S221038

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRISTOL-MYERS SQUIBB COMPANY,

Defendant and Petitioner,

vs.

SUPERIOR COURT OF THE CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

BRACY ANDERSON, et al.,

Real Parties in Interest.

From a Decision by the Court of Appeal, First Appellate District Division Two, Case No. A140035

AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA IN SUPPORT OF BRACY ANDERSON, ET AL., REAL PARTIES IN INTEREST

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization which has no shareholders. As such, *amicus* and its counsel certify that *amicus* and its counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amicus* and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: July 8, 2015

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SHARON J. ARKIN

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INTEREST OF THE *AMICUS*

The Consumer Attorneys of California ("Consumer Attorneys") is a voluntary membership organization representing approximately 6,000 associated attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals subjected in a variety of ways to personal injury, employment discrimination, and other harmful business and governmental practices. Consumer Attorneys has taken a leading role in advancing and protecting the rights of injured Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent consumers in cases involving corporate defendants organized in other states and with their primary places of business elsewhere, Consumer Attorneys is interested in the significant issues presented by the *Bristol-Myers* opinion.

INTRODUCTION

Petitioner Bristol-Myers Squibb Company ("BMS") and its amici argue that the United States Supreme Court's decision in *Daimler AG v. Bauman* (2014) 134 S.Ct. 746, 187 L.Ed.2d 624 eliminated the concept of general jurisdiction, traditionally predicated on "instances when the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities" as articulated in *International Shoe Co. v. Washington* (1945) 325 U.S. 310, 318, 66 S.Ct. 154, 90 L.Ed. 95. Instead, BMS argues, *Bauman* strictly limited general jurisdiction only to the state in which a corporation is actually incorporated or the state where its corporate headquarters or principal place of business is located.

Bauman did no such thing. In fact in both *Bauman* and in its immediate predecessor, *Goodyear Dunlop Tires Operations, S.A. v. Brown* (2011) 131 S.Ct. 2846, 180 L.Ed.2d 796, the United States Supreme Court reaffirmed that substantial and continuous business operations within a state allows exercise of general jurisdiction over that corporate defendant, even if that state is not the corporation's state of incorporation or principal place of business. (*Bauman*, at 760 ["*Goodyear* did *not* hold that a corporation may be subject to general jurisdiction *only* in a forum where it

is incorporated or has its principal place of business." (Initial emphasis added, latter emphasis in original)].)

Essentially, those cases confirmed the prior analysis in *International Shoe* that business activities within a state which are *sufficiently* substantial and continuous to confer general jurisdiction fundamentally render the corporation "at home" in that state. (*Ibid*.) All that *Bauman* and *Goodyear* actually did was establish that the state of incorporation and the state of principal place of business were, *at the very least*, appropriate locales for exercise of general jurisdiction. Neither case stands for the proposition that *no other possible locations qualify as a basis for general jurisdiction.*[1]

Most critical to an assessment of the *Bauman* and *Goodyear* decisions, the Supreme Court itself has previously confirmed that its decisions must be limited to their facts. (*R.A.V. v. City of St. Paul, Minn.* (1992) 505 U.S. 377, 386, 112 S.Ct. 2538, 120 L.Ed. 305, fn. 5.) The facts in this case have no corollary whatsoever to the facts in *Bauman* or *Goodyear*:

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1 And, as discussed in detail, below, the law review article cited by the Supreme Court for its "paradigm" language affirmatively establishes that the concept of general jurisdiction based on substantial and continuous activity in the forum state remains an appropriate and constitutional basis for the exercise of general jurisdiction even when the forum state is neither the state of incorporation nor the principal place of business. (*Goodyear*, at 2853-2854, citing to Brilmayer et al., A General Look at General Jurisdiction, 66 Texas L.Rev. 721, 728 (March 1988).)

- In *Bauman*, the target defendant, Daimler AG ("Daimler"), was the German parent corporation of an American corporation (MBUSA) that distributed automobiles in California (*Bauman*, 750-751,752), but which itself *conducted no business in California*. In *Goodyear*, the target defendants were three subsidiaries of an American corporation (Goodyear), located in Turkey, Luxemburg and France, which had distributed defective tires that caused an injury accident in France, and which engaged in no business in the forum state (i.e., North Carolina). (*Goodyear*, at 2848.) In this case, BMS itself engages in extensive business operations in California, generating nearly a *billion dollars* in revenue from California over a six-year period. [Pet.Ex. 452 ¶ 3.]
- In *Bauman* and *Goodyear*, there is no evidence that the target defendants owned property in the forum states (*Bauman*, at 752, 756; *Goodyear*, at 2851); in this case BMS owns or leases several properties in California. [Pet.Ex. 428 ¶ 3.]
- In *Bauman* and *Goodyear*, the target defendants had no employees in the forum (*ibid*); in this case BMS employs hundreds of people in California. [Pet.Ex. 428, ¶ 3.]
- In *Bauman* and *Goodyear*, there is no evidence that the target defendants were registered or qualified to do business in the forum

state (*ibid*); in this case BMS has been qualified to do business in California since 1936. [Pet.Ex. 509.]

The factual distinctions between *Bauman* and *Goodyear*, as compared to the factual circumstances in this case, address the question left open in both *Bauman* and *Goodyear*, i.e., when is a business's operations within a state other than its state of incorporation or principal place of business sufficient for the exercise of general jurisdiction? In *Goodyear*, the court answered that question by concluding that "continuous and systematic general business contacts" warrant exercise of general jurisdiction. (*Goodyear*, at 2851, 2857.) *Bauman* similarly confirmed that general jurisdiction exists when "affiliations [are] '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*." (*Bauman*, at 758, fn. 11, emphasis added.)

And, indeed, the evidence cited above amply demonstrates that BMS made itself "at home," "comparable to a domestic enterprise" in California:

- It is registered with the Secretary of State and makes required filings, just like a domestic corporation;
- It owns and/or leases property in the state, just like a domestic corporation;
- It has hundreds of employees in the state, just like a domestic

corporation;

- It agreed to comply with California corporate law, just like a domestic corporation (Corporations Code section 2105);
- It generates massive revenues from its California operations, just like a domestic corporation.

BMS' operations in California clearly represent the same kind of time, effort, resources and revenues that would be the envy of most of California's domestic corporations. Because BMS operates in California much like a domestic corporation does, imposition of general jurisdiction on it is not unreasonable or in violation of the Fourteenth Amendment's due process clause.

Simply put, if the Supreme Court had meant that general jurisdiction could *only* be exercised over a corporation in its state of incorporation or at its principal place of business, it would have said so; what it would *not* have said is that general jurisdiction could be exercised in a location that is "*comparable to* a domestic enterprise" in the forum state or in a state where its operations are so continuous and systematic *as to render the corporation "at home" in that state*.

There is one other consideration that should be addressed by this Court in assessing the question of personal jurisdiction, but which has not been addressed by the parties: Whether qualifying to do business under

California's Corporations Code section 2501, and appointment of an agent for service of process as required under that statute, constitutes consent to general jurisdiction. The only specific case in California addressing this issue, *Grey Line Tours of Southern Nevada v. Reynolds Electrical and Engineering Company, Inc.* (1987) 193 Cal.App.3d 190, 194-195 relied solely on a 1936 federal district court decision for its conclusion that compliance with the statute does not constitute consent to personal jurisdiction. The *Grey Line* court conducted no legal analysis or statutory construction in reaching its conclusion and dismissed out-of-hand the Judicial Council's own conclusion to the contrary. And the federal district court decision rested primarily on the fact that this Court had not analyzed the issue.[2]

This consent issue is critical. California citizens who, through the Secretary of State, authorize companies to operate freely in this State, are

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2 Although this specific issue was not raised in either the trial court or the appellate court in this case, given the broad application the *Bauman* holding has been given, this is a critical issue that must be addressed by this Court in order to assure that the courts of this State can adjudicate cases involving corporations which qualify to do business here. Because this is a legal issue based on undisputed facts and the issue is of critical importance, this additional consideration should be addressed in order to provide desperately-needed guidance to the bench and the bar. (*Civil Service Employees Ins. Co v. Superior Court (Schlichting)* (1978) 22 Cal.3d 362, 374-375; *Brown v. Fair Political Practices Commission* (2000) 84 Cal.App.4th 137, 140.)

entitled to impose on those companies the very same right to exercise general jurisdiction as they can impose on domestic corporations. Indeed, refusing to permit such an exercise of jurisdictional power unfairly disadvantages domestic corporations: By subjecting domestic corporations to general jurisdiction, but protecting foreign corporations from the same degree of jurisdictional power, the foreign interlopers obtain a business advantage. But the Legislature's language in 2105, and as interpreted by the Judicial Council, warrants the conclusion that by qualifying to do business in California a corporation consents to personal jurisdiction here for all possible claims, whether related to its business in the State or not.

Bauman and *Goodyear* should be confined to their facts and general jurisdiction principles should be applied in such a way as to ensure fairness to *both* defendants *and* plaintiffs. Balance can be obtained where a defendant is sued in California based on exposures in another state through application of a conflict of laws analysis. But, under *Bauman* and *Goodyear*, and given the facts in *this* case, personal jurisdiction should be found to apply to BMS

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LEGAL ARGUMENT

1.

NEITHER *BAUMAN* NOR *GOODYEAR* DISAPPROVED ANY PRIOR CASES DISCUSSING GENERAL JURISDICTION AND NEITHER CASE HELD THAT GENERAL JURISDICTION IS LIMITED *ONLY* TO A CORPORATION'S STATE OF INCORPORATION OR ITS PRINCIPAL PLACE OF BUSINESS

Contrary to BMS' arguments, the United States Supreme Court has never limited general jurisdiction solely to a corporation's state of incorporation or principal place of business. In fact, the *Bauman* court itself expressly disclaimed any such holding: "*Goodyear* did *not* hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business." (*Bauman*, at 760, initial emphasis added, latter emphasis in original)

And there is a long line of cases – stretching back even before the Supreme Court's decision in *International Shoe* – holding that a corporate defendant can be subject to general jurisdiction even in a state that is not its state of incorporation or principal place of business. Those cases – reaching as far back as 1917 – confirm that imposition of general

jurisdiction does not offend due process where a corporation's continuous and systematic conduct of business within a state that is neither its principal place of business nor its state of incorporation is sufficient. Nothing in either *Goodyear* or *Bauman* abrogated or eliminated that venerable concept or overruled *any* of those cases. And, in fact, the very law review article cited by Justice Ginsburg in both *Goodyear* and *Bauman* as establishing the "paradigm" bases for exercise of general jurisdiction confirms that general jurisdiction is properly exercised in a state which is not one of those "paradigm" locations *so long as the corporation engages in continuous, substantial and systematic business activity in that state*. (Brilmayer, Haverkamp and Logan, A General Look at General Jurisdiction, 66 Tex. L.Rev. 721 (March 1988).) And Justice Ginsburg specifically confirmed in *Bauman* that a corporation's operations outside of these paradigm forums "may be so substantial and of such a nature as to render the corporation at home in that State." (*Bauman*, at p. 761, fn. 19.) Thus, the issue is whether BMS' business operations in the State of California are so "substantial and of such a nature as to render" it "at home" here. Since that is precisely what the evidence in this case establishes, the Court of Appeal's determination that general jurisdiction did not lie was incorrect and should be reversed.

A. **Historical evolution of the doctrine of general jurisdiction**.

The Supreme Court's opinion in *International Shoe* is viewed as the seminal decision establishing the distinction between specific jurisdiction and general jurisdiction – although the *International Shoe* court never actually utilized those terms. But the *International Shoe* decision did articulate the analysis upon which those doctrines are currently based.

(1) ***International Shoe***.

As *International Shoe* explained, a corporation's "presence" in a state for purposes of subjecting it to jurisdiction for lawsuits "has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on." (*Id*., at 317.) Further, the court explained, "it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there." (*Ibid*.) This is, of course, a classic description of specific jurisdiction.

The *International Shoe* court went on, however, to confirm that "there have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify

suit against it on causes of action arising from dealings *entirely distinct from those activities*," citing to *Missouri, Kansas & Texas Railway Co. v. Reynolds* (1921) 255 U.S. 565, 41 S.Ct. 446, 65 L.Ed. 788 ("*Reynolds III*") and *Tauza v. Susquehanna Coal Co.* (1917) 220 N.Y. 259, 115 N.E. 915. (*Id*., 318; emphasis added.) This is what is commonly referred to as general jurisdiction.

As the Supreme Court later explained in *Perkins v. Benguet Consolidated Mining Co.* (1952) 342 U.S. 437, 72 S.Ct. 413, 96 L.Ed. 485, the *International Shoe* court's citation to the *Reynolds II* case "does not disclose the significance of this decision but light is thrown upon it by the opinions of the state court below," citing to *Reynolds v. Missouri, Kansas & Texas Railway Co.* (1916) 224 Mass. 379, 113 N.E. 413 ("*Reynolds I*"). (*Perkins*, at 446, fn. 6.)

In *Reynolds I*, referenced by the Supreme Court in *Perkins*, the defendant railway company was organized under Kansas law and operated its railway lines in Missouri, Kansas, Oklahoma, Texas "and perhaps other states, but none in Massachusetts," manifestly confirming that Massachusetts was not the railway's principal place of business. (*Id.*, at 382.) The company hired a "New England passenger agent," based in Boston, who did not actually sell tickets for the defendant railway, but who did advertise for the sale of, and who did sell, coupons for transfer to the

defendant's lines to be attached to and sold with other railway lines' tickets. (*Id*., at 384.) In the 1916 decision, the appellate court declined to decide whether "the cause of action set out in the plaintiff's bill is one which can be sued in this state because related to the business done here" because the issue was "not presented on this report." (*Id.*, 388.)

That same appellate court, however, took that issue up in another appeal from the same underlying case a year later in *Reynolds v. Missouri, Kansas & Texas Railway Co.* (1917) 228 Mass. 584 ("*Reynolds II*"). In that opinion, the court clarified that the lawsuit related to the enforcement of promissory notes, and that the notes involved were neither negotiated nor executed within the state, but that because of the defendant's general business activity within the state, jurisdiction would lie. (*Id*., at 586, 588.) In other words, the court applied the doctrine of general jurisdiction to the railroad company on the basis of the extent of the business it conducted in Massachusetts, even though the issue in litigation had nothing to do with Massachusetts, the defendant was not organized under the laws of that state and its principal place of business was not in that state. Given that the Supreme Court referenced *Reynolds* as a basis for application of general jurisdiction principles in both *International Shoe* and *Perkins*, that case provides guidance to the issues here.

The other case cited by the *International Shoe* court as

demonstrating a proper basis for exercise of what would become known as general jurisdiction was *Tauza v. Susquehanna Coal Co.* (1917) 220 N.Y. 259, 115 N.E. 915. In that case, the defendant coal company was organized under the laws of Pennsylvania, with its principal place of business in Philadelphia. (*Id*., at 265.) It did, however, have a branch office in New York with a suite of offices and a sales agent who supervised eight salesmen, as well as other employees, i.e., clerks and stenographers. (*Ibid*.) Coal ordered in New York was shipped from Pennsylvania as part of the company's established course of business. (*Ibid*.) As in *Reynolds I*, the cause of action sued on had nothing to do with New York. (*Id*., at 268.)

Justice Cardozo articulated two important concepts in holding that jurisdiction was properly exercised over the coal company. First, he confirmed, "there is no precise test of the nature or extent of the business that must be done" in order to confer jurisdiction, only that "[a]ll that is requisite is that enough be done to enable us to say the corporation is *here*."[3] (*Id*, at 268, emphasis added.)

Second, Justice Cardozo confirmed, once the company is in the state, "it may be served; and the validity of the service is independent of the

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3 Which sounds much like Justice Ginsburg's requirement that a corporation be "at home" in the forum state for general jurisdiction principles to apply. (*Bauman*, at 761.)

origin of the cause of action." (*Id*., at 268-269.)[4]

Based on these cases, and its own analysis, *International Shoe* confirmed that, where the company does some sufficient amount of business in the forum state, the forum state can exercise jurisdiction over that defendant even in a "suit against it on causes of action arising from dealings entirely distinct from those activities." (*International Shoe*, at 318.) Notably, nothing in *Bauman* or *Goodyear* disapproved or overruled any analysis in *International Shoe, Tauza* or *Reynolds I*.

(2) <u>von Mehren and Trautman</u>

One of the law review articles repeatedly referenced by Justice Ginsburg in both *Goodyear* and *Bauman* was by von Mehren and Trautman and published in the Harvard Law Review. (von Mehren and Trautman, Jurisdiction to Adjudicate: A Suggested Analysis, 79 Harv. L.Rev. 1121 (April 1966) ("von Mehren") (*Goodyear*, at 2851; 2857, fn. 5; *Bauman*, at 754; 755; 756, fin. 8; 758, fn. 9, 762, fn. 20.) As explained in another law review article cited to by Justice Ginsburg, Twitchell, The Myth of General Jurisdiction, 101 Harv. L.Rev. 610 (January 1988) (*Goodyear*, at 2854;

4 Although Justice Ginsburg noted that *Tauza* "should not attract heavy reliance today," (*Bauman*, at 761, fn. 18, the Supreme Court did not actually disapprove or overrule *Tauza*.

Bauman, at 755), it was von Mehren and Trautman who first coined the phrases general jurisdiction and specific jurisdiction for elucidation of the jurisdictional concepts that were articulated in *International Shoe* and subsequently adopted by numerous other courts. (*Id*., at 1122.) The von Mehren article, however, focuses primarily on the history and suggested expansion of the doctrine of specific jurisdiction rather than when and how the general jurisdiction doctrine should be applied.

(3) Brilmayer, Haverkamp and Logan

In both *Goodyear* and *Bauman*, the Supreme Court's general jurisdiction analysis regarding the "paradigm" locations where a corporation could be found to be "at home," and thus subject to general jurisdiction, was based on a law review article by Brilmayer, Haverkamp and Logan, A General Look at General Jurisdiction, 66 Tex. L.Rev. 721 (March 1988) ("Brilmayer").) (*Goodyear*, at 2851, 2854; *Bauman*, at 760, fn. 10; 769.)

Because Justice Ginsburg relied so heavily on that article's general jurisdiction analysis in both *Goodyear* and *Bauman*, the article must weigh heavily in construing the meaning of those decisions.

Noting that the "law treats corporations like legal persons,"

Brilmayer confirms that a corporation's "place of incorporation and the principal place of business are both analogous to domicile," i.e., the fundamental basis for jurisdiction over an individual. (*Id*., at 733.) In assessing whether a corporation is subject to general jurisdiction as the result of doing business in the state, Brilmayer confirms that there are "two standards with which to evaluate a corporation's doing business in a state." (*Id.*, at 734.) Those are, of course, where it is incorporated and its principal place of business.

But, Brilmayer points out, where a corporation engages in a substantial quantity of activities unrelated to the injury at issue, that may satisfy the rationales which justify general jurisdiction at the place of incorporation or the principal place of business. In other words, general jurisdiction is appropriate where it satisfies concerns relating to "convenience to both the plaintiff and defendant, power, and reciprocal benefits and burdens." (Brilmayer, at 741.) For example, "[t]o the extent that defending in one's domicile is convenient, litigating where one carries on continuous and systematic activities is also likely to be convenient. Similarly, allowing suit where the defendant is so engaged serves the plaintiff's convenience by providing a more definite forum; indeed, a test that focuses on continuous and systematic activities eliminates the uncertainty of proving which of several places is the defendant's principal

place of business." (*Ibid.*)

Further, and "[m]ost importantly, the reciprocal benefits rationale obtains when the defendant carries out substantial activities, which implicate the police powers and public facilities of the state." (*Ibid*.)

Another key to the Brilmayer analysis is its confirmation that the extent of the corporation's business operations in the forum state, as compared its operations elsewhere, is not controlling. Thus, the fact that the corporation does less business in the forum state than in its home state or in other states "seems virtually irrelevant to any of the convenience or fairness policies underlying the imposition of general jurisdiction over a defendant." (*Ibid*.) And, tellingly, Brilmayer confirms that "the due process clause should permit general jurisdiction on the basis of activities when the defendant *reaches the quantum of local activity in which a purely local company typically would engage*."[5] (*Ibid*, emphasis added.)

Thus, Brilmayer concludes, the existence of "continuous and systematic activities, therefore, satisfies the reciprocal benefits and burdens rationale" and the "basic enquiry must be whether the defendant's level of activity rises to the level of activity of an insider, so that relegating the defendant to the political processes is fair. Such a quantum of activity is a

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5 As discussed in detail in the next section, these two factors strongly support the exercise of general jurisdiction over BMS in this case.

prerequisite to asserting a state's coercive power when the state cannot justify such power by its authority to regulate in-state activities. Significantly, for purposes of general jurisdiction, *the relevant issue is the absolute amount of activity, not the amount of activity relevant to what the defendant does outside the state*." (Brilmayer, at 742-743, emphasis added.)

Brilmayer also extensively discusses the issue of whether a burden on interstate commerce is implicated in the analysis. (Brilmayer, at 743-748.) The concern centers on whether exercise of general jurisdiction would unduly burden interstate commerce where the defendant's forum-based activities are primarily interstate rather than intrastate. (*Ibid*.) But Justice Cardozo answered that question in *Tauza*, confirming that the imposition of general jurisdiction on a corporation not incorporated in the forum does not burden interstate commerce any more than litigation against a local defendant who engages only in intrastate commerce would.

As Justice Cardozo explained: "We are to say, not whether the business is such that the corporation may be prevented from being here [e.g., through a state's licensing laws], but whether its business is such that it *is* here. If in fact it is here, if it is here, not occasionally or casually, but with a fair measure of permanence and continuity, then, whether its business is interstate or local, it is within the jurisdiction of courts."

(*Tauza*, at 267.) As he continued: "To hold that a state cannot burden interstate commerce, or pass laws which regulate it, 'is a long way from holding that the ordinary process of the courts may not reach corporations carrying on business within the state which is wholly of an interstate commerce character.' . . . All that is requisite is that enough be done to enable us to say that the corporation is here [citations]. If it is here it may be served." (*Id*., at 267-268.)

The Brilmayer article was relied on extensively by Justice Ginsburg in concluding that general jurisdiction can be exercised over a corporation in the "paradigm" forums, i.e. at its principal place of business or where it is incorporated. But contrary to BMS' argument, Brilmayer's use of that term was never intended to *limit* general jurisdiction to a corporation's state of incorporation or principal place of business. Rather, in addition to those two definitive places for the exercise of general jurisdiction, a forum where the corporation engages in continuing and systematic business equivalent to that of a local corporate defendant, is sufficient.

(4) ***Goodyear* and *Bauman***

Although Justice Ginsburg's discussion of both general and specific jurisdiction in *Goodyear* and *Bauman* are wide-ranging, the facts in both cases are narrow and have no corollary to the facts in this case. As noted in

Goelz & Watts, *California Practice Guide: Federal Ninth Circuit Civil Appellate Practice* (Rutter 2014) ¶ 8:188: "Supreme Court decisions are only precedential as to issues *actually decided* by the Court. 'It is of course contrary to all traditions of our jurisprudence to consider the law on [a] point conclusively resolved by broad language in cases where the issue was not presented or even envisioned.' [*R.A.V. v. City of St. Paul, Minn.* 505 US 377, 386, 112 S.Ct. 2538, 2545, fn. 5 (1992) (brackets added)." (Emphasis added.)

Accordingly, the question is whether the holdings in *Goodyear* and *Bauman* that the target defendants were not properly subject to the jurisdiction of the forum court (i.e., North Carolina in *Goodyear* and California in *Bauman*) apply in this case at all. An examination of the facts in those cases compels the conclusion that they do not.

Goodyear involved the deaths of two boys from North Carolina that occurred as the result of a bus accident while they were traveling in France. (*Goodyear*, at 2850.) It was alleged that the tires on the bus– which had been manufactured by a foreign subsidiary of Goodyear in Turkey – were defective and caused the accident. (*Ibid.*) The boys' parents filed suit in North Carolina, naming Goodyear USA and three of its foreign subsidiaries, located in Turkey, France, and Luxembourg, as defendants.

Notably, *Goodyear USA did not contest jurisdiction*, acknowledging

that it "had plants in North Carolina and regularly engaged in commercial activity there." (*Ibid*.) The court noted that Goodyear USA was incorporated in Ohio (*Goodyear*, at 2852), but the case does not discuss whether its principal place of business was in North Carolina. The implication, however, is that it was not and that Goodyear USA only had manufacturing plants in the state, but that it did engage in commercial activity there, thus warranting imposition of general jurisdiction.

As the Supreme Court explained, the issue in the case was whether "foreign subsidiaries of a United States parent corporation [are] amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State." (*Ibid*.)

That question for decision has absolutely no correlation to the facts here since BMS is not the foreign subsidiary of a United States parent corporation. Indeed, the position of BMS is akin to that of Goodyear USA, i.e., BMS, itself, has extensive business operations in this state.

The North Carolina Court of Appeals held that because the foreign subsidiaries placed tires in the "stream of commerce," some of which had reached North Carolina, exercise of general jurisdiction was proper. But, the Supreme Court held, a "connection so limited between the forum and the foreign corporation . . . is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the 'continuous and

systematic' affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contacts with the State." (*Id*., at 2851.)

Thus, the *Goodyear* court did *not* hold that a "continuous and systematic" affiliation between a corporation and a state was *never* sufficient to impose general jurisdiction on an out-of-state corporation; to the contrary, it implied that such an affiliation *is* sufficient. And that conclusion was confirmed in *Bauman*: "*Goodyear* did *not* hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business." (*Bauman*, at 760, initial emphasis added, latter emphasis in original.)

Indeed, had the *Goodyear* court intended to hold that general jurisdiction could be exercised *only* in states in which the corporation is organized or maintains its principal place of business, it would have been easy to say so: "We hold that unless a corporation is sued in the state in which it is organized or where it has its principal place of business, general jurisdiction will not lie." Simple, clear and straightforward. But the court said nothing like that.

Not only that, but the *Goodyear* court identified several factors which presumably *would* justify imposition of general jurisdiction over the foreign subsidiaries, had they existed: Noting that no showing of a

continuous and substantial course of business existed, the court noted that the subsidiaries "are not registered to do business in North Carolina. They have no places of business, employees, or bank accounts in North Carolina. They do not design, manufacture, or advertise their products in North Carolina. And they do not solicit business in North Carolina or themselves sell or ship tires to North Carolina customers." (*Goodyear*, 2852.) As such, the court concluded there was no basis for the exercise of general jurisdiction.

The only possible purpose for listing those factors was to confirm that their *existence* would, in fact, warrant imposition of general jurisdiction since their *absence* did not.

In *Helicopteros Nacionales De Colombia, S.A. v. Hall* (1984) 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 the Supreme Court similarly discussed certain factors to consider in deciding whether a foreign corporation's activities within the state were sufficient to trigger general jurisdiction, and included the fact that "Helicol never has been authorized to do business in Texas and never has had an agent for the service of process within the State. It never has performed helicopter operations in Texas or sold any product that reached Texas, never solicited business in Texas, never signed any contract in Texas, never had any employee based there, and never recruited an employee in Texas. In addition, Helicol never

has owned real property or personal property in Texas and has never maintained an office or establishment there." (*Helicopteros*, at 411.) Thus, as in *Goodyear*, the implication is that if, indeed, some or all of those factors had existed, general jurisdiction could have been imposed.

Thus, the factual circumstances in *Goodyear* have no relationship to the facts in this case and *Goodyear* does not stand for the proposition that general jurisdiction cannot be imposed on BMS.

Bauman, in turn, involved an action brought under the federal Alien Tort Statute and the Torture Victims Protection Act against a German corporation, Daimler AG ("Daimler"). (*Bauman*, at 749-751.)[6] The action alleged that Daimler, a German corporation that had no direct operations in the United States at all, through its *Argentinean subsidiary* collaborated with state security forces to kidnap, torture and kill the plaintiffs or their relatives *in Argentina* and all of whom were citizens of *Argentina or Chile*. (*Ibid*.) The plaintiffs sued Daimler, the German parent corporation, asserting that jurisdiction existed over the *parent* based on the activity of the *United States* subsidiary (MBUSA) in *California*. (*Ibid*.) It was

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6 The decision by the First District in *Young v. Daimler AG* (2014) 228 Cal.App.4th 855, 175 Cal.Rptr.3d 811 does nothing to advance BMS's arguments since that court was dealing with precisely the same question of jurisdiction over precisely the same German parent corporation as that at issue in *Bauman*.

conceded that there would have been general jurisdiction over the American subsidiary in California. (*Id*., 758.)

The Supreme Court summarized the issue this way: "This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." (*Id*., at 751.) The Ninth Circuit had concluded that the American subsidiary of the German corporation acted as the German corporation's agent in California and that such an agency relationship was sufficient to confer general jurisdiction over the German corporation in California. The Supreme Court reversed, holding that "[i]t was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there on claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California." (*Id*., at 762.)

Again, in *Bauman*, the Supreme Court *never* held that general jurisdiction could be exercised only in the states where the defendant was incorporated or where its principal place of business was. In fact, any such conclusion is directly contrary to the court's statement summarizing the holding in *Goodyear* (*Bauman*, at 760) and as implied in footnote 11 of the opinion to the effect that "general jurisdiction requires affiliations 'so

"continuous and systematic" as to render [the foreign corporation] essentially at home in the forum State," which it said is "***comparable to*** *a domestic corporation*." (*Bauman*, at 758, emphasis added.) Thus, as discussed in the Brilmayer article, if a defendant's forum business activities can be equated to those of a local corporation, general jurisdiction will lie.

And the "comparable to" language in *Bauman* is important. If *Bauman* intended to limit general jurisdiction to states in which the corporation is organized or has its principal place of business, the corporation would ***be*** a domestic corporation. There would be no need to consider whether the activities of the corporation in the forum state were sufficiently continuous and substantial so as to be "*comparable to* a domestic corporation."

Because nothing in either *Goodyear* or *Bauman* warrant the conclusion that the Supreme Court overruled or disapproved *Reynolds I*, *Tauza* or *International Shoe*, the long history of jurisprudence assessing whether a corporation's activities in a forum state are sufficient for imposition of general jurisdiction remains intact. Indeed, *Bauman* expressly confirmed that a corporation's operations outside of the paradigm forums "may be so substantial and of such a nature as to render the corporation at home in that State," and therefore subject to general jurisdiction. (*Bauman*, at 761, fn. 19.) And, as discussed in the next

section, applying those analyses to the facts in this case compel the conclusion that the trial court's denial of BMS' motion to quash was correct.

B. <u>The evidence in this case demonstrates the existence of all the hallmarks of a domestic corporation as to which general jurisdiction should apply</u>.

As discussed above, the U.S. Supreme Court and the Brilmayer article specifically identify certain factors which warrant imposition of general jurisdiction over an out-of-state corporation. These include:

- Registering to do business in the state;
- Designating an agent for service of process;
- Owning real property in the state;
- Owning personal property in the state;
- Having *a* place of business in the state (though not necessarily a *principal* place of business), i.e., maintaining an office or "establishment" in the state;
- Performing operations in the state;
- Employing personnel in the state;
- Some quantum of local activity equivalent to a local, domestic enterprise.

The evidence in this case amply demonstrates an appropriate basis for exercising general jurisdiction over BMS, based on the factors articulated in *Helicopteros*, *Bauman* and *Goodyear*:

- BMS is registered with the Secretary of State and makes required filings, just like a domestic corporation [Pet.Ex. 509];
- It owns and leases property in the state, just like a domestic corporation [Pet.Ex. 428 ¶ 3];
- It has hundreds of employees in the state, just like a domestic corporation [Pet.Ex. 428 ¶ 3];
- BMS operates facilities in the state, just like a domestic corporation [Pet.Ex. 428 ¶ 3];
- It agreed to comply with California corporate law, just like a domestic corporation [Pet.Ex. 509] (Corporations Code section 2105);
- It generates massive revenues from its California operations, larger than many domestic corporations [Pet.Ex. 452 ¶ 3];

One other point. As reflected in *Tauza*, it is not fair to compare the out-of-state corporation's business within the state to its level of business outside the state in deciding whether the in-state business is "enough" to warrant the exercise of general jurisdiction. Rather, as the Brilmayer article discusses, general jurisdiction does not necessarily turn on the relative size

or extent of a defendant's business operations within the forum state, as compared with its operations elsewhere. (Brilmayer, at 742-743.) Although the *Bauman* court cautioned that "a corporation that operates in many places can scarcely be deemed at home in all of them," (*Bauman*, at 762, fn. 20), both Brilmayer and *Bauman* confirm, the real issue is whether the defendant's operations *in the forum state* are, themselves, equivalent to those of a domestic corporation, i.e., whether the corporation "at home" in the forum state for purposes of general jurisdiction.

And, unquestionably, in this case, they *are*, as detailed above.

Given the revenues BMS earns in California, given the size and extent of its real estate holdings, and given the fact that it generates enormous revenue within California, BMS' business operations in California are not only "comparable" to a domestic California corporation, they are comparable to some of the *largest* domestic California corporations.

Under the analyses articulated in *Helicopteros*, *Goodyear*, *Bauman* and Brilmayer, the exercise of general jurisdiction over BMS in California is more than justified. The appellate court's conclusion to the contrary was incorrect.

2.

PERSONAL JURISDICTION CAN ALSO BE BASED ON THE FACT THAT BMS QUALIFIED TO DO BUSINESS IN CALIFORNIA, THEREBY CONSENTING TO THE JURISDITION OF ITS COURTS

The fact that BMS qualified to do business in this State under Corporations Code section 2105 raises an issue separate from the question of general jurisdiction: Personal jurisdiction based on consent.

As the U.S. Supreme Court has itself recognized, personal jurisdiction may also be exercised over a defendant who *consents* to jurisdiction, even when neither special jurisdiction nor general jurisdiction would otherwise lie. (*Insurance Corp. of Ireland v. Campagne des Bauxies de Guinee* (1982) 456 U.S. 694, 704.) And this consent doctrine may include "state procedures which find constructive consent to the personal jurisdiction of the state court in the voluntary use of certain state procedures." (*Ibid*.) Nearly a century ago, Justice Holmes confirmed that a corporation which appoints an agent for service of process, in compliance with state laws requiring it to do so in order to transact business in the state, could rationally be held to consent to jurisdiction. (*Pennsylvania Fire Ins. Co. v. Gold Issue Mining and Milling Co*. (1917) 243 U.S. 93, 94; see, also,

Burnham v. Superior Court of California (1990) 495 U.S. 604, 622 [holding that service on a defendant within the state does not trigger the analysis of whether "fair play and substantial justice" was met, and citing to several cases applying the in-state service rule to foreign corporations who had appointed an agent for service of process].)

Other courts have explicitly held that were state statutes require a foreign corporation to designate an agent for service of process, that constitutes consent to jurisdiction of that state's courts, irrespective of whether jurisdiction would otherwise lie. (See, e.g., *Senju Pharmaceutical Co., Ltd. v. Metrics, Inc.* (D.N.J. 2015) __ F.Supp.3d __, 2015 WL1472123; *Perrigo Company v. Merial Limited* (D. Neb. 2015) 2015 WL 1538088; *Acorda Therapeutics, Inc. v. Mylan Pharmaceuticals, Inc.* (D. Del. 2015) __ F.Supp.3d __, 2015 WL 186833, *13; *Gucci America Inc. v. Li* (2nd Cir. 2014) 768 F.3d 122*; Tiffany (NJ) LLC v. China Merchants Bank* (2nd Cir. 2014) 589 Fed.Appx. 550, 553, as amended September 23, 2014; *Bane v. Netlink, Inc.* (3rd Cir. 1991) 925 F.2d 637, 640; *Allied-Signal Inc. v. Purex Ind., Inc.* (N.J. Super.Ct.App.Div. 1990) 576 A.2d 942; see, also, Restatement (Second) Conflicts of Laws, § 44, comment a ["By authorizing an agent or public official to accept service of process in actions brought against it, the corporation consents to the exercise by the state of judicial jurisdiction over it as to all causes of action which the

authority of the agent or official extends. This consent is effective even though no other basis exists for the exercise of jurisdiction over the corporation."].)

California requires out-of-state corporations that wish to conduct intrastate business in California to obtain a certificate of qualification from the Secretary of State. (Corporations Code section 2105.) Included in the requirements to obtain that certification, a corporation must name "an agent upon whom process directed to the corporation may be served within this state." (Corporations Code section 2105, subdivision (a)(5).) Subdivision (a)(6)(A) of that statute also requires the corporation to provide "irrevocable consent to service of process directed to it upon the agent . . . ." And subdivision (a)(6)(A) "extends" that consent to search warrants, irrespective of whether the corporation is a party or a non-party to the matter for which the search warrant is sought.

Only one case decided under section 2105 discusses whether the "consent" demanded as a condition for transacting business in this state, *Gray Line Tours of Southern Nevada v. Reynolds Electrical and*

Engineering Co., Inc. (1987) 193 Cal.App.3d 190, 194-195.[7] In *Grey Line Tours*, the plaintiff argued that the defendant's qualification to do business in California and the appointment of an agent constituted consent to jurisdiction. The *Gray Line Tours* court, however, rejected that argument based on nothing more than a 1936 federal district court decision, *Miner v. United Air Lines Transport Corporation* (S.D. Cal. 1936) 16 F.Supp. 930. That decision, in turn, reached its conclusion not on the basis of any statutory construction or reasoned analysis, but on the assumption that because "the highest court in California has given to this legislation no construction which authorizes service of process upon the statutory agent of the foreign corporation defendant where the suit is found upon a cause of action in no way connected with business transacted with in this state . . . ," no such consent could be implied.

The *Gray Line Tours* court conducted no statutory analysis, did not examine any legislative intent and simply rejected out-of-hand the Judicial Council Comments to California's long-arm statute, Code of Civil

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7 In dicta, *DVI, Inc. v. Superior Court* (2002) 104 Cal.App.4th 1080, 1095 cited to *Gray Line Tours* for its proposition that simply registering with the Secretary of State to conduct intrastate business and appointing an agent for service of process does not confer general jurisdiction, but that determination was not necessary to the court's decision in that case and, in any event, the *DVI* court merely adopted the *Gray Line Tours* holding without analysis.

Procedure section 410.10 which concluded that, in fact, registering to do business in this State and appointing an agent for service of process *does* constitute consent to jurisdiction on *any* suit filed.

The Judicial Council's analysis ("*Basis of Judicial Jurisdiction*," which appears in the annotations to California's "long-arm" statute, Code of Civil Procedure section 410.10) addresses jurisdiction over both individuals and corporations.

As to foreign corporations – like BMS – the Judicial Council confirms that California "has power to exercise judicial jurisdiction over a foreign corporation *which has authorized an agent or a public official to accept service of process in actions brought against the corporation as to* ***all*** *causes of action to which such authority extends*. (Subparagraph (3); emphasis added.) Further, the Judicial Council states, "[b]y authorizing an agent or public official to accept service of process in actions brought against it, *a corporation consents to the exercise of judicial jurisdiction over it as to* <u>*all*</u> *causes of action* to which the authority of the agent or official extends." (*Ibid*; emphasis added.)

Most importantly for the issues in this case, the statute requiring foreign corporations to qualify to conduct intrastate business in California and to designate an agent for service of process "*does not limit the required consent to causes of action that arise from only intrastate business done in*

the state, and includes <u>*all causes of actions*</u> *that may be brought in the state against a foreign corporation*." (*Ibid*., emphasis added, citing to Corporations Code section 6403 [see, now section 2105, subdivision (a)].)

If *Bauman* is given effect outside of its limited factual scope and applied to situations like that in this case, i.e., involving extensive intrastate business by a corporation, it is essential that this Court examine and decide the consent issue so that California citizens are able to obtain jurisdiction over out-of-state corporations who actively transact business – and derive significant revenue – from this State.

Even under *Bauman*, California's domestic corporations are indisputably subject to general personal jurisdiction, simply by being incorporated here. So, too, are those corporations which may be incorporated elsewhere, but have their principal place of business in this State. If foreign corporations are permitted to conduct business in this State *without being subject to the same general personal jurisdictional mandates as domestic corporations, those foreign corporations will have a commercial advantage over California's home-grown corporations*.

This is not a trivial issue. Such distinctions between domestic and foreign corporations may have a significant effect on domestic corporations and will manifestly have a significant effect on California citizens, like the real parties in this case, who attempt to hold foreign corporations

accountable in the same way they could hold domestic corporations accountable.

Because of the importance of this issue, consideration of this jurisdiction-by-consent issue should be given by this Court in resolving the issues in this case.

CONCLUSION

BMS' attempt to read *Goodyear* and *Bauman* as eliminating standard principles of general jurisdiction and limiting the doctrine's application only to a corporation's state of incorporation or principal place of business is unwarranted and unjustified. Its arguments should be rejected. Further, the issue of jurisdiction-by-consent should be addressed as well. Either way, the appellate court's judgment should be reversed on the question of whether there is personal jurisdiction over BMS in this case.

Dated: July 8, 2015 THE ARKIN LAW FIRM

By:_____
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CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is 8195 words as calculated utilizing the word count feature of the Word for Mac software used to create this document.

Dated: July 8, 2015

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Case Number S221038

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