No. 07-15386

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BARBARA BAUMAN *et al.*,

Plaintiffs-Appellants,

v.

DAIMLERCHRYSLER AG,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
Case No. 04-194 RMW
Opinion Filed May 18, 2011
(Schroeder, D. Nelson, Reinhardt)

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR REHEARING OR REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, undersigned counsel states that the Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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IDENTITY, INTEREST AND AUTHORITY OF *AMICUS* [1]

Identity – The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in courts throughout the country, including this Court, on issues of national concern to the business community.

Interest – The Chamber has a keen interest in the rules governing the jurisdiction of the United States courts. Those rules directly affect the Chamber's members in numerous ways. As in this case, the rules may serve as a basis for asserting jurisdiction over the foreign parent of a United States-based corporation.

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[1] No party other than *amicus* and its counsel authored this brief in whole or in part. No party, no party's counsel and no other person – other than *amicus curiae*, its members or its counsel – contributed money that was intended to fund preparing or submitting the brief.

Those same rules can also be used by courts in one state to assert jurisdiction over a small business located in another state. More than 96% of the Chamber's members are small businesses with 100 employees or less, including a number of home-based, one-person operations. Finally, those rules can play a critical role on the international stage, affecting both the enforceability of judgments rendered by United States courts and, in some cases, influencing the extent to which foreign courts will assert jurisdiction over United States companies.

Authority – The Chamber files this brief pursuant to Federal Rule of Appellate Procedure 29(a) and this Circuit's Rule 29-2. All parties have consented to this filing pursuant to an agreement under which each side will consent to five *amicus* briefs designated by the other side. DaimlerChrysler AG has designated this brief as one of its five.

ARGUMENT

I. PLENARY REVIEW IS WARRANTED TO RESOLVE INTRACIRCUIT AND INTERCIRCUIT DISAGREEMENTS OVER THE STANDARDS FOR IMPUTING JURISDICTIONAL CONTACTS.

Just last month, the Supreme Court stressed the narrow grounds upon which a United States court may exercise general jurisdiction over a corporation, foreign or otherwise. *Goodyear Dunlop Tires Operations S.A. v. Brown*, 2011 WL

2518815 at *6 (U.S. June 27, 2011). *See also J. McIntyre Mach., Ltd. v. Nicastro*, 2011 WL 2518811, at *6 (U.S. June 27, 2011) ("[T]hose who … operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter.") (plurality opinion). None of the typical grounds such as the state of incorporation or consent applies to DaimlerChrysler AG ("*Daimler AG*"). While the "[f]low of a manufacturer's products into the forum … may bolster an affiliation germane to *specific* jurisdiction" it does "not warrant a determination that … the forum has *general* jurisdiction over a defendant." *Goodyear*, 2011 WL 2518815, at *8. Contrary to this clear command, Judge Reinhardt's opinion for the panel makes precisely the determination that *Goodyear* forbids. It upholds the exercise of *general* jurisdiction over Daimler AG – effectively making it answerable in California for any claim arising anywhere in the world irrespective of whether those claims have anything to do with California – based simply on its commercial relationship with a United States-based distributor.

Admittedly, the panel did not have the benefit of *Goodyear* and *Nicastro* when it issued the opinion. Yet even before the release of those decisions, the panel opinion generated intracircuit and intercircuit conflicts. The clearest evidence of the intracircuit conflict comes from this case's history. On August 28, 2009, the panel issued an opinion (*Bauman I*) that read circuit precedent to

conclude that jurisdiction over Daimler AG was improper. *Bauman v. Daimler Chrysler Corp.*, 579 F.3d 1088, 1094-97 (9th Cir. 2009). Fewer than two years later and without any meaningful change in circuit precedent, the panel withdrew its original opinion and issued the present one (*Bauman II*) that read the exact same circuit precedent to reach the opposite conclusion. It is hard to imagine more compelling proof of the intracircuit confusion that justifies the need for plenary review, especially in the area of judicial jurisdiction where clear rules are essential. *Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1193 (2010).

Not only does *Bauman II* expose the conflicts within this Circuit's precedent, it also creates deep conflicts with the other circuits' decisions. *See* Jennifer A. Schwartz, *Piercing the Corporate Veil of an Alien Parent for Jurisdictional Purposes: A Proposal for a Standard that Comports with Due Process*, 96 Cal. L. Rev. 731, 752 (2008) ("Outcomes in veil-piercing cases are fraught with inconsistency and clear trends are difficult to deduce even within individual jurisdictions."); Lonny S. Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. Pa. L. Rev. 1023, 1076-77 (2004) ("[T]he result of all of this indeterminacy in the standards for piercing, among and within jurisdictions, is that the precedents applying the doctrine become no precedents at all."). Those conflicts concern both the available theories for such imputation and the degree of "control" necessary to warrant imputation.

Immediate resolution of these conflicts is of central importance to the American business community. The contradictory signals sent by the panel in this case discourage foreign direct investment in the United States, invite retaliatory assertions of jurisdiction by foreign courts and threaten small businesses. Thus, given the intracircuit conflicts, the intercircuit conflicts and the importance of the issues, *en banc* review is appropriate under Federal Rule of Appellate Procedure 35(a) and this Circuit's Rule 35-1.

A. The panel opinion creates intracircuit and intercircuit conflicts over the theories that will support imputing a subsidiary's contacts to a non-resident parent corporation.

The first holding warranting *en banc* review is *Bauman II*'s statement that *alter ego* and agency are "two separate tests [for finding] the necessary contacts to support the exercise of personal jurisdiction over a foreign parent company by virtue of its relationship to a subsidiary that has continual operations in the forum." Slip op. at 6576. This holding is clearly central to its opinion for the panel disavows any reliance on the "*alter ego*" theory and rests its finding of jurisdiction exclusively on the allegedly separate "agency" theory. This holding exposes conflicts within this Circuit's own precedent and creates conflicts with the decisions of several other circuits.

This Circuit's decisions have not charted a clear course on whether there are "two separate tests" to support the exercise of judicial jurisdiction over a nonresident parent corporation based on the in-forum activities of its wholly owned subsidiary. At least three decisions, tracing to this Circuit's decision in *Wells Fargo*, lend some support to *Bauman II*'s idea that "two separate tests" are available. *Wells Fargo & Co. v. Wells Fargo Exp. Co.*, 556 F.2d 406, 421, 423 (9th Cir. 1977); *Doe v. Unocal Corp.*, 248 F.3d 915, 926-30 (9th Cir. 2001) (per curiam) (adopting district court opinion); *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1134-35 (9th Cir. 2003). Tellingly, however, none of those prior decisions actually upheld the exercise of jurisdiction on the basis of those "separate tests". By contrast, at least four of this Circuit's prior decisions did not differentiate between "two separate tests" in deciding whether to impute a subsidiary's jurisdictional contacts to a nonresident parent corporation. *See Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d 1297, 1299-1300 (9th Cir. 1985); *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177-78 (9th Cir. 1980); *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996); *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1069 n. 7 (9th Cir. 2000).

The clearest intracircuit conflict arises between *Bauman II* and this Circuit's prior decisions in *Kramer Motors* and *AT&T*. In *Kramer Motors*, this Circuit rejected an attempt to impute a subsidiary's jurisdictional contacts to its

nonresident parent and conducted a unitary analysis of the issue suggesting that *alter ego* and agency were not separate tests:

> These facts are insufficient to make BLMI an 'alter ego' or 'agent' of any of the British corporations so as to make any of them subject to jurisdiction solely through BLMI's presence in the United States. … The record does not show that executives and directors of the British corporations ever controlled the BLMI board or formed a broad majority. None of the United Kingdom companies controls the internal affairs of BLMI or determines how it operates on a daily basis. BLMI has primary and exclusive responsibility for the distribution, marketing and sale of British Leyland vehicles, parts and accessories within the United States. BLIL did not implement or supervise the reorganization plan. It proposed no changes in the plan. The parent and subsidiary have dealt with each other as distinct corporate entities.

Kramer Motors, 628 F.2d at 1177-78 (citations omitted). In *AT&T*, this Circuit again declined to impute a subsidiary's jurisdictional contacts to its nonresident parent and, citing *Kramer Motors*, did not suggest the existence of separate "agency" and "*alter ego*" tests for its jurisdictional analysis. 94 F.3d at 591.

Not only does *Bauman II* expose conflicts within this Circuit, but its assertion of "separate tests" also conflicts with the decisions of six other circuits. In contrast to *Bauman II*, those circuits have all considered the question of imputing a subsidiary's jurisdictional contacts to its nonresident parent without suggesting that "separate tests" with different standards govern the inquiry. *See, e.g., Donatelli v. Nat'l Hockey League*, 893 F.2d 459, 465-66 (1st Cir. 1990); *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 62-63 (4th Cir. 1993); *Hargrave v.*

Fibreboard Corp., 710 F.2d 1154, 1160-61 (5th Cir. 1983); *Estate of Thomas v. Toyota Motor Corp. Worldwide*, 545 F.3d 357, 362-63 (6th Cir. 2008); *Epps v. Stewart Info. Servs. Corp.*, 327 F.3d 643, 648-49 (8th Cir. 2003); *Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286, 1293-94 (11th Cir. 2000). In some cases, these circuits describe their test in terms of whether the subsidiary is the *alter ego* of the parent. *See, e.g., Dalton v. R&W Marine, Inc.*, 897 F.2d 1359, 1363 (5th Cir. 1990). In other cases, these circuits describe their tests in terms of whether the corporate veil should be pierced for jurisdictional purposes. *See, e.g., IDS Life Ins. Co. v. SunAmerica Life Ins. Co.*, 136 F.3d 537, 540 (7th Cir. 1998). What unifies these circuits – and distinguishes them from the panel's decision – is the belief that a single, stringent test governs the question of whether judicial jurisdiction may be asserted over a foreign nonresident parent based on its subsidiary's contacts with the forum state.

Decisions of the Eighth Circuit and Eleventh Circuit are exemplary of this conflicting view. The Eighth Circuit has described the question in the following terms:

> [P]ersonal jurisdiction [over a nonresident parent] can be based on the activities of the nonresident corporation's in-state subsidiary, *but only if the parent so controlled and dominated the affairs of the subsidiary* that the latter's corporate existence was disregarded so as to cause the residential corporation to act as the nonresidential corporate defendant's alter ego.

Epps, 327 F.3d at 648-49 (emphasis added). Echoing the Eighth Circuit's single test for imputation of jurisdictional contacts, the Eleventh Circuit likewise has described its test in terms that do not differentiate between alternative theories:

> For [plaintiffs] to persuade us that the district court had general personal jurisdiction over [the nonresident defendant] because of [its subsidiary's] activities in the United States, it would have to show that [the subsidiary's] corporate existence was simply a formality, and that it was merely [the parent's] agent.

Consolidated Dev. Corp., 216 F.3d at 1293-94. In neither case did the court suggest that a second, independent theory could support the imputation of a subsidiary's contacts to a non-resident parent corporation.

B. The panel opinion creates intracircuit and intercircuit conflicts over the degree of "control" necessary to support imputation of jurisdictional contacts.

The second holding warranting *en banc* review is *Bauman II*'s dilution of the "control" requirement for imputing jurisdictional contacts. This holding is also clearly central to the opinion for the panel makes clear that the standard for control under its "agency" theory is less stringent than the comparable control criterion governing the *alter ego* test. Slip Op. at 6580 n. 14. Exactly how less stringent is a matter on which *Bauman II* is remarkably opaque, ignoring the value of "clarity" espoused by the Supreme Court in *Hertz*. Slip Op. at 6577 n. 12. (favoring a "case-by-case common law method for refining" the "precise degree of control

required"). At a minimum, *Bauman II* confirms that its "right to control" test does not require proof that the parent "actually exercise control over the operations of its subsidiary on a day-to-day basis." Slip Op. at 6580. Elsewhere, *Bauman II* suggests that the "right to control," while sufficient, may not even be necessary and declines to "define the precise degree of control required to meet [the agency] test or establish any particular method for determining its existence." Slip Op. at 6577 n. 12. This holding, specifically the rejection of the "actual control over day-to-day operations" test, also exposes conflicts within this Circuit's precedent and creates conflicts with the decisions of four other circuits.

The clearest evidence of the conflict comes from *Bauman I*. That opinion recognized that this Court's decisions, particularly its opinion in *Unocal*, "has given rise to some confusion" and, consequently, sought to "clarify [this circuit's] law in the area of agency jurisdiction." 579 F.3d at 1095. In direct contradiction to *Bauman II*, *Bauman I* read this Circuit's prior precedents as setting a high standard. Agency jurisdiction required control that is "pervasive and continual" and "over and above that to be expected as an incident of ownership." *Id.* *Bauman I* found support in this Circuit's own precedent, the Restatement of Agency and other circuits' decisions. It is, therefore, unsurprising that *Bauman II*, which reached the polar opposite conclusion, throws this Circuit's law into intracircuit and intercircuit conflict.

With respect to this Circuit's precedents, *Bauman II* conflicts most directly with this Court's decisions in *Harris Rutsky* and *Ochoa v. J.B. Martin & Sons Farms, Inc.*, 287 F.3d 1182 (9th Cir. 2002). In *Harris Rutsky*, the court considered whether a subsidiary's contacts could be imputed to its parent. In remanding the case for further factual development, the court noted that some allegations (namely the activities of an individual who worked on behalf of both companies) "might well be properly characterized as inconsistent with the parent corporation's investor status, and more like *control over day-to-day activities*" which could support jurisdiction under the *alter ego* or agency tests. 328 F.3d at 1135. Similarly, in *Ochoa*, the court considered whether a nonresident defendant could be subject to jurisdiction under an agency theory based on the conduct of its unrelated contractor. The court found that jurisdiction was appropriate and rested its conclusions on the facts indicating that the nonresident corporation "*exercised* some control" over the contractor. 287 F.3d at 1189 (emphasis added). Both of these cases, contrary to *Bauman II*, strongly suggest that actual control, not merely the right to control, is necessary to support the imputation of jurisdictional contacts under this Circuit's agency test.

Like the courts in *Harris Rutsky* and *Ochoa* (and unlike *Bauman II*), several other circuits required proof that a nonresident company have actual control over another company's day-to-day operations before imputing the latter's jurisdictional

contacts to the former. Decisions from the First, Fifth, Sixth and Seventh Circuits contradict the conclusion reached by *Bauman II*. *See, e.g.*, *Miller v. Honda Motor Co., Ltd.*, 779 F.2d 769, 772 (1st Cir. 1985); *Dalton*, 897 F.2d at 1363; *Dean v. Motel 6 Operating, L.P.*, 134 F.3d 1269, 1274 (6th Cir. 1998); *Cent. States, Se. & Sw. Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 943 (7th Cir. 2000).

The conflict between *Bauman II* and decisions of the First and Fifth Circuit is especially sharp. In *Miller*, the First Circuit declined to impute a subsidiary's jurisdictional contacts to its nonresident parent where "the day to day operational decisions of each company are made by separate groups of corporate officers." 779 F.2d at 772. Similarly, in *Dalton*, the Fifth Circuit declined to impute a subsidiary's contacts to its nonresident parent. Though recognizing that some factors (such as shared bank accounts and a consolidated tax return) supported disregard of corporate separateness, the Fifth Circuit ultimately concluded that such factors were "outweighed" by, among other things, the fact that the parent "makes its subsidiaries responsible for daily operations … ." 897 F.2d at 1363. The results in these cases, both refusing to exercise jurisdiction over the nonresident parent, vividly illustrate the outcome-determinative effect of *Bauman II*'s holding that control over "day to day operations" is not an essential prerequisite to the imputation of a subsidiary's jurisdictional contacts.

While *Bauman II* tries to align its opinion with the Second Circuit's decision in *Wiwa v. Royal Dutch Shell Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), *Wiwa* should not be followed. The *Wiwa* opinion unreflectively collapses two discrete choice-of-law inquiries – the *authorization* to impute an agent's jurisdictional contacts to its principal (a question of state law) and the *constitutionality* of that authorization (a question of federal law). *Wiwa* simply ignored this discrete, second step in the conflicts inquiry and allowed New York law to drive its federal constitutional analysis. *Id.* at 95-99. *Bauman II* repeats this error by allowing imputation principles, developed as a matter of New York law, to guide a federal constitutional inquiry.

In all events, *Wiwa* is inapposite. In *Wiwa*, the Court found that the New York Investor Relations Office (whose contacts were imputed to the foreign parent) was regularly and actively engaging in services exclusively on behalf of a non-resident company that fully funded its operations. *Id.* at 95-96**.** *Accord Stubbs v. Wyndham Nassau Resort & Crystal Palace Casino*, 447 F.3d 1357 (11th Cir. 2006). By contrast, this case involves a distribution relationship. In the typical distribution relationship, title and risk pass from the manufacturer to the distributor at the time of sale, and the distributor then sells the goods downstream for the benefit of its own account. *See* Ralph H. Folsom *et al.*, International Business Transactions 127-54 (West 2d ed. 2001). Under those circumstances, the more

analogous Second Circuit precedent is *Jazini v. Nissan Motor Co.*, 148 F.3d 181 (2d Cir. 1998), a case cited by *Bauman I*, 579 F.3d at 1096, but inexplicably ignored by *Bauman II*. In *Jazini*, the Second Circuit upheld a district court's dismissal of (and refusal to order jurisdictional discovery against) a foreign motor vehicle manufacturer where the plaintiffs sought to base personal jurisdiction on the company's relationship with a domestic subsidiary that also acted as its distributor. 148 F.3d at 185. Thus, far from supporting *Bauman II*, the most relevant Second Circuit precedent stands at odds with it.

C. The proper standards governing imputation of jurisdictional contacts is a matter of central importance to the American business community.

Bauman II warrants plenary consideration not only for the conflicts it creates, but also for the importance of the issues presented by the case. In three respects, the issues are sufficiently important to warrant plenary review.

First, *Bauman II* discourages foreign direct investment in the United States. As the Department of Commerce recently explained, foreign direct investment plays a vital role in the health of the United States economy. U.S. Dep't of Commerce, The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty at 2. The creation and maintenance of U.S.-based subsidiaries enables foreign

companies to serve the United States market while protecting their legal interests. The litigation environment plays a critical role in the decision by a foreign company to invest in the United States. *Id.* at 7. Under the logic of *Bauman II*, any party anywhere in the world could conceivably attempt to assert jurisdiction over Daimler AG (or any other foreign corporation similarly organized) based on claims that have absolutely nothing to do with the United States or California. Such sweeping jurisdictional theories discourage foreign investment and harm the United States economy.

Second, *Bauman II* threatens American companies with retaliatory assertions of judicial jurisdiction by foreign courts. In most foreign countries, the notion of jurisdiction by imputation would be unfathomable. *See, e.g.*, European Council Regulation 44/2001. Despite the unfamiliarity of the principle, several countries have enacted "retaliatory jurisdictional laws." *See* Gary B. Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 Ga. J. Int'l & Comp. L. 1, 15 (1987). Under these retaliatory laws, the courts of these countries may exercise jurisdiction over foreign persons "in circumstances where the courts of the foreigner's home state would have asserted jurisdiction." *Id.* For example, based on *Bauman II*, a French court could assert jurisdiction over a United States parent corporation based on the court's jurisdiction over its wholly owned French subsidiary. Such jurisdiction would be proper only as to United States companies.

Moreover, because *Bauman II* permits jurisdiction over claims unrelated to a foreign company's contacts, the French court's jurisdiction over the United States parent would be limitless. Such outcomes undermine the ability of United States businesses to develop foreign markets and undercut the foreign commercial interests of the United States.

Third, *Bauman II* jeopardizes small business owners. Putting to one side the facts of the case, at bottom, *Bauman II* held that the contacts of a corporation may be imputed to its sole shareholder on the basis of the importance of the company's activities and the shareholder's right to control the company's operations. The "undesirable consequences" of this approach are not confined to the foreign parent-domestic subsidiary context but, rather, could also be extended to closely held domestic corporations such as family-owned, small businesses. *Nicastro*, 2011 WL 2518811 at *8 (plurality opinion). Such businesses represent the lifeblood of the United States economy. U.S. Small Business Administration, Office of Advocacy, The Small Business Economy: A Report to the President (2009). Several federal courts, including at least one case in this Circuit, have considered – and in some cases applied – theories of jurisdictional imputation to individual owners of such small businesses. *See, e.g., Davis v. Metro Prods, Inc.*, 885 F.2d 515, 523-24 (9th Cir. 1989); *Genetic Implant Sys., Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1459-60 (Fed. Cir. 1997); *Patin v. Thoroughbred Power Boats, Inc.*,

294 F.3d 640, 652-54 (5th Cir. 2002). Unless promptly corrected, the expansive assertion of judicial jurisdiction represented by *Bauman II* could likewise be used to harass individual owners of small businesses and force them to choose between abandoning a potentially lucrative market or risk subjecting themselves to assertions of judicial jurisdiction in faraway courts.

CONCLUSION

For the foregoing reasons, the petition for rehearing and suggestion of rehearing *en banc* should be granted.

Respectfully submitted,

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July 8, 2011

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July 8, 2011 Peter B. Rutledge

CERTIFICATE OF SERVICE

I, Peter B. Rutledge, certify that on July 8, 2011 the attached BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT THE PETITION FOR REHEARING OR REHEARING *EN BANC* was filed electronically with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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