Civil Procedure—Ninth Circuit Focuses on Importance of Subsidiary Rather Than Control to Impose General Jurisdiction over Foreign Corporation—*Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011)

The Supreme Court of the United States has established that general personal jurisdiction allows a forum to exercise authority over a defendant to adjudicate claims that do not arise from the defendant's contacts within the forum state.[1] Since the advent of the modern corporation, plaintiffs have attempted to establish jurisdiction over a foreign corporation because of its subsidiary's contacts with a forum state.[2] In *Bauman v. DaimlerChrysler Corp.*,[3] the Court of Appeals for the Ninth Circuit considered whether a state may exercise general jurisdiction over a foreign corporation because it has a subsidiary with extensive contacts in the United States.[4] The Ninth Circuit held that a subsidiary is a foreign corporation's agent for jurisdictional purposes if the subsidiary's services are sufficiently important to the parent corporation and the parent has the right to substantially control the subsidiary's activities.[5]

In 2004, twenty-three persons (Plaintiffs) filed a lawsuit against DaimlerChrysler Aktiengesellschaft (DCAG) in the United States District

1. *See* Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 (1984) (adopting specific and general jurisdiction distinction); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-49 (1952) (asserting general jurisdiction over foreign corporation based on company's "substantial, . . . continuous and systematic" contacts with forum); Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-18 (1945) (establishing minimum-contacts test). In *International Shoe*, the Court recognized that a forum state may justifiably adjudicate a suit arising from dealings entirely distinct from forum activities when a corporation maintains continuous and substantial operations within the forum. Int'l Shoe Co. v. Washington, 326 U.S. 310, 318 (1945).

2. *See* 1 PHILLIP I. BLUMBERG ET AL., BLUMBERG ON CORPORATE GROUPS § 16, at 16-8 to -18 (2d ed. 2004 & Supp. 2009) [hereinafter CORPORATE GROUPS] (outlining jurisdictional-attribution theories per jurisdiction); Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CAL. L. REV. 1, 6-13 (1986) (articulating theories of attributive jurisdiction as exception to entity approach of corporate law). The theory of jurisdictional attribution is comparable to the substantive corporate-law doctrine of piercing the veil. *See* CORPORATE GROUPS, *supra*, at 16-7 to -8; Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023, 1027 (2004) (noting forum will view two corporations as one); Brilmayer & Paisley, *supra*, at 14 (stating courts may consider parent-subsidiary relationship). While jurisdictional attribution is comparable to piercing the veil, the test has been broadly applied by eliminating the traditional element of fraudulent misuse of the corporate form. *See* Hoffman, *supra*, at 1027, 1090-94 (criticizing liberalization of veil-piercing doctrine for jurisdictional attribution); *see also* Phillip I. Blumberg, *The Transformation of Modern Corporation Law: The Law of Corporate Groups*, 37 CONN. L. REV. 605, 605-13 (2005) [hereinafter *Modern Corporation Law*] (explaining focus on "enterprise" law supplementing "entity" law in reaction to emergence of modern corporations).

3. 644 F.3d 909 (9th Cir. 2011).

4. *Id.* at 919-20.

5. *Id.* at 931.

Court for the Northern District of California.[6] Plaintiffs alleged that DCAG's wholly owned subsidiary, Mercedes-Benz Argentina, collaborated with the Argentinean government to kidnap, torture, or kill the Plaintiffs or their relatives during Argentina's "Dirty War."[7] In response to the Plaintiffs' complaint, DCAG moved to dismiss for insufficient service of process and lack of personal jurisdiction.[8]

Plaintiffs argued that DCAG had sufficient contacts with California to warrant general jurisdiction by virtue of its wholly owned subsidiary, Mercedes-Benz United States, LLC (MBUSA).[9] To support this claim, Plaintiffs contended that MBUSA acted as DCAG's agent for the purpose of asserting jurisdiction over DCAG.[10] The district court tentatively granted DCAG's motion to dismiss for lack of personal jurisdiction but permitted limited jurisdictional discovery before issuing a final decision.[11] The district court reasoned that, because DCAG could create another subsidiary or use an independent distributor to distribute and sell its vehicles in the United States,

6. Bauman v. DaimlerChrysler AG, No. C-04-00194, 2005 WL 3157472, at *1 (N.D. Cal. Nov. 22, 2005), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011). Plaintiffs had previously initiated service attempts upon DCAG through German courts but service was halted to determine if it would violate Germany's sovereignty rights. *Id.* Plaintiffs later discovered that DCAG claimed to have a headquarters for DaimlerChrysler Corporation in Michigan. *Id.* at *2. Plaintiffs then attempted to serve DCAG at DaimlerChrysler Corporation in Michigan. *Id.*

7. Bauman v. DaimlerChrysler AG, No. C-04-00194, 2005 WL 3157472, at *2 (N.D. Cal. Nov. 22, 2005), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011). Plaintiffs claimed that California could exercise jurisdiction over DCAG, a foreign corporation, for claims that neither arose out of its alleged contacts with the forum nor occurred in the United States. *See id.* at *1 (seeking personal jurisdiction over DCAG for acts occurring outside United States).

8. Bauman v. DaimlerChrysler AG, No. C-04-00194, 2005 WL 3157472, at *2 (N.D. Cal. Nov. 22, 2005), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011). DCAG later withdrew its challenge to service of process, but continued to assert that the court must dismiss the Plaintiffs' complaint for lack of personal jurisdiction. *Id.*

9. Bauman v. DaimlerChrysler AG, No. C-04-00194, 2005 WL 3157472, at *4 (N.D. Cal. Nov. 22, 2005), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011). Plaintiffs also alleged that DCAG itself had sufficient contacts to warrant general jurisdiction, but this claim was dismissed and not at issue in the subsequent hearing or on appeal. *See id.* at *1 (detailing jurisdictional-attribution issue before court); 644 F.3d at 921-24 (discussing agency test and weighing jurisdictional contacts of subsidiary with forum state).

10. Bauman v. DaimlerChrysler AG, No. C-04-00194, 2005 WL 3157472, at *4 (N.D. Cal. Nov. 22, 2005), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011). Plaintiffs presented evidence indicating that MBUSA is wholly owned by DCAG and serves the United States market as DCAG's exclusive Mercedes-Benz importer and sales agent. *Id.* at *10. Plaintiffs also presented the following evidence regarding MBUSA's contacts: MBUSA is the single largest supplier of luxury vehicles to the California car market, and MBUSA has a regional office and a Vehicle Preparation Center in California. *Id.*

11. Bauman v. DaimlerChrysler AG, No. C-04-00194, 2005 WL 3157472, at *12, *20 (N.D. Cal. Nov. 22, 2005) (concluding activities of MBUSA should not be imputed to DCAG), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011). The district court relied on Ninth Circuit decisions where the courts held that the subsidiary's services must be "'sufficiently important to the [parent] corporation' . . . where the subsidiary was either 'established for, or is engaged in, activities that, but for the existence of the subsidiary, the parent would have to undertake itself.'" *Id.* at *11 (quoting Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1135 (9th Cir. 2003)).

MBUSA was not an agent of DCAG for jurisdictional purposes.[12]

After jurisdictional discovery was complete, the district court confirmed its tentative ruling that the court lacked general jurisdiction over DCAG and granted DCAG's motion to dismiss.[13] The court based its reasoning on DCAG's past use of independent distributors before it created MBUSA and Toyota Motor Corporation's current use of independent distributors within the United States.[14] The court explained that, because the use of a subsidiary to distribute and sell vehicles in the United States is not necessary, MBUSA's purpose is not a task that "but for the existence of the subsidiary, [DCAG] would have to undertake itself."[15] On appeal, the Court of Appeals for the Ninth Circuit affirmed the district court's dismissal of the lawsuit for lack of personal jurisdiction.[16] Nine months later, the three-judge panel for the Ninth Circuit unanimously vacated its prior decision and reversed the finding of the district court, holding that MBUSA's business was sufficiently important to DCAG and that without MBUSA or another representative, it would have to distribute and sell its vehicles itself.[17] Additionally, because DCAG had the

12. Bauman v. DaimlerChrysler AG, No. C-04-00194, 2005 WL 3157472, at *12-20 (N.D. Cal. Nov. 22, 2005) (relying on "agency" test set forth by Ninth Circuit), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011). The district court found that MBUSA engaged in "substantial activity" by selling DCAG's product in the United States. *Id.* at *11. The court interpreted the "but for" test employed by the Ninth Circuit to mean that if another representative could sufficiently perform the services of MBUSA, the actions of MBUSA should not be attributed to DCAG to establish general jurisdiction. *Id.* at *12.

13. Bauman v. DaimlerChrysler AG, No. C-04-00194, 2007 WL 486389, at *1 (N.D. Cal. Feb. 12, 2007), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011). The district court again applied a literal interpretation of the language of the Ninth Circuit's but-for test. *See supra* notes 11-12 and accompanying text (describing but-for test adopted by Ninth Circuit).

14. Bauman v. DaimlerChrysler AG, No. C-04-00194, 2007 WL 486389, at *2 (N.D. Cal. Feb. 12, 2007) (analyzing but-for test with case facts and other motor corporations), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011).

15. Bauman v. DaimlerChrysler AG, No. C-04-00194, 2007 WL 486389, at *2 (N.D. Cal. Feb. 12, 2007) (quoting Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1135 (9th Cir. 2003)) (internal quotation marks omitted) (analyzing facts under literal interpretation of Ninth Circuit's but-for test), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011); *see supra* notes 11-12 and accompanying text (describing but-for test adopted by Ninth Circuit).

16. Bauman v. DaimlerChrysler Corp., 579 F.3d 1088, 1079-97 (9th Cir. 2009) (holding parent corporation must exercise pervasive control of subsidiary), *vacated*, 603 F.3d 1141 (9th Cir. 2010). The court stated that for an agency relationship to exist that warrants the attribution of jurisdiction, the parent must exert pervasive and continual control over the subsidiary so that the subsidiary is considered a mere instrumentality of the parent, despite the corporate formalities. *Id.* at 1095. The court also agreed with the district court's literal interpretation of the but-for test when making its determination to affirm the decision. *See id.* at 1094-95. Dissenting Circuit Judge Stephen R. Reinhardt disagreed with the majority's test and advocated for a much different approach. *See id.* at 1098 (Reinhardt, J., dissenting) (contending majority test for personal jurisdiction goes further than necessary). In his dissent, Judge Reinhardt noted that the principal focus of the agency test is the sufficient importance of the subsidiary to the parent corporation, not pervasive control. *Id.* at 1098-99. He also explained that the circuit's past decisions failed to distinguish the "alter ego" and "agency" tests, both of which require different levels of control. *Id.*

17. Bauman v. DaimlerChrysler Corp., 603 F.3d 1141 (9th Cir. 2010), *vacating* 579 F.3d 1088 (9th Cir. 2009); *see also* 644 F.3d at 931. The Ninth Circuit noted that selling Mercedes-Benz vehicles is a critical aspect of DCAG's business operations. *See* 644 F.3d at 922. The court emphasized that DCAG's charter

right to substantially control MBUSA's operations, the Ninth Circuit held that it meant MBUSA was DCAG's agent for the purpose of attributing general jurisdiction.[18] Five months after the Ninth Circuit filed its opinion, a majority of the circuit's active judges voted to deny DCAG's petition for rehearing en banc.[19]

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defined its goals as the "'development, manufacture, and *sales* of its products.'" *Id.* Additionally, when the suit was filed, the United States market accounted for 19% of the worldwide sale of Mercedes-Benz vehicles, and MBUSA's sales in California alone accounted for 2.4% of DCAG's worldwide sales. *Id.* The court concluded that MBUSA's services were "sufficiently important" to DCAG because of the high percentage of sales that the United States market accounted for in DCAG's business. *Id.* Furthermore, the Ninth Circuit stated that independent contractors may be considered representatives, and that contracting with an independent contractor to achieve the same end satisfies the sufficient-importance test. *Id.*

18. 644 F.3d at 922-24. The Ninth Circuit described the General Distributor's Agreement (Agreement) between DCAG and MBUSA in detail. *Id.* at 924. The Agreement, which established extensive requirements for MBUSA as the general distributor of Mercedes-Benz cars in the United States, included:

> MBUSA must make "*any* changes or adjustments" to that [sales] network requested by DCAG. . . .
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> . . . MBUSA and its Authorized Resellers "shall comply with [DCAG's] requirements or such other manuals, guidelines or materials as may be implemented and amended or updated by [DCAG]." . . .
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> . . . MBUSA must further observe all of DCAG's "rules, terms and conditions" relating to the use of these business systems.
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> . . . .
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> . . . DCAG must approve the replacements for any key personnel of MBUSA . . . MBUSA personnel must participate in training offered or organized by DCAG. . . .
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> DCAG sets the warranty terms applicable to MBUSA. . . .
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> MBUSA cannot "alter or modify" any Vehicle without DCAG's "prior approval and then only in the manner [DCAG] authorizes" . . . .
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> The Agreement requires MBUSA to "actively market" the Mercedes Benz vehicles. . . .
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> . . . DCAG may change the prices "at any time, and make the changes effective immediately.". . .
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> MBUSA must request the approval of DCAG before it changes its management control or ownership interests, the name or form of its legal entity, or the location of its principal place of business.

Id. at 915-17.

The court further emphasized that the Second Circuit, which it extensively relied upon for agency theory, applied the sufficient-importance test without requiring any control. *Id.* at 923. The court noted that although control is nonexistent in the Second Circuit's agency test, it is included in the Ninth Circuit's analysis; however, the court weighed it with less significance than the sufficient-importance element. *Id.* To support its analysis, the court looked at *United States v. Bonds*, a recent Ninth Circuit decision, and the Restatement of Agency. *Id.*; *see also* United States v. Bonds, 608 F.3d 495, 506 (9th Cir. 2010) (holding principal needs right to control agent to form agency relationship); RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006) (outlining elements of common-law agency).

19. Bauman v. DaimlerChrysler Corp., No. 07-15386, 2011 WL 5402020, at *1 (9th Cir. Nov. 9, 2011). Circuit Judge Diarmuid F. O'Scannlain, joined by seven other judges, dissented from the denial of rehearing en banc. *Id.* at *1 (O'Scannlain, J., dissenting). The dissent asserted that the panel's decision "ignores the Supreme Court's warnings that the Due Process Clause permits '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 *1 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 (1985)). In stressing the panel's "affront to due

Before *International Shoe* introduced the modern constitutional standards of personal jurisdiction, the concept of asserting jurisdiction over an out-of-state corporation had been uniformly based on the traditional "entity" approach to corporate law.[20] In the 1925 case of *Cannon Manufacturing Co. v. Cudahy Packing Co.*, the Supreme Court concluded that despite a corporation's complete ownership and control of its subsidiary, the subsidiary was a separate and distinct corporate entity; therefore, the activities of the subsidiary were not attributable to the parent corporation where it would be considered "present" in the forum state.[21] Twenty years after *Cannon*, the federal courts began to

process," the dissent relied on a recent Supreme Court case where the Court held that foreign subsidiaries of a United States parent corporation were not amenable to suit in state court on claims unrelated to any activity of the subsidiaries in the forum state. *Id.* at *2 (citing Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846 (2011)). Claiming that the reasoning in *Goodyear* is directly applicable to the facts in *Bauman*, the dissent asserted that allowing such coercive jurisdictional power over DCAG is incompatible with the Due Process Clause. *See id.* at *2. Additionally, the dissent challenged the panel's redefinition of the agency test by literally interpreting the Ninth Circuit's but-for test and requiring parental control to reach the level of day-to-day control. *See id.* at *2 nn.2-3.

20. *See* CORPORATE GROUPS, *supra* note 2, at 24-3 to -5 (explaining formalistic view of corporate entities served as standard for several decades until *International Shoe*); Brilmayer & Paisley, *supra* note 2, at 3 (stipulating formally separate corporations were always treated as separate entities prior to *International Shoe*); Hoffman, *supra* note 2, at 1042-45 (recognizing widespread "entity" view of corporate form was uniform before modern Supreme Court standards); *see also* Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 337 (1925) (refusing to attribute jurisdiction to parent corporation based on formal separation of subsidiary and parent). The traditional doctrines of entity law revolve around a presumption of corporate separateness. *See* CORPORATE GROUPS, *supra* note 2, at 23-20 to -21. This approach is also referred to as the "*Cannon* doctrine." *See id.* at 24-8; *see also* Brilmayer & Paisley, *supra* note 2, at 2. Courts applying the *Cannon* doctrine respect corporate formalities, regard the entities within a corporation as separate, and typically prevent the attribution of jurisdiction despite a corporation's integration with subsidiaries, the subsidiary's exclusive sales of products of its parent, or complete ownership of subsidiary by parent. *See* Brilmayer & Paisley, *supra* note 2, at 2; *see also* CORPORATE GROUPS, *supra* note 2, at 24-8. As the presumption of corporate separateness is the prevailing standard, all American jurisdictions employ the traditional doctrines of entity law; however, many jurisdictions recognize the exceptions to this presumption: alter-ego and agency theories. *See* Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1083-85 (E.D. Pa. 1992) (explaining different lines of cases where presumption of separateness pierced); CORPORATE GROUPS, *supra* note 2, at 23-20 to -22; Brilmayer & Paisley, *supra* note 2, at 2-6; *see also infra* note 33 (explaining distinctions between jurisdictional-attribution doctrines).

21. *See* Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 335 (1925) (emphasizing subsidiary's distinction from parent corporation despite knowledge that separation was for parent's legal advantage). In *Cannon*, a North Carolina plaintiff-corporation brought suit in North Carolina against its parent corporation domiciled in Maine for a cause of action unrelated to the forum state. *Id.* at 334. The basis for jurisdiction over the Maine corporation was the activity of the parent's wholly owned Alabama subsidiary in North Carolina. *Id.* The Court implicitly reasoned that the formalistic organization of the corporation—subsidiary and parent being separate corporate entities—did not satisfy the "presence" requirement of the traditional jurisdictional standard. *See id.* at 335. In *Cannon*, Justice Louis D. Brandeis claimed that the decision was not based on a constitutional standard, but was merely decided based on whether the corporation was "doing business" in the jurisdiction. *See id.* at 334 (explaining main issue whether corporation was "doing business" in forum to deem it present). Justice Brandeis clearly stated that there was no direct issue of state or federal constitutional powers presented in this case. *Id.* at 336. Several cases, however, have suggested that *Cannon* rested on the constitutional analysis of the presence requirement articulated in *Pennoyer v. Neff*. Pennoyer v. Neff, 95 U.S. 714, 734-36 (1877) (denying jurisdiction because defendant not present within forum state); Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1084 n.9 (E.D. Pa. 1992) (suggesting correlation between *Pennoyer* requirement and *Cannon* decision); Brunswick Corp. v. Suzuki Motor Co., 575 F. Supp. 1412, 1418

deemphasize the strict jurisdictional standard of presence and instead looked to minimum contacts, thereby focusing on the corporate defendant's relationship to the forum rather than the mechanics of its corporate structure.[22] In a string of decisions issued in the decades following *International Shoe*, the Supreme Court established the constitutional limits of exercising personal jurisdiction over an out-of-state corporation.[23]

Since the modern standards of personal jurisdiction have developed, the Supreme Court has not had the opportunity to apply such standards to a case involving the amenability of jurisdiction to a parent corporation based on the contacts of its in-state subsidiary.[24] As there is no definitive precedent set forth

(E.D. Wis. 1983) (explaining *Cannon* decision derived from *Pennoyer*'s presence standard).

22. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316-18 (1945) (holding minimum contacts—not merely presence—with forum state satisfies due process). The Court recognized that activities of a corporation's agent within a state can be sufficient to satisfy the demands of due process. *Id.* at 316-17. The Court noted that "the 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." *Id.*; *see also Modern Corporation Law*, *supra* note 2, at 605-13 (describing modern focus on corporate enterprises, rather than separate corporate entities). Because due process became the standard for determining the availability of jurisdiction, *Cannon* has essentially become obsolete. *See* Brilmayer & Paisley, *supra* note 2, at 3-4 (noting minimum contacts replaced presence test); *see also* Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1084 n.9 (E.D. Pa. 1992) (agreeing with case law suggesting Supreme Court abandoned strict presence requirement of *Cannon*).

23. *See* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985) (holding defendant must purposefully avail himself of forum's benefits of conducting business); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414-15 (1984) (articulating standard for general jurisdiction as requiring "continuous and systematic" contacts with forum); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (holding defendant must reasonably foresee being haled into court based on purposeful contacts with forum); Perkins v. Benguet Consol. Mining Co., 342 U.S. 437, 447-48 (1952) (holding defendant-corporation's contacts with forum must be "substantial . . . continuous and systematic" for exercise of general jurisdiction). The *Burger King* Court, relying on *International Shoe*, noted that the "essential" question in a jurisdictional inquiry is whether "there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475 (1985) (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)) (internal quotation marks omitted). The Court went on to state that there must be reasonableness in the interests of both parties, the interests of the sovereigns involved, and the interests of the judicial system. *See id.* at 476-77. The Court, however, has held that where the minimum-contacts test is satisfied, only in rare cases will such reasonableness factors outweigh the defendant's contacts. *See id.* at 477-48; *see also* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 116 (1987) (holding exercise of jurisdiction over defendant-corporation unreasonable despite minimum contacts).

24. *See* CORPORATE GROUPS, *supra* note 2, at 23-22 (noting *Cannon* sole Supreme Court case firmly addressing issue); Hoffman, *supra* note 2, at 1026-30 (recognizing lower courts attributing jurisdiction to parent corporations without standard issued by Supreme Court). *But see* Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2857 (2011) (addressing plaintiff's claim for assertion of jurisdiction over subsidiary because of parent's contacts); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 705 n.* (1988) (noting *Cannon* held activities of subsidiary not necessarily enough to attribute jurisdiction to parent). In *Goodyear*, the plaintiff belatedly asserted a "single enterprise" theory to the Court. Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2857 (2011). Because the claim was untimely, the Court did not further discuss the issue; it merely stated that the plaintiff's contention was forfeited, but noted the possibility of attributing jurisdiction. *Id.* In dicta, the Court in *Volkswagenwerk* recognized that there are situations in which the relationship between a parent corporation and its subsidiary can warrant valid service of process for jurisdiction over the parent. *See* Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694,

by the Court, this widespread practice of jurisdictional attribution is unsettlingly divided across the American legal system.[25] In *Gelfand v. Tanner Motor Tours, Ltd.*,[26] the Second Circuit laid the foundation for the use of the "agency theory" doctrine in New York law.[27] Applying a decision from the Court of Appeals of New York, the *Gelfand* court determined that the decisive agency test is whether a foreign corporation's in-state representative "provides services beyond 'mere solicitation' and [whether] these services are sufficiently important to the foreign corporation that if it did not have a representative to perform them, the corporation's own officials would undertake to perform substantially similar services."[28] Rather than require the common-law element of control over an agent, the Second Circuit has continued to evaluate the "sufficient importance," economic integration, and functional relationship of

715 (1988); *see also* Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 781 n.13 (1984).

25. *See* CORPORATE GROUPS, *supra* note 2, at 23-22 (explaining split in American courts regarding application of attributive-jurisdiction theories); Brilmayer & Paisley, *supra* note 2, at 24 (recognizing attributive-jurisdiction theories not uniform and vary by jurisdiction). The jurisdictional variations include the amount of weight to apply to the parent's control over its subsidiary and the importance of the subsidiary's activities. *See* CORPORATE GROUPS, *supra* note 2, 29-3 to -39 (outlining division of attributive-jurisdiction theories per jurisdiction). *See generally* Russell J. Weintraub, *A Map Out of the Personal Jurisdiction Labyrinth*, 28 U.C. DAVIS L. REV. 531 (1995) (discussing "chaotic state of adjudicating personal jurisdiction").

26. 385 F.2d 116 (2d Cir. 1967).

27. *See* Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir. 1967) (determining jurisdiction appropriate over tour operator based on activities of affiliated travel agent). In *Gelfand*, the Second Circuit held that New York had jurisdiction over the defendant-corporation because its independent contractor's contacts with the forum were imputed to the defendant. *Id.* at 120-21. The court reasoned that the vertically integrated economic relationship between the defendant and its contractor showed that the defendant heavily relied upon the contractor to merchandise its product. *See id.* The court decided that the defendant's reliance upon its independent contractor for three-sevenths of its business in a particular division satisfied the due process requirements of *International Shoe* and established a systematic course of doing business in the forum, which had a long-arm-statute equivalent of general jurisdiction. *Id.* at 121. It must be acknowledged that agency theory of jurisdictional attribution does not comport with common-law agency. *See* RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006) (outlining elements of common-law agency). A common-law agency relationship exists only when three elements are satisfied: a consensual relationship where one party is the principal and the other is an agent; the principal has the right to control the agent; and the agent's conduct is on behalf of the principal. *Id.*; *see also* CORPORATE GROUPS, *supra* note 2, at 16-8 to -17 (explaining difference between general agency theory and common-law agency theory).

28. Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir. 1967). Additionally, the court stated, "It is clear from the record that unless defendants had arrived at this working arrangement with [the contractor] or a similar arrangement with some other New York representative, they would either have had to open their own reservation office in New York or give up the Grand Canyon tour." *Id.* The court reasoned that because the contractor was present in the forum and the out-of-state corporation relied on the contractor's services as an essential economic function of its business, the contractor was acting as an agent for the corporation. *See id.*; *see also* Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 853 (N.Y. 1967) (holding jurisdiction appropriate over foreign hotel chain based on activities of affiliated reservations service). In *Frummer*, the New York Court of Appeals determined that the significant factor in concluding that a representative is a foreign corporation's agent is that the representative "does all the business which [the foreign corporation] could do were it [in-state] by its own officials." Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 854 (N.Y. 1967). This test was then applied by the Second Circuit in *Gelfand* as the sufficient-importance test. *See* Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 120-21 (2d Cir. 1967).

the parent corporation and its representative.[29]

The Ninth Circuit adopted the agency theory of personal jurisdiction in *Wells Fargo & Co. v. Wells Fargo Express Co.*[30] and relied extensively on the Second Circuit's sufficient-importance test.[31] The court emphasized the irrelevance of whether the putative agent was a subsidiary of the parent or independently owned, therefore adhering to the Second Circuit's focus on the functional relationship between the parent corporation and its representative.[32] In three subsequent cases, the Ninth Circuit also relied on the decision of a Pennsylvania federal district court, which found that courts may attribute a representative's contacts to a parent corporation where the representative was "either established for, or is in engaged in, activities that, but for the existence

29. *See* Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 95 (2d Cir. 2000) (holding parent corporation need not exercise direct control over its putative agent); Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 119, 121 (2d Cir. 1967) (recognizing agency relationship exists despite corporation's lack of control over independent contractor). In *Gelfand*, there was no evidence that the defendant controlled any aspect of the contractor's operations and the court did not rely on any form of control to hold that an agency relationship did exist. *See* Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 119, 121 (2d Cir. 1967). The *Gelfand* court noted that without the independent contractor's services, the defendant's product would not be effectively merchandised in the forum state. *Id.* at 121. This lead the court to conclude that because the services were important to the defendant, the independent contractor was the defendant's agent, making evidence of control unnecessary. *Id.* at 119-21. The *Gelfand* court noted that the jurisdictional test must be "pragmatic" and must focus on the integration of the enterprise, rather than on the distinction between the two entities. *See* Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 120-21 & n.1 (2d Cir. 1967). In *Wiwa*, the court held that the "agent must be primarily employed by the defendant and not engaged in similar services for other clients." Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 95 (2d Cir. 2000); *see also* Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 854 (N.Y. 1967) (recognizing agent conducts all business principal would were it present in forum). This exclusivity requirement effectively serves as a substitution for the element of control. *See* Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 95 (2d Cir. 2000); Frummer v. Hilton Hotels Int'l, Inc., 227 N.E.2d 851, 854 (N.Y. 1967) (noting exclusivity "significant and pivotal factor"); *see also* CORPORATE GROUPS, *supra* note 2, at 29-14 to -15 (describing basic theory behind New York agency doctrine). The focus of the sufficient-importance test is premised on the economic integration of the parent and its subsidiary. *See* CORPORATE GROUPS, *supra* note 2, at 29-15. When a parent delegates essential economic functions to a representative, the representative is conducting business on behalf of the parent and, "in the truest sense, the subsidiaries' presence substitutes for the presence of the parent." Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1342 (E.D.N.Y. 1981); *see also* CORPORATE GROUPS, *supra* note 2, at 29-15; Murray E. Knudsen, Comment, *Jurisdiction over a Corporation Based on the Contracts of a Related Corporation: Time For a Rule of Attribution*, 92 DICK. L. REV. 917, 919 (1988) (noting courts' attention to details of corporate-family relationship, rather than corporate formalities).

30. 556 F.2d 406 (9th Cir. 1977).

31. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 423, 426 (9th Cir. 1977) (relying on agency test of *Gelfand* to vacate motion for lack of personal jurisdiction). In *Wells Fargo*, the court introduced the Second Circuit's "sufficient importance" test as a reliable test for attributing jurisdiction, but did not apply the test to the facts of the case. *See id.* at 423.

32. Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 422-24 & n.19 (9th Cir. 1977) (citing several appellate and district court decisions supporting theory of agency). By indicating that the formalities of the corporation's structure are irrelevant, the court provided that the sufficient-importance test focuses on the realistic relationship between the parent and subsidiary, thereby subscribing to the enterprise theory of corporations. *See id.*; *see also supra* note 29 (explaining general theory of economic integration to find agency relationship).

of the subsidiary, the parent would have to undertake itself."[33] When it adopted the sufficient-importance and but-for tests, the Ninth Circuit did not emphasize a parent corporation's control over its representative, which is an essential element of common-law agency.[34] Nevertheless, whether the element of control is actually required is not clear because the Ninth Circuit either remanded or decided such cases for lack of sufficient importance.[35]

33. Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1084 (E.D. Pa. 1992); *see* Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1135 (9th Cir. 2003); Doe v. Unocal Corp., 248 F.3d 915, 928 (9th Cir. 2001); Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1405 n.9 (9th Cir. 1994). In *Unocal*, foreign plaintiffs claimed that a foreign corporation with multiple holding-company subsidiaries in the United States was amenable to general jurisdiction based on the contacts of its holding companies. *See* Doe v. Unocal Corp., 248 F.3d 915, 921 (9th Cir. 2001). The court held that holding stock in a parent corporation does not satisfy the sufficient-importance test because subsidiaries can hold stock anywhere; therefore, the parent is not purposefully availing itself of the forum's benefits. *Id.* at 930 ("[T]he agent [must] perform some service or engage in some meaningful activity in the forum state on behalf of its principal . . . ."). In *Gallagher*, plaintiffs claimed that Pennsylvania had the authority to exercise general jurisdiction over a corporation because it had a subsidiary with substantial contacts within the forum. *See* Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1081 (E.D. Pa. 1992). The court, recognizing that a bare parent-subsidiary relationship does not allow a court to attribute jurisdictional contacts, outlined three lines of cases where imputing jurisdictional contacts is proper. *Id.* at 1083-84. The first line of cases follows the *Cannon* doctrine and holds that so long as both subsidiary and parent observe and respect the corporate form, jurisdictional contacts will not be attributed to the parent. *Id.*; *see also* Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 335 (1925) (noting corporate separateness created by defendant to secure benefit of local laws). The next line is the alter-ego theory, where courts hold that contacts will be attributed when the parent "exercises total control over the affairs and activities of the subsidiary . . . ." Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1084 (E.D. Pa. 1992). The third line is the agency theory—which the *Gallagher* court stated was the correct one—in which the contacts of the subsidiary should be attributed to the parent when, but for the subsidiary's services, the parent would have to undertake them itself. *Id.* The court noted that the most persuasive evidence within the agency test is "the symbiosis between the corporate functions, combined with proof that, not only does the parent own 100% of the subsidiary, but that the subsidiary does 100% of its business with the parent." *Id.* at 1085 n.10. This approach to the agency theory is the functional-delegation doctrine of New York. *See* CORPORATE GROUPS, *supra* note 2, at 24-18 to -19 (explaining how New York agency doctrine influenced *Gallagher* decision).

34. *See* Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1135 (9th Cir. 2003); Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 422-23 (9th Cir. 1977); Knudsen, *supra* note 29, at 931-32 (recognizing lack of emphasis on control in agency test). The element of control is not the determinative factor when applying the agency test. Knudsen, *supra* note 29, at 931-32. *But see* Doe v. Unocal Corp., 248 F.3d 915, 928 (9th Cir. 2001) (declaring agency relationships typified by parental control over subsidiary's internal affairs or daily operations); Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980) (holding facts insufficient to satisfy agency test because parent lacked control over day-to-day operations); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52 cmt. b (1971) (stating parent must control subsidiary to effectuate disregard of subsidiary's independent existence). Additionally, recent state court decisions have held that extensive control by a parent corporation over its representative must be shown when applying the agency test. *See* Rasmussen v. Gen. Motors Corp., 803 N.W.2d 623, 634-35 (Wis. 2011) (holding no agency relationship absent control by parent effectuating disregard of separate corporate identities).

35. *Compare* Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1135 (9th Cir. 2003) (remanding for jurisdictional discovery to present sufficient facts), *and* Doe v. Unocal Corp., 248 F.3d 915, 928-31 (9th Cir. 2001) (granting defendant's motion to dismiss because of plaintiff's failure to satisfy sufficient-importance test), *with* Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1406 (9th Cir. 1994) (remanding for additional findings by district court), *and* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 426 (9th Cir. 1977) (remanding for jurisdictional discovery to find additional facts). *But see* Kramer

In *Bauman v. DaimlerChrysler Corp.*, the Ninth Circuit considered whether a distribution subsidiary of a foreign corporation qualified as an agent under the agency test employed by the Second and Ninth Circuits.[36] Guided by previous decisions of both circuits, the *Bauman* court outlined what it regarded as the two elements of the agency test: the subsidiary must provide sufficiently important services that the parent corporation would delegate or perform itself if the subsidiary did not perform them, and the parent must reserve the right to exercise control over the representative.[37] The court first examined the sufficient-importance element in detail, emphasizing that the essence of the agency test requires a determination of whether the parent—in this case, DCAG—would distribute and sell its vehicles in the United States itself "*if it had no representative at all* to perform [these services]."[38] Recognizing the lack of clarity in the Ninth Circuit's articulation of the adopted but-for test, the court explicitly noted that the purpose of this test is to identify the importance of the delegated functions of a subsidiary, not to determine whether a particular subsidiary is the only entity that could perform such services.[39] Because of the large amount of revenue DCAG earns in the United States through MBUSA, the Ninth Circuit held that MBUSA's services satisfied the sufficient-importance test—that is, even if DCAG replaced MBUSA with a contractor, that contractor would still be considered a representative for purposes of the

Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980) (holding no agency relationship because of lack of day-to-day control over representative).

36. *See* 644 F.3d at 912. The court recognized that the Ninth Circuit's agency test for personal jurisdiction stems from Second Circuit case law. *Id.* at 921; *see also* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 423 (9th Cir. 1977) (adopting sufficient-importance test of Second Circuit).

37. *See* 644 F.3d at 921-23. The court determined that it did not need to evaluate the level of control under the alter-ego test because the facts indicated a level of control that satisfied the agency test. *Id.* at 920-21 & n.12. The court relied on *Doe v. Unocal Corp.*, where the Ninth Circuit applied the sufficient-importance element, but did not apply the element of control. *See id.* at 920 n.12.

38. *Id.* at 921 (emphasizing irrelevance of distinguishing between subsidiary and representative for agency test). The court focused on the functional relationship between MBUSA and DCAG, disregarding that they are technically separate entities. *See id.* at 921-22. The court emphasized that the heart of the agency test is to determine the importance of the delegated functions that the representative performs. *See id.* Citing the percentage of DCAG's worldwide sales made in the United States through MBUSA, the court concluded that MBUSA's sales are sufficiently important and that DCAG could not afford to eliminate a United States distribution system—whether that be MBUSA or another representative. *See id.* at 922.

39. *See id.* at 921-22 & n.13 (clarifying Ninth Circuit's articulation of Eastern District of Pennsylvania's but-for test). The court recognized that the language borrowed from *Gallagher*—"[the subsidiary] is engaged in, activities that, but for the existence *of the subsidiary*, the parent would have to undertake itself[]"—could be read to suggest that an agency relationship cannot exist if an independent contractor could effectively perform the subsidiary's services. *Id.* at 922 n.13; *see also* Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1084 (E.D. Pa. 1992). A literal reading of the but-for test quoted in recent Ninth Circuit decisions would significantly undermine the purpose of the agency test. *See* 644 F.3d at 921-22 & n.13. The court reasoned that because large corporations can delegate most of their necessary services to other subsidiaries or contractors, such a misinterpretation of the test would "make little sense in a complex global economy." *Id.* at 922 n.13. The agency test's purpose is to determine the importance of the services, not whether only one particular subsidiary or representative can perform those services. *See id.* To avoid further confusion, the court accepted the sufficient-importance test as the decisive test and refrained from applying the but-for test. *See id.*

test.[40]

The court then examined the element of control by analyzing the issue under the principles of traditional common-law agency.[41] Reiterating the distinction between the agency and alter-ego tests, the court emphasized that in an agency-test analysis, control is weighed with less significance than the sufficient-importance element.[42] The Ninth Circuit held that a parent corporation need only exercise the right to control the subsidiary, rather than exercise day-to-day control over its operations.[43] Highlighting the General Distributor's Agreement between DCAG and MBUSA, the court held that it was evident that DCAG reserved the right to exercise control over nearly every aspect of MBUSA's operations.[44] The Ninth Circuit then evaluated the reasonableness of exercising general jurisdiction over DCAG and determined that, due to DCAG's extensive presence and earnings of revenue in the United States through MBUSA, any sovereignty or convenience arguments were insufficient to outweigh the exercise of jurisdiction.[45] In concluding its opinion, the Ninth Circuit stressed that the realistic nature of its agency test is necessary to adapt to an "increasingly complex and globalized economy," as it held that MBUSA was

40. 644 F.3d at 922 (holding MBUSA's services satisfy first element of agency test). The court noted the importance of DCAG's charter defining its goals as the "'development, manufacture, and *sales* of products.'" *Id.* (citation omitted). Because MBUSA's sales in the United States accounted for 19% of Mercedes-Benz vehicles sold worldwide, and 2.4% in California alone, the court concluded that DCAG could not afford to be without a United States distribution system. *Id.* By emphasizing the language in the sufficient-importance tests employed by *Doe v. Unocal Corp.* and *Wiwa v. Royal Dutch*, the court focused on the economic integration and functional relationship of the corporation, rather than on the mechanics of its structure. *See id.*

41. *Id.* at 922-24.

42. *Id.* at 922 (explaining agency and alter-ego tests involve consideration of distinct factors). The court distinguished its analysis in *Bauman* from *Kramer Motors, Inc.* by noting that the alter-ego test requires a showing that the parent controls the subsidiary "to such a degree as to render the latter the mere instrumentality of the former." *See id.* at 922 n.14 (quoting Doe v. Unocal Corp., 248 F.3d 915, 926 (9th Cir. 2001)) (internal quotation marks omitted). The agency test, however, does not require control to such an extent. *See id.* at 922. Indeed, the court pointed to *Wiwa v. Royal Dutch* as evidence that the Second Circuit does not even require evidence of control over the parent's representative. *See id.* at 923.

43. *Id.* at 923-24. The court looked to the Third Restatement of Agency to hold that the parent corporation only needs to have the right to control its representative, not exercise day-to-day control. *Id.* Additionally, the court cited a recent Ninth Circuit decision that stressed the same point: the agent must manifest assent to the principal's right to control the agent. *Id.* at 923 (citing *Bonds* where court held principal needs right to control agent for agency relationship); *see also* United States v. Bonds, 608 F.3d 495, 506 (9th Cir. 2010).

44. *See supra* note 18 (outlining agreement between DCAG and MBUSA).

45. 644 F.3d at 925-30 (citing MBUSA's substantial contacts and DCAG's presence through MBUSA as reasons for disregarding reasonableness). The court concluded that general jurisdiction was reasonable because DCAG is a complex multinational corporation with extensive ties to the United States, and California has become a major hub for world commerce. *Id.* at 925. The court also looked to the case of *Wiwa v. Royal Dutch*, in which the Second Circuit reasoned, "[Foreign corporations] have access to enormous resources, face little or no language barrier, have litigated in this country on previous occasions . . . . We conclude that the inconvenience to the defendants involved in litigating in New York City would not be great . . . ." *Id.* at 930 (quoting Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 99 (2d Cir. 2000).

DCAG's agent for the purposes of attributing jurisdiction.[46]

The Ninth Circuit properly refined the agency test to provide clarity to a confused circuit with inconsistent holdings.[47] A survey of the various forms and applications of jurisdictional attribution indicates that many jurisdictions have been adapting their personal-jurisdiction tests to efficiently and fairly adjudicate claims against large, complex corporations.[48] The court correctly applied the sufficient-importance test because it adheres to the Second Circuit's underlying purpose in employing the test: recognition of economic integration and the delegation of services that are essential to a parent corporation's business.[49] By articulating the meaning of the but-for test, the court properly demonstrated the purpose of the test because the cases employing the test emphasize the subsidiary's importance, not its unique qualities.[50] If the but-for test is improperly applied—as it was in *Bauman* at the district court level—multinational corporations would be insulated from jurisdiction in many of the states where they conduct business.[51]

Furthermore, the Ninth Circuit properly concluded that MBUSA's services are sufficiently important to DCAG because DCAG could not afford to abandon the United States market.[52] Unlike in *Unocal*, where the defendant's subsidiaries were merely holding its assets, MBUSA was distributing and selling DCAG's vehicles, which is an important and essential part of DCAG's business.[53] As federal courts have noted, a subsidiary that merely holds stock

46. *Id.* at 931.

47. *See* Bauman v. DaimlerChrysler AG, No. C-04-00194, 2005 WL 3157472, at *12 (N.D. Cal. Nov. 22, 2005) (finding no agency relationship under literal interpretation of Ninth Circuit's but-for test), *rev'd sub nom.* Bauman v. DaimlerChrysler Corp., 644 F.3d 909 (9th Cir. 2011); *see also* Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980) (holding no agency relationship because of lack of day-to-day control over representative); *supra* notes 11-12 and accompanying text (explaining district court's reasoning in *Bauman*).

48. *See supra* notes 22-25 and accompanying text (outlining progression of jurisdictional attribution and adaptation to complex corporations); *see also Modern Corporation Law*, *supra* note 2, at 605-15 (explaining focus on enterprise law supplementing entity law in reaction to emergence of modern corporations).

49. *See supra* notes 27-29 (describing New York agency doctrine and purpose behind its established tests).

50. *See supra* note 33 (explaining but-for test established by *Gallagher*).

51. *See* CORPORATE GROUPS, *supra* note 2, at 29-33 to -34 (explaining concern regarding jurisdictional insulation). A deeper principle is involved in applying agency theory. *See id.* A finding of an agency relationship between a parent corporation and its representative will prevent the jurisdictional insulation that many corporations attempt to create. *See id*; *see also* Brilmayer & Paisley, *supra* note 2, at 14-30 (asserting disregard of separate-entity status and shifting responsibility prevents jurisdictional insulation).

52. *See* Wiwa v. Royal Dutch Petrol. Co., 226 F.3d 88, 95-96 (2d Cir. 2000) (citing importance of subsidiary to parent by emphasizing exclusive relationship and amount invested in subsidiary). Additionally, in *Wiwa*, the Second Circuit held that the sufficient-importance test was satisfied because of the importance of the United States market and the defendant-corporation's need to access capital markets. *Id.* at 96-97.

53. *See* Doe v. Unocal Corp., 248 F.3d 915, 929-30 (9th Cir. 2001) (holding no agency relationship exists between parent corporation and subsidiary holding company). The *Unocal* court reasoned that holding-company subsidiaries do not perform any services or activities for the parent. *Id.* They simply hold assets and do not serve any other function. *Id.* Merely holding the assets of a parent and not representing it in any other

in a parent company can do so in any jurisdiction; therefore, attribution of the subsidiary's contacts to the parent would be inappropriate.[54] In contrast, where a subsidiary engages in meaningful activity in a forum on the parent's behalf, attributing its contacts to the parent satisfies due process because the parent has chosen to make such contacts through the use of a subsidiary.[55] While it may be common sense that the United States market is not one that foreign corporations would likely abandon, the decisions addressing this issue—whether or not the defendant-corporation would perform its representative's services "*if it had no representative at all* to perform them"—are decided in a discretionary manner, and therefore neither a clear standard nor consistency has emerged.[56]

Although the Ninth Circuit accurately applied the well-established sufficient-importance element, there is authority that contradicts the circuit's rather relaxed application of the element of control.[57] Case law that includes decisions from the Ninth Circuit has recognized that for jurisdiction to be attributed to a parent corporation, the parent must exercise extensive, day-to-day control over its subsidiary.[58] Nevertheless, the court's requirement of the right to control the subsidiary is a creditable addition to synthesize the authority and comport with the "traditional notions of fair play and substantial justice."[59]

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manner does not "substitute[] for the presence of the principal." *Id.* (quoting Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322, 1342 (E.D.N.Y. 1981)) (internal quotation marks omitted); *see also supra* notes 12, 17-18 (describing relationship between MBUSA and DCAG).

54. *See* Doe v. Unocal Corp., 248 F.3d 915, 929-30 (9th Cir. 2001) (determining holding company's assets, without more, does not satisfy agency test); *see also* Harris Rutsky & Co. Ins. Servs. v. Bell & Clements Ltd., 328 F.3d 1122, 1135 (9th Cir. 2003); Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1405 (9th Cir. 1994); Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 422-23 (9th Cir. 1977); Gallagher v. Mazda Motor of Am., Inc., 781 F. Supp. 1079, 1084 (E.D. Pa. 1992); *cf.* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475-76 (1985) (holding defendant must purposefully avail himself of forum's benefits of conducting business); *supra* note 23 (describing purposeful-availment requirement for personal jurisdiction).

55. *See supra* notes 27-29 (describing sufficient-importance test and purpose behind its application).

56. 644 F.3d at 921. *Compare* Chan v. Soc'y Expeditions, Inc., 39 F.3d 1398, 1405-06 (9th Cir. 1994) (holding sufficiently important because sales agent marketed tickets to parent's products), *with* Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406, 424 (9th Cir. 1977) (holding sufficiently important because subsidiary mere department of parent), *and* Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 120-21 (2d Cir. 1967) (determining jurisdiction appropriate over tour operator based on activities of affiliated travel agent).

57. *See* Bauman v. DaimlerChrysler Corp., No. 07-15386, 2011 WL 5402020, at *2 n.3 (9th Cir. Nov. 9, 2011) (O'Scannlain, J., dissenting) (stressing agency test requires high degree of control amounting to day-to-day control); Doe v. Unocal Corp., 248 F.3d 915, 928 (9th Cir. 2001) (holding typical agency relationships involve parental control of subsidiary's internal affairs or daily operations); Kramer Motors, Inc. v. British Leyland, Ltd., 628 F.2d 1175, 1177 (9th Cir. 1980) (holding facts insufficient to satisfy agency theory because parent lacked control over day-to-day operations); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 52 cmt. b (1971) (stating parent must control subsidiary to disregard subsidiary's independent existence). Additionally, recent state court decisions have held that extensive control by a parent corporation over its representative must be shown when applying the agency test. *See* Rasmussen v. Gen. Motors Corp., 803 N.W.2d 623, 634-35 (Wis. 2011) (holding no agency relationship absent control by parent effectuating disregard of separate corporate identities).

58. *See supra* note 57 (citing authority requiring day-to-day control to satisfy agency test).

59. Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457,

Despite the Ninth Circuit's proper analysis of agency-theory case law, this area of the law is still crying out for clarity and would greatly benefit from a Supreme Court standard.[60] Until the Supreme Court issues an opinion on jurisdictional attribution, *Bauman v. DaimlerChrysler Corp.* could discourage foreign corporations from doing business in the United States for fear of being susceptible to American justice for their unrelated actions abroad.[61]

In *Bauman v. DaimlerChrysler Corp.*, the Ninth Circuit considered whether courts can constitutionally exercise general jurisdiction over a foreign corporation because it has a wholly owned subsidiary with extensive contacts in the forum state. The court held that a subsidiary is a foreign corporation's agent for jurisdictional purposes if the subsidiary's services are sufficiently important to the parent corporation and the parent has the right to substantially control the subsidiary's operations. Although the Ninth Circuit properly synthesized and applied the agency theory of jurisdictional attribution, the consequences of the decision may deter foreign investment and will likely invite a ruling by the Supreme Court to finally articulate a rule for this inconsistent area of American jurisprudence.

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463 (1940)) (internal quotation marks omitted); *see supra* notes 20, 22-23, 34 and accompanying text (describing due process requirements and different forms of control required).

60. *See* Bauman v. DaimlerChrysler Corp., No. 07-15386, 2011 WL 5402020, at *4 (9th Cir. Nov. 9, 2011) (O'Scannlain, J., dissenting) ("[T]his case presents a question of substantial importance where a uniform rule is desirable . . . ."); Hoffman, *supra* note 2, at 1026-27 (criticizing inconsistency of jurisdictional-attribution doctrines); Knudsen, *supra* note 29, at 945 (calling for consistent standard and revision of jurisdictional-attribution doctrines); *supra* note 25 (describing split in application of jurisdictional-attribution doctrines across American legal field).

61. *See* Bauman v. DaimlerChrysler Corp., No. 07-15386, 2011 WL 5402020, at *2 (9th Cir. Nov. 9, 2011) (O'Scannlain, J., dissenting) (noting *Bauman* decision "threatens to make innumerable foreign corporations unconstitutionally subject to general personal jurisdiction in our courts."); Hoffman, *supra* note 2, at 1081-82 (emphasizing use of ambiguous doctrine leads to unpredictable litigation and behavior by businesses). Hoffman warns of the burdens on businesses as more courts adopt similar doctrines and liberally apply them without clear consistency. *See id.*; *cf.* Weintraub, *supra* note 25, at 542-44 (discouraging use of jurisdictional attribution to settle claims of injuries at hotels and resorts). Furthermore, the dissent from the denial of rehearing en banc in *Bauman* also noted that the majority's decision may have unpredictable effects on foreign policy and international comity. *See* Bauman v. DaimlerChrysler Corp., No. 07-15386, 2011 WL 5402020, at *4 (9th Cir. Nov. 9, 2011) (O'Scannlain, J., dissenting) (arguing excessive assertion of general jurisdiction potentially threatens United States' foreign trade and diplomatic interests).