No. 11-965

In The
Supreme Court of the United States

DAIMLERCHRYSLER AG,

Petitioner,

v.

BARBARA BAUMAN, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* VIEGA GmbH & CO. KG AND VIEGA INTERNATIONAL GmbH IN SUPPORT OF PETITIONER DAIMLERCHRYSLER AG

PAT LUNDVALL, *Counsel of Record*
DEBBIE LEONARD
AMANDA C. YEN
MCDONALD CARANO WILSON LLP
2300 West Sahara Ave., Suite 1200
Las Vegas, Nevada 89102
(702) 873-4100
plundvall@mcdonaldcarano.com

Counsel for Amici Curiae

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that *amicus* Viega GmbH & Co. KG is a *Kommanditgesellschaft* or German limited partnership and *amicus* Viega International GmbH is a *Gesellschaft mit beschränkter Haftung*, or German limited liability company. Viega GmbH & Co. KG is the sole member of Viega International GmbH. No parent company and no publicly held company owns 10% or more of Viega GmbH & Co. KG membership interests.

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INTEREST OF *AMICI CURIAE*[1]

Viega GmbH & Co. KG ("Viega GmbH") and Viega International GmbH ("Viega International") (collectively for purposes of this *amicus curiae* brief only, the "German Viega Companies") are a *Kommanditgesellschaft,* or German limited partnership, and a *Gesellschaft mit beschränkter Haftung,* or German limited liability company, or German limited liability companies, with their respective "*Sitz*" ("seat"), or effective place of business, in Attendorn, Germany. Viega International is wholly owned by Viega GmbH, which is and always has been family-owned. The German Viega Companies design and manufacture plumbing and heating products in Germany and are foreign corporations that have no contact with the United States. Only their distinct and separate U.S. subsidiaries have such contact.

The German Viega Companies' interest in the outcome of this case stems from being subjected to general personal jurisdiction in several[2] cases in the

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[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *amici* or their counsel made any monetary contribution toward the preparation or submission of this brief. Both Petitioner and Respondent have consented to the filing of *amicus curiae* briefs in support of either party or of neither party.

[2] Several class action complaints have been filed against the German Viega Companies in the United States District Court for the District of Nevada. *See Waterfall Homeowners Assoc., et al. v. Viega, Inc., et al.*, Case No. 2:11-cv-1498 (D. Nev.); *Southern Terrace Homeowners Assoc. v. Viega, Inc., et al.*, Case

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United States District Court for the District of Nevada (the "District Court") and in Nevada state courts in Clark County, Nevada.[3] In exerting such general personal jurisdiction, the District Court felt bound by *Bauman v. DaimlerChrysler Corp. ("Bauman")*, 644 F.3d 909 (9th Cir. 2011), notwithstanding the German Viega Companies' lack of *any* contact – much less continuous and systematic contact – with the forum state. *See Waterfall*, Dkt. 127 at 5:17-21.[4]

No. 2:12-cv-0206 (D. Nev.); and *Anthem Highlands Comm. Assoc. v. Viega, Inc., et al.,* Case No. 2:12-cv-0207 (D. Nev.). These cases were subsequently consolidated into one action in the District of Nevada. *See Hartmann, et al. v. Uponor, Inc., et al.*, Case No. 2:08-cv-01223-RCJ-GWF (D. Nev.), Dkt. 718 (severing and consolidating claims against the German Viega Companies into the *Waterfall* action).

[3] In November 2011, the German Viega Companies were also found subject to general personal jurisdiction by Nevada state courts, which were persuaded by *Bauman*. The German Viega Companies sought relief from the Nevada Supreme Court, which decided to hear the issue and requested briefing. *See Viega GmbH, et al. v. Eighth Judicial Dist. Court (Aventine-Tramonti Homeowners' Assoc.)*, No. 59976 (Nev. filed Jan. 4, 2012); *Viega GmbH, et al. v. Eighth Judicial Dist. Court (La Paloma Homeowners' Assoc.)*, No. 60015 (Nev. filed Jan. 10, 2012). The cases have been fully briefed, argued and submitted. In the meantime, the German Viega Companies also gave notice to the Nevada Supreme Court that this Court granted certiorari in *Bauman*. The Nevada Supreme Court has yet to hand down a decision. For simplicity's sake, the remainder of this *amicus* brief will focus on the federal court litigation although the federal due process issue in all of these cases is the same.

[4] Factual references throughout this *amicus* brief are supported by the record in *Waterfall* and the United States District Court for the District of Nevada case *Slaughter, et al. v.*

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The German Viega Companies relied upon established corporate law throughout the United States in deciding to invest in the United States through subsidiaries. The German Viega Companies observed all necessary corporate formalities that maintained those subsidiaries as separate and distinct legal entities. Nevertheless, the District Court relied upon the agency theory articulated in *Bauman*, and solely because "[t]he German Viega Defendants are . . . alleged to be the parents of subsidiaries over which there is general jurisdiction in Nevada," exerted general personal jurisdiction over those foreign entities. *Id.* As a result, the question presented to this Court is the very issue of law upon which the Nevada District Court relied to find general personal jurisdiction over the German Viega Companies.

The German Viega Companies submit this *amicus curiae* brief to provide the Court with a first-hand example of the fallout from *Bauman* on foreign entities that have no contacts with the United States but that nevertheless are being subjected to general personal jurisdiction as a result of the Ninth Circuit's wide-reaching decision.

Uponor, Inc., et al., renamed *Hartmann, et al. v. Uponor, Inc., et al.*, Case No. 2:08-cv-01223-RCJ-GWF (D. Nev.).

SUMMARY OF THE ARGUMENT

Bauman erroneously subjects companies like the German Viega Companies to litigation in a forum state notwithstanding the lack of any contacts with that forum. Absent reversal, *Bauman* exposes such companies to the risk of being haled into court in any jurisdiction in which their direct or indirect subsidiaries conduct business. This result is contrary to long-standing principles of corporate law that recognize parent companies and their subsidiaries as legally distinct. The German Viega Companies have scaled back investment in the U.S. because of *Bauman*, and those cases that have followed *Bauman*. Since these *Bauman*-influenced decisions, the German Viega Companies have been expanding investments in other countries, such as ones in Asia, with more predictable legal environments. Absent reversal, the German Viega Companies will consider divesting in the United States, and will recommend to other similarly situated companies to do the same.

Where a subsidiary's actions cannot be imputed to a parent corporation for liability purposes as long as the entities maintain separate corporate identities, so too, a parent corporation should be protected from general personal jurisdiction that arises solely from its subsidiary's contact with the forum state. Corporate law demands that a parent and subsidiary that comply with the requirements necessary to maintain their separate corporate existences – as the German Viega Companies and their American subsidiaries did

– be recognized as distinct entities for *all* legal purposes. Anything less lends itself to an unpredictable business environment that discourages outside investment in the United States by potential investors like the German Viega Companies, in contravention of the very principles that have guided the development of corporate law in this country. For these reasons, *Bauman* must be reversed.

ARGUMENT

I. The German Viega Companies Sought To Invest In The United States In Reliance Upon Well-Established Principles of Corporate Law

A. The United States Has Long Recognized And Protected Distinct Corporate Identities

Long-standing principles of corporate law demand that *Bauman* be reversed. It is well established that a parent corporation is considered separate and distinct from its subsidiaries if each maintains a separate corporate existence. *United States v. Bestfoods*, 524 U.S. 51, 61 (1998). To that end, this Court has recognized that "[i]t is a general principle of corporate law deeply ingrained in our economic and legal systems that a parent corporation (so-called because of control through ownership of another corporation's stock) is not liable for the acts of its subsidiaries." *Id.* at 61 (internal quotations and

citations omitted). Such respect for corporate separateness is no less important when deciding whether to subject foreign companies with U.S. subsidiaries to the jurisdiction of U.S. courts.

As the law recognizes, creation of a parent/subsidiary relationship while preserving a separate corporate existence between the two entities is an important economic engine for United States business activities. *See*, *e.g.*, *Anderson v. Abbott*, 321 U.S. 349, 362 (1944); *see generally Bestfoods*, 524 U.S. at 61; *see also Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1362 (10th Cir. 1993) ("The law allows businesses to incorporate to limit liability and isolate liabilities among separate entities."); *All Star, Inc. v. Fellows,* 676 S.E.2d 808, 813 (Ga.App. 2009) ("The law of corporations is founded on the legal principle that each corporation is a separate entity.") (internal quotation and citation omitted). This balance struck in corporate law allows each company to manage its business, yet gives a parent corporation some control over its subsidiary while concurrently benefitting from less exposure to legal risk. *See generally Bestfoods*, 524 U.S. at 61. Moreover, corporate law allows a corporation to engage in a new line of business activity perhaps unrelated to its current business and to obtain new and diverse revenue to sustain and supplement current revenue. *See generally Boulder Acquisition Corp. v. Unemployment Ins. Appeals of Indiana Dept. of Workforce Dev.*, 976 N.E.2d 1282, 1288 (Ind.App. 2012) ("[T]he law of corporations

allows a parent company to benefit by creating legally separate subsidiary companies which the parent company owns. . . .").

By providing a degree of assurance that corporate separateness will isolate a parent company from the legal risks associated with an American subsidiary, U.S. corporate law has encouraged business growth and diverse investment by foreign companies. *See generally Bestfoods*, 524 U.S. at 61. Parent companies and their subsidiaries have grown to depend upon the law that one entity's actions cannot be imputed to the other notwithstanding the parent/subsidiary relationship. *Id.* The *Bauman* decision eviscerates this well-established principle.

B. Relying Upon These Well-Established Principles Of Corporate Law, The German Viega Companies Invested In The United States

The protections of U.S. corporate law have guided the business decisions of the German Viega Companies. The German Viega Companies have avoided conducting business directly in the United States in order to avoid direct liability and to prevent the potentially significant tax exposure that could result from such conduct. *Waterfall*, Dkt. 80-1 ¶ 22. Nevertheless, like many foreign businesses, the German Viega Companies sought to diversify and take advantage of opportunities for new revenue and business growth

outside of Germany. To that end, guided by U.S. corporate law (*see Bestfoods*, 524 U.S. at 61; *see, e.g., Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 335-37 (1925)), the German Viega Companies created subsidiaries to engage in United States commerce while, at the same time, maintaining the parent companies' separate German corporate identity. *See generally Waterfall*, Dkt. 80 and 80-1. The German Viega Companies' approach was not just allowed by U.S. corporate law, but, until the Ninth Circuit's decision in *Bauman*, was outright encouraged in order to promote foreign investment in this country. *See Bestfoods*, 524 U.S. at 61.

In October 2005, seeking to accomplish their goal of diversification and to invest in established domestic corporations (with the incidental benefit to both the German Viega Companies and United States commerce), Viega, Inc., a separate and distinct Delaware corporation with its principal place of business in Massachusetts, became the sole shareholder of Vanguard Industries, Inc., a Kansas corporation, which in turn was the 100% shareholder of Vanguard Piping Systems, Inc., also a Kansas corporation. *Waterfall,* Dkt. 80-1 ¶¶ 5 and 7. Subsequent to the acquisition of the Vanguard entities, Viega, Inc. relocated its principal place of business to Kansas. *Id.* ¶ 5. Through these transactions, in 2005, Vanguard Industries, Inc. and Vanguard Piping Systems, Inc. (the "Vanguard Entities") became, through Viega, Inc., *indirect* subsidiaries of the German Viega Companies. *Id.*

In January 2007, the operations of the Vanguard Entities were moved into Viega, LLC, a Delaware limited liability company formed in 2006 with its principal place of business in Kansas. *Id.* ¶ 9. Viega, Inc. is the sole member of Viega, LLC. *Id.* Thus, Viega, LLC remained an *indirect* subsidiary of the German Viega Companies. Both Viega, Inc. and Viega, LLC maintained their separate identities as Delaware corporations with their principal places of business in Kansas.

At all pertinent times and consistent with U.S. corporate law, the German Viega Companies have remained wholly separate and distinct corporations from Vanguard Industries, Inc.; Vanguard Piping Systems, Inc.; VG Pipe, LLC; Viega, Inc.; and Viega, LLC (the "American Vanguard/Viega Companies"). The German Viega Companies purposefully do not exercise control over the day-to-day business operations of the American Vanguard/Viega Companies or any other subsidiary of the German Viega Companies in the United States. *Id.* ¶ 12. None of the American Vanguard/Viega Companies in the United States is an agent of the German Viega Companies; rather, each subsidiary is a separate and distinct legal entity operating on its own behalf. *Id.* ¶ 13.

At all times, the German Viega Companies have strictly observed all corporate formalities necessary to maintain the separate legal existence of each and all of their American subsidiaries. *Id.* ¶ 7. As a result, until the Ninth Circuit issued its far-reaching decision in *Bauman*, U.S. corporate law allowed the

German Viega Companies (and other foreign companies like the German Viega Companies) to invest and promote growth in the United States without being subject to the general jurisdiction of U.S. courts based on subsidiaries' contacts.

II. Based Upon *Bauman*'s Overreaching Rule, The Nevada District Court Asserted Personal Jurisdiction Over The German Viega Companies Simply Because They Invested In The United States

A. The Evidence Submitted By The German Viega Companies Demonstrated The Absence Of Any Contacts With Nevada

On September 16, 2011, two homeowners associations filed suit against the U.S. indirect subsidiaries of the German Viega Companies, the American Vanguard/Viega Companies, for their alleged involvement in the design, manufacture, and construction of so-called "defective high-zinc-content brass [] fittings and potable-water-delivery systems and attendant high-zinc-content brass plumbing components. . . ." *Waterfall,* Dkt. 1 ¶ 33. Despite the corporate distinction between the German Viega Companies and their indirect U.S. subsidiaries, and despite the fact that the fittings and systems at issue were not manufactured by the German Viega Companies but rather manufactured by third parties and distributed by the U.S. entities, plaintiffs nevertheless also named the

German Viega Companies as defendants. *Waterfall,* Dkt. 1.

Because the German Viega Companies had no contact with the forum state, did not design, manufacture, market, construct, distribute, guarantee or sell the plumbing components in question and only had an *indirect* relationship with the American Vanguard/Viega Companies, on February 8, 2012, the German Viega Companies filed a Motion to Dismiss for Lack of Personal Jurisdiction Pursuant to FRCP 12(b)(2). *Waterfall*, Dkt. 80. The German Viega Companies argued that the District Court could not assert either specific[5] or general personal jurisdiction over the German Viega Companies and therefore should dismiss them from the lawsuit. *Id.*

Addressing general personal jurisdiction, the German Viega Companies provided evidence to the District Court (and the Nevada state courts in the Nevada state litigation) that the German Viega Companies do not do business in the State of Nevada, do not maintain any office, agency or representative in Nevada, and are not qualified, licensed or authorized

[5] Because the present issue before the Court and the basis for the District Court's assertion of personal jurisdiction involves *general* personal jurisdiction, the German Viega Companies do not advance their arguments against specific jurisdiction here. *See Waterfall*, Dkt. 104 at 20:14-17 and Dkt. 127 at 5:17-21. Nonetheless, the Vanguard-entity products at issue in the Nevada litigation were not designed, manufactured, distributed, marketed, or guaranteed by the German Viega Companies.

to do business in Nevada. *Waterfall*, Dkt. 80-1 ¶ 10. Moreover, no one is authorized by the German Viega Companies to accept service of process in Nevada, and the German Viega Companies have never appointed an agent for service of process in Nevada. *Id.*

By way of sworn affidavits and sworn declarations, as applicable, the German Viega Companies demonstrated that they do not conduct advertising or solicitation activities or sales, service or other business activities in Nevada. *Id.* ¶ 11. For that reason, the German Viega Companies do not enter into any contracts to insure a person, property or other risk in the state. *Id.* The German Viega Companies have never sold any products in Nevada, do not design any Viega products specifically for the Nevada market, and have not created, and do not employ or control any distribution system in Nevada. *Id.* ¶¶ 13-14.

B. Bound By The Ninth Circuit's Erroneous Decision In *Bauman*, The Nevada District Court Asserted General Personal Jurisdiction Over The German Viega Companies

Notwithstanding the undisputed evidence that the German Viega Companies had no contact with the forum state, the District Court denied the German Viega Companies' motion to dismiss and asserted general personal jurisdiction over the foreign entities. Deferring to its own 2009 order in *Slaughter, et al. v. Uponor, Inc., et al.*, Case No. 2:08-cv-01223

(D. Nev. 2009), Dkt. No. 259, which in turn had relied upon the Ninth Circuit's first, now superseded, *Bauman* decision, *Bauman v. DaimlerChrysler Corp.*, 579 F.3d 1088 (9th Cir. 2009), the District Court held: "As the Court ruled with respect to the Finnish Uponor Defendants in *Slaughter*, there is agency jurisdiction over these foreign companies. (*See* Order, Nov. 19, 2009, ECF No. 259 in Case No. 2:08-cv-01223 (quoting [*Bauman*], 579 F.3d 1088, 1094-95 (9th Cir. 2009)))." *Waterfall*, Dkt. 104 at 20:14-17.

In *Slaughter*, the same District Court Judge found that the Finnish corporation "purposefully sold, *through its subsidiaries*, products in Nevada such that it should reasonably be expected to be haled into a Nevada court if those activities result in alleged harm." *See Slaughter,* Dkt. 259 at 10:22-11:2 (emphasis added). Using this same *Bauman* analysis, the District Court exerted general personal jurisdiction over the German Viega Companies. *Waterfall*, Dkt. 104 at 20:14-17.

The German Viega Companies sought reconsideration (*Waterfall,* Dkt. 108), arguing that this Court's decision in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851 (2011), undermined the District Court's application of the "agency jurisdiction" theory. *Waterfall*, Dkt. 108 at 2:5-12. The District Court was not persuaded for two reasons. First, while the first *Bauman* decision had been vacated by the Ninth Circuit since the District Court had issued its *Slaughter* decision, on May 18, 2011

after rehearing, the Ninth Circuit had once again applied an agency jurisdiction theory in the *Bauman* decision now before this Court. *Waterfall*, Dkt. 127 at 5:7-10 (citing *Bauman*).

Second, the District Court rejected the German Viega Companies' argument that *Goodyear* undermines the *Bauman* agency jurisdiction theory: "[t]he German Viega Defendants are alleged to be not subsidiaries whose products came to the Nevada forum through no action of their own and who have no contact with Nevada directly or through their own subsidiaries, ***but rather they are alleged to be the parents of subsidiaries over which there is general jurisdiction in Nevada.***" *Waterfall*, Dkt. 127 at 5:16-21 (emphasis added). As a result, the District Court concluded that the German Viega Companies "stand in a different position than did the *Goodyear* subsidiaries." *Id.* In other words, applying *Bauman*, the District Court asserted general personal jurisdiction over foreign entities that had *no contact* with the State of Nevada simply because the German Viega Companies were alleged to be the *parents of subsidiaries* who were subject to personal jurisdiction in Nevada. *Id.*

III. Like The *Bauman* Foreign Defendants, The German Viega Companies Should Not Be Subject To General Personal Jurisdiction Simply Because They Are Parent Corporations To Indirect Subsidiaries Doing Business In The United States

Fundamental principles of corporate law demand that both the *Bauman* defendants and the German Viega Companies be protected from general personal jurisdiction. Just as a subsidiary's actions will not be imputed to the parent corporation for purposes of liability (*Bestfoods*, 524 U.S. at 61), this Court already has provided the legal framework for answering the question of whether personal jurisdiction over a parent corporation can be established through its subsidiary: "[J]urisdiction 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***." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, n.13 (1984) (internal citations omitted) (emphasis added). Conducting a separate jurisdictional analysis for each parent and subsidiary allows each entity to anticipate and manage risks in conducting its business. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) ("Simple jurisdictional rules also promote greater predictability. Predictability is valuable to corporations making business and investment decisions."); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (internal quotations and citations omitted) ("By requiring that individuals have fair warning that a particular activity may

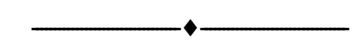
subject [them] to the jurisdiction of a foreign sovereign, the Due Process Clause gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to whether that conduct will and will not render them liable to suit.").

Bauman undermines this predictability inherent to U.S. corporate law, and the District Court's application of *Bauman* to assert general personal jurisdiction over the German Viega Companies underscores the capricious legal environment created by the Ninth Circuit's erroneous decision. In this altered legal landscape, foreign entities such as the German Viega Companies must reevaluate the costs and benefits of their continued investment in the United States. *Bauman* leaves foreign corporations that have no contact with the forum state other than a relationship with indirect subsidiaries without any guideposts as to how to conduct their activities and manage risks going forward.

The German Viega Companies chose to invest in American companies in reliance on the long-standing tenet that investors or parent companies that observe corporate formalities when establishing and overseeing subsidiaries will be treated as distinct entities. Yet, *Bauman* allowed a forum state with which the German Viega Companies had no contact to assert general personal jurisdiction, presuming that the parent and subsidiary companies were simply one. As a result of *Bauman*, the German Viega Companies are now subject to litigation in Nevada based on the

alleged misdeeds of distinct subsidiary companies. Thus, they are prone to suit in any state in which their indirect subsidiaries conduct business – regardless of the fact that the German Viega Companies are separate corporate entities under U.S. law, and are uninvolved in the alleged misdeeds at issue.

For the German Viega Companies, the implications of *Bauman* are wide reaching. With *Bauman* controlling, the only means by which the German Viega Companies can minimize their risk of having to litigate in a forum in which their indirect subsidiaries conduct business is to avoid the forum completely. This means closing the subsidiaries and avoiding any business in the state altogether. The German Viega Companies have for the moment decided to limit any further U.S. investments until the legal situation is clarified, and have chosen in the meantime to invest in other countries that more predictably apply the relevant corporate law with respect to these types of investments. Unless this Court definitively rejects *Bauman*, not only will the German Viega Companies consider both continuing the moratorium on U.S. investments and divesting themselves of their current U.S. investments, but they will also recommend to other similarly-situated foreign investors to do the same.



CONCLUSION

The application of *Bauman* to the German Viega Companies demonstrates that *Bauman* violates the well-established principle that a parent corporation is considered separate and distinct from its subsidiaries as long as separate corporate existence is maintained. In ruling that general personal jurisdiction can be exerted over a foreign entity solely through the contacts of its indirect subsidiary, *Bauman* – in contravention of the most fundamental notions of due process – creates an unpredictable legal landscape for foreign business and thereby stifles foreign investment in the United States. For these reasons, the Ninth Circuit's *Bauman* decision should be reversed.

Respectfully submitted,

PAT LUNDVALL, *Counsel of Record*
DEBBIE LEONARD
AMANDA C. YEN
MCDONALD CARANO WILSON LLP
2300 West Sahara Ave., Suite 1200
Las Vegas, Nevada 89102
(702) 873-4100
plundvall@mcdonaldcarano.com

Counsel for Amici Curiae

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