No. 07-15386

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BARBARA BAUMAN ET AL.,
Plaintiffs/Appellants,

v.

DAIMLERCHRYSLER AG,
Defendant/Appellee.

On Appeal from the United States District Court
for the Northern District of California
Case No. 04-194 RMW
Opinion Filed May 18, 2011
(Schroeder, D. Nelson, Reinhardt)

BRIEF FOR THE FEDERATION OF GERMAN INDUSTRIES AND THE ASSOCIATION OF GERMAN CHAMBERS OF INDUSTRY AND COMMERCE AS *AMICI CURIAE* IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* Federation of German Industries and Association of German Chambers of Industry and Commerce are not corporations as understood by American law. Neither of the *amici* has a parent corporation, and no publicly held corporation owns 10% or more of the stock in either of them.

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STATEMENT OF *AMICI* INTEREST[1]

Amici represent the interests of German business and industry. The Federation of German Industries (Bundesverband der Deutschen Industrie) serves as the umbrella organization for associations of industrial businesses and industry-related service providers in Germany. The Association of German Chambers of Industry and Commerce (Deutscher Industrie- und Handelskammertag, or "DIHK") is the umbrella organization of all 80 regional Chambers of Industry and Commerce in Germany, representing the interests of the entire German economy regardless of the specific individual interests of any particular trade. DIHK coordinates the network of German Chambers of Commerce abroad, including in the United States. *Amici* represent 3.6 million businesses of all sizes that employ millions of people.

The panel's novel conception of "agency"—and unprecedented use of that concept to work a breathtaking expansion of "general" personal jurisdiction—are of profound concern to the German businesses that *amici* represent, including German corporations that have direct or indirect U.S. subsidiaries or have entered

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[1] The parties have consented to the filing of this *amicus* brief. Under Fed. R. App. P. 29(c)(5), *amici curiae* state that no counsel for a party wrote this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than the *amici curiae*, their members, or their counsel, has made a monetary contribution to this brief's preparation or submission.

into standard distributorship agreements of the kind involved in this case (which, characteristically as here, specifically *disclaim* any agency relationship between product manufacturer and distributor). If permitted to stand, the panel's flawed analysis will upend the settled expectations of foreign manufacturers that serve U.S. markets through ordinary distributorship arrangements, chill foreign investment in and trade with the United States, and ultimately harm U.S. manufacturers that sell abroad through foreign distributors by eliciting reciprocal and retaliatory treatment by the courts of other countries.

ARGUMENT

In withdrawing its original opinion and replacing it with a revised opinion that reaches the opposite result, the panel radically diluted the due process protections afforded to foreign corporations against unwarranted assertions of "general" personal jurisdiction. The panel accomplished that result in two steps. First, it announced an unprecedented theory of "agency" jurisdiction that not only conflicts with Circuit (and Supreme Court) precedent but also is extremely far-reaching (because its supposed limits turn out, on examination, to be illusory). Second, the panel proceeded to extend its novel concept of "agency jurisdiction" beyond the realm of *specific* personal jurisdiction—in which jurisdiction would be asserted over a principal based on its agent's forum activities with respect to legal claims that

specifically arise out of those activities—to the traditionally far more restrictive realm of *general* jurisdiction.

Each step in this analysis was mistaken. Nor can the panel's analysis be reconciled with the Supreme Court's recent decision in *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, No. 10-76, 2011 WL 2518815, at *3 (U.S. June 27, 2011), which made clear that the exercise of general jurisdiction "over foreign (sister-state or foreign-country) corporations" is strictly limited by the Due Process Clause to instances where the foreign company's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." Contrary to the panel's conclusion, a foreign manufacturer's decision to form a relationship with a product distributor who is "essentially at home in the forum," even if that distributor (unlike here) qualifies as a true agent, simply cannot meet the exacting standard for asserting *general* jurisdiction over the foreign manufacturer.

Rehearing by the panel or, failing that, by the full Court is needed to eliminate the serious conflicts created by the panel's decision with other decisions of this Court, the Supreme Court, and other circuits, as well as to correct the panel's glaring errors on legal questions of surpassing importance to *amici*'s members and other foreign companies that serve the U.S. market.

I. THE PANEL'S REVISED OPINION CONFLICTS WITH DECISIONS OF THE SUPREME COURT, THIS COURT, AND OTHER CIRCUITS HOLDING THAT THE CONTACTS OF A SUBSIDIARY MAY BE ATTRIBUTED TO ITS PARENT *ONLY* IF THE SUBSIDIARY IS THE PARENT'S ALTER EGO

A. The Contacts Of A Subsidiary May Not Be Attributed To Its Parent Unless The Corporate Separation Is "Pure Fiction"

The panel's revised opinion is squarely at odds with the Supreme Court's decision in *Cannon Mfg. Co.* v. *Cudahy Packing Co.*, 267 U.S. 333 (1925), which held that the maintenance of corporate formalities precludes the exercise of personal jurisdiction over a foreign parent based on its subsidiary's forum contacts. In *Cannon*, the plaintiff sued a Maine corporation in North Carolina for breach of contract. The plaintiff served the complaint on a wholly owned subsidiary of the Maine corporation that had an office in North Carolina and, notably, was "the instrumentality employed to market [the parent's] products within the state." *Id.* at 335. Even though it found that the parent "dominate[d]" the subsidiary "immediately and completely," the Supreme Court refused to disregard the "corporate separation" so "carefully maintained" through the keeping of separate books and the observance of all corporate formalities. *Id.* at 335-36. "The corporate separation," the Court reasoned, "though perhaps merely formal, was real. *It was not pure fiction*." *Id.* at 337 (emphasis added).

This Court has long interpreted *Cannon* to stand for the proposition that the contacts of a subsidiary may not be attributed to its parent so long as the companies

maintain separate and distinct corporate existences. In *Transure, Inc.* v. *Marsh & McLennan, Inc.*, 766 F.2d 1297 (9th Cir. 1985), for example, the plaintiff sued a Delaware corporation in California on the theory that the Delaware corporation was the parent of a company that did business in California. Applying *Cannon*, this Court held that the subsidiary's contacts could not be attributed to the parent for purposes of establishing personal jurisdiction: "While Transure has pointed to various factors which indicate that [the parent] exercises some control over [the subsidiary], '[t]he corporate separation, though perhaps merely formal, [is] real.'" *Id.* at 1299 (quoting *Cannon*, 267 U.S. at 337); accord *Fields* v. *Sedgwick Associated Risks, Ltd.*, 796 F.2d 299, 302 (9th Cir. 1986) ("[A] parent corporation's ties to a forum do not create personal jurisdiction over the subsidiary").

As the panel recognized, a subsidiary's contacts may be attributed to its parent where there is "such unity of interest and ownership that the separate personalities of the two entities no longer exist." Slip op. at 6576 (internal quotation marks omitted). But that "alter ego" theory is entirely consistent with *Cannon* and *Transure*'s exclusive focus on the maintenance of corporate formalities. In cases involving general jurisdiction, which requires that a corporate defendant be incorporated in the forum or otherwise "at home" there (*Goodyear*, 2011 WL 2518815, at *3), if a subsidiary is truly the alter ego of the parent, then the parent *is* effectively present—and therefore amenable to suit—wherever its subsidiary is

present. But where the corporate separation is "real," the forum presence and contacts of the subsidiary may not be attributed to the parent company (even in cases where the subsidiary is a true agent of the parent). That rule also flows from *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 781 n.13 (1984), which reaffirmed the holding of *Consolidated Textile Corp.* v. *Gregory*, 289 U.S. 85 (1933), that sales through a subsidiary in the forum failed to render the parent "present" there—even though the subsidiary was "wholly controlled by" as well as "an agent of" the parent. *Id.* at 88.

In this case, it is undisputed that defendant Daimler AG (formerly known as DaimlerChrysler AG) and its indirect subsidiary and distributor, Mercedes Benz USA ("MBUSA"), are separate and distinct corporate entities that have faithfully maintained all corporate formalities. By upholding the exercise of jurisdiction over Daimler AG in California based solely on MBUSA's California contacts, then, the revised opinion violates the rules of attribution enunciated in *Cannon* and adopted by this Court in *Transure*—decisions that the revised opinion neglected even to cite.

Notably, the panel's revised opinion also creates conflicts with decisions of other circuits recognizing the alter ego theory as the *sole* basis upon which a subsidiary's forum contacts may be attributed to a parent company. In the Fifth Circuit, for example, it is "well-settled that where, as here, a wholly owned subsidiary is operated as a distinct corporation, its contacts with the forum *cannot be*

imputed to the parent." *Southmark Corp.* v. *Life Investors, Inc.*, 851 F.2d 763, 773-74 (5th Cir. 1988) (emphasis added). That is because "*Cannon* . . . stands for the proposition that so long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other." *Hargrave* v. *Fibreboard Corp.*, 710 F.2d 1154, 1160 (5th Cir. 1983). Other Circuits have reached the same conclusion.[2]

These decisions reflect "[a] basic tenet of American corporate law," namely "that the corporation and its shareholders are distinct entities." *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 474 (2003). They also effectuate the Supreme Court's teaching that, under the Due Process Clause, "[e]ach defendant's contacts with the forum State must be assessed individually." *Keeton*, 465 U.S. at 781 n.13. "Where two corporations are in fact separate"—as they irrefutably are here—"permitting the activities of the subsidiary to be used as a basis for personal jurisdiction over the parent violates this principle and thus due process." *Central States, Se. & Sw. Areas Pension Fund* v. *Reimer Express World Corp.*, 230 F.3d 934, 944 (7th Cir. 2000).

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[2] See, *e.g.*, *Consol. Dev. Corp.* v. *Sherritt, Inc.*, 216 F.3d 1286, 1293 (11th Cir. 2000) ("It is well established that as long as a parent and a subsidiary are separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other"); *Central States, Se. & Sw. Areas Pension Fund* v. *Reimer Express World Corp.*, 230 F.3d 934, 944 (7th Cir. 2000) (attribution of contacts impermissible "where corporate formalities are substantially observed and the parent does not dominate the subsidiary").

Rehearing is warranted to bring the panel's decision into conformity with these controlling legal principles and precedents.

B. The Panel's Revised Opinion Fails To Take Account Of The Crucial Distinction Between General And Specific Personal Jurisdiction

As the Supreme Court recently reaffirmed, personal jurisdiction comes in two forms: specific and general. *Goodyear*, 2011 WL 2518815, at *3-4, *8-10. The standard for establishing *general* jurisdiction is far more exacting than that applied to specific jurisdiction. And for good reason: unlike specific jurisdiction, general jurisdiction allows *any* claim to be asserted against a defendant, even if that claim is, as here, completely unrelated to the defendant's forum contacts. Accordingly, a court may exercise general jurisdiction over foreign defendants only "when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." *Id.* at *3.

That strict corporate "presence" requirement cannot be established merely by a foreign corporation's act of engaging a person or entity that is itself "at home in the forum" to act there on the foreign corporation's behalf for limited or specific purposes (such as the sale of products)—and certainly not by the type of vague and expansive agency test adopted by the panel. Thus, a German or French corporation with no contacts with Alaska or Guam does not suddenly become a resident of those jurisdictions (susceptible to lawsuits there on any conceivable claim) by engaging a collection agency that is based in Alaska or Guam (or incorporated

there) to assist with the collection of accounts receivable. The principle is even more obvious when one considers a scenario in which the agent is an individual. If the same German or French corporation engages a real estate agent in Anchorage or Hagåtña to rent temporary office space during an upcoming convention, does the fact that the agent is a resident of Alaska or Guam thereby render the foreign company "present" there as well and thus subject to general jurisdiction? Of course not. Nor do D.C. corporations with their operations in the District of Columbia automatically become present and subject to general jurisdiction in Virginia and Maryland by hiring employees (agents of the corporation) who happen to reside in those jurisdictions.[3]

Numerous courts have recognized that, as high as the threshold is ordinarily to establish general jurisdiction, "[t]he bar is set *even higher* in a case like this one, in which plaintiffs seek to disregard the corporate form." *Negron-Torres* v. *Verizon Communications, Inc.*, 478 F.3d 19, 27 (1st Cir. 2007) (declining to pierce the corporate veil to find general jurisdiction over a parent corporation) (emphasis added; quotation marks omitted). Thus, even if a true agency relationship could in certain circumstances support *specific* jurisdiction over a foreign parent (an issue not presented in this case), such a relationship is plainly insufficient to satisfy the

[3] For that reason, courts have recognized that even appointing a registered agent for service of process is insufficient "to establish general personal jurisdiction over a

more stringent *general* jurisdiction standard of corporate "presence" in the forum. See *Thomson* v. *Toyota Motor Corp. Worldwide*, 545 F.3d 357, 363 (6th Cir. 2008) (rejecting general jurisdiction over a foreign automobile manufacturer because the manufacturer and its subsidiary were not alter egos).

The Supreme Court's recent decision in *Goodyear* underscores the stringent limitations that due process places on the exercise of general jurisdiction. In words that apply with equal force to the panel's analysis, the Court there expressly rejected a "sprawling view of general jurisdiction" under which "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed." *Goodyear*, 2011 WL 2518815, at *9; see also *J. McIntyre Mach., Ltd.* v. *Nicastro*, No. 09-1343, 2011 WL 2518811, at *6 (U.S. June 27, 2011) (opinion of Kennedy, J.) ("[T]hose who live or operate primarily outside a State have a due process right not to be subjected to judgment in its courts as a general matter."). By adopting a novel and expansive concept of "agency," the panel has accomplished the same result unanimously rejected in *Goodyear*.

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corporation." *Consol. Dev. Corp.*, 216 F.3d at 1293 (citing multiple cases).

II. THE PANEL'S NOVEL "AGENCY JURISDICTION" THEORY VIOLATES PRINCIPLES OF AGENCY LAW RECOGNIZED BY THIS COURT, IGNORES COMMERCIAL REALITIES, AND IS VIRTUALLY LIMITLESS IN SCOPE

A. MBUSA Is Not Daimler AG's Agent

Even if an agency relationship might support the assertion of personal jurisdiction in some circumstances, the agency test adopted by the panel is deeply flawed—and contrary to this Court's precedent. The panel concluded that MBUSA qualifies as Daimler AG's agent on the sole grounds that MBUSA performed activities of "special importance" to Daimler AG and Daimler AG possessed the right to control *some* aspects of those activities. In reaching that conclusion, the panel ignored not only black-letter agency law but also undisputed record evidence clearly refuting the existence of any agency relationship.

This Court has recognized that "the two distinctive elements of an agency relationship" are that "(1) the agent acts on behalf of his principal and (2) the agent has the power to bind the principal." *Stansifer* v. *Chrysler Motors Corp.*, 487 F.2d 59, 65 (9th Cir. 1973); see also *Commissoner* v. *Bollinger*, 485 U.S. 340, 346-47 (1988) (in determining whether an entity is the "true corporate agent . . . of [an] owner-principal," the Court looks to whether the entity "binds the principal by its actions") (quotation marks omitted). Significantly, the "General Distributor Agreement" between Daimler AG and MBUSA negates *both* of those requirements. It expressly provides that MBUSA has "*no authority to make binding obligations for*

or act on behalf of DAIMLERCHRYSLER." Agreement Art. 11.1(2) (emphasis added); see also *id.* at Art. 11.1(1) (providing that MBUSA is an "independent contractor[]" that "shall buy and sell Contract Goods . . . as an independent business for [its] own account" and shall *not* serve as "a general or special agent, partner, joint venturer, or employee" of Daimler AG). These provisions—which the revised opinion never mentions—are fatal to the panel's conclusion that MBUSA is Daimler AG's agent.

Nor is this all. In a true sales agency relationship, "title passes directly from the [producer] to [the ultimate] purchasers" of the product, bypassing the agent completely. *United States* v. *Gen. Elec. Co.*, 272 U.S. 476, 484 (1926); see also *Stansifer*, 487 F.2d at 65 (finding no agency relationship where, among other things, an automobile distributor obtained title from the manufacturer). Here, however, as the panel recognized in its original opinion but neglected to mention in its revised opinion, Daimler AG "sells its vehicles . . . to MBUSA in Germany, where title passes" to MBUSA. *Bauman* v. *DaimlerChrysler Corp.*, 579 F.3d 1088, 1092 (9th Cir. 2009) ("*Bauman I*") (withdrawn opinion).

Finally, in determining whether an agency relationship exists this Court routinely looks to contractual provisions either establishing or disclaiming such a relationship. See *Gravely Motor Plow & Cultivator Co.* v. *H.V. Carter Co.*, 193 F.2d 158, 160 (9th Cir. 1951) (relying on fact that the "contract specifically provides

that 'the distributor'" is "not the agent of" the manufacturer); *Stansifer*, 487 F.2d at 64. Such evidence is important under well-settled principles of agency law. See RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act."). As noted above, the General Distributor Agreement in this case could hardly be clearer: it emphatically states that it "does *not* make" MBUSA either "a general or [a] special agent" of Daimler AG. Agreement Art. 11.1(1) (emphasis added). Although the panel acknowledged that the Agreement was a "critical legal document that defines [Daimler AG's] relationship with MBUSA," and therefore "discuss[ed]" the Agreement's "provisions at some length" (see slip op. at 6565-70), it made no mention of the critical provision expressly disclaiming an agency relationship.[4]

In addition to ignoring crucial terms of the Agreement and settled principles of agency law, the panel's opinion disregards commercial realities. As its name suggests, the "General Distributor Agreement" between Daimler AG and MBUSA bears all of the hallmarks of a typical arms-length distributorship agreement and

[4] The revised opinion also fails to acknowledge that "MBUSA had the power to independently decide against buying [Daimler AG's] G-Class vehicles in California"—a power that is utterly inconsistent with an agency relationship. *Bauman I*, 579 F.3d at 1096.

none of the characteristics of an agency relationship. See 1 W. GARNER, FRANCHISE & DISTRIBUTION LAW & PRACTICE § 1:29, at 1-39 (2008) (in distinguishing a distributor from an agent, explaining that the latter "represents the supplier and stands in its shoes," "usually does not have a separate legal identity from that of the supplier," "is responsible for . . . collecting the purchase price" for the supplier, "does not bear the risk of loss of the product or of collection from the customer," and is "compensated through a salary and commission"); *id.* § 3:6, at 3-14 (noting that a "dealer or distributor agreement usually provides that the dealer is an independent contractor and that neither party is the agent of the other for any purpose."). The panel's conclusion that MBUSA is Daimler AG's "agent" flies in the face of settled commercial practices and widespread understandings of what constitutes a distributorship or dealer relationship as opposed to an agency relationship.

B. The Panel's Expansive Agency Test Lacks Meaningful Limitations

As Daimler AG demonstrates in its rehearing petition (at 10-15), the panel's decision expands in several key ways upon this Circuit's concept of "agency jurisdiction" as articulated in *Doe* v. *Unocal Corp.*, 248 F.3d 915 (9th Cir. 2001) (per curiam). Thus, the panel announces that in order to satisfy the "special importance" test, which supposedly serves as a limit on agency jurisdiction, a plaintiff need only show that the services performed by the local entity are

"sufficiently important to the foreign entity" that "they would almost certainly be performed by other means" if the local entity did not exist. Slip op. at 6579 (quotation marks omitted). But that "test" establishes no limitation at all. *Anything* a corporation does through an independent contractor, subsidiary, or distributor is presumably something that the corporation would do "by other means" if the independent contractor, subsidiary, or distributor did not exist. *Ibid.*

For example, if a corporation currently contracts for cleaning services, it would presumably have to find another contractor to clean its offices if its current contractor became unavailable. The same is true for product distributors: if a company uses a distributor to sell its products, it clearly *wants* to sell those products. If the distributor ceased to exist, then, the manufacturer would undoubtedly seek another distributor to sell its products—or attempt to do so itself. That tautological reasoning formed the entire basis of the revised opinion's two-paragraph analysis of the issue: because Daimler AG wants to sell cars, any distributor that helps it do so is necessarily of "special importance" and therefore an entity whose forum contacts can be converted to Daimler AG's under the agency jurisdiction theory.

The implication of that analysis, of course, is that every distributor—and indeed every independent contractor or subsidiary—passes the first prong of the panel's reformulated agency test. That means that all the work in the agency test is

done by the "control" prong. But the revised opinion eviscerated that requirement too, holding that actual control over a subsidiary's daily activities is unnecessary to establish an agency relationship. Rehearing is warranted because that holding squarely conflicts with this Court's precedents. See *Doe*, 248 F.3d at 926; *Kramer Motors, Inc.* v. *British Leyland, Ltd.*, 628 F.2d 1175, 1177 (9th Cir. 1980) (per curiam).

III. THE ISSUES PRESENTED BY THIS CASE ARE OF EXCEPTIONAL IMPORTANCE TO BOTH FOREIGN AND DOMESTIC CORPORATIONS AS WELL AS TO CONSUMERS

If left uncorrected, the panel's expansive agency theory—and extension of that theory to the doctrine of general jurisdiction—will have a detrimental impact on U.S. foreign relations and international trade as well as on U.S. companies and consumers. In *Goodyear*, the Solicitor General of the United States recently cautioned that the excessive assertion of *general* jurisdiction by American courts "may dissuade foreign companies from doing business in the United States, thereby depriving United States consumers of the full benefits of foreign trade." No. 10-76 Brief for the United States as *Amicus Curiae* Supporting Petitioners, at 12. The panel's decision in this case raises the same risk.

The international community has long lamented seemingly lax U.S. rules regarding personal jurisdiction. See Twitchell, *Why We Keep Doing Business With Doing-Business Jurisdiction*, 2001 U. CHI. LEGAL F. 171, 173 (2001). If those

rules are diluted further by the vague and expansive "agency" theory adopted by the panel, it is likely that foreign countries will retaliate by imposing similar rules that would subject U.S. companies to general jurisdiction even though they operate solely through independent contractors or subsidiaries in those countries. See Born, *Reflections on Judicial Jurisdiction in International Cases*, 17 GA. J. INT'L & COMP. L. 1, 29 (1987) ("Because exorbitant assertions of judicial jurisdiction by United States courts may offend foreign sovereigns, these claims can provoke diplomatic protests, trigger commercial or judicial retaliation, and threaten friendly relations in unrelated fields."). Faced with such reciprocal treatment, some U.S. product manufacturers would no doubt elect simply to stop serving markets where they cannot tolerate being subjected to general jurisdiction, with negative ramifications for the U.S. economy and international commerce.

Finally, although the revised opinion casually dismissed the concern expressed by German courts that this suit may impinge upon German sovereignty, Slip op. at 6587, the Solicitor General in *Goodyear* recently noted that "foreign governments' objections to our state courts' expansive views of general personal jurisdiction have in the past impeded negotiations of international agreements on the reciprocal recognition and enforcement of judgments." No. 10-76 U.S. Br. 33. These serious concerns should not have been brushed aside. See *Asahi Metal Industry Co.* v. *Superior Court of California*, 480 U.S. 102, 115 (1987) (instructing

courts to consider the "Federal interest in Government's foreign relations policies").

CONCLUSION

The Court should grant rehearing or rehearing en banc.

Respectfully submitted.

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CERTIFICATION OF COMPLIANCE

1. This brief complies with Circuit Rule 29-2(c) and Fed. R. App. P. 32 because this brief contains 4066 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2003 in 14-point Times New Roman.

Dated: July 8, 2011

Respectfully submitted,

/s/ Alan Untereiner

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have caused the foregoing document to be mailed by Federal Express to the following non-CM/ECF participant:

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