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

SUPPLEMENTAL BRIEF OF PETITIONER

Robert A. Dolinko
NIXON PEABODY LLP
One Embarcadero
Center
Suite 1800
San Francisco,
California 94111
(415) 984-8200

Frank B. Shuster
Counsel of Record
CONSTANGY, BROOKS
& SMITH, LLP
230 Peachtree
Street, NW
Suite 2400
Atlanta, Georgia
30303
(404) 525-8622

Counsel for Petitioner The Hertz Corporation

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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.

TABLE OF CONTENTS

SUPPLEMENTAL APPENDIX

TABLE OF AUTHORITIES

INTRODUCTION

In support of its pending Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, Petitioner The Hertz Corporation ("Hertz") submits this supplemental brief regarding the intervening decision in *Davis v. HSBC Bank Nevada, N.A.*, ___ F.3d ___, No. 08-57062 (9th Cir. Feb. 26, 2009).[1/] In *Davis*, the Ninth Circuit addressed the exact same issue that led to the filing of Hertz' Petition, i.e., the appropriate test for determining a corporation's principal place of business pursuant to 28 U.S.C. § 1332(c)(1). As explained below, the opinion in *Davis* only solidifies the circuit court split on this issue described in Hertz' Petition, and heightens the need for this Court to provide uniformity in how federal district courts determine the existence of their diversity jurisdiction.

With respect to the circuit split, *Davis* reiterates the Ninth Circuit's reliance on the place of operations test for determining a corporation's

---

[1/] The decision in *Davis* was issued on February 26, 2009 and Hertz first learned of it on February 27, 2009, the same day its Petition for Writ of Certiorari (the "Petition") in this matter was printed. Rather than seeking an extension of time to rewrite the Petition to address *Davis*, Hertz filed the Petition as scheduled and then prepared this Supplemental Brief in accordance with Supreme Court Rule 15.8. As *Davis* is not yet published, for purposes of convenience, Hertz has reproduced *Davis* in a Supplemental Appendix (included herein and referred to as "Supp. App.") and will cite to that case using the appropriate page of the Supplemental Appendix.

principal place of business, and it extends the application of that test to all corporations, regardless of their size or the scope of their business operations. As described in Hertz' Petition, this test conflicts with those used by every other circuit and these differing tests produce results not permitted by 28 U.S.C. § 1332(c)(1), i.e., corporations being deemed to have more than one principal place of business.

With respect to the heightened need for uniformity, and as recognized by Judge Kleinfeld's concurring opinion in *Davis*, the "mathematical gyrations" required by the place of operations test will continue to generate "excessive unpredictability" in determining a corporation's principal place of business and yield results which are more a product of "fortuity" than reasoned principles of law. Jurisdictional determinations should not be left to guesswork. *Davis* heightens the need for this Court to provide definite and well-defined principles pursuant to which federal courts can determine the existence of their diversity jurisdiction.

ARGUMENT

I. *Davis* Extends the Place of Operations Test to All Corporations and Solidifies the Circuit Split Identified in Hertz' Petition

In *Davis*, the Ninth Circuit unequivocally reaffirmed its reliance on the place of operations test as the primary test for determining a corporation's principal place of business pursuant to 28 U.S.C. § 1332(c)(1). *Davis*, Supp. App. at 4a ("In this circuit

we apply two tests . . . [f]irst we apply the place of operations test . . . [and only i]f no state contains a substantial predominance of corporate operations [do] we apply the nerve center test"). In addition, and notwithstanding its acknowledgment that corporations with business activities spread across many states are "much less likely" to have operations that substantially predominate in one state, *Davis* extended the application of this test to all corporations, regardless of the size or scope of their business operations. *Id.* at 8a (a nationwide corporation will be deemed to be a California citizen when a substantial predominance of its business operations are in California). As recognized by the concurring opinion in *Davis*, "rather than limiting application of what is plainly the wrong test for national corporations (the place of operations test), the majority opinion extends [that test]" to all corporations. *Id.* at 12a.

As a result of this extension, whenever the Ninth Circuit determines a corporation's principal place of business, it will continue to ignore the location from which the corporation directs and controls its business activities unless the corporation first proves that its business activities and assets are so evenly spread out that no one state substantially predominates over any other single state. As explained in Hertz' Petition, this test conflicts with the tests used by every other circuit (i.e., under the nerve center test, the distribution of business activities and assets are irrelevant to determining a corporation's principal place of business; under the center of corporate activities test, such facts are

relevant to the determination, but they are of lesser importance; and, under the totality of the circumstances test, they are included in an evaluation of all the locations where the corporation does business) and these conflicts will continue to result in corporations being deemed to have more than one principal place of business for purposes of diversity jurisdiction. As explained in Hertz' Petition, however, a corporation can have only one principal place of business for purposes of diversity jurisdiction.

The majority opinion in *Davis* implicitly recognizes a flaw in the place of operations test and laments the inability to adopt the nerve center test used by Judge Kleinfeld. *Davis*, Supp. App. at 4a, n. 3 ("Were we writing on a clean slate, we would find much in favor of the rule suggested by the concurrence. But we see ourselves as bound by the holding in *Tosco*."). This Court, however, is not so bound and it has a clean slate upon which to resolve this conflict and establish a uniform and administrable standard for determining a corporation's principal place of business.

II. The Methodology for Applying the Place of Operations Test Generates Excessive Unpredictability, Encourages Expensive Litigation and Leads to Results Predicated on Fortuity

According to *Davis*, the place of operations test is to be applied as follows: (1) if any single state contains a substantial predominance of a

corporation's business activities, then the corporation's principal place of business is located in that state; (2) in determining whether such a substantial predominance exists, the court is required to compare the corporation's business activities in the state at issue to its business activities in other individual states; (3) if business activities in the state at issue are substantially larger than the activities in any other individual state, a substantial predominance exists; (4) a finding of substantial predominance does not require that a majority of the corporation's business activities occur in the state at issue; and, (5) no hard and fast rules or percentages exist for determining when the difference in business activities between two states is substantial. *Davis*, Supp. App. at 4a – 7a. Hertz respectfully submits that this is the equivalent of saying "we know it when we see it, but do not ask us to explain why we see it the way we do."

Such concerns are echoed by the concurring opinion in *Davis*, which recognizes that such state-to-state comparisons "only assures identification of the state that has 'substantially' more than the state it is compared to," and it says nothing about whether that location is the principal, most important or most influential place of business in comparison to all others. *Id.* at 12a. As the concurring opinion in *Davis* goes on to recognize, "identification by this comparison . . . will have little to do with the correctness of the methodology . . . more to do with fortuity . . . [and it will] generate[] excessive unpredictability and encourage[] expensive litigation

to identify the 'principal place of business' for corporations that operate in multiple states." *Id.*

Any doubt about the validity of these concerns should be resolved by comparing *Davis* to the instant case. Both involve corporations with business operations spread across many states, i.e., Best Buy (49 states) and Hertz (44 states), each of which have more than 80% of their business activities located outside of California, i.e., Best Buy (87%-89% outside of California) and Hertz (80%-83% outside of California). Yet, the Ninth Circuit found that Hertz had a substantial predominance of its business in California, while finding that Best Buy did not. *Davis*, Supp. App. at 7a.[2/]

[2/] Does Hertz' car rental business substantially predominate in California because 17%-20% of its employees, facilities and revenues are located there, whereas Best Buy's retail consumer electronics business does not substantially predominate in California because it only has 11%-13% of its employees, facilities and revenues there? Do the differing natures of their businesses, and the 6% to 7% differential in their business activities in California, mean that Hertz is more familiar to the citizens of that state despite the fact that Best Buy has nearly 13,000 more employees than Hertz in California, i.e., 16,033 versus 2,299, and generates over $3.3 billion dollars more in revenues there than Hertz, i.e., $4.2 billion versus $818 million? *Compare Davis*, Supp. App. at 36a – 37a and Pet. App. 26a at ¶¶ 7-8. If so, what rationale and mathematical gyrations warrant such conclusions and where is the line to be drawn between substantial predominance and mere predominance? Moreover, what does any of this have to do with the ordinary meaning of the term "principal place of business" or the underlying purposes of diversity jurisdiction?

In *Davis*, the court gave no indication that its opinion conflicted with the unpublished opinion in the instant case.[3/] Nonetheless, these decisions are irreconcilably conflicted and the conflicts are, in large part, a function of the flawed methodology utilized by the Ninth Circuit in applying the place of operations test. Absent review, diversity jurisdiction in the Ninth Circuit will continue to be a function of fortuity, with litigants left to guess in which court they belong.

III. Absent the Court Granting Plenary Review, it Should Grant this Petition, Vacate the Decision Below, and Remand the Matter to the Ninth Circuit for Reconsideration in Light of *Davis*

Pursuant to 28 U.S.C. § 2106, this Court has the power to grant, vacate and remand ("GVR") cases when a supervening event "alters the basis upon which the judgment rests . . . ." *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 161, 65 S. Ct. 573 577 (1945) (Douglas, J. dissenting); *see also*, *Lawrence v. Chater*, 516 U.S. 163, 167, 116 S. Ct. 604, 607 (1996)(*per curiam*)(GVR appropriate where there are intervening developments which reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity and such a redetermination may determine the ultimate outcome of the

---

[3/] Since Circuit Judge Ikuta was a member of the panels in both cases, the *Davis* panel was aware of the order affirming the remand in the instant case to state court.

litigation).[4] Where, however, "it appears that the intervening development . . . is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Lawrence*, 516 U.S. at 167 – 168, 116 S. Ct. at 607.

While Hertz respectfully submits that certiorari should be granted to resolve the above-described circuit split, and provide needed uniformity, this case meets all of the factors required for the issuance of a GVR and the equities would favor such relief. First, the recently issued decision in *Davis*, which is published and, therefore, binding precedent in the Ninth Circuit, clearly qualifies as an intervening development. *See, e.g., Metropolitan Life Ins. Co. v. Hawkins-Dean*, 549 U.S. 1048, 127 S. Ct. 659 (2006)(memorandum)(GVR for reconsideration in light of intervening *en banc* decision by Ninth Circuit); *Kyle v. United States*, 504 U.S. 980, 112 S. Ct. 2959, 2959 – 2960 (1992)(memorandum)(GVR for reconsideration in light of intervening Fifth Circuit panel decision). Second, there is a reasonable probability that the

---

[4] A GVR in this case would not implicate the concerns expressed by the dissent in *Lawrence* and *Stutson v. United States*, 516 U.S. 163, 191-192, 116 S. Ct. 604, 619 (1996)(Scalia, J. dissenting) since it does not involve a situation where a party to the litigation is repudiating or changing its position on a particular point of law. Rather, the Ninth Circuit's published decision in *Davis* is "an intervening factor [which] has arisen which has a legal bearing upon the decision." *Id.*

unpublished opinion in the instant case rests on premises which the Ninth Circuit now rejects in a published, binding decision, i.e., *Davis* specifically considered the nationwide nature of Best Buy's retail consumer electronics business activities, and the distorting effect of California's population on those business activities, in finding that Best Buy's business activities did not substantially predominate in California whereas the panel herein saw no policy reasons for doing so.[5/] Third, a remand may determine the ultimate outcome of this litigation because, after application of the holding in *Davis*, the Ninth Circuit could reasonably conclude that the case should proceed in federal court and the state court proceeding to which Hertz objects would come to an end. Finally, the equities support a GVR since the intervening development of the law as announced in *Davis* is not "part of an unfair or manipulative litigation strategy" by Hertz.

For all of these reasons, if the Court does not grant Hertz' Petition for the purpose of deciding the case on the merits, it should grant the Petition, vacate and remand the Ninth Circuit's decision.

[5/] Since *Davis* affirmatively recognized a legal standard for determining principal place of business which was previously rejected by the Ninth Circuit in the instant case, a GVR is appropriate. *See, e.g., Metropolitan Life Ins. Co. v. Hawkins-Dean*, 549 U.S. 1048 (2006)(memorandum)(GVR for reconsideration in light of Ninth Circuit decision modifying that circuit's legal standard for judicial review of benefits decisions by plan administrators).

CONCLUSION

While a GVR in this matter would be appropriate, it would not resolve the circuit split described in Hertz' Petition and recognized by the concurring opinion in *Davis*, Supp. App. at 38a ("[c]omparison of individual states . . . likely to lead to intercircuit conflicts about where national business[es] are citizens"). The Ninth Circuit will continue to apply the place of operations test, the Seventh Circuit will continue to apply the nerve center test, the Third Circuit will continue to apply the center of corporate activities test, the Fifth, Sixth, Eighth, Tenth and Eleventh Circuits will continue to apply the totality of the circumstances test and, depending on the circumstances, the First, Second and Fourth Circuits will continue to apply either the place of operations test or the nerve center test. Since the differing emphases of these tests yield different results when applied to the same facts, courts will continue to find that corporations have more than one principal place of business for purposes of diversity jurisdiction. In addition, the Ninth Circuit will continue to determine a corporation's principal place of business pursuant to a test which (1) does not compare all the places where it conducts business and (2) seeks to draw a line between substantial predominance and mere predominance without any guideposts for making that determination.

A matter as fundamental as a court's jurisdiction to hear a dispute should not be left to such conflicts and confusion. Corporations should

not be left to guess about the location of their principal place of business. As requested in Hertz' Petition, this Court should establish definite and well-defined principles for determining the existence of diversity jurisdiction and *Davis* only heightens the need for the Court to do so.

Respectfully Submitted,

Frank B. Shuster
Counsel of Record
CONSTANGY, BROOKS & SMITH, LLP
230 Peachtree Street, NW
Suite 2400
Atlanta, Georgia 30303
(404) 525-8622

Robert A. Dolinko
NIXON PEABODY LLP
One Embarcadero Center
Suite 1800
San Francisco,
California 94111
(415) 984-8200

Counsel for Petitioner
The Hertz Corporation