No.

In the Supreme Court of the United States

THE BANK OF NEW YORK MELLON,

Petitioner,

v.

AMERICAN FIDELITY ASSURANCE CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIOTARI

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QUESTION PRESENTED

Whether, under this Court's decision in *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014), personal jurisdiction may be asserted over a corporate defendant only in the defendant's place of incorporation or principal place of business, except in extraordinary circumstances.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states the following:

Petitioner The Bank of New York Mellon is a wholly-owned subsidiary of The Bank of New York Mellon Corp., a Delaware corporation that is a publicly held company. No publicly held company owns 10% or more of The Bank of New York Mellon Corp.'s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Bank of New York Mellon respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The decision of the Tenth Circuit (App., *infra*, 1a-18a) is reported at 810 F.3d 1234. The decisions of the United States District Court for the Western District of Oklahoma (*id.* at 19a-39a) are unreported.

JURISDICTION

The judgment of the Tenth Circuit was entered on January 20, 2016. That court denied a timely petition for rehearing on February 29, 2016. This Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of Fourteenth Amendment provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

The Tenth Circuit's decision in this case erred in its treatment of a recurring matter of great practical significance: the rules governing a court's assertion of personal jurisdiction over an out-of-state corporation. In particular, this Court's decision in *Daimler AG* v. *Bauman*, 134 S. Ct. 746 (2014), clarified the law on that subject, holding that, absent extraordinary circumstances, general jurisdiction—that is, jurisdiction to decide *any* claim against the defendant,

even if that claim has nothing at all to do with the forum—may be asserted over a corporate defendant *only* in the defendant's State of incorporation or principal place of business. Here, however, the court of appeals rejected that understanding of *Daimler*, expressly holding that *Daimler* did *not* change the pre-existing general-jurisdiction standard and does *not* stand for the proposition that (absent extraordinary circumstances) general jurisdiction over corporate defendants is proper only in their State of incorporation or principal place of business.

This holding is incorrect. It cannot be reconciled with the plain language of *Daimler*. It conflicts with the decisions of other courts of appeals, including *Gucci Am., Inc.* v. *Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014), and *Brown* v. *Lockheed Martin Corp.*, 814 F.3f 619 (2d Cir. 2016), which have held that *Daimler* did change the law by limiting general jurisdiction over a corporate defendant (in most cases) to its place of incorporation or principal place of business. And by doing so, the Tenth Circuit's decision creates the very sort of confusion, uncertainty, and unpredictability that clear jurisdictional rules are designed to avoid and that this Court in *Daimler* intended to eliminate. Review by this Court is warranted.

1. This case concerns the constitutional rules governing the exercise of personal jurisdiction. "The Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear Dunlop Tires Operations, S.A.* v. Brown, 131 S. Ct. 2846, 2853 (2011). Under the "canonical opinion in this area," *Int'l Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), "a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if

the defendant has certain minimum contacts with [the State] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Daimler*, 134 S. Ct. at 754 (quotation omitted). This limitation on a court's authority "protects [the defendant's] liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful 'contacts, ties, or relations.'" *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 471-472 (1985).

Under this due process doctrine, the Court has recognized "two categories of personal jurisdiction." *Daimler*, 134 S. Ct. at 754. The first, and the one principally at issue in this case, is "general or all-purpose jurisdiction." *Goodyear*, 131 S. Ct. at 2851. Jurisdiction of this sort is present "where a foreign corporation's 'continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings *entirely distinct from those activities*." *Daimler*, 134 S. Ct. at 754 (quoting *Int'l Shoe*, 326 U.S. at 318) (emphasis added). The second form of personal jurisdiction, "specific jurisdiction," exists when "the suit 'aris[es] out of or relate[s] to the defendant's contacts with the forum.'" *Ibid.* (quoting *Helicopteros Nacionales de Colombia, S.A.* v. *Hall*, 466 U.S. 408, 414 n.8 (1984); brackets added by the Court)).

2. Petitioner The Bank of New York Mellon ("BNYM") is a commercial bank and securities services company that has its principal place of business in New York and is organized under the laws of that State. App., *infra*, 2a. It serves as trustee for trusts that held pools of mortgage loans. Respondent American Fidelity Assurance Co. ("American Fidelity") is an insurance company that invested in these trusts.

Ibid. Ultimately, American Fidelity brought this suit against BNYM in the Western District of Oklahoma, contending that BNYM failed to properly execute its duties as trustee. Insofar as is relevant here, American Fidelity's complaint alleged that the court could assert general jurisdiction over BNYM. Although BNYM filed a motion to dismiss, it initially did not seek dismissal of the complaint for lack of jurisdiction; BNYM had engaged in a continuous and systematic course of business in Oklahoma and, in BNYM's view, such continuous and systematic contacts were sufficient to establish general jurisdiction in Oklahoma under then-governing law.[1]

Four days after BNYM filed its answer, however, this Court decided *Daimler*, holding that the defendant in that case was not subject to general jurisdiction in California because it is "not incorporated in California, nor does [it] have its principal place of business there." 134 S. Ct. at 761. BNYM then promptly moved to dismiss this case for lack of personal jurisdiction, arguing that it is not subject to general jurisdiction in Oklahoma under the *Daimler* standard because it is neither incorporated nor has its principal place of business in that State. The district court denied the motion, holding that BNYM had waived the lack-of-jurisdiction defense under Fed. R. Civ. P. 12(h) by failing to assert it in BNYM's initial motion to dismiss; that was so because, in the court's view, "*Daimler* did not create a basis for challenging personal jurisdiction not previously available to [BNYM]." App., *infra*, 33a. But the district court

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[1] As the parties subsequently stipulated, BNYM had engaged in a substantial range of business, and provided numerous services for clients, in Oklahoma. *See* App., *infra*, 4a.

subsequently certified the case for interlocutory appeal, noting that BNYM "has identified authority from other jurisdictions that may support its position that it has not waived the defense of personal jurisdiction because *Daimler* provided new grounds for the defense." *Id.* at 27a.

3. The Tenth Circuit affirmed, holding that *Daimler* had not changed the law, that the same lack-of-jurisdiction argument had been available to BNYM both pre- and post-*Daimler*, and that BNYM accordingly waived the argument by failing to make it in BNYM's initial motion to dismiss. App., *infra*, 1a-18a.

In the court of appeals' view, "the general jurisdiction standard BNYM asserts was the same before and after *Daimler* was decided, and it was therefore available to BNYM from the outset of the litigation." App., *infra*, 6a; see *id.* at 14a-15a. This conclusion rested on two propositions. On the one hand, the court opined that "systematic and continuous" contacts had *not* been thought sufficient, pre-*Daimler*, to establish general jurisdiction. Instead, the court noted that the pre-*Daimler* decision in *Goodyear* "explained [that] general jurisdiction is proper if a corporate defendant's 'affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum.'" App., *infra*, 11a (quoting 131 S. Ct. at 2851). Without explaining just what it is that makes a corporation "at home" in a forum other than continuous and systematic contacts, the court opined that, pre-*Daimler*, "[t]his court ha[d] not permitted, and could not permit under *Goodyear*, general jurisdiction based only on continuous and systematic contacts with the forum." App., *infra*, 15a.

On the other hand, the Tenth Circuit held that *Daimler* neither stated a new rule nor departed in any respect from *Goodyear*. As the court expressly held: "BNYM argues *Daimler* limited general jurisdiction to a corporation's state of incorporation or principal place of business, except in exceptional circumstances not present in this case. * * * *Daimler*, like *Goodyear*, *did not limit general jurisdiction in this manner*." App., *infra*, 14a (emphasis added). "Instead," the court continued, "*Daimler* reaffirmed the *Goodyear* standard: general jurisdiction is proper when a 'corporation's affiliations with the state are so continuous and systematic *as to render [it] at home in the forum state*.'" App., *infra*, 15a (quoting *Daimler*, 134 S. Ct. at 761 (in turn quoting *Goodyear*, 131 S. Ct. at 2851) (emphasis added by the court of appeals)).

The Tenth Circuit concluded that "BNYM ignores the 'at home' part of the *Daimler*/*Goodyear* standard" (App., *infra*, 15a), although the court did not explain what "at home" means if the term signifies something other than the place of incorporation or principal place of business. But however that may be, the court of appeals concluded that the lack-of-jurisdiction defense "could be asserted to the same extent under *Goodyear* as it could be asserted under *Daimler*," and therefore had been waived in this case. App., *infra*, 17a.

REASONS FOR GRANTING THE PETITION

Although this petition arises in the context of waiver, the dispositive question concerns the meaning of *Daimler*. All agree that BNYM's lack-of-jurisdiction defense was not waived if the defense was unavailable prior to *Daimler*, but that it was

waived if *Daimler* left the law unchanged. Resolution of the case here therefore turns on whether *Daimler* states a rule that, in all but extraordinary circumstances, jurisdiction over a corporate defendant is limited to the defendant's principal place of business or of incorporation. The Tenth Circuit erroneously answered this question "no," and therefore found that *Daimler* did not effect a change in the law. The Tenth Circuit's error is highly consequential, as it misstates and confuses the law on a recurring matter of enormous practical importance.

A. Prior to *Daimler*, courts generally held general personal jurisdiction to exist where a corporate defendant engaged in a continuous and systematic court of business.

The Tenth Circuit's background understanding was that, prior to *Daimler*, courts "ha[d] not permitted, and could not permit under *Goodyear*, general jurisdiction based only on continuous and systematic contacts with the forum." App., *infra*, 15a. But that conclusion is wrong: pre-*Daimler*, that is *precisely* the standard that generally was understood to govern the assertion of general jurisdiction.

During the period following *Goodyear* but prior to *Daimler*, courts uniformly regarded "continuous and systematic contacts" as the governing standard for general jurisdiction. *See, e.g.*, *Pervasive Software Inc.* v. *Lexware GmbH & Co. KG*, 688 F.3d 214, 231 (5th Cir. 2012); *Indah* v. *S.E.C.*, 661 F.3d 914, 923 (6th Cir. 2011); *KM Enters., Inc.* v. *Global Traffic Techs., Inc.*, 725 F.3d 718, 733 (7th Cir. 2013); *CollegeSource, Inc.* v. *AcademyOne, Inc.*, 653 F.3d

1066, 1074 (9th Cir. 2011).[2] The Tenth Circuit did so as well. See, *e.g.*, *Monge* v. *RG Petro-Mach. (Grp.) Co.*, 701 F.3d 598, 614-15, 620 (10th Cir. 2012); *Grynberg* v. *Ivanhoe Energy, Inc.*, 490 F. App'x 86, 92-96 (10th Cir. 2012).[3] BNYM therefore was correct

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[2] Moreover, courts regularly *found* general jurisdiction to be present under this standard. *See*, *e.g.*, *Wells Fargo Bank, N.A.* v. *RLJ Lodging Trust*, 2013 WL 5753805, at *5 (N.D. Ill. 2013); *Neeley* v. *Wolters Kluwer Health, Inc.*, 2013 WL 3929059, at *6-7 (E.D. Mo. 2013); *United States ex rel. Barko* v. *Halliburton Co.*, 952 F. Supp. 2d 108, 116 (D.D.C. 2013); *Ruben* v. *United States*, 918 F. Supp. 2d 358, 360-61 (E.D. Pa. 2013); *Hess* v. *Bumbo Int'l Tr.*, 954 F. Supp. 2d 590, 595 (S.D. Tex. 2013); *ATI Indus. Automation, Inc.* v. *Applied Robotics, Inc.*, 2013 WL 1149174, at *3-5 (M.D.N.C. 2013); *Ashbury Int'l Grp., Inc.* v. *Cadex Def., Inc.*, 2012 WL 4325183, at *7-8 (W.D. Va. 2012); *McFadden* v. *Fuyao N. Am., Inc.*, 2012 WL 1230046, at *2-3 (E.D. Mich. 2012); *Genocide Victims of Krajina* v. *L-3 Servs., Inc.*, 804 F. Supp. 2d 814, 820-21 (N.D. Ill. 2011); *Hartford Cas. Ins. Co.* v. *Foxfire Printing & Packaging, Inc.*, 2011 WL 4345850, at *5 (N.D. Ill. 2011).

[3] The court below suggested that its decisions in *Monge* and *Grynberg* read the "'at home' part of the Tenth Circuit/*Goodyear* standard" to mean something other than continuous and systematic business contacts. App., *infra*, 11a-12a. But that is an improbable suggestion. Although *Monge* quoted the *Goodyear* "at home" language in passing (701 F.3d at 614, 620), it also stated the "continuous and systematic" test without reference to the "at home" formulation (*see id.* at 614-15, 620), citing and quoting from pre-*Goodyear* decisions that said nothing about being "at home" in the forum. *See id.* at 614 (citing cases). As for *Grynberg*, although it mentioned the "at home" formulation in a parenthetical quote (490 F. App'x at 95), it repeatedly characterized the governing test simply as that of "continuous and systematic general business contacts with the forum state." *Id.* at 92 (citations and internal quotation marks omitted); *see id.* at 93, 94, 95, 96. Nothing in the decision suggested that there is more to the test than that. Courts in the Tenth Circuit found general jurisdiction to exist under this "continuous and

in believing, pre-*Daimler*, that it was subject to general jurisdiction in Oklahoma under the then-governing standard. The point was not disputed below: American Fidelity specifically alleged in its complaint that BNYM "engaged in systematic and continuous contact with Oklahoma" (Ct. App. JA 10-11) and *agreed* that BNYM "would have been subject to general jurisdiction prior to *Daimler*, in that it engaged in a substantial business in Oklahoma." R.60, at 4.

In fact, that was the standard applied by this Court itself in *Goodyear*. To be sure, as the court below noted, the Court in *Goodyear* stated that general jurisdiction exists when the defendant's contacts with the forum state are so "'continuous and systematic' as to render [it] essentially at home" there. 131 S. Ct. at 2851. But the Court used this "at home" formulation to *mean* continuous and systematic contacts—the test that traditionally had governed general jurisdiction. *Ibid*. The Court's analysis in *Goodyear* proves the point. The Court's holding turned on a close review of the defendant's general business contacts with the forum, looking to whether the *Goodyear* defendant was "registered to do business" in the forum; whether it had a "place of business, employees, or bank accounts" there; and whether it "solicit[ed] business" there. *Id*. at 2852. These contacts, the Court concluded, fell "far short of 'the continuous and systematic general business contacts' necessary" for general jurisdiction. *Id*. at 2857. The point is not debatable: As the leading treatise stated

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systematic" contacts standard. See, *e.g.*, *Grimes* v. *Cirrus Indus., Inc.*, 712 F. Supp. 2d 1256, 1263 (W.D. Okla. 2010); *Wilson* v. *Qorvis Commc'ns, LLC*, 2001 WL 4171567, at *3 (W.D. Okla. 2007).

unequivocally prior to *Daimler*, "[i]f the *Goodyear* opinion stands for anything * * * it simply reaffirms that defendants must have continuous and systematic contacts with the forum in order to be subject to general jurisdiction." 4 Charles Alan Wright *et al.*, FEDERAL PRACTICE & PROCEDURE § 1067.5 (3d ed. Supp. 2013).

B. The Tenth Circuit misunderstood the rule stated by *Daimler*.

The Tenth Circuit's error regarding the nature of pre-*Daimler* law set the stage for its more fundamental misunderstanding of *Daimler* itself. The court thus rejected BNYM's argument that "*Daimler* limited general jurisdiction to a corporation's state of incorporation or principal place of business, except in exceptional circumstances not present in this case," instead holding that "*Daimler*, like *Goodyear*, did not limit general jurisdiction in this manner." App., *infra*, 14a. But that is *precisely* what *Daimler* held.

1. *Daimler* establishes a clear rule governing the application of general jurisdiction: except in narrowly defined "exceptional" circumstances, a corporation is subject to jurisdiction *only* in its "place of incorporation and principal place of business." 134 S. Ct. at 760. Thus, *Daimler* considered whether Daimler AG was subject to general jurisdiction in California, on the assumption that the contacts of Daimler's subsidiary Mercedes Benz USA ("MBUSA") were properly attributable to it. *Ibid.* The *Daimler* plaintiffs had argued that general jurisdiction was proper because MBUSA had a regional headquarters in California, multiple other permanent physical facilities there, was the leading distributor of luxury automobiles in the State, and made ten percent of its nationwide

sales there. *Id.* at 752. But in rejecting the exercise of general jurisdiction, the Court found these extensive connections simply irrelevant. Rather, the dispositive consideration was that "neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there." *Id.* at 762.

The Court arrived at this result for several reasons. To begin with, a corporation's place of incorporation and principal place of business are "affiliations" that "have the virtue of being unique." *Daimler*, 131 S. Ct. at 760. "[T]hat is, each ordinarily indicates only one place," and that location is easily ascertainable. *Ibid.* A rule focusing on these locations therefore both prevents confusion and "afford[s] plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Ibid.*

In addition, this clear rule furthers the predictability that is essential for the fair notice that lies at the heart of the due process requirement. A broader rule—in particular, one that finds general jurisdiction any place that the defendant conducts continuous business—"would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 761-62 (quoting *Burger King*, 471 U.S. at 472). In contrast, a "'[s]imple jurisdictional rule[]" that looks to the place of incorporation or principal place of business "promote[s] greater predictability.'" *Id.* at 760 (quoting *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010)).

This conclusion also reflects the reality that, with respect to out-of forum defendants, "'specific jurisdic-

tion has become the centerpiece of modern jurisdiction theory, while general jurisdiction has played a reduced role.'" *Daimler*, 134 S. Ct. at 755. Overall, the Court's "decisions have continued to bear out the prediction that 'specific jurisdiction will come into sharper relief and form a considerably more significant part of the scene.'" *Ibid*. Thus, as the "Court has increasingly trained [its attention] on the 'relationship among the defendant, the forum, and the litigation'" (*i.e.*, "specific jurisdiction"), "general jurisdiction has come to occupy a less dominant place in the contemporary scheme." *Id*. at 758. And that development, in turn, reinforces the understanding that the assertion of jurisdiction is most appropriate where the action arises out of the defendant's conduct in the forum—which is to say, that it is "is one thing to hold a corporation answerable for operations in the forum State, [and] quite another to expose it to suit on claims having no connection whatever to the forum State." *Id.* at 761 n.19.

To be sure, *Daimler* recognized in a footnote that there may still exist an "exceptional case" where "a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State." *Daimler*, 134 S. Ct. at 761 n.19. Notably, however, the *only* example of such an extraordinary case offered by the Court was its decision in *Perkins* v. *Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). And that case involved truly "exceptional facts" (*Daimler*, 134 S. Ct. at 756 n.8): after the corporate defendant's home forum (the Philippines) was occupied by the Japanese army during World War II, the defendant moved its headquarters and corporate rec-

ords to Ohio, making that State the company's "principal, if temporary, place of business'" (*id.* at 756 (citation omitted)) and "'a surrogate for the place of incorporation or head office.'" *Ibid.* (citation omitted). With this extraordinary case as the only exception, the *Daimler* place of incorporation/principal place of business rule is all but absolute.

2. Since *Daimler* was decided, the other courts of appeals have understood this Court to have meant precisely what it said: as the Second Circuit put it, "[a]side from 'an exceptional case,'" "a corporation is at home (and thus subject to general jurisdiction, consistent with due process) only in a state that is the company's formal place of incorporation or its principal place of business." *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014). As that court more recently reaffirmed: "in our view *Daimler* established that, except in a truly 'exceptional' case, a corporate defendant may be treated as 'essentially at home' only where it is incorporated or maintains its principal place of business—the 'paradigm' cases." *Brown* v. *Lockheed Martin Corp,* 814 F.3d 619, 627 (2d Cir. 2016). The Second Circuit added that "at least three of our sister circuits have agreed with this reading of *Daimler*." *Ibid.* (citing *Kipp* v. *Ski Enter Corp. of Wis.*, 783 F.3d 695, 698 (7th Cir. 2015); *Martinez* v. *Aero Caribbean*, 764 F.3d 1062, 1070 (9th Cir. 2014); *Monkton Ins. Servs., Ltd.* v. *Ritter*, 768 F.3d 429, 432 (5th Cir. 2014)). The Tenth Circuit's directly contrary reading of *Daimler* cannot be reconciled with the holdings of these other courts.

3. In this context, the court below also erred in holding that "the general jurisdiction standard * * * was the same before and after *Daimler* was decided" and that "*Daimler* reaffirmed the *Goodyear* stand-

ard." App., *infra*, 6a, 15a. This point, too, is not debatable; courts and commentators have almost universally agreed that *Daimler* "sharply curtailed the use of general jurisdiction." Charles W. Rhodes & Cassandra Burke Robertson, *Toward a New Equilibrium in Personal Jurisdiction*, 48 U.C. Davis L. Rev. 207, 214, 218 (2014).

Thus, in *Gucci*, on facts and in a procedural posture materially identical to those here, the Second Circuit held that *Daimler* changed the law in a way that permitted a bank defendant to assert the absence of general jurisdiction for the first time during the pendency of an appeal. *Gucci*, 768 F.3d at 135. Before *Daimler*, the law prevailing in the Second Circuit (as in the Tenth) held that an out-of-state defendant was subject to general jurisdiction if "it engaged in a 'continuous and systematic course of doing business'" in the State. *Id.* at 136. But *Gucci* found that, in *Daimler*, this Court altered "prior controlling precedent of this Circuit" by holding that, as a general matter, a corporation is subject to general jurisdiction only in its State of incorporation or principal place of business. *Ibid.* The defendant in *Gucci* therefore did not waive its lack-of-jurisdiction defense because "'a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made.'" *Id.* at 135.[4]

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[4] The court below distinguished *Gucci* on the ground that pre-*Daimler* Second Circuit precedent took a more expansive approach to jurisdiction than did *Daimler*, while "the Tenth Circuit's pre-*Daimler* precedent would have allowed BNYM's defense to the same extent *Daimler* would." App., *infra* 17a n.4. As we have explained, this analysis misunderstands both *Daimler* and pre-*Daimler* Tenth Circuit precedent. It also is

The Second Circuit reached the same conclusion outside the waiver context in *Brown*. There, a plaintiff sought to assert general jurisdiction in Connecticut over an out-of-state corporation, pointing to the defendant's long-standing and continuous conduct of business in that State. But the Second Circuit held jurisdiction unavailable, explaining that the defendant's contacts with Connecticut, "while perhaps 'continuous and systematic,' fall well below the high level needed to place the corporation 'essentially at home' in the state." 814 F.3d at 623. The Second Circuit added "that, although [these contacts] might have sufficed under the more forgiving standard that prevailed in the past, [the defendant's] contacts fail to clear the high bar set by *Daimler* to a state's exercise of general jurisdiction over a foreign corporation." *Id.* at 626. Thus, the plaintiff

> had a stronger, if not ultimately persuasive, argument on this score in 2012, when the suit was filed. At that time, the [Supreme] Court's 2011 decision in *Goodyear* seemed to have left open the possibility that contacts of substance, deliberately undertaken and of some duration, could place a corporation 'at home' in many locations. But *Daimler*, decided in 2014, considerably altered the analytic landscape for general jurisdiction and left little room for these arguments.

Id. at 629.

Other courts have reached the same conclusion, rejecting waiver arguments or granting reconsidera-

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mystifying on its own terms; the holding in *Gucci* necessarily turned on a finding that *Daimler* changed the law in just the way that we argue here.

tion in light of *Daimler*. See *7 W. 57th St. Realty Co., LLC* v. *Citigroup, Inc.*, 2015 WL 1514539, at *6 (S.D.N.Y. 2015); *Fed. Home Loan Bank of Boston* v. *Ally Fin., Inc.*, 2014 WL 4964506, at *2 (D. Mass. 2014); *Estate of Klieman* v. *Palestinian Auth.*, 2015 WL 967624, at *3-4 (D.D.C. 2015); *Neeley* v. *Wyeth LLC*, 2015 WL 1456984, at *3 (E.D. Mo. 2015); see also *Weinfeld* v. *Minor*, 2014 WL 4954630, at *6 (E.D.N.Y. 2014) (*Daimler* "calls into question the current scope of New York's general jurisdiction statute"); *Epstein* v. *Goodman Mfg. Co.*, 2015 WL 502033, at *3 (D.N.J. 2015) ("*Daimler* has narrowed the previous approach.").

Commentators agree. See Bernadette Bollas Genetin, *The Supreme Court's New Approach to Personal Jurisdiction*, 60 S.M.U. L. Rev. 107, 107 (2015) (*Daimler* "usher[s] in a new era in the law of general and specific personal jurisdiction"); Tanya J. Monestier, *Where is Home Depot "At Home"?* Daimler v. Bauman *and the End of Doing Business Jurisdiction*, 66 Hastings L.J. 233, 286 (2014) ("[t]he *Daimler* decision will certainly cause upheaval in the case law for many years to come. * * * The biggest implication of *Daimler* is that doing business jurisdiction has been wiped off the jurisdictional map.").

The Tenth Circuit's contrary decision cannot be reconciled with this widespread understanding of *Daimler*. Indeed, other courts have recognized that the Tenth Circuit takes an aberrant approach. See *Strauss* v. *Credit Lyonnais, S.A.*, 2016 WL 1305160, at *5 (E.D.N.Y. 2016) (rejecting argument that *Daimler* and *Goodyear* stated the same standard, but noting that the argument "finds * * * support" in the decisions of the district court and Tenth Circuit in this case); *Weiss* v. *National Westminster Bank PLC*,

2016 WL 1305157, at *5 (E.D.N.Y. 2016) (same). This Court should resolve that conflict.

C. The issue presented here is a significant and recurring one.

Finally, the significance of the Tenth Circuit's error far transcends the outcome in this case. As this Court has emphasized, jurisdictional rules must "'give[] a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King*, 471 U.S. at 472 (quoting *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980)). "[T]he foreseeability that is critical to due process analysis * * * is that the defendant's conduct and connection with the forum State [must be] such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297. The *Daimler* Court adopted its clear and precise rule, in part, for just this reason. See 134 S. Ct. at 760.

But the decision below, which departs from the rule of *Daimler* and disregards the approach taken by other courts, confuses the law in a way that makes this essential predictability and foreseeability impossible. And that problem of inter-court inconsistency is compounded by the uncertain nature of the rule stated by the Tenth Circuit: having rejected the place of incorporation/principal place of business standard of *Daimler*, the court of appeals made no attempt at all to explain how to determine whether a defendant *is* "at home" in the forum. This "know it when you see it" approach invites litigation, pre-

cludes certainty, and makes inconsistent outcomes inevitable.

Because this aberrant holding now governs general jurisdiction cases in the Tenth Circuit, review by this Court is warranted. Indeed, given the manifest inconsistency between the decision below and this Court's ruling in *Daimler*, this Court might wish to consider summary reversal of the Tenth Circuit's decision in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2016

APPENDICES

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

AMERICAN FIDELITY ASSURANCE COMPANY,

PLAINTIFF - APPELLEE,

v.

THE BANK OF NEW YORK MELLON,

DEFENDANT - APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA (D.C. NO. 5:11-CV-01284-D)

Charles A. Rothfeld, Mayer Brown, LLP, Washington, DC (Paul W. Hughes and James F. Tierney, Mayer Brown, LLP Washington, DC; and Matthew D. Ingber and Christopher J. Houpt, Mayer Brown, LLP, New York, New York, with him on the briefs), appearing for Appellant.

Stuart W. Emmons (William B. Federman, on the brief), Federman & Sherwood, Oklahoma City, Oklahoma, appearing for Appellee.

Before **LUCERO**, **MATHESON**, and **PHILLIPS**, Circuit Judges.

MATHESON, Circuit Judge.

American Fidelity Assurance Company ("American Fidelity") sued the Bank of New York Mellon ("BNYM") in the Western District of Oklahoma for claims arising from BNYM's conduct as Trustee of a trust holding mortgage-backed securities owned by American Fidelity. BNYM did not assert a personal jurisdiction defense in its first two motions to dismiss or in its answer. In its third motion to dismiss, BNYM argued it was not subject to general jurisdiction in Oklahoma. The district court denied the motion, concluding BNYM had waived the defense by failing to raise it in prior filings. BNYM challenges that decision in an interlocutory appeal. Exercising jurisdiction under 28 U.S.C. § 1292(b), we affirm.

I. **BACKGROUND**

A. ***Factual History***

Countrywide Financial Corporation and related entities ("Countrywide") sold mortgage-backed securities ("Certificates"). BNYM, a commercial bank and securities services company, is chartered under New York law and its principal place of business is New York. Through Pooling and Service Agreements between Countrywide and BNYM, Countrywide created trusts to hold the Certificates for the benefit of the Certificate holders and appointed BNYM to administer the trusts as Trustee.

American Fidelity, an insurance company, purchased Certificates from Countrywide. BNYM was therefore Trustee of the trusts holding American Fidelity's securities.

B. ***Procedural History***

American Fidelity sued BNYM, invoking diversity jurisdiction and alleging that BNYM breached contractual and fiduciary duties as Trustee.

In April 2012, BNYM moved to dismiss American Fidelity's complaint for failure to state a claim. The district court granted BNYM's motion, and American Fidelity filed an amended complaint. Shortly thereafter, American Fidelity filed a second amended complaint, which is the operative complaint for this appeal.

In May 2013, BNYM moved to dismiss American Fidelity's second amended complaint, arguing American Fidelity again failed to state a claim. The district court denied the motion. BNYM did not assert a personal jurisdiction defense in either of its pre-answer motions to dismiss.

In January 2014, BNYM answered American Fidelity's second amended complaint, and again did not assert a personal jurisdiction defense. Four days later, the Supreme Court decided *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

The parties filed a joint status report and discovery plan in which BNYM stated it "may move to dismiss the case in light of recent Supreme Court decisions that limit the permissible scope of personal jurisdiction under the U.S. Constitution." App. at 44.

In March 2014, BNYM filed a third motion to dismiss, arguing for the first time that the court lacked personal jurisdiction over BNYM. BNYM contended the court lacked general jurisdiction based on *Daimler*, and also lacked specific jurisdiction because American Fidelity failed to allege sufficient contacts

between BNYM and Oklahoma. Before the court ruled on the motion, the parties stipulated to the following jurisdictional facts:

> a. BNYM has conducted corporate trust business or services for clients that are located in the State of Oklahoma;
>
> b. BNYM has conducted commercial indenture trust business for clients that are located in the State of Oklahoma;
>
> c. BNYM has provided investment services for trusts, insurance companies, and/or banks that are located in the State of Oklahoma;
>
> d. BNYM has provided commercial broker-dealer services for clients that are located in the State of Oklahoma;
>
> e. BNYM has solicited business from municipal or state governmental organizations that are located in the State of Oklahoma; and
>
> f. BNYM has provided investment services for municipal or state governmental organizations that are located in the State of Oklahoma.

App. at 51-52.

The district court denied the motion, concluding BNYM had waived any general jurisdiction defense under Federal Rule of Civil Procedure 12(h). It explained that *Daimler* applied the standard previously articulated in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). BNYM was therefore not presenting a new defense that had been unavailable when it previously moved to dismiss American Fidelity's original and second amend-

ed complaints and when it filed its answer. The court did not address BNYM's arguments about specific jurisdiction because BNYM had waived its general jurisdiction defense, thereby allowing the court to exercise personal jurisdiction over BNYM.

BNYM now seeks interlocutory review of the district court's decision.

II. APPELLATE JURISDICTION

Although BNYM appeals the district court's denial of its motion to dismiss—which typically is a non-final order—we have jurisdiction under the "two-tiered arrangement," *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 47 (1995), described in 28 U.S.C. § 1292(b).

The district court denied BNYM's third motion to dismiss on September 10, 2014, and certified that order for interlocutory appeal under 28 U.S.C. § 1292(b) on December 12, 2014. On December 22, 2014, BNYM timely requested approval from the Tenth Circuit to file an interlocutory appeal under § 1292(b). *See id.* (authorizing court of appeals to hear interlocutory appeals certified by a district court if "application is made to [the circuit court] within ten days after the entry of the [certification] order"). The Tenth Circuit granted BNYM's application. We therefore have jurisdiction under 28 U.S.C. § 1292(b).

III. DISCUSSION

BNYM argues its general jurisdiction defense was not available before *Daimler* was decided but was available afterwards because *Daimler* narrowed the basis for general jurisdiction. We disagree. BNYM's general jurisdiction defense was available

when it first responded to American Fidelity's original and second amended complaints and when it filed its answer. By "available" we mean the standard it relies upon would have been the same if it had relied on it earlier. Put another way, the general jurisdiction standard BNYM asserts was the same before and after *Daimler* was decided, and it was therefore available to BNYM from the outset of the litigation.[1]

Federal Rule of Civil Procedure 12(h)(1) provides that a party waives the defenses listed in Rule 12(b)(2)-(5), including lack of personal jurisdiction, Rule 12(b)(2), by failing to assert them in a responsive pleading or an earlier motion. Rule 12(g)(2) limits the waiver rule to defenses that were "available to the party but omitted from its earlier motion." BNYM waived its personal jurisdiction defense if it was available when it moved to dismiss American Fidelity's original and second amended complaints and when it filed its answer.

Whether a party has waived a personal jurisdiction defense is a mixed question of law and fact. *FDIC v. Oaklawn Apts.*, 959 F.2d 170, 173 (10th Cir. 1992). We review the district court's legal conclusions de novo. *Id.* Although we typically review the district court's factual findings for clear error, *id.*, the parties do not contest any facts on appeal.

Our discussion proceeds as follows. First, we explain the concept of general jurisdiction. Second, we identify the standard for general jurisdiction devel-

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[1] The district court did not decide, nor do we, whether the state courts in Oklahoma may exercise general jurisdiction over BNYM. We address only whether BNYM has waived its opportunity to contest general jurisdiction in this case.

oped and applied in the Supreme Court and the Tenth Circuit before *Daimler* was decided. Third, we discuss the *Daimler* decision. Finally, we show that the general jurisdiction defense that BNYM raised and the district court rejected as waived was available to BNYM when it moved to dismiss American Fidelity's original and second amended complaints and when it filed its answer. As a result, we agree with the district court that BNYM waived its general jurisdiction defense, and we affirm dismissal of this case.

A. ***General Jurisdiction***

Under the Fourteenth Amendment, "a State may authorize its courts to exercise personal jurisdiction over an out-of-state defendant if the defendant has 'certain minimum contacts with the State such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.'" *Goodyear*, 131 S. Ct. at 2853 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)) (brackets omitted). Two personal jurisdiction categories emerged from this standard: general jurisdiction and specific jurisdiction. *See OMI Holdings, Inc. v. Royal Ins. Co. of Can.*, 149 F.3d 1086, 1090-91 (10th Cir. 1998).

A court exercises general jurisdiction when it asserts personal jurisdiction "over a defendant in a suit *not* arising out of or related to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.9 (1984) (emphasis added). "Where a court has general jurisdiction over a defendant, that defendant may be called into that court to answer for any alleged wrong, committed in any place, no matter how unrelated to the defendant's contacts with the forum."

Abelesz v. OTP Bank, 692 F.3d 638, 654 (7th Cir. 2012) (quotations omitted).

B. *Pre-Daimler Precedent*

1. The Supreme Court and the *Goodyear* standard

In *Goodyear*, the Supreme Court explained, "[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so continuous and systematic as to render them essentially at home in the forum State." 131 S. Ct. at 2851 (quotations omitted). The *Goodyear* standard was not new; it summarized a longstanding jurisdictional rule. *See, e.g.*, *Int'l Shoe*, 326 U.S. at 318 ("[T]here have been instances in which the continuous corporate operations within a state were thought so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."). Before *Goodyear*, the Supreme Court applied the general jurisdiction standard in two cases, finding a proper exercise of general jurisdiction in one and an improper exercise in the other.

First, in *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), the Supreme Court held an Ohio state court could properly exercise general jurisdiction over Benguet, a mining company incorporated in the Philippines. *Id.* at 438, 446. Benguet owned and operated mining properties in the Philippines and owned no mining properties in Ohio. *Id.* at 447-48. Mining operations ceased during the Japanese occupation of the Philippines. *Id.* at 447.

During that time, Benguet's president—who was also the company's general manager and principal

stockholder—temporarily moved to Ohio. *Id.* at 447. He maintained an office in Ohio, where he stored company files and conducted company business. *Id.* at 447-48. He corresponded about company business—including supervising the rehabilitation of the company's properties in the Philippines—and drew and distributed salary checks from the office. *Id.* at 448. He used two Ohio-based bank accounts for company funds and an Ohio bank as the transfer agent for company stock. *Id.* He also held several directors' meetings at his home or office in Ohio. *Id.* In short, the president supervised and managed Benguet from Ohio during the wartime occupation of the company's properties. *Id.* The Court concluded these activities were sufficient to allow an Ohio court to assert general jurisdiction over the corporation without violating due process. *Id.*

Second, in *Helicopteros*, the Supreme Court held a foreign corporation's activities in Texas were insufficient to allow Texas state courts to exercise general jurisdiction over the corporation. *Helicopteros*, 466 U.S. at 418-19. Helicopteros was a Colombian corporation with its principal place of business in Bogotá. It provided helicopter transportation for oil and construction companies in South America. *Id.* at 409. One of its helicopters crashed in Peru, killing four passengers who were employed by a Texas-based oil consortium involved in a Peruvian pipeline. *Id.* at 409-10. The decedents' survivors and representatives attempted to sue the Colombian corporation in Texas state court. *Id.* at 410, 412.

Helicopteros had no place of business in Texas and had never been licensed to do business in Texas. *Id.* at 416. Its CEO once flew to Texas for contract negotiations with the consortium. *Id.* at 410. But the

contract was ultimately formalized in Peru, was written in Spanish on official Peruvian government stationery, indicated that all relevant parties would reside in Peru, provided that controversies arising from the contract would be submitted to Peruvian courts, and stipulated that payments under the contract would be made through Bank of America in New York City. *Id.* at 410-11.

Helicopteros did have some contacts with the forum. It purchased $4 million worth of helicopters and helicopter parts from a Texas supplier, sent prospective pilots to Texas for training and to retrieve the helicopters, and sent management and maintenance personnel to Texas for training and consultation. *Id.* at 411. Finally, it received $5 million in payments from the consortium drawn on a Texas bank. *Id.*

The Supreme Court considered each of Helicopteros's contacts with the forum state and concluded they were each too isolated and inconsequential to allow a Texas court to exercise general jurisdiction over the corporation. *Id.* at 415-18 & n.12.

* * * *

Against this backdrop, *Goodyear* held a North Carolina court could not exercise general jurisdiction over corporate defendants whose connections with the forum were based solely on their products reaching North Carolina through the stream of commerce. 131 S. Ct. at 2851. The defendants were "indirect subsidiaries" of Goodyear USA (an Ohio corporation) and were not registered to do business in North Carolina. *Id.* at 2852. They had no place of business, employees, or bank accounts in the state. *Id.* They did not solicit business or directly ship products there.

Id. The defendants' products reached North Carolina only indirectly through Goodyear USA's distribution process—the products were custom ordered by other Goodyear USA affiliates who distributed them in North Carolina. *Id.* The Court concluded that general jurisdiction was not proper based solely on the defendants' products being distributed to the forum state through the stream of commerce. *Id.* at 2856.

As noted above, *Goodyear* explained general jurisdiction is proper if a corporate defendant's "affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." *Id.* at 2851 (quotations omitted).

2. **The Tenth Circuit**

The Tenth Circuit has addressed general jurisdiction in several cases, but BNYM focuses its arguments on *Grynberg v. Ivanhoe Energy, Inc.*, 490 F. App'x 86 (10th Cir. 2012) (unpublished), and *Monge v. RG-Petro Machinery (Grp.) Co.*, 701 F.3d 598 (10th Cir. 2012).

In *Grynberg*, the Tenth Circuit considered whether the corporate defendant's CEO—who was also an individually named defendant in the case—was subject to general jurisdiction in Colorado because he had been a litigant in Colorado courts on numerous occasions. 490 F. App'x at 93. The court first contrasted the facts in *Grynberg* with those supporting general jurisdiction in *Perkins*. *Id.* at 95. It also concluded the individually named defendant's litigation activities did not qualify as jurisdictional contacts. *Id.* at 95-96. Consistent with *Goodyear* and yet-to-be-decided *Daimler*, the *Grynberg* court concluded the CEO defendant did not have continuous and systematic business contacts with Colorado, *id.*

at 96, and did not, therefore, have to decide whether the contacts rendered him effectively at home there.

In *Monge*, the Tenth Circuit concluded the district court could not exercise general jurisdiction over a Chinese corporate defendant based on its contacts with Oklahoma. 701 F.3d at 602, 620. The defendant did not have a physical presence in Oklahoma. *Id.* at 620. It had sent a few emails to a business in Oklahoma, made a small number of sales to a single business there, and its representatives once visited the state for a few hours. *Id.* The court concluded these contacts with the forum were not "so continuous and systematic as to render [it] essentially at home in the forum State." *Id.* (quoting *Goodyear*, 131 S. Ct. at 2851).

C. ***Daimler***

In 2014, the Supreme Court held in *Daimler* that a federal court in California did not have general jurisdiction over Daimler, a German corporation. 134 S. Ct. at 751. Daimler had an Argentine subsidiary, MB Argentina. *Id.* Daimler also had a separate subsidiary, DaimlerChrysler North America Holding Corporation, which had its own subsidiary, Mercedes-Benz USA, LLC ("MBUSA"). *Id.* at 752 & n.3. MBUSA was incorporated in Delaware, and its principal place of business was in New Jersey. *Id.* at 752. It had facilities in California, including a regional office, a vehicle preparation facility, and the Mercedes Benz Classic Center.[2] *Id.* Plaintiffs sued Daimler in

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[2] The Classic Center is a facility offering a variety of services for enthusiasts, including workshops, parts, sales, and an events hall. *See* Mercedes-Benz, Classic Center, http://www.mbusa.com/mercedes/enthusiast/classic_center (last accessed Dec. 16, 2015).

federal court in California and asserted claims arising from MB Argentina's activities in Argentina. *Id.* at 751. Plaintiffs asserted Daimler was subject to general jurisdiction in California based on MBUSA's contacts with the state. *Id.*

The Court assumed for purposes of its decision that MBUSA was "at home" in California, *id.* at 758, but nonetheless concluded Daimler was not, even if MBUSA's California contacts were imputed to Daimler, *id.* at 760. The Court, invoking *Goodyear*, said: "the inquiry under *Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so continuous and systematic as to render it essentially at home in the forum state.'" *Id.* at 761 (quoting *Goodyear*, 131 S. Ct. at 2851) (brackets omitted). The Court's application of the *Goodyear* "at home" standard was brief:

> Here, neither Daimler nor MBUSA is incorporated in California, nor does either entity have its principal place of business there. If Daimler's California activities sufficed to allow adjudication of this Argentina-rooted case in California, the same global reach would presumably be available in every other State in which MBUSA's sales are sizable. Such exorbitant exercises of all-purpose jurisdiction would scarcely permit out-of-state defendants "to structure their primary conduct with some minimum assurances as to where that conduct will and will not render them liable to suit."

Id. at 761-62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

The Court, explaining *Goodyear*, stated that "[g]eneral jurisdiction . . . calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 762 n.20. Consequently, when determining where a corporation can be deemed "at home" when it has significant contacts in many fora, *Daimler* suggested the place of incorporation and principal place of business are particularly, though not solely, important.

D. ***BNYM Waived its Personal Jurisdiction Defense***

BNYM argues that it is not subject to general jurisdiction in Oklahoma "[b]ecause Oklahoma is not BNYM's place of incorporation or principal place of business—and because there are no 'exceptional' circumstances that would warrant a departure from the governing rule." Aplt. Br. at 10. Not only was this argument available to BNYM when it moved to dismiss and filed its answer, it misreads and truncates both *Daimler* and Tenth Circuit precedent.

1. **Waiver and *Daimler***

BNYM argues *Daimler* limited general jurisdiction to a corporation's state of incorporation or principal place of business, except in exceptional circumstances not present in this case. *Id.* at 12-21. *Daimler*, like *Goodyear*, did not limit general jurisdiction in this manner. Moreover, *Daimler* rejected BNYM's notion, *id.* at 14, that *Goodyear* required only that "a corporation engages in a substantial, continuous, and systematic course of business [in the forum]." *Daimler*, 134 S. Ct. at 761 (quotations omitted).

Instead, *Daimler* reaffirmed the *Goodyear* standard: general jurisdiction is proper when a "corporation's affiliations with the state are so continuous and systematic *as to render them at home in the forum state*." *Id.* (quoting *Goodyear*, 564 U.S. at 2851) (emphasis added). BNYM ignores the "at home" part of the *Daimler/Goodyear* standard.

BNYM waived its defense based on *Daimler* because the same defense was available to BNYM when it filed its motions to dismiss and its answer. This is so because *Daimler* reaffirmed and applied *Goodyear*, and the defense was available under *Goodyear*.

2. **Waiver and Tenth Circuit Cases**

BNYM also contends its general jurisdiction argument was not available until *Daimler* because this court in *Grynberg* and *Monge* interpreted *Goodyear* to permit general jurisdiction so long as a corporation had continuous and systematic contacts with the forum state. Aplt. Br. at 30. We did no such thing. This court has not permitted, and could not permit under *Goodyear*, general jurisdiction based only on continuous and systematic contacts with the forum. The fundamental flaw in BNYM's argument is its failure to recognize that *Grynberg* and *Monge denied* general jurisdiction.

Once again, in attempting to restate our precedent, BNYM ignores the "at home" part of the Tenth Circuit/*Goodyear* standard. *Monge* stated that general jurisdiction is proper only when the defendant's contacts with the forum state are (1) continuous and systematic and (2) sufficient to render it at home there, and concluded the defendant's contacts did not satisfy this standard. 701 F.3d at 620. *Grynberg* de-

termined the defendant's contacts were not continuous and systematic, 490 F. App'x at 96, obviating the need to address whether they were sufficient to render the defendant at home in the forum. Indeed, this court has repeatedly denied general jurisdiction based on the *Goodyear* standard.[3] *Grynberg* and *Monge* both applied *Goodyear* and are consistent with *Daimler*. Neither case established Tenth Circuit precedent preventing BNYM from raising its general jurisdiction defense because both employed the same

[3] In addition to *Grynberg* and *Monge*, the Tenth Circuit addressed and rejected general jurisdiction four other times since *Goodyear*. *See Weldon v. Ramstad-Hvass*, 512 F. App'x 783, 788 (10th Cir. 2013) (unpublished) (holding a contract between Wyoming and Minnesota under which Wyoming prisoners would be housed in a facility in Minnesota was insufficient to create general jurisdiction over Minnesota prison officials); *Fireman's Fund Ins. Co. v. Thyssen Mining Constr. of Can., Ltd.*, 703 F.3d 488, 493-94 (10th Cir. 2012) (holding district court could not assert general jurisdiction over a foreign corporation based on the managing director's residence in the state, under an agency theory); *Shrader v. Beann*, 503 F. App'x 650, 653-54 (10th Cir. 2012) (unpublished) (reaffirming holding—from previous appeal in the same suit—that the district court could not assert general jurisdiction over a website that had no intrinsic connection to the forum state and that did not conduct business with forum residents in such a sustained manner that it was tantamount to physical presence in the forum); *Beyer v. Camex Equip. Sales & Rentals, Inc.*, 465 F. App'x 817, 818 (10th Cir. 2012) (unpublished) (holding district court in Colorado could not assert general jurisdiction over Canadian manufacturer after its truck was purchased by a Wyoming corporation and used by a Wyoming resident to perform work in Colorado when the truck failed and caused injuries, and the Canadian corporation lacked continuous and systematic business contacts with Colorado).

standard that the Supreme Court reaffirmed and applied in *Daimler*.[4]

* * *

BNYM's general jurisdiction defense was available when it previously moved to dismiss American Fidelity's original and second amended complaints and when it filed its answer because the defense could be asserted to the same extent under *Goodyear* as it could be asserted under *Daimler*.[5] The defense is therefore waived under Rule 12(h).

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[4] BNYM's reliance on *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014), is misplaced. In that case, the Second Circuit determined that a general jurisdiction defense had not been waived because the circuit's pre-*Daimler* precedent did not allow the defense and *Daimler* did. *Id.* at 135-36. By contrast, as explained above, the Tenth Circuit's pre-*Daimler* precedent would have allowed BNYM's defense to the same extent *Daimler* would.

[5] Concurring in the judgment, Justice Sotomayor described the majority's assessment of a corporate defendant's contacts as a "proportionality inquiry" made in light of the corporation's "nationwide and worldwide" activities. *Daimler*, 134 S. Ct. at 770 (Sotomayor, J., concurring). She critiqued the majority's analysis and characterized the proportionality inquiry as a "new rule" requiring that "for a foreign defendant to be subject to general jurisdiction, it must not only possess continuous and systematic contacts with a forum State, but those contacts must surpass some unspecified level when viewed in comparison to the company's nationwide and worldwide activities." *Id.* (quotations omitted). BNYM does not assert an argument based on anything *Daimler* may have added to *Goodyear*'s general jurisdiction test. Even if Justice Sotomayor's concurring view of what she calls *Daimler*'s "proportionality inquiry" were a correct reading of *Daimler*'s majority opinion, *id.*, BNYM does not challenge general jurisdiction based on it.

IV. **CONCLUSION**

We affirm the district court's decision denying BNYM's motion to dismiss.[6]

[6] Having concluded BNYM waived its defense as to general jurisdiction, thereby permitting the district court to exercise personal jurisdiction over BNYM, we need not consider whether the court could also exercise specific jurisdiction over BNYM.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

AMERICAN FIDELITY ASSURANCE COMPANY,

Plaintiff,

v.

THE BANK OF NEW YORK MELLON,

Defendant.

Case No. CIV-11-1284-D

ORDER DENYING MOTION TO RECONSIDER AND AMENDING ORDER DENYING DEFENDANT'S MOTION TO DISMISS TO GRANT CERTIFICATION FOR INTERLOCUTORY APPEAL

Before the Court is the Motion [Doc. No. 63] of Defendant, The Bank of New York Mellon (Defendant), asking the Court to reconsider its September 10, 2014 Order denying Defendant's motion to dismiss for lack of personal jurisdiction. In the alternative, Defendant asks the Court to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Plaintiff has filed a response in opposition [Doc. No. 65] and Defendant has replied [Doc. No. 66]. For the reasons set forth below, the Court denies Defendant's request for reconsideration but grants Defendant's request for certification of an interlocutory appeal.

Discussion

The Court previously determined that Defendant waived the defense of personal jurisdiction pursuant to Fed. R. Civ. P. 12(h)(1). In reaching this holding,

the Court determined that the legal basis for the Defendant's challenge to the Court's exercise of general personal jurisdiction was available to it pursuant to the decision of the United States Supreme Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, – U.S. –, 131 S.Ct. 2846 (2011). In that case the Supreme Court held that the proper consideration when determining general jurisdiction is whether the defendant's "affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum state." *Id*. at 2851. Defendant contends this Court is wrong and that not until the Supreme Court's later decision in *Daimler AG v. Bauman*, – U.S. –, 134 S.Ct. 746 (2014), could it challenge the Court's exercise of general personal jurisdiction.

I. Motion To Reconsider

"The Federal Rules of Civil Procedure do not recognize a 'motion to reconsider.'" *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991); *see also Warren v. American Bankers Ins.*, 507 F.3d 1239, 1243 (10th Cir.2007). However, a district court has inherent power to revise interlocutory orders at any time before the entry of a final judgment. *See Warren*, 507 F.3d at 1243; *Riggs v. Scrivner, Inc.*, 927 F.2d 1146, 1148 (10th Cir.1991). The appropriate circumstances for seeking reconsideration of issues previously decided in a case are limited:

> Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a

> party's position, or the controlling law. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.

Servants of Paraclete v. Does, 204 F.3d 1005, 1012 (10th Cir.2000) (citations omitted); *see alsoVan Skiver*, 952 F.2d at 1243; *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1212 (10th Cir.2012).

Here, Defendant contends there has been an "intervening change in the controlling law," relying on the Second Circuit Court of Appeals' decision in *Gucci American, Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014), a case decided on September 17, 2014, after this Court's entry of its order. The error in Defendant's argument is that Defendant hones the issue as premised on the proper application of *Daimler*, rather than whether the defense of personal jurisdiction was waived pursuant to Fed. R. Civ. P. 12(h) due to the availability of the defense under *Goodyear*.

In *Gucci*, the Second Circuit, addressing the issue of general personal jurisdiction in light of *Daimler* for the first time on appeal, found personal jurisdiction lacking over a non-party. The non-party was a foreign bank ordered to comply with the terms of an asset freeze injunction. The injunction could be enforced against the non-party bank only if personal jurisdiction existed over it.

Critically, the Second Circuit did not address the issue presented to this Court – waiver of the defense of personal jurisdiction pursuant to Fed. R. Civ. P. 12(h). As it expressly acknowledged, it could not address that issue as "the waiver provisions of [Fed. R. Civ. P. 12(h)] are inapplicable because the Bank is

not a 'party' that could fail to assert its personal jurisdiction defense in an answer or a motion to dismiss." *Id*. at 136 n. 14. The Second Circuit nonetheless found that the nonparty bank did not waive the defense of personal jurisdiction because "[u]nder prior controlling precedent *of this Circuit*, the Bank was subject to general jurisdiction . . ." and, therefore, the defense was not previously available to the bank. *Id*. at 136 (emphasis added) (*citing Hoffriz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55 (2d Cir. 1985)). Nowhere did the Second Circuit address the issue whether the "at home" standard announced in *Goodyear* deemed waiver appropriate.[1] Indeed, the Second Circuit focused on concerns of international comity in addressing the issue of exercising general

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[1] Another decision of the Second Circuit Court of Appeals clearly recognizes that the at home standard relied upon by Defendant was established in *Goodyear*. *See Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 226 (2d Cir. 2014) ("[A]lthough *Daimler and Goodyear* do not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business, *those cases* make clear that even a company's engage[ment] in a substantial, continuous, and systematic course of business is alone insufficient to render it at home in New York.") (emphasis in original and emphasis added) (citation and internal quotation omitted). Other courts have similarly recognized *Goodyear* as establishing the change in law resulting from the at home standard. *Compare NExTT Solutions, LLC, v. XOS Technologies, Inc.*, 2014 WL 6674619 at *4 (N.D. Ind. Nov. 25, 2014) (unpublished op.) ("In 2011, the Supreme Court of the United States [in *Goodyear*] clarified that general jurisdiction cannot be premised solely upon 'continuous and systematic' contacts with a forum state" and that "[a]fter *Goodyear* was decided in 2011, courts in [the Seventh] [C]ircuit rarely found general jurisdiction to exist."). This Court has not canvassed all of the post-*Daimler* decisions to address the at-home standard but merely cites these cases as illustrative.

jurisdiction over a foreign bank. *See Gucci*, 768 F.3d at 135 (Noting that the Court in *Daimler*, "expressly warned against the 'risks to international comity' of an overly expansive view of general jurisdiction inconsistent with 'the "fair play and substantial justice' due process demands.'") (*quoting Daimler*, 134 S.Ct. at 763 (additional citations omitted).

Defendant also cites *Federal Home Loan Bank of Boston v. Ally Financial, Inc.*, 2014 WL 4964506 (D. Mass. Sept. 30, 2014) (unpublished op.). In that case, the district court was called upon to reconsider its prior order holding that under *Goodyear*, "[t]he defendants were sufficiently 'at home in the forum State,' making the exercise of general jurisdiction over them proper.'" *Id*. at * 1 (*quoting Goodyear*, 131 S.Ct. at 2851)). The Court determined that "[t]he *Daimler* decision requires a *tighter assessment* of the standard than perhaps was clear from *Goodyear*" and vacated its prior order. *Id*. at *2 (emphasis added). The Court did not address a waiver issue like the issue confronted by this Court.

Defendant further cites *Weinfeld v. Minor*, 2014 WL 4954630 (E.D. N. Y. Sept. 30, 2014) (unpublished op.). There, in deciding whether to transfer the action to a different forum, the court in dicta recognized that *Daimler* "call[ed] into question the current scope of New York's general jurisdiction statute." Significantly, the court cited *both Daimler* and *Goodyear* for the genesis of the "at home" standard governing the exercise of general personal jurisdiction. *Id*. at * 6. Again, however, the court did not address in any fashion the waiver issue presented to this Court.

In sum, the Court has considered Defendant's argument and reviewed the case law cited by De-

fendant but finds Defendant has failed to establish grounds for reconsideration. Accordingly, Defendant's Motion to Reconsider is DENIED.

II. Certification Pursuant To 28 U.S.C. § 1292(B)

Alternatively, pursuant to 28 U.S.C. § 292(b), Defendant requests that the Court certify its order for interlocutory appeal. Pursuant to § 1292(b), district courts have the discretionary authority to authorize an appeal of an interlocutory order where such appeal is not otherwise provided by statute. *Swint v. Chambers County Comm'n.*, 514 U. S. 35, 47 (1995). When analyzing whether certification is appropriate under § 1292(b) the Court must find that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" 28 U.S.C. § 1292(b).

Certification of interlocutory appeals under § 1292(b) is "limited to extraordinary cases in which extended and expensive proceedings probably can be avoided by immediate and final decision of controlling questions encountered early in the action." *State of Utah by and through Utah State Dept. of Health v. Kennecott Corp.*, 14 F.3d 1489, 1495 (10th Cir. 1994) (citation omitted). A primary purpose of § 1292(b) is to provide an opportunity to review an order when an immediate appeal would "materially advance the ultimate termination of the litigation." *Id. See also Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) (Section 1292 is "a rare exception to the final judgment rule that generally prohibits piecemeal appeals.").

The September 10, 2014 Order is not otherwise appealable by statute, satisfying the initial requirement of § 1292(b). Thus, the Court proceeds to address the three prongs of the § 1292(b) analysis.

A. Controlling Question of Law

The Court's September 10, 2014 Order decides that Defendant has waived the right to challenge the Court's exercise of general personal jurisdiction over it. That decision is grounded in the Court's determination that the basis for Defendant's challenge to the exercise of general personal jurisdiction existed at the time of *Goodyear*. The Court's order does not address application of the *Goodyear* standard to the facts of this case. The Court did not need to conduct that analysis, having concluded the defense of lack of personal jurisdiction had been waived. The Court therefore finds the issue of waiver involves a question of law.

The Court further finds the issue qualifies as controlling. An issue is controlling if interlocutory reversal would terminate the action or substantially affect the course of litigation conserving resources for either the district court or the parties. *See Pack v. Investools, Inc.*, Case No. 2:09-cv-1042-TS, 2011 WL 2161098 at *1 (D. Utah June 1, 2011) (unpublished op.); *see also Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., Inc.,* 86 F. 3d 656, 659 (7th Cir. 1996) (stating question of law may be "controlling" if resolution is likely to affect the further course of litigation); and 16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice & Procedure*, § 3930 n. 25 (2d Ed. 1996) (growing number of decisions have accepted question as controlling if possible reversal may save time for court or litigants). A question is considered controlling for

§ 1292(b) purposes if its incorrect disposition would require reversal of a final judgment. *Id.* at n. 19.

Here, if the appellate court were to find no waiver, the action would be subject to dismissal if the court further determined general personal jurisdiction does not exist over Defendant. *See id.*, § 3929, at 388 ("The court may . . . consider any question reasonably bound up with the certified order, whether it is antecedent to, broader or narrower than, or different from the question specified by the district court."); *see also Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269, 1272 (10th Cir. 1994) ("If we find that a particular question other than the question specifically identified by the district court controls the disposition of the certified order, we may, and indeed should, address that question."). If that conclusion were reached, especially in this case involving complex factual and legal issues, a substantial savings of time for the court and the litigants would be accomplished by allowing an interlocutory appeal.

B. Substantial Ground For Difference of Opinion

For a substantial ground for difference of opinion to exist, the question presented for certification must be difficult, novel, and involve "a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions." *In re Grand Jury Proceedings June 1991*, 767 F. Supp.222, 226 (D. Colo. 1991). "[T]he mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion." *Northern Arapaho Tribe v. Ashe*, 925 F. Supp.2d 1206, 1223-24 (D. Wyo. 2012) (citations omitted). De-

fendant repeatedly urges that *Daimler* announces a new standard for the exercise of general personal jurisdiction. Defendant does not address the more narrow issue decided by this Court – whether the standard Defendant relies upon was available to it in *Goodyear* and, consequently therefore, whether Defendant waived the right to present its challenge.

Nonetheless, the ultimate scope of *Daimler* and its application to specific facts of a particular case may be subject to dispute among the courts. Defendant has identified authority from other jurisdictions that may support its position that it has not waived the defense of personal jurisdiction because *Daimler* provided new grounds for the defense. Conversely, this Court has noted at least one other district court that directly agrees with the Court's analysis of the same issue.*See* Order [Doc. No. 62] at p. 8 *citing Gilmore v. Palestinian Interim Self-Government Authority*, 8 F. Supp. 3d 9 (D.D.C. 2014). While the Court remains convinced its analysis of the narrow issue presented is correct, Defendant presents a tenable argument that there may be a substantial ground for disagreement sufficient to satisfy this requirement of § 1292(b).[2]

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[2] As the Court noted in its prior Order, even after *Daimler*, courts have not restricted analysis of *Goodyear's* at home standard to simply determine whether a corporate defendant is incorporated or has its principal place of business in the forum state. *See, e.g., Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) ("Because Butterfield is neither incorporated nor has its principal place of business in Texas, *and because* Ritter has not pleaded facts showing that Butterfield's contacts with Texas are 'continuous and systematic' enough to render it 'at home' in Texas, general jurisdiction is improper.") (emphasis added) (*quoting Daimler*, 134 S.Ct. at 761).

C. Materially Advance Litigation

Finally, the Court must determine whether an immediate appeal would materially advance the termination of this litigation. According to the Tenth Circuit, this requirement reflects the primary purpose of § 1292(b). *State of Utah v. Kennecott Corp.*, 14 F.3d 1489, 1495 (10th Cir. 1994). As a result, § 1292(b) interlocutory appeals are "limited to extraordinary cases in which extended and expensive proceedings probably can be avoided by immediate and final decision of controlling questions encountered early in the action." *Id.* (citing S. Rep. No. 85-2434 (1958), *as reprinted in* 1958 U. S. C. C. A. N. 5255).

The Court is not aware of any decision of the Tenth Circuit Court of Appeals addressing the propriety of certifying a § 1292(b) interlocutory appeal of an order addressing waiver of a defense pursuant to Fed. R. Civ. P. 12(h)(1). Similarly, the Court is not aware of a Tenth Circuit decision addressing certification of an order addressing personal jurisdiction. However, in *Cudd Pressure Control, Inc. v. Cornelius*, 1996 WL 122018, at *1, *3 (10th Cir. Mar. 20, 1996) (unpublished opinion), the Tenth Circuit addressed the merits of a personal jurisdiction issue without discussing the propriety of the discretionary § 1292(b) certification.

As stated above, if the appellate court were to disagree with this Court's waiver analysis and further determine general personal jurisdiction is lacking, such a determination would terminate the litigation before this Court. Because the scope of Supreme Court precedent is at issue, and due to the complexities of the issues involved in the instant case, granting Defendant leave to appeal at this stage may ma-

terially advance the termination of the litigation. In sum, therefore, the Court finds that certification under § 1292(b) is warranted.

III. Conclusion

For the foregoing reasons, Defendant's motion to reconsider is DENIED. Defendant's alternative motion for immediate certification of an appeal is GRANTED. The Court's September 10, 2014 Order [Doc. No. 62] is DEEMED AMENDED to reflect that the Court finds under 28 U.S.C. § 1292(b), the issue of whether Defendant has waived the defense of general personal jurisdiction pursuant to Fed. R. Civ. P. 12(h) is a controlling question of law to which there is substantial ground for difference of opinion and that an immediate interlocutory appeal from the Court's September 10, 2014 Order may materially advance the ultimate termination of this litigation.

The action shall be STAYED until either the time for Defendant to file an interlocutory appeal under 28 U.S.C. § 1292(b) expires or until the Tenth Circuit Court of Appeals finally disposes of any such appeal, whichever is later.

IT IS SO ORDERED this 12th day of December, 2014.

/s/Timothy D. DeGiusti
TIMOTHY D. DeGIUSTI
UNITED STATED DISTRICT JUDGE

APPENDIX C

AMERICAN FIDELITY ASSURANCE COMPANY,

Plaintiff,

V.

THE BANK OF NEW YORK MELLON,

Defendant.

CASE NO. CIV-11-1284-D

O R D E R

Before the Court is Defendant's Motion to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, for Leave to Amend the Answer and Brief in Support [Doc. No. 48]. Plaintiff has responded to the motion [Doc. No. 60] and Defendant has filed a reply [Doc. No. 61]. For the reasons set forth below, Defendant has waived the defense of personal jurisdiction and Defendant's motion, therefore, is denied.

I. Case History

This action was filed on November 1, 2011. Defendant filed its first motion to dismiss on April 12, 2012, pursuant to Fed. R. Civ. P. 12(b)(6). On January 18, 2013, the Court granted Defendants's motion to dismiss but further granted Plaintiff's request for leave to amend the complaint. Plaintiff filed an amended complaint on February 8, 2013 and a second amended complaint on April 19, 2013. Defendant then moved to dismiss the second amended complaint and again sought dismissal pursuant to Fed. R. Civ. P. 12(b)(6). The court denied the motion to dismiss on December 26, 2013. Defendant filed its

answer to the second amended complaint on January 10, 2014.

Thereafter, on February 27, 2014, the parties submitted a Joint Status Report and Discovery Plan. Defendant states therein that it "may move to dismiss the case in light of recent Supreme Court decisions that limit the permissible scope of personal jurisdiction under the U.S. Constitution." *See id.* at p. 3, ¶ 6. Defendant filed the pending motion to dismiss on March 3, 2014, raising for the first time the defense of lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2).

Defendant moves for dismissal on grounds that this Court lacks both general and specific personal jurisdiction over it. Defendant relies on two recent decisions of the United States Supreme Court, *Daimler AG v. Bauman*, – U.S. –, 134 S.Ct. 746 (2014) and *Walden* v. *Fiore*, – U.S. –, 134 S.Ct. 1115 (2014). Defendant contends that in *Daimler*, the Supreme Court announced a change in law regarding general personal jurisdiction and that prior to *Daimler*, existing Tenth Circuit precedent precluded Defendant from raising the defense.

II. Discussion

A. The Waiver Rule

Personal jurisdiction is a defense that is subject to waiver. *Williams v. Life Sav. and Loan*, 802 F.2d 1200, 1202 (10th Cir. 1986) ("A defect in the district court's jurisdiction over a party, however, is a personal defense which may be asserted or waived by a party."). Pursuant to Fed. R. Civ. P. 12(h)(1), a party waives the defense of lack of personal jurisdiction if the party moves for dismissal and does not include the defense in the motion. *See id.* ("A party waives

any defense listed in Rule 12(b)(2)-(5) by . . . omitting it from a motion in the circumstances described in Rule 12(g)(2) . . . ."); *see also United States v. 51 Pieces of Real Property, Roswell, N.M.*, 17 F.3d 1306, 1314 (10th Cir. 1994)("If a party files a pre-answer motion and fails to assert the defenses of lack of personal jurisdiction or insufficiency of service, he waives these defenses."); Thus, when Defendant moved to dismiss Plaintiff's complaint (and amended complaint) pursuant to Fed. R. Civ. P. 12(b)(6) it was required under the federal rules to simultaneously move for dismissal under Fed. R. Civ. P. 12(b)(2)-(5).

Defendant acknowledges the waiver provisions of Rule 12(h), but contends the defense of lack of personal jurisdiction was not available when it previously moved for dismissal. *See* Fed. R. Civ. P. 12 (g)(2) ("[A] party that makes a motion under this rule must not make another motion under this rule raising a defense or objection *that was available* to the party but omitted from its earlier motion.") (emphasis added). Generally, a defense is unavailable "if its legal basis did not exist at the time of the answer or pre-answer motion . . . ." *Chatman-Bey v. Thornburgh*, 864 F.2d 804, 813 n. 9 (D.C. Cir. 1988) (citations omitted). *See also Holzsager v. Valley Hospital*, 646 F.2d 792, 796 (2d Cir. 1981) ("[A] party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made . . . .").

As stated, Defendant contends the Supreme Court's *Daimler* decision constitutes a change in law as to general personal jurisdiction.[1] According to De-

[1] Defendant does not contend there has been a change in the law regarding the grounds for its defense of lack of specific per-

fendant, general personal jurisdiction existed over it before this change in law. *See* Defendant's Motion at p. 6 ("[t]he plaintiff *appeared* to meet the then-governing standard" for general personal jurisdiction) (emphasis added).[2] Defendant contends the fact that general personal jurisdiction "appeared" to be satisfied, rendered a challenge to specific personal jurisdiction superfluous. *See id.*, *see also* Defendant's Motion at p. 20 ("[W]hen BNYM filed its answer it would have been held subject to general jurisdiction in Oklahoma" and, therefore, "arguments related to specific jurisdiction . . . would have been irrelevant because BNYM would have been subject to general jurisdiction."). In other words, Defendant concedes it could have previously challenged specific personal jurisdiction but did not do so because Plaintiff's allegations were purportedly sufficient to establish general jurisdiction.[3]

The Court finds these arguments unavailing. Contrary to Defendant's argument, *Daimler* did not create a basis for challenging personal jurisdiction not previously available to Defendant.

B. The Supreme Court's *Daimler* Decision

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sonal jurisdiction but does rely upon *Walden* to support its argument that there is no specific personal jurisdiction under the facts of this case. According to Defendant, *Walden* has "sharpened" the arguments available to establish a lack of specific jurisdiction. *See* Defendant's Motion at p. 15. Indeed, Defendant relies almost exclusively on well-established Tenth Circuit authority to support its argument that there is no specific personal jurisdiction.

[2] ECF pagination is used to reference portions of Defendant's brief.

[3] In response, Plaintiff contends it has never sought to invoke general personal jurisdiction over Defendants.

According to Defendant, the *Daimler* decision "dramatically narrowed the circumstances in which a court may exercise general personal jurisdiction over an out-of-state corporation." *See* Defendant's Motion at p. 1. Defendant contends that under *Daimler*, "[g]eneral jurisdiction exists only when the defendant's contacts with the forum state are so 'continuous and systematic as to render [it] essentially at home' there." *See id.* at p. 6 (*quoting Daimler*, 134 S.Ct. at 761). Defendant further contends – albeit erroneously – that *Daimler* holds for the first time that general jurisdiction only exists in a forum where a corporation is incorporated or has its principal place of business. *See* Defendant's Motion at p 2.[4]

Defendant contends Plaintiff's conclusory allegation that Defendant "engaged in systematic and continuous contact with Oklahoma" does not come close to meeting this "new standard." *See* Defendant's Motion at p. 12. And Defendant contends that because it is neither incorporated in the state of Oklahoma nor has its principal place of business there, general jurisdiction is now lacking.

Defendant impermissibly asks this Court to presume that Plaintiff's mere allegation that Defendant has "continuous and systematic" contacts with the forum state was sufficient under pre-*Daimler* author-

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[4] As discussed *infra*, the Court found in *Goodyear* that a corporation is at home where it has its principal place of business or where it is incorporated but did not limit general jurisdiction to these two locations. Defendant claims in *Daimler* the Court did just that. But contrary to Defendant's assertion, in *Daimler* the Court expressly continued to acknowledge that it would be possible for a corporation to be "at home" in places outside of its place of incorporation or principal place of business. *See Daimler*, 134 S.Ct. at 761 n. 19.

ity to establish general personal jurisdiction. Significantly, Defendant makes no attempt to develop this argument or demonstrate how the exercise of general jurisdiction would have been proper prior to *Daimler*.

More importantly, the standard Defendant relies upon was not pronounced by the Supreme Court in *Daimler*, but was pronounced more than two years earlier in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, – U.S. –, 131 S.Ct. 2846 (2011). And unlike the case law relied upon by Defendant to support the unavailability of the defense, as discussed below, *Daimler* did not announce a new constitutional rule or overrule prior precedent. *Compare Holzsager*, 646 F.2d at 795 (personal jurisdiction defense not waived where intervening Supreme Court decision declared unconstitutional state law permitting exercise of personal jurisdiction through quasi-in-rem attachment of insurance policies issued by resident insurers). Nor has Defendant shown the defense would have been futile under pre-*Daimler* precedent. *See Bennett v. City of Holyoke*, 362 F.3d 1, 7 (1st Cir. 2004) (upholding waiver of defense where party failed to demonstrate it would have been futile to raise if timely asserted where defense was "fairly available"; absence of precedent directly on point does not excuse a party's failure to assert an available defense"); *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009) (finding no waiver where defense of lack of personal jurisdiction, if previously raised, would have been "directly contrary to controlling precedent" and subsequent decision "overruled that precedent").

In *Goodyear*, the Supreme Court held that a court may assert general jurisdiction over a foreign corporation "to hear any and all claims against them

when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum state." *Goodyear*, 131 S.Ct. at 2851. The "paradigm forum for the exercise of general jurisdiction . . . [is] one in which the corporation is fairly regarded as at home." *Id*. at 2853-54. These "paradigm forums" are the principle place of business and the place of incorporation. *Id*.

Thus, Defendant's challenge to general jurisdiction was available well before the *Daimler* decision. Indeed, multiple statements by the Court in *Daimler* demonstrate that the standard Defendant relies upon was clearly first expressed in *Goodyear*. *See, e.g.*, *Daimler*, 134 S.Ct. at 758 n. 11 ("As the Court made plain in *Goodyear* and repeats here, general jurisdiction requires affiliations 'so continuous and systematic' as to render [the foreign corporation] *essentially at home in the forum State*.'") (emphasis added); *id.,* 134 S.Ct. at 751 ("*Instructed by Goodyear*, we conclude Daimler is not 'at home' in California . . . .") (emphasis added); *id*., 134 S.Ct. at 761 ("*[T]he inquiry under Goodyear* is not whether a foreign corporation's in-forum contacts can be said to be in some sense 'continuous and systematic,' it is whether that corporation's 'affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum state.") (emphasis added).

To counter waiver, in its reply Defendant cites to the concurrence of Justice Sotomayer in *Daimler* in which she states that the Supreme Court has "adopt[ed] a new rule of constitutional law." *See* Defendant's Reply at p. 9 *citing Daimler*, 134 S.Ct. at 773 (Sotomayor, J., concurring). But Defendant injects an overly broad application of the statement made in the concurrence. Significantly, Justice

Sotomayor was *not* addressing the "at home" standard central to Defendant's argument here. Instead, she was addressing a holding of the Court not relied upon by Defendant – the majority's conclusion that a foreign defendant's contacts with the forum must be "viewed in comparison to the company's nationwide and worldwide activities." *Id*. at 770.

Defendant further cites what it contends to be contrary Tenth Circuit precedent that predates the *Goodyear* decision to support its contention that the argument concerning general jurisdiction could not have been raised pre-*Daimler*.[5] But Defendant ignores Tenth Circuit precedent immediately after *Goodyear* that clearly relies upon the "at-home" standard announced in *Goodyear*. *See, e.g., Monge v. RG Petro-Machinery (Group) Co. Ltd.*, 701 F.3d 598, 620 (10th Cir. 2012); *see also Grynberg v. Ivanhoe Energy, Inc.*, 490 Fed. Appx. 86, 94-96 (10th Cir. 2012). This precedent existed in 2012, well before the Supreme Court's *Daimler* decision.

Moreover, circuit courts to address general jurisdiction post-*Daimler* have recognized that it "reaffirmed" *Goodyear*. Significantly, these courts have not presumed general jurisdiction is lacking if the corporation's place of incorporation or principal place of business is not in the forum state. Instead, the inquiry the courts continue to make even, post-*Daimler,* is whether the contacts with the forum

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[5] For example, Defendant cites *Newsome v. Gallacher*, 722 F.3d 1257, 1264 (10th Cir. 2013). *See* Defendant's Motion at p. 6. But in *Newsome*, the court's analysis focused solely on specific jurisdiction as the plaintiff did not contend general jurisdiction existed over defendants. Thus, Defendant's reliance on *Newsome* is unpersuasive.

state are so continuous and systematic as to render a defendant "at home" in the forum state. *See, e.g., Sonera Holding B.V. v. Cukurova Holding, A.S.,* 750 F.3d 221, 222 (2d Cir. 2014) (noting that *Daimler* "*reaffirms* that general jurisdiction extends beyond an entity's state of incorporation and principal place of business only in the exceptional case where its contacts with another forum are so substantial as to render it 'at home' in the state.") (emphasis added);[6] *Snodgrass v. Berklee College of Music*, 559 Fed. Appx. 541, 542 (7th Cir. 2014) (addressing – post *Daimler* – whether out-of-state corporation's affiliations with the forum state were so continuous and systematic as to render the corporation at home in that state). In addition, at least one district court has found waiver of the defense of personal jurisdiction where, as here, the defendants contended that *Daimler* announced a new rule. *See Gilmore v. Palestinian Interim Self-Government Authority*, – F.Supp.2d – ,

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[6] Defendant relies on another post-*Daimler* decision from the Second Circuit, *In re Roman Catholic Diocese of Albany, New York, Inc.*, 745 F.3d 30 (2d Cir. 2014). But there, too, the Second Circuit acknowledged that *Daimler* "reaffirmed that, under *Goodyear*, general jurisdiction might, 'in an exceptional case,' extend beyond a corporation's state of incorporation and principal place of business to a forum where 'a corporation's operations . . . [are] so substantial and of such a nature as to render the corporation at home in that State.'" *Id*. at 39 (quoting *Daimler*, 134 S.Ct. at 761 n. 19). Moreover, in analyzing the issue of general personal jurisdiction, the Second Circuit measured the contacts with the forum state not only against the "at home" standard expressed in both *Goodyear* and *Daimler*, but relied on prior Supreme Court precedent regarding the exercise of general personal jurisdiction including *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952) and *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984). *See id*. at 40.

No. 1-853 (GK), 2014 WL 2865538 at * 4 (D.D.C. June 23, 2014) (stating that defendants were "flat-out wrong that *Daimler* was the genesis of [the "at home"] rule [and that] [t]he 'at home' standard was unmistakably announced in *Goodyear* . . . .").

III. Conclusion

In sum, therefore, *Goodyear* announced the "at home" standard relied upon by Defendant. Because that standard was available more than two years ago, Defendant has not demonstrated the defense of lack of general personal jurisdiction was "unavailable" until January 2014 when *Daimler* was decided. Absent reliance upon *Daimler*, Defendant has no other grounds upon which to defeat waiver of the personal jurisdiction defense.

Because the Court finds Defendant has waived the defense, there is no need to analyze whether specific personal jurisdiction exists over Defendant. Moreover, Defendant's request for leave to amend the answer is denied. Granting such relief would be inconsistent with the Court's finding that Defendant has waived the lack of personal jurisdiction defense.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss for Lack of Personal Jurisdiction or, in the Alternative, for Leave to Amend the Answer and Brief in Support [Doc. No. 48] is DENIED.

IT IS SO ORDERED this 10th day of September, 2014.

/s/ Timothy D. DeGiusti
TIMOTHY D. DEGIUSTI
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMERICAN FIDELITY ASSURANCE COMPANY,

Plaintiff - Appellee,

v.

THE BANK OF NEW YORK MELLON,

Defendant - Appellant.

No. 15-6009

ORDER

Before **LUCERO, MATHESON**, and **PHILLIPS**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk