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September 25, 2014

VIA OVERNIGHT DELIVERY

The Honorable Tani Gorre Cantil-Sakauye
Chief Justice, and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Bristol-Myers Squibb Company v. Superior Court (Anderson)*, No. S221038
Amicus Curiae Letter in Support of Petition for Review

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

The National Association of Manufacturers (NAM), the National Federation of Independent Business (NFIB), the American Tort Reform Association (ATRA), the Alliance of Automobile Manufacturers (Alliance), and the Juvenile Products Manufacturers Association (JPMA), on behalf of their members, respectfully submit this letter in support of the Petition for Review in *Bristol-Myers Squibb Company v. Superior Court (Anderson)*. The Court of Appeal's unprecedented expansion of California's specific jurisdiction reach over out-of-state defendants stretches far beyond the limits imposed by the Due Process Clause and recognized by California courts. The ruling eliminates the traditional causal nexus between the forum-based contacts and the alleged injury as a precondition to jurisdiction. It replaces the familiar jurisdictional requirement that the claims "arise out of" or have a "substantial connection" with an out-of-state business's California contacts with a watered-down and vague standard requiring only *some* connection to California. This decision adversely affects *all* businesses by eliminating a fundamental and constitutionally guaranteed degree of predictability of being brought into a foreign forum's court based on forum-directed conduct, not some tenuous connection to the forum. Consequently, businesses are deprived of their right to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen Corp. v. Woodson* (1980) 444 U.S. 286, 297.

Never before has any California court exercised specific jurisdiction over an out-of-state defendant in a product liability claim filed by out-of-state plaintiffs for events and injuries that occurred entirely out-of-state. Yet the Court of Appeal did so here.

The Court of Appeal first properly rejected the lower court's holding that California had general or "all-purpose" jurisdiction over Bristol-Myers Squibb (BMS), consistent with

the recent United States Supreme Court decision in *Daimler AG v. Bauman* (2014) 134 S.Ct. 746. It found that BMS was not "at home" in California such that it would always be subject to California jurisdiction even if a claim is wholly unrelated to BMS's California contacts.

Though the lower court's analysis ended with general jurisdiction, the Court of Appeal nevertheless proceeded to hold that specific jurisdiction over BMS was appropriate. Contrary to general jurisdiction, specific jurisdiction is proper only when "the defendant's *suit-related conduct* [ ] create[s] a *substantial connection* with the forum State." *Walden v. Fiore* (2014) 134 S.Ct. 1115, 1121 (emphasis added). While the out-of-state plaintiffs' claims did not "arise out of" BMS's California contacts, the Court of Appeal still found that BMS's *nationwide* sales of its product, resulting in California product liability claims by California residents, was "substantially connected" to the out-of-state plaintiffs' claims. It reasoned that because BMS had significant but unrelated California contacts, the attenuated connection between the California plaintiffs' claims and the out-of-state plaintiffs' claims was sufficient to constitute a "substantial connection." The Court of Appeal thus blurred the separate and distinct concepts of general and specific jurisdiction by focusing on the quantity of BMS's California contacts rather than the connection between those contacts and the out-of-state plaintiffs' litigation.

This hybrid analysis directly conflicts with the United States Supreme Court's recent trend to distinguish these concepts and limit their respective scope. In *Daimler AG*, the Court recognized that these concepts "have followed markedly different trajectories post-*International Shoe*" but that it has "declined to stretch general jurisdiction beyond limits traditionally recognized." *Daimler AG v. Bauman, supra*, 134 S.Ct. at pp. 757-758.

Even more recently, the Court in *Walden* highlighted the distinction between general and specific jurisdiction, *see Walden v. Fiore, supra*, 134 S.Ct. at p. 1121, fn. 6, and further clarified a stricter "substantial connection" requirement under the specific jurisdiction analysis. It reiterated that the analysis "'focuses on the relationship among the defendant, the forum, and the litigation.'" *Id.* (quoting *Keeton v. Hustler Magazine, Inc.* (1984) 465 U.S. 770, 775) (internal quotations omitted). But unlike predecessor cases that cited to case law requiring that the litigation either "arise out of *or relate to*" a defendant's contacts with the forum, *Helicopteros Nacionales de Colombia, S.A. v. Hall* (1984) 466 U.S. 408, 414 (emphasis added), the Court took a narrower stance consistent with the limits of due process. It omitted the lesser "relate to" catchall that diluted the connectivity standard, and instead stated a more precise connectivity test, now requiring that "the relationship *must arise out of*

contacts that the defendant himself creates with the forum State." *Walden*, at p. 1122 (emphasis added) (original emphasis and internal quotations omitted); *see also*, *e.g.*, *Sawtelle v. Farrell* (1st Cir. 1995) 70 F.3d 1381, 1389 (specific jurisdiction requires that the action "directly arise out of the specific contacts between the defendant and forum state"); *RAR, Inc. v. Turner Diesel, Ltd.* (7th Cir. 1997) 107 F.3d 1272, 1278 (same). The *Walden* Court therefore affirmed *only* the stricter "arise out of" standard, tightening the relationship between the litigation and the defendant's forum contacts necessary to establish specific jurisdiction.

The Court of Appeal, however, relied on the "relate to" connectivity to erroneously apply a sliding-scale approach to the relatedness analysis. By utilizing an inversely proportionate sliding-scale to determine if a "substantial connection" exists between the defendant's suit-related conduct and California contacts, the connection may simply be attenuated instead of "substantial" if an out-of-state business has significant though unrelated California contacts. Even worse, the Court of Appeal explained that "this 'substantial connection' need not have *any* relevance to establishing the plaintiff's claim," (Opinion, at p. 28 [original emphasis],) rendering the specific jurisdiction analysis akin to general jurisdiction. This is a far cry from the "arise out of" relatedness standard necessary to establish a "substantial connection" articulated by the *Walden* Court, and contrary to the United States Supreme Court's trend to distinguish and limit general and specific jurisdiction. Under this misguided approach, the Court of Appeal clearly lessened the "substantial connection" requirement – the key distinction between general and specific jurisdiction – to oblivion. In effect, California has improperly assumed general jurisdiction over *all* out-of-state businesses selling products in California for mass tort product liability claims, regardless of how or where those claims arose, under the guise of overreaching specific jurisdiction.

The *amici curiae* here have significant interests in this litigation. Businesses large and small sell their products in more than one state, and frequently sell their products to consumers in all 50 states. When plaintiffs allege injuries in multiple forums, the Due Process Clause affords businesses much-needed predictability by foreclosing the prospect of litigation in far-flung jurisdictions with no connection to the dispute. But the uncertainty raised by the Court of Appeal's hybrid general/specific jurisdiction analysis makes it nearly impossible for businesses to tailor their forum-related activities and calculate their reasonable expectation of being haled into any particular forum's court. Moreover, the Court of Appeal impermissibly expanded California's specific jurisdiction reach to establish a back-door general jurisdiction forum for mass tort product liability claims, subjecting *all* out-of-state businesses selling products in California to unfairly burdensome litigation. For these reasons explained more

thoroughly below, the *amici curiae* respectfully request this Court to grant the Petition for Review.

I. INTERESTS AS *AMICI CURIAE*

Founded in 1895, NAM is the preeminent association of U.S. manufacturers and the largest industrial trade association in the country. Its members include more than 12,000 manufacturing companies, over 1,000 of which are located in California, and it represents the interests of small and large manufacturers in every industrial sector and in all 50 States. NAM regularly participates as *amicus curiae* in cases like this one that raise issues affecting U.S. manufacturers, their business practices, and their ability to stay competitive, promote economic growth, and create jobs. It has been involved as an *amicus curiae* in 44 instances in California courts in the past 14 years alone.

NFIB is the Nation's leading small business advocacy association, representing 350,000 member businesses including over 21,000 members in California. NFIB's members range from sole proprietors to firms with hundreds of employees, and collectively they reflect the full spectrum of America's small business owners. Founded in 1943 as a nonpartisan organization, NFIB defends the freedom of small business owners to operate and grow their businesses and promotes public policies that recognize and encourage the vital contributions that small businesses make to our national economy. NFIB is committed to advocating for federal and state policies that provide consistency and certainty for small business owners across the United States.

ATRA, founded in 1986, is a broad-based coalition of more than 170 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote a civil justice system that ensures fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before California state and federal courts that have addressed important liability issues.

The Alliance is a trade association whose members operate in California and throughout the United States. The Alliance, formed in 1999 and incorporated in Delaware, has twelve members: BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Car Corporation. Alliance members are responsible for 77% of all car and light truck sales in the United States. The

Alliance's mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to meet emerging challenges associated with the manufacture of new automobiles. The Alliance files *amicus curiae* briefs in cases such as this one that are important to the automobile industry.

The JPMA is a national trade organization of more than 250 companies in the United States, Canada and Mexico. JPMA exists to advance the interests, growth and well-being of North American prenatal-to-preschool product manufacturers, importers and distributors marketing under their own brands to consumers. It does so through advocacy, public relations, information sharing, product performance certification and business development assistance conducted with appreciation for the needs of parents, children and retailers.

II. REASONS FOR GRANTING REVIEW

As a result of the Court of Appeal's unpredictable hybrid analysis, businesses face practical difficulties because they cannot control their susceptibility to a forum's jurisdiction or offset burdensome litigation based on their forum-related activity. The United States Supreme Court explained:

> When a corporation purposefully avails itself of the privilege of conducting activities within the forum State, [citation,] it has clear notice that it is subject to suit there, *and can act to alleviate the risk of burdensome litigation* by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State.

World-Wide Volkswagen Corp. v. Woodson, *supra*, 444 U.S. at p. 297 (emphasis added and internal quotations omitted). While under a traditional specific jurisdiction analysis[1] a business could tailor its forum-specific contacts to the unique circumstances of each state in which it avails itself, their contacts under the hybrid analysis are now subject to the whim of a

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[1] *See Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 473 ("Thus, the forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its product into the stream of commerce with the expectation that they will be purchased by consumers in the forum State and those products subsequently injure *forum consumers*." [emphasis added and internal quotations omitted]).

plaintiff's forum preference, which invariably will be to plaintiff's advantage. Thus, a business that once chose to minimize its contacts in a particularly burdensome forum to lessen its litigation exposure can no longer do so because *every* contact, regardless of the forum, carries the same litigation exposure as if that contact was in the burdensome forum. Because of this unpredictability, the business contact in every forum *must* reflect the litigation risk of the most burdensome forum based on the chance of being haled into court there. The result is significantly higher business costs, which undoubtedly will be offset at the expense of *all* consumers, or if these costs cannot be offset, at the business's expense.

These costs are real and alike for *all* businesses. Large self-insured corporations or small family-owned businesses paying insurance premiums will face higher defense and transaction costs and greater liability exposure. Looking at this case alone where all witnesses are likely out-of-state, BMS will incur substantially higher defense costs by being forced to first obtain subpoenas from a non-forum court for every non-party witness, and then requiring counsel to unnecessarily travel out-of-state to take virtually all depositions. Moreover, consumer preferences for forums with significantly higher-than-average jury verdicts (higher payout per lawsuit) or consumer-friendly laws (higher probability of a lawsuit being filed) will result in greater liability exposure.

The expansion of litigation to foreign jurisdictions ratchets up the stake and will likewise result in higher transaction costs, forcing companies to the Hobson's choice of either litigate at a high, often economically crippling, cost or resolve claims regardless of merit. For instance, the threat of class certification in a perceived plaintiff-friendly jurisdiction may necessitate the settlement of meritless claims. These transaction costs are not just monetary. The presence of non-resident plaintiffs who reside in the same state as a defendant business may defeat removal on diversity grounds, divesting businesses of their right to be heard in federal court as the real parties in interest did so here.

Collectively, these unnecessary costs *will* be passed on to consumers in *all* forums. This will be particularly problematic for small businesses that do not have the benefit of a wide distribution network or large volume sales to marginalize these costs to its customers. Thus, what once was a sound business decision to establish minimal contacts in a burdensome forum (offset by other forum contacts with lesser litigation risk), may not make sense anymore under the Court of Appeal's opinion, resulting in the unintended consequence of driving business out of California.

But this is not the only unintended consequence. The Court of Appeal also inadvertently divested California courts of jurisdiction over legitimate California interests, including those that can significantly affect business and commerce in California, leaving the job to other forums to dictate California policy. This tantalizing prospect will leave states with no choice but to adopt this sweeping opinion in an effort to both compete over multi-jurisdictional claims and protect and impose their own interests. *Other* states will decide California-centric disputes: a California resident injured in California by either a California or an out-of-state business may initiate a claim in another more favorable forum in which that business has significant contacts resulting in similar claims. Moreover, the Court of Appeal's hybrid analysis is not limited to mass tort product liability claims, but can be broadly applied to matters outside of this context. Therefore, California's exercise of overreaching jurisdiction in one context will result in corresponding divestment of jurisdiction in other contexts.

By divesting jurisdiction to more favorable forums, California's courts will be left powerless to properly regulate or enforce its laws. Under the minimum contacts analysis, however, the very basis for subjecting an out-of-state defendant to a foreign jurisdiction stems from a defendant's purposeful availment of the benefits and protections of that jurisdiction's laws. The United States Supreme Court explained,

> [W]here the defendant deliberately has engaged in significant activities within a state, [citation,] ... he manifestly has availed himself of the privilege of conducting business there, and *because his activities are shielded by the benefits and protections of the forum's laws*, it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.

Burger King Corp. v. Rudzewicz, *supra*, 471 U.S. at p. 476 (emphasis added and internal quotations omitted). In other words, the minimum contacts analysis hinges on the *quid pro quo* relationship between the benefits derived from the protections of a state's laws and the burdens of litigating there. But when a state loses its ability to effectively regulate and enforce its own laws, it also fails to provide the protections that balance those burdens, highlighting the importance of requiring a direct connection between a defendant's contacts with the state and the litigation in a specific jurisdiction analysis. The Due Process Clause, however, does not permit courts to exercise boundless jurisdiction, inequitably subjecting businesses to burdensome litigation while also depriving them of the benefits of their forum contacts. Yet this is the result here.

III. CONCLUSION

The Court of Appeal's hybrid general/specific jurisdiction analysis prevents businesses from tailoring their forum-specific contacts, subjecting them to unavoidable and unfairly burdensome litigation. The resulting costs will be passed on to all consumers (for those business that can sustain them), or worse, drive business out of California. By further expanding the scope of a forum's specific jurisdiction reach, California courts inadvertently divested their jurisdiction to other forums to adjudicate important California interests, depriving businesses of the benefits of their California contacts. For these reasons, the *amici curiae* respectfully request this Court to grant the Petition for Review.

Respectfully submitted,

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BY: _____

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CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to this action. My business address is 550 South Hope Street, Suite 2000, Los Angeles, California 90071-2627.

On **September 25, 2014**, I served the foregoing document(s) described as **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action:

SEE ATTACHED SERVICE LIST

☐ **By FAX:** by causing a true copy thereof to be sent via facsimile to the attorney(s) of record at the telecopier number(s) so indicated above and that the transmission was reported as completed and without error.

☒ **By MAIL:** by placing true and correct copy(ies) thereof in an envelope addressed to the attorney(s) of record, addressed as stated above.

☐ **By PERSONAL SERVICE:** I delivered the envelope by hand on the addressee, addressed as stated above.

☐ **By OVERNIGHT DELIVERY:** by causing same to be delivered via UPS to the addressee(s).

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **September 25, 2014**, Los Angeles, California.

Rosie Zapatero

Bristol-Myers Squibb Company v. Superior Court (Anderson)
No. S221308

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