No. 07-15386

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARBARA BAUMAN ET AL.,
Plaintiffs/Appellants,

v.

DAIMLERCHRYSLER AG,
Defendant/Appellee.

On Appeal from the United States District Court
for the Northern District of California
Case No. 04-194 RMW

APPELLEE'S SUPPLEMENTAL BRIEF ADDRESSING THE COURT'S QUESTIONS OF MAY 6, 2010

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INTRODUCTION

Control is an element of this Court's agency test for personal jurisdiction, and the level required is "parental control of the subsidiary's internal affairs or daily operations." *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001); *Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980). Any lesser control requirement would render "agency" jurisdiction a misnomer here and would cast the jurisdictional net far more broadly than would be reasonable. It can only be proper to find general personal jurisdiction – that defendant itself has "continuous and systematic" contacts in the forum – if, among other things, the foreign defendant exercised day-to-day control over the local activities of its subsidiary.

The district court correctly found that DaimlerChrysler *Aktiengesellschaft* ("DCAG") did not control the internal affairs or daily activities of its indirect subsidiary Mercedes-Benz USA, LLC ("MBUSA"). *See* Panel Decision ("PD") at 12010. In addition, as the district court also correctly found, plaintiffs failed to establish DCAG "would undertake to perform substantially similar services in the absence of MBUSA." *Id.* These are two independent reasons to affirm the district court's judgment of dismissal.

Even had plaintiffs otherwise established the requirements for agency jurisdiction, the district court, after careful analysis, properly concluded that the

exercise of such jurisdiction would be unreasonable in this particular case. Plaintiffs, defendant, and the alleged events not only lack any connection to California, they also lack any connection to the alleged agent, MBUSA. Predicating jurisdiction based on the California contacts of a New Jersey company, which all agree had nothing to do with plaintiffs' claims, would be especially unreasonable and unfair.

The district court's order dismissing DCAG for lack of personal jurisdiction was correct and sensible. It should be affirmed.

I

AGENCY JURISDICTION REQUIRES PLAINTIFFS TO SHOW "CONTROL OF THE SUBSIDIARY'S INTERNAL AFFAIRS OR DAILY OPERATIONS"

A. The Court's Precedents Establish Such a Control Requirement, and with Good Reason

As they must, "Plaintiffs-Appellants concede that some degree of control, or at least the right to control, is relevant to an agency determination." Reh'g Pet. at 8 n.1. Based on its own "review of our cases," this Court reached the same conclusion. PD at 12009. Even the dissent agreed. *Id.* at 12015 n.1.

The Court's precedents establish the degree of control required for agency jurisdiction: "An alter ego or agency relationship is typified by parental control of the subsidiary's internal affairs or daily operations." *Unocal*, 248 F.3d at 926; *Kramer*, 628 F.2d at 1177. In *Unocal*, this Court found no basis for agency

jurisdiction because the record did "not support plaintiffs' contention that [the parent] directly controls the day-to-day activities of the California [subsidiaries]. The fact that [the parent] may indirectly control or supervise its subsidiaries, does not lead the Court to a different conclusion." 248 F.3d at 930. In *Kramer*, the Court found no agency jurisdiction even though the parent "had general executive responsibility for the operation of [the subsidiary], and reviewed and approved its major policy decisions . . . ." 628 F.2d at 1177; *see also Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1135 (9th Cir. 2003) (analyzing whether defendant's activities involved "control over day-to-day activities" of alleged agent).

It is true that some district courts have misunderstood the *Kramer/Unocal* standard on control, and there may be a need to clarify the law in this regard. Many other district courts in this Circuit, however, have understood and relied on the proper standard even before the PD. *See, e.g.*, *Costa v. Keppel Singapore Dockyard PTE, Ltd.*, 2003 WL 24242419, at *12 (C.D. Cal. Apr. 25, 2003) (agency "require[s] evidence that the parent controls the subsidiary's internal affairs or daily operations"); *Covad Communications Co. v. Pacific Bell*, 1999 WL 33757058, at *7 (N.D. Cal. Dec. 14, 1999) ("A parent company must exercise substantial day-to-day control of its subsidiary in order for its subsidiary to be viewed as its agent."); *Bright v. Primary Source Media*, 1998 WL 671247, at *5-*7 (N.D. Cal. Sept. 29,

1998) ("plaintiffs have failed to allege any facts to suggest that TCC controlled the internal affairs of Primary Source Media or its daily operations"). By reaffirming the standard set forth in *Kramer* and *Unocal*, this Court can eliminate any confusion and thereby "allow[] potential defendants to structure their primary conduct with some assurance as to where that conduct will and will not render them liable to suit." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 471-72 (1985).

Plaintiffs contend they are "confused" because the control element of both alter ego and agency are similar. Reh'g Pet. at 7. But there is no principled reason why they should *not* be similar. Plaintiffs "confusion" is premised on the mistaken assertion that alter ego jurisdiction is based *solely* on control. *Id.* at 5-7. In truth, alter ego jurisdiction requires a complete disregard of corporate formalities and a showing that failure to apply the doctrine "would result in fraud or injustice." *Unocal*, 238 F.3d at 926. By comparison, as this Court noted, agency jurisdiction here would require both control and a "showing that DCAG would undertake to perform substantially similar services in the absence of MBUSA." PD at 12010.

Because the elements of each theory are different, there are many situations in which one doctrine would apply but the other would not, even where the level of control is the same. For example, assuming control of internal operations or daily affairs, a subsidiary could be an agent (but not alter ego) if the parent "would undertake to perform" the subsidiary's tasks if the subsidiary did not

exist. PD at 12010. Conversely, a subsidiary could be an alter ego (but not agent) if it were undercapitalized or if fraud were involved. *See SGI Air Holdings II LLC v. Novartis Int'l AG*, 239 F. Supp. 2d 1161, 1166 (D. Colo. 2003) (explaining differences, but noting "both agency and alter ego theories often depend on the same type of evidence regarding day to day control"); *Hill v. R+L Carriers, Inc.*, 2009 WL 4730903 at *3-*4 & n.2 (N.D. Cal. Dec. 8, 2009) (rejecting agency jurisdiction but leaving open alter ego jurisdiction if plaintiff could prove defendant subsidiary was undercapitalized and "failing to pierce the corporate veil would amount to a fraud on the creditors").

Indeed, some courts have held that constitutional due process *mandates* control over the internal affairs or day-to-day operations before the contacts of one corporation can be imputed to another. *See, e.g., Central States v. Reimer Express World Corp.*, 230 F.3d 934, 943 (7th Cir. 2000) ("constitutional due process requires that personal jurisdiction" be rejected where "the parent does not exercise an unusually high degree of control over the subsidiary"); *In re Automobile Antitrust Cases I & II*, 135 Cal. App. 4th 100, 121 (2005) (merely asking "if the foreign corporation could have chosen simply to run the local business itself" cannot be sufficient, because premising jurisdiction on that basis alone "would ignore federal constitutional law").

Others rely on the respect long afforded to properly-maintained corporate distinctions. *See, e.g., Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983) (based on *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333 (1925), and similar authority, Fifth Circuit "demand[s] proof of control by the parent over the internal business operations and affairs of the subsidiary in order to fuse the two for jurisdictional purposes"); *cf. U.S. v. Bestfoods*, 524 U.S. 51, 61 (1998) ("It is a general principal of corporate law deeply 'ingrained in our economic and legal systems' that a parent corporation . . . is not liable for the acts of its subsidiaries.").

General jurisdiction requires that a defendant itself have "continuous and systematic" contacts with the forum, so this Court "regularly ha[s] declined to find general jurisdiction even where the [defendant's] contacts were quite extensive." *Amoco Egypt Oil Co. v. Leonis Navigation Co.*, 1 F.3d 848, 851 n.3 (9th Cir. 1993). That control over internal affairs or daily activities is required before contacts can be imputed from a local subsidiary to a foreign parent is consistent with the Supreme Court's admonition that personal jurisdiction cannot be predicated on the "unilateral activity" of another. *Burger King*, 471 U.S. at 473; *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 109 (1987). Without evidence of day-to-day control by the parent – *i.e.*, if jurisdiction existed solely because the subsidiary was unilaterally performing a "sufficiently important" activity – the Supreme Court's prohibition would be violated.

B. Plaintiffs Did Not Show That DCAG Exercised Control over MBUSA's Internal or Daily Operations

Plaintiffs continue to rely primarily on DCAG's right to oversee and direct certain MBUSA operations under the General Distributor Agreement. This Court correctly found the Distributor Agreement "consistent with the 'monitoring' and 'articulation of general policies' permitted under our law." PD at 12010 (citing *Unocal*, 248 F.3d at 926). As Judge Schroeder observed at argument, plaintiffs' overbroad "theory would go for Louis Vuitton and Chanel" and subject them to general jurisdiction "because of the volume and amount of profit that is from the U.S." Recording on Court's Website at 9:37-10:17. Legitimate parental oversight does not create an agency relationship. *See, e.g.*, *Stanisfer v. Chrysler Motors Corp.*, 487 F.2d 59, 64-66 (9th Cir. 1973) ("controls of the type reserved" in an automotive distribution agreement "do not create a relationship of agency"); *Moody v. Charming Shoppes of Delaware, Inc.*, 2008 WL 2128955, at *7 (N.D. Cal. May 20, 2008) (setting "goals the subsidiary must accomplish and enforc[ing] the same by creating a hierarchy with accountability" insufficient for agency jurisdiction); *Bright*, 1998 WL 671247, at *7 (agency jurisdiction improper "even where a corporate parent actively approves a corporation's major policy decisions and is involved in the executive operation of the corporation").

Moreover, the Distributor Agreement at most provides the right to control certain aspects of MBUSA's operations. A right to control is insufficient to

establish agency jurisdiction, however; a parent must *actually* control the subsidiary's internal affairs or daily operations. *See, e.g.*, *Unocal*, 248 F.3d at 930 (rejecting agency jurisdiction where record did not show that the parent "directly controls the day-to-day activities" of the subsidiary); Section I.A., *supra*. If the rule were otherwise, arguably every parent/subsidiary relationship would meet the control requirement, rendering it meaningless and undermining well-established corporate law. *See U.S. v. Bestfoods*, 524 U.S. at 61 ("[I]t is hornbook law that 'the exercise of 'control' which stock ownership gives to the stockholders'" is not sufficient to disregard corporate separation); *Unocal*, 248 F.3d at 925. Despite discovery directed to that issue (*see* PD at 12004), plaintiffs offered no evidence that DCAG actually controls MBUSA's internal affairs or daily operations.

C. Plaintiffs Did Not Meet the Independent Requirement to Show DCAG Would Itself Have Sold Vehicles in California

As the Court also explained in the PD: "Even if DCAG did exert pervasive control, appellants have also failed to make a prima facie showing that DCAG would undertake to perform substantially similar services in the absence of MBUSA." PD at 12010. DCAG established that – for a variety of reasons including, among other things, lack of distribution and marketing expertise in the forum, tax considerations, and the availability of other distribution mechanisms – it would not itself sell cars in California if MBUSA were unavailable. PD at 12010-11; *see, e.g.*, Supp-II at A142-43 (Schwung Decl. ¶¶ 4-6, 11); DCAG Br. at 26-29;

see also Cai v. DaimlerChrysler AG, 480 F. Supp. 2d 1245, 152 (D. Or. 2007) (no evidence that DCAG would do business in Oregon if truck-selling subsidiary could not do so). This is an independent reason to affirm the judgment that has nothing to do with control.

II

JURISDICTION WOULD NOT BE REASONABLE IN ANY EVENT BECAUSE THIS LAWSUIT HAS ABSOLUTELY NOTHING TO DO WITH EITHER CALIFORNIA OR MBUSA

None of the 23 plaintiffs is a California resident; there is no California defendant; all of the alleged events occurred outside of California; and there are no witnesses, documents, or evidence in California. Moreover, and importantly, plaintiffs admit this lawsuit has nothing whatsoever to do with MBUSA, which is their only alleged hook for suing DCAG in California. As the district court correctly concluded after carefully evaluating all of the pertinent factors, asserting personal jurisdiction in California over German-defendant DCAG under the circumstances of this case would be unreasonable regardless of whether plaintiffs could otherwise have met the requirements of agency jurisdiction. *Bauman v. DaimlerChrysler AG*, 2005 WL 3157472, at *12-*19 (N.D. Cal. Nov. 22, 2005); *Bauman*, 2007 WL 486389, at *3-*4 (N.D. Cal. Feb. 12, 2007).

To find jurisdiction reasonable where any connection between plaintiffs' claims and the forum is so totally lacking would render the separate reasonableness

requirement meaningless. As the Supreme Court has explained, reasonableness is a distinct constitutional prerequisite "even if the defendant has purposefully engaged in forum activities." *Burger King*, 471 U.S. at 477-78.

On rehearing, plaintiffs focus on rearguing the claim that they lack another available forum. Even there, plaintiffs largely ignore Germany as an alternative. They instead rely primarily on an Argentine decision enforcing a two-year statue of limitations for "dirty war" disappearance claims (*Yanez et al. v. National Government*). But the limitations period addressed in *Yanez* has long existed (*see Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1547 n.11 (N.D. Cal. 1987) (recognizing two-year statute), *reconsidered on other grounds*, 697 F. Supp. 707 (N.D. Cal. 1988)), and plaintiffs never addressed it until their reply brief on appeal.

Yanez involved claims against the current Government, so it did not speak to claims against others. In any event, because Argentina is a civil law country, court decisions on matters such as limitations/tolling issues are *not* binding in other cases. *See, e.g.*, Suprema Corte de Justicia de Buenos Aires [SCBA], 9/12/2004, "*Porras Casas, Nora del Valle c/ Gallo, Daniel, y otros / Daños y perjuicios*," fallo c77132 Buenos Aires (Arg.). Thus, an April 27, 2010 Argentine Supreme Court decision ruled unconstitutional presidential pardons granted to "dirty war" officials because they involved crimes against humanity and the international community

and "[t]he statute of limitations is not applied to these crimes." *Martinez de Hoz Pardon Quashed by Supreme Court*, BUENOS AIRES HERALD (Apr. 28, 2010).

There is plenty of reason to believe an Argentine court would hear plaintiffs' claims. Most directly, plaintiffs' ability to pursue claims in Argentina is amply demonstrated by the fact that five of the *Bauman* plaintiffs *currently have pending civil claims* there against DaimlerChrysler Argentina based on "dirty war" related allegations. *See Crossato et al. v. DaimlerChrysler Argentina et al.*, No. 5346/07 (Fed. Civ. & Comm. Ct. No. 6, Buenos Aires). "Dirty war" civil claims also are pending against Ford. Supp II at A079-82.

In addition, news reports reveal that prosecutions against former "dirty war" government leaders continue to be successful in Argentina, and others are proceeding vigorously. *See, e.g.*, *25 Years for Leader of Argentine Dictatorship*, NEW YORK TIMES (Apr. 20, 2010) (recent conviction of former president Reynaldo Bignone); *Argentina Charges Ex-Dictator with 49 More Murders*, YAHOO! NEWS (May 3, 2010) (charges against former president Jorge Videla as well as "over 100 [other dirty war] suspects"). Not only do these developments show that Argentina and its courts remain clearly committed to addressing "dirty war" claims, but in addition, as the record below explains, private plaintiffs can assert claims in Argentine criminal cases. Supp.-II at A173 (Ortiz Dec. ¶ 8.J).

In any event, "plaintiff bears the burden of proving the unavailability of an alternative forum." *Harris Rutsky*, 328 F.3d at 1133. Particularly given the evidence that plaintiffs themselves are actively involved in prosecuting "dirty war" claims in Argentina, and that plaintiffs' claim about equitable tolling in Germany merely exploited a difference in nomenclature (*see* DCAG Br. at 41-43, 48-53; *Bauman*, 2007 WL 486389, at *5-*6), the district court properly found that plaintiffs failed to show the unavailability of either Argentina or Germany.

The district court carefully considered all seven reasonableness factors and properly concluded that asserting personal jurisdiction in this case, which has absolutely no connection with California or MBUSA, would be unreasonable. *Id.* at *2-*6; *Bauman*, 2005 WL 3157472, at *12-*19. This is another independent reason to affirm the judgment below.

CONCLUSION

The district court's judgment should once again be affirmed.

Dated: May 20, 2010 Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of the Court's May 6, 2010 Order and Circuit Rule 32-3 because this brief contains 2699 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2000 (Version 9.0) in 14-point Times New Roman.

Dated: May 20, 2010 Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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

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