In the
Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, ET AL.,

Respondents.

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NO. 11-965

In The
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DAIMLERCHRYSLER AG,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, INC. AND THE ASSOCIATION OF GLOBAL AUTOMAKERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

HERBERT RUBIN
BERNARD J. WALD
IAN CERESNEY*
LINDA M. BROWN
HERZFELD & RUBIN, P.C.
125 Broad Street
New York, New York 10004
Telephone: (212) 471-8500
E-Mail: ICeresney@herzfeld-rubin.com

* Counsel of Record

DICK BAILEY SERVICE (212) 608-7666 (718) 522-4363 (516) 222-2470 (914) 682-0848 Fax: (718) 522-4024
1-800-531-2028 - Email: appeals@dickbailey.com -Website: www.dickbailey.com

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INTERESTS OF *AMICI CURIAE*[1]

The Alliance of Automobile Manufacturers, Inc. ("the Alliance") is a nonprofit trade association of car and light truck manufacturers, whose members include BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors Company, Jaguar Land Rover, Mazda North American Operations, Mercedes-Benz USA, Mitsubishi North America, Porsche Cars North America, Toyota Motor North America, Inc., Volkswagen Group of America, Inc. and Volvo Car Corporation.

The Association of Global Automakers ("Global Automakers"), formerly known as the Association of International Automobile Manufacturers (AIAM), is a nonprofit trade association whose members include the U.S. manufacturing and distribution subsidiaries of 13 international motor vehicle manufacturers, including: American Honda Motor Co., Inc., Aston Martin Lagonda of North America, Inc., Ferrari North America, Inc., Hyundai Motor America, Inc., Isuzu Motors America, LLC, Kia Motors America, Inc., Maserati North America, Inc., McLaren Automotive, Ltd., Nissan North America, Inc., Peugeot Motors of America, Subaru of America, Inc.,

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[1] Pursuant to S. Ct. Rule 37.6, counsel of record for *amici curiae* states that no counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amici curiae* has made a monetary contribution intended to fund the preparation or submission of this brief. The parties' letters of consent to the filing of this brief have been filed with the Clerk.

Suzuki Motor of America, Inc. and Toyota Motor North America, Inc.

The mission of the Alliance and of Global Automakers is to protect and promote the legal and policy interests of their members. As noted above, *Amici's* members include global companies which design, manufacture and sell vehicles in various parts of the world and which utilize distributorship arrangements to conduct business in this country, as well as U.S. manufacturing and distribution subsidiaries of international vehicle manufacturers. The jurisdictional issues presented in this case are therefore of major importance to *amici's* member companies, who are uniquely positioned to provide needed guidance to this Court.

INTRODUCTION

In this case, the Ninth Circuit Court of Appeals held that twenty-two Argentinian citizens or residents may obtain general personal jurisdiction in California over DaimlerChrysler AG, now known as Daimler AG, a German corporation, under an implied agency fiction, based solely on the alleged presence in California of Mercedes-Benz USA, LLC ("MBUSA"), an indirect subsidiary of Daimler AG, even though plaintiffs' claims are entirely unrelated to, and do not arise from, any contacts with California by either Daimler AG or MBUSA. The events at issue took place more than 30 years ago, halfway around the world in Argentina. None of the events giving rise to this suit occurred in California, or even the United States. None of the plaintiffs is an American citizen and there is no meaningful

connection between the parties or the facts of this case and California. One might properly ask, "What is such a case doing in the courts of the U.S.?" Yet, the Ninth Circuit held that Daimler AG is subject to general jurisdiction in California because MBUSA is purportedly an "agent" of Daimler AG for jurisdictional purposes.

This ruling constitutes an unprecedented vast expansion of personal jurisdiction over foreign corporations and an undermining of the concept of separate corporate identity. It sets a dangerous precedent with extremely troublesome implications not only for *amici's* members, both here and abroad, but for virtually all manufacturers abroad whose products are distributed in this country by American subsidiaries or totally independent parties. This holding, if upheld by this Court and applied by other federal and state courts, would permit American courts to exercise what amounts to universal jurisdiction over nonresident corporations "in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world." *Purdue Research Found. v. Sanofi-Synthelabo, S.A.*, 338 F.3d 773, 787 (7th Cir. 2003) (emphasis in original).

This Court has rejected such a vast and unprecedented view of general jurisdiction as not consonant with Due Process. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, __U.S. __, 131 S. Ct. 2846, 2856, 180 L. Ed.2d 796, 809 (2011) (rejecting "sprawling view of general jurisdiction" under which "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed.")

Beyond the blatant incompatibility with this Court's doctrine, and the manifest existence of a split in authority among the various Circuits with respect to purported "agency" jurisdiction, critical policy considerations militate against the essentially limitless view of general jurisdiction adopted by the Ninth Circuit. These policy considerations include: the chilling effect upon business activity and investment; the adverse effects upon international comity; the risk of retaliation by the legislatures and courts of foreign countries against U.S. companies; the open invitation to counsel anywhere in the world to engage in forum shopping in the U.S. on claims irrelevant to the U.S.; and the damage to the federal government's ability to conduct foreign relations and to negotiate treaties.

Failure by this Court to overrule the Ninth Circuit and to reaffirm and apply the traditional limitations regarding general jurisdiction would significantly increase the exposure of foreign businesses to lawsuits in the U.S. arising out of events and activities not even remotely related to contacts of those foreign businesses with the forum. Not only would this risk a flight of foreign companies doing business or investing in the U.S., but U.S. federal and state courts could be deluged with litigation having no connection to the U.S. Plaintiffs' counsel would be permitted to select a favorable U.S. forum in which to litigate any claim arising worldwide, simply because the target foreign defendant has a "relationship" with a separate company located in the selected U.S. forum, although the forum has nothing to do with the claim.

Amici urge this Court to reject the Ninth Circuit's overreaching assertion of universal general jurisdiction over any company in the world which has a relationship with subsidiaries, affiliates or independent contractors in the United States. We urge this Court to adhere to its historical and longstanding limitations on the exercise of personal jurisdiction by American courts over nonresident corporations.[2]

FACTUAL AND PROCEDURAL BACKGROUND

Amici adopt the statements of fact set forth in Daimler AG's Brief.

POINT I

THE NINTH CIRCUIT'S DECISION UNDERMINES THE LIMITATIONS WHICH DUE PROCESS PLACES ON A COURT'S EXERCISE OF "GENERAL" PERSONAL JURISDICTION.

A. The Decision Abrogates the Due Process Mandate that the Required Minimum Contacts with the Forum State Must Be

[2] In view of the comments by this Court in *Kiobel v. Royal Dutch Petroleum Co.*, __ U.S. __, 133 S.Ct. 1659, 185 L.Ed.2d 671 (2012), any attempt to utilize the Alien Tort Statute (ATS) as a basis for jurisdiction here is misplaced. As this Court observed, the history of that statute shows that Congress did not expect that causes of action would be brought under the ATS for violations of the law of nations occurring abroad. Rather, the statute was enacted primarily to deal with piracy, violation of safe conducts, and infringement of the rights of ambassadors, none of which is involved here.

Assessed for Each Defendant Individually.

The Constitutional right to Due Process "protects an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-472 (1985), quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945). Due Process requires that, for a nonresident corporate defendant to be subjected to general personal jurisdiction, it must have certain minimum contacts with the forum, such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice." *Helicopteros Nacionales de Colombia, S.A., v. Hall*, 466 U.S. 408, 414 (1984), quoting *International Shoe*, 326 U.S. at 316. This requirement of minimum contacts ensures that the defendant has "fair warning" that its decision to engage in certain activities may subject it to a foreign court's jurisdiction. *Burger King*, 471 U.S. at 472.

"Specific jurisdiction," as opposed to "general jurisdiction," is the exercise of "personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum." *Helicopteros*, 466 U.S. at 414 n.8. Here, indisputably, there is no basis for specific jurisdiction over Daimler AG, since plaintiffs' suit does not arise out of or relate to any activities or contacts by Daimler AG, or even by any subsidiary of Daimler AG, with California.

General jurisdiction extends to cases "not arising out of or related to the defendant's contacts with the forum." *Id*. at 414 n.9. However, this Court has instructed that the defendant's activities in the forum state must be sufficiently "continuous and systematic" as well as "substantial" to make the assertion of general jurisdiction reasonable. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445-46 (1952). As *Goodyear Dunlop Tires Operations, S.A. v. Brown, supra* declares, the defendant must be "at home" in the forum for general jurisdiction to apply (131 S. Ct. at 2854, 180 L. Ed.2d at 806).

The "substantial, continuous and systematic" contacts and "at home" standard for general jurisdiction is a demanding one. It is considerably more stringent than that employed for specific jurisdiction. See *Burnham v. Superior Court of California*, 495 U.S. 604, 610, 618 (1990) (plurality opinion); *Burger King*, 471 U.S. at 472-73 and n. 15; *Helicopteros*, 466 U.S. at 415. This much higher burden is necessitated because of the far-reaching consequences to a defendant that accompany the exercise of general jurisdiction, through which a defendant can be compelled to appear and defend an action that has nothing to do with any activities with the forum (see, e.g., *Goodyear Dunlop Tires Operations, S.A. v. Brown*, *supra*, 131 S. Ct. at 2855-2857).

This Court has also made clear that the relevant jurisdictional contacts are to be assessed for the defendant individually. See, e.g., *Burger King*, 471 U.S. at 475 ("Jurisdiction is proper…when the contacts proximately result from actions by the defendant *himself* that create a substantial

connection with the forum" [emphasis in original]); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781 n. 13 (1984) ("Each defendant's contacts with the forum State must be assessed individually.").

That test is not satisfied here. Daimler AG did not carry on "continuous and systematic" activities in California, nor is it "at home" in California. The happenstance that MBUSA, an indirect subsidiary of Daimler AG, may be "present" and engage in business in California is irrelevant to the general jurisdiction analysis with respect to Daimler AG. This Court held in *Helicopteros* that "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts" (466 U.S. at 417).

This Court's test for general jurisdiction focuses on two prongs: the purposeful actions of the defendant itself in the forum and the nature of the defendant's contacts with the forum, both of which the Ninth Circuit's decision disregards. The Ninth Circuit's holding fails to meet the stringent minimum contacts test and also violates this Court's continued instruction that the requisite minimum contacts "must be met as to *each defendant* over whom a state court exercises jurisdiction" (*Rush v. Savchuk*, 444 U.S. 320, 332 [1980] [emphasis added]), and that "Each defendant's contacts with the forum State must be assessed *individually*" (*Keeton*, *supra*, 465 U.S. at 781 n. 13 [emphasis added]).

B. The Ninth Circuit's Decision Ignores Precedent from this Court Mandating Recognition of and Respect for the Distinction Between Separate Corporate Entities.

The Ninth Circuit's holding further violates this Court's recognition that "respect for corporate distinctions" is a bedrock principle of law which is "deeply engrained in our economic and legal systems." *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998). Pursuant to this principle, a corporation generally will not be held liable for the acts of its subsidiaries or other affiliated corporations. *Ibid*; see also, *Janus Capital Group, Inc. v. First Derivative Traders*, __U.S.__ , 131 S. Ct. 2296, 2304, 180 L.Ed.2d 166, 177 (2011) (rejecting liability for investment advisor based on statement made by its mutual fund client, even though there was a close corporate relationship between the two, and stating that "We decline this invitation to disregard the corporate form"). The forceful reiteration of this directive in *Goodyear* does not permit the disregard with which it is treated by the Ninth Circuit.

This principle applies not only with respect to the issue of vicarious liability, but equally to the issue of personal jurisdiction. Thus, in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335-337 (1925), jurisdiction over a foreign corporation based on its subsidiary's forum contacts was squarely rejected, even though the parent dominated the subsidiary "immediately and completely." 267 U.S. at 335.

In *Cannon*, the North Carolina plaintiff sued a Maine-based corporation in North Carolina for breach of contract. The plaintiff sought to impute the jurisdictional contacts of the defendant's wholly-owned subsidiary, which functioned as an "instrumentality employed to market [the Maine corporation's] products within [North Carolina]." *Id.* at 335. Although the Maine corporation exercised total control over its subsidiary, and the subsidiary performed the same marketing and distribution functions that the parent itself performed in other states (*Id.* at 335), this Court held that the distributor relationship did not create jurisdiction over the parent for claims unrelated to the subsidiary's contacts with the forum.

In so holding, this Court noted that the separate corporate existence of the two companies had been properly observed by the defendant and its subsidiary (*Id.* at 335). Said this Court, "The corporate separation, though perhaps merely formal, was real. It was not pure fiction" (*Id.* at 337). This Court noted that the Maine corporation wanted to have business transactions with persons resident in North Carolina, "but for reasons satisfactory to itself did not choose to enter the State in its corporate capacity." (*Id.* at 336). While this corporate separation "was doubtless adopted solely to secure to the defendant [Maine corporation] some advantage" (*Id.* at 335), a corporation of one state is not amenable to suit in the federal court for another state in which the plaintiff resides whenever it employs a subsidiary corporation as the instrumentality for doing business there (*Id.* at 336). This Court noted that the use of a subsidiary for

such purposes does not necessarily subject the parent corporation to jurisdiction. (*Id.*). Indeed, the Maine corporation might have conducted such business through an independent entity without subjecting itself to jurisdiction. (*Id.*). This Court concluded that, for purposes of jurisdiction, the business of the subsidiary in North Carolina did not become the business of the parent Maine corporation.

Notably, this Court in *Keeton*, 465 U.S. at 781 n. 13, explained that "jurisdiction over a parent corporation [does not] automatically establish jurisdiction over a wholly owned subsidiary. Each defendant's contacts with the forum State must be assessed individually" (citations omitted). If jurisdiction over a parent corporation does not automatically establish jurisdiction over a wholly-owned subsidiary, then, *a fortiori*, jurisdiction over a wholly-owned subsidiary, or a company with an even more remote connection to the defendant (such as an independent distributor), likewise cannot establish jurisdiction over a non-resident company. See also, *Phila. & Reading Ry. v. McKibbin*, 243 U.S. 264, 268 (1917) ("Nor would the fact…that 'subsidiary companies' did business within the state, warrant a finding that the defendant did business there.").

The Ninth Circuit's decision appears to state that a different standard may be applied with respect to corporate separateness when the issue of personal jurisdiction over the parent corporation is at stake, as opposed to vicarious liability of the parent corporation for the acts of its subsidiary (644 F.3d 909). But the Ninth Circuit provides no explanation as to why, if a parent corporation cannot

be held liable based on the activities of its subsidiary, it itself can be held subject to personal jurisdiction on the basis of these same activities.

Should there be any concern about potential misuse of the corporate form, this Court has instructed that "the corporate veil may be pierced…when, inter alia, the corporate form would otherwise be misused to accomplish certain wrongful purposes…." *Bestfoods*, 524 U.S. at 62. Here, it is undisputed that Daimler AG and MBUSA adhere to all the legal requirements necessary to maintain their separate corporate identities and there is no contention that they have misused the corporate form.

The Ninth Circuit's decision thus runs counter to, and cannot be reconciled with, this Court's emphatic recognition of the concept of separate corporate entities. The Ninth Circuit's decision, which finds general jurisdiction based on the actions and contacts with the forum of an entity other than the defendant, also violates this Court's repeated admonitions regarding the need for a separate due process analysis as to each defendant "individually" and the need to respect corporate distinctions. See, e.g., *Keeton*, 465 U.S. at 781 n. 13; *United States v. Bestfoods*, 524 U.S. 51, 61-62.

C. The Ninth Circuit's Assertion of General Jurisdiction on an Implied Agency Theory Effectively Has No Limitations.

The Ninth Circuit's finding of general jurisdiction over Daimler AG because of contacts which its indirect subsidiary, MBUSA, has with

California, appears to be rooted in the court's erroneous belief that MBUSA is an "agent" of Daimler AG for any and all unrelated matters. It is undisputed that none of MBUSA's contacts or activities in California had anything to do with the plaintiffs' suit.[3]

The breathless sweep of the Ninth Circuit's decision propounding the purported "agency" theory of general jurisdiction violates Due Process, as it effectively has no limitations. The Ninth Circuit pronounced that Daimler AG was subject to general jurisdiction because "the services that MBUSA currently performs are sufficiently important to DCAG [Daimler AG] that they would almost certainly be performed by other means if MBUSA did not exist, whether by DCAG performing those services itself or by DCAG entering into a new agreement with a new subsidiary or a non-subsidiary national distributor for the performance of those services." As Judge O'Scannlain noted in his dissent, however, this is an illusory standard

[3] The Ninth Circuit stated in its decision (644 F.3d at 921) that its "agency" test for personal jurisdiction over a foreign corporation on the basis of its subsidiary's contacts with the forum has its origins in case law from the Second Circuit. The Ninth Circuit first adopted the agency theory in *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 423 (9th Cir. 1977), which relied extensively on *Gelfand v. Tanner Motor Tours, Ltd.*, 385 F.2d 116 (2d Cir. 1967), among others. However, the *Gelfand* case involved specific jurisdiction, not general jurisdiction. The Fourth, Fifth, Sixth, Seventh and Eighth Circuits have categorically rejected the purported "agency" theory of personal jurisdiction propounded by the Ninth Circuit (see discussion in Daimler AG's Brief), dispatching plaintiffs' argument below that the Ninth Circuit's "agency" theory of jurisdiction is "mainstream."

because "Anything a corporation does through an independent contractor, subsidiary or distributor is presumably something that the corporation would do 'by other means' if the independent contractor, subsidiary, or distributor did not exist."

The Ninth Circuit went on to state in the decision that whether the alleged agent was a subsidiary of the principal or independently owned is "irrelevant." Said the court, "Independent contractors may be considered representatives." Under the Ninth Circuit's reasoning, contracting with an independent entity to distribute cars in the United States would meet the "sufficiently important test," and if Daimler AG were to replace MBUSA with an independent entity, that entity, according to the Ninth Circuit, would still be considered a representative, i.e., an "agent," of Daimler AG, subjecting Daimler AG to general jurisdiction. The court then stretched this extraordinary concept of MBUSA's alleged "representation" or "agency" to events which occurred more than 30 years earlier, thousands of miles away, which had nothing to do with distributing cars in the United States.

Under the Ninth Circuit's expanded "agency" or "representative" test, every relationship that a foreign corporation has with a subsidiary, independent contractor or distributor in the forum would potentially subject it to general jurisdiction. The Ninth Circuit's decision cannot be squared with this Court's decision in *Cannon Mfg. Co. v. Cudahy Packing Co.*, *supra*, 267 U.S. 333, 335-337. There, the parent corporation exercised total control over its subsidiary, and the subsidiary performed the same marketing and distribution functions that the parent

itself performed in other states (*Id.* at 335). This Court, nevertheless, held that the distributorship relationship did not create jurisdiction over the parent for claims unrelated to the subsidiary's contacts with the forum. This Court further stated in *Cannon* that the parent corporation might have conducted such business in the forum state through an independent entity, without subjecting itself to jurisdiction.

Not only is the Ninth Circuit's "agency" or "representative" test purely illusory and all-inclusive, the decision further waters down the concept of distinct corporate identity by indicating that a foreign corporation may be subject to general jurisdiction even where no control is exercised over the subsidiary or distributor which is acting independently, as long as the foreign corporation has an unexercised right of control. Under this approach, there would be virtually universal jurisdiction in every American court over every significant foreign or domestic manufacturer. Moreover, because the jurisdiction would be *general*, it would exist without regard to the nature of the claim. Jurisdiction would be available, not only in every state and federal court, but "in *any* litigation arising out of *any* transaction or occurrence taking place *anywhere* in the world." *Purdue*, 338 F.3d at 787. Such an expansive exercise of general jurisdiction is not consonant with Due Process. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A. v. Brown*, *supra,* __U.S. __, 131 S. Ct. at 2856, 180 L. Ed.2d at 809.

D. The Ninth Circuit's Assertion of General Jurisdiction Based on an Implied Agency Theory Has No Foundation in the Traditional Law of Agency.

In effect, the Ninth Circuit's decision impermissibly removes any distinction between subsidiaries, independent distributors and true agents. However, "distributors," "agents" and "subsidiaries" can be very different legal entities and have differing legal relationships with a manufacturer. See 1 W.M. Garner, *Franchise and Distribution Law and Practice* §§1:11 to 1:31, at 22-36 (2012) (distinguishing among distributorships, dealerships, agency relationships and manufacturer's representatives, among other things).

The General Distributor Agreement between Daimler AG and MBUSA bears none of the hallmarks of an agency relationship. As noted in 1 W. Garner, Franchise & Distribution Law and Practice §1.29 (2012), in an agency relationship, the "agent represents the supplier and stands in its shoes; it usually does not have a separate legal identity from that of the supplier. The agent is responsible for selling the product to customers and for collecting the purchase price. An agent does not bear the risk of loss of the product or of collection from the customer….The agent will usually be compensated through a salary and commission."

In contrast, a "dealer or distributor agreement usually provides that the dealer is an independent contractor and that neither party is the agent of the other for any purpose." Garner, *supra*, at §3.6. A

distributor generally purchases the product from the manufacturer, and title then passes from the manufacturer to the distributor. The distributor passes title to the customer when the distributor sells the product on its own behalf. In contrast, in a sales agency relationship, the agent does not take title to the product but rather, arranges direct sales between the manufacturer and the customer. *United States v. Gen. Elec. Co.*, 272 U.S. 476, 484 (1926); *Cannon*, *supra*, 267 U.S. at 251.

Here, there can be no dispute that MBUSA has a "separate legal identity" from Daimler AG and that it does not "stand in the shoes" of Daimler AG. Further, the General Distributor Agreement specifically provides that MBUSA is an "independent contractor" that "shall buy and sell Contract Goods…as an independent business for [its] own account" and that it is not a "general or special agent, partner, joint venture, or employee" of Daimler AG (Agreement Art. 11.1[1]). As further recognized by the Ninth Circuit in its original decision, Daimler AG sells its vehicles, manufactured in Germany, to MBUSA in Germany, where title passes to MBUSA (*Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088, 1092 [9th Cir. 2009] [withdrawn opinion]).

This Court has further held that, in determining whether a corporate entity is a true agent, the Court should examine whether the purported agent can bind the principal by its actions. *Commissioner v. Bollinger*, 485 U.S. 340, 346-347 (1988). Here, the General Distributor Agreement between MBUSA and Daimler AG specifically provides that MBUSA has no authority to make

binding obligations for or act on behalf of Daimler AG (Agreement Art. 11.1[2]).

The Ninth Circuit's decision turns the traditional law of agency on its head. The Restatement (Third) of Agency §1.01 (2006) provides that

> "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act."

Here, the General Distributor Agreement between Daimler AG and MBUSA specifically disavows any agency relationship on the part of MBUSA. This is the case with most distributor agreements. See Garner, *supra* §3:6 ("The dealer or distributor agreement usually provides that the dealer is an independent contractor and that neither party is the agent of the other for any purpose."). Not only did the General Distributor Agreement explicitly disavow an agency relationship, there is no evidence that Daimler AG "manifested assent" to or designated MBUSA as its agent, particularly for events which took place in a distant country over 30 years ago. Nor is there any evidence that MBUSA agreed to serve as Daimler AG's agent. Thus, the Ninth Circuit's decision in this case stands upon the thin reed of the fiction of an untenable implied agency.

What is more, the Ninth Circuit departed from its prior precedent. In its place, the Ninth Circuit vastly inflated its jurisdictional reach when it held that a foreign parent's "right to control" a domestic subsidiary is sufficient to support general jurisdiction based on agency, whether or not it ever actually exercised that right. Prior Ninth Circuit decisions held that the mere right to control another corporation is not sufficient to establish agency and that actual exercise of control is required. See, *e.g.*, *Doe v. Unocal Corp.*, 248 F.3d 915, 926; *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980).

The Ninth Circuit's abrogation of the need for actual control violates Due Process. Such absence of control contradicts the Due Process requirement for "continuous, systematic and substantial" contact by the foreign corporation with the forum state. See, *e.g.*, *Perkins*, 342 U.S. at 448 (defendant must undertake in the state "continuous and systematic supervision" of its employees' activities from within the forum state). It is only where the corporate defendant has engaged in an exceptional sort of supervision and control of corporate activities in the forum state that general jurisdiction may be asserted (*Perkins, supra*). Where such exceptional supervision and control is absent, general jurisdiction is lacking (*Helicopteros, supra.*)

Neither the District Court nor the Ninth Circuit found that Daimler AG exercised such exceptional day to day control over MBUSA or even had the right to exercise such day to day control over MBUSA. The General Distributor Agreement specifically disavows any agency. More than that, it

provides that either party may terminate the Agreement; that MBUSA's goals are negotiated by both parties; that MBUSA can decide not to buy certain classes of vehicles; and that Daimler AG has no control over the product's ultimate destination (579 F.3d at 1096).

In determining that MBUSA was the "agent" of Daimler AG, the Ninth Circuit pointed to certain quality control provisions in the General Distributor Agreement between Daimler AG and MBUSA, by which Daimler AG reserved various rights. Among other things, these included the right to approve MBUSA's authorized resellers and the location of retail sales outlets, showrooms and service facilities, and required MBUSA's observance and maintenance of certain standards and requirements. Contrary to the Ninth Circuit's apparent belief, these quality control contractual provisions do not serve to make MBUSA the "agent" of Daimler AG.

Quality control contractual requirements, such as those referred to above, are common provisions in distributor agreements. See Garner, *supra*, at §3.6. Manufacturers have a cognizable interest in assuring that quality control is exercised by the distributors of their products. Indeed, trademark protection depends on the existence of such quality control protections.

As noted in 3 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition §18.42 (4th ed. 2011):

> "A trademark carries with it a message that the trademark owner is controlling the nature and quality of the goods or

> services sold under the mark….A product is not truly 'genuine' unless it has been manufactured and distributed under quality controls established by the manufacturer….Thus, not only does the trademark owner have the right to control quality, when it licenses, it has the duty to control quality."

As Judge Posner has further noted,

> "The owner of a trademark has a duty to ensure the consistency of the trademarked good or service. If he does not fulfill this duty, he forfeits the trademark….The purpose of a trademark, after all, is to identify a good or service to the consumer, and identity implies consistency and a correlative duty to make sure that the good or service really is of consistent quality, i.e., really is the same good or service." *Gorenstein Enterprises, Inc. v. Quality Care-USA, Inc.*, 874 F.2d 431, 435 (7th Cir. 1989).

Surely, foreign manufacturers should not be required to sacrifice such trademark protections in order to avoid the unbounded exercise of general jurisdiction by U.S. courts.

In effect, the Ninth Circuit's "global enterprise" theory of jurisdiction treats the foreign corporation and its subsidiaries/distributors as a single entity. In erasing the limitations of Due Process, it would provide American courts with judicial authority over every significant

manufacturer's global conduct. Such an unrestrained exercise of universal jurisdiction fails the "reasonableness" test of *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 115, 107 S.Ct. 1026, 94 L.Ed.2d 92 (1987), and violates "traditional notions of fair play and substantial justice." *International Shoe*, 326 U.S. at 316.

POINT II

IF NOT CORRECTED, THE NINTH CIRCUIT'S DECISION WOULD RENDER ANY MANUFACTURER SUBJECT TO SUIT IN ANY JURISDICTION IN THE U.S. IN WHICH IT HAS AN AFFILIATE OR SUBSIDIARY, REGARDLESS OF WHERE THE CLAIM AROSE.

Due Process jurisdictional limitations provide "a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). These concerns require a common sense rationale as to why the U.S. courts should be prepared to decide any dispute involving a foreign manufacturer which conducted business in the U.S., whether directly or through an affiliate/subsidiary, for any claim that arose anywhere in the world from the actions of another affiliate/subsidiary. The Ninth Circuit offered no such rationale.

Here, Daimler AG had no way to foresee that the alleged California contacts of an indirect subsidiary, MBUSA, could subject it to liability for activities purportedly engaged in by another indirect subsidiary in Argentina in the 1970s, and that, as a result of MBUSA's contacts with California, Daimler AG can be sued in California for those activities. Moreover, that the California court should be required to resolve such claims where they relate to activities in Argentina, involve Argentinian law, require Argentinian witnesses and have absolutely no relationship to California or to the California affiliate/subsidiary, is mind-boggling and violates Due Process.

Under the Ninth Circuit's decision, there is almost nothing a foreign manufacturer, whose products are sold in the U.S., can do to minimize the risk of litigation in the forum. The only way that such a manufacturer might potentially avoid suit in a given state in the U.S. would be to avoid the state entirely, closing any subsidiaries in the state and avoiding relationships with distributors in the state. The resulting adverse impact upon the U.S. economy is obvious.

Companies such as *amici's* members, whose products are sold worldwide, utilize a variety of business structures and arrangements, including distributor agreements. The Ninth Circuit's decision permitting jurisdiction over a nonresident manufacturer, where it utilizes a completely independent distributor or an independently operating conventional corporate subsidiary in the forum state, causes well-justified concern to *amici's* members. It affects long-existing structures, as well

as prospective distributor agreements with independent and subsidiary entities in the U.S.

As Justice Ginsburg noted in her dissent in *J. McIntyre Mach., Ltd. v. Nicastro*, __U.S.__, 131 S. Ct. 2780, 2799, 180 L.Ed.2d 765 (2011), arrangements such as the one here between Daimler AG and MBUSA, through which a foreign-country manufacturer utilizes a U.S. company to distribute its products, are "common." While some have mischaracterized these distributor relationships as calculated tactics by foreign manufacturers to avoid U.S. jurisdiction, there are solid and compelling business reasons why foreign manufacturers engage U.S. distributors, which have nothing to do with jurisdictional issues.

Among other reasons, a U.S. distributor is far more likely than a foreign manufacturer to have knowledge of American laws, regulations, business practices, culture and buying preferences. A U.S. distributor such as MBUSA would be far better equipped than a German-based manufacturer to negotiate American laws and requirements regarding such matters as tax collection, licensing requirements, compliance with federal safety regulations and vehicle importation customs requirements, among other things.

The distribution arrangements between foreign manufacturers and U.S. distributors provide significant benefits to the U.S. economy. U.S. subsidiaries of foreign companies employ 5.6 million Americans and support an annual payroll of $408 billion. Organization for International Investment, Insourcing Facts, available at

http://www.ofii.org/resources/insourcing-facts.html (last visited June 11, 2013). These jobs provide an average compensation per worker of $77,409, more than 36% higher than the economy-wide average. *Id.* Such corporations employ approximately 34 percent of the U.S. motor vehicle industry, 31 percent of the U.S. chemicals industry and 24 percent of the U.S. primary metals industry. *Id.*

These U.S. subsidiaries of global companies add $649.3 billion in value to the U.S economy. Further, they purchase goods and services worth hundreds of billions of dollars every year from local suppliers and small businesses across the U.S. *Id.* These corporations pay 14 percent of U.S. federal corporate income taxes and invest an annual $149 billion on property, plant construction and new equipment, accounting for 14.4 percent of all non-residential capital investment made in the U.S. *Id.*

The Ninth Circuit's decision threatens to bring about a dampening effect on foreign investment in the U.S., with consequent deleterious effects upon the American economy. According to a report issued by the U.S. Department of Commerce entitled "The U.S. Litigation Environment and Foreign Direct Investment – Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty" (hereinafter, "Department of Commerce Report"), the high legal cost of doing business in the U.S. and the unpredictable nature of liability in the U.S. are major concerns to foreign corporations considering whether to invest or continue to invest in the U.S. The Report notes at page 5 that

> "Two areas stand out to international investors: (a) the comparatively high legal cost of doing business in the U.S. market and (b) the unpredictable and unfamiliar nature of liability in the United States. Each is directly related to the litigious nature of the U.S. legal system. Each is relevant for assessing whether foreign companies will choose to make investments in the U.S. economy or, if an international company is already doing business there, to what extent the company will choose to continue to fund its U.S. businesses instead of subsidiaries doing business in other parts of the world."

According to the Department of Commerce Report, there is an international perception that the pervasive nature of litigation in the United States and other related aspects of the legal system increase the costs of doing business and add uncertainty (*Id.* at page 1). The Report notes that U.S. tort costs as a percentage of GDP are triple that of France and the United Kingdom and at least double that of Germany, Japan and Switzerland, making this issue "an important U.S. competitiveness concern." (*Id.*).

The Department of Commerce Report observes at page 2 that

> "Fear of litigation is among the top issues listed by senior executives who manage internationally owned U.S. businesses. Significantly, U.S.-owned

> companies that operate in other advanced economies do not express a similar concern. Also, there is the perception that, at least in some contexts, other countries' legal systems are more predictable and that the legal costs of doing business are substantially less. These perceptions exist even though the overall high quality of the U.S. legal system is also well recognized internationally.
>
> "Policymakers need to address the international concerns involving the U.S. litigation environment. If high U.S. legal costs are not commensurate with high benefits, policymakers will need to find ways to reduce uncertainty and to bring U.S. legal costs more in line with those of other advanced economies."

While the Department of Commerce Report notes that the U.S. is the world's largest recipient of foreign direct investment, and that foreign direct investment plays a major role as a key driver of the U.S. economy and as an important source of innovation, exports and jobs, the Report further notes that the U.S. share of global foreign direct investment inflows has declined since the late 1980s and that competition to attract foreign direct investment has become more intense (Department of Commerce Report, p. 2). The Report observes that "Fear of litigation and potential liability under the U.S. legal system are among the more important

concerns to those interested in investing in the United States." (*Id.*).

The Department of Commerce Report further states that

> "Over time, the growth in tort costs has had a competitive impact on the relative cost of doing business in the United States….[T]he United Kingdom and several other industrial countries, including Japan and Switzerland, are now seen as having a significant cost advantage compared to the United States." (Department of Commerce Report, p. 4).

The Department of Commerce Report concludes that the trend of declining U.S. share of global foreign direct investment inflows since the 1980s "reinforces the need for the United States to renew its commitment to open investment and to policies that make this Nation attractive" to foreign direct investment (Department of Commerce Report, p. 3).

A study conducted by David L. McKnight and Paul J. Hinton entitled International Comparisons of Litigation Costs: Europe, the United States and Canada (May 2013), compared liability costs, defined as the cost of claims whether resolved through litigation or other claims resolution processes, as a fraction of GDP across Europe, the U.S. and Canada. The study found that the U.S. has the highest liability costs as a percentage of GDP of the countries surveyed, with liability costs at 2.6 times the average level of the Eurozone economies

surveyed. The study observed that these costs have potential adverse consequences for international competitiveness and productivity, and that litigation also imposes indirect costs stemming from the uncertainty created by litigation, which may deter investment in high-cost jurisdictions.

In a study conducted in April 2008 on behalf of the Organization for International Investment entitled The Insourcing Survey: a CEO-Level Survey of U.S. Subsidiaries of Foreign Companies, top-level executives at major U.S. subsidiaries of foreign companies were surveyed to gauge how the U.S. is perceived as a location for business investment, as compared to other countries. The survey found that 61% of the CEOs of the U.S. subsidiaries surveyed said that the business climate for investing in the U.S. is falling behind other countries, and that 43% of those surveyed stated that the investment climate in the U.S. is getting worse for foreign-based companies.

Moreover, not only are there strong economic reasons to curb unnecessary litigation costs in the U.S., there are also practical reasons to limit rather than expand the jurisdictional bases for resolving disputes involving foreign plaintiffs litigating against foreign defendants for acts arising outside of the U.S., where jurisdiction is predicated on a U.S. affiliate/subsidiary which had no relationship or connection to the claim. It is inefficient and time-consuming to have U.S. courts resolve disputes arising outside the U.S. which are governed by foreign law, which rely upon the testimony of foreign witnesses and records located outside of the jurisdiction (which are frequently in foreign

languages), and which would result in judgments that present enforcement issues and are subject to collateral attacks in foreign jurisdictions.

Companies such as *amici's* members play a vital role in the U.S. economy, employing millions of Americans and pouring billions of dollars into capital investment in the U.S. The Ninth Circuit's decision, if affirmed, provides no benefits to U.S. citizens or to the U.S. economy, increases litigation costs in the U.S., results in the U.S. courts resolving disputes that have no connection to the U.S. and violates the Due Process of foreign corporations. By diverting judicial resources that would otherwise address domestic disputes, the Ninth Circuit decision, if not reversed, will negatively impact our judicial system.

POINT III

THE NINTH CIRCUIT'S ILL-ADVISED DECISION, IF UNCORRECTED BY THIS COURT, WILL HAVE UNDESIRABLE INTERNATIONAL REPERCUSSIONS.

Comity is an essential ingredient in governing the relations between nations. See, e.g., *Hilton v. Guyot*, 159 U.S. 113, 16 S.Ct. 139, 40 L.Ed. 95 (1895). Respect for and confidence in the legal systems of other nations to fairly resolve the legal disputes that are properly within their jurisdictions is a requirement of international comity. The Ninth Circuit's decision violates principles of international comity by permitting U.S. courts to exercise universal jurisdiction over any dispute anywhere, creating an unworkable system which disregards the

sovereign rights of other nations to resolve legal disputes arising within their borders.

Unless there is a recognized and accepted jurisdictional basis for a court to hear a legal dispute, there should be no reason for a court to find jurisdiction. If the rationale of the Ninth Circuit's decision were to be adopted by every country, the consequence would be confusion. Every manufacturer whose products are sold in any country through an affiliate/subsidiary would be subject to suit in that forum, despite the fact that the claim arose in another country through the activities of a different affiliate/subsidiary in that other country. Just as foreign corporations would be exposed to suit in any jurisdiction in the U.S., U.S. corporations would be subject to suit in any foreign country where an affiliate/subsidiary is located. The Ninth Circuit's invasion into the authority of foreign courts would create the risk of inconsistent decisions by different countries, undermining the consistency of international law.

The Ninth Circuit's decision, if affirmed by this Court, would also result in an explosion of worldwide forum shopping. Pursuant to the Ninth Circuit's decision, any dealer or distributor located within the U.S., whether subsidiary or independent contractor, would provide the basis for innumerable potential plaintiffs, who are not citizens of or residents of the U.S., to bring suits against foreign defendants on causes of action which have nothing to do with any activities in the U.S. All that a potential plaintiff would need to do is to locate an entity in the U.S. that deals in the product, has a "relationship" with the defendant, and performs a function that is

"important" to the defendant. Citizens of foreign countries who have claims against manufacturers domiciled in their countries, but who desire to maintain an action in the U.S. because of a more favorable statute of limitations, or the availability of a jury trial or an American measure of damages or some other favorable U.S. law, would be encouraged to forum shop by seeking out any company in the U.S. upon whose contacts general jurisdiction in the U.S. could be sought over the defendant. The practical consequences would be to flood U.S. federal and state courts with lawsuits that have no connection to the U.S., as well as to deter foreign investment in the U.S. See, e.g., Department of Commerce Report at pp. 7-8 (noting that the "U.S. legal system has had a problem with forum shopping" and that "practices such as forum shopping have contributed to [foreign companies'] fear of litigation (and liability) and are seen as a source of significant investor uncertainty.").

Necessarily, if U.S. courts entertain claims arising in foreign countries against entities which never did business in the U.S., they will inevitably need to apply foreign law. Our judiciary is not versed in the law of other countries such as Argentina, which is not only a recipe for error but would also be a significant drain on judicial resources. The Ninth Circuit's decision is thus not only constitutionally wrong, it is ill-advised.

Further, aggressive assertion of jurisdiction over foreign companies risks exposing American companies to retaliatory exercise of jurisdiction by foreign courts. See, e.g., *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21

(1963), noting that expansive application of U.S. law in foreign contexts could "invite retaliatory action from other nations." Several European nations have enacted "retaliatory jurisdictional" laws, which permit the courts of those nations to assert jurisdiction over foreign corporations to the extent that the courts of the foreign corporation's nation would have asserted jurisdiction. See Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987).

Consistent with the Ninth Circuit's holding, such retaliatory jurisdiction laws would allow European courts to assert jurisdiction over American companies based on relationships which the American companies have with European subsidiaries or even entirely independent distributors. What is more, because the Ninth Circuit's decision premises jurisdiction over foreign companies based on contacts unrelated to those giving rise to the suit, assertions of such similar jurisdictional predicates in other countries would be virtually without limit. Similar jurisdiction, however, would not be asserted over other members of the European Union, for example, as European law prohibits the application of such laws to citizens of other member countries. Born, *supra,* at 15. The effect would be to penalize American companies and hinder their attempts to gain markets in other countries.

The litigation exposure would be especially profound for companies, such as the members of the Alliance and Global Automakers, which manufacture products distributed worldwide. For example, as shown by its Form 10-K Annual Report for the year

ending December 31, 2010 filed with the United States Securities and Exchange Commission ("SEC"), General Motors Company ("GM") has hundreds of subsidiaries, joint ventures and affiliates located in far-flung places around the world, including Argentina, Australia, Austria, Belgium, Brazil, Chile, China, Colombia, the Democratic Republic of Congo, Ecuador, Egypt, England, Finland, France, Germany, Greece, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, Malaysia, Mexico, the Netherlands, New Zealand, Nigeria, the Philippines, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Singapore, South Africa, Spain, Sweden, Switzerland, Taiwan, Thailand, Tunisia, Turkey, United Arab Emirates, Uruguay, Uzbekistan, Venezuela and Vietnam. As demonstrated by its Form 10-K Annual Report for the fiscal year ending on December 31, 2011 filed with the SEC, Ford Motor Company ("Ford") has 161 "significant" non-U.S. subsidiaries located in a similar spread throughout the globe.

This Court has called upon the lower courts "to consider the procedural and substantive policies of other nations whose interests are affected by the assertion of jurisdiction," and the "Federal Government's interest in its foreign relations policies." *Asahi Metal Indus. Co. v. Superior Court*, *supra*, 480 U.S. 102, 115. This Court has also instructed that "`Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.'" *Asahi*, 480 U.S. at 115, quoting *United States v. First Nat'l Bank*, 379 U.S. 378, 404 (1965).

The expansive exercise of general jurisdiction over foreign companies by American courts impinges upon the sovereignty of foreign nations and frustrates the United States' continued efforts to complete treaties with other nations with respect to the enforcement of judgments and other issues. In its *amicus* brief submitted on appeal in *Goodyear*, *supra*, the United States government observed that:

> "[F]oreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments….The conclusion of such international compacts is an important foreign policy objective of the United States…." (U.S. Br., pp. 33-34; footnote omitted).

The United States government further noted in its *amicus* brief in *Goodyear* that:

> "A State's excessive assertion of general jurisdiction potentially threatens particular harm to the United States' foreign trade and diplomatic interests…." (U.S. Br., p. 12).

As the United States "must speak with one voice when regulating commercial relations with foreign governments" (*Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 [1976]), this Court should reverse the Ninth Circuit's decision.

CONCLUSION

The Ninth Circuit's explosive expansion of general jurisdiction, utilizing the fiction of "implied agency" to justify general jurisdiction over Daimler AG based on the forum contacts of a separate and independent indirect subsidiary MBUSA, contradicts this Court's precedents, flouts traditional American jurisdictional and agency principles, and violates fundamental requirements of Due Process.

The question presented to this Court by Daimler AG is "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum state." For the foregoing reasons and those set forth in Petitioner's Brief, *amici* urge this Court to answer the question in the affirmative and to reverse the Ninth Circuit's decision.

Respectfully submitted,

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IAN CERESNEY

HERBERT RUBIN
BERNARD J. WALD
IAN CERESNEY*
LINDA M. BROWN
HERZFELD & RUBIN, P.C.
125 Broad Street
New York, New York 10004
Telephone: (212) 471-8500

Facsimile: (212) 344-3333
E-Mail: ICeresney@herzfeld-rubin.com
Counsel for The Alliance of Automobile
Manufacturers, Inc.
and The Association of Global Automakers
* Counsel of Record

July 1, 2013