Case No. SC95514

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.

FROM THE CIRCUIT COURT
OF ST. LOUIS COUNTY, MISSOURI
CASE No. 15SL-CC02095

RESPONDENT'S BRIEF IN OPPOSITION OF PETITION FOR WRIT OF PROHIBITION OR, IN THE ALTERNATIVE, WRIT OF MANDAMUS

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Introduction

This is a personal jurisdiction case. "Jurisdiction to resolve cases on the merits requires both authority over the category of claim in the suit (subject-matter jurisdiction) and authority over the parties (personal jurisdiction), so that the court's decision will bind them." *Ruhrgas AG v. Marathon Oil Co.,* 526 U.S. 574, 577. (1999).

Norfolk Southern Railway Company ("NSRC") owns or operates approximately 400 miles of railroad track, generates approximately $232,000,000 in revenue, and employs nearly 600 people, all in Missouri. NSRC has appointed a registered agent to receive service in Missouri. Further, NSRC has haled people and entities into Missouri's courts to obtain damages when its railroad business interests in Missouri have been damaged. *See*, Appendix at 31, 35, 54. In cases where it was the plaintiff in a Missouri state court, NSRC has admitted that it "operates commercial railroad services throughout the United States, including Ray County, Missouri." Appendix at 54.

In this case, NSRC asks this Court to conclude that it is not sufficiently present in Missouri to justify Missouri's exercise of adjudicatory authority over it in a Federal Employer's Liability Act ("FELA") case for injuries that its employee suffered while engaged in NSRC railroad operations in Indiana. 45 U.S.C. secs. 51-60.

This brief begins not with direct responses to NSRC's points, but with an attempt at an overview of the U.S. Supreme Court's treatment of *in personam* jurisdiction. In none of the cases discussed in the controlling precedents of that Court had the defendant appointed a registered agent for the service of process in the forum seeking to exercise adjudicatory authority. As noted, NSRC has appointed such an agent. That appointment, coupled with both (1) its purposeful availment of the benefits it receives from Missouri's law and location to generate profits and (2) the unique aspects of FELA law, create a compelling legal rationale for this Court to conclude that Missouri's courts may adjudicate the underlying case. Respondent, the Honorable Colleen Dolan, properly found that Missouri courts have personal jurisdiction over NSRC generally and in the underlying case specifically. The writ previously issued should be quashed.

The Due Process Scenarios

Due process is at the heart of the United States Supreme Court's treatment of in personam jurisdiction. The due process issues addressed by the Supreme Court present themselves generally in at least five different scenarios. (In the fifth scenario – in which the defendant is legally and factually present in a forum and the injury occurs in that

forum – defendants generally do not challenge jurisdiction. There is no need to discuss it in this case.)

1. A company is *legally* present in the forum and is sued there despite the fact that the company conducts no activities related to the cause of action pleaded in the suit.

2. A foreign company is sued in a forum in which it is not legally present, but the activity that is the subject of the suit occurred in that forum.

3. A foreign company is sued in a forum in which it is has minimum contacts and/or has purposefully availed itself of the benefits of the forum, but has not appointed a registered agent, and the cause of action arose outside the forum.

4. a. A corporation appoints a registered agent in a forum and is sued there for acts that occurred outside the forum.

   b. A corporation appoints a registered agent in the state and purposefully avails itself of the benefits of the forum's laws by continuously conducting economically substantial activities there and is sued in that forum for acts that occurred outside the forum.

(Scenario #4 will be discussed in response to Point III and not in this introduction.)

Each scenario asks the same question, however, expressed best by Judge Learned Hand's clear vision well before the Supreme Court decided *International Shoe Co.,* 326 U.S. 310 (1945). "We are to inquire whether the extent and continuity of what [the foreign corporation] has done in the state in question makes it reasonable to bring it before one of its courts." *Hutchinson v. Chase & Gilbert*, 45 F.2d 139, 141 (2d Cir. 1930). Said more colloquially, the question is whether the corporation is legally or factually "there" for due process purposes, i.e. territorially present in the forum even if the cause of action arose elsewhere.

That such presence is the core issue is made evident in *Burnam v. Superior Court*, 495 U.S. 604 (1990), in which all nine justices agreed that if personal service is made on a nonresident defendant who is present in the state, due process is satisfied. There, a couple had married in West Virginia, lived as husband and wife in New Jersey, and only after the couple separated did the wife move to California, leaving her husband in New Jersey. Wife filed for divorce in California. When the husband came to California to visit the children, the wife served him with a California summons. Despite a disagreement on rationale, the Court held that California courts had in personam jurisdiction.

All the shifting judicial tests and the academic musings on this issue are but an attempt to answer the "there" question. As to the fictitious persons we call corporations, which owe their existence and authority to operate to a state's laws, territorial limits (the place of incorporation) became substantially less important even after *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1877), and before *International Shoe* rendered those limits nearly meaningless. Judge Hand wrote:

> As to jurisdiction, the express consent of a corporation to be sued elsewhere avoided its territorial limitations (*Lafayette Ins. Co. v. French*, 18 How. 404; *Pennsylvania F.I. Co. v. Gold Issue Mining Co.*, 243 U.S. 93; *Louisville & N. Ry. Co. v. Chatters,* 279 U.S. 320, 323,), and beginning with *Lafayette Ins. Co. v. French*, supra, this has been extended to cases where the corporate activities within the foreign state are such as empower that state to exact such a consent.

Hutchinson, 45 F.2d at 140-41. Judge Hand suggested the most cogent answer to the "there" question. Personal jurisdiction exists in a state court over a foreign defendant, whether or not the activity occurred there, if there are, he wrote, "some continuous dealings in the state of the forum; enough to demand a trial away from its home." *Id.* at 141.

With *International Shoe*, the due process question remained the same but reduced itself to consideration primarily of the nature of a *defendant's* contacts with the forum and the *defendant's* rights and reasonable expectations.

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not *present* within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

Id. at 316 (emphasis added). See, *J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. 873, 879 (2011)("The Due Process Clause protects an individual's right not to be deprived of life, liberty, or property only by the exercise of lawful power…").

There is no bright line test, and no "little more or little less" recipe to determine the jurisdictional issue, where the defendant claims it is absent from the forum. *Id.* at 319. Instead, "[w]hether due process is satisfied must depend rather upon the quality and nature of the [defendant's] activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure." *Nicastro,* 564 U.S. at 879. Thus, "[a] court may subject a defendant to

judgment only when the defendant has sufficient contacts with the sovereign 'such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Id.* quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945). See also, *Walden v. Fiore*, ___ U.S. ____, ____, 134 S.Ct. 1115, 1122 (2014)("Due process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties").

Whether a corporate defendant claiming to be absent is *present* in a forum "can be manifested only by activities carried on in its behalf by those who are authorized to act for it." *International Shoe*, 326 U.S. at 316.

> "[T]he terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." … 'Presence' in the state in this sense ***has never been doubted*** when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, ***even though no consent to be sued or authorization to an agent to accept service of process has been given***.

Id. at 316-17 (Emphasis added). Thus, a corporation with continuous and systematic ties to a state is "present" in that state if the activities that are the subject of the suit "arise from or are related to" the corporations activities in the state.

International Shoe used the phrase "arising from or connected to" to explain whether a cause of action is connected to the corporation's activities in the forum.

> But to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations *arise out of or are connected with the activities within the state*, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Id. at 319 (emphasis added). Ironically, the "related to" part of the test was first formulated in a general jurisdiction case. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984). Having added "related to" to the jurisdictional lexicon, however, *Helicopteros* expressly chose not to answer the following questions:

> (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists."

Id. at 415, n.10. Indeed, the Supreme Court has yet to make such an announcement on these questions.

Following *International Shoe,* "'the relationship among the defendant, the forum, and the litigation, … became the central concern of the inquiry into personal jurisdiction.'" *Daimler, A.G. v. Bauman*, ___ U.S. ___, 134 S.Ct. 746, 754 (2014) quoting *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977). Given *Walden*'s focus on the defendant, the question is thus narrowed to whether the defendant, the forum and the litigation are connected in some way, not whether the plaintiff is connected.

International Shoe did not recognize the terms "general jurisdiction" and "special jurisdiction." Those terms came from Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121 (1966). *Helicopteros,* 466 U.S. at 415 n. 8 & 9 employed the phrases "general" and "special" jurisdiction

for the first time, citing von Mehren's and Trautman's distinctions. *Daimler* notes, however, that *International Shoe* "presaged the development of two categories of personal jurisdiction." *Id.* at 754. Thus, *International Shoe* remains "canonical." *Id.*, quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown,* 564 U.S. 915, 923 (2011).

Respondent now turns to a discussion of the scenarios outlined above.

a. SCENARIO #1. General Jurisdiction:

The cause of action arises from dealings that are "entirely distinct" from the corporation's activities in the forum in which it is "at home."

The gateway inquiry for *general* jurisdiction is whether the cause of action brought in a state is "entirely distinct" from – as opposed to arising out of or related to – the corporation's activities in that state. The line drawn between "entirely distinct" and "arising out of or related to" is the line drawn by *Daimler* between general jurisdiction and special jurisdiction. *Id.* at 754. That line is effectively a line between being legally present only and being factually and/or legally present. If the cause of action is related to the corporation's activities in the forum, the due process inquiry is the special jurisdiction inquiry and there is no need to consider general jurisdiction tests. As *Daimler* makes clear:

"specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role." *Id.* at 755.

Because general jurisdiction is a relative backwater of the due process landscape, there are but four cases addressing general jurisdiction post-*International Shoe*. The first, *Perkins v. Benguet Consol. Min. Co.*, 342 U.S. 437 (1952), is emblematic of the rarity of the issue and the only case to find general jurisdiction existed. There, the plaintiff sued Benguet in Ohio. Benguet, a Philippine company, operated gold and silver mines in the Phillipines but ceased its mining operations during the Japanese occupation of the Philippines during World War II. Benguet's president moved to Ohio, where he kept an office, maintained the company's files, and oversaw the company's activities. *Id.* at 448. Perkins, an Ohio resident, sued Benguet in Ohio for dividends and damages for a failure to issue her stock certificates. *Id.* at 438-39.

The Court determined that the relevant activity for purposes of due process analysis was mining.[1] "[N]o mining properties in Ohio were

[1] This conclusion is important because one could argue that the activities of the corporation in Ohio (financial and other management, including, one supposes, the issuance of stock and the payment of dividends) were directly related to the failure-to-pay-dividends and the

owned or operated by the company…." *Id.* The Supreme Court held that Ohio courts could exercise general jurisdiction over Benguet without offending due process because Ohio was the corporation's principal place of business and "many of its wartime activities were directed from Ohio and were being given the personal attention of its president in that State at the time he was served with summons." *Id.* at 448.

Interestingly, and as discussed below, two other bases for jurisdiction might exist in *Perkins*. First, one assumes that a company maintaining its headquarters in Ohio is legally present there, having appointed a registered agent to receive service, though *Perkins* does not say so. Second, the territorial due process holdings permit personal jurisdiction on the basis of actual territorial presence alone. *Burnham* 495 U.S. 604. Benguet was in Ohio, whether or not it admitted it was.

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failure-to-issue-stock-certificate causes of action. Nonetheless, the Court characterized the case as one that "takes us one step further to a proceeding in personam to enforce a cause of action not arising out of the corporation's activities in the state of the forum." *Perkins,* 342 U.S. at 446.

Whether these are independent bases for general jurisdiction is not decided in the cases.

The second, *Helicopteros*, arose from a helicopter crash in Peru. Four U.S. citizens died in that accident; their survivors and representatives brought suit in Texas state court against the helicopter's owner and operator, a Colombian corporation. The Colombian company's contacts with Texas were confined to "sending its chief executive officer to Houston for a contract-negotiation session; accepting into its New York bank account checks drawn on a Houston bank; purchasing helicopters, equipment, and training services from [a Texas-based helicopter company] for substantial sums; and sending personnel to [Texas] for training." *Id.* at 416. "All parties to the present case concede that respondents' claims did not 'arise out of,' and are not related to, [the company's] activities within Texas." *Id.* at 415-16. The Court held that the company's Texas connections did not resemble the "continuous and systematic general business contacts ... found to exist in *Perkins*." *Id.* "[M]ere purchases, even if occurring at regular intervals, are not enough to warrant a State's assertion of *in personam* jurisdiction over a nonresident corporation in a cause of action not related to those purchase transactions." *Id.* at 418. Obviously, Helicopteros was not registered to do business in Texas.

The third case is *Goodyear*, decided 30 years after *Helicopteros*. There the Court faced this issue: "Are foreign subsidiaries of a United States parent corporation amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum State?" 564 U.S. at 919.

Goodyear arose from a bus accident outside Paris, France. Two North Carolina boys died as a result. The boys' parents brought a wrongful-death suit in North Carolina state court alleging that the bus's tire was defectively manufactured. The complaint named as defendants not only The Goodyear Tire and Rubber Company (Goodyear USA), an Ohio corporation, but also Goodyear's Turkish, French, and Luxembourgian subsidiaries. The foreign subsidiaries, which manufactured tires for sale in Europe and Asia, lacked any affiliation with North Carolina. A small percentage of tires manufactured by the foreign subsidiaries were distributed in North Carolina, however and on that ground, the North Carolina court held the subsidiaries amenable to the *general* jurisdiction of North Carolina courts. Goodyear USA did not contest jurisdiction even though it was not incorporated in North Carolina and did not maintain its principal place of business there. "In contrast to the parent company, Goodyear USA, which does not contest

the North Carolina courts' personal jurisdiction over it, petitioners are not registered to do business in North Carolina." *Id.* at 921.

The Court reversed, concluding that the North Carolina court's analysis (as NSRC's argument does here) slid over "the essential difference between case-specific and all-purpose (general) jurisdiction." *Id.* at 927. Placement of a product into the stream of commerce

> may bolster an affiliation germane to *specific* jurisdiction.... But ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant.

Id. The Court reasoned that "[a] corporation's 'continuous activity of some sorts within a state,' *International Shoe* instructed, 'is not enough to support the demand that the corporation be amenable to suits unrelated to that activity.'" *Id.* at 928. The Court concluded:

> [P]etitioners are in no sense at home in North Carolina. Their attenuated connections to the State… fall far short of "the continuous and systematic general business contacts" necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.

Id. at 929.

Daimler, the final case, followed *Goodyear* by a year, tightening further the reach of general jurisdiction, that is, again, jurisdiction over a cause of action that is unrelated to the activities of a corporation in a forum/state. *Daimler* considered "the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States." *Daimler,* 134 S.Ct. at 750. Specifically, the Court considered whether continuous and systematic contacts with the state of California *by a non-defendant, wholly owned subsidiary* (Mercedes-Benz USA LLC – "MBUSA") of Daimler AG (Daimler) could be imputed to Daimler for the purposes of establishing general jurisdiction over Daimler in California. "Plaintiffs' operative complaint names only one corporate defendant: Daimler, the petitioner here." *Id.* at 752.

Plaintiffs sued Daimler in California. "The complaint alleged that during Argentina's 1976–1983 'Dirty War,' Daimler's Argentinian subsidiary, Mercedes–Benz Argentina (MB Argentina) collaborated with state security forces to kidnap, detain, torture, and kill certain MB Argentina workers, among them, plaintiffs or persons closely related to plaintiffs." *Id.* at 751. The complaint sought damages for human rights violations.

Daimler, a German stock company with headquarters in Stuttgart, manufactured Mercedes-Benz vehicles in Germany. *Id.* at 750-51. It had no presence in California. Rather Daimler's subsidiary, MBUSA, a Delaware limited liability corporation, a company that was *not* a defendant, maintained its principal place of business in New Jersey and sold cars in California. *Id.* at 751. Plaintiffs hoped to establish that Daimler was subject to general jurisdiction in California based on MBUSA's "continuous and systematic" California contacts. *Id.* at 752. MBUSA was Daimler's exclusive importer and distributor in the United States and maintained a regional office in California, along with a Vehicle Preparation Center, and a Classic Center." *Id.* MBUSA was also California's "largest supplier of luxury vehicles," and "over 10% of" new sales of Mercedez-Benz cars in the United States were in California. *Id.*

Based on MBUSA's "continuous and systematic" contacts in California, plaintiffs alleged that MBUSA was subject to general jurisdiction in California. *Id.* They argued further that the general jurisdiction of California over the subsidiary, MBUSA, should be attributed to Daimler, *Id.* at 752, and that Daimler should be subject to suit in California for unrelated conduct in Argentina of another subsidiary under principles of general jurisdiction. *Id.* at 758-59.

It was hardly surprising under the facts that the Court rejected the argument. First, Daimler did not have its state of incorporation or principal place of business in California. *Id.* at 760. MBUSA, which was registered to do business in California, was not a defendant. Second, the "continuous and systematic" conduct in California did not rise to the level at which Daimler could be considered "essentially at home" there, even assuming that MBUSA's activities could render MBUSA at home in California and assuming also that the activities could be attributed to Daimler. *Id.*

As one can see, the facts in the general jurisdiction cases are unusual, often involving defendants who have not touched the forum at all. Indeed, only one of the cases, *Benguet*, found that general jurisdiction existed – and then only because the forum was home to the brains of the company, from which all decisions emanated. Thus, *Daimler* accurately comments that "[s]ince *International Shoe,* 'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.'" *Daimler* at 755, quoting *Goodyear,* 564 U.S. at 925. Indeed, "general jurisdiction exists as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it."

Borchers, *The Problem With General Jurisdiction*, 2001 U. CHI. LEGAL FORUM 119, 139, quoted with approval in *Daimler* at 758, n.9.

"General jurisdiction" clearly means something altogether different than "specific jurisdiction." As noted, general jurisdiction arises without concern for minimum contacts related to the specific litigation at issue. It is agnostic as to the litigation in the case. Rather, general jurisdiction depends on a corporation's *affiliations* with a forum without regard for the causes of action filed. Thus general jurisdiction exists where "a foreign corporation's 'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it [there] on causes of action arising from dealings entirely distinct from those activities.'" *Daimler*, 134 S.Ct. at 754, quoting *International Shoe*, 326 U.S. at 318. The general jurisdiction inquiry "is not whether a foreign corporation's in-forum *contacts* can be said to be in some sense "continuous and systematic," it is whether that corporation's "*affiliations* with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Daimler*, 134 S.Ct. at 761. (Emphasis added).

Again, general jurisdiction is philosophically centered on reciprocal fairness in this sense: A company that maintains its corporate headquarters in a state but that does not sell a single product there, has

nonetheless taken full advantage of that state's hospitality and laws such that it cannot claim to be absent from that state even if that presence has no pertinence to the specific litigation.

Thus, *Daimler* serves a limiting purpose for a rare set of cases. Under the Due Process Clause, general jurisdiction exists for cases divorced from the activities of a corporation in a forum when (1) a defendant corporation's principal place of business is there, (2) its place of incorporation (with which it may have no contacts at all beyond its desire to take advantage of the laws of that state) or (3) extraordinary circumstances, which Daimler does not explain:

> We do not foreclose the possibility that in an exceptional case, see, *e.g., Perkins*, described *supra,* at 755 – 757, and n. 8, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level.

Id. at 761.

Specific Jurisdiction:

Overview

As *Daimler* makes clear, "specific jurisdiction" exists "if the defendant has 'certain minimum contacts with [the State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" 134 S.Ct. at 754, quoting *Goodyear,* 564 U.S. at 953, which quotes *International Shoe,* 326 U.S. at 316. Specific jurisdiction is thus focused on "'the relationship among the defendant, the forum, and the litigation… [which] became the central concern of the inquiry into personal jurisdiction.'" *Daimler*, 134 S.Ct. at 757-58, quoting *Shaffer v. Heitner*, 433 U.S. 186, 197 (1977).

Specific jurisdiction too is founded on notions of reciprocal fairness. *See*, *International Shoe,* 326 U.S. at 319 ("[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state" such that an "obligatio[n] arise[s]" to respond there to suit).

The "defendant, forum and litigation" focus of the specific jurisdiction inquiry is, again, defendant-focused and is informed by two questions. Both questions require a "yes" answer:

(1) Is the defendant present in the state for due process purposes?

As will be shown, the cases hold that a defendant is present in a

forum (is related to that forum) if it has, at least, "minimum contacts" with the state. Scenario #2.

(2) Does the cause of action pleaded have anything to do with the defendant's presence in the state? Scenario #3.

Again as will be shown, where the cause of action "arises out of or is related to" the corporation's activities in the state, specific jurisdiction exists.

b. SCENARIO #2: A foreign defendant is sued in a forum in which it claims it is not present, but the activity that is the subject of the suit occurred in that forum.

International Shoe, arose from these Scenario #2 facts: The state of Washington wished to require International Shoe Company, a St. Louis company organized under Delaware law, to contribute unemployment taxes to the state coffers and sued to obtain what the company would not voluntarily provide. The company had no office in Washington, made no contracts for the sale or purchase of merchandise there, maintained no stock of merchandise in Washington and made no deliveries of goods in intrastate commerce. The company employed 11-13 commissioned salespersons in Washington, all of whom were supervised from St. Louis, though they resided in Washington and confined their sales efforts to that state. The company provided samples

and, on occasion, rented permanent sample rooms, for exhibiting samples, in business buildings, or rooms in hotels or business buildings temporarily for that purpose. No salesman had authority to enter into contracts or to make collections. Their work was limited to soliciting orders. *Id.* at 313-14.

The Court permitted Washington to exercise in personam jurisdiction over International Shoe Company. The Court described the contacts between the company and the state as

> systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. The obligation which is here sued upon arose out of those very activities. It is evident that these operations establish sufficient contacts or ties with the state of the forum to make it reasonable and just according to our traditional conception of fair play and substantial justice to permit the state to enforce the obligations which appellant has incurred there.

Id. at 320.

International Shoe remains "canonical" because it lays out the due process interests identified and tests employed by the Court today. Thus, in the following Scenario #2 cases, the results flowed nearly seamlessly from *International Shoe*'s teachings.

Again, and importantly, in none of these cases did the defendant appoint a registered agent for the service of process and thus consent to jurisdiction in the forum.

In *Travelers Health Ass'n v. Virginia*, 339 U.S. 643 (1950), Travelers, a Nebraska corporation, had entered into numerous insurance contracts in Virginia without opening an office in the state or sending agents into the state. *Id.* at 645-46. Travelers typically obtained new Virginia members, instead, through unpaid recommendations of existing Virginia members. These recommendations resulted in Travelers' insurance certificates being "systematically and widely delivered in Virginia." *Id.* Because it had no office or agents in Virginia, Travelers declined to comply with Virginia Blue Sky laws requiring registration of companies that sold insurance certificates in the state. Virginia initiated a cease and desist action regarding Travelers' failure to register; Travelers argued lack of personal jurisdiction.

Travelers held that the Due Process Clause permitted personal jurisdiction because Travelers defendant had reached into Virginia and

had "create[d] continuing relationships" with numerous residents over a period of years. The Court observed that relevant witnesses and the claim investigation would most likely be in Virginia. "[W]here business activities reach out beyond one state and create continuing relationships and obligations with citizens of another state, courts need not resort to a fictional 'consent' in order to sustain the jurisdiction of regulatory agencies in the latter state." *Id.* at 647.

Mullane v. Cent. Hanover Bank & Trust Co., 339, U.S. 306 (1950) examined whether a New York court could, in a suit to settle the accounts of a common trust fund established in New York, exert jurisdiction over numerous non-New York-resident defendants who were individual beneficiaries of the trust. The Court held that the Due Process Clause permitted jurisdiction:

> It is sufficient to observe that . . . the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

Id. at 313.

McGee v. Int'l Life Insurance Co., 335 U.S. 220 (1957) held that due process permits personal jurisdiction against a defendant that had only a single, but "substantial connection" with the state. *Id.* at 223. International Life had issued a single reinsurance certificate to a California insured. Following the insured's death, his mother obtained a judgment in California requiring International Life to pay the proceeds of the policy to her as the beneficiary. The mother attempted to enforce the judgment in Texas. International Life objected to the California court's authority to enter judgment against it.

McGee upheld jurisdiction. The suit was "based on a contract which had a substantial connection with" California: the contract was delivered in the state, the insured paid the premiums from California, and the insured lived in California until he died. The Court considered: (1) the substantial connection of the insurance contract to the forum; (2) the "manifest interest" of the state in providing effective redress when insurance companies refuse to pay claims; (3) a comparison of defendant's ability to litigate in the chosen forum and plaintiff's ability to litigate a small-dollar claim in the defendant's distant home; and (4) the crucial witnesses that would be located in the insured's state. *Id.* at 123-24. In light of these factors, the Court concluded that any

inconvenience to the defendant would not constitute a denial of due process.

Daimler cites all of these cases in its discussion of ***specific*** jurisdiction.

Some argue that the constitutional analysis changed with *Hanson v. Denckla*, 357 U.S. 235 (1958), and that *McGee*'s reach extended only to insurance cases. See, *Trippe Mfg. Co. v. Spencer Gifts, Inc.,* 270 F.2d 821, 822 (7th Cir. 1959)("we think the more recent case of *Hanson v. Denckla*, demonstrates the *McGee* case has been limited by the Court to the insurance field").

Hanson introduced a one-dimensional requirement that a defendant, who claims it is absent, is nonetheless present for due process purposes when the defendant has "purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. *Hanson* also concluded that the "unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum." *Id.* This focus necessarily minimized the importance of a plaintiff or other person's connection to or interest in a forum. Charles W. Rhodes, *Nineteenth Century Personal Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. L. REV.

387, 402-04 (2012).

In *Hanson,* a Delaware trust company sent trust income to and "carried on several bits of trust administration" with a Florida domiciliary, who had created the trust while living in Pennsylvania and had named the Delaware trust company as trustee before she moved to Florida. *Id.* at 238-40, 246, 250. *Hanson* held that Florida could not exercise adjudicative authority over the trust company because it had not "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and privileges of its laws." *Id.* at 251-53. Absent purposeful, forum-directed action, the defendant trust company could have no "contact" with Florida, and thus lacked the "minimum contacts" essential to personal jurisdiction. *Id.*

Hanson emphasized that the Due Process Clause serves interstate federalism interests as well as liberty interests, and it imposed "territorial limitations" on the power of states, even if asserting jurisdiction would be entirely fair to the defendant. "However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." *Id.* Minimum contacts – and thus factual presence – were a function of a defendant purposefully availing itself of the benefits and privileges of

forum law. "The *Hanson* Court's addition of the 'purposeful availment' requirement could be construed as an indication that it viewed 'minimum contacts' as a substitute for presence or, perhaps, as the equivalent of implied consent to jurisdiction." Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 93 (1983).

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) analyzed whether a New York retailer and its regional distributor who claimed they were absent from Oklahoma could be required to submit to jurisdiction in Oklahoma regarding an accident that occurred in Oklahoma but involved a vehicle sold in New York. Neither the dealer nor the distributor sold cars in Oklahoma.

The Court found no purposeful availment – and no thus basis for Oklahoma to exercise adjudicatory authority – because the defendants had "no contacts, ties, or relations" with the forum. *Id.* at 294. The Court's rationale confirmed that "minimum contacts" protected a liberty interest in the defendant. *Id.* at 291-92. What is "critical to due process analysis … is that the *defendant*'s conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." *Id.* at 297 (emphasis added).

Insurance Corp. of Ireland, Ltd. v. Compagnie Des Bauxites de

Guinee, 456 U.S. 694 (1982) concluded again that the Due Process Clause protects "an individual liberty interest" in the defendant. *Id.* at 702. It does so because it "restrict[s] . . . judicial power not as a matter of sovereignty, but as a matter of individual liberty." *Id.*

In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 468-69 (1985), Burger King alleged that its franchisee, Rudzewicz, breached franchise obligations in Florida by failing to make the required payments "at plaintiff's place of business in Miami, Dade County, Florida," and also charged that the franchisee was tortiously infringing its trademarks and service marks through their continued, unauthorized operation as a Burger King restaurant. *Id.* at 468-69. The Court noted that "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, quoting *World-Wide Volkswagen,* 444 U.S. at 297. The Court equated "minimum contacts" with "purposeful availment."

> [T]he constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum. … This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction

> solely as a result of "random," "fortuitous," or "attenuated" contacts, [citations omitted] or of the "unilateral activity of another party or a third person," *[citation omitted].* Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a "substantial connection" with the forum State.

Id. at 475 (emphasis original).

Burger King permitted jurisdiction in Florida despite the fact that no physical ties to Florida could be attributed to the defendant franchisee, including the maintenance of an office there, nor even a visit from the franchisee. "'Yet this franchise dispute grew directly out of "a contract which had a *substantial* connection with that State."' *McGee v. International Life Insurance Co.,* 355 U.S. at 223, 78 S.Ct. at 201 (emphasis added)." *Id.* at 479. It was enough for Florida to exercise adjudicatory authority that:

> The franchisee deliberately reached out beyond Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. *Travelers Health Assn. v. Virginia,* 339 U.S., at 647, 70 S.Ct. at 929. Upon approval, he entered into a

> carefully structured 20-year relationship that envisioned continuing and wide-reaching contacts with Burger King in Florida. In light of Rudzewicz' voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortuitous," or "attenuated.

Id. at 479-480.

Still later, in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), a plurality opinion concluded that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Id.* at 117. The Court required additional conduct by the defendant that would reveal "an intent to serve the market in the forum State." *Id.* An intent to serve the market is a form of targeting.

The Court took a decades' long break from this issue until *J. McIntyre Machinery, Ltd. v. Nicastro,* 564 U.S. 873 (2011), which arose from a products liability suit filed in New Jersey state court. While working in New Jersey, Nicastro lost several fingers while using a metal-shearing machine manufactured by J. McIntyre Machinery, Ltd. in England. McIntyre at no time either marketed goods in New Jersey or

shipped them there. Four justices attempted to clarify *Asahi*'s "stream of commerce" reference.

> The principal inquiry in cases of this sort is whether the defendant's activities manifest an intention to submit to the power of a sovereign. In other words, the defendant must "purposefully avai[l] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Id. at 882, quoting *Hanson*, 357 U.S. at 253. The Court suggested that a different result might attach if

> "[A]ctions of the defendant may amount to a legal submission to the jurisdiction of the court." Sometimes a defendant does so by sending its goods rather than its agents. The defendant's transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have *targeted* the forum; as a general rule, it is not enough that the defendant might have predicted that its goods will reach the forum State.

Id. at 882, quoting *Insurance Corp.*, 456 U.S. at 704-5. (Emphasis added).

Several other "targeting" cases fall under Scenario #2. First,

Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) arose when a New York resident sued an Ohio corporation with its principal place of business in California for libel in New Hampshire. The Court permitted New Hampshire jurisdiction because "[t]he general course of conduct in circulating magazines throughout the state was purposefully directed at New Hampshire, and inevitably affected persons in the state." *Id.* at 774.

Importantly, where there is targeting, "we have not to date required a plaintiff to have "minimum contacts" with the forum State before permitting that State to assert personal jurisdiction over a nonresident defendant." *Id.* at 779. Thus, "plaintiff's residence in the forum State is not a separate requirement, and lack of residence will not defeat jurisdiction established on the basis of defendant's contacts." *Id.* at 780. Thus targeting becomes, for jurisdictional purposes, purposeful availment.

In *Calder v. Jones,* 465 U.S. 783 (1984), an actress brought suit in California claiming that she had been libeled in a National Enquirer article written and edited in Florida. The article was circulated in California. The Court affirmed California jurisdiction because the writer and editor "knew that the brunt of that injury would be felt by respondent in the State in which she lives and works and in which the *National Enquirer* has its largest circulation. Under the circumstances,

petitioners must 'reasonably anticipate being haled into court there' to answer for the truth of the statements made in their article. *Id.* at 789-90.

Though there are other cases, these set out the Court's significant pronouncements on this issue, with one exception – the case decided unanimously by the Court one month *after* *Daimler*.

In *Walden v. Fiore,* ___ *U.S.* ____, 134 S.Ct. 1115 (2014), plaintiffs, who had residences in Nevada and California, filed suit in federal court in Nevada against defendant Walden, a Georgia police officer. Walden, while acting as a deputized agent for the Drug Enforcement Agency (DEA), seized money held by professional gamblers returning from Puerto Rico. Walden engaged in conversations with plaintiffs' Nevada attorney about the source of the funds; helped draft an affidavit showing probable cause for forfeiture of the money, which he forwarded to the United States Attorney's Office and failed to include exculpatory evidence in his official conduct. The gamblers wanted their money back and sued Walden in Nevada alleging intentional violations of their Fourth Amendment rights, arising from Walden's seizure in Georgia of approximately $97,000 following a search of plaintiffs at an Atlanta airport. Ultimately, no forfeiture complaint was filed, and plaintiffs' money was returned.

The Court denied Nevada personal jurisdiction over Walden. The focus of special jurisdiction in every circumstance, as *Walden* makes clear, is on a defendant's actual "presence" in a forum, either physically, by minimum contacts/purposeful availment or targeting.

The Court cited *Keeton*'s teaching that the inquiry must include consideration of "the relationship among the defendant, the forum, and the litigation." *Id.* at 1188. Citing *World-Wide* and *Hanson, Walden* linked the defendant, forum and the litigation together in a defendant-only focus that required: (1) that the relation with the forum state "must arise out of contacts that the 'defendant *himself* creates with the forum State,'" 134 U.S. at 1122, citing *Burger King*, 471 U.S. at 475, and that (2) "our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself, not the defendant's contacts with persons who reside there." *Id.*

Taken together, these two criteria simply add definition to *Hanson*'s "purposeful availment" requirement. When read with *Walden*'s explanation of the focus of the Due Process Clause – "[d]ue process limits on the State's adjudicative authority principally protect the liberty of the nonresident defendant—not the convenience of plaintiffs or third parties" – the return to *Hanson*'s single factor, "purposeful availment" test to determine presence in special jurisdiction

cases is complete. *Id.* Indeed,

> the [Court's] entrenched practice [is] of resolving jurisdictional questions by asking, in essence, whether the defendant is 'present' within the forum state through the surrogate of minimum contacts. Thus, the defendant continues to be the Supreme Court's favored litigant. This bias is further betrayed in the requirement that the fundamental condition of jurisdiction is the defendant's purposeful contacts—those that induce reciprocal benefits and protections. … The proposition that jurisdiction depends upon the 'relationship among the defendant, the forum, and the litigation' is a hollow refrain.

Graham C. Lilly, *Jurisdiction over Domestic and Alien Defendants*, 69 VA. L. REV. 85, 108 (1983).

In sum, Scenario #2 cases permit jurisdiction when a defendant who claims to be absent is actually present in the forum (1) where the absent defendant's non-forum acts target the forum or (2) through minimum contacts with the forum or (3) the defendant's purposeful availment of the forum's laws and benefits. In each instance it all comes 'round again to Judge Hand's seminal analysis. Where a defendant is generating profits purposefully in a forum by targeting that forum, *or* is

there not on an episodic basis but on a constant, continual and more-or-less permanent basis, *or* takes full advantage of the benefits and opportunities afforded by the laws of that forum, that defendant has sufficient "continuous dealings in the state of the forum; enough to demand a trial away from its home." *Hutchinson*, 45 F.2d at 141. In other words, the defendant is "there" and reasonably expects to get sued therein. When all the dust settles, "finding a lack of contact is the only realistic way most defendants will have to defeat jurisdiction." Richard D. Freer, *Personal Jurisdiction in the Twenty-First Century: The Ironic Legacy of Justice Brennan*, 63 S.C. L. REV. 551, 589 (2012).

c. Scenario #3. A foreign company is sued in a forum but the act that caused the suit occurred outside the forum.

Most of the special jurisdiction cases are Scenario #2 cases. In Scenario #2 cases, the issue of presence is vigorously disputed.

Scenario #3 is different. Under Scenario #3 cases, a defendant has purposefully availed itself of the benefits of the forum. That presence exists despite the fact that the defendant does not maintain its principal place of business there nor is it incorporated there, and in the cases decided so far, has not appointed an agent to receive process or consented to service.

Scenario #3 cases consider whether the cause of action "arises from ***or*** is related to" the defendant's activities in the forum when no consent to service exists. The Second Circuit has concluded that the "related to" test "is but a part of a general inquiry" to determine whether assumption of adjudicative authority is reasonable. *Chew v. Dietrich*, 143 F.3d 24, 29 (2nd Cir. 1998).

From the language used, it seems obvious that "arising from" creates a causation standard, while "related to" embraces a broader relationship with the defendant's activities in the forum. The absence of the word "direct" in the *International Shoe/Helicopteros* formulations is significant and expresses a greater breadth than causation.[2]

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[2] Several federal circuits have melded the two into a single causation standard, often adding the word "direct" to the Supreme Court's formulation. This approach completely ignores the disjunctive in the *Helicopteros* test. See, generally, Braham Boyce Ketcham, *Related Contacts for Specific Personal Jurisdiction over Foreign Defendants: Adopting A Two-Part Test*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 477, 484-85 (2009)(at least seven Circuit Courts of Appeals have created four different approaches to determine whether contacts are sufficiently related to warrant personal jurisdiction).

That there are two tests, not one, is shown by the Court's use of the disjunctive.

> For our part, we think it significant that the constitutional catchphrase is disjunctive in nature, referring to suits 'aris[ing] out of, or relat[ing] to,' in-forum activities. We believe that this added language portends added flexibility and signals a relaxation of the applicable standard. A number of other courts share this belief. *See, e.g., City of Virginia Beach v. Roanoke River Basin Ass'n,* 776 F.2d 484, 487 (4th Cir.1985); *Southwire Co. v. Trans–World Metals & Co.,* 735 F.2d 440, 442 (11th Cir.1984); *Thos. P. Gonzalez Corp. v. Consejo *207 Nacional de Produccion,* 614 F.2d 1247, 1254 (9th Cir.1980); *see also In re Oil Spill by the Amoco Cadiz,* 699 F.2d 909, 915 (7th Cir.1983).

Ticketmaster-New York, Inc. v. Alioto, 26 F.3d 201, 206-07 (1st Cir. 1994).

> The relatedness problem in personal jurisdiction has two dimensions. First, there is the problem of the relationship between the defendant and the forum state. *[Is*

> *the defendant present in the forum? Scenario #2].* Second, there is the problem of the relationship between the lawsuit and the forum state. [*Are the defendant's activities within the forum connected in some way with the subject of the lawsuit? Scenario #3.*] Although these two problems are interconnected, they form distinct analytical categories.

Robin J. Effron, *Letting the Perfect Become the Enemy of the Good: The Relatedness Problem in Personal Jurisdiction*, 16 LEWIS & CLARK L. REV. 867, 872 (2012).

The Scenario #2 inquiry is handled by minimum contacts/purposeful availment/targeting.

The Scenario #3 inquiry focuses on whether the activity sued on bears some relationship to the activities undertaken by the defendant in the forum of suit. Indeed, the critical question is whether the tie between the defendant's contacts and the plaintiff's claim is sufficiently close to make jurisdiction fair and reasonable. *See Shoppers Food Warehouse v. Moreno,* 746 A.2d 320, 335–36 (D.C.2000); *see also Chew v. Dietrich,* 143 F.3d 24, 29 (2d Cir.1998); *Vons Cos. v. Seabest Foods, Inc.,* 14 Cal.4th 434, 58 Cal.Rptr.2d 899, 926 P.2d 1085, 1096–97 (1996); *Thomason v. Chem. Bank,* 234 Conn. 281, 661 A.2d 595, 603–04 (1995). Thus, the proper inquiry is not whether the defendant who has purposefully

availed itself of the benefits of a forum should have foreseen a *particular* lawsuit involving a specific plaintiff, but whether a particular generic *kind* of lawsuit brought by the plaintiff is one that a defendant could reasonably expect in the forum.

The general jurisdiction cases are helpful here. It makes little sense for the Due Process Clause to permit a severance of all links between the lawsuit and the defendant's activities in the forum where the defendant is "at home" on the one hand, but to require a direct causal link between the particular lawsuit and the defendant's activities in a forum where the defendant's presence is pervasive, continuous and purposeful on the other. Thus, where a lawsuit is of a kind that the defendant should reasonably expect to see in a forum in which it has purposefully availed itself of the benefits of that forum, such a suit is "related to" the in-forum activities of the defendant as required by *International Shoe/Helicopteros.*

If one is required to look at the principal or essential commercial activity of the company, rather than some specialized activity or legal affiliation that supports that activity, then a company that operates railroads in interstate commerce as its primary commercial activity can be sued in every state in which it is present and in which it operates as a railroad.

This long introduction, made necessary by the relatively obtuse nature of the U.S. Supreme Court's decisions, leads to several conclusions pertinent here.

First, the general jurisdictional cases taken and decided by the U.S. Supreme Court are cases that lie factually well outside the mainstream. From:

(1) attempts to sue a German company in California for acts committed by its separate subsidiary in Argentina claiming jurisdiction based on contacts with California by yet another separate subsidiary that is not a defendant in the case (*Daimler*), to

(2) attempts to sue French companies for accidents that occurred in France in North Carolina, to

(3) attempts to sue a Colombian corporation in Texas for a helicopter crash in Peru when all the parties concede that there is no relationship between the Colombian company's activities and Texas,

(4) to a suit against a company in Ohio that is there only because it was forced to leave it Philippine home by a world war

the general jurisdiction cases are, to say the least, unusual and their results predictable given the facts.

Second, *Goodyear/Daimler* did nothing to alter special jurisdiction. NSRC attempts to read *Daimler* to hold that the law of specific jurisdiction now denies jurisdiction to Missouri courts if the injury occurred outside Missouri unless NSRC is incorporated in Missouri or maintains its principal place of business in Missouri. The law of specific jurisdiction is so settled that in *Goodyear*, Goodyear US did not deny that the North Carolina courts had jurisdiction over it even though the accident occurred in France and Goodyear US had no connection to North Carolina beyond registration to do business there and the sales of its products there. Indeed, before *Daimler* no one could doubt that Missouri had personal jurisdiction over NSRC. Because *Daimler* did not address special jurisdiction except to distinguish it from general jurisdiction, no one should doubt Missouri's authority in this case either.

Third, general jurisdiction, as now formulated, attempts to broaden, not narrow jurisdiction. "These ["at home"] bases [for general jurisdiction] afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Id.* at 760.

Fourth, where a cause of action occurred cannot ultimately be critical to the due process analysis. In general jurisdiction cases, the cause of action is not part of the analysis at all. This is because the focus in in personam jurisdiction cases is now virtually exclusively on the defendant's contacts with the forum. That is the teaching of both *Walden*, the Supreme Court's latest specific jurisdiction case, and *Daimler*. If the place of the cause of action mattered at all for due process purposes, general jurisdiction could not permit suits in, for example, Delaware, where many major corporations are incorporated but have virtually no activity beyond that affiliation. Yet general jurisdiction permits just that. And this is because the defendant is either legally there (in a general jurisdiction setting) or factually there (in a specific jurisdiction setting), but which ever theory is applied, the defendant is so "there" that both the defendant's expectations and "traditional notions of fair play and substantial justice" are met in that forum.

Fifth, despite the U.S. Supreme Court's stated unwillingness to answer the questions its opinions raise, the outcome of nearly every case is predictable if one asks the simple question: Is the defendant in the forum? A corporation is in a forum if (1) it has placed itself there by minimum contacts with the forum or (2) purposeful availment of the forum's laws and benefits. The former is about the defendant's economic

and legal interface with the forum; the latter is about acts intentionally done to take advantage of economic and legal opportunities in the forum. The high-level test that must be applied if minimum contacts/purposeful availment are present is whether the defendant reasonable should expect to be haled into court in that forum – that is the meaning of the phrase "traditional notions of fair play and substantial justice."

NSRC owns and/or operates substantial property in Missouri directly related to its core business, hires and maintains hundreds of employees in Missouri, generates hundreds of millions of dollars in revenue in Missouri, annually confirms its registration to do business in Missouri, maintains an agent to receive process and uses the courts to its advantage. It can hardly argue now with a straight face that it is not present in Missouri; nor can it claim surprise at being haled into court in Missouri, especially when it has voluntarily employed Missouri courts for its own purposes as it saw fit.

This brief now turns to NSRC's three arguments in support of its writ.

Standard of Review Applicable to all Points

Though not agreeing with its conclusion, Respondent agrees that NSRC properly states the standard of review.

I. The preliminary writ should be quashed. Missouri Courts have specific jurisdiction over the underlying action.

NSRC believes that unless the injuries pleaded in the underlying FELA cause of action occurred in Missouri, no Missouri court has specific jurisdiction to hear the underlying case. This Court need not wander into the esoteric weeds of jurisdiction at all because this is a FELA case and that fact alone answers the jurisdiction issue in Respondent's favor.

If the Court wishes to consider the specific jurisdiction issues without reference to FELA, NSRC's conclusion ignores the "related to"

language of the specific jurisdiction cases. It also assumes that *Daimler* changed the law of specific jurisdiction. Again, it did not.

What NSRC attempts here is little more than to convert a forum non conveniens claim into a jurisdictional claim. Long before *Goodyear/Daimler,* courts have held that where a company is registered to do business in a state (it is legally present in the state) and/or has continuous and systematic dealings in the state (it is factually present), it properly can be haled into court in that state for causes of action arising outside of that state provided it could be sued for those causes of action had they occurred in the state. *Daimler* does not change that.

A. The underlying case pleads a cause of action under FELA. FELA creates specific jurisdiction wherever NSRC operates its railroads.

NSRC never mentions FELA in its brief.

Anytime a Missouri NSRC employee is injured in Missouri, a FELA action is proper in Missouri or anywhere else that NSRC operates track. NSRC was on notice of this fact because Congress informed NSRC that it could be sued anywhere it did its railroad business. See, *Tyrrell v. BNSF Railway Co.*, ___ P.3d. ____, 2016 WL 3067430 (2016)(holding that FELA grants Montana jurisdiction in railroad cases). Indeed, *Brown v. Lockheed Martin Corp.*, 814 F.3d 619 (2nd Cir. 2016), one of NSRC's

cases, turns on the defendant's lack of notice that it could be haled into a court in Connecticut to defend an asbestos suit. "We have been directed to no basis on which the corporation should have understood that, by registering and appointing an agent, it could be haled into Connecticut court on non-Connecticut based actions." *Id.* at 637. FELA provides that notice in a FELA-based case.

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.

45 U.S.C. sec. 56. While this statute specifically identifies the federal courts in which a FELA action may be brought, it nonetheless follows that where states have concurrent jurisdiction, a railroad company cannot honestly assert that it does not expect to be haled into court to defend a FELA action in a state court in a state in which it has hundreds of miles of railroad tracks and hundreds of railroad employees when it knows it could be haled into a federal court sitting in that same state.

The U.S. Supreme Court consistently has interpreted 45 U.S.C. § 56 to allow state courts to hear cases brought under FELA even where the only basis for jurisdiction is the railroad doing business in the forum state. E.g., *Pope v. Atl. Coast Line R.R. Co.,* 345 U.S. 379 (1953); *Miles v. Illinois Cent. R. Co.,* 315 U.S. 698 (1942). For example, in *Pope,* a plaintiff who resided and was injured in Georgia filed a FELA action against his railroad employer, a Virginia corporation, in Alabama state court. The plaintiff grounded jurisdiction and venue on 45 U.S.C. § 56. The railroad requested an injunction from a Georgia state court pursuant to a Georgia statute providing Georgia courts with the power to enjoin Georgia residents from bringing suits in a foreign jurisdiction. The Georgia Supreme Court ruled in favor of the railroad. The U.S. Supreme Court reversed, holding that 45 U.S.C. § 56 "establishes a petitioner's right to sue in Alabama. It provides that the employee may bring his suit wherever the carrier 'shall be doing business,' and admittedly respondent does business in Jefferson County, Alabama. Congress has deliberately chosen to give petitioner a transitory cause of action...." *Pope,* 345 U.S. at 383.

Similarly, in *Miles*, a Tennessee resident was killed while working for his railroad employer in Tennessee. The railroad was an Illinois corporation. The employee's estate brought suit against the railroad in

Missouri. The Tennessee Court of Appeals, at the railroad's request, permanently enjoined the employee's estate from prosecuting his claim in Missouri. The U.S. Supreme Court reversed, holding:

> Congress has exercised its authority over interstate commerce to the extent of permitting suits in state courts, despite the incidental burden, where process may be obtained on a defendant ... actually carrying on railroading by operating trains and maintaining traffic offices within the territory of the court's jurisdiction.

Id. at 702.

The U.S. Supreme Court's decision in *Denver & Rio Grande W. R.R. Co. v. Terte,* 284 U.S. 284 (1932), provides further guidance on whether NSRC is subject to suit under FELA by way of "doing business" in Missouri. In *Terte,* the U.S. Supreme Court addressed whether a Missouri state court could entertain a FELA suit against two different railroad companies—the Denver and Rio Grande Western Railroad Company (Rio Grande) and the Atchison, Topeka and Santa Fe Railway Company (Santa Fe). The railroad employee sought damages for injuries sustained in Colorado by the railroad companies' joint negligence. The U.S. Supreme Court addressed the personal jurisdiction of the Missouri court over the two railroads, respectively. The Court held that the Rio

Grande could not be sued in Missouri, because:

> The Rio Grande, a Delaware corporation, operates lines which lie wholly within Colorado, Utah and New Mexico. It neither owns nor operates any line in Missouri; but it does own and use some property located there. It maintains one or more offices in the State and employs agents who solicit traffic. These agents engage in transactions incident to the procurement, delivery and record of such traffic. It is not licensed to do business in Missouri.

Terte, 284 U.S. at 286. By contrast, the U.S. Supreme Court held that "the Santa Fe was properly sued" in Missouri, relying on the following facts:

> The Santa Fe, a Kansas corporation, owns and operates railroad lines in Missouri, Kansas, Colorado, and other States. It is licensed to do business in Missouri and has an office and agents in Jackson County[, Missouri]. These agents transact the business ordinarily connected with the operation of a carrier by railroad.

Terte, 284 U.S. at 286, 52 S.Ct. at 153

It is undisputed that NSRC owns and/or operates railroad lines in Missouri. NSRC is licensed to do business and has offices and agents in Missouri. NSRC's agents in Missouri transact business ordinarily connected with the operation of a railroad carrier. Thus, under the U.S. Supreme Court's reasoning in *Terte,* NSRC is "properly sued" in Missouri. *See Terte,* 284 U.S. at 287–88. NSRC is "doing business" in Missouri, and Missouri courts have specific personal jurisdiction over NSRC under 45 U.S.C. § 56.

This conclusion is in line with the U.S. Supreme Court's "liberal construction" of FELA in favor of injured railroad workers. *See Urie v. Thompson,* 337 U.S. 163, 180 (1949). 45 U.S.C. § 56 does not specify whether the "concurrent jurisdiction" conferred upon the state and federal courts refers only to subject-matter jurisdiction or personal jurisdiction; the U.S. Supreme Court has never given it such an interpretation, nor should this Court.

FELA does not require states to entertain suits arising under it; rather it empowers them to do so where local law permits. *See Douglas v. N.Y., New Haven & Hartford R.R. Co.,* 279 U.S. 377, 388 (1929) ("[T]here is nothing in the Act of Congress that purports to force a duty upon [State] Courts as against an otherwise valid excuse.") (citation omitted); *Mondou v. N.Y., New Haven & Hartford R.R. Co. (Second*

Employers' Liab. Cases), 223 U.S. 1, 59 (1912) ("[R]ights arising under [FELA] may be enforced, as of right, in the courts of the States when their jurisdiction, as prescribed by local laws, is adequate to the occasion"). However, "the Federal Constitution prohibits state courts of general jurisdiction from refusing to [enforce FELA] solely because the suit is brought under a federal law." *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230, 233–34 (1934). *See also Dice v. Akron, Canton & Youngstown R.R. Co.,* 342 U.S. 359, 364–65 (1952)("[N]o State which gives its courts jurisdiction over common law actions for negligence may deny access to its courts for a negligence action founded on the [FELA]."). Further, the existence of jurisdiction "creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Mondou,* 223 U.S. at 58.

If FELA does not grant specific jurisdiction, then Congress drafted FELA to make a railroad "at home" for general jurisdictional purposes wherever it is "doing business." *See Kepner,* 314 U.S. at 49–50, (citing 45 Cong. Rec. at 4034).

Daimler did not overrule decades of consistent U.S. Supreme Court precedent dictating that railroad employees may bring suit under FELA wherever the railroad is "doing business."

None of the cases NSRC cites in its Point I are FELA cases. For

that reason, they are inapposite.

B. Even if FELA does not decide this case, Missouri has specific jurisdiction over the underling case.

The two premises on which NSRC bases its argument that specific jurisdiction does not exist in the underlying case are patently wrong.

First, NSRC incorrectly asserts that under settled Missouri law, NSRC may be haled into Missouri's courts *only* if § 506.500.1, RSMo, the long-arm statute, applies.

When a corporation maintains a registered agent in Missouri, the plaintiff need not establish that the corporation falls within the reach of Missouri's long-arm statute. *State ex rel K-Mart Corp v. Holliger,* 986 S.W.2d 165, 167-68 (Mo. banc 1999). This is because the long-arm statute "explicitly applies only to 'service outside of the state'" *Id.* [T]here is no need for a 'long arm' to reach [a corporation] outside of Missouri [where the corporation] has a registered agent in Missouri. *Id. See, Knowlton v. Allied Van Lines, Inc.,* 900 F.2d 1196, 1199 (8th Cir. 1990) ("Consent is [a] traditional basis of jurisdiction, existing independently of long-arm statutes.") *And see*, *Chalky v. Smithkline Beecham Corp.*, 2016 WL 705134 (E.D. Mo. 2016)(holding that "the holding of the Eighth Circuit in *Knowlton v. Allied Van Lines, Inc.* remains controlling and was not

dissipated by the subsequent holdings of the Supreme Court in *Daimler* and *Goodyear*").

Thus, to the extent that NSRC asserts that Missouri courts lack jurisdiction over it under the Missouri long-arm statute because Plaintiff's alleged claims do not arise from (1) the transaction of any business within the state; or, (2) the commission of a tortuous act within the state, NSRC's argument is wrong as a matter of law and has been properly rejected by this Court in *Holliger.*

> K-Mart relies on the long-arm statute for its argument that Missouri does not have personal jurisdiction in this case because the claim did not arise out of one of the activities enumerated in the statute. However, long-arm statutes, as the name implies, are intended to expand the reach of the law of the state to authorize jurisdiction over foreign corporations that are not necessarily authorized to do business in the state but whose activities justify personal jurisdiction. ***In fact, we can find no Missouri case challenging jurisdiction over a foreign corporation whose registered agent was served in Missouri.*** The provisions of section 506.150 are incorporated into rule 54.06, which explicitly applies only to "service outside the state." ***In this***

> ***case, there is no need for a "long-arm" to reach K–Mart outside of Missouri, because K–Mart has a registered agent in Missouri.***
>
> We reject K-Mart's argument that Missouri's long-arm statute is the exclusive means of obtaining jurisdiction over a foreign corporation.

Holliger, 986 S.W.2d at 168-69 (emphasis added).

Second, NSRC incorrectly asserts that "the fact that NSRC does business in Missouri has no bearing on the specific jurisdiction analysis." Rel.Br.18.

> The "canonical" *International Shoe*, allowed personal jurisdiction:
>
> to the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations *arise out of or are connected with the activities within the state*, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

Id. at 319 (emphasis added). *Helicopteros* changed "connected with" to "related to," a broadening that remains the law. But *Helicopteros*, as previously discussed, purposefully left unanswered:

> (1) whether the terms "arising out of" and "related to" describe different connections between a cause of action and a defendant's contacts with a forum, and (2) what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists."

Id. at 415, n.10.

From the language used, it seems obvious that "arising from" creates a causation standard, while "related to" embraces a broader relationship with the defendant's activities in the forum. The absence of the word "direct" in the *International Shoe/Helicopteros* formulations is significant and expresses a greater breadth than causation.

That there are two tests, not one, is shown by the Court's use of the disjunctive.

> For our part, we think it significant that the constitutional catchphrase is disjunctive in nature, referring to suits 'aris[ing] out of, or relat[ing] to,' in-forum activities. We

> believe that this added language portends added flexibility and signals a relaxation of the applicable standard. A number of other courts share this belief. *See, e.g., City of Virginia Beach v. Roanoke River Basin Ass'n,* 776 F.2d 484, 487 (4th Cir.1985); *Southwire Co. v. Trans–World Metals & Co.,* 735 F.2d 440, 442 (11th Cir.1984); *Thos. P. Gonzalez Corp. v. Consejo Nacional de Produccion,* 614 F.2d 1247, 1254 (9th Cir.1980); *see also In re Oil Spill by the Amoco Cadiz,* 699 F.2d 909, 915 (7th Cir.1983).

Ticketmaster-New York, Inc., 26 F.3d at 206-07.

NSRC wants to make this is a Scenario #3 case. In essence, NSRC claims that even if it is in Missouri legally or factually for purposes of the underlying case, the cause of action is unrelated to NSRC's activities in Missouri. But *Daimler*'s use of the phrase "entirely distinct" seems to add meaning to the phrase "related to" effectively moving towards answering the questions left open in *Helicopteros* about the meaning of the latter phrase. Read with *Helicopteros, Daimler* appears to say that only where a corporation's activities in a forum are "entirely distinct" from the kind of activities it undertakes there, are those activities not "related to" the cause of action. Again, this is because the corporation could expect to be sued for injuries arising from those activities in the

state and it thus cannot be surprised when it is sued for injuries arising from identical activities in a neighboring forum.

Thus, the proper inquiry is not whether the defendant who has purposefully availed itself of the benefits of a forum should have foreseen a *particular* lawsuit involving a specific plaintiff, but whether a particular generic *kind* of lawsuit brought by the plaintiff is one that a defendant could reasonably expect in the forum because of the activities it carries on there.

The general jurisdiction cases are helpful here. It makes little sense for the Due Process Clause to permit a severance of all links between the lawsuit and the defendant's activities in the forum where the defendant is "at home" (because of legal affiliations only) on the one hand, but to require a direct causal link between the particular lawsuit and the defendant's activities in a forum where the defendant's presence is pervasive, continuous and purposeful on the other and involves the exact kind of conduct that resulted in the cause of action. Thus, where a lawsuit is of a kind that the defendant should reasonably expect to see in a forum in which it has purposefully availed itself of the benefits of that forum, such suit is "related to" the in-forum activities of the defendant as required by *International Shoe/Helicopteros.*

Brown, on which NSRC relies, makes this point. First, the *Brown* plaintiffs "conceded the absence of any basis for the exercise of specific jurisdiction over Lockheed by Connecticut courts." *Id.* at 622. No such concession exists here. Indeed, Respondent here asserts that if Lockheed Martin's economically significant *contacts* with Connecticut had something to do with asbestos or its use there, and Lockheed Martin could expect to be sued for asbestos activities in Connecticut, specific jurisdiction would attach.

Second, Lockheed Martin's *affiliations* amounted to leasing office space, owning no property, employing as many as 70 employees, and making sales of approximately $40 million per year. There was no evidence that asbestos was involved in any of these *affiliations*. There was no evidence that Lockheed Martin had ever employed the Connecticut courts to pursue remedies on its behalf, as NSRC has done in Missouri.

Once the *Brown* plaintiffs conceded that *affiliations* were all that were at issue, they lost the general jurisdiction fight. Lockheed Martin's only legal affiliation was its business registration. Its factual presence was not related to asbestos.

Brown also concluded that *Daimler* overruled the registration cases. If *Daimler* did so, it did so *sub silentio*. And as Respondent's Point

III shows, there is an argument that *Brown* is simply wrong on this score when there are continuous and significant contacts with the state.

Walden, which is discussed more fully in the introduction, limits the focus of the due process inquiry to the defendant; indeed, under *Walden,* the question is narrowed to whether the defendant, the forum and the litigation are related in some way, not whether the plaintiff is connected to the forum or the forum to the litigation beyond a defendant's activities there.

Here NSRC is connected to the forum by its registration and its Missouri-focused multiple contacts/purposeful availment; NSRC is related to the litigation because it is railroad litigation – all that NSRC does in Missouri. In sum, NSRC (1) has Missouri contacts related to the Plaintiff's cause of action (its railroad business); (2) NSRC, through those contacts, has purposefully availed itself of Missouri laws and benefits; and (3) NSRC's contacts with Missouri are such that it could reasonably anticipate being haled into court there. Casenet reveals that NSRC has been haled into court dozens of times for the operation of its railroad business in Missouri – and that it has haled others into court when it served its own purposes. See Appendix at 31, 35, 54.

NSRC cites two additional cases. First, *Waite v. AII Acquisition Corp.*, No. 15-CV-62359, 2016 WL 2346743 (S.D. Fla. May 4, 2016)

correctly held that *Walden* did not permit specific jurisdiction in Florida because only the plaintiff had contact with the state, not the defendant. The defendant had no contacts with Florida. Here, NSRC's contacts with Missouri are not disputed.

Second, *Dimitrov v. Nissan N. Am., Inc.,* No. 15 C 06332, 2015 WL 9304490 (N.D. Ill. Dec. 22, 2015) based its ruling on a lack of evidence that a shooting in Mississippi was related to "Defendant's Midwest regional office, a dealership, or some other facility theoretically located in Illinois. Because Dimitrov's claims are wholly unrelated to Defendant's contacts with Illinois, Defendant cannot be subjected to specific jurisdiction here*." Id.* at *3. Here, the claim is related to NSRC's activity in Missouri.

NSRC's remaining cases are trial court decisions that turn on pleading failures. The mere invocation of FELA in this case overcomes those failures because FELA connects the railroad to every jurisdiction in which it operates.

Conclusion

Missouri courts have specific adjudicatory authority over the underlying case either under FELA or because the injury causing

activities are related to NSRC's activities in Missouri. The writ should be quashed.

II. Missouri Courts have General Jurisdiction over NSRC under these Facts. The Preliminary Writ should be Quashed.

Point II asserts that Missouri does not have general jurisdiction over NSRC.

Under *Daimler,* which deals only with *general* jurisdiction, a corporation may be sued where it is "at home." The only logical basis for general jurisdiction is the undeniable legal presence of the defendant in the forum; any relationship between the cause of action and the forum is irrelevant. Logically, it follows that if the Due Process Clause permits general jurisdiction merely because of legal presence, due process cannot be offended if that legal presence is not subject to serious dispute – a presence supplemented by an actual, economically substantial factual presence of a continuous and systematic nature.

NSRC's argument that "*Daimler* did away with a 'continuous and systematic' business contacts analysis" for general jurisdiction analysis, Rel.Br.20, is incorrect. In fact, *Daimler* reiterated *Goodyear's* holding to the contrary.

> As we have since explained, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when

> their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Goodyear,* 564 U.S. at 919.

Id. at 754. This, of course, is the "exceptional" third category of cases that *Daimler* recognizes creates general jurisdiction, which *Daimler* chooses not to discuss. "But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level." *Id.* at 761, n.19.

Nor does *Daimler* attempt to define what it means by affiliations beyond (1) incorporation (which is nothing more than a fictitious presence because a corporation's factual presence may be completely divorced from its state of incorporation and (2) principal place of business (which denotes the corporation's "nerve center" from which its "officers direct, control and coordinate the corporation's activities." *Hertz Corp. v. Friend*, 559 U.S. 77, 92-93 (2010). Whatever justifies the Supreme Court's conclusions in this regard, these two places show a territorial connection or association. And for that reason, *Daimler* left open the possibility of general jurisdiction where the corporation's affiliations also show corporate territorial presence. Again,

> [w]e do not foreclose the possibility that in an exceptional case, see, *e.g., Perkins*, described *supra,* at 755 – 757, and n.

> 8, a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State. But this case presents no occasion to explore that question, because Daimler's activities in California plainly do not approach that level. It is one thing to hold a corporation answerable for operations in the forum State, see *infra,* at 763, quite another to expose it to suit on claims having no connection whatever to the forum State.

Id. at 761, n.19. *See*, Christina R. Edson, *Quill's Constitutional Jurisprudence And Tax Nexus Standards In An Age Of Electronic Commerce* 49 Tax Lawyer 893, 893 (Summer 1996)("a substantial economic presence standard 'incorporates due process "purposeful direction" towards a state while examining the degree to which a company has exploited a local market'"). Thus, *Daimler* wrote that MBUSA's substantial economic affiliations with California were such that those affiliations might render it at home there, but because Daimler, not MBUSA, was the focus, it did not matter.

> Even if we were to assume that MBUSA is at home in California, and further to assume MBUSA's contacts are

> imputable to Daimler, there would still be no basis to subject Daimler to *general* jurisdiction in California, for Daimler's slim contacts with the State hardly render it at home there.

Id. at 760. It is "attenuated connections" that make a corporation not "at home."

> [P]etitioners [the foreign subsidiaries] are in no sense at home in North Carolina. Their attenuated connections to the State, see *supra,* at 2852, fall far short of the "the continuous and systematic general business contacts" necessary to empower North Carolina to entertain suit against them on claims unrelated to anything that connects them to the State.

Goodyear, 564 U.S. at 929. Thus, *Daimler* agrees that

> *Goodyear* did not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business; it simply typed those places paradigm all-purpose forums.

Daimler at 761. And what we do know from *Daimler* is that sizable sales by a subsidiary are an attenuated connection *for the parent*.

> Neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business

> there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. No decision of this Court sanctions a view of *general* jurisdiction so grasping.

Id. at 761 (emphasis added). It is important, however, that it is Daimler's connections that are attenuated, not MBUSA's, which are economically substantial. Whether MBUSA's connections were also insufficient to permit general jurisdiction is not decided, as *Daimler* makes clear. *Id.* at 761, n.19.

Respondent, Judge Dolan, first asserts that FELA creates general jurisdiction in Missouri, if the Court concludes that FELA does not create specific jurisdiction.

Second, leaving FELA aside, the act of registration and the appointment of an agent to receive process together with NSRC's substantial economic, continuous and systematic affiliations with Missouri,

- particularly through its use of the courts to seek remedies when it is wronged (Appendix 31, 35, 54)

and when one considers that

- NSRC's operating revenue in Missouri is approximately $232,480,000;
- NSRC maintains, operates or owns approximately 400 miles of track in Missouri – a distance more than 1.5 times the distance between St. Louis and Kansas City;
- NSRC **thus** employs approximately 590 employees in the State of Missouri;
- NSRC's operations in Missouri include the operation of rail yards in the City of St. Louis, Wentzville, North Kansas City and Moberly, Missouri, the employment of both craft and management employees in Missouri, and the regular, every day operation of trains across its hundreds of miles of track in Missouri;
- NSRC's heaviest routes include the Cleveland to Kansas City route, which go through Missouri

are sufficient for NSRC to be "at home" in Missouri.

NSRC relies on two readily distinguishable cases. The first, *Brown*, rejected registration as a basis for general jurisdiction. *Brown* did not consider whether substantial economic affiliations taken together with registration created general jurisdiction because Connecticut's registration statute "nowhere expressly provides that foreign corporations that register to transact business in the state shall

be subject to the 'general jurisdiction' of the Connecticut courts or directs that Connecticut courts may exercise their power over registered corporations on any cause asserted by any person." 814 F.3d at 634. This conclusion is contrary to *Louisville & N.R. Co. v. Chatters,* 279 U.S. 320, 329 (1929), which creates a default position of consent to jurisdiction unless state law expressly denies that registration equals consent. Moreover, *Brown* does not address the territorial due process analysis advanced in *Burnham v. Superior Court,* 495 U.S. 604 (1990) in which all nine justices of the Supreme Court agreed (though for different reasons) that service on a territorially present defendant created personal jurisdiction. Nor does Connecticut have a decision like *Jenkins v. Croft,* 63 S.W.3d 710, 712 (Mo.App.2002) which holds that "[a]s a general rule a defendant found within the territorial jurisdiction of a court is subject to that court's in personam jurisdiction." See, Point III, infra.

The second case, *Nicholson v. e-Telequote Ins., Inc.*, 2015 WL 5950659 (N.D. Ill)(Oct. 13, 2015), is similar to *Daimler* because the plaintiffs sued a portfolio management company, TRG, that did not do business in Illinois, except through e-Telequote, essentially a subsidiary.

> e-TeleQuote answered Plaintiffs' complaint without raising any objections as to personal jurisdiction. Defendant TRG,

> however, has moved to dismiss the claims against it, arguing that "TRG has absolutely no connection to the challenged conduct nor to the State of Illinois, and at no time has TRG ever engaged in the types of telemarketing activities alleged in the Complaint."

Id. Additionally, "e-TeleQuote is registered to do business in Illinois (TRG is not)… [and] 10 percent of e-TeleQuote's income in 2012 was derived from business transactions in Illinois…." *Id.* at *1. Further, as did *Daimler* in regard to MBUSA, the court refused to attribute e-Telequote's legal and economic presence in Illinois to TRG, which was not there and had not registered to do business in that state.

In sum, if general jurisdiction is the only acceptable basis for Missouri to assert personal jurisdiction over NSRC in this case because the injury occurred in Indiana, then NSRC is "at home" in Missouri because (1) NSRC is registered to do business in Missouri and has appointed an agent to accept service in Missouri, (2) NSRC has a direct, continuous and systematic presence in Missouri that produces substantial economic benefit to NSRC, and (3) NSRC is so "at home" in Missouri that it has actually employed the courts of Missouri to achieve remedies that support the substantial economic benefits.

Conclusion

Missouri has general jurisdiction over the underlying case. The writ should be quashed.

III. Registration to do Business and Appointment of an Agent for the Service of Process is Sufficient Alone to Permit Missouri to Exercise Adjudicative Authority over a Corporation.

Alternatively, such Registration and Appointment, together with a Long History of Continuous and Systematic Contacts with Missouri and a Corporation's Purposeful Availment of the Benefits of Missouri's Law that Produced Significant Economic Benefits to the Corporation are Sufficient to Permit Missouri to Exercise Adjudicative Authority over a Corporation.

The Court should Quash the Writ Previously Issued.

NSRC asserts that its registration to do business in Missouri and the appointment of an agent to receive service of process did not waive its jurisdictional defenses in the underlying case. NSRC does not say whether its argument in Point III proceeds under general jurisdiction or specific jurisdiction theories. Respondent asserts that even if registration alone does not create general jurisdiction, it creates specific jurisdiction under purposeful availment/minimum contacts rules or, alternatively, under territorial presence due process analysis.

The Supreme Court's cases provide tantalizing hints that registration to do business in a state might be purposeful availment and that the appointment of a registered agent would constitute an acceptable basis for jurisdiction and it has never said otherwise.

- "'Presence' in the state in this sense ***has never been doubted*** when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, ***even though no consent to be sued or authorization to an agent to accept service of process has been given***." *International Shoe, 326 U.S.* at 316-17 (emphasis added).
- This "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts, [citations omitted] or of the "unilateral activity of another party or a third person…." *Burger King*, 471 U.S. at 475.
- "In contrast to the parent company, Goodyear USA, which does not contest the North Carolina courts' personal jurisdiction over it, petitioners are not registered to do business in North Carolina." *Goodyear*, 564 U.S. at 921.

- *Hanson* held that Florida could not exercise adjudicative authority over the trust company because it had not "purposefully avail[ed] itself of the privilege of conducting activities within the forum State, thus invoking the benefits and privileges of its laws." *Id.* at 251-53.
- The "'continuous and systematic' conduct in California did not rise to the level at which Daimler could be considered 'essentially at home' there, even assuming that MBUSA's activities [including registration] could render MBUSA at home in California. *Daimler,* at 760.
- *Daimler* notes that consent to jurisdiction may be an alternative to the minimum contacts analysis discussed in that case, citing to *Perkins,* as "the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has *not consented* to suit in the forum." 134 S.Ct. at 755–56 (emphasis added).

NSRC relies chiefly on *Genuine Parts Co. v. Cepec*, ___ A.3d ___, 2016 WL 1569077 (Del. 2016). *Cepec* turns on Delaware law, particularly on an interpretation of its business registration statute.

There, the plaintiffs, Georgia residents, sued seven companies associated with the manufacture, distribution, or installation of asbestos

products in Delaware. Plaintiff worked for Genuine Parts in a warehouse in Florida. Genuine Parts is a Georgia corporation whose principal place of business was in Georgia. Genuine Parts was properly registered to do business in Delaware and had designated an agent for service of process in Delaware.

Genuine Parts moved to dismiss the claims against it for lack of general and specific personal jurisdiction. In response, the Cepecs waived any specific jurisdiction claim and argued only general jurisdiction.

Perhaps it is a bit too forthcoming, but *Cepec* confessed that "Delaware is a state of fewer than one million people. Our citizens benefit from having foreign corporations offer their goods and services here. If the cost of doing so is that those foreign corporations will be subject to general jurisdiction in Delaware, they rightly may choose not to do so." *Id.* at *14. Then *Cepec* ruled for Genuine Parts on the general jurisdiction issue.

A multitude of cases disagree with *Cepec. Helsinn Healthcare S.A. v. Hospira, Inc.,* 2016 WL 1338601, at *3 (D.N.J. Apr. 5, 2016) ("*Daimler* did not address the issue of consent-based jurisdiction.... "); *Mitchell v. Eli Lilly & Co.,* —— F.Supp.3d ——, —— – ——, 2016 WL 362441, at *5–9 (E.D.Mo. Jan. 29, 2016) (rejecting the argument that *Daimler*

altered general jurisdiction by consent); *Grubb v. Day to Day Logistics, Inc.,* 2015 WL 4068742, at *4 (S.D.Ohio July 2, 2015) (declining to extend *Daimler* to consent); *Fesniak v. Equifax Mortg. Servs. LLC,* 2015 WL 2412119, at *6 (D.N.J. May 21, 2015) (acknowledging that one may still consent to personal jurisdiction); *Gracey v. Janssen Pharms., Inc.,* 2015 WL 2066242, at *3 n. 4 (E.D.Mo. May 4, 2015)(noting that *Daimler* did not alter jurisdiction by consent); *Perrigo Co. v. Merial Ltd.,* 2015 WL 1538088, at *7 (D.Neb. Apr. 7, 2015) ("*Daimler* only speaks to whether general jurisdiction can be appropriately exercised over a foreign corporation that has not consented to suit in the forum."); *Senju Pharm. Co., Ltd. v. Metrics, Inc.,* 96 F.Supp.3d 428, 437 (D.N.J.2015) ("*Daimler* did not discuss instate service and there was no indication in Daimler that the defendant had registered to do business in the state or been served with process there."); *Otsuka Pharm. v. Mylan,* 106 F.Supp.3d 456, 467–69 (D.N.J.2015) (declining to extend *Daimler* to consent).

1. Consent by Registration Comports with Due Process

Scenario #4a

Long-ago decided authority concludes that personal jurisdiction is a "'personal privilege respecting the venue, or place of suit, which [a defendant] may assert, or may waive, at his election.' Being a privilege it may be lost." *Neirbo Co. v. Bethlehem Shipbuilding Corp.,* 308 U.S.

165, 168, 60 S.Ct. 153, 84 L.Ed. 167 (1939) (quoting *Commercial Cas. Ins. Co. v. Consol. Stone Co.,* 278 U.S. 177, 179, 49 S.Ct. 98, 73 L.Ed. 252 (1929)). Consent operates as a waiver, where there is notice, by statute or decisional law.

This Court has yet to decide definitively whether compliance with § 351.576, RSMo, which requires registration and the appointment of an in-state agent for service of process in order to conduct business in Missouri, constitutes an express consent to general personal jurisdiction in every instance and without more. See, *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 168-69 (Mo. 1999)("We need not address the issue of whether registration of a foreign corporation and designation of an agent for service of process, without more, is always sufficient to confer jurisdiction" because the defendant "is conducting substantial and continuous business in Missouri" and the defendant concedes "that its contacts with Missouri are sufficient to satisfy due process requirements").

Missouri's corporate registration statute provides: "A foreign corporation may not transact business in this state until it obtains a certificate of authority from the secretary of state." § 351.572.1, RSMo. A corporation's certificate of authority to operate in Missouri places it on equal footing with corporations incorporated here: "A foreign corporation

with a valid certificate of authority has the same but no greater rights and has the same but no greater privileges as, and ...is subject to the same duties, restrictions, penalties, and liabilities now or later imposed on, a domestic corporation of like character." § 351.582.2, RSMo.

One requirement Missouri imposes on registered corporations is that, "[e]ach foreign corporation authorized to transact business in this state shall continuously maintain in this state ... [a] registered agent....". § 351.586, RSMo. Missouri permits service of process "[u]pon a domestic or foreign corporation ... when by law it may be sued ... by delivering a copy of the summons and of the petition to ... [a] general agent, or ... any other agent authorized by appointment or required by law to receive service of process...." § 506.150.1(3), RSMo; Rule 54.13(b)(3). In turn, when a corporation avails itself of the privilege of registering to do business in Missouri and, commensurate with that privilege, maintains a registered agent in Missouri, it does so knowing that: "The registered agent of a foreign corporation authorized to transact business in this state is the corporation's agent for service of process, notice, or demand required or permitted by law to be served on the foreign corporation." § 351.594.1, RSMo. By its plain text, the statute does not limit service of process to those suits arising from or related to a registered corporation's activities in Missouri.

In contrast, "[t]he secretary of state's revocation of a foreign corporation's certificate of authority appoints the secretary of state the foreign corporation's agent for service of process," but only for "any proceeding based on a cause of action which arose during the time the foreign corporation was authorized to transact business in" Missouri. § 351.602.4, RSMo. If a corporation seeks to "obtain[ ] a certificate of withdrawal from the secretary of state," it must similarly submit an application in which it, among other things, "revokes the authority of its registered agent to accept service on its behalf and appoints the secretary of state as its agent for service of process in any proceeding based on a cause of action arising during the time it was authorized to transact business in" Missouri. § 351.596.2(3), RSMo.

Without deciding it definitively, *Holliger* recognizes that a corporation's registration and appointment of an in-state agent may form an independent basis for personal jurisdiction based on consent. As *Holliger* explained: "Where a corporation's registered agent is served in Missouri, assertion of jurisdiction [is] no more than adherence to the traditional understanding that a state may condition a corporation's doing business upon the appointment of an agent in the state for service of process." *Id.* at 167. *Sieg v. Int'l Envtl. Mgmt., Inc.*, 375 S.W.3d 145, 157 (Mo.Ct.App.2012) is consistent with *Holliger*'s holding. "Missouri

authorize[s] [a corporation] to do business here *subject to the condition* that it designate an agent ... to accept service of process.... Due process requires no more."

Given Missouri's statutes and the judicial gloss put on them, NSRC's reliance on *Brown* is misplaced.

Beginning with *Ex parte Schollenberger,* 96 U.S. (6 Otto) 369, 24 L.Ed. 853 (1877), the Supreme Court first held that a state legislature may require a foreign corporation to consent to general personal jurisdiction as a condition of being granted the right to do business in that state:

> [I]f the legislature of a State requires a foreign corporation to consent to be "found" within its territory, for the purpose of the service of process in a suit, as a condition to doing business in the State, and the corporation does so consent, the fact that it is found gives the State jurisdiction, notwithstanding the finding was procured by consent.

Id. at 377.

In *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.,* 243 U.S. 93 (1917), the Supreme Court affirmed that it had "little doubt" that the appointment of an agent by a foreign corporation for service of process could subject it to personal jurisdiction. 243 U.S. at 95. In that

case, the defendant was a foreign insurance company which had obtained a license to do business in Missouri and, in accordance Missouri law, "filed with the superintendent of the insurance department a power of attorney consenting that service of process upon the superintendent should be deemed personal service upon the company so long as it should have any liabilities outstanding in the state." *Id.* at 94. The defendant argued that "such service was insufficient except in suits upon Missouri contracts, and that if the statute were construed to govern the present case, it encountered the 14th Amendment by denying to the defendant due process of law." *Id.* at 94–95. An unanimous Court disagreed, holding that, "when a power is actually conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts. The execution was the defendant's voluntary act." *Id.* at 96.

In the nearly 100 years since the Supreme Court decided *Pennsylvania Fire,* it has had ample opportunity to reconsider its holding. Yet each time the issue arose, the Supreme Court reaffirmed that registration statutes, mandatory for doing business, could confer jurisdiction through consent depending on the interpretation given to those state statutes by state courts. *See Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.,* 257 U.S. 213, 216 (1921) (finding no

jurisdiction over a foreign corporation when the compliance statute was limited to "liability incurred within the State," but noting that "the state law [could] either expressly or by local construction give[ ] to the appointment a larger scope"); *Louisville & N.R. Co. v. Chatters,* 279 U.S. 320, 329 (1929) (creating a default position of consent unless state law concludes "that, in the absence of an authoritative state decision giving a narrower scope to the power of attorney filed under the state statute, it operates as a consent to suit" (citing *Pennsylvania Fire,* 243 U.S. 93)); *Neirbo,* 308 U.S. at 175 (holding that, "[a] statute calling for [designation of an agent for service of process in the forum state] is constitutional, and the designation of the agent 'a voluntary act' " (citing *Pennsylvania Fire,* 243 U.S. 93)).

The Supreme Court's subsequent decisions in *International Shoe* did not overrule this historic and oft-affirmed line of binding precedent. Neither did *Daimler*. Indeed, both cases are expressly limited to scenarios that do not involve *consent* to jurisdiction. In *International Shoe,* the Court restricted its discussion to cases where "*no consent* to be sued or authorization to an agent to accept service of process has been given." 326 U.S. at 317 (emphasis added).

Based on the limitation placed on the reach of *International Shoe* by the Supreme Court itself after *International Shoe,* numerous circuit

courts continued to uphold the exercise of general jurisdiction over defendants registered to do business in the states at issue, relying on the continuing vitality of *Pennsylvania Fire. See, e.g., King v. Am. Family Mut. Ins. Co.,* 632 F.3d 570, 576, 578 (9th Cir. 2011)(these cases, read with *Robert Mitchell* collectively stand for the proposition that courts must, subject to federal constitutional restraints, look to state statutes and federal and case law in order to determine whether a foreign corporation is subject to personal jurisdiction in a given case because the corporation has appointed an agent for service of process."); *Bane v. Netlink, Inc.,* 925 F.2d 637, 641 (3d Cir.1991) (observing that "[c]onsent is a traditional basis for assertion of jurisdiction long upheld as constitutional"); *Holloway v. Wright & Morrissey, Inc.,* 739 F.2d 695, 697 (1st Cir.1984) ("It is well-settled that a corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal jurisdiction in any action that is within the scope of the agent's authority").

The Second Restatement adopted that same view in 1971. See, also Restatement (Second) of Conflict of Laws § 44 (1971) ("A state has power to exercise judicial jurisdiction over a foreign corporation which has authorized an agent or a public official to accept service of process in actions brought against the corporation in the state as to all causes of

action to which the authority of the agent or official to accept service extends.").

Daimler did not change the law on this point, either. There is no discussion of registration statutes in *Daimler* and no citation to *Schollenberger, Pennsylvania Fire*, or the cases post-dating those two. Indeed, *Daimler* notes that consent to jurisdiction is an alternative to the minimum contacts analysis discussed in that case, citing to *Perkins,* as "the textbook case of general jurisdiction appropriately exercised over a foreign corporation that has *not consented* to suit in the forum." 134 S.Ct. at 755–56 (emphasis added). Thus, *Daimler* did not impliedly eradicate the distinction between cases involving an express consent to general jurisdiction and those analyzing general jurisdiction in the absence of consent; it actually maintains it.

The relevant inquiry is not whether NSRC voluntarily consented to jurisdiction in Missouri, but whether it voluntarily elected to do business in Missouri and to register and appoint an agent to be its territorial presence here and to receive service of process here.

Notably, *Pennsylvania Fire* was decided decades before NSRC chose to register to do business in Missouri. In the face of that authority, NSRC was on notice and therefore knowingly chose to register to do business in Missouri, thereby accepting the implication of having done

so. And *Chatters,* 279 U.S. at 329, created a default position that consent to jurisdiction exists upon registration absent a state's express decision to delink consent with registration. "[I]n the absence of an authoritative state decision giving a narrower scope to the power of attorney filed under the state statute, [registration] operates as a consent to suit." *Id.*

In addition, the cases admit a territorially-based personal jurisdiction where the defendant is present and receives service. *Daimler* creates no exception to the cases holding that service on a defendant physically present in a state meets all the requirements of due process.

> "As a general rule a defendant found within the territorial jurisdiction of a court is subject to that court's in personam jurisdiction." *Jenkins v. Croft,* 63 S.W.3d 710, 712 (Mo.App.2002); *see also Palmer v. Bank of Sturgeon,* 281 Mo. 72, 218 S.W. 873, 877–78 (Mo. banc 1920); *Malone v. State,* 747 S.W.2d 695, 700 (Mo.App.1988); *In re Shaw,* 449 S.W.2d 380, 382 (Mo.App.1969). A minimum contacts analysis is required only if one of the traditional territorial bases of personal jurisdiction—such as presence within the jurisdiction at the time of service—is absent. *Bryant v. Smith Interior Design Group, Inc.,* 310 S.W.3d 227, 232

(Mo.2010); *State ex rel. K–Mart Corp. v. Holliger,* 986 S.W.2d 165, 167 (Mo. banc 1999).

Fulton v. The Bunker Extreme, Inc., 343 S.W.3d 9, 12 (Mo. Ct. App. 2011). In *Burnam,* 495 U.S. 604, all nine justices of the Supreme Court agreed with this result, though for three different reasons. Importantly, none of the justices suggested that service on a territorially present defendant was infirm for due process reasons, whatever rationale that supported that conclusion.

Registration exists to create a territorial presence by a corporate defendant. Service on the agent appointed for that purpose is service within the state and creates personal jurisdiction.

2. Registration to do business + purposeful availment of the benefits of the forum's law.

Scenario #4b

Yet, in this case, the Court need not consider whether the fact of appointing a registered agent, standing alone, provides a basis for specific personal jurisdiction over NSRC. There is much more that makes NSRC present in Missouri – its purposeful availment of the benefits of Missouri law and Missouri's location. These include 400 miles of track, nearly 600 employees, $232+ million in revenue, and NSRC's

willingness to use Missouri courts to seek remedies for wrongs committed against it.

Because the due process inquiry is essentially whether NSRC is territorially present in Missouri such that it could reasonably expect to be haled into Missouri's courts, the combination of presence (by registration to do business) and purposeful availment (by a continuous and systematic, economically significant and long-standing willingness to take advantage of Missouri's laws and location), means that due process is easily satisfied in this case even though the specific cause of action arose outside Missouri. For this reason

> Missouri cases uniformly held that a foreign corporation present and conducting substantial business in Missouri was subject to the jurisdiction of our courts. Some of these cases involved service in Missouri pursuant to section 506.150 and its predecessor statutes. *See, Collar v. Peninsular Gas Co.,* 295 S.W.2d 88, 90 (Mo.1956), citing *State ex rel. Ferrocarriles Nacionales De Mexico v. Rutledge,* 331 Mo. 1015, 56 S.W.2d 28 (1932). *See also Painter v. Colorado Springs & Cripple Creek Dist. Ry. Co.* 127 Mo.App. 248, 104 S.W. 1139 (1907); *State ex rel. Nashville, C. & St. L. Ry. v. Hall et al.,* 337 Mo. 1229, 88 S.W.2d 342 (1935);

> *Wooster et al. v. Trimont Mfg. Co.,* 356 Mo. 682, 203 S.W.2d 411 (1947); *Ward v. Cook United, Inc.,* 521 S.W.2d 461 (Mo.App.1975); and *Morrow v. Caloric Appliance Corporation,* 372 S.W.2d 41 (Mo.1963). Where a corporation's registered agent is served in Missouri, assertion of jurisdiction was no more than adherence to the traditional understanding that a state may condition a corporation's doing business upon the appointment of an agent in the state for service of process. *Lafayette Ins. Co. v. French,* 59 U.S. 404, 18 How. 404, 15 L.Ed. 451 (1856). Though *Pennoyer v. Neff,* 95 U.S. 714, 24 L.Ed. 565 (1877), limited extraterritorial exercise of jurisdiction under the due process clause of the fourteenth amendment, the Court in dictum left intact the traditional understanding expressed in *French* and other early cases. 95 U.S. at 735.

State ex rel. K-Mart Corp. v. Holliger, 986 S.W.2d 165, 167 (Mo. 1999).

Registration/appointment of an agent gives NSRC a legal presence in Missouri as well as purposeful availment of Missouri's laws. The well-more-than minimum contacts, and NSRC's use of Missouri's courts for its own purposes, gives NSRC a factual presence in Missouri as well as

an incontrovertible display that NSRC had a reasonable expectation of being haled into the very courts into which it haled others. Due process is fully satisfied in the underlying case, whether one calls it specific or general jurisdiction.

Conclusion

The writ should be quashed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(C)

The undersigned hereby certifies that this brief complies with Rule 84.06(c) in that it does not exceed the number of words set by Rule

84.06(b) (i.e., it does not exceed 27,900 words for a Respondent's brief). This brief contains 19,570 words. The word count was derived from Microsoft Word, using the Word Count process, with "including footnotes" selected.

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CERTIFICATE OF SERVICE

I certify that in filing this document with the Supreme Court of Missouri through the electronic filing system an electronic copy of this document and attached Appendix was served on counsel named below on this 15th day of July, 2016, and the undersigned further certifies

that he has signed the original and is maintaining the same pursuant to Rule 55.03 (a).

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