No. 08-1107

IN THE

Supreme Court of the United States

THE HERTZ CORPORATION,

Petitioner,

v.

MELINDA FRIEND, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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JURISDICTION

For the reasons set forth in Section V below, Respondents dispute Petitioner's assertion that this Court has jurisdiction pursuant to 28 U.S.C. § 1254. Rather, pursuant to 28 U.S.C. § 1453, which is expressly applicable to appellate jurisdiction in cases like this one, which are removed pursuant to the Class Action Fairness Act and subsequently remanded, appellate jurisdiction has expired.

INTRODUCTION

The Petition for Certiorari of The Hertz Corporation arises out of a class-action case alleging violations of California law brought solely on behalf of California workers. This action was filed in California Superior Court, removed by Hertz to federal district court, and remanded, on Plaintiffs' Motion, back to California Superior Court. It has been proceeding in California Superior Court since January 2008. The parties have taken numerous depositions and exchanged thousands of pages of documents pursuant to a discovery plan agreed upon by the parties and approved by the Superior Court. After nearly a year and a half of litigation, including significant discovery, depositions and motion practice, Plaintiffs are on schedule to file their Motion for Class Certification in the late summer or early fall of 2009.

While the case has moved steadily toward resolution on the merits, without any allegation or hint of prejudice or bias on behalf of the California Superior Court, Hertz has fought a separate, losing battle in the federal

appeals court against the remand by the district court. Hertz now asks this Court, after a year and a half of concerted litigation, to pluck this case from the purview of California Superior Court.

Hertz's Petition focuses entirely on the issue of whether Hertz's "principal place of business" is California for purposes of diversity jurisdiction. Hertz claims that the Circuit Courts of Appeal are split in their interpretations of this statutory provision.

Review by this Court is unnecessary and inappropriate for several reasons. First, at the same time it fought for removal in this case, Hertz sought remand to California state court in a very similar case involving an overlapping class of plaintiffs pending in federal district court in southern California, and thus may very well be judicially estopped from advancing its arguments in this Court.

Second, Hertz has significantly overstated the perceived split among the Circuits. As Judge Kleinfeld of the Ninth Circuit recently wrote in an opinion on which Hertz relies heavily in its Petition and supplemental briefing, all of the Circuits generally apply the same test to determine a corporation's "principal place of business."

Third, Hertz's desire for an "economical" test for determining a corporation's "principal place of business" may have some superficial appeal, but it does not comport with the intent or structural goals of the diversity jurisdiction statute. The statute's drafters

were concerned with a test that actually ascertains the location of a corporation's business activities; Hertz's proposed "economical" test fails to do that.

Fourth, Hertz has alleged no prejudice as a result of this case being litigated in state court. Hertz is very familiar with California's citizens and courts, and cannot and does not make a showing that it will suffer any of the "local prejudice" that diversity jurisdiction was designed to address.

Fifth, contrary to Hertz's contention, this is not an issue that is "rarely" presented to this Court. Subject matter jurisdiction is always at issue, and may be raised, by a party or *sua sponte*, at any stage of the proceedings. In fact, it may be raised for the first time by this Court. Thus, even if this Court were inclined to examine the standards for diversity jurisdiction, it need not use this flawed and inappropriate case to do so.

Finally, this case does not present an effective vehicle for resolving any alleged "split" among the Circuits regarding the "principal place of business" test because California truly is Hertz's principal place of business. Hertz does fully one-fifth of its business in California—nearly two times more than any other state.

For all the reasons below, Respondents respectfully request that Hertz's Petition be denied.

REASONS FOR DENYING THE PETITION

I. In a similar case, Hertz has specifically requested remand from federal to California court and thus may be judicially estopped from raising the argument here

Hertz omits from its Petition any mention of *Piccirilli v. Hertz*, a similar wage-and-hour class-action case. *Piccirilli* was originally filed in state court and removed by Hertz to the U.S. District Court for the Southern District of California. But when it suited Hertz's interests to be back in state court, Hertz *specifically requested remand* to the California state court. *See Piccirilli v. The Hertz Corp.*, S.D.Cal. Case No. 07 CV 1370 JAH, Joint Motion to Remand Case to State Court (Document No. 30).

Hertz has attempted to hedge in *Piccirilli*, stating that its desire to be in state court in the *Piccirilli* case should have no bearing on its objection to remand in this case. But such posturing does not preclude the effects of judicial estoppel. *See New Hampshire v. Maine*, 532 U.S. 742, 743 (2001) (judicial estoppel "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment"). The implications of Hertz's about-face from its position in *Piccirilli* present complications that would hamper, if not moot, this Court's ability to resolve the issue even as framed by Hertz.

II. Hertz's supposed split among the Circuits is greatly exaggerated

Hertz has submitted a supplemental brief to this Court regarding the recent Ninth Circuit case of *Davis v. HSBC Bank Nevada, N.A.*, 557 F.3d 1026 (9th Cir. 2009). While the majority opinion in this case is a brief and fairly straightforward application of the "principal place of business" test as described in *Tosco Corp. v. Communities for a Better Environment*, 236 F.3d 495 (9th Cir. 2001), Judge Kleinfeld's concurring opinion discusses the test in detail.

Judge Kleinfeld concludes that no significant rift exists on this subject:

> Our sister circuits generally apply some combination of the nerve center, the "corporate activities" or place of operations, and the "total activity" tests. Despite varying verbal formulas, their approaches generally amount to about the same thing as *Industrial Tectonics*, *Tosco*, and this separate opinion.

Davis, 557 F.3d at 1033 (Kleinfeld, J., concurring).

Indeed, there is a prevailing "general rule" that "the bulk of corporate activity, as evidenced by the location of daily operating and management activities, governs the choice of a principal place of business." 3B Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3625, at 625 (2d ed. 1984); *Danjaq, S.A. v. Pathe Commcations Corp.*, 979 F.2d 772, 776 (9th Cir. 1992); *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092, n.3 (9th Cir. 1990).

Judge Kleinfeld's concurrence accurately portrays that the primary difference among the Circuits is the language of the tests they use and, not, as Hertz contends, a "deep four-way split." *See Davis*, 557 F.3d at 1033 (Kleinfeld, J., concurring).

III. Hertz wishes to jettison the intent of the creators of diversity jurisdiction for mere expediency

Hertz pleads for a diversity determination that is "prompt, economical" and "simple [and] practical[.]" Hertz's Petition at 21-22. Similarly, Judge Kleinfeld calls for a test that is "faster, more certain, and cheaper to apply[.]" *Davis*, 557 F.3d at 1031.

While all of these attributes are laudable, they completely ignore the intent of the drafters of the diversity jurisdiction statutes. The underlying purposes of diversity jurisdiction are not in dispute, but they are most certainly imperiled by Hertz's insistence on a "principal place of business" test that does not actually evaluate a company's principal place of business.

When Congress added the "principal place of business" provision, it did so in an attempt to reduce the evil of a state tribunal being denied the opportunity to apply that state's laws to essentially local corporations. With twenty percent of all of its domestic business in California, Hertz has no basis to complain about being considered a California corporation.

Despite its large presence in California and its failure to identify any sort of tangible prejudice, Hertz

urges this Court to abandon the intent of the framers of diversity jurisdiction in favor of a more "simple" test. But because Hertz can identify no harm, this is neither the litigant, nor the set of facts, that call for a wholesale reinterpretation of the meaning and purposes of diversity jurisdiction. This is especially true because Hertz's forum shopping in the *Piccirilli* case has included a request to remand that case to California court.

IV. Hertz does not even attempt to make a showing that it has been or would be prejudiced by having this case heard in state court

Diversity jurisdiction, as Hertz points out in its Petition, serves several purposes. One such purpose, and the only purpose that could apply in this instance, is to "provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries[.]" S. Rep. 85-1830 (1958), as reprinted in 1958 U.S.C.C.A.N. 3099, 3102. But what Hertz's Petition wholly fails to show is how any such "local court" prejudice either has happened or could happen in this case. To the contrary, Hertz has affirmatively sought the jurisdiction of the California Superior Court in other related litigation when it serves Hertz's interests to do so.[1]

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[1] In addition, it is well-settled that Congress, in crafting the diversity jurisdiction and remand statutes, willingly risked some incorrect remand decisions in favor of efficient litigation. *See Mobil Corp. v. Abeille General Ins. Co.*, 984 F.2d 664, 666 (5th Cir. 1993) ("Congress enacted § 1447(d) so that state court

(Cont'd)

Hertz is not an "outsider" subject to the local prejudice contemplated by the framers of the diversity jurisdiction statute. As Hertz admits, it does approximately one-fifth of its business in California. Hertz is a household name, and one that is extremely well-known in California's cities, airports and roadways. As such, allowing Hertz to force this action into state court in fact risks creating the evil that the "principal place of business" requirement was specifically designed to address:

> The statute was designed to prevent assertion, for purposes of diversity jurisdiction, that a corporation is a citizen exclusively of the state in which (perhaps as its sole connection) it obtained its corporate charter, and that it is not a citizen of the state in which it conducts its principal business activities.

(Cont'd)

actions could proceed without delay if federal courts consider proper factors and remand, regardless of the correctness of their jurisdictional decisions."); *Robertson v. Ball*, 534 F.2d 63, 66, n.5 (5th Cir. 1976) ("the general policy of § 1447(d) . . . might be stated thusly: once the federal district court considers the proper factors and decides to remand, the action should go forward in state court without the further delay of appeal, and without regard to whether the federal district court was correct or incorrect."); *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 354 (1976) (Rehnquist, J., dissenting) ("Congress' purpose in barring review of all remand orders has always been very clear to prevent the additional delay which a removing party may achieve by seeking appellate reconsideration of an order of remand.")

Egan v. American Airlines, Inc., 324 F.2d 565, 566 (2d Cir. 1963).

Hertz simply does not assert that this case presents a harm needing this Court's remedy.

V. The issue of diversity jurisdiction presented by Hertz's Petition is quite common, and may be reviewed by this Court in any diversity case that comes before it

Contrary to the position taken in Hertz's Petition, the traditional bar on review of granted remand orders does not make this an issue that will "evade" this Court "for many years to come." Hertz's Petition at 20-21. The determination of a corporation's principal place of business is a not unique to the Class Action Fairness Act ("CAFA"), and in fact is applicable to *all* diversity cases, whether removed or initially filed in federal court, and regardless of whether they implicate CAFA. 28 U.S.C. § 1332(c)(1). It is well-settled that questions of subject matter jurisdiction cannot be waived and may be raised at any point in a case, even *sua sponte* by this Court. *See Louisville & Nashville R.R. v. Mottley*, 211 U.S. 149, 152 (1908) (*sua sponte* vacating lower court judgment and dismissing the case for lack of jurisdiction).

Furthermore, because CAFA's provision for appellate review is unique and very limited, the jurisdiction of this court to grant Hertz's petition is in question. CAFA imposes a limited time period for appellate review, after which appellate jurisdiction ceases. 28 U.S.C. § 1453(c)(2)-(4) (providing that decision

must be entered within 60 days of granting the initial petition for review, subject to a 10-day or agreed-upon extension of time, and that if this time period is exceeded the appeal is denied as a matter of law and the case is remanded); *see also* 28 U.S.C. § 1453(c)(1) (providing that, except for the limited rights under § 1453(c)(2)-(4), the general rule regarding non-reviewability of remand orders, 28 U.S.C. § 1447, applies to cases removed under CAFA). In this case, the Ninth Circuit granted Hertz's petition for review on September 8, 2008, and issued its opinion on October 31, 2008, within the time authorized by 28 U.S.C. § 1453. However, as per 28 U.S.C. § 1453, appellate jurisdiction ceased no later than November 17, 2008. Accordingly, there simply is no statutorily authorized basis for further appellate review or federal jurisdiction over this case.

VI. This case is not the proper vehicle for resolving whatever alleged split there may or may not be between the Circuits because Hertz's "principal place of business" is California

Hertz understates the significant portion of its business that takes place in California. Hertz repeatedly states that it has "operations in California commensurate with its population[.]" Hertz's Petition at 16, 19, 20, and 22. But while Hertz does approximately twenty percent of its business in California, California represents only twelve percent of the country's population. Thus, Hertz does significantly more business in California than the state's share of the nation's population would indicate.

With so much of its business in California, Hertz is a corporation that should not be attempting to exploit the "principal place of business" doctrine to carry out its forum-shopping goals. As Hertz's Petition concedes,

> the "principal place of business" provision was added to address "the evil whereby a local institution, engaged in a local business and in many cases locally owned, is enabled to bring its litigation into the federal courts simply because it has obtained a corporate charter from another state."

Hertz's Petition at 18 (quoting S. Rep. 85-1830 at 3102).

Put simply, Hertz's complaint that its "principal place of business" wrongly has been sited in California is not a compelling one, since Hertz does fully one-fifth of its business in the state. The only harm Hertz can identify is that corporations like it will "los[e] the protections intended by diversity jurisdiction[.]" Hertz's Petition at 19. But because its business is so focused on one state, Hertz simply is *not* the type of litigant for whom the protections of diversity jurisdiction were intended.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny Hertz's Petition for a Writ of Certiorari.

Respectfully submitted,

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