IN THE SUPREME COURT OF THE STATE OF OREGON

CHRISTOPHER S. BARRETT, Plaintiff-Adverse Party, vs. UNION PACIFIC RAILROAD COMPANY Defendant-Relator.	Multnomah County Circuit Court Case No. 15CV27317 Supreme Court Case No. S063914 **MANDAMUS PROCEEEDING**

BRIEF ON THE MERITS OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION

On Petition for Mandamus to the Circuit Court of Multnomah County,
Honorable Kenneth R. Walker, Circuit Court Judge

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Introduction and Historical Overview of Union Pacific Railroad Co.

This is a case involving a defendant which advertises itself to be "the first transcontinental railroad; the greatest, most daring engineering effort the country had yet seen [commencing in the 1860s]."[1] It further tells a tale of its history in Oregon:

> The road began while it was still common for many travelers to walk alongside their wagons across the Great Plains to California and Oregon; a journey that could take six grueling months. It is no small wonder then, that America had railroad fever in the 19th century. The national imagination was propelled by the very real, albeit intimidating, prospect of building a railroad that joined east and west.
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> As it stood, only trails and wagon tracks crossed the wilderness in the mid-19th century. To bridge that wilderness with rails took six years and an army of 20,000 men, most of them immigrants from China and Europe. It took brute human effort, as the building was done entirely by hand. To this day, no one knows how many died in the effort, or what it really cost.
>
> For many, a railroad was considered the key to westward expansion and the future of the country. A transcontinental route would greatly reduce the time it took to cross the continent, develop the nation's vast interior, encourage settlement, promote trade and fuel industry. Congress determined that a railroad linking the Atlantic and Pacific Oceans was also essential to national defense. * * *[2]

Accordingly, under *Daimler* and the seminal general jurisdiction cases *Daimler* cites as good law, Oregon's exercise of general jurisdiction over Union

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[1] http://www.up.com/aboutup/history/overview/index htm

[2] http://www.up.com/aboutup/history/overview/building_road/index htm

Pacific Railroad Company (UP) properly arises from its continuous, systematic, and substantial presence in Oregon.

Unlike the German defendant and its indirect and independent U.S. subsidiary in *Daimler*, this case involves an American corporation that has directly owned and operated freight railways through Oregon since becoming "the first transcontinental railroad" in the 1860's.[3] In light of that history, UP is "at home" for general jurisdiction purposes here in Oregon.

***Daimler* simply applied the prevailing law.**

Daimler AG v. Bauman, ___ US ___, 134 S Ct 746, 187 L Ed 624 (2014) does nothing to alter the conclusion that Oregon retains personal jurisdiction over the owner of its railways. Neither does it serve to alter or restrict the law of general jurisdiction or render any of Oregon's jurisdictional statutes unconstitutional. Rather, in *Daimler* the Supreme Court applied the existing law to a case in which "foreign plaintiffs [alleged claims in California] against a [German] defendant based on events occurring entirely outside of the United States." 134 S Ct at 750.

Indeed, the Court regards as continuing to be good law the few post-*International Shoe* cases addressing general jurisdiction. Each of those cases, as well as *Daimler*, involved scenarios that aren't present here: defendants who were incorporated in foreign countries. In *Perkins v. Benguet Consol. Mining*

[3] http://www.up.com/aboutup/history/overview/index.htm.

Co., 342 U.S. 437, 448, 72 S.Ct. 413, 96 L.Ed. 485 (1952), the plaintiff had alleged claims in Ohio against a mining company incorporated in the Philippines where it had operated gold and silver mines prior to World War II. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984), the plaintiffs had alleged claims in Texas against a Columbian corporation that owned and operated a helicopter that had crashed in Peru, killing the plaintiffs' decedents. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ——, 131 S.Ct. 2846, 180 L.Ed.2d 796 (2011), the plaintiffs had alleged claims in North Carolina against the Turkish, French, and Luxembourgian subsidiaries of the Ohio corporation allegedly responsible for the sale and distribution of defective tires that had caused a bus crash in Paris, killing plaintiffs' decedents. And in *Daimler*, Argentinean residents sued a German corporation in California for the kidnap, torture, and killing of Argentinean workers at its wholly-owned subsidiary in Argentina. 134 S Ct at 750-51. More importantly, the *Daimler* plaintiffs argued that the California court's jurisdiction over Daimler arose from an indirect and independent subsidiary of Daimler (that was incorporated in Delaware and resided in New Jersey) which had distribution offices in California and purportedly had acted as Daimler's agent. *Id.* at 752.

There is nothing as attenuated or remote about UP's operations in Oregon. UP's historic ties to the Pacific Northwest renders it "at home" where

those tracks are laid, maintained, and where their employees continue to work. There is no subsidiary or agency relationship at issue, no international company incorporated in a foreign country, no foreign plaintiffs, and no international comity concerns respecting claims over which the law of another country might apply. Under *Goodyear* and *Daimler*, an Oregon court "may assert jurisdiction over [UP] 'to hear any and all claims against [it because UP's] affiliations with [Oregon] are so constant and pervasive 'as to render [UP] essentially at home in [Oregon].'" *Daimler*, 134 S Ct at 751.

The *Daimler* court, in fact, made clear that the holdings and analysis of its prior cases still apply. Contacts with the forum state may not be "slim" and general jurisdiction may not arise merely from the presence of an "in-state subsidiary or affiliate." *Id.* at 760. The Court "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;" rather, general jurisdiction may be asserted in "instances in which the continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit ... *on causes of action arising from dealings entirely distinct from those activities*." *Id.* at 760-61.

> As the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations "so 'continuous and systematic' as to render [the foreign corporation] essentially at home in the forum State[,]" *i.e., comparable to a domestic enterprise in that State. Id.* at 758 n. 10 (emphasis added).

Accordingly, under *Daimler*, UP is "at home" in Oregon because it has directly owned and operated the rail facilities and operational hubs located in this state on a *continuous* and *systematic* basis since 1970. UP has functioned as a *domestic enterprise* in Oregon by registering to transact business here since 1969. Under Oregon law, registering to transact business in this state expressly renders an entity "subject to the same duties, restrictions, penalties and liabilities now or later imposed on, a domestic corporation of like character." ORS 60.714(1). Accordingly, the trial court's ruling is consistent with the requirements of *Daimler*. And it is exactly in line with that Court's articulation of the prevailing law on general jurisdiction.

Under *Daimler*, UP's contacts with Oregon were sufficiently "substantial."

Daimler does not require any economic comparisons to other operations under a footnote in which the Court clarified:

> [g]eneral jurisdiction * * * calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. *Daimler,* 134 S Ct at 762 n. 20.

That statement does not call for a new or altered method for determining whether a court may properly exercise general jurisdiction over a party. When read in context, the footnote arises in response to Justice Sotomayor's concurrence, serving to directly *refute* her assertion that the Court's general jurisdiction inquiry must now "focus on *the magnitude* of the defendant's in-

state contacts." *Id.* The Court sought merely to steer away from an emphasis on "magnitude," and to reiterate the long-standing rule of "substantiality" in testing the exercise of general jurisdiction over a foreign defendant.

Also when read in context, the footnote pertains to the Court's determinations that neither Daimler nor its indirect subsidiary and alleged "agent" MBUSA were incorporated in or had a principal place of business in California. *Id.* at 761. More importantly, the Court never accepted the agency theory posited as the basis for the California court's exercise of jurisdiction over Daimler.

> 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[.] *Id.* at 760 (emphasis added).

To support that point, the court compared the in-state activities of the purported agent, MBUSA, to the world-wide operations of *Daimler* when it ultimately held:

> 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. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."
>
> It was therefore error for the Ninth Circuit to conclude that Daimler, even with MBUSA's contacts attributed to it, was at home in California, and hence subject to suit there *on claims by*

> *foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California.* *Id.* at 761-62 (citation omitted) (emphasis added).

In other words, "a particular quantum of local activity" cannot give a State authority *over a "far larger quantum of ...activity."* *Id.* at 762 n 20 (emphasis added). This was not a new and more restrictive view of general jurisdiction. It was the application of the prevailing law simply to hold that a California court may not exercise general jurisdiction over a German corporation for the alleged atrocities which had occurred in Argentina.

In contrast, plaintiff here is suing an American corporation directly for injuries sustained while employed by that corporation. Plaintiff was an Oregon resident whom UP hired, trained, and employed in Oregon. There is no subsidiary or agent involved. There is no international corporation involved. There are no citizens or residents from other countries in this case. And there are no claims arising under international law or the law of other countries. The question for this Court then is the same as it was before *Daimler*: are UP's contacts with Oregon sufficiently continuous, systematic, and substantial such that UP is "at home" in Oregon??

Substantiality, not magnitude.

Because the *Daimler* Court has clarified that "the general jurisdiction inquiry does not focus solely on the magnitude of the defendant's in-state contacts," substantial forum contacts are best defined as contacts that are

"material," "important," "essential," "not illusive," "real," or "true." *Webster's Third New Int'l Dictionary* 2280 (unabridged ed 1993). It simply cannot be said that UP's Oregon railways and operations are immaterial, unimportant, or inessential to the conduct of its business since the 1860's of running "the first transcontinental railroad; the greatest, most daring engineering effort the country had yet seen."[4]

No matter the comparative number of track miles or employees, the amount of revenue generated or customers served, or the number of facilities maintained and operated in Oregon, UP simply cannot maintain its network of railways without Oregon's rail system. Oregon's presence is essential and necessary to complete the railway network that is at the heart of UP's operation. That is a substantial Oregon contact, and UP is sufficiently "at home" in Oregon. Accordingly, UP is subject to the general jurisdiction of Oregon courts on claims arising out of the conduct of its transportation system, of which its Oregon facilities are an integral part.

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[4] http://www.up.com/aboutup/history/overview/index htm

Conclusion

Based on the forgoing, and under the facts of this case and *Daimler*, the trial court may properly exercise personal jurisdiction over UP.

Respectfully submitted on this 29th day of August, 2016,

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CERTIFICATE OF COMPLIANCE

Brief length: I certify that this brief complies with the word-count limitation in ORAP 5.05(2)(b) and 9.05(3), and the word count of this brief is **1,924** words.

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CERTIFICATE OF SERVICE AND FILING

I certify that on August 29, 2016, I electronically filed the foregoing **BRIEF ON THE MERITS OF AMICUS CURIAE OREGON TRIAL LAWYERS ASSOCIATION** with the State Court Administrator and by so doing either caused a true copy to be served electronically on the following parties or served them by conventional email or mail should the system have failed to provide such service:

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