if not entirely covered by other doctrines such as transfer, venue, and forum non-conveniens, which are better suited, and less subject to manipulation, than is an attempt to overlay a finding of reasonableness on top of a finding of minimum contacts. That is the lesson of Justice Scalia's opinion in *Burnham v. Superior Court,* 495 U.S. 604 (1990), and it should now be adopted as law in all personal jurisdiction cases.

ARGUMENT

THE DISTRICT COURT HAS GENERAL JURISDICTION OVER PETITIONER.

A. THE CONTINUOUS AND SYSTEMATIC CONTACTS OF PETITIONER'S SUBSIDIARY WITH CALIFORNIA PROVIDED THE PROPER BASIS FOR PERSONAL JURISDICTION OVER PETITIONER IN THIS CASE.

1. The Theory Relied on by Petitioner Would Affect Many Cases Beyond the Unusual Facts of This Case.

Petitioner wishes this Court to treat this case as if the question presented were "Why should a German corporation be permitted to be sued in California, where it does no business, over claims by citizens of Argentina, based on conduct of the corporation's Argentine subsidiary?" But the issue before this Court involves only the Due Process Clause of the Constitution, and does not involve other doctrines, such as forum non-conveniens, that may bear on that question. More importantly, the theory advanced by petitioner to sustain its Due Process challenge would extend far beyond the facts of this case and would enable many corporations to avoid being called to account for their actions by the simple device of establishing a wholly-owned subsidiary to act on its behalf.[3]

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[3] Petitioner relies heavily on *Goodyear Dunlop Tire Operations, S.A. v. Brown,* 131 S. Ct. 2846 (2011). As explained at length in respondents' brief, that case is the converse of this one: it held

For example, on the merits, but not as part of the personal jurisdiction inquiry, there is the fact-based legal issue of whether Daimler, as parent, may be held legally responsible for the conduct that caused respondents' injuries, which were allegedly inflicted on them by the direct actions of Daimler's Argentine subsidiary. Whichever court has to decide that question will have to invoke the applicable choice of law principles to decide whether Argentine, German, or California law should apply. But whatever the answer to that question may be, petitioner's theory would preclude any US court from even reaching it.

Beyond these unique claims, three examples illustrate the far more common claims that would escape suit in California under petitioner's theory:

(1) An officer in the US Army, whose home state is California, is stationed in Germany and buys a Mercedes, drives it for two years, and has it shipped to his next duty station in California. A year later, its gas tank explodes, killing two passengers and seriously injuring the serviceman who brought the car from petitioner. Suit is filed in California against petitioner.

(2) The Bank of Southern California opens a branch in Stuttgart where Daimler's

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that a wholly-owned non-US subsidiary could not be sued in North Carolina, based on the activities of its US parent in that State, when the subsidiary itself did not have minimum contacts with that State. None of the rationales advanced for subjecting petitioner to suit here, nor any of the adverse consequences in terms of the ability of a parent to avoid being sued in the US, discussed *infra* at 10-16, apply to that situation.

headquarters are located. It loans Daimler $50 million and several years later, it closes the office. Daimler defaults on the loan, and the Bank files suit in California to collect the amount owed.

(3) After completing graduate studies in engineering in Germany, a California citizen accepts a job working for Daimler in Stuttgart. After five years there, he returns to California, with a promise from Daimler that it would send him a check for $10,000 that is owed to him for work done in Germany under his contract. When the company does not honor its promise, he sues in California to collect his $10,000.

In each of these examples, and many others that could be constructed, the only basis for jurisdiction against Daimler would be general jurisdiction because in none of the transactions did Daimler have specific contact with California. In all three, it was *foreseeable* that Daimler would be sued in California, but after *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 295 (1980) (*"World-Wide VW")*, it is clear that foreseeability alone is not sufficient even to establish specific jurisdiction. Daimler's wholly-owned subsidiary MBUSA does business in California on a "continuous and systematic" basis, *Goodyear,* 131 S. Ct. at 2851, where it sells thousands of automobiles each year that it purchases from Daimler, and it is not disputed that MBUSA is subject to general jurisdiction in California. *See* Resp. Br. 5, 13-14. Nonetheless, under Daimler's theory, it could not be sued in California over any of

those claims or any other claim in which the plaintiff is relying on general jurisdiction.

In its brief supporting petitioner, the United States suggests that "[i]n some instances, the interests of the United States are served by permitting suits against foreign subsidiaries to go forward in domestic courts" (Br. 1). Those might include the cases in which a federal statute is involved (Br. 3) and for which the United States in its amicus brief in *Kiobel v. Royal Dutch Petroleum Co.,* 133 S. Ct. 1659 (2013), also suggested that the door be left open. But if petitioner's is right that, if the formalities of separate incorporation of a defendant's U.S. subsidiary are followed, the activities of the subsidiary are not chargeable to the parent for jurisdictional purposes, then the presence of a federal claim would be irrelevant, and there will be "no instances" in which such suits can be brought in domestic courts.[4]

Amicus recognizes that the brief decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), can be read to support petitioner. But that decision pre-dated *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), and the beginning

[4] The position of the Chamber of Commerce is even more extreme than that of petitioner. According to the Chamber, general jurisdiction over a corporation is *only* available where it is incorporated or has its principal place of business (Chamber Br. at 9). Those places are the functional equivalent of the residence of an individual. *J. McIntyre Machinery, Ltd. v. Nicastro,* 131 S. Ct. 2780, 2787 (2011) (*"McIntyre"*). However as *Burnham, supra,* held, an individual is subject to general jurisdiction any place where he is personally served. If the Chamber is right, corporations would be *less* amenable to suits than individuals when the claim is unrelated to the forum jurisdiction, even if the corporation had a plant and thousands of employees in that jurisdiction.

of the modern era of personal jurisdiction by twenty years. Moreover, as shown in the concurring opinion of Justice Shirley Abrahamson in *Rasmussen v. General Motors Corp.,* 335 Wis.2d 1, 803 N.W.2d 623, 639-640 (2011), there is a considerable basis for reading that decision more narrowly, even taking into account when it was written. But if it were good law today, it would provide an iron-clad blueprint that would enable all corporations to avoid being sued based on either specific or general jurisdiction by doing business outside its home state through a 100% owned subsidiary.

Even more significant, petitioner's theory, which makes a separately incorporated wholly-owned subsidiary the touchstone for avoiding general jurisdiction, would also result in a major reduction of the ability of claimants to rely on specific jurisdiction. That can be seen from applying the result in *McIntyre*, a case that petitioner does not cite, presumably because its position is that this case has nothing to do with specific jurisdiction. In *McIntyre* this Court held that a British manufacturer could not be sued in New Jersey because it had sold all of its products to a company that the Court found to be an independent third party distributor that in turn sold the machine that injured the plaintiff to the plaintiff's employer. The distributor in *McIntyre* was not owned in whole or in part by the manufacturer, although its independence was open to real question. 131 S.Ct. at 2797 (Ginsburg, J. dissenting); Alan B. Morrison, *The Impacts of McIntyre on Minimum Contacts,* 89 Geo. Wash. L. Rev. Arguendo 1, 4-5 (2011). By concluding that the distributor was independent, and because of the lack of any other contacts by the manufacturer with New Jersey, the Court ruled that the manufacturer had

not "purposely availed" itself of the laws of New Jersey and hence could not be sued there. Therefore, because the same Due Process Clause is at issue in this case as in *McIntyre*, if petitioner's theory is accepted for general jurisdiction, it would apply equally to specific jurisdiction. That would produce disastrous results for the victims of tortious conduct by parent manufacturers that do business in the United States entirely through their wholly-owned subsidiaries.

To illustrate: suppose in the next case, Daimler sells a Mercedes to MBUSA, as it does with all the Mercedes that it manufactures for sale in the U.S. The car is then sold to a dealer (who is truly independent of both Daimler and MBUSA), who in turn sells it to a California citizen. Several months later, the car's gas tank explodes causing serious injuries to the driver-owner and the death of his two passengers. If Daimler's insulation theory is correct, the victims of that explosion could not sue Daimler because it would not have "purposely availed" itself of the laws of California, even though its wholly-owned subsidiary, to which it sold the car that caused the injuries in question, was doing business in California and was the exclusive agent to sell Daimler products throughout the United States. JA 149-50, 206.

The victims could, of course, obtain specific jurisdiction over MBUSA and the dealer who sold the car in question, but whether they would have legally and factually viable claims against them based on defects in design or manufacture of the vehicle would be determined by the applicable state laws. Without pre-judging the answer, the question would be whether parties that had no role in the design or manufacture of the vehicle, or any ability to

determine whether there were defects or the right to try to fix any that they found, could be held liable under the applicable state law for the injuries that resulted. Even if the law allowed such suits to proceed, a jury might find them not liable, perhaps on the belief that Daimler – the true culprit – had already paid its share or would in a subsequent lawsuit. Moreover, in a suit against MBUSA and the dealer, none of the discovery tools available against parties, such as interrogatories, requests for the production of documents, and requests for admission, could be used against Daimler. All discovery against Daimler would have to rely on treaties between the US and Germany, and any discovery enforcement would take place in German courts, with all the resulting expense, delay, and uncertainty.

It is more than a little ironic that the acceptance of petitioner's theory would turn the outcome in *World-Wide VW* on its head, not to mention exponentially expanding the impact of *McIntyre*. Thus, in *World-Wide VW*, no one disputed that plaintiffs could sue the German manufacturer as well as the US subsidiary that imported the car in question into this country. That was true even though the plaintiffs' injuries occurred in Oklahoma, a thousand miles from where the car in question arrived in the US and from where it was sold to the driver who suffered the injuries caused by its alleged defects. In fact, the Court in *World-Wide VW* unambiguously identified conduct like Daimler's as sufficient grounds to establish jurisdiction: "if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, *but arises from the efforts of a manufacturer or distributor to serve, directly or indirectly*, the market for its product in other States,

it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or others." 444 U.S. at 297 (emphasis added).

But if Daimler is correct in its approach, the plaintiffs could have not sued the manufacturer in *World-Wide VW* in Oklahoma because its sale of the car to the importer would have insulated it from suit there even for defects in design or manufacture of the vehicle. Indeed, under the agreement between MBUSA and petitioner, all sales occur outside the US, where title passes to MBNA. Pet. Br. 4. Thus, even if, as Justice Kennedy suggested in *McIntyre,* 131 S. Ct. at 2790, Congress were to confer federal court jurisdiction over foreign companies that purposely avail themselves of any laws in the United States, the completion of the sale, under petitioner's theory, even to a wholly-owned subsidiary, would close that avenue as well.[5] Moreover, in *World-Wide VW*, there was an apparently independent distributor, like the one in *McIntyre,* that obtained its cars from the importer. 444 U.S. at 288-89. But under *McIntyre,* plus the insulation that would be provided by acceptance of petitioner's theory, the other remaining defendant in *World-Wide VW* – the importer – would also no longer be subject to suit in Oklahoma or any place except where it sold the car in question or where it is subject to general jurisdiction.

Furthermore, there is no basis on which petitioner's theory can be limited to corporations that

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[5] The defendant in *International Shoe* sold its products FOB St Louis, 326 U.S. at 314, but that did not stand as a barrier to personal jurisdiction over it in the State of Washington where the shoes were sent.

are established outside the United States. Although Justices Breyer and Alito in their concurrence in *McIntyre* suggested that the result in that case might not apply if the defendant were a US, as opposed to a foreign person, 131 S. Ct. at 2793-94, Justice Kennedy's plurality opinion does not support such a distinction. Nor does logic or precedent. The Due Process protection against suits in jurisdictions with which the defendant has no contacts focuses its inquiry on the activities of the defendant in the place where the suit was filed, irrespective of the location of the defendant when it undertook the conduct at issue in the lawsuit. To be sure, the outcome in *Asahi Metal Industries Co. v. Superior Court,* 480 U.S. 102 (1987), was doubtless affected by the fact that the only remaining defendant was a Taiwanese corporation that had no connection with California, beyond the fact that one of its parts was a component in a tire that ended up there in a motorcycle that caused the injury in question. There was no opinion for the Court in *Asahi*, but it is hard to see how it would have come out differently if all that remained was a suit between two US, but non-California, component manufacturers, instead of between two non-US companies, as in *Asahi.* Put another way, all of the reasons that Due Process protects a non-US company from being haled into court in a state with which it has no contacts apply fully to a US corporation when it is sued in a state with which it has no contacts.

2. Petitioner's Approach Will Result in Substantial Unfairness to Claimants, Will Not Increase Predictability, and Will Result in Increased Litigation Costs.

Petitioner makes much of the desirability of predictability in this area. Pet Br. 16, 21, 27. But with predictability comes the real potential for large companies to arrange their affairs to insulate themselves from liability by establishing wholly-owned subsidiaries, such as Daimler did with MBUSA. Amicus assumes that Daimler's parent-subsidiary arrangement was done for legitimate reasons, but if the Court accepts petitioner's insulation theory, the ability to avoid lawsuits in most jurisdictions will become a very welcome side-benefit for the company and is likely to cause other companies to make similar arrangements for the very purpose of limiting the states in which they can be sued. Such arrangements will not totally protect a company from suits away from home, but they can significantly limit suits to places in which it has a substantial presence, where it can always be sued.

If petitioner's theory were to become the law, future plaintiffs might be faced with a difficult choice: suing only the defendants with local contacts in the local court, with all the problems applicable to a suit where the "real" defendant – the parent – is not subject to personal jurisdiction, or journeying to where the parent can still be sued, with all the cost and inconvenience that it entails, and with the loss of the right to sue "local" defendants there. What is most unreasonable about these scenarios is that the parent is totally in control of them. Those who may be injured by its wrongdoing never consent to this

arrangement and have no way to counter or avoid their consequences. Nothing in the Due Process Clause compels such unfair results.

Moreover, since petitioner's theory still leaves room for a finding of a "sham" relationship between parent and subsidiary, there would still be an issue in every case as to whether it is appropriate to pierce the corporate veil between parent and wholly-owned subsidiary. That opening has two side effects that undermine petitioner's stated desire for predictability and simplicity. First, a company will never know whether its parent-subsidiary arrangement will be upheld until it has been litigated, perhaps more than once if there are changes in the relationship. That means the certainty that petitioner seeks will not result, unless it also advocates the elimination of all efforts to pierce the corporate veil, including even for plainly sham parent-subsidiary relations. Second, once the door is open to examining that relationship, every case will involve substantial discovery, similar to what took place in the trial court in this case, where the record excerpts on appeal on this jurisdictional issue extended to well over 400 pages. That will mean that time and expense unrelated to the merits will be imposed on both sides, contrary to the goal of Rule 1 of the Federal Rules of Civil Procedure – obtaining a "just, speedy, and inexpensive determination of every action and proceeding."[6]

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[6] The brief of the United States (17-18) suggests that the inquiry should include a determination of how many cars Daimler sells in California through its subsidiary, relative to its sales elsewhere. That approach would not only undermine the predictability that petitioner and the United States claim to desire, but would substantially increase discovery costs and delay and present the court with an essentially unanswerable

By contrast, if for purposes of determining personal jurisdiction, the court treats the activities of all wholly-owned subsidiaries as the activities of the parent, when they involve the same business as that of the parent, that will greatly simplify the process. Thus, there is no doubt that sales of Mercedes-Benz, through MBUSA, are substantial, amounting to 2.4% of its world-wide sales, and if they are taken into account, there should be little question that both MBUSA and Daimler are subject to general jurisdiction in California. Indeed, if the proper test of attributing the activities of a wholly-owned subsidiary to its parents were applied, Daimler would not, consistent with Rule 11, even be able to move to dismiss for want of personal jurisdiction.

Moreover, this approach will increase certainty and the ability of companies to plan: if you create a wholly-owned subsidiary, you should assume that you will be subject to suit in any place where the subsidiary can be sued. It will not, and should not, matter whether the parent exercises day-to-day control over the business of the subsidiary. Daimler does not dispute that, as the sole shareholder, it has the power to compel the subsidiary to do its bidding and to reverse actions of which it does not approve, just the way that a company with divisions, but no subsidiaries, controls the activities of those divisions. And if there were any doubt about Daimler's control over MBUSA regarding the sale and servicing of Mercedes-Benz automobiles in the United States, a look at the

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question of how many sales are enough. The open-ended and extremely flexible approach suggested by the United States (Br. 18-22) would cause similar problems and should be rejected for that reason as well. *See also id.* at 30, n. 10, suggesting complicated tests based on applicable federal and/or state law.

extensive General Distribution Agreement between the two companies will dispel that notion. JA 149-215.

Accordingly, this Court should hold that, because there is general jurisdiction in California over MBUSA, and because MBUSA is a wholly-owned subsidiary of Daimler, the California courts have general jurisdiction over respondents' claims against Daimler. In some cases, the subsidiary may not be subject to general jurisdiction because it is not doing business in a state, even though it sold a car made by the parent to a buyer in that state. A plaintiff alleging a defect in that car would have to rely on specific jurisdiction, and under the 100% ownership attribution rule advanced by amicus, the parent would be subject to specific jurisdiction in that state only if, but always when, the subsidiary is subject to specific jurisdiction over a claim relating to a product of the parent. Such a result would hardly be the kind of "random, fortuitous or attenuated contacts" found objectionable in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 475 (1985). In short, whenever there is 100% ownership of a subsidiary, the contacts of the subsidiary should be attributed to the parent for purposes of determining both general and specific jurisdiction.[7]

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[7] Contrary to the claim of the Chamber (Br. 2, 5, 33) attributing the activities of a corporate subsidiary to its parent would not open the doors to sue a 100% shareholder in a jurisdiction where his corporation was doing business or even headquartered. That is because corporate subsidiaries are created to carry on the business of their parents, whereas a shareholder will generally set up a corporation to do a particular business, but not to be the alter ego for the shareholder's entire life. Surely, the sole owner of the stock of a widget-making corporation chartered in Delaware could not be sued for divorce there if he resided in California and had no

B. THE COURT SHOULD REJECT THE REASONABLENESS OVERLAY THAT PETITIONER ASKS IT TO APPLY.

Even if this Court upholds the ruling below that petitioner has sufficient contacts with California to warrant its being sued there, petitioner nonetheless asks the Court to erect an additional hurdle that would prevent this case from being tried in California: its contention that Due Process also includes a further reasonableness requirement that respondents do not satisfy. That request should be rejected for several reasons.

First, if such a rule now exists, it is a one-way street, helping only defendants avoiding a lawsuit in a place not of their choosing. Notably, petitioner and its amici do not support the other side of that rule: when it is unfair to require a plaintiff to go elsewhere to sue, then suit should be allowed where plaintiff resides. Although petitioner would doubtless suggest that the reasonableness requirement is applicable mainly to cases like this, there is, once again, no basis in the Due Process Clause that can contain it to cases involving non-US corporations whose conduct abroad allegedly harmed non-US citizens. Moreover, as then-Justice Rehnquist observed for the Court in *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 779 (1984), "we have not to date required a plaintiff to have 'minimum contacts' with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant. On the contrary, we have

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connection with Delaware other than his ownership of a Delaware company.

upheld the assertion of jurisdiction where such contacts were entirely lacking."

More importantly, if such a rule is embedded in Due Process, it would necessarily apply to all cases in which personal jurisdiction is contested, regardless of whether jurisdiction is alleged to be general or specific, or whether it is based on personal service within the state, the domicile of the individual or corporate defendant, or the amount or nature of the contacts that the defendant has with the forum state. And it surely could not be limited to non-US defendants when general jurisdiction is the basis for suit.

The goal of Due Process in the context of personal jurisdiction is to assure that it is fair to hale the defendant into a court of the forum state to defend against the plaintiff's claim. Since *International Shoe*, this Court has developed a series of more-or-less objective tests that serve as a proxy for a fairness determination, the principal one being that of minimum contacts. For general jurisdiction cases, the tests seek to answer the question of whether the defendant has a "home" in that state, or is doing sufficient business there that the state should be considered a second (or third or fourth) "home" to that company. In order to satisfy minimum contacts for specific jurisdiction, the plaintiff must only establish that there are sufficient contacts with that state with respect to the claim at issue. Those tests do not answer all questions, and at the margins they are surely unclear in some applications, at least until this Court has settled their meaning in particular contexts, as it did in *Goodyear* and *McIntyre*, and as it may do in this case.

To the extent that fairness and reasonableness are seen as a goal and various tests have been applied to determine whether that goal has been met, it is unobjectionable. But as Justice Scalia observed in *Burnham*, once the applicable test has been satisfied – personal service on Mr. Burnham in the forum state – that is the end of the Due Process inquiry. 495 U.S. at 622-23. *See also Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 773 (1984) (reversing court of appeals which found lack of personal jurisdiction because of factors beyond minimum contacts with forum state that made it "unfair" to sue defendant there).

Amicus recognizes that, in a number of personal jurisdiction opinions of this Court, mainly those by Justice Brennan, there have been discussions of the fairness of allowing the defendant to be sued in that jurisdiction and that those discussions provide some basis for petitioner's secondary plea. *See, e.g., Burger King,* 471 U.S. at 476-77; *Asahi Metal Indus. Co. v. Superior Court,* 480 U.S. 102, 113 (1987). In none of those cases, with the possible exception of *Asahi*, in which there was no majority opinion and the case came from a state court, was unreasonableness found to be the basis for denying jurisdiction when it was otherwise proper. Given *McIntyre's* rejection of the stream of commerce argument, even for the large, expensive, and dangerous finished product at issue in that case, *Asahi,* with its highly unusual facts, would be quickly dismissed today, thus undermining whatever claim to precedent its reasonableness discussion might have. Moreover, as *Burger King,* 475 U.S. at 477*,* and *World Wide VW,* 444 U.S. at 302, show, Justice Brennan generally used fairness and

reasonableness as a basis to *uphold* jurisdiction, not as petitioner urges, to deny it.[8]

More important, use of reasonableness in personal jurisdiction claims should be rejected because it is both unprincipled and unnecessary. It is unprincipled because it is entirely subjective and acts as a one-way ratchet by which a defendant can escape suit in a given forum even if the minimum contacts test has been met. Due Process entails a set of legal doctrines that have explained and expanded the concept of minimum contacts in various contexts. They have limits, and the courts are bound to follow their applications in subsequent cases.

Not so for reasonableness, as Justice Scalia's examples in *Burham* demonstrate. The out-of-state defendant was sued in California for divorce by his wife who had moved there. Service was effected personally on him, while he was there visiting his children as part of a three day California trip. If reasonableness were an additional out for Mr. Burnham, Justice Scalia asked, would the outcome have been different if he came there only on business, or if he had no contact with his family while there, or if his visit was only for minutes, or he came to see a sick or dying child? *Burnham*, 495 U.S. at 625-26. One could add, would it have mattered if he were served in an airport while awaiting a change of planes, or if his flight to China was diverted to San Francisco, where a process server caught up with

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[8] Amicus recognizes that reasonableness was a decisive factor in 2-1 decision holding that there was no general jurisdiction over the defendant, because the court considered that, unlike this Court, was bound to follow *Asahi* on that issue. *Metropolitan Life Ins. Co. v. Robertson-Ceco Corp.,* 84 F.3d 560, 573 (2d Cir.), *cert. denied,* 519 U.S. 1006 (1996).

him? Or in this case, would the outcome be different if reasonableness was added to minimum contacts, and if the claims arose in Germany, or the plaintiffs were former German citizens who now were permanent resident aliens, or even U.S. citizens, living in California?

Those questions are unanswerable because there is no principled way that the Due Process Clause of the Constitution can be interpreted to provide acceptable answers. That is because such an inquiry is fraught with "subjectivity and hence inadequacy," and there is no guiding principle by which meaningful lines can be drawn. *Burnham,* 495 U.S. at 623. The inquiry is one that is also infinitely manipulable and based on "no authority other than individual Justices' perceptions of fairness." *Id.* at 627. What is left is "a 'totality of the circumstances' test, guaranteeing what traditional territorial rules of jurisdiction were designed precisely to avoid: uncertainty and litigation over the preliminary issue of the forum's competence." *Id.* at 626.

Equally important, adding reasonableness on top of minimum contacts is unnecessary. Assuming that there are some cases in which Due Process has been satisfied, but in which trying the case in another forum seems to be clearly indicated, there are other procedural rules for accomplishing that end that do not involve constitutionalizing an inherently subjective inquiry such as reasonableness. Indeed, Justice Brennan in *Burger King* specifically noted that even where "some other considerations would render jurisdiction unreasonable [they] usually may be accommodated through means short of finding jurisdiction unconstitutional." 471 U.S. at 477.

In the federal courts, there are at least three established doctrines that address this problem in a much more appropriate way. As noted, petitioner's reasonableness inquiry would apply to all defendants, not just those against non-US corporations. Thus, if the defendant is a US person, the recent revisions to the venue statute, 28 U.S.C. § 1391(b), would provide additional protection even if there is personal jurisdiction. Moreover, the transfer statute, 28 U.S.C. § 1404(a), permits transfers to another district court for "the convenience of parties and witnesses in the interest of justice."[9]

In addition, there is the doctrine of forum non-conveniens, which Justice Brennan specifically mentioned, along with section 1404(a), in *Burger King*. 471 U.S. at 477, n. 20. Both doctrines are obvious candidates for consideration in this case by the district court, which is in the best position to gather evidence regarding the relevant factors as enunciated by this Court in *Gulf Oil Corp. v. Gilbert,* 330 U.S. 501 (1947), and *Piper Aircraft Co. v. Reyno,* 454 U.S. 235 (1981). It is also better able to weigh the discretionary factors at issue than is an appellate court, and it can also impose conditions on granting the motion, such as a willingness to provide certain discovery or not to interpose a statute of limitations defense based on the new filing abroad. Moreover, extensive discovery will rarely be needed on these other determinations, saving time and expense for all, especially as compared to the kind of discovery needed to answer the personal jurisdiction question in this and other similar cases. As discretionary

[9] *Walden v. Fiore,* No. 12-574, *petition granted,* March 4, 2013, is an excellent example of a case in which a motion to transfer should have been considered at the outset in lieu of the lengthy litigation regarding personal jurisdiction.

rulings, they would not set any precedent, including that the defendant is subject to suit in that forum. In addition, they would provide little or no basis for appeal, regardless of which way the district court decided. And they would be much more efficient in sorting out the appropriate from the inappropriate cases, and thus able to assure that, as the United States urges (Br. 1), there would be "some instances" in which suits against foreign corporations could be brought in domestic courts

Finally, if current federal law does not properly require courts to take into account the relevant factors, that is a matter for Congress to address in legislation, not for courts to impose based on their views on what factors are relevant and how they should be balanced. Indeed, the existence of these alternative avenues for addressing concerns about the reasonableness of entertaining a lawsuit in a given forum, while perhaps falling short of preempting the field, at least should sound a cautionary note before this Court makes the concerns animated by those avenues part of an unalterable constitutional determination, as petitioner argues.

Nor is the possibility that a plaintiff will choose to sue in a state court, when these federal laws do not apply, a reason for the Court to accept petitioner's proposal. If there is a federal claim, the entire case can be removed, regardless of the residence/citizenship of the defendant. 28 U.S.C. § 1441(a). If there is diversity jurisdiction under 28 U.S.C. § 1332, the case can also be removed unless one of the defendants is a citizen of the forum state, 28 U.S.C. § 1441(b)(2). But if the defendant is a citizen of that state, it would never be unreasonable to sue that defendant there. And if the case is a class action under 28 U.S.C. § 1332(d)(1), removal may be

made without regard to the citizenship of any of the defendants. 28 U.S.C. § 1453(b).

The only situation in which removal will not be available (excluding those in which the amount in controversy is not more than $75,000) is the rare case like this one in which alien plaintiffs are suing an alien defendant. But even then, it assumes that state courts, which are overworked and underfunded, do not now have in place rules that keep such cases out of their courts, at least when the plaintiffs are not residents of the state. As applied to this case, California has a statute that performs the same function as does the federal doctrine of forum non conveniens. Under Section 410.30(a) of the California Code of Civil Procedure, if a court "finds that in the interest of substantial justice an action should be heard in a forum outside this state," it "shall stay or dismiss the action in whole or in part on any conditions that may be just."

Moreover, it is not just California that has the authority to dismiss cases brought in an inappropriate forum. As of 2008, 47 states have confirmed their ability to dismiss cases that should more properly be heard elsewhere through the application of the forum non conveniens doctrine. *See Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1180 n.9 (R.I. 2008). And none of the remaining three have definitively rejected it. *Id. See also* Restatement (Second) Conflicts of Law § 84 (1971) and the many cases that have cited it: "**Forum Non Conveniens**: A state will not exercise jurisdiction if it is a seriously inconvenient forum for the trial of the action provided that a more appropriate forum is available to the plaintiff."

As expressed by the Mississippi Supreme Court, there is a very sensible, non-defendant-biased reason why states have embraced the doctrine: allowing suits by non-residents against non-resident defendants "would waste finite judicial resources on claims that have nothing to do with the state. Each trial requires the empaneling of Mississippians as jurors and the use of Mississippi tax dollars. These resources should be used for cases in which Mississippi has an interest." *3M Co. v. Johnson*, 926 So.2d 860, 866 (Miss. 2006).

Whatever practices might have existed in prior years when state courts did not have limits on their venue rules and were wide-open to cases like this, that is no longer true. For this reason, there is no realistic fear that imposing a reasonableness requirement as an additional part of the Due Process analysis is needed to protect defendants from being sued in inconvenient state courts.

It is, of course, possible that some case, somewhere, involving facts more extreme than this, will not be sent elsewhere. That may be because Congress, state legislatures, and/or state supreme courts will either have different judgments about whether those cases should be heard in existing fora, or they have not made what the defendant considers to be desirable amendments to the laws on forum selection. But the minimal likelihood that such cases will arise at all, or with sufficient frequency to cause serious problems, is not a reason for this Court to make a constitutional issue out of reasonableness in every personal jurisdiction case, as petitioner would have it do.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed, and the District Court directed to consider whether any federal claims remain in the case, and, if not, to exercise its discretion under 28 U.S.C. § 1367(c) to keep or dismiss the non-federal claims.

Respectfully Submitted,

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August 26, 2013

ADDENDUM

Mercedes-Benz

Mercedes-Benz
Research & Development
North America, Inc.

Group Research & Advanced
Engineering USA Division
A Daimler Company

September 17, 2012

California Energy Commission
Dockets Office, MS-4
Docket No: 12-HYD-1 Hydrogen and Transportation
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: Submittal by Mercedes-Benz Research & Development North America, Inc. – Input for docket number **12-HYD-1,** Hydrogen and Transportation-DRAFT Solicitation Comment

To Whom It May Concern:

Since 2005, Mercedes-Benz Research & Development North America has leased fuel cell vehicles in the State of California and presently leases over forty B-Class F-Cell vehicles to private individuals in Southern California. Through our vehicle operation, we have collected a multitude of knowledge and data on customer behavior related to vehicle operation and hydrogen refueling.

Therefore, we suggest a few minor modifications to the Hydrogen and Transportation-DRAFT

Solicitation based on our experience and market research. These suggestions also acknowledge the voice and feedback of our F-Cell customers and ensure the utmost level of success of this solicitation and future vehicle operation within California.

We are pleased that the Energy Commission chose to heed the advice of the CaFCP OEM Working Group and have incorporated the aggregated OEM hydrogen station priority locations directly into the draft solicitation using the maps produced by UC Irvine. Locating stations in the identified areas supports the execution of our early commercialization plans.

Our suggestion concerns station performance. The performance criteria language in the draft solicitation needs to set specifications that are able to kick-start the commercialization of hydrogen fuel cell vehicles. The stations must provide H70 Type A fueling performance as defined in SAE TIR J2601. This allows comparable fill times to conventional passenger cars which our customers expect and for stations to easily meet the hourly peak station demand in prime areas.

In addition, the performance requirements for stations in prime areas should be much higher than the minimum values given in the draft solicitation in order to meet the initial customer demand. Specifically, these stations must be able to fuel at least 10 cars per hour during peak times (50 to 70 kg/hour) and provide at least 150 kg over a 12 hour period. Stations not meeting these performance targets will not meet customer expectations and may struggle in the market jeopardizing the success of hydrogen technology.

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Therefore, we also suggest that the Qualifications of the Weight for Solicitation Section XII-9 be increased from 2 to 7 in order to show the proper level of importance for station performance in the solicitation. The current draft solicitation weight of 2 greatly undervalues station performance, and ensures high customer frustration with the station and likely low customer utilization.

Thank you for your consideration and support. If there are any questions or need for any additional information, please contact me by phone (310-549-9646) or by e-mail (rosario.berretta@daimler.com)

Sincerely,

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