No. S_____
(Court of Appeal No. A140035)
(San Francisco County Super. Ct. J.C.C.P. No. 4748)

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRISTOL-MYERS SQUIBB COMPANY,
Petitioner,

v.

SUPERIOR COURT FOR THE COUNTY OF SAN FRANCISCO,
Respondent.

BRACY ANDERSON, ET AL.,
Real Parties in Interest.

PETITION FOR REVIEW

ARNOLD & PORTER LLP
SEAN M. SELEGUE (No. 155249)
sean.selegue@aporter.com
SHARON D. MAYO (No. 150469)
JEREMY MCLAUGHLIN (No. 258644)
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111-4024
Telephone: 415.471.3100
Facsimile: 415.471.3400

ARNOLD & PORTER LLP
MAURICE A. LEITER (No. 123732)
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017-5844
Telephone: 213.243.4000
Facsimile: 213.243.4199

Attorneys for Petitioner
Bristol-Myers Squibb Company

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ISSUE PRESENTED

In light of the United States Supreme Court's recent decisions in *Daimler AG v. Bauman*, No. 11-965, 571 U.S. ___ (2014), and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), and notwithstanding older contrary California decisions, does the federal Due Process Clause permit a California court to assert personal jurisdiction over an out-of-state company regarding the claims of 575 out-of-state plaintiffs based on events that took place entirely outside California?

STATEMENT OF FACTS

On January 14, 2014, and too late for the Court of Appeal to have considered it here, the United States Supreme Court decided *Daimler AG v. Bauman*, No. 11-965, 571 U.S. ___ (2014). That case directly addresses the issue presented in this Petition: when may a court exercise general jurisdiction over an out-of-state company for causes of action that do not relate to the defendant's activities in the forum state? The Supreme Court's answer in *Daimler* was unequivocal: if a company is neither incorporated nor has its principal place of business in the forum state, that state cannot exercise general jurisdiction over the defendant absent exceptional circumstances.

That is the situation here. 575 non-California residents joined with 84 unrelated California residents to assert product liability claims against Petitioner Bristol-Myers Squibb Company ("BMS"), a company incorporated in Delaware with a principal place of business in New York. Petition for Writ of Mandate ("Writ Petition"), at 3-4 n.2; Petitioner's Exhibits ("Pet. Ex.") Ex. 428 ¶ 2, 432 ¶ 2.[1] These out-of-state plaintiffs, the Real Parties in Interest ("Real

[1] "Petitioner's Exhibits" refers to the exhibits BMS filed in the Court of Appeal in support of BMS's Writ Petition.

Parties"), allege injuries from Plavix®, a prescription drug BMS manufactures outside California. Real Parties do not dispute that *they obtained their prescriptions for Plavix®, purchased the medication, used it, and were allegedly injured by it outside of California*.[2]

BMS has no contacts with California related to Plavix® other than selling the medication here to persons *other* than Real Parties. While those sales are substantial in absolute terms, they represent a very small share of the company's U.S. operations. Pet. Ex. 430 ¶ 3, Ex. 432 ¶4. Similarly, while the company operates five facilities in California, those facilities are unrelated to Plavix® and constitute a small portion of BMS's U.S. operations: the company's 164 California employees represent only 1.3% of the company's total 12,598 employees in the United States. Pet. Ex. 428 ¶ 3, Ex. 430 ¶ 2.

Based on these facts, on July 9, 2013, BMS filed a Motion to Quash Service of Summons for Lack of Personal Jurisdiction. Pet. Ex. 336:9-22, 342. BMS contended that the court lacked personal jurisdiction under California's long-arm statute, which provides that a court may exercise jurisdiction "on any basis not inconsistent with the Constitution of this state or of the United States." CIV. PROC. CODE § 410.10. After a hearing, the trial court denied the motion, reasoning

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[2] BMS has not challenged jurisdiction over the 84 plaintiffs who reside in California, but the pendency of their claims in no way supports jurisdiction over Real Parties' claims. *See, e.g., Simons v. Arcan, Inc.*, No. 12-01493, 2013 WL 1285489, at *2 (E.D. Pa. Mar. 28, 2013) ("[The] personal jurisdiction analysis usually must be conducted separately for each plaintiff . . . ."). Likewise, the trial court's jurisdiction over a California co-defendant that distributed Plavix®, McKesson Corp., does not confer jurisdiction over BMS. *See, e.g., In re Auto. Antitrust Cases I & II*, 135 Cal. App. 4th 100, 113 (2005) ("Personal jurisdiction must be based on forum-related acts that were personally committed by each nonresident defendant.").

that it could assert general or all-purpose jurisdiction over BMS. Pet. Ex. 791, Exs. 812-14. In doing so, the trial court relied on a Court of Appeal opinion, *Hesse v. Best Western International, Inc.*, 32 Cal. App. 4th 404 (1995), that BMS had argued conflicted with a subsequent opinion of the United States Supreme Court that limited general jurisdiction to those places where a corporate defendant is "at home." *Goodyear*, 131 S. Ct. at 2851.

On October 22, 2013, BMS filed a Petition for Writ of Mandate in the Court of Appeal. On January 14, 2014, the Court of Appeal summarily denied BMS's Writ Petition. On the same day, the United States Supreme Court issued its decision in *Daimler AG v. Bauman*, No. 11-965, 571 U.S. ___ (2014), which conflicts even more sharply with *Hesse*. In issuing its summary denial of the Writ Petition, then, the Court of Appeal likely did not have the opportunity to consider the impact of *Daimler*.

REASONS FOR GRANTING REVIEW

I.

THE COURT SHOULD GRANT REVIEW TO BRING CALIFORNIA DECISIONS INTO CONFORMITY WITH FEDERAL CONSTITUTIONAL LAW.

In the last three years, the United States Supreme Court has twice addressed, with increasing concern, improper assertions of personal jurisdiction over foreign defendants in actions that have nothing do with the foreign defendants' activities in the forum state. These decisions mark a major change in how courts are to assess personal jurisdiction. The assertion of personal jurisdiction over "mass actions" like this one brought by hundreds of individual plaintiffs in California against out-of-state defendants based on events that have nothing to do with California violates due process. California law has yet to catch up with the high court's recent rulings,

resulting in BMS improperly being compelled to defend in California hundreds of out-of-state claims over which the California courts lack jurisdiction.

In its two recent decisions—one announced just last week—the United States Supreme Court has held that a corporation can be subjected to general jurisdiction only in its place of incorporation or principal place of business, other than in "exceptional" circumstances like a temporary relocation of corporate headquarters. *Daimler AG v. Bauman*, No. 11-965, 571 U.S. ___ (2014); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011). In so holding, the Court has drawn a sharp distinction between general or "all-purpose" personal jurisdiction and specific jurisdiction. General jurisdiction, on which the trial court here relied, may be exercised on corporate defendants only in those few states where the defendant is "at home," such as its place of incorporation or principal place of business. By contrast, specific jurisdiction allows an out-of-state defendant who has minimum contacts with a state to be sued there only for claims related to the defendant's in-state activities.

Prior to *Daimler*, Real Parties had argued that *Goodyear* did not create a new standard. *See, e.g.*, Opp'n to Pet., at 3 (Nov. 12, 2013) ("[T]he Supreme Court in *Goodyear* did not create a new 'at home' test for general jurisdiction."). But there is now no room for debate that the high court has fundamentally reshaped and narrowed the ability of courts to assert general jurisdiction over foreign defendants, at term that includes out-of-state corporations. *Goodyear,* 131 S. Ct. at 2851. In the words of a noted academic whose writings the Supreme Court found persuasive in both *Daimler* and *Goodyear,* "[t]he *Daimler A.G. v. Bauman* decision delivers a knockout blow to ambitious plaintiffs' lawyers who hoped for continued erosion of the constitutional limits on the reach of

state power." L. Brilmayer, *Daimler*: *A Map Out of Obscure Territory*, DAILY J. (Jan. 17, 2014).

The time has passed for California to sit on the sidelines of this issue, with out-of-date decisions still in the official reporters. Three years ago, the high court first noted that lower courts had conflated specific jurisdiction with general jurisdiction. *Goodyear*, 131 S. Ct. at 2855-56. In *Goodyear,* the Court reversed a North Carolina court for confusing the two concepts and applying the more lenient standards for specific jurisdiction to invoke general jurisdiction. The North Carolina court had concluded that it could assert jurisdiction over foreign tire manufacturers concerning a claim arising from an accident in Paris, France. The defendants' only connection with North Carolina was that a small percentage of their tires—not the ones that caused the accident in Paris—had been distributed in the state by the foreign companies' corporate affiliates. The Court unanimously rejected the notion that a "stream of commerce" rationale could justify a rule that would render "any substantial manufacturer or seller of goods . . . amenable to suit, on any claim for relief, wherever its products are distributed." *Id.* at 2857.

The Court in *Goodyear* went on to clarify that general jurisdiction exists over foreign corporations only where their affiliations with the State are "so 'continuous and systematic' *as to render them essentially at home in the forum State*." 131 S. Ct. at 2851 (citation omitted; emphasis added); *see also id.* at 2854, 2857. In describing this "at home" standard, the Supreme Court recognized that for corporations, the "paradigm" all-purpose forums are where a corporation is incorporated or has its principal place of business. *Goodyear*, 131 S. Ct. at 2853-54 (citing L. Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988)); *see also Daimler*, 571 U.S. ___ (slip op. (Jan. 14, 2014)

at 14 n.11) ("As the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations so continuous and systematic as to render the foreign corporation essentially at home in the forum State, *i.e.*, *comparable to a domestic enterprise in that State*.") (citation, quotation marks, and alteration omitted; emphasis added).

In *Daimler*, the high court again reversed a lower court decision that had asserted general jurisdiction over a foreign corporation. The Court there unanimously overturned a Ninth Circuit decision that had concluded a federal District Court in California had general jurisdiction over a German corporation for claims brought by foreign nationals related to events that took place outside the United States. In doing so, the Court signaled its concern over "exorbitant" and "unacceptably grasping" theories of general personal jurisdiction that violate "due process constraints on the assertion of adjudicatory authority." 571 U.S. ___ (slip op. at 2, 19, 21).

In *Daimler*, twenty-two Argentinean residents brought a lawsuit in California against Daimler, a German company, for actions purportedly taken by Daimler's Argentina subsidiary. 571 U.S. ___ (slip op. at 1). Even though the alleged torts occurred in Argentina, the plaintiffs argued that a California court could exercise general jurisdiction over Daimler because one of its U.S. subsidiaries did business here. *Id.* at 2. The U.S. subsidiary had several offices in California and was the largest supplier of luxury vehicles to the California market. *Id.* at 4.

The Court concluded that a defendant is "at home" only in a place where it is incorporated, where it maintains its principal place of business, and perhaps elsewhere "in an exceptional case" such as *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), in which a foreign company had temporarily moved its headquarters during World War II.

Daimler, 571 U.S. ___ (slip op. at 20 n.19). Applying these standards, and even assuming that the activities of Daimler's U.S. subsidiary in California should be imputed to the German parent, (*id.* at 18, 21), the Court concluded that general jurisdiction was lacking:

> [N]either Daimler nor [its U.S. subsidiary] is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other state in which [the U.S. subsidiary's] sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

Id. at 20-21 (internal quotation marks and citation omitted).

Daimler's analysis applies equally here. Like BMS, the defendant in *Daimler* was not incorporated and did not maintain its principal place of business in the forum state. Like BMS, the defendant in *Daimler* conducted business in California, including substantial product sales and the maintenance and operation of physical facilities. But that is not enough for a state court to assert *general* jurisdiction over *any* claim against the defendant arising anywhere in the world. If doing business in a state were sufficient to subject a foreign corporation to general jurisdiction there, then large companies like BMS would potentially be subject to general jurisdiction in dozens of states. The United States Supreme Court in *Daimler* specifically rejected such a possibility: "A corporation that operates in many places can scarcely be deemed at home in all of them." 571 U.S. ___ (slip op. at 21 n.20).

In exercising general jurisdiction over BMS, the Superior Court relied on California precedent that predated *Goodyear*, concluding that cases like *Hesse v. Best Western*

International, Inc., 32 Cal. App. 4th 404 (1995), were "left undisturbed by the Supreme Court in *Goodyear* . . . ." Pet. Ex. 813. The Superior Court looked to *Hesse* and concluded that general jurisdiction over an out-of-state corporation is appropriate if the defendant's forum activities are "sufficiently wide-ranging, systematic and continuous" to confer general jurisdiction. *Id.* (quoting *Hesse*, 32 Cal. App. 4th 404). But *Daimler* rejected that very test. *Daimler*, 571 U.S. ___ (slip op. at 19) ("Plaintiffs would have us . . . approve the exercise of general jurisdiction in every State in which a corporation 'engages in substantial, continuous, and systematic course of business.' That formulation, we hold, is unacceptably grasping."). Accordingly, *Hesse* stands in direct conflict to *Daimler* and *Goodyear*.

Under the *Hesse* line of cases, a court tallies up the defendant's forum contacts in absolute terms to determine if they are of sufficient magnitude to warrant general jurisdiction. *E.g., As You Sow v. Crawford Labs., Inc.*, 50 Cal. App. 4th 1859, 1868 (1996) ("For general jurisdiction, we are concerned with the quality and quantity of [defendant's] business contacts in California."). This method of scorekeeping is perfectly appropriate when a court is considering an exercise of *specific* jurisdiction. But when general jurisdiction is at issue, as here, a different analysis applies. *Daimler* expressly rejected examination of the sheer magnitude of the corporate defendant's contact with the forum state, noting that "[g]eneral jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide," not just in the forum state. *Daimler*, 571 U.S. ___ (slip op. at 21 n.20). Here, as in *Daimler*, BMS's contacts with California—however substantial in absolute terms—are a very small part of its world-wide operations and do not make California BMS's "home."

Accordingly, this Court should grant review to bring California decisional law into conformity with federal constitutional standards. CAL. R. CT. 8.500(b)(1) (review is appropriate "[w]hen necessary to secure uniformity of decision or to settle an important question of law").

II.

AT A MINIMUM, THE COURT SHOULD GRANT REVIEW AND TRANSFER THE MATTER TO THE COURT OF APPEAL TO CONSIDER THIS IMPORTANT QUESTION OF LAW.

No published California decision has yet applied *Goodyear* or *Daimler* and, as noted above, existing California decisions conflict with the two recent decisions of the United States Supreme Court. If this Court does not itself accept the matter for decision, it should grant review and transfer the matter to the Court of Appeal with instructions to issue the alternative writ and rule on the merits. CAL. R. CT. 8.528(d). A grant and transfer would be particularly appropriate here because the United States Supreme Court handed down *Daimler* on the same day the Court of Appeal issued its summary denial of BMS's petition. Accordingly, the Court of Appeal almost certainly was not aware of *Daimler* when it issued the summary denial. Because the summary denial was final immediately as to the Court of Appeal, BMS was unable to bring *Daimler* to the Court of Appeal's attention—and the Court of Appeal itself was powerless to withdraw its decision. *See* CAL. R. CT. 8.490(b)(1)(A); *see also id.* 8.490(c) & 8.268(a)(2) ("[a]n order for rehearing must be filed before the decision is final"). The Court of Appeal should decide the important issue presented to resolve the conflict between *Hesse*, on the one hand, and *Goodyear* and *Daimler*, on the other.

III.

IF REVIEW IS NOT GRANTED, THE CONSTITUTIONAL VIOLATION WILL GO UNREMEDIED.

Ordinarily, when an important new decision like *Daimler* is issued, a party in BMS's position could return to the trial court and file a motion to reconsider under Section 1008(b) of the Code of Civil Procedure. If the trial court again declined to dismiss Real Parties' actions for lack of jurisdiction, BMS could then seek appellate review by writ petition or appeal after final judgment. This is not an ordinary case, however, and a grant of review presents BMS's *only* avenue of relief absent a grant of *certiorari* by the United States Supreme Court.

Appeal after entry of final judgment is not available unless BMS were to decline to defend the action and accept a default judgment. "[M]andamus [is] the *exclusive* remedy for a party who wishe[s] to assert his jurisdictional objection while nevertheless preserving his right to defend on the merits if his challenge was unsuccessful." *State Farm Gen. Ins. Co. v. JT's Frames, Inc.*, 181 Cal. App. 4th 429, 439 (2010) (citation and internal quotation marks omitted). BMS, like most defendants, is not willing to accept a default judgment as a means of seeking appellate review and has already filed answers. Accordingly, writ review provides BMS its only avenue for appellate relief. CODE CIV. PROC. § 418.10(c), (e)(3); *State Farm Gen. Ins. Co.*, 181 Cal. App. 4th at 437-38.

In light of the harsh choice presented to defendants like BMS, the Legislature enacted Section 418.10(e)(1) of the Code of Civil Procedure to allow a writ petition to be filed and decided even when the defendant takes steps to avoid entry of a default. That section provides that "no act by a party who makes a motion under this section, including filing an answer . . . constitutes an appearance, unless the court denies the motion made under this section." Section 418.10(e)(2) further postpones a general appearance until writ proceedings

"have finally concluded." If this Court does not grant review, then the writ proceedings will conclude, and BMS will be deemed to have entered a general appearance and to have "waived any right it may have had to insist that jurisdiction of its person had not been obtained." *State Farm*, 181 Cal. App. 4th at 437 (internal quotation marks omitted).

CONCLUSION

The Court should grant review and either decide the issue presented on its merits or transfer the matter to the Court of Appeal with directions to issue the alternative writ and rule on the merits of BMS's petition to that court.

DATED: January 24, 2014

Respectfully,

ARNOLD & PORTER LLP
SEAN M. SELEGUE
SHARON D. MAYO
JEREMY M. MCLAUGHLIN
MAURICE A. LEITER

By: /s/ *Sean M. SeLegue*
SEAN M. SELEGUE

Attorneys for Petitioner
Bristol-Myers Squibb Company

CERTIFICATE OF COMPLIANCE PURSUANT TO CAL. R. CT. 8.504(d)(1)

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used, I certify that the attached **Petition for Review** contains 3,094 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: January 24, 2014

/s/ *Sean M. SeLegue*
SEAN M. SELEGUE

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

BRISTOL-MYERS SQUIBB COMPANY,

Petitioner,

v.

SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent;

BRACY ANDERSON ET AL.,

Real Party in Interest.

A140035

(J.C.C.P. No. 4748)

BY THE COURT:

The petition for writ of mandate is denied.

Dated: JAN 14 2014 _____ P.J.

PROOF OF SERVICE

I am a citizen of the United States employed in the City and County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is Three Embarcadero Center, 10th Floor, San Francisco, California 94111.

On January 24, 2014, I served the foregoing documents described as:

PETITION FOR REVIEW

on the interested parties in this action (*see below Service List*) as follows:

☑ BY MAIL I placed such envelope with postage thereon prepaid in the United States Mail at Three Embarcadero Center, 10th Floor, San Francisco, California 94111.

☑ BY EMAIL by transmitting a true and correct copy via email the document(s) listed above on this date to the person(s) at the email address(es) set forth below.

☐ BY FEDERAL EXPRESS I am readily familiar with Arnold & Porter LLP's business practices of collecting and processing items for pickup and next business day delivery by Federal Express. Under said practices, items to be delivered the next business day are either picked up by Federal Express or deposited in a box or other Facility regularly maintained by Federal Express in the ordinary course of business on that same day with the cost thereof billed to Arnold & Porter LLP's account. I placed such sealed envelope for delivery by Federal Express to the offices of the addressee(s) as indicated on the below mailing list on the date hereof following ordinary business practices.

SERVICE LIST

Kelly A. McMeekin KMcMeekin@NapoliBern.com Hunter J. Shkolnik Hunter@NapoliBern.com Shayna E. Sacks SSacks@NapoliBern.com NAPOLI BERN RIPKA SHKOLNIK & ASSOCIATES LLP 525 S. Douglas Street, Suite 260 El Segundo, CA 90245 Telephone: (310) 331-8224 Facsimile: (310) 736-2877	Attorneys for Plaintiffs in *Adams, Ailes, Alexander, Anderson, Applen, Bales, Bryan,* and *Caouette* [Via U.S. and electronic mail]
William M. Audet waudet@audetlaw.com Joshua C. Ezrin jezrin@audetlaw.com AUDET & PARTNERS LLP 221 Main Street, Suite 1460 San Francisco, CA 94105 Telephone: (415) 568-2555 Facsimile: (415) 568-2556	Attorneys for Plaintiffs in *Bryan* [Via U.S. and electronic mail]
Clerk of the Court San Francisco County Superior Court 400 McAllister Street San Francisco, CA 94102	[Via U.S. Mail]
Hon. John Munter San Francisco County Superior Court 400 McAllister Street San Francisco, CA 94102	[Via U.S. Mail]
Clerk of the Court 1st District Court of Appeal Division Two 350 McAllister Street San Francisco, CA 94102	[Via U.S. Mail and electronic submission through the Court of Appeal website]

COUNSEL FOR PARTIES IN OTHER COORDINATED ACTIONS WHO ARE NOT PARTIES TO THIS WRIT PROCEEDING

Orry P. Korb, County Counsel
Greta Hansen, Lead Deputy County Counsel
Danny Chou, Assistant County Counsel
Danny.Chou@eco.scegov.org
Kavita Narayan, Deputy County Counsel
OFFICE OF THE COUNTY COUNSEL
COUNTY OF SANTA CLARA
70 West Hedding Street
East Wing 9th Floor
San Jose, CA 95110
Telephone: (408) 299-5900
Facsimile: (408) 292-7240

Attorneys for Plaintiff *County of Santa Clara*

[Via U.S. and electronic mail]

Paul R. Kiesel
kiesel@kbla.com
Raymond P. Boucher
boucher@kbla.com
Helen Zukin
zukin@kbla.com
KIESEL LAW LLP
8648 Wilshire Boulevard
Beverly Hills, CA 90211-2910
Telephone: (310) 854-4444
Facsimile: (310) 854-0812

Attorneys for Plaintiff *County of Santa Clara*

[Via U.S. and electronic mail]

Fletcher V. Trammell
ftrammell@bpblaw.com
Robert W. Cowan
rcowan@bpblaw.com
BAILEY PEAVY BAILEY PLLC
440 Louisiana Street, Suite 2100
Houston, Texas 77002
Telephone: (713) 425-7100
Facsimile: (713) 425-7101

Attorneys for Plaintiff *County of Santa Clara*

[Via U.S. and electronic mail]

Robert L. Salim
skeeter@cp-tel.net
LAW OFFICE OF ROBERT L. SALIM
1901 Texas Street
Natchitoches, LA 71457
Telephone: (318) 354-1043
Facsimile: (318) 354-1021

Attorneys for Plaintiff *County of Santa Clara*

[Via U.S. and electronic mail]

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on January 24, 2014.

/s/ *Jane Rustice*
Jane Rustice