

NOS. 00-0791, 0792

IN THE SUPREME COURT OF TEXAS

DAIMLER-BENZ AKTIENGESELLSCHAFT,

Petitioner

v.

**SCOTT OLSON, INDIVIDUALLY AND
AS INDEPENDENT EXECUTOR OF THE ESTATE OF
KAREN L. OLSON AND VICKIE OLSON,**

Respondents

**BRIEF *AMICI CURIAE* OF CHAMBER OF COMMERCE OF THE
UNITED STATES AND ORGANIZATION FOR INTERNATIONAL
INVESTMENT IN SUPPORT OF PETITIONS FOR REVIEW AND MANDAMUS**

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BRIEF *AMICI CURIAE*

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, *amici curiae* Chamber of Commerce of the United States of America and Organization for International Investment respectfully submit this brief *amici curiae* in support of Petitioner Daimler-Benz Aktiengesellschaft’s (“Daimler-Benz AG”) Petitions for Review and Mandamus. This brief is tendered on behalf of, and all fees for its preparation have been or will be paid by, *amici* organizations.

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INTERESTS OF *AMICI CURIAE*

The Chamber of Commerce of the United States and the Organization for International Investment are business associations that have substantial common interests in ensuring stable and predictable legal regimes affecting interstate and foreign commerce, and in promoting policies that secure for their members and this nation the benefits of an open national and global economy.

The Chamber of Commerce of the United States of America (the “Chamber”) is the world’s largest business federation, representing an underlying membership of more than 3 million U.S. businesses and organizations, with 140,000 direct members, of every size, in every business sector, and from every region in the country. While most of the country’s largest companies belong to the Chamber, 96% of its members are small businesses with fewer than 100 employees. Chamber members transact business in all or nearly all of the United States, as well as in a large number of countries around the world. Currently, 87 American Chambers of Commerce abroad in 77 countries are affiliated with the Chamber. An important function of the Chamber is to advocate its members’ interests in matters of national concern before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Organization for International Investment (“OFII”) is the largest business association in the United States representing the interests of U.S. subsidiaries of international companies. OFII’s member companies employ hundreds of thousands of workers in thousands of plants and locations throughout the United States, including Texas. Members of OFII transact business throughout the United States, as well as in many foreign countries, and are affiliates of companies transacting business in countries around the world.

The Chamber and OFII are umbrella organizations charged with representing the legal and policy interests of their members in matters of national import – such as this litigation. The jurisdictional determination of the court of appeals in this case has serious operational and financial implications for *amici* member companies. Many maintain Internet websites and/or employ a parent/subsidiary business structure similar to those at issue in this case. The court’s expansive “minimum contacts” analysis, if sustained, will force a fundamental reevaluation of these long-established business plans and structures, with significant implications not only for *amici*’s members but also the state and national economies they support.

SUMMARY OF THE ARGUMENT

This case raises a question of great practical importance to the general business community: whether a non-resident corporation may be compelled to defend itself in Texas courts based solely on (a) its operation of a minimally-interactive Internet website, (b) an unrelated appearance in federal court to prevent infringement of a federally-protected trademark, or (c) the imputed forum contacts of an independent subsidiary.

For more than half a century, the “touchstone” for determining whether a non-resident corporate defendant could be sued in a state court has been whether it purposefully established “minimum contacts” with the forum State. To comport with due process, the exercise of *in personam* jurisdiction by a Texas court must have a basis in some act by which the defendant purposefully established such minimum contacts with Texas, and must result from a defendant’s own conduct, not that of another person or from merely having placed goods into the general “stream of commerce.”

“Purposeful establishment” is a bright-line test intended to secure the constitutionally-protected liberty interest of a non-resident not to be haled into a jurisdiction solely as a result of random, fortuitous or attenuated contacts. For the business community, this rule “gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum

assurance as to where that conduct will and will not render them liable to suit.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985).

The decision of the court of appeals in this case marks a radical departure from these long-settled constitutional principles. Petitioner Daimler-Benz AG had no offices, employees, bank accounts or property in Texas, had not solicited business in Texas, and had not entered into contracts in the State or engaged in any other direct activities that might reasonably be found to create the requisite “minimum contacts” with this forum. The court nevertheless found “purposeful establishment” in two incidental contacts – an out-of-state Internet website accessible to Texas residents, and Petitioner’s appearance in federal court in Texas to protect a corporate trademark – and by imputing to Daimler-Benz AG the more substantial forum contacts of an independent indirect subsidiary.

The court’s novel analysis is plainly inconsistent with established precedent and, if allowed to stand, will undermine fundamental assumptions on which most business activity in this country is structured. Many businesses maintain minimally-interactive websites similar to the one operated by Daimler-Benz AG and, under the far-reaching theory propounded in the opinion below, would find themselves subject to the general jurisdiction of Texas courts. The federal circuit courts that to date have considered this Internet theory of jurisdiction uniformly have rejected it, as should this Court. Likewise, general jurisdiction over a non-resident trademark owner cannot reasonably be derived, consistent with due process, from a limited appearance in federal court to protect a

federally-created interest. Grounding general jurisdiction on such action not only violates due process, but also impermissibly burdens the exercise of the federal trademark rights. Finding either of these common business activities to be “purposeful establishment” or the “continuous and systematic presence” in Texas required for general jurisdiction would in effect extend Texas jurisdiction to much of the non-resident business community.

Compounding the threat to non-resident companies was the court’s erroneous application of “alter ego” doctrine to pierce the corporate veil between parent and subsidiary and impute the latter’s more substantial forum contacts to its non-resident parent would, if sustained, have similarly far-reaching implications. Imputation of a subsidiary’s contacts to a non-resident parent is an extraordinary action, properly limited to those extreme circumstances where the parent so dominates or controls its subsidiary as to render corporate separateness a fiction. Rigorous rules have been developed to govern alter ego determinations. Rather than apply these, the court’s judgment in this case turned on factors of control so common to the parent/subsidiary relationship as to render vast numbers of non-resident parent companies subject to the general jurisdiction of Texas courts.

ARGUMENT

The court's assertion of personal jurisdiction in this case marks a radical departure from established law, calling into question fundamental assumptions on which most business in this country is structured. Just how far afield the court has strayed is apparent from a brief review of the basic constitutional rules governing the exercise of *in personam* jurisdiction over non-residents.

A. The Court of Appeals Ignored Long-Settled “Minimum Contacts” Rules Developed to Protect Non-Resident Defendants from Suit in Jurisdictions Where They Have Chosen Not to Do Business.

A court's power to exercise jurisdiction over a non-resident defendant is limited by the Due Process Clause of the Fourteenth Amendment. As the United States Supreme Court first observed more than 50 years ago in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), the Due Process Clause protects a defendant's liberty interest in not being subject to the binding judgments of a forum with which it has established no meaningful “contacts, ties, or relations.”

The “touchstone” for determining whether the exercise of personal jurisdiction comports with due process has been and “remains whether the defendant purposefully established ‘minimum contacts’ in the forum State.” *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985). “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 where that conduct will and will not render them liable to suit.'" *Id.* at 472 (citation omitted).

Such "minimum contacts" must result from a defendant's own conduct, not unilateral activity by another. In *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297-98 (1980), the U.S. Supreme Court expressly rejected a jurisdictional claim based on a non-resident corporation's products having been carried by a consumer into the forum state. The corporate defendants in *World-Wide Volkswagen* had no direct ties to Oklahoma but, it had been argued, should have foreseen that an automobile sold in New York might be driven to other states and subject them to suit in these jurisdictions. The Supreme Court disagreed, ruling that due process requirements cannot be satisfied by the foreseeable unilateral actions of another but rather require that a non-resident defendant deliver products into the stream of commerce "with the expectation that they will be purchased by consumers in the forum State." *Id.* at 297-98.¹

Adherence to these considered principles is especially important when, as in this case, the action initiated against a non-resident does not arise out of the defendant's

¹ As a majority of the federal circuit courts of appeals have observed, in cases asserting general jurisdiction "the weaker the plaintiff's showing [on minimum contacts], the less a defendant need show in terms of unreasonableness to defeat jurisdiction." *Metropolitan Life Ins. Co. v. Robertson-Cece Corp.*, 84 F.3d 560, 569 (2d Cir.), *cert. denied*, 519 U.S. 1006 (1996). Further, "no court has ever held that the maintenance of even a

limited contacts with the forum state. In such cases of “general jurisdiction,” there is a greater burden on the plaintiff to demonstrate that a defendant engaged in purposeful, systematic and continuous activities in the forum state. *See Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 416-18 (1984). Were it otherwise, manufacturers could be subjected to suit for any purpose in all 50 states, with little hope of predictability and little regard for the business planning concerns that *World-Wide Volkswagen* sought to protect.

This action against Daimler-Benz AG arises from facts remarkably similar to those rejected in *World-Wide Volkswagen* as justifying the assertion of jurisdiction. Both involved product liability actions brought by the owner of an automobile purchased from non-resident defendants outside the forum state. In *World-Wide Volkswagen*, the automobile in question was purchased in New York and driven 2,000 miles to the forum state, Oklahoma. In this case, the automobile was purchased in Europe and subsequently transported by the plaintiff half way around the world to Texas. In both cases, the defendant corporations did no business in the traditional sense in the forum state. In *World-Wide Volkswagen*, maintenance services were available in Oklahoma from independent corporate entities but not the defendants. Likewise, in this case sales and maintenance services could be obtained in Texas from independent corporate entities, but not from Daimler-Benz AG.

substantial sales force within the state is a sufficient contact to assert jurisdiction in an unrelated cause of action.” *Id.* (quoting *Congoleum Corp. v. DLW Aktiengesellschaft*, 729 F.2d 1240, 1242 (9th Cir. 1984)).

The one material difference between these fact patterns, unremarked upon by the court of appeals, makes this an even stronger case for rejecting jurisdiction. In *World-Wide Volkswagen*, the automobile placed in the “stream of commerce” was built for the U.S. market, subject to federal safety and technical standards that apply nationwide (that is, in both New York and Oklahoma). By contrast, the automobile in this case was produced for the European market, not the United States, subject to European, not American, regulatory standards. It was taken not merely from one state to another, but into a different country and dramatically different legal and regulatory environment.² In *World-Wide Volkswagen*, the non-resident defendants did not expect to have to defend a lawsuit in Oklahoma but were at least aware of the federal technical and safety rules applicable to automobiles driven to Oklahoma and could factor this knowledge into their general business planning. In this case, Daimler-Benz AG lacked notice not only that it might be sued in Texas but also that products made for the European market might be driven in the United States and judged by U.S. regulatory standards.³

² If general jurisdiction can be obtained as easily as the court of appeals suggests, traditional due process limits will effectively disappear – subjecting much of the business community to general jurisdiction on a nation-wide basis. The practical consequences would be enormous. Companies would have to shape their business activities in Texas, for example, with an eye toward the risk of suit on any grounds in California (whose courts and legislature may have very different policy priorities) whether or not they choose to do business there. So, too, on an international level, companies would be justifiably concerned that courts of other countries might follow the U.S. example and subject them to suit there on the thinnest of grounds.

³ This difference highlights a further important prudential consideration militating against the assertion of general jurisdiction in cases like this one – that of having to apply foreign substantive law, with its attendant practical difficulties and comity concerns. While not dispositive, such considerations can and should inform application of the “purposeful establishment” requirement to specific fact patterns. *See, e.g., Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984) (declining to find purposeful establishment by a Colombian corporation based on employee travel to Texas to negotiate acquisition of helicopters involved in a foreign aviation accident and for related personnel training).

B. The Website and Trademark “Contacts” Cited by the Court Also Fail to Satisfy Minimum Due Process Requirements.

Recognizing that Daimler-Benz AG had not “purposefully availed itself of the privilege of conducting activities” in Texas in the traditional sense, the court of appeals mined the record for other activities that might be relied upon to satisfy this due process requirement. It found two – an out-of-state company website accessible to Texas residents, and Daimler-Benz AG’s filing of a trademark infringement complaint in a federal court in Texas. Neither contact, in *amici’s* view, offers a reasonable or constitutionally adequate basis for asserting general jurisdiction over non-resident defendants.

1. Maintenance of a Passive or Minimally-Active Internet Web Site Does Not Support the Exercise of General Jurisdiction.

Almost all businesses now have Internet websites. All have global reach (*i.e.*, no territorial limit) and most are at least partially “interactive,” allowing Texas residents as well as others to submit comments and questions and receive electronic mailings. Whatever the significance for due process purposes of websites used to conduct business transactions, “purposeful establishment” cannot reasonably be ascribed to the operation of more modest, informational sites such as the one in this case. For example, in *Mink v. AAAA Dev. LLC*, 190 F.3d 333, 337 (5th Cir. 1999), the Court of Appeals for the Fifth Circuit ruled that “[a]bsent a defendant doing business over the Internet or sufficient

interactivity with residents of the forum state, we cannot conclude that personal jurisdiction would be appropriate.”⁴

The U.S. Court of Appeals for the District of Columbia Circuit put it well in *GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1350 (D.C. Cir. 2000), when it observed that finding necessary minimum contacts in mere accessibility of a website would mean that “personal jurisdiction in Internet-related cases would always be found in any forum in the country” and that this theory “simply cannot hold water.” Recalling the promise of the Due Process Clause to provide “predictability to the legal system,” the Court further opined that “[w]e do not believe that the advent of advanced technology, say, as with the Internet, should vitiate long-held and inviolate principles of federal jurisdiction. In the context of the Internet, [plaintiff’s] expansive theory of personal jurisdiction would shred these constitutional assurances out of practical existence. Our sister circuits have not accepted such an approach, and neither shall we.” *Id.*

The contrary approach adopted by the court of appeals in this case is of grave concern to *amici* and the general business community. In light of *Mink*, *GTE New Media Services* and the growing attention to Internet contacts in personal jurisdiction

⁴ In that case, the Fifth Circuit found insufficiently interactive a website offering electronic mail access, printable order forms and a toll-free phone number. *See also Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419-20 (9th Cir. 1997); *Bensusan Restaurant Corp. v. King*, 126 F.3d 25, 29 (2d Cir. 1997). By contrast, the website here merely allowed Internet users to send e-mails, to which Daimler Benz AG might or might not respond.

jurisprudence, this case presents this Court with a valuable and timely opportunity to clarify principles to guide the lower courts and business community in Texas.⁵

2. Due Process Does Not Permit the Exercise of General Jurisdiction Based on a Non-Resident’s Filing of a Federal Trademark Complaint.

Aggressive protection of a federal trademark right is a common, unavoidable business responsibility that cannot reasonably be construed as “purposeful establishment” for due process purposes. Were the law otherwise, non-resident trademark holders would effectively lose control over their ability to “structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.” *Burger King*, 471 U.S. at 472.

Three unique characteristics of federal trademark law make reliance on an infringement complaint as a basis for general jurisdiction particularly inappropriate. First, trademark owners are expected under federal law to aggressively assert and defend their registered marks. Failure to address known infringement, as in this case, can undermine Lanham Act protection and, in extreme cases, be found to constitute “abandonment.” *See* 15 U.S.C. § 1114.⁶ Second, only the owner of a trademark – not its

⁵ *See* Case Note, 113 HARV. L. REV. 2128 (June 2000) (on *GTE New Media Services*, offering overview of recent developments).

⁶ A trademark owner that fails to enforce its rights against an infringer does not simply forego that claim, but also risks impairing legal rights in the trademark itself. Failure to prosecute can contribute to widespread unauthorized use, thereby weakening the distinctiveness of the mark in the public mind. *See Amstar Corp. v. Domino’s Pizza, Inc.*, 615 F.2d 252 (5th Cir.), *cert. denied*, 449 U.S. 899 (1980). Failure to prosecute can, over time, even result in trademark “abandonment.” *See Wallpaper Mfrs. Ltd. v. Crown Wallcoverings Corp.*, 680 F.2d 755, 766 (CCPA 1982); 15 U.S.C. § 1127.

licensee – can sue to prevent infringement. *Id.*; see 5 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION ¶ 32:3 (1999). Third, the usual rule is that suit must be brought where the trademark infringement occurs, which often coincides with the situs of the defendant. See *Cottman Transmission Sys. v. Martino*, 36 F.3d 291, 295 (3d Cir. 1994).

Because of these constraints, trademark owners often have little choice but to bring suit in the defendant’s forum. In this case, once Daimler-Benz AG learned that a Texas company was infringing its trademark, it was obliged by Lanham Act rules to seek redress in federal court in Texas. Equating this with “purposeful establishment” to support general jurisdiction over unrelated claims and for all purposes would make a mockery of the rule, effectively allowing trademark infringers to determine where and when a non-resident trademark owner can be subjected to the general jurisdiction of Texas courts. Conversely, the burden placed on a trademark owner’s exercise of Lanham Act rights would run afoul of the federal Constitution’s Supremacy Clause – by forcing non-resident owners to choose between federally-created trademark rights and their due process right to structure primary conduct so as to avoid exposure to litigation in a particular jurisdiction.

There is a further reason not to treat trademark actions as a basis for asserting general jurisdiction over non-resident defendants. At its core, the Lanham Act is a consumer protection law. The protection afforded individual trademark owners is not solely, or even fundamentally, for them but for the consuming public. Under the Lanham

Act, consumer confusion is the gravamen of trademark infringement and the trademark owner a "vicarious avenger" of consumer interests. *See* 15 U.S.C. § 1052(d); 1 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION ¶ 2:33 (2000). Forcing trademark owners to forego due process protection as the price of enforcing a trademark would severely undermine this important public interest in vigilant trademark protection.

In sum, neither Daimler Benz AG's minimally-interactive website nor its trademark infringement complaint offer a reasonable or constitutionally sufficient basis for asserting general jurisdiction. Rather, these are precisely the kind of "random," "fortuitous" or "attenuated" contacts that the "purposeful establishment" requirement is intended to protect against. *See Burger King*, 471 U.S. at 474 (citing *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)).

C. Absent Extraordinary Circumstances, Subsidiary Forum Contacts Cannot Be Imputed to a Non-Resident Parent Company.

An equally troubling aspect of the court's decision is its novel application of the "alter ego" doctrine to "pierce the corporate veil" between parent and an indirect subsidiary and impute the admittedly more substantial forum contacts of the subsidiary to its non-resident parent. The court of appeals found the requisite indicia of control in factors so common to the parent/subsidiary relationship as to render vast numbers of non-resident parent companies subject to the general jurisdiction of Texas courts.

Imputation of a subsidiary's contacts to a non-resident parent is an extraordinary action, properly limited to those extreme circumstances where a "parent so controls or dominates the subsidiary as to disregard corporate formalities." *Conner v. ContiCarries & Terminals*, 944 S.W.2d 405, 419 (Tex. App. Houston [14th District] 1997, no writ). Absent clear evidence that the corporate separateness of a parent/subsidiary structure is "pure fiction," "the presence of one corporation in a forum state may not be attributed to the other." *Id.* at 420. The court of appeals failed to apply this settled standard.

Conceding that Daimler-Benz AG and MBNA operated as separate companies and observed all relevant corporate formalities, the court nevertheless found grounds to pierce the corporate veil in the very nature of the parent/subsidiary relationship. Among the factors it found dispositive were:

- The parent company's description of itself in annual reports and financial statements "as the 'managing holding company' of the Daimler-Benz Group" and use of the collective pronouns "our" and "we" when referring to U.S. sales;
- A speech several years ago by the chairman and CEO of MBNA describing his company as "the organization that links our parent company in Germany and our 320 dealers across the United States";
- A statement in a 1993 shareholder report that Daimler-Benz AG "follows and assesses on-going projects of subsidiary companies," without specific reference to MBNA or the United States;
- A contract provision "requir[ing] MBNA to display Daimler-Benz's trademarks";
- An exclusive distribution agreement for the United States market between Mercedes-Benz AG and MBNA that "obligates MBNA to strive for maximum imports and sales of Mercedes-Benz vehicles";

- Provisions in the MBNA distribution agreement governing warranty work and related reporting requirements and recognizing a “common interest” in a corporate identity for the dealer network worldwide.

Daimler-Benz Aktiengesellschaft v. Olson, No. 03-99-00114-CV at 10-11 (Tex. App. Austin Jun. 15, 2000).

These and other “indicia” of parent company “control” cited by the court are such common business practices that *amici* find it hard to imagine how in the future any non-resident parent corporation with a subsidiary in Texas could avoid having the subsidiary’s forum contacts imputed to it. Put simply, the court’s judgment was governed not by traditional “alter ego” considerations, but its apparent belief that doing business with a subsidiary ought to make the parent subject to the general jurisdiction of Texas courts.⁷ This alternative basis was clearly expressed by the court in the summary paragraph concluding its “alter ego” analysis:

Our review of the evidence shows Daimler-Benz as a company devoted to selling its cars worldwide, including Texas. To achieve this goal, Daimler-Benz has established subsidiaries in important markets around the globe. *Although Daimler-Benz strictly observes corporate formalities, MBNA essentially connects Daimler-Benz to markets in the U.S., including Texas.* Daimler-Benz holds itself out to investors as a corporation that does business in all corners of the globe. MBNA’s classification as a sales company demonstrates that its function is to generate sales for Daimler-Benz. The confusion of identity created by MBNA’s use of Daimler-Benz’s three-pointed star is some evidence that Daimler-Benz is doing business through

⁷ U.S. courts routinely reject efforts to assert jurisdiction over non-resident corporations based on sales through wholly-owned subsidiaries. *See, e.g., Jazini v. Nissan Motor Co. Ltd.*, 148 F.3d 181, 184 (2d Cir. 1998) (“a foreign car manufacturer is not ‘present’ in New York simply because it sells cars through a New York distributor”).

MBNA. Daimler-Benz also exercises significant functions for MBNA and its other subsidiaries, such as obtaining financing and coordinating purchasing. Further, the management of Daimler-Benz closely supervises and directs the activities of its subsidiaries. *Thus, while formally separate, Daimler-Benz and MBNA form a functional whole in promoting and marketing vehicles in Texas.*

Id. at 11. (emphasis added).

A review of the relationship between most other parent and subsidiary companies would produce similar evidence. Under the court's expansive theory of jurisdiction, all such non-resident companies could be compelled to defend themselves in Texas courts if they have subsidiaries present in the State. But this is precisely the result that the Due Process Clause is intended to prevent.

CONCLUSION

Amici respectfully request that this Court grant Petitioner Daimler-Benz AG's petitions for review and for mandamus, reverse the jurisdictional finding of the court of appeals, and reaffirm that *in personam* jurisdiction may not be exercised over a non-resident defendant based solely on the maintenance of a non-sales Internet website, an unrelated appearance in federal court to enforce a protected trademark, or, absent proper application of the "alter ego" doctrine, the forum activities of an independent subsidiary.

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