

No. 15-15343

IN THE
United States Court of Appeals for the Ninth Circuit

AM TRUST,

Plaintiff-Appellant,

v.

UBS AG,

Defendant-Appellee.

From the United States District Court for the Northern District Of California
The Honorable Phyllis J. Hamilton | Case No. 4:14-cv-04125-PJH

BRIEF FOR APPELLEE UBS AG

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, UBS AG states that it has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Plaintiff AM Trust (a Bahamian trust) brought this suit against UBS AG (a Swiss bank) for alleged mismanagement in Europe of the financial accounts of an Indonesian national. The personal jurisdiction question now on appeal is controlled by the recent decision of the Supreme Court in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), which presented the same issue: Just like *Daimler*, “[t]his case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against a foreign defendant based on events occurring entirely outside the United States.” *Id.* at 750. UBS is not incorporated in California, its principal place of business is not California, it does not have an agent to accept service of process in California, and its California operations are limited to two branches that have nothing to do with this case. As AM Trust acknowledges, “UBS is at home in Switzerland[,] not California.” Br. 18.

In the district court, AM Trust all but conceded that its attempt to establish personal jurisdiction over UBS in California is foreclosed by Supreme Court precedent. UBS’s Supplemental Excerpts of Record (“SER”) 3 (AM Trust’s counsel arguing to the district court, “The awful *Daimler* case if that is followed in the spirit and in law exactly we haven’t got a chance”). Now on appeal, AM Trust abandons any claim for specific jurisdiction (i.e., jurisdiction that exists because the claim arises in California, as opposed to “general” or “all-purpose”

jurisdiction). But AM Trust asks this Court to “carve out” a “niche” exception for general personal jurisdiction over a foreign bank like UBS because of the federal government’s regulation of international banks. Such a “carve out” or “exception” is contrary to *Daimler* and has been rejected by courts in California and elsewhere; this Court should reject it as well, and affirm the district court.

JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this case under 28 U.S.C. § 1332(d)(2) because the complaint pleads a class action that satisfies the elements of that subsection. Absent class certification, the federal courts will lose jurisdiction because “[i]n the case of litigation involving an alien, a state or citizen of a state must be a party.” *Yokeno v. Sekiguchi*, 754 F.3d 649, 652 (9th Cir. 2014).

On January 29, 2015, the district court granted UBS’s motion to dismiss with prejudice for lack of personal jurisdiction, and entered a final judgment. *See* No. 4:14-cv-04125-PJH, Dkt. Nos. 22, 23 (N.D. Cal.). On February 25, 2015, AM Trust timely noticed its appeal of the district court’s decision. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1291. *See Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 654 (9th Cir. 1991).

ISSUES PRESENTED

1. Whether the district court properly granted UBS's motion to dismiss for lack of personal jurisdiction because UBS is not incorporated in California and does not have its principal place of business in California.
2. Whether the district court correctly concluded that UBS did not consent to personal jurisdiction over this suit in California.
3. Whether the district court acted within its broad discretion in rejecting jurisdictional discovery as a "fishing expedition" that would be contrary to Supreme Court precedent.

STATEMENT OF THE CASE

I. Factual Background

AM Trust claims to be a Bahamian trust created by or for the heirs of Adam Malik, a former Indonesian politician and President of the United Nations General Assembly, who died in September 1984.¹ AM Trust's Excerpts of Record ("ER") 5, 31. This suit arises from financial deposits that Mr. Malik allegedly made with UBS's predecessor banks. ER 6.

UBS has a 152-year history as a Swiss financial institution. ER 5. The present day UBS was formed in 1998, when Union Bank of Switzerland and Swiss

¹ The General Assembly is one of six principal organs of the United Nations. The President of the General Assembly is different from the Secretary-General of the United Nations, who is the head of the United Nations.

Bank Corporation merged to form the new company. ER 5. UBS is incorporated and domiciled in Switzerland, and is Switzerland's largest bank. ER 5–6. It operates under the Swiss Code of Obligations and the Swiss Federal Banking Act as an “Aktiengesellschaft,” a corporation that has issued shares of common stock to investors. ER 6. UBS's global headquarters and principal place of business are located in Zurich and Basel, Switzerland. ER 5–6.

UBS and its subsidiaries have offices in more than 50 countries, including the United States. ER 6. UBS maintains two branches in California: one in Los Angeles and one in San Francisco. ER 6. Neither of these branches had any involvement in the allegations in the present case. ER 12. UBS also maintains branches in Connecticut, Florida, Illinois, and New York. ER 6. UBS has several wholly owned direct and indirect subsidiaries that operate in and/or are incorporated in the United States. ER 6.

According to the complaint, Mr. Malik “obtained, came in possession [of] or was assigned several bank and safekeeping accounts” with UBS's predecessors, Union Bank of Switzerland and Swiss Bank Corporation. ER 6. The accounts were allegedly “assigned to Adam Malik by Jusuf Muda Dalam, the former Director of the Indonesian Central Bank,” under undisclosed circumstances. ER 6. The resources in the accounts, which were allegedly valued at “over five million dollars,” were allegedly deposited in Switzerland and Singapore. ER 6. AM Trust

insists that “the accounts and their contents are believed to be in compliance with Indonesian law of that time and were not the proceeds of unlawful activity” (ER 6), even though AM Trust alleges that a trial on this matter in Indonesia would cause political repercussions and “revive numerous false allegations and conspiracy theories” (ER 9).

AM Trust contends that there are accounts at UBS that hold assets to which Mr. Malik’s heirs are entitled, but which those heirs have been unable to access. ER 10. Mr. Malik’s estate withdrew 2.9 million Swiss Francs from one of his accounts in 1985, but the heirs have allegedly been unable to recover further funds. ER 6.

The complaint states that Mr. Malik’s representatives have had multiple conversations with UBS and its predecessors, during which the banks have repeatedly told the heirs that they have no further information regarding accounts for Mr. Malik. For example, the complaint describes correspondence between Mr. Malik’s representatives and Swiss Bank Corporation in 1993, in which Swiss Bank Corporation reported that it had searched its files and was unable to locate further records related to accounts of Mr. Malik. ER 32. Mr. Malik’s representatives also met with UBS in 2006, after which UBS reported that Union Bank of Switzerland previously had an account for Mr. Malik that was closed in 1985, but that UBS had no existing account for Mr. Malik. ER 33. In 2013, at the request of Mr. Malik’s

estate, the Swiss Banking Ombudsman Central Claims Office undertook a search and reported that no assets connected with Mr. Malik had been reported to it as dormant. ER 34. UBS reiterated the same when Mr. Malik's representatives asked again in 2014. ER 34.

Notwithstanding the fact that Mr. Malik has been dead for 30 years, the mysterious circumstances surrounding the transfer of these assets by another politician into Mr. Malik's name, and the fact that no heirs were allegedly ever named as signatories on or beneficiaries of the accounts, AM Trust alleges that its difficulty in obtaining information about or access to Mr. Malik's accounts is attributable *solely* to UBS.

The complaint does not allege that any known California residents are involved in this suit or that any relevant conduct took place in California. In fact, the State of California is mentioned in only a single paragraph of the complaint, which alleges that UBS "conducts commerce within the State of California directly through local branches and financial advisors." ER 28. The Statement of the Case in AM Trust's appellate brief does not mention California at all.

II. Procedural History

On September 12, 2014, AM Trust filed a putative nationwide class action against UBS. The complaint alleged seven causes of action—(1) quasi-contract (unjust enrichment); (2) accounting; (3) restitution; (4) breach of fiduciary duty;

(5) conversion; (6) constructive trust; and (7) trespass to chattel—all allegedly based on UBS’s mismanagement of Mr. Malik’s accounts. ER 26–43. AM Trust sought to represent a class of ostensibly similarly situated persons who had accounts with UBS. The class is defined (with certain exceptions) as “Secret Bank Account Holders at UBS and its predecessors ... who held an interest in secret bank accounts during the past 62 years (the current Swiss Statute of Limitations for dormant accounts) which were deliberately closed and converted by defendants without consent of the account holders and records destroyed, concealed, or withheld under the so called ten year rule when subsequent inquiries were initiated.” ER 34–35. AM Trust has never identified any actual class members, much less members who are citizens of the United States or California.

UBS moved to dismiss for lack of personal jurisdiction because AM Trust’s allegations fell squarely within *Daimler v. Bauman*. AM Trust did not even attempt to distinguish *Daimler*, but simply disagreed with the Supreme Court’s controlling decision. SER 3. On January 29, 2015, the district court granted UBS’s motion and dismissed the case with prejudice. ER 5–18.

The court first held that UBS is not subject to general jurisdiction in California because it is incorporated in Switzerland and has its principal place of business in Switzerland. ER 14. The court noted that if a foreign corporation like UBS were subject to jurisdiction merely because its operations in the United States

are regulated by federal law, then every federal corporation would be subject to general jurisdiction in the United States, notwithstanding *Daimler*. ER 14.

The district court also held that UBS is not subject to specific jurisdiction in this case because none of AM Trust's claims arise out of any of UBS's contacts with California. ER 16. And the court determined that UBS did not consent to jurisdiction over this suit, either by way of any federal banking statute or by doing business in the United States. ER 16.

Finally, the district court denied AM Trust jurisdictional discovery because it would be "unnecessary and inappropriate" as "none of the proposed discovery has any relevance to the applicable jurisdictional inquiry." ER 16–17. In light of AM Trust's concession that UBS is a Swiss company that is incorporated in Switzerland and has its principal place of business there, as well as its concession that this case does not arise from UBS's contacts with California, the district court held that AM Trust's proposed discovery would be nothing but a "fishing expedition." ER 17–18.

SUMMARY OF ARGUMENT

The district court correctly granted UBS's motion to dismiss because AM Trust failed to meet its burden to show that UBS is subject to personal jurisdiction in California.

- I.** UBS is not subject to general personal jurisdiction in California.

A. The Supreme Court of the United States held in *Daimler* that a corporation generally is subject to general jurisdiction *only* in its place of incorporation or principal place of business. As AM Trust acknowledges, UBS is at home in Switzerland because its place of incorporation and principal place of business are indisputably located there, not in California. AM Trust does not point to any exceptional facts that would make California, rather than Switzerland, UBS's principal place of business, and thus UBS is not subject to general personal jurisdiction in California.

B. UBS is not subject to general jurisdiction in California merely because it, like the defendant in *Daimler*, has United States operations. Nor is the regulation of UBS by federal law a ground for imposing general personal jurisdiction.

II. UBS did not consent, in any form, to be sued on these claims in California.

A. UBS did not consent to personal jurisdiction in California merely because it, like the defendant in *Daimler*, is a multinational company that is regulated by federal and state law. That UBS previously consented to be sued *by the United States* on claims *arising under federal banking law* has nothing to do with this suit, brought by a private party, that does not involve any banking statute.

B. Nor did UBS consent to be sued by appointing an agent to accept service of process. In fact, UBS does *not* currently have an agent in California to accept service of process. In any event, as a matter of California law, a company does not consent to general jurisdiction simply by registering to do business and appointing an agent to accept service. Moreover, any other interpretation of state law would be unconstitutional after *Daimler*.

C. This Court has held that it is not possible to establish personal jurisdiction over a corporation by merely serving a corporate agent with a suit in the state. And the law is clear that UBS did not consent to personal jurisdiction when it stipulated that it would not contest the validity of service of process.

III. The district court did not abuse its discretion in refusing to allow jurisdictional discovery. The Supreme Court held in *Daimler* that discovery is not appropriate to establish general personal jurisdiction. And in any event, nothing in the material that AM Trust seeks to discover is relevant to personal jurisdiction in this case.

STANDARD OF REVIEW

This Court reviews de novo the district court's conclusion that it lacks personal jurisdiction over UBS. *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1066 (9th Cir. 2014). Contrary to AM Trust's brief (pp. 14–15), this case was not dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a

claim for relief; it was dismissed under Rule 12(b)(2) for lack of personal jurisdiction. *See* ER 4. As a result, where facts alleged in the complaint are controverted, the court does not simply presume that the plaintiff's allegations are true. *See Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). Rather, it is the *plaintiff*, as the party invoking the federal court's power, that bears the burden to demonstrate personal jurisdiction. *Martinez*, 764 F.3d at 1066.

This Court reviews for abuse of discretion the district court's denial of jurisdictional discovery. *Martinez*, 764 F.3d at 1066. The district court's decision to deny this discovery "will not be reversed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant." *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008) (internal quotation marks omitted).

ARGUMENT

AM Trust argues that UBS can be sued in California on claims arising anywhere in the world because UBS has agreed to conduct its United States banking operations in accordance with federal law. AM Trust is incorrect. This case is factually indistinguishable from *Daimler*, and AM Trust's attempted end-run around *Daimler* through its "consent" argument is wrong as a factual and legal matter. This Court should affirm.

I. UBS Is Not Subject To General Personal Jurisdiction In California

The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee every civil defendant the right not to be sued in a court where it is not subject to personal jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2850 (2011). Because there is no federal statute governing personal jurisdiction in this case, the district court applies the law of the state in which the district court sits. *Martinez*, 764 F.3d at 1066; Fed. R. Civ. P. 4(k)(1)(A). “California’s long-arm statute, Cal. Civ. Proc. Code § 410.10, is coextensive with federal due process requirements, so the jurisdictional analyses under state law and federal due process are the same.” *Mavrix Photo, Inc. v. Brand Techs., Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011).

In order to invoke the jurisdiction of the court, the plaintiff must show that the defendant has sufficient “minimum contacts” with the forum such that 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 (2011)). This type of jurisdiction comes in two forms: “specific or conduct-linked jurisdiction” or else “general or all-purpose jurisdiction.” *Daimler*, 134 S. Ct. at 751. Specific jurisdiction (which AM Trust does not assert on appeal) requires that the plaintiff’s cause of action arise from the defendant’s activities in the forum. *Goodyear*, 131 S. Ct. at 2854. General jurisdiction, by contrast, allows suit even

on matters that are unrelated to the defendant's contacts with the forum. Importantly, general jurisdiction applies only when the defendant's contacts with the forum are so pervasive and of such a nature as to render it essentially at home in the forum state. *Daimler*, 134 S. Ct. at 754.

Since the Supreme Court's opinion in *International Shoe*, it is "specific jurisdiction [that] has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role." *Daimler*, 134 S. Ct. at 755 (quoting *Goodyear*, 131 S. Ct. at 2854). That is, due process generally requires that a suit be brought in the forum where the claim arose. General jurisdiction is the *exception*, and exists only "as an imperfect safety valve that sometimes allows plaintiffs access to a reasonable forum in cases when specific jurisdiction would deny it." *Id.* at 758 n.9 (internal quotation marks and citation omitted). For that reason, the Supreme Court in *Daimler* and *Goodyear* clarified that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there." *Id.* at 760 (quoting *Goodyear*, 131 S. Ct. at 2853–54). For a corporation, general jurisdiction is possible only in a place "in which the corporation is fairly regarded as at home," which is virtually always limited to the corporation's place of incorporation or principal place of business. *Id.* (internal quotation marks omitted).

Here, AM Trust has *acknowledged* that UBS “is at home in Switzerland[,] not California.” Br. 18. That is obviously true because UBS has its place of incorporation and principal place of business in Switzerland, and there are no exceptional facts that would establish a surrogate principal place of business for AM Trust in California. AM Trust argues that UBS should nevertheless be subject to general personal jurisdiction because it has agreed to operate its United States branches in accordance with federal law. But as set forth below, that argument is entirely foreclosed by *Daimler*.

A. Under *Daimler*, UBS Is Not At Home In California

The Supreme Court in *Daimler* held that a foreign corporation is *not* at home in a state even if it “engages in a substantial, continuous, and systematic course of business” in the forum. 134 S. Ct. at 761 (internal quotation marks omitted). Instead, a corporation is generally at home only in its principal place of business or place of incorporation. *Id.* at 760.

Daimler confined the exercise of general jurisdiction in this way because a defendant should be subject to general jurisdiction only in specific and easily ascertainable places. 134 S. Ct. at 760 (“each ordinarily indicates only one place”). This limit matters because “[s]imple jurisdictional rules ... promote greater predictability.” *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010); *see also Daimler*, 134 S. Ct. at 761–62 (holding that broad general jurisdiction would prevent

defendants from “structur[ing] their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit”) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)).

Daimler also held that only “in an exceptional case ... [could] a corporation’s operations in a forum other than its formal place of incorporation or principal place of business ... be so substantial and of such a nature as to render the corporation at home in that State.” 134 S. Ct. at 761 n.19; *see also Martinez*, 764 F.3d at 1070. As the only example of such an exceptional case, the Supreme Court pointed to *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). *See Daimler*, 134 S. Ct. at 761 n.19.

Perkins involved a Filipino mining company whose president ceased operations during the Japanese occupation in World War II and moved the company’s files to Ohio. 342 U.S. at 447–48. A plaintiff sued the company in Ohio on a claim that did not arise there, and the Supreme Court held that general jurisdiction in Ohio was permitted by due process because Ohio had become “the center of the corporation’s wartime activities” and a “surrogate for the place of incorporation or head office.” *Daimler*, 134 S. Ct. at 756 n.8 (quoting *Perkins*, 342 U.S. at 447–48). But as *Daimler* made clear, *Perkins* “should be regarded as a decision on its exceptional facts, not as a significant reaffirmation of obsolescing

notions of general jurisdiction based on nothing more than a corporation's doing business in a forum." *Id.* (internal quotation marks and citation omitted).

UBS's mere operation of two branches in California bears no resemblance at all to the "exceptional" facts of *Perkins*, and AM Trust does not argue otherwise. California is not even arguably "the center" of UBS's corporate activities, and it is not a "surrogate for the place of incorporation or head office." *Daimler*, 134 S. Ct. at 756 n.8 (internal quotation marks omitted).

AM Trust conceded in the district court, and acknowledges here, that under a straightforward application of *Daimler*, general jurisdiction over UBS does not exist in this case. *See* SER 3 (if "the awful *Daimler* case" is "followed in the spirit and in law exactly" then "we haven't got a chance"); Br. 18 ("UBS is at home in Switzerland[,] not California"). As a result, AM Trust does not even argue that UBS satisfies the *Daimler* test for general personal jurisdiction in California by appraising UBS's activities "in their entirety, nationwide and worldwide." 134 S. Ct. at 762 n.20.

Just as the defendant in *Daimler* had significant operations in the forum, but few compared to its massive operations across the world (134 S. Ct. at 752), UBS's two branches in California are but a tiny fraction of its worldwide banking operations. This Court has rejected general personal jurisdiction after *Daimler* under virtually identical circumstances. *See Martinez*, 764 F.3d at 1070 (rejecting

general jurisdiction over a French airplane manufacturer whose California contacts—including contracts to sell airplanes in California worth between \$225 and \$450 million and advertising in California—were “minor compared to its other worldwide contacts”). A corporation like UBS that operates in many places “can scarcely be deemed at home in all of them.” *Daimler*, 134 S. Ct. at 762 n.20.

B. AM Trust Fails To Distinguish *Daimler*

AM Trust asks this Court to “go beyond” a “literal” reading of *Daimler* (Br. 7), and carve out an exception for banks like UBS that operate federally chartered branches in the United States and that are regulated by United States agencies. AM Trust contends that UBS, as a foreign bank doing business in the United States, is “heavily regulated by the federal and/or state governments.” Br. 19 (citing the International Banking Act and the Edge Act). These federal statutes, AM Trust says, exist in order to hold foreign banks to substantially the same rights and obligations as domestic banks, and require UBS to adopt United States law in order to operate in the United States. Br. 20, 23. AM Trust argues that by virtue of these regulations, UBS has “expressly or impliedly consented to jurisdiction,” and has acquired a “dual corporate nationality” such that “general jurisdiction should exist where UBS operates it[s] retail bank operations.” Br. 19, 27.

The district court correctly concluded that AM Trust’s argument for general jurisdiction based on a so-called dual nationality “makes no sense.” ER 16.

Indeed, this argument directly contradicts *Daimler*, which is indistinguishable on its facts: Both cases involved a foreign plaintiff and a foreign defendant operating in the United States, and both cases centered on foreign events having nothing to do with California.

Moreover, the federal statutes that AM Trust picks out are not at all relevant to the California district court's personal jurisdiction over UBS. Neither the Edge Act nor the International Banking Act subjects UBS to general personal jurisdiction in California.

The Edge Act allows *domestic* banks to engage in international banking through federally chartered subsidiaries. *See* 12 U.S.C. § 601 et seq. That statute does not even apply to international banks, let alone subject them to general personal jurisdiction in California.

The International Banking Act does apply to a foreign bank like UBS, and it does require that UBS's United States operations comply with United States law. *See* 12 U.S.C. § 3016a. But nothing about that requirement changes UBS's character as an exclusively foreign bank. Regulations implementing the International Banking Act require every foreign bank to designate a "home country" where it is incorporated and require oversight of the foreign bank by a "home country supervisor" (12 C.F.R. § 211.24), which is a governmental entity from the foreign bank's home country "with responsibility for supervision and

regulation of the foreign bank” (12 C.F.R. § 211.21(q)). UBS’s domestic branches (including the two branches in California) all list “Switzerland” as their “home country” (ER 15), which confirms that federal law treats them as foreign banks.

In any event, even though UBS’s domestic operations are subject to the same rights and obligations as a United States domestic bank, those include the constitutional right not to be sued except in a court with personal jurisdiction. A domestic bank that is incorporated in New York and has its principal place of business there has the right to refuse personal jurisdiction in California, even if the bank does substantial business in California, where the suit does not arise from the bank’s California contacts. UBS must be treated the same way.

AM Trust’s request for personal jurisdiction based on the “special nature of the banking industry” (Br. 23) is directly contrary to *Daimler*. There are no material differences between the facts of the two cases. Auto manufacturing, import, and sales—at issue in *Daimler*—are no less heavily regulated in the United States than banking. The auto industry is regulated by, among other agencies, U.S. Customs and Border Protection, the Environmental Protection Agency, and the National Highway Traffic Safety Administration, as well as every single state. Yet that made not a whit of difference to the Supreme Court. In fact, the “globalized” nature of banking (Br. 23) is yet one more reason why general personal jurisdiction is not proper in this case: *Daimler* noted that other nations do not accept broad

general personal jurisdiction and held that an expansive view of general jurisdiction would pose “risks to international comity.” 134 S. Ct. at 763.

Moreover, AM Trust does not even attempt to tie this case to *California*. AM Trust’s arguments show, at most, that UBS has a connection *to the United States*, not that it has sufficient minimum contacts *with California* that are necessary to support general personal jurisdiction in California. Indeed, UBS’s branches are registered as *federal* branches, meaning that they are not regulated at all by state law. *See* ER 15 (citing 12 U.S.C. § 3102). Personal jurisdiction is determined state by state, not merely by demonstrating that the defendant has connections to the entire United States. That is why the Supreme Court rejected general jurisdiction over the defendant in *Daimler* even though the company did substantial business in the United States (indeed, in California). *See* 134 S. Ct. at 752 (noting that the defendant was the largest supplier of luxury vehicles to the California market and had millions of dollars in sales there).

AM Trust’s position also contradicts the decisions in other circuits, which have refused to exercise general jurisdiction over foreign banks that have branch offices in the forum but are headquartered elsewhere. The Second Circuit in *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014), rejected this very argument: “Just like the defendant in *Daimler*, the ... Bank here has branch offices in the forum, but is incorporated and headquartered elsewhere.” *Id.* This

precluded the exercise of jurisdiction, because the bank’s “activities . . . , as with those of the defendant in *Daimler*, ‘plainly do not approach’ the required level of contact.” *Id.* (quoting *Daimler*, 134 S. Ct. at 761 n.19); *see also SPV Osus Ltd. v. UBS*, --- F. Supp. 3d ---, 2015 WL 4394955, at *4 (S.D.N.Y. July 20, 2015) (rejecting general jurisdiction over UBS in New York even though UBS “has offices in New York, conducts substantial business [t]here, has a registered agent [t]here, and has been the subject of many suits in New York courts”).

In short, AM Trust’s contention that general personal jurisdiction should exist wherever UBS “operates its retail bank operations” (Br. 27) is *precisely* what the Supreme Court rejected in *Daimler*. 134 S. Ct. at 761–62. And contrary to AM Trust’s worry (Br. 25), nothing about the clear rules in *Daimler* gives foreign banks “a carte blanche exception from jurisdiction.” A plaintiff who suffers a loss arising from a foreign bank’s operations in California (or any other state) can sue the bank there using specific jurisdiction—the most common form of jurisdiction since *International Shoe*. And any plaintiff can always sue a foreign bank in its place of incorporation or principal place of business, no matter where the cause of action arose. That AM Trust would prefer not to sue UBS in Switzerland or one of the other forums with some alleged connection to this lawsuit is no injustice.

II. UBS Did Not Consent To Jurisdiction

Because AM Trust's primary jurisdictional argument is squarely foreclosed by *Daimler*, AM Trust pivots to arguing that UBS has consented to personal jurisdiction in this case. AM Trust is wrong.

A. AM Trust Does Not Identify Any Statute Or Contract That Establishes Consent To General Personal Jurisdiction

AM Trust's first contention is that UBS consented to jurisdiction in this case "by operating federally chartered bank branches in California." Br. 19. The "predicates" for such consent, AM Trust says, are the International Banking Act and the Edge Act. *Id.*

As explained above, the Edge Act has nothing to do with a foreign bank like UBS. And the International Banking Act preserves *foreign* oversight of a foreign bank. Certainly the International Banking Act does not say that a foreign bank consents to general personal jurisdiction in every state where it opens a branch. Nor *could* such a statute thereby create personal jurisdiction, as AM Trust concedes. *See* Br. 20.

AM Trust next argues that UBS has consented to federal jurisdiction (over certain claims) in an agreement with the Office of the Comptroller of the Currency. *See* Br. 24–25. But the plain text of that agreement shows that it has nothing to do with this case:

UBS consents to federal court jurisdiction **for purposes of any and all claims made by**, proceedings initiated by, or obligations to, **the United States**, the Office of the Comptroller and any other United States government agency, department or division, **in any matter arising under** the National Bank Act, the International Banking Act, and other applicable **Federal banking laws**.

Id. (emphases added). This case does not involve any claims by, or obligations to, the United States, and it does not arise under the International Banking Act or any other federal banking law. This is a common law suit by a private trust based on allegations unrelated to the United States. UBS's agreement with the Office of the Comptroller is entirely irrelevant.

AM Trust also argues that UBS has a "custom and practice" to submit to federal court jurisdiction "regarding its worldwide operations." Br. 27. But nothing in the complaint supports that assertion, and, in fact, it is false. *See, e.g., SPV Osus*, 2015 WL 4394955 at *4 n.7 (dismissing a case against UBS in New York for lack of personal jurisdiction and citing, among other things, the district court's opinion in this case).

In any case, there is no "waive it once, waive it forever" doctrine regarding the constitutional right of a defendant to refuse to submit to personal jurisdiction. *See Dow Chem. Co. v. Calderon*, 422 F.3d 827, 833–36 (9th Cir. 2005) (rejecting plaintiffs' argument that the defendant had consented to personal jurisdiction in the present suit by having declined to object to personal jurisdiction in a prior suit involving the same facts and similar parties). If UBS consented to personal

jurisdiction in a prior case, or even multiple cases, that still would have no impact on UBS's right to refuse to submit to personal jurisdiction in this suit. This Court "has held that even if actions are closely related—as when different plaintiffs sue the same defendant in different cases but based on the same facts—defendants do not waive their personal jurisdiction defense by raising it only in a later action, so long as the defendant is not independently seeking affirmative relief in the same court concerning the same transaction or occurrence." *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 27 F. Supp. 3d 1002, 1009 (N.D. Cal. 2014) (citing *Dow Chemical*, 422 F.3d at 835–36).

B. UBS Is Not Registered To Do Business In California And Did Not Thereby Consent To Jurisdiction

AM Trust also argues that UBS consented to personal jurisdiction in this case by merely *registering* to do business in California and appointing an agent for service of process there. That is wrong as both a factual and a legal matter.

First, under the National Banking Act, a bank like UBS is not required to register to do business in a state in order to operate a federally chartered branch in that state. Rather, the bank is regulated exclusively by the federal Comptroller of the Currency. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 13–14 (2007). AM Trust's complaint *did not allege* that UBS is registered to do business in California or that UBS has appointed an agent to accept service of process in California. AM Trust did not allege those facts because they are not true: Publicly

available materials available from the California Secretary of State confirm that UBS has not been registered to do business in California for more than 12 years. *See* Exhibits to Declaration of Michael Huston in support of UBS’s Motion for Judicial Notice at 4, 19.² UBS has no appointed agent to accept service of process in California except on claims that were incurred “*within this state* prior to” UBS’s surrender of its California business registration in May 2003 (Cal. Corp. Code § 2112(a) (emphasis added)), a class of claims that does not include AM Trust’s claims here. As a result, even if it were true that, under California law, registering to do business or appointing a registered agent amounted to consent to general personal jurisdiction (and it does not), UBS would not have consented to jurisdiction in this case.

In fact, however, in California (unlike some other states), registering to do business *does not* amount to consent to personal jurisdiction. This is a question of state law, and federal courts must “look first and foremost to a state’s construction

² When resolving a challenge to jurisdiction, like this one, the Court “may review evidence beyond the complaint.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Moreover, under Federal Rule of Evidence 201(b)(1), the Court may take judicial notice of “matters of public record.” *Lee v. City of L.A.*, 250 F.3d 668, 688–89 (9th Cir. 2001). UBS is filing concurrently a motion for judicial notice of the California Secretary of State materials. UBS did not introduce these materials in the district court because AM Trust did not argue below that UBS is registered to do business in California.

of its own statute to determine whether appointment of an agent for service of process is a sufficient basis for the exercise of personal jurisdiction over a foreign corporation.” *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 575 (9th Cir. 2011).

The Supreme Court has held that “[t]he purpose of state statutes requiring the appointment by foreign corporations of agents upon whom process may be served is primarily to subject them to the jurisdiction of local courts in controversies growing out of transactions *within the state*.” *Morris & Co. v. Skandinavia Ins. Co.*, 279 U.S. 405, 408–09 (1929) (emphasis added). As a result, the Supreme Court has for nearly a century applied a presumption *against* construing a state’s business-registration statutes to establish general personal jurisdiction. *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.*, 257 U.S. 213, 215–16 (1921) (“Unless the state law either expressly or by local construction gives to the appointment [of an agent] a larger scope, we should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere”); *see also King*, 632 F.3d at 575 (the “default rule” is that, “in the absence of broader statutory language or state court interpretations, the appointment of an agent for the service of process is, by itself, insufficient to subject foreign corporations to suits for business transacted elsewhere”).

This Court determined several years ago that, under California law, service of process upon a foreign corporation in California does not support *general*

jurisdiction over that corporation, as opposed to jurisdiction over claims relating to the defendant's business in California. *Dunn v. Cedar Rapids Eng'g Co. of Delaware*, 152 F.2d 733, 734 (9th Cir. 1945); *see also World Lebanese Cultural Union, Inc. v. World Lebanese Cultural Union of N.Y., Inc.*, 2011 WL 5118525, at *4 (N.D. Cal. Oct. 28, 2011); *Martin v. D-Wave Sys. Inc.*, 2009 WL 4572742, at *3 (N.D. Cal. Dec. 1, 2009); *Miner v. United Air Lines Transp. Corp.*, 16 F. Supp. 930, 931 (S.D. Cal. 1936).

Since that time, there have been no changes to California law or an interpretation by the Supreme Court of California that would allow a different result. Instead, the California Courts of Appeal have twice held that designating an agent for service of process and qualifying to do business in California do not establish consent to general personal jurisdiction. *See DVI, Inc. v. Superior Court*, 104 Cal. App. 4th 1080, 1095 (2002); *Gray Line Tours of S. Nev. v. Reynolds Elec. & Eng'g Co.*, 193 Cal. App. 3d 190, 193–94 (1987).

This Court “must defer to the California Court of Appeal’s interpretation ... unless there is convincing evidence that the California Supreme Court would decide the matter differently” (*Cal. Pro-Life Council, Inc. v. Getman*, 328 F. 3d 1088, 1099 (9th Cir. 2003)), which there is not. On the contrary, California’s foreign-corporation registration statute requires consent only “to service of process”; it says nothing about personal jurisdiction. Cal. Corp. Code § 2105(a)

(emphasis added). The California Legislature has amended the registration statute four times since *Gray Line Tours* (in 1999, 2004, 2012, and 2014) without ever modifying the operative language relied on by the California Court of Appeal. By leaving unchanged Section 2105's language on consent, the Legislature has effectively ratified *Gray Line Tours* as a matter of California law. *See, e.g., People v. Bouzas*, 53 Cal. 3d 467, 475 (1991) (“When a statute has been construed by the courts, and the Legislature thereafter reenacts that statute without changing the interpretation put on that statute by the courts, the Legislature is presumed to have been aware of, and acquiesced in, the courts’ construction of that statute.”).

AM Trust points to decisions from other states that have permitted jurisdiction over corporations with agents for accepting service of process. *See* Br. 18, 25–26 (citing *Gucci*, 768 F.3d at [136. n.15]; *Vera v. Cuba*, --- F. Supp. 3d ---, 2015 WL 1244050 (S.D.N.Y. March 17, 2015); *Otsuka Pharm. Co. v. Mylan, Inc.*, --- F. Supp. 3d ---, 2015 WL 1305764 (D.N.J. March 23, 2015); *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, --- F. Supp. 3d ---, 2015 WL 186833 (D. Del. Jan. 14, 2015)). But those non-California cases are inapplicable and AM Trust mischaracterizes them.

In *Gucci*, the Second Circuit remanded only for consideration of whether the defendant had consented to *specific* jurisdiction in New York by applying to conduct business and appointing an agent for service. *See* 768 F.3d at 136 (“Even

without general personal jurisdiction, the district court may be able to require [the defendant's] compliance with the Asset Freeze Injunction by exercising specific jurisdiction"). Here, AM Trust does not challenge the district court's specific jurisdiction holding on appeal, so *Gucci* (which applied New York law) is inapplicable. *Vera* is a Second Circuit case controlled by *Gucci*; the district court distinguished *Gucci* merely on the ground that *Vera* was about discovery in aid of post-judgment execution proceedings. See 2015 WL 1244050, at *7–9. *Acorda* and *Otsuka* are both entirely dependent on *state courts'* interpretations of their respective state statutes on registration-and-appointment by foreign corporations, so those decisions are inapplicable in California. See *Acorda*, 2015 WL 186833, at *10–11 (Delaware law); *Otsuka*, 2015 WL 1305764, at *11 (New Jersey law).

Moreover, *even if* the California courts had interpreted California law to provide that a foreign corporation that registers to do business in California and appoints an agent for service has consented to personal jurisdiction in California on claims arising anywhere in the world, and *even if* UBS had registered to do business in California and appointed an agent to accept service there, personal jurisdiction in this case would *still* be unconstitutional after *Daimler*.

A state is not permitted to extend the reach of personal jurisdiction beyond what is permitted by the Due Process Clause. See *Goodyear*, 131 S. Ct. at 2850 (“A [state's] assertion of jurisdiction exposes defendants to the State's coercive

power, and is therefore subject to review for compatibility with the Fourteenth Amendment’s Due Process Clause”). The Supreme Court has long held that a state may not “burden[] the Constitution’s enumerated rights by coercively withholding benefits from those who exercise them.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013). In *Southern Pacific Co. v. Denton*, 146 U.S. 202, 206–07 (1892), the Court struck down a Texas statute that, as a condition of allowing a foreign corporation to do business in the state, required the corporation to register, appoint an agent for service, and waive the defendant’s right to remove a case from state to federal court. The Supreme Court held that requiring the corporation, “as a condition precedent to obtaining a permit to do business within the state, to surrender a right and privilege secured to it by the Constitution of the United States, was unconstitutional and void[.]” *Id.* at 207.

California could not require a corporation registering to do business to waive its due process right to be free from suits in courts without personal jurisdiction, just as California could not condition that privilege on the defendant waiving its right to a jury trial (U.S. Const. amend. VII), or its right to be free from excessive fines (U.S. Const. amend. VIII). Any other outcome would allow states to subject a corporate defendant to general personal jurisdiction in every state where it does business, which is precisely the outcome that the Supreme Court held is forbidden by the Due Process Clause in *Daimler*. 134 S. Ct. at 761.

C. A Corporation Like UBS Is Not Subject To “Tag” Jurisdiction

AM Trust argues for the first time on appeal that UBS is also subject to “tag” jurisdiction because it was served with this case in California, citing *Burnham v. Superior Court of California*, 495 U.S. 604 (1990). Br. 26, 30. This traditional form of jurisdiction over real persons allows a court to exercise personal jurisdiction over the defendant when the defendant is served with process in the forum state.

AM Trust never mentioned this argument below, and thereby waived it. *See Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998) (noting this Court’s “general rule against entertaining arguments on appeal that were not presented or developed before the district court”) (internal quotation marks omitted). But regardless, this Court has squarely held—in a case that AM Trust does not cite—that tag jurisdiction under *Burnham* “does not apply to corporations.” *Martinez*, 764 F.3d at 1064, *cert. denied*, 135 S. Ct. 2310 (2015).

Burnham did not “discuss[] tag jurisdiction with respect to artificial persons,” which (unlike natural persons) can operate only through agents and can do so in many places simultaneously. *Martinez*, 764 F.3d at 1067–68. A natural person can be present in a state both physically and through its contacts with the state, but a corporation can be present only through its contacts. *Id.* at 1068 (“An officer of a corporation is not the corporation, even when the officer acts on the

corporation's behalf"). And "[w]hile a corporation may in some abstract sense be 'present' wherever its officers do business, such presence is not physical in the way contemplated by *Burnham*." *Id.* (noting that *Burnham* distinguished the physical presence that is required for tag jurisdiction from the "purely fictional" concept of constructive "presence" through business contacts) (citing *Burnham*, 495 U.S. at 617–19).

Martinez also held that it would be inconsistent with Supreme Court precedent to conclude that tag jurisdiction can apply to corporations. 764 F.3d at 1068. *International Shoe* said that a corporation can be subject to personal jurisdiction *only* when it has sufficient contacts with the forum. And in *Perkins*, the defendant corporation's president had been personally served in the forum. "If tag jurisdiction had been available" for corporations, "that alone would have resolved the case." *Martinez*, 764 F.3d at 1068. Yet the Supreme Court in *Perkins* analyzed personal jurisdiction based solely on the defendant's contacts with the forum state. *Martinez*, 764 F.3d at 1068. The possibility of corporate tag jurisdiction would also allow an obvious end-run around *Daimler*'s clear rule that a corporation is not subject to jurisdiction everywhere that it does business.

For similar reasons, it makes no difference to this case that UBS agreed before the district court that it "[would] not dispute service of process." Br. 27 (citing ER 19–22). AM Trust cites no authority (besides *Burnham*) for the

proposition that waiving a challenge to the manner of service would also waive a challenge to personal jurisdiction. Federal Rule of Civil Procedure 4(b) lists “(2) lack of personal jurisdiction” and “(4) insufficient service of process” as *separate*, independent defenses to a claim for relief. Thus, in *Chan v. Society Expeditions, Inc.*, 39 F.3d 1398, 1404 & n.8 (9th Cir. 1994), this Court held that just because the plaintiffs made effective service of process on the corporate defendant, the district court did not thereby acquire *personal jurisdiction* over the defendant.

The purpose of the Federal Rules’ service requirement is to bring notice of the action to the defendant’s attention (*United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984)), whereas the requirement of personal jurisdiction ensures that the tribunal has “coercive power” over the defendant (*Goodyear*, 131 S. Ct. at 2850). The concepts are related, but distinct. *See* 4 Charles Alan Wright et al., *Federal Practice & Procedure* § 1063 (3d ed. updated Apr. 2015) (noting that “[s]trictly speaking, Rule 4 [regarding service] does not deal directly with ... jurisdiction over the person or property”). And *both* proper service *and* personal jurisdiction “must be satisfied in every case.” *Id.*; *see also Chan*, 39 F.3d at 1404–05 (remanding for reconsideration of personal jurisdiction even though service of process on the defendant was proper).

UBS's decision in the district court not to challenge service—or, for that matter, subject matter jurisdiction, venue, or any other Rule 12(b) defense—had no impact on its ability to move to dismiss the case for lack of personal jurisdiction. Were the rule otherwise, then attorneys would be forced to recite every possible objection at the outset of a case just to avoid waiver, which would only frustrate efforts to make litigation more efficient by cooperation.

III. The District Court Did Not Abuse Its Discretion In Denying Jurisdictional Discovery

A district court may properly deny jurisdictional discovery where, for example, the plaintiff's request is “based on little more than a hunch that [discovery] might yield jurisdictionally relevant facts” (*Boschetto*, 539 F.3d at 1020), or where the requested information is irrelevant to personal jurisdiction as a matter of law (*Pebble Beach v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006)). For these and the additional reasons discussed below, the district court did not abuse its discretion in denying AM Trust jurisdictional discovery here.

In *Boschetto*, this Court held that the defendant's act of selling a car on eBay to a California resident did not establish personal jurisdiction. The court affirmed the denial of jurisdictional discovery because there were no allegations that the defendants had sold any other cars on eBay before or after the lawsuit, or done anything else related to California. 539 F.3d at 1020. In *Butcher's Union Local No. 498 v. SDC Investment, Inc.*, the plaintiffs did not plead that the defendant had

any contacts relevant to California, and their jurisdictional discovery request was based merely on the *belief* that discovery would enable them to demonstrate sufficient California business contacts. 788 F.2d 535, 540 (9th Cir. 1986). This Court held that the plaintiffs' speculation about jurisdictionally relevant contacts did not rise to the "clearest showing" of actual and substantial prejudice that is required for reversal. *Id.* And in *Pebble Beach*, the Court rejected as a matter of law the plaintiff's contention that the defendant's passive website could subject the defendant to personal jurisdiction in California, and thus the Court held that additional discovery regarding the website "would not be helpful." 453 F.3d at 1160; *see also Terracom v. Valley Nat'l Bank.*, 49 F.3d 555, 562 (9th Cir. 1995) (the district court need not permit "even limited discovery" where the plaintiff's claim of personal jurisdiction "appears to be both attenuated and based on bare allegations in the face of specific denials made by defendants") (internal quotation marks omitted).

Here, AM Trust sought jurisdictional discovery on three questions: (1) where and when UBS has consented to federal jurisdiction; (2) where and when UBS has consented to federal jurisdiction regarding its banking operations; and (3) the nature and extent of UBS's banking and financial-service operations in California. Br. 29. But the district court carefully compared all of this requested information to the facts alleged in the complaint and determined that none of the

proposed discovery is relevant to personal jurisdiction in this case. *See Boschetto*, 539 F.3d at 1020 (jurisdictional discovery should be denied when the requested information is not relevant to personal jurisdiction).

As to AM Trust's first two requests, even if it were true that UBS had consented to federal jurisdiction in prior cases, the district court held that those decisions would have no impact on personal jurisdiction here. As discussed above (p. 23), UBS's consent to jurisdiction in any prior cases has no effect at all on its right to seek dismissal based on a lack of personal jurisdiction in this case.

Similarly prohibited is AM Trust's request for discovery regarding UBS's California operations. For the reasons explained above, none of those facts is relevant to the argument that UBS consented to personal jurisdiction in this case, because a party does not subject itself to general personal jurisdiction in California by merely doing business in the state. *Supra* pp. 15–16. *Daimler* emphasized that a defendant is (absent exceptional circumstances) subject to general jurisdiction only in its principal place of business and place of incorporation, both of which are “unique—that is, each ordinarily indicates only one place—as well as *easily ascertainable*.” 134 S. Ct. at 760 (emphasis added). These limitations are important, the Court held, because “[s]imple jurisdictional rules ... promote greater predictability.” *Id.* (quoting *Hertz*, 559 U.S. 77 at 94). Thus, “it is hard to see why

much in the way of discovery would be needed to determine where a corporation is at home.” *Id.* at 762 n.20.

AM Trust acknowledged before the district court that UBS’s place of incorporation and principal place of business are both in Switzerland, and it acknowledges on appeal that UBS is at home in Switzerland, not California. Under those circumstances, the “nature and extent” of UBS’s California operations will have no impact whatsoever on the question of general jurisdiction. *See id.* (“the general jurisdiction inquiry does not focus solely on the magnitude of the defendant’s in-state contacts”) (internal quotation marks omitted).

The district court’s denial of jurisdictional discovery was a proper exercise of its discretion, and this Court should affirm.

CONCLUSION

This Court should affirm the judgment of the district court.

Dated: September 4, 2015

Respectfully submitted,

s/ Dean J. Kitchens

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the foregoing Brief for Appellee UBS AG is proportionately spaced, has a typeface of 14 points, and contains 8,805 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word count feature of Microsoft Word 2010 used to generate this brief.

s/ Dean J. Kitchens

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, UBS AG states that it is not aware of any related cases.

s/ Dean J. Kitchens

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2015, I filed the foregoing Brief for Appellee UBS AG and Supplemental Excerpt of Record with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Dean J. Kitchens