IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI ex rel. NORFOLK SOUTHERN RAILWAY COMPANY, Relator, v. HONORABLE COLLEEN DOLAN, JUDGE OF THE TWENTY-FIRST JUDICIAL CIRCUIT IN THE COUNTY OF ST. LOUIS, DIVISION 20, Respondent.	)	Cause No. SC SC95514

RELATOR'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, WRIT OF MANDAMUS

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ARGUMENT

This underlying case involves injuries Russell Parker ("Plaintiff"), an Indiana resident, allegedly sustained in Indiana while working for NSRC – a railway company incorporated in Virginia with its principal place of business in Virginia. Plaintiff seeks to hale NSRC into a Missouri court, despite the fact that none of the events giving rise to the underlying suit occurred in Missouri, and neither of the parties to the underlying suit is a citizen or resident of Missouri.

Lacking a credible response to NSRC's Petition, Respondent resorts to a series of interpretive contortions of non-controlling precedent to raise what are, in essence, four basic questions:

(1) Does the Federal Employers' Liability Act ("FELA") grant State courts the power to exercise personal jurisdiction over railroads?

(2) Is "doing business" in a State enough to allow the exercise of specific personal jurisdiction over a non-resident corporation for injuries that occur outside the State?

(3) Is doing continuous business in a State enough to allow the exercise of general personal jurisdiction for any and all claims against a non-resident corporation?

(4) Does a corporation consent to personal jurisdiction on any and all claims against it in Missouri by complying with Missouri's business registration statutes?

The Court should answer each of these questions in the negative based on existing precedent and the U.S. Supreme Court's pronouncement in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

I. The FELA does not create personal jurisdiction in Missouri Courts.

Respondent asserts that the FELA itself answers the personal jurisdiction issue. It does not. Respondent even erroneously states that NSRC did not mention the FELA in its brief,[1] suggesting NSRC is avoiding some obvious solution to the jurisdictional question. NSRC is not hiding the ball. Its brief discusses the issue of personal jurisdiction without delving into the specifics of the FELA because the law is well-settled that State courts are not empowered to assert personal jurisdiction over a non-resident defendant based solely on the statutory language of the FELA. In fact, the law is so well-settled that Plaintiff in the underlying matter never made this argument during briefing on the personal jurisdiction issue.

Respondent nonetheless mistakenly argues that "Missouri courts have specific personal jurisdiction over NSRC under 45 U.S.C. § 56." (Resp. Brief, p. 66). Section 56 of the FELA provides:

> Under this chapter an action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States.

[1] Relator's brief clearly states that this is a FELA case. *See* Relator's Brief, p. 9.

45 U.S.C. § 56. Respondent astutely observes that the first part of this statute identifies the federal courts in which a FELA claim may be brought, but then curiously suggests the subsequent "concurrent jurisdiction" language could be interpreted as referring to either subject-matter jurisdiction or personal jurisdiction. (Resp. Brief, p. 66).

The U.S. Supreme Court settled this question over a century ago, noting that subject-matter jurisdiction is implicated by the statute:

> [W]e deem it well to observe that ***there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts***, or to control or affect their modes of procedure, ***but only a question of the duty of such a court***, when its ordinary jurisdiction, as prescribed by local laws, is appropriate to the occasion, and is invoked in conformity with those laws, ***to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress***, and susceptible of adjudication according to the prevailing rules of procedure.

Mondou v. New York, New Haven & Hartford R.R. Co., 223 U.S. 1, 56-57 (1912) (emphasis added). In other words, section 56 of the FELA gives State courts the authority "to take cognizance of an action" (i.e., subject-matter jurisdiction), but only "when their jurisdiction, as prescribed by local laws, is adequate to the occasion." *Mondou*, 223 U.S. at 59. Thus, if a State court has personal jurisdiction over a defendant (as determined by local law and, in accordance with *Daimler*, the Due Process Clause of the Fourteenth

Amendment), then that court will have subject-matter jurisdiction to hear the FELA claim pursuant to 45 U.S.C. § 56.

Numerous State and lower federal courts have recognized this distinction. *See, e.g., Albarado v. S. Pac. Transp. Co.*, 199 F.3d 762, 765 (5th Cir. 1999) ("With respect to claims brought pursuant to FELA, federal courts have concurrent original ***subject matter jurisdiction***, but not removal jurisdiction. Thus a FELA claim, if filed originally in state court, may not be removed unless it is joined with separate and independent claims over which the federal courts exercise exclusive jurisdiction."); *S. Pac. Transp. Co. v. Fox*, 609 So.2d 357, 362-63 (Miss. 1992) (noting that concurrent jurisdiction language of section 56 refers to subject matter jurisdiction and that nothing in the FELA addresses personal jurisdiction); *Smith v. Norfolk S. Ry. Co.*, 2009 WL 960684 at *1, 2 (C.D. Ill. Apr. 8, 2009) (noting that state and federal courts enjoy "concurrent subject matter jurisdiction" based on section 56).

Moreover, the U.S. Supreme Court has noted that section 56 "establishes ***venue*** for an action in the federal courts." *Baltimore & O.R. Co. v. Kepner*, 314 U.S. 44, 52 (1941) (emphasis added). It has never interpreted this venue statute to authorize personal jurisdiction,[2] *see Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 13 n.3 (Mont. 2016) (McKinnon,

[2] Respondent admits that there is no precedent for the proposition that section 56 grants State courts authority to exercise personal jurisdiction over a defendant. (Resp. Brief, p. 66). Nor could she. *See Mondou*, 223 U.S. at 56-57.

J., dissenting), even recently noting that section 56 provides for "concurrent jurisdiction of the state and federal courts" in the context of the application of substantive federal law. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 165 (2007).

Respondent, perhaps attracted to the idea of citing U.S. Supreme Court cases involving FELA claims brought in Missouri Courts, conflates issues of venue, subject-matter jurisdiction, and personal jurisdiction to argue that NSRC is "properly sued" in Missouri. But a closer reading of Respondent's cases shows that none of them support the proposition that NSRC is properly sued in Missouri for injuries allegedly sustained in Indiana from activities conducted by NSRC in Indiana.

Respondent suggests the holding in *Denver & Rio Grande W. R.R. Co. v. Terte*, 284 U.S. 284 (1932) provides authority for exercising specific personal jurisdiction over NSRC in Missouri, despite no discussion or analysis of the due process concerns raised by NSRC. In fact, *Terte* did not involve a challenge to personal jurisdiction, but rather whether interstate commerce would be unduly burdened by allowing a FELA claim to proceed in Missouri when the injury was sustained in another State. *Id.* at 285. The U.S. Supreme Court held that a Missouri resident, previously employed and injured by a defendant railroad in Colorado, could sue a Kansas-based railroad in Jackson County, Missouri based on "the doctrine approved in *Hoffman v. State of Missouri ex rel. Foraker*, 274 U.S. 21 [1927]." *Id.* at 287.

The doctrine approved in *Hoffman*, as it relates to foreign corporations,[3] has nothing to do with personal jurisdiction, but rather rejects the argument that interstate commerce would be burdened if a suit is allowed to proceed in a forum other than where the cause of action arose. The *Hoffman* Court noted that a foreign corporation "must submit, ***if there is jurisdiction***, to the requirements of orderly, effective administration of justice," even if that submission burdens interstate commerce. 274 U.S. at 23 (emphasis added). Just as the Court held fifteen years prior in *Mondou*, it reiterated again that submission by a foreign corporation requires a finding that personal jurisdiction exists in the first place. *Id.; see also Mondou*, 223 U.S. at 59.

Ironically, Respondent argues that NSRC has attempted to turn a *forum non conveniens* claim into a personal jurisdiction one. (Resp. Brief, p. 61). Yet, the cases cited for the proposition that the FELA authorizes specific personal jurisdiction wherever a railroad corporation does business, including the aforementioned *Terte*, are really just variations on a *forum non conveniens* argument.

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[3] *Hoffman* did not involve suit against a foreign corporation in Missouri. 274 U.S. at 22. It is actually a case that supports the general jurisdiction holding in *Daimler*. It was a wrongful death FELA action brought against a Missouri corporation and involving an accident that occurred in Kansas. *Id.* The Missouri railroad was properly sued in part because "it is sued in the state of its incorporation," *id.*, which is one of the paradigm bases for general personal jurisdiction. *See Daimler*, 134 S. Ct. at 760.

The defendants in *Terte* cited concerns over the large expense they would incur to bring witnesses from Colorado to Missouri for trial. 284 U.S. at 286. The *Pope* and *Miles* cases addressed the authority of State courts to enjoin residents from bringing FELA claims in other State courts, and both railroads framed the discussion in *forum non conveniens* terms. *See Pope v. Atlantic Coast Line R.R. Co.*, 345 U.S. 379, 381 (1953) (respondent railroad argued "that petitioner had deliberately sought to 'harass' his employer by subjecting it to the burden and expense of defending the claim in a distant forum, far from the scene of the accident and the residences of the witnesses"); *Miles v. Illinois Cent. R. Co.*, 315 U.S. 698, 700 (1942) ("The grounds for the injunction were the inconvenience and expense to the Illinois Central of taking its Memphis employees to St. Louis and the resulting burden upon interstate commerce."). Neither *Pope* nor *Miles* address the due process concerns implicated by exercising personal jurisdiction over a foreign railroad for injuries that do not arise out of that railroad's activities in the forum State. Simply put, there is no Missouri or U.S. Supreme Court authority holding that the FELA's statutory language authorizes specific personal jurisdiction in this matter.

Likewise, Respondent's undeveloped suggestion that Congress drafted the FELA to make railroads "at home" in State courts for general jurisdiction purposes, (Resp. Brief, p. 67), is without legal support. The right of State courts to exercise personal jurisdiction flows from the Due Process Clause of the Fourteenth Amendment, which provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." Thus, Congress has no authority to draft the FELA in a manner that would "restrict, abrogate, or dilute" a defendant's constitutional guarantees because the

law is well-established that "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 732 (1982).

If personal jurisdiction is authorized at all by the FELA, it can only empower the federal district courts to exercise personal jurisdiction. *See* 45 U.S.C. § 56 ("[A]n action may be brought in a ***district court*** of the United States . . . .") (emphasis added). Any broader interpretation would impermissibly abrogate NSRC's constitutional guarantees. *Hogan*, 458 U.S. at 732.

Thus, Respondent is in error for suggesting that the FELA answers the jurisdictional question.

II. Finding specific personal jurisdiction present in a case involving injuries allegedly sustained in Indiana because those injuries are "related to" the type of business NSRC conducts in Missouri would create an exception that swallows the rule pronounced in *Daimler*.

Respondent asserts that this is a specific jurisdiction case because Plaintiff, an Indiana resident, was allegedly injured in Indiana during the course of his railroad employment and NSRC does business as a railroad in Missouri. The *Daimler* Court made clear, however, that simply doing business in a forum does not allow the exercise of personal jurisdiction in a forum other than a corporation's formal place of incorporation or principal place of business. *Id.* at 760-61 (holding that a formulation approving the exercise of general jurisdiction in every State in which corporation engages in a substantial, continuous, and systematic course of business is "unacceptably grasping").

Yet, Respondent seeks a rule that would essentially merge general and specific jurisdiction and authorize personal jurisdiction in any State where NSRC engages in a substantial, continuous, and systematic course of business.

When taken together, the U.S. Supreme Court's decisions in *Walden v. Fiore*, 134 S. Ct. 1115 (2014), *Daimler*, and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011), clarify the parameters for both specific and general personal jurisdiction and show that Respondent's attempt to shoehorn a general jurisdiction claim into a specific one must fail. As the U.S. Supreme Court explained in *Walden*, the Court's most recent specific personal jurisdiction case, "[f]or a State to exercise jurisdiction consistent with due process, the defendant's ***suit-related conduct*** must create a substantial connection with the forum State." 134 S. Ct. at 1121 (emphasis added). The *Walden* Court reaffirmed the rule derived from *International Shoe* and discussed in both *Goodyear* and *Daimler* – that specific jurisdiction applies "where the corporation's in-state activity is 'continuous and systematic' and ***that activity gave rise to the episode-in-suit***." *Goodyear*, 564 U.S. at 923 (emphasis in original); *see also Daimler*, 134 S. Ct. at 761 (noting that specific jurisdiction applies "where a corporation's in-state activities are not only 'continuous and systematic, but also give rise to the liabilities sued on").

This Court recently noted that the "[p]ersonal jurisdiction analysis begins by looking at the relationship between the defendant, the forum, and the litigation. *Andra v. Left Gate Property Holding, Inc.*, 453 S.W.3d 216, 227 (Mo. banc 2015) (quoting *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014)). A court may exercise specific jurisdiction over a foreign defendant when the suit arises out of or relates to a defendant's contacts with the

forum. *Id.* This Court has never construed "relates to" in the manner suggested by Respondent – i.e., that a foreign defendant is subject to specific jurisdiction in every State where it does business so long as the suit fits within the generic business activity of the foreign corporation. In fact, in *Andra*, the Court noted that even single or isolated contacts with a forum could authorize the exercise of specific jurisdiction for claims "arising from" those acts because it would be fair to require a foreign defendant to litigate claims "relating to" those acts. *Id.* at 227 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985).[4] The question the Court should ask is – does the cause of action

[4] It is clear from *Andra* and the specific jurisdiction cases cited by Respondent that there must be something more than a generic link between the litigation and a defendant's general business activities in the forum State. *See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945) (noting that dispute over payment of unemployment taxes "arose out of" International Shoe Company's activities in the State of Washington); *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647-48 (1950) (dispute over compliance with Virginia Blue Sky laws was directly related to Nebraska corporation's delivery of insurance certificates to Virginia residents and its continuing obligations between it and Virginia certificate holders); *McGhee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223 (1957) (noting due process met because "the suit was based on a contract which had substantial connection with" the forum State); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984) (concluding that "regular circulation of magazines in the forum State is sufficient to support an assertion of jurisdiction in a libel action based

(i.e., the alleged injury) connect NSRC to Missouri in some meaningful way? If the answer is no, like in the underlying case, there is no specific personal jurisdiction.

Thus, for instance, when evaluating Florida defendants' minimum contacts in a California libel suit, the U.S. Supreme Court "examined the various contacts the defendants had created with California (and not just with the plaintiff) ***by writing the allegedly libelous story***." *Walden*, 134 S. Ct. at 1123 (emphasis added) (citing *Calder v. Jones*, 465 U.S. 783 (1984)). The Court did not look at the defendants' contact with California independent of the libel allegations, and this Court should not look at NSRC's contacts with Missouri independent of Plaintiff's alleged injuries. There must be some connection between the Indiana-based injuries (the suit-related conduct) and NSRC's contacts with Missouri.

Under Respondent's formulation, any of the following acts would arguably allow the assertion of specific personal jurisdiction over NSRC in Missouri because they "relate to" NSRC's railroad business:

- A personal injury case involving a railroad accident in Virginia;
- An intentional infliction of emotional distress claim brought by an NSRC employee working in Georgia for alleged harassment by his supervisors; or

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on the contents of the magazine"); *Burger King*, 471 U.S. at 479 (noting that dispute "grew directly out of a contract which had a ***substantial*** connection with" the forum State).

- An action for property damage to a personal vehicle based on a rail collision in North Carolina.

When Respondent's rule is taken to its logical conclusion, the Court is left with a specific jurisdiction standard that looks no different than the "unacceptably grasping" formulation approving the exercise of general jurisdiction in every State in which a corporation engages in substantial and continuous business. *Daimler*, 134 S. Ct. at 760-61.

In fact, Respondent's argument for specific jurisdiction is analogous to the scenario Justice Sotomayor stated was incompatible with the majority's holding in *Daimler*:

> The principle announced by the majority would apply equally to preclude general jurisdiction over a U.S. company that is incorporated and has its principal place of business in another U.S. state. Under the majority's rule, for example, a General Motors auto worker who retires to Florida would be unable to sue GM in that State for disabilities that develop from the retiree's labor at a Michigan parts plant, even though GM undertakes considerable business operations in Florida.

Daimler, 134 S. Ct. at 773 n.12 (Sotomayor, J., concurring). Just as the retired GM laborer cannot sue GM in Florida for injuries that arose in Michigan, Plaintiff in the underlying matter cannot sue NSRC in Missouri for injuries that arose in Indiana, even though NSRC conducts substantial and continuous business operations in Missouri.

Respondent's repurposing of general jurisdiction as specific jurisdiction would swallow the clear, bright-lined rule pronounced in *Daimler*.

An Oklahoma district court recently considered and rejected this same argument in several multi-plaintiff product liability claims that, like here, were brought by non-forum residents (none of the plaintiffs resided in Oklahoma) against non-resident corporations. *See Guillette v. PD-RX Pharmaceuticals, Inc.*, 2016 WL 3094073 at *1, 4-5 (W.D. Okla. June 1, 2016); *Manning v. PD-RX Pharmaceuticals, Inc.*, 2016 WL 3094075 at *1, 4-5 (W.D. Okla. June 1, 2016); *Nauman v. PD-RX Pharmaceuticals Inc.*, 2016 WL 3094081 at *1, 4-5 (W.D. Okla. June 1, 2016). Among many points similar to those raised by Respondent, the plaintiffs in these cases argued that specific jurisdiction was proper because the defendants registered to do business in Oklahoma, were involved in litigation in Oklahoma courts,[5] conducted business in Oklahoma, and derived substantial revenues

[5] Respondent's Appendix includes three cases in which NSRC was the named Plaintiff. (Resp. Appendix, A31-A57). In each case, the cause of action arose out of an incident that occurred in Missouri. (*Id.*, A31 at ¶ 1, A36, A54 at ¶ 3). In other words, each case involved specific jurisdiction. Importantly, NSRC has never maintained that it can never be sued in Missouri, and its use of Missouri courts to vindicate its rights for causes of action arising in Missouri should have no bearing on whether it should be subject to specific jurisdiction in Missouri for causes of action that arose outside of, and have no connection to, Missouri.

from that business. *E.g.*, *Guillette*, 2016 WL 3094073 at *4. Based on these contacts, plaintiffs argued that their injuries "relate to the genre of activities that the Defendants perform in Oklahoma, i.e. marketing of pharmaceuticals." *Id.*

Respondent makes the same argument here, asserting it is proper to exercise specific jurisdiction in the underlying case because NSRC registered to do business in Missouri, conducts railroad activities in Missouri, and Plaintiff's injuries allegedly resulted from railroad activities.[6] An Indiana plaintiff, Respondent argues, can sue NSRC anywhere it conducts railroad business for injuries that occurred in Indiana and arose out of NSRC's activities in Indiana. This simply is not enough to exercise specific jurisdiction when there is no evidence that NSRC's activities in Missouri have any connection to Plaintiff's injuries. As the Oklahoma district court held:

> Even assuming that Defendants purposefully directed their activities at Oklahoma, Plaintiffs have not met their *prima facie* burden to show that their injuries arose out of those activities. Plaintiffs are non-Oklahoma residents who ingested propoxyphene-containing products or represent someone who did. The injuries they complain of occurred outside of

[6] Again, it should be noted that neither Respondent nor Plaintiff assert that any alleged injury occurred in the State of Missouri or that NSRC's railroad activities in Missouri led to Plaintiff's injuries.

> Oklahoma and arose out of Defendants' marketing and sales of propoxyphene-containing products outside of Oklahoma. Plaintiffs have put forth no evidence the products were ingested in Oklahoma nor any argument to draw any connection between their out-of-state injuries and Defendants' in-state activities under either the but-for or the proximate cause test. Accordingly, the exercise of specific jurisdiction over the Defendants is not proper.

See Guillette, 2016 WL 3094073 at *5.

In this case, Plaintiff complains of cumulative trauma injuries that arose out of NSRC's activities in Indiana. Plaintiff made no effort to connect his injuries (the litigation) with NSRC's activities in Missouri (the forum). Respondent's assertion that all that need be shown is that NSRC conducts railroad activities in Missouri is nothing more than a thinly-veiled effort to circumvent the *Goodyear* and *Daimler* decisions restricting the scope of general personal jurisdiction.

Respondent argues that it makes little sense for the Due Process Clause to permit a severance of any link between the cause of action and a corporation's activities in its home State for general jurisdiction purposes, while requiring a causal link between the litigation and the foreign corporation's in-state activities for specific jurisdiction purposes. (Resp. Brief, p. 73). But it does make sense. Allowing a corporation to be sued on any and all claims in its place of incorporation or headquarters allows it "to structure [its] primary conduct with some minimum assurance as to where that conduct will and

will not render them liable to suit." *Daimler*, 134 S. Ct. at 762 (quoting *Burger King Corp.*, 471 U.S. at 472). With the clarity provided by *Goodyear* and *Daimler*, a corporation can now knowingly choose its place of incorporation and its principal place of business, and make that choice knowing it will have to defend all lawsuits there. That same corporation can now knowingly register to do and conduct business in other States with the expectation that it will not have to defend lawsuits for injuries unrelated to its business activities in that specific State. *See id.* at 761-62 (holding that approval of general jurisdiction in every State in which a corporation engages in substantial business "is unacceptably grasping" and, quoting *International Shoe*, noting that specific jurisdiction would be appropriate when in-state activities are "***not only*** continuous and systematic, ***but also give rise to the liabilities sued on***").

Thus, the assertion that specific jurisdiction applies to this case must be rejected.

III. The Due Process Clause of the Fourteenth Amendment prohibits the exercise of general jurisdiction over NSRC because NSRC is not "at home" in Missouri.

How many "homes" can a corporation have? Generally only one[7] or two, according to *Daimler* and *Goodyear*, with a possible third in "exceptional" cases. According to Respondent, however, a corporation can be "at home" – and subject to

[7] The paradigmatic places of incorporation and principal place of business are often the same.

general personal jurisdiction – in any State where it registers to do business and conducts regular business activities.

Registration and designation of an agent for service of process cannot confer general jurisdiction for the reasons discussed *infra*, and if *Daimler* and *Goodyear* stand for anything, it is the proposition that a foreign corporation cannot be haled into any court in a State for any and all claims against it simply because it does substantial and continuous business in that State. Rather, courts should look to the corporation's place of incorporation and principal place of business and beyond that only in exceptional cases.

General jurisdiction "does not focus solely on the magnitude of the defendant's in-state contacts." *Daimler*, 134 S. Ct. at 762 n.20. Rather, the inquiry "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* This is why *Daimler* identifies the paradigm bases as principal place of business and where a corporation is headquartered, *id.* at 760, neither of which for NSRC are in Missouri. "It is one thing to hold a corporation answerable for operations in the forum State, quite another to expose it to suit on claims having no connection whatever to the forum State." *Id.* at 761 n.19 (internal citation omitted). Thus, this Court could only find NSRC "at home" in Missouri if its contacts are "exceptional." *See id.*

Respondent contends this is an "exceptional case" because NSRC's continuous business activities in Missouri produce a substantial economic benefit to NSRC. (Resp. Brief, p. 82-83). This argument amounts to the "doing business" test rejected in *Daimler*. 134 S. Ct. at 762 n.20. When properly viewed through the prism of *Daimler*, there is

nothing "exceptional" about NSRC's activities in Missouri such that it should be expected to defend any and all claims here. The Court in *Daimler* assumed that the California contacts of Mercedes-Benz USA (MBUSA) were fully imputable to its parent corporation (Daimler), but still refused to find general personal jurisdiction. *Id.* at 760-62.[8] Those contacts included: being the largest supplier of luxury cars in California, maintaining multiple facilities and a regional headquarters in California, and $4.6 billion in sales in California. *Id.* at 752, 767. These activities, though large in absolute terms, were small relative to Daimler's worldwide operations. *Id.* at 752 (the sales accounted for

[8] Respondent suggests that *Daimler* turns on the parent/subsidiary relationship between Daimler and MBUSA, and that the imputation of MBUSA's contacts only means that such contacts are too attenuated for the exercise of jurisdiction over its parent corporation. (Resp. Brief, p. 80-82). However, the primary discussion regarding why California cannot assert general jurisdiction over *Daimler* (Part IV.B) never uses the words "parent" or "subsidiary." The parent/subsidiary relationship is discussed in Part IV.A of *Daimler* in relation to the narrower question of the impact of the agency relationship on general jurisdiction. For purposes of its holding, however, the Court assumed the contacts could be imputed to the parent, and thus the parent/subsidiary relationship discussion is not relevant to the holding as to general jurisdiction. *See Brown v. CBS Corp.*, 19 F. Supp. 3d 390, 399 (D. Conn. 2014) (citing *Daimler*, 134 S. Ct. at 759), *aff'd Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2d Cir. 2016).

only 2.4% of Daimler's overall business). As such, general jurisdiction over Daimler was not proper despite the significant California contacts imputed to it. *Id.* at 762.

Similarly, this Court should reject the contention that NSRC is "at home" based on the amount of business it performs in Missouri. Like the defendant in *Daimler*, NSRC's level of activity may seem large in absolute terms, but that activity must be assessed in relation to its nationwide business.[9] *Id.* at 762 n.20. That assessment reveals that approximately 2% of NSRC's revenues come from its Missouri operations, (*see* Relator's Appendix, A0512), a figure not unlike the 2.4% of total sales in California that *Daimler* held was insufficient to render the foreign defendant "at home" there.

Respondent gloms onto the "exceptional case" opening left by *Daimler*, but ignores the only example of such a case identified by the Court – *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), in which a foreign corporation suspended its regular activities during wartime and temporarily relocated its principal place of business to Ohio. *Daimler*, 134 S. Ct. at 761 n.19. During that time, "[a]ll of the [company's] activities were directed by the company's president from within Ohio" so that "Ohio

[9] Respondent converts the approximate percentage of revenues, employees, and track NSRC has in Missouri, (Resp. Brief, p. 83), but it is nonetheless important to remember that those numbers equate to approximately 2% of NSRC's total operating revenue, 2% of its total workforce, and 2% of its total track mileage. (Relator's Brief, p. 23-24; Relator's Appendix, A051-A052).

could be considered a surrogate for the place of incorporation of head office." *Id.* at 756 n.8.

Here, there is nothing in the record to support a finding that all of NSRC's activities are directed from within Missouri, and NSRC vigorously disputes that Missouri could be considered a surrogate for Virginia, where NSRC is incorporated and has its principal place of business. NSRC conducts business in Missouri, but its nationwide business is not directed from Missouri. As such, NSRC is not "at home" in Missouri and is not subject to general personal jurisdiction in Missouri.

IV. NSRC did not consent to personal jurisdiction by registering to do business in Missouri, and it would be unconstitutional for Missouri to condition business registration on consent.

With no basis for finding specific or general jurisdiction, or jurisdiction based on the statutory text of the FELA, the Court is left with Respondent's argument that NSRC consented to personal jurisdiction on any and all claims against it by registering to do business in Missouri and appointing an agent for service of process.

Consent to jurisdiction operates as a waiver of NSRC's due process rights, and any such waiver must be ***intentional***. *See Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982). The U.S. Supreme Court did not list business registration as a form of intentional consent, *see id.*, because it previously held that courts "should not construe" registration statutes as consent to jurisdiction for suits related to "business transacted by the foreign corporation elsewhere . . . ." *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921). This is

because "[t]he purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies ***growing out of transactions within the state***." *Morris & Co v. Skandinavia Ins. Co.*, 279 U.S. 405, 408-09 (1929).

NSRC acknowledges the line of archaic U.S. Supreme Court decisions cited by Respondent – including *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917)[10] and *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939) – but these cases, and the concept of "consent by registration," emerged from the strict territorial view of jurisdiction in place since *Pennoyer v. Neff*, 95 U.S. 714 (1878), that held that a tribunal's personal jurisdiction "reache[d] no farther than the geographic bounds of the forum." *Daimler*, 134 S. Ct. at 753. The concept of "consent by registration" has never been affirmed by the Supreme Court since the jurisdictional analysis shifted to one of "minimum contacts" and fairness in *International Shoe*. *See* Matthew Kipp, INFERRING EXPRESS CONSENT: THE PARADOX OF PERMITTING REGISTRATION STATUTES TO CONFER GENERAL JURISDICTION, 9 Rev. Litig. 1, 4-7 (1990). In fact, subsequent Supreme Court decisions indicate that due process is offended by basing jurisdiction on business registration. *See, e.g., McGhee*, 355 U.S. at 222 ("In a continuing process of evolution this Court accepted ***and then abandoned*** 'consent,'

[10] Amici derisively labels this decision "The Case That Dare Not Speak Its Name", but perhaps, as discussed *infra*, it should be called "The Case That Should Not Be Cited."

'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over such corporations.").

Moreover, while Respondent asserts that *Daimler* did not expressly overrule any of the archaic consent cases cited, the Supreme Court was very clear, when it rejected two similarly situated cases cited by the plaintiffs to support the assertion that general jurisdiction is proper when a foreign corporation has some presence in the forum, that *Pennoyer*-era cases are no longer compatible with modern jurisdictional jurisprudence. 134 S. Ct. at 761 n.18 (discussing *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898) and *Tauza v. Susequehanna Coal Co.*, 115 N.E. 915 (1917)). Such cases were "decided in the era dominated by *Pennoyer*'s territorial thinking" and "should not attract heavy reliance today." *Id.; see also Genuine Parts Co. v. Cepec*, 137 A.3d 123, 145-46 (Del. 2016) (noting that the older cases relied upon by Respondent and other courts that have upheld jurisdiction based on consent were "rooted in an era where foreign corporations could not be sued in other states unless there was some fictional basis to find them present there").[11]

[11] The Delaware Supreme Court also acknowledged how litigation has changed since that era: "And to give some credit to our predecessor generations, plaintiffs typically did not sue defendants in fora that had no rational relation to causes of action; the increasing embrace of that practice among segments of the plaintiffs' bar has instead built over recent decades." *Id.* at 146. Predictably, the plaintiffs' bar has swooped in to file an

Even if such cases had a place in the modern jurisdictional landscape, it is important to remember that the Supreme Court has never held that consent flows directly from registering to do business in a State, but rather from the explicit language of a State statute or the judicial interpretation given it from the State's courts. *See Robert Mitchell Furniture Co.*, 257 U.S. at 216. Respondent readily acknowledges that this Court has never expressly held that compliance with Missouri's business registration statutes operates as a consent to personal jurisdiction. *See State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 168 (Mo. banc 1999) (noting that the limitation on the assertion of consent-based jurisdiction "may be, of course, the due process clause of the United States constitution"). Respondent argues, however, that the "judicial gloss" put on Missouri's statutes in *Holliger* warrants consent-based jurisdiction based on cases like *Pennsylvania Fire*. (Resp. Brief, p. 92-104).

Holliger is inapposite because, as NSRC noted in its brief, K-Mart Corporation conceded that there were no due process concerns over Missouri's exercise of personal jurisdiction. *Id.* at 166, 168-69. NSRC has made no such concession. Moreover, any judicial gloss derived from certain pronouncements in *Holliger* must be reevaluated in light of *Daimler*. *See Cepec*, 137 A.3d at 137-44; *see also Ritchie Capital Management, L.L.C. v. Costco Wholesale Corp.*, __ Fed Appx. __, 2016 WL 3583225 at *1 n.1 (2d Cir.

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amicus brief in support of denying foreign corporations their due process protections. *See* Amicus Brief of Missouri Association of Trial Attorneys.

July 1, 2016) (noting that consent by registration theory of jurisdiction "may no longer be sound in light of the Supreme Court's decision in *Daimler*"). After *Goodyear* and *Daimler*, a narrower reading of Missouri's business registration statutes "has the intuitively sensible effect of not subjecting properly registered foreign corporations to an 'unacceptably grasping' and 'exorbitant' exercise of jurisdiction, consistent with *Daimler*'s teachings." *Cepec*, 137 A.3d at 141;[12] *see also Brown*, 814 F.3d at 640 (noting that, if registration and appointment of a registered agent pursuant to statute sufficed to confer jurisdiction, "every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler*'s ruling would be robbed of meaning by a back-door thief").

To the extent that any Missouri trial or appellate courts have endorsed a "consent by registration" theory of jurisdiction, those opinions should be overruled by this Court, as the Delaware Supreme Court recently did to its own precedent in *Cepec*. 137 A.3d at 137-44. "Consent by registration" evolved from an outdated view of jurisdiction that no longer applies to corporations competing in a global economy. *Id.* at 138 ("[W]e no longer live in a time where foreign corporations cannot operate in other states unless they

[12] A narrow reading also avoids the perverse result of subjecting properly registered businesses to "an overreaching consequence – general jurisdiction – that does not apply to foreign corporations that do business in [Missouri] without properly registering[.]" *Id.* at 140.

somehow become a resident; nor do we live in a time where states have no effective bases to hold foreign corporations accountable for their activities within their borders."). Continued adherence to this historical view of personal jurisdiction would violate due process.[13]

Moreover, as a matter of public policy, this Court should be mindful of the "disproportionate toll on commerce [that] is itself constitutionally problematic" if it

[13] This is why the Court must reject the argument that NSRC was on notice of its consent to personal jurisdiction because *Pennsylvania Fire* was decided decades before it registered in Missouri. (Resp. Brief, p. 99). NSRC noted *supra* that subsequent decisions by the Supreme Court questioned the viability of *Pennsylvania Fire*'s holding, but *Daimler* provides even more clarity. Consent-based jurisdiction subjects a foreign corporation to general jurisdiction in any State where it registers to do business in compliance with the law, as every State has a business registration statute. *See* Tanya J. Monestier, REGISTRATION STATUTES, GENERAL JURISDICTION, AND THE FALLACY OF CONSENT, 36 Cardozo L. Rev. 1343, 1363 n.109 (2015) (listing every state business registration statute). *Daimler* is explicit, however, that courts cannot claim personal jurisdiction over a foreign corporation simply because it does a lot of business within the forum State, which would obviously include registered businesses. 134 S. Ct. at 761. Such "exorbitant" exercise of jurisdiction is "barred by due process constraints on the assertion of adjudicatory authority." *Id.* at 751.

adopts "consent by registration" as an independent basis for personal jurisdiction. *Cepec*, 137 A.3d at 142. Missouri corporations are entitled to the same protections and certainty afforded corporations incorporated or headquartered in sister states. Delaware has already held that Missouri's businesses are not subject to personal jurisdiction in Delaware merely by registering to do business there, *see id.* at 137-44, and Missouri should not adopt a policy that would encourage other States to require Missouri corporations to waive their due process protections by registering to do business in them. *Cepec*, 137 A.3d at 142 ("Such an exercise of overreaching . . . will also encourage other states to do the same.").

Missouri is home to some of the nation's largest corporations, including ten corporations on Fortune Magazine's 2016 Fortune 500 rankings:

- Express Scripts Holding
- Centene
- Emerson Electric
- Monsanto
- Reinsurance Group of America
- O'Reilly Automotive
- Edward Jones Financial
- Graybar Electric
- Ameren
- Peabody Energy

See "Fortune's 500 Companies," Missouri Economic Research and Information Center, *https://www.missourieconomy.org/industry/fortune_500/index.stm* (last visited Aug. 2, 2016). These corporations should be able "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Daimler*, 134 S. Ct. at 762. They cannot do so if forced to defend suits wherever they are required by law to register. *See Cepec*, 137 A.3d at 143 (noting that all states have business registration statutes and that many corporations "as a practical matter must operate in all fifty states").

NSRC should not be subject to personal jurisdiction here simply because it followed the law and complied with Missouri's business registration statutes, just as Missouri's Fortune 500 companies and numerous other Missouri-based businesses (e.g., Enterprise Rent-A-Car, Hallmark, Bass Pro Shops) should not be subject to personal jurisdiction for any claim in States in which they register to do business. This type of jurisdictional overreach is the antithesis of the *Daimler* holding. 134 S. Ct. at 760-61 ("Plaintiffs would have us . . . approve the exercise of general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business. That formulation, we hold, is unacceptably grasping.").

As such, the Court should reject "consent by registration" as a basis for exercising personal jurisdiction over NSRC.

CONCLUSION

Each of Respondent's arguments for personal jurisdiction in this matter is unavailing. The FELA does not grant State courts the power to exercise personal jurisdiction. Specific jurisdiction is not present because Plaintiff's injuries are not meaningfully connected to NSRC's activities in Missouri. General jurisdiction is not proper because *Daimler* made clear a corporation cannot be "at home" in every State in which it operates. Finally, consent-based jurisdiction, if ever valid, cannot survive in light of *Daimler*'s holding.

Thus, the Court's temporary Writ of Prohibition should be made permanent, preventing the Twenty-First Judicial Circuit of St. Louis County, Missouri from exercising personal jurisdiction over Relator in this case and requiring Respondent to enter an order dismissing the underlying case against Relator for lack of personal jurisdiction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the information required by Rule 55.03.

2. This brief complies with the limitations contained in Rule 84.06(b).

3. Per Rule 84.06(c), the word count of this brief is 7,743, as determined by Microsoft Word 2010 using the Word Count process with "including footnotes" selected.

4. The brief was prepared using "Times New Roman" font in 13 point size, in Microsoft Word 2010.

/s/ Kurt E. Reitz_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on registered counsel via the Missouri Courts E-filing System on August 4, 2016, and the undersigned further certifies that he has signed the original and is maintaining the same pursuant to Rule 55.03(a).

/s/ Kurt E. Reitz