No. 08-1107

IN THE

Supreme Court of the United States

THE HERTZ CORPORATION,
Petitioner,

v.

MELINDA FRIEND, *et al.*,
Respondents.

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

REPLY BRIEF OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioner states as follows:

The Hertz Corporation is a wholly owned subsidiary of Hertz Global Holdings, Inc., a publicly traded corporation on the New York Stock Exchange. No publicly traded corporation owns 10% or more of Hertz Global Holdings, Inc.'s common stock.

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Respondents' Brief in Opposition ("Respondents' Brief") offers no cogent explanation as to why this case does not provide the Court with a rare opportunity to resolve a threshold jurisdictional question that affects thousands of federal district court cases each year, *i.e.*, the appropriate test for locating a corporation's principal place of business for purposes of determining the existence of diversity jurisdiction. Rather, Respondents make a superficial effort to harmonize the various tests used by the circuits and devote the bulk of their brief to a variety of poorly defined procedural objections. As explained briefly below, not only do these objections lack support in the applicable facts and controlling law, but several of them support granting Hertz' Petition for Writ of Certiorari (the "Petition").

ARGUMENT

I. Respondents' Procedural Objections Lack Merit and Several Heighten the Need for Review

According to Respondents, "pursuant to 28 U.S.C. § 1453 . . . appellate jurisdiction has expired" and this Court lacks jurisdiction to grant Hertz' Petition. *See* Respondents' Brief at 1. However, Section 1453 requires that once a circuit court has granted review of a remand order under the Class Action Fairness Act ("CAFA"), "the court [of appeals] shall complete all action on such appeal, including rendering judgment, not later than 60 days after the date on which such appeal was filed" and if such a final judgment "is not issued before the end of the [60

day] period . . . the appeal shall be denied." 28 U.S.C. § 1453(c)(2), (4). However, CAFA nowhere bars this Court's jurisdiction to review judgments rendered pursuant to an appeal permitted under Section 1453.

In contrast, the statute governing this Court's certiorari jurisdiction provides that cases in the courts of appeals may be reviewed by this Court "by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after the rendition of judgment or decree . . ." 28 U.S.C. § 1254(1). In the instant case, a judgment was rendered by the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") within the time permitted by CAFA, and Hertz thereafter timely submitted its Petition with respect to that judgment.

Finally, when Congress provided for circuit court review of remand orders in CAFA cases, and created an exception to the general ban on the review of remand orders established by 28 U.S.C. § 1447(d), it did not include any language depriving this Court of jurisdiction to review such circuit court orders. In contrast, when Congress intends to deprive this Court of appellate jurisdiction, it does so explicitly. *See, e.g.,* 28 U.S.C. § 1452(b) (orders remanding bankruptcy cases are "not reviewable by appeal or otherwise by the court of appeals under [28 U.S.C.] section 158(d), 1291, or 1292 . . . or by the Supreme Court of the United States under [28 U.S.C.] section 1254"). Given that Congress did not include language in 28 U.S.C. § 1453 prohibiting review of judgments rendered in appeals permitted by that

section, this Court should not lightly assume any such prohibition, and Respondents offer no reason for doing so. *See, e.g., Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341, 125 S. Ct. 694, 700 (2005)(this Court "do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest"). Consequently, the Court has jurisdiction to grant this Petition pursuant to 28 U.S.C. § 1254(1).

Respondents next suggest that Hertz "may very well be judicially estopped from advancing its arguments in this Court" because of a joint motion to remand submitted in *Piccirilli v. The Hertz Corporation*, S.D. Cal. Case No. 07-CV-1370-JAH. *See* Respondent's Brief at 4. However, in *Piccirilli*, Hertz was confronted with the following conundrum—whether to submit a proposed class action settlement to a federal court in Southern California, in a case properly removed to that court pursuant to CAFA, despite the Ninth Circuit's intervening holding herein that Hertz was a citizen of California and affirming the remand of the *Friend* class action lawsuit to state court. Rather than seek approval of a class action settlement from a court which might lack jurisdiction, Hertz joined in a motion to remand which specifically described this procedural history, and further provided that it "shall not be deemed to constitute, nor be construed as a waiver of, Hertz' right to again remove this action to federal court in the event . . . the Supreme

Court grants certiorari and reverses the Ninth Circuit's determination with respect to the location of Hertz' principal place of business." *See* Reply Appendix at 4a (*Piccirilli* joint motion to remand) and 7a (order on same).

Hertz never asserted in the joint motion to remand in *Piccirilli* that its principal place of business was California; to the contrary, Hertz affirmatively stated that it was seeking this Court's review and reversal of the Ninth Circuit's determination of that very issue. Likewise, Hertz never asserted that the federal court did not have subject matter jurisdiction over the *Piccirilli* action, but only sought remand to avoid the uncertainty of effecting a class action settlement in a court that might lack jurisdiction. Such facts and reservation of rights clearly are not within the doctrine of judicial estoppel.

Judicial estoppel is an equitable doctrine intended to protect litigants and the courts from the abuses and prejudices that can result from a party's reliance on contradictory assertions. *See, e.g., New Hampshire v. Maine*, 532 U.S. 742, 749-751, 121 S. Ct. 1808, 1814-1815 (2001) (summarizing general purposes of the doctrine and recognizing that the circumstances under which it may be applied are not reducible to general formulation). Among the factors to consider in applying the doctrine are whether a party's later position is "clearly inconsistent" with its prior position, whether judicial acceptance of the later position would create "the perception that either the first or second court was misled", and

"whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* at 750-751. None of these factors exist in the instant matter. As noted above, Hertz made no "clearly inconsistent" assertions in the *Piccirilli* joint motion to remand. Nor can it be said that Hertz attempted to mislead the court; to the contrary, by seeking remand, Hertz simply sought to foreclose the possibility that a class action settlement might later be nullified for lack of subject matter jurisdiction. Finally, Hertz obtained no "unfair advantage" nor imposed any "unfair detriment" on other parties through its actions; instead, it gave up the very judicial forum to which it believed it was entitled.

Not only is Respondents' judicial estoppel argument contradicted by the above described circumstances and applicable legal principles, but it actually presents an excellent example of why this Court should grant review. Thus, Hertz was caught between conflicting opinions with respect to its citizenship and faced the prospect that its substantial settlement of a class action lawsuit "may be set at naught because [it] made the wrong guess about jurisdiction." *Dimmitt & Owens Financial, Inc. v. United States*, 787 F.2d 1186, 1191 (7th Cir. 1986). Absent this Court granting review, and providing definite and accepted principles pursuant to which federal courts can readily and uniformly determine their diversity jurisdiction, other courts and litigants will be confronted with the same conundrum.

Respondents next suggest that review should be denied because substantial discovery has taken place in the state court proceeding. However, Respondents offer no authority in support of this suggestion and as this Court has explained:

> It is suggested . . . that we lack power to review the action of the Circuit Court of Appeals, since the mandate of that court has issued and the District Court has remanded the cause to the state court. . . . [N]o such limitation affects our authority to review an action of the Circuit Court of Appeals, directing a remand to state court. Nor does the fact that the mandate of the Circuit Court of Appeals has issued defeat this Court's jurisdiction.

Aetna Cas. & Sur. Co. v. Flowers, 330 U.S. 464, 466-467, 67 S. Ct. 798, 799-800 (1947). *See also*, *Lincoln Property Co. v. Roche*, 546 U.S. 81, 126 S. Ct. 606 (2005) (district court remanded case to state court on August 20, 2004 pursuant to ruling by court of appeals and certiorari granted on February 25, 2005); *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2, 103 S. Ct. 2573, 2575 (1983)(citing *Aetna* and noting failure to obtain stay of circuit court mandate did not defeat this Court's jurisdiction); *Carr v. Zaja*, 283 U.S. 52, 53, 51 S. Ct. 360 (1931)(failure to stay mandate does not defeat Court's jurisdiction).

As an apparent corollary to the foregoing argument, Respondents assert that Hertz has failed to show "how any such 'local court' prejudice either has happened [during the course of the discovery proceedings to date] or could happen in this case [in the future]". Respondents' Brief at 7 - 8. However, Respondents offer no legal support for this assertion and their argument once again serves to highlight the need for this Court to grant review. Initially in this regard, the legislative history for the diversity jurisdiction statute recognizes that "[t]he underlying purpose of diversity of citizenship legislation . . . is to provide a separate forum for out-of-state citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts." S. Rep. 85-1830 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3099, 3102. Simply put, such prejudices are assumed to exist and do not require independent proof. Moreover, the suggestion that such proof is required, and that a district court needs to determine whether a particular defendant is somehow the "type of citizen" that diversity jurisdiction was intended to protect, only heightens the need for this court to grant review and determine whether any such showing is required, or how it is to be made.

Finally, Respondents argue that the issue presented by the instant Petition "is quite common and may be reviewed by this Court in any diversity case that comes before it." Respondents' Brief at 9 – 10. In support of this assertion, Respondents rely on the proposition that "subject matter jurisdiction cannot be waived and may be raised at any point in a

case, even *sua sponte* by this Court." *Id.* Not only is this assertion contradicted by the cases cited in Footnote 1 of Respondents' Brief, it is predicated on a legal principle which can have no application in the instant context. Thus, once a removed action is remanded to state court, who do Respondents expect to raise the issue of jurisdiction *sua sponte*? The state court judge in the remanded action? A state court judge has no legal authority to determine, *sua sponte* or otherwise, that a federal court has erred in locating a corporation's principal place of business for purposes of diversity jurisdiction. Likewise, it is axiomatic that a state court judge does not have any legal authority to "reject" a remand on such basis.

With respect to review of a remand order by the federal courts in a typical diversity case, and as explained by this Court:

> an order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise . . . [and] as long as a district court's remand is based on a timely raised defect in removal procedure or on a lack of subject matter jurisdiction . . . a court of appeals lacks jurisdiction to entertain an appeal of the remand order under [28 U.S.C. § 1447(d)].

Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 127-128, 116 S. Ct. 494, 497 (1995).

Simply put, aside from the limited review of remand orders under CAFA, remand orders predicated on a lack of diversity jurisdiction are not reviewable in federal court, a state court judge lacks the authority to reverse such a determination and, absent review by this Court, a jurisdictional issue affecting thousands of federal court cases each year will continue to evade review.

II. Respondents' Substantive Objections Do Not Undermine the Need for Review

According to Respondents, there is no "deep four-way split" among the tests applied by the circuits for locating a corporation's principal place of business for purposes of diversity jurisdiction. However, Respondents make no effort to explain how the test applied by the Seventh Circuit (*i.e.*, nerve center) can be harmonized with the test applied by the Ninth Circuit (*i.e.*, substantial predominance), or how these two tests are not likely to result in corporations being deemed to have more than one principal place of business. *Compare*, *Metropolitan Life Ins. Co. v. Estate of Cammon*, 929 F.2d 1220, 1223 (7th Cir. 1991)("this court follows the 'nerve center' approach to corporate citizenship: a corporation has a single principal place of business where its executive headquarters are located") with *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1094 (9th Cir. 1990)("nerve center test should be used only when no state contains a substantial predominance of the corporation's business activities")(emphasis supplied). Nor do Respondents explain how the Ninth Circuit's method for applying

its place of operations test can be harmonized with the tests applied by any other circuit, *i.e.*, no circuit, save the Ninth, requires a corporation to make a threshold showing that its operations do not substantially predominate in any single state before a court can consider the location of its nerve center. *See* Petition at 10 – 13; Brief for Amici Curiae Chamber of Commerce of the United States of America, Business Roundtable and American Trucking Associations in Support of Petitioner at 9 – 10. Simply put, Respondents ignore the realities of the present situation and cling to a talismanic belief that "the primary difference among the Circuits is the language of the tests they use . . . ." Respondents' Brief at 6. Contrary to Respondents' vague and superficial assertions, and as amply demonstrated by the authorities cited by Hertz and amici curiae, the split among the circuits is very real and demands review by this Court.

CONCLUSION

As noted by the amici curiae, it has been more than 50 years since Congress amended 28 U.S.C. § 1332 to provide that a corporation is a citizen of the state in which it is incorporated and in which it has its principal place of business, and the circuits are firmly entrenched in their various methods for locating a corporation's principal place of business. Those tests are in conflict and the "prompt, economical and sound administration of justice . . . [requires] definite and finally accepted principles . . . [for determining] the respective jurisdictions of federal and state courts . . . ." *American Fire & Cas.*

Co. v. Finn, 341 U.S. 6, 8, 71 S. Ct. 534, 537 (1951). The instant case presents a unique opportunity, which may not occur again for many years to come, for this Court to provide uniformity with respect to a jurisdictional determination that each year affects thousands of federal district court cases. Therefore, Hertz respectfully submits that its Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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