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Nonparty Jurisdiction

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ABSTRACT

The Supreme Court's recent decisions on personal jurisdiction, including its 2021 decision in Ford Motor Co. v. Montana Eighth Judicial District Court, *have all focused on the adjudication of plenary claims. In seven years, the Court has decided six major cases on personal jurisdiction in that context. However, these precedents also appear to guide lower courts in areas outside the traditional focus of personal jurisdiction doctrine but where personal jurisdiction is nonetheless necessary. For example, a court must have personal jurisdiction over a nonparty witness in order to compel the witness to testify or to produce documents. A court must have personal jurisdiction over a person in order to obtain preliminary relief, and a court must have jurisdiction, either personal jurisdiction or attachment jurisdiction, in order to recognize and enforce a foreign country judgment or arbitral award. In the development of its jurisdictional jurisprudence, the Supreme Court has never paused to consider the implications of its decisions on these other applications of personal jurisdiction.*

This Article attempts to chart a path by examining these other forms of personal jurisdiction that arise, often in connection with the assertion of jurisdiction over a nonparty to the initial litigation. This Article presents a coherent approach to the power of courts over nonparties that is consistent with the prevailing constitutional doctrine on personal jurisdiction developed in the context of traditional plenary claims. This Article offers a comprehensive consideration of how courts should approach the question of their authority over nonparties—a theory of "nonparty" or "discovery jurisdiction" that fits comfortably with the Court's present jurisprudence.

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TABLE OF CONTENTS

"Whereas full-blown litigation exposes a defendant to extensive costs and subjects it to liability of its own, a nonparty faces no liability. . . . It faces almost no litigation burden and no liability of its own." [1]

"If anything, one would think that a more restrictive standard should apply when assessing personal jurisdiction over nonparties, not a looser one, because unlike defendants they are not accused of violating the plaintiff's rights and essentially have 'no dog in the fight.'" [2]

I. INTRODUCTION

Jurisdiction governs far more than the question of which court shall adjudicate a case between a plaintiff and a defendant. For example, jurisdiction determines when courts can exercise power over persons not a party to the case at all. Courts exercise power over nonparties for many purposes—enforcing a judgment, freezing assets pending adjudication, or compelling production of evidence. Nonparties are relative strangers to the underlying dispute. They find themselves on the receiving end of a subpoena or a writ because they happen to be

1. Licea v. Curacao Drydock Co., C.A. No. 4:13-MC-00874, slip op. at 7 (S.D. Tex. Sept. 9, 2014) (discussing a garnishee).

2. Leibovitch v. Islamic Republic of Iran, No. 08 C 1939, 2016 WL 2977273, at *7 (N.D. Ill. May 19, 2016) (quoting Ryan W. Scott, *Minimum Contacts, No Dog: Evaluating Personal Jurisdiction for Nonparty Discovery*, 88 MINN. L. REV. 968, 995–1004 (2004)).

in possession of documents, testimony, or assets important to the plaintiff or defendant. The current theoretical structure of jurisdiction fails to address these assertions of judicial power.

Until recently, the breadth of US courts' power over persons concealed this void. But "only when the tide goes out do you discover who's been swimming naked."[3] The tide went out on January 14, 2014, when the US Supreme Court decided *Daimler AG v. Bauman*, which dramatically tightened the limits on where a party could be sued for any conduct—so-called "general" or "all-purpose" jurisdiction.[4] For over half a century, a party could be sued for any claims in a forum where it had "continuous and systematic" contacts—for example, where it maintained a leased sales office with a handful of employees—sometimes referred to as "doing business" jurisdiction.[5] After *Daimler*, a party can only be sued for any and all claims where it is "at home"—absent exceptional circumstances, its place of incorporation or principal place of business.[6]

Before *Daimler*, nearly every transnational foreign nonparty action involved "doing business" jurisdiction.[7] There was no need for a more sophisticated theory of nonparty jurisdiction—or any theory—because the "doing business" standard of jurisdiction was so easy to meet. For example, US courts have frequently exercised their power over multinational companies as witnesses. This ability of US courts to compel testimony or the production of documents is one of the defining features of US dispute resolution. However, US courts' power over these witnesses has been almost completely reliant on the old "doing business" jurisdiction. This reliance was not limited to civil adjudication—grand jury subpoenas relied on the same jurisdictional

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3. Attributed to Warren Buffet. He added: "And then, the naked swimmers call Berkshire." *See* Jonathan Stempel & Jennifer Ablan, *Warren Buffett Maps Out Hopes for Berkshire Without Him*, REUTERS (May 4, 2013, 8:07 AM), https://www.reuters.com/article/uk-berkshire-agm-idUKBRE94307J20130504 [https://perma.cc/W28F-ZB4U] (Oct. 27, 2021).

4. Daimler AG v. Bauman, 571 U.S. 117, 138 (2014).

5. For classic examples of pre-Daimler "doing business" jurisdiction in plenary actions, see, e.g., Bryant v. Finnish Nat'l Airline, 208 N.E.2d 439, 441–42 (N.Y. 1965) (finding a basis for jurisdiction where a foreign corporation maintained a lease, employed several people, and had a bank account in the forum); Tauza v. Susquehanna Coal Co., 115 N.E. 915, 916–17 (N.Y. 1917) (upholding general jurisdiction due to the presence of a local office conducting regular business).

6. *See Daimler AG*, 571 U.S. at 137 (observing that "[w]ith respect to a corporation, the place of incorporation and principal place of business are" the paradigmatic forums for exercise of all-purpose jurisdiction).

7. *See* Linda J. Silberman & Aaron D. Simowitz, *Recognition and Enforcement of Foreign Judgments and Awards: What Hath Daimler Wrought?*, 91 N.Y.U. L. REV. 344, 351 (2016) ("Daimler's application to recognition and enforcement has not been limited to actions against debtors; it has also been applied to enforcement proceedings against third parties.").

basis.[8] If *Daimler* applies in this context, US courts may no longer be able to gather information as they have for decades.

Recently, courts have looked to other bases of jurisdiction.[9] Some courts have relied on specific jurisdiction, which permits courts to hear claims when the defendant has contacts in the forum "arising out of or related to the claim."[10] But they have not resolved what "claim" means in this context—in other words, whether the nexus had to be with the underlying action (for example, an anti-counterfeiting action against Chinese website operators) or the action for discovery. If the nexus had to be with the underlying action, discovery could only be had from a nonparty if it had contacts in the US forum connected with the plenary action against the defendant, a difficult standard to satisfy. If the nexus had to be with the action for discovery, it is not at all clear what contacts would "arise out of or relate" to a subpoena. The very formulation of the specific jurisdiction standard indicates its origins in plenary actions. To fill the gap left by *Daimler*, subsequent courts have deployed various other bases of jurisdiction ill-suited to the task.[11]

The concerns motivating the constitutional doctrine of personal, or adjudicative, jurisdiction are notoriously murky. However, two factors seem to predominate: the burdens on the target of the action and the nature of the action itself.

As to burdens, the Court in *Phillips Petroleum Co. v. Shutts* distinguished between the protections owed to absent class plaintiffs and to defendants, reasoning that "[b]ecause States place fewer burdens upon absent class plaintiffs than they do upon absent defendants in nonclass suits, the Due Process Clause need not and does not afford the former as much protection from state-court jurisdiction as it does the latter."[12] *Shutts* is the closest the Court has ever come to addressing the due process protections owed to non-defendants, and so the "burdens upon" nonparties have been central to the thinking of lower courts since. Courts have struggled with the question of what burdens are faced by a nonparty. Courts and scholars have yet to analyze whether, how, or why these burdens are different from those faced by a defendant in plenary action. Courts and commentators tend

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8. *See* Marc Gottridge & Anjum Unwala, *Daimler's Effect on Bank of Nova Scotia Subpoenas*, LAW.COM: CORP. COUNS. (October 13, 2016), https://www.law.com/corpcounsel/almID/1202769838649/?/&slreturn=20220102132437 [https://perma.cc/Q4NN-YNTJ] (archived Mar. 20, 2022).

9. *See* Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 138 (2d Cir. 2014) ("In light of that pre-Daimler case law, the district court had no need to consider specific jurisdiction or to develop a record sufficient for that purpose. On remand, the district court must give the issue due consideration.").

10. *See* Gucci Am., Inc. v. Weixing Li, 135 F. Supp. 3d 87, 95 (S.D.N.Y. 2015) ("Here, there can be no real dispute that BOC frequently and deliberately used its New York correspondent account with Chase to effectuate wire transfers for its U.S. clients, including, critically, Defendants in this action." (emphasis omitted)).

11. *See infra* Section II.

12. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811 (1985).

to treat "burdens" or "litigation burdens" as a monolithic concept. In fact, there are many different types of burdens. Parties and nonparties face different burdens of responding to being served with a complaint, petition, or subpoena; different burdens of complying with the action; different burdens of litigating the action; and different burdens if the action is lost or ignored. Disaggregating these types of burdens is the first step to an assessment of whether burdens lie more heavily on the parties or the nonparties and, if so, which ones. These burdens are also likely to vary for foreign nonparties.

As to the nature of the action, the landmark decision of *Shaffer v. Heitner* distinguished between the ability of plaintiffs to sue defendants on any claim where a defendant's property could be found (so-called type two quasi-in-rem jurisdiction) and the ability of a creditor to obtain jurisdiction for actions to recognize and enforce a judgment wherever the debtor's property is found.[13]

As post-*Daimler* litigation makes clear, every possibility is on the table, from discovery entirely unrestrained by due process jurisdictional protections, to a dramatic retrenchment of the power of US courts to compel discovery from multinationals, even those with documents in the United States. Some possibilities can be ruled out. Elimination of jurisdictional protections would wrongly assume that burdens on nonparties are always minimal or nonexistent. US courts seem drawn to concepts rooted in in-rem or quasi-in-rem jurisdiction, but this slide toward asset jurisdiction fundamentally misunderstands the nature of discovery actions as laid out in the Federal Rules of Civil Procedure. Personal jurisdiction can be asserted over nonparties when they aid or abet in the knowing violation of an injunction, but linking personal jurisdiction to the injunctive power risks distorting one or both. Finally, the Supreme Court could not have meant to simply eliminate this long-standing pillar of US procedure in cross-border cases. There is no such suggestion in *Daimler* or in other decisions. Indeed, the Court's decisions suggest sustained support for cross-border discovery.

The burdens on nonparties and the nature of nonparty actions also suggest the most promising paths forward. *Daimler* should not apply of its own force to the very different context of nonparty actions, just as it should not apply to post-judgment actions.[14] The burdens on nonparties are different from those on defendants. It is difficult to say that, in every instance, nonparties will face lesser burdens. However, the primary burden on foreign nonparties is the vise of foreign compulsion, where foreign law forbids what US law requires.[15] This particular type of burden should not weigh heavily in the jurisdictional

13. *See* Shaffer v. Heitner, 433 U.S. 186, 210 n.36 (1977).

14. *See generally* Silberman & Simowitz, *supra* note 7, at 391.

15. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 442 (AM. L. INST. 2018) (discussing the standard for foreign state compulsion).

analysis. Foreign compulsion is subject to a separate, tailored inquiry that US courts apply after the jurisdictional stage.[16] To import these concerns into the jurisdiction analysis would be to double-count them.

Specific jurisdiction is another potential path forward. Whereas general jurisdiction is normally justified as appropriate for insiders (e.g., citizens and domiciliaries), specific jurisdiction is most appropriately used to enforce a sovereign's regulatory policies. Discovery is a species of regulation. In addition, disclosure regimes are tailored to support other areas of substantive law. However, the very formulation of specific jurisdiction belies its origins in merits actions. Specific jurisdiction permits power over a foreign defendant when its contacts in the forum "arise out of or relate to the claim." For nonparty actions, courts have struggled even to determine which is the relevant "claim"—the action for discovery or the underlying merits action.

II. *DAIMLER* AND NONPARTIES

Before *Daimler*, US courts used the old formulation for "doing business" jurisdiction to exercise broad powers over foreign nonparty witnesses and garnishees in both civil and criminal cases. In *Daimler*, the Supreme Court pruned general jurisdiction in the context of a human rights claim asserted by a foreign plaintiff, based on foreign conduct, against a foreign defendant. After *Daimler*, transnational nonparty practice has been thrown into confusion. Courts have struggled to formulate a coherent approach to specific jurisdiction and have turned to other inapposite approaches.

A. Nonparties before Daimler

The combination of the broad standards for discovery in the Federal Rules of Civil Procedure with the jurisdictional revolution following *International Shoe Co. v. Washington*[17] produced the most aggressive transnational discovery system in the world. This system produced extensive case law about the breadth of discovery—but little touching the issue of jurisdiction. The validity of "doing business" jurisdiction over nonparties was assumed.

According to the Restatement (Third) of Foreign Relations Law: "No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in

16. *See id.*

17. Int'l Shoe Co. v. Washington, 326 U.S. 310, 314 (1945) ("[A]gents of a foreign corporation plus some additional activities there are sufficient to render the corporation amenable to suit brought in the courts of the state to enforce an obligation arising out of its activities there.").

the United States."[18] In the celebrated *British Airways Board v. Laker Airways* case, Lord Diplock remarked that US-style civil procedure "seems to any English lawyer strange and indeed oppressive of defendants," particularly the "wide-roving search for any information that might be helpful."[19]

US courts have held since the 1960s that they have the power to order disclosure of documents held abroad under the comparatively broad standards laid out in the Federal Rules of Civil Procedure.[20] US courts have consistently held that personal jurisdiction is required for a court to enforce a subpoena.[21] However, it became axiomatic that a US court could issue any order to a party over which it established personal jurisdiction.[22] To order discovery of documents held abroad, US courts were therefore required to find only personal jurisdiction over a nonparty and that the nonparty had possession, custody, or control over the documents.[23]

US courts recognized that these discovery orders could create conflicts with foreign laws, and so required consideration of the foreign sovereign's interests.[24] The Restatement (Fourth) of U.S. Foreign Relations Law recognizes that broad authority of US courts to order discovery of evidence held abroad in civil proceedings, noting that a

> court in the United States . . . may order a person subject to its jurisdiction to produce documents or other forms of evidence and to submit to depositions . . . even if the evidence, the person who controls access to the

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18. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 442 n.1 (AM. L. INST. 1987).

19. British Airways Bd. v. Laker Airways, Ltd. [1985] AC 58, 78 (HL) (appeal taken from Eng.).

20. *See, e.g.*, United States v. First Nat'l City Bank, 396 F.2d 897, 900–01 (2d Cir. 1968) ("It is no longer open to doubt that a federal court has the power to require the production of documents located in foreign countries if the court has in personam jurisdiction of the person in possession or control of the material.").

21. *See* U.S. Cath. Conf. v. Abortion Rts. Mobilization, Inc., 487 U.S. 72, 76 (1988) (holding that "the subpoena power of a court cannot be more extensive than its jurisdiction"); Eli Lilly & Co. v. Gottstein, 617 F.3d 186, 192 n.4 (2d Cir. 2010) (collecting cases).

22. *See* Diego Zambrano, *A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery*, 34 BERKELEY J. INT'L L. 157, 164 (2016) ("It is axiomatic that without personal jurisdiction a court cannot order a party to produce documents because it has no power over that party.").

23. *See* Marc Rich & Co. v. United States, 707 F.2d 663, 667 (2d Cir. 1983) ("Neither may the witness resist the production of documents on the ground that the documents are located abroad. The test for production of documents is control, not location." (internal citations omitted)).

24. *See, e.g.*, Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197 (1958); Application of Chase Manhattan Bank, 297 F.2d 611, 613 (2d Cir. 1962); Ings v. Ferguson, 282 F.2d 149, 152 (2d Cir. 1960); First Nat'l City Bank of N.Y. v. IRS, 271 F.2d 616 (2d Cir. 1959).

> evidence, or the person subject to the compulsory interview is outside the United States.[25]

A US court may also "impose sanctions on a person who fails to comply with an order to produce evidence or submit to a compulsory interview, even if complying with the order would subject the person to punishment under foreign law."[26] The Restatement (Fourth) seems to take a more aggressive stance toward cross-border discovery than the Restatement (Third), which prescribed a balancing test.[27]

The jurisdictional narrowing of *Daimler* affects not only private civil subpoenas but also subpoenas issued by government prosecutors. "For over three decades, *Bank of Nova Scotia* subpoenas have been a powerful weapon in prosecutors' arsenals, permitting them to obtain records held by a bank's foreign branch through service of a subpoena on a local branch."[28] These subpoenas get their name from a 1982 decision affirming a contempt sanction against a foreign bank.[29] US prosecutors had served the bank's Miami branch with a subpoena demanding documents held at the bank's Bahamian branch. The district court ordered compliance with the subpoena and imposed civil contempt sanctions when the bank still failed to comply. The US Court of Appeals for the Eleventh Circuit affirmed the sanctions, rejecting the bank's arguments that requiring it to violate Bahamian bank secrecy law would therefore violate its due process protections.[30]

Under the *Bank of Nova Scotia* framework, "U.S. courts have frequently held that significant U.S. government concerns may outweigh foreign interests in protection of private or confidential information."[31] But *Bank of Nova Scotia* would never have happened without the old "doing business" jurisdiction. In *Bank of Nova Scotia*, the US court was only able to assert power over the foreign bank by virtue of its domestic branch. The Canadian bank was plainly not "at home" in the United States. Nor does it appear that prosecutors would have had a simple means to demonstrate specific jurisdiction—the documents sought were neither in the United States nor generated by conduct in the United States. Simply put, this entire line of cases would not have existed but for the uncontroversial acceptance of pre-*Daimler* "doing business" jurisdiction.

The breadth of the pre-*Daimler* "doing business" jurisdiction concealed a void in the development of a jurisdictional theory for

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25. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 426 (1) (AM. L. INST. 2018).

26. *Id.* § 426 (3).

27. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, §§ 441 & 442.

28. *See* Gottridge & Unwala, *supra* note 8.

29. *See id.*

30. *See id.*

31. Steven C. Bennett, M. James Daley & Natascha Gerlach, *Storm Clouds Gathering for Cross-Border Discovery and Data Privacy: Cloud Computing Meets the U.S.A. Patriot Act*, 13 SEDONA CONF. J. 235, 244 (2012).

transnational nonparty proceedings. There is a void at the interstate level as well, though for a different reason. By statute, most states expressly limit the reach of subpoenas to their territorial boundaries.[32] This prompted Rhonda Wasserman to call the jurisdictional reach of subpoenas "*Pennoyer's* Last Vestige."[33] State courts have consistently rejected the notion that a mere finding of jurisdiction could support service of subpoena beyond the state's territorial boundaries.[34] On the occasion that courts have taken up specific jurisdiction in dicta, they have been skeptical.[35]

Enforcement of interstate subpoenas therefore took a very different path from transnational subpoenas. In interstate discovery, "enforcement of a subpoena seeking out-of-state discovery is generally governed by the courts and the law of the state in which the witness resides or where the documents are located."[36] In light of the territorial limits of the subpoena power, most states have enacted some version of the Uniform Interstate Depositions and Discovery Act (UIDDA). UIDDA sets out reciprocal procedures through which testimony or documents sought in the forum state can be obtained by presentment of a subpoena issued by a sister state.[37]

The Supreme Court of Virginia recently rejected the argument that jurisdiction over an out-of-state nonparty conferred subpoena power and relied, in part, on "the policy underlying the General Assembly's enactment of the UIDDA" that "provides a reciprocal and fair process that assists out-of-state litigants seeking discovery from nonparties."[38] The court noted that the UIDDA "contemplates that Virginia courts will respect the territorial limitations of their own subpoena power," that such "respect furthers the preservation of

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32. *See In re* Vioxx Prods. Liab. Litig., 438 F. Supp. 2d 664, 667 (E.D. La. 2006) ("From its inception in the 14th century English courts of chancery, the subpoena has been limited by the territorial bounds of the issuing court. Even as the subpoena made its way from England to the United States, it maintained its territorial boundaries." (internal citation omitted)).

33. *See* Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37, 39 (1989) ("Regardless of the distance between the witness and the courthouse, the amount of contact the witness has with the state, or the need for live testimony, the states uniformly and steadfastly have refrained from exercising extraterritorial subpoena power. Instead, they have clung to an antiquated view of state court power.").

34. *See* Yelp, Inc. v. Hadeed Carpet Cleaning, Inc., 770 S.E.2d 440, 443 (Va. 2015) (collecting cases).

35. *See, e.g.*, Colorado Mills, LLC v. SunOpta Grains & Foods Inc., 269 P.3d 731, 733 (Colo. 2012) (suggesting that Colorado's long-arm statute might extend specific jurisdiction to non-residents, though not in the instant case).

36. *Yelp, Inc.*, 770 S.E.2d at 444.

37. Am. Online, Inc. v. Anonymous Publicly Traded Co., 542 S.E.2d 377, 382 (2001) (applying Uniform Foreign Deposition Act, predecessor to the UIDDA). The court noted that the system of interstate discovery therefore grew "rooted in principles of comity" and the need to "provide[] a mechanism for discovery of evidence in aid of actions pending in foreign jurisdictions." *Id.*

38. *Yelp, Inc.*, 770 S.E.2d at 445.

comity and uniformity among the states, which ultimately benefits Virginia citizens."[39] The court also observed that the "language of the statute also manifests the intent of the General Assembly to respect the territorial limitations of out-of-state discovery" and not an intent to create "two mechanisms for obtaining discovery from a nonparty residing outside of Virginia."[40]

The US Supreme Court could have taken a similar path in its approach to discovery from foreign nonparties. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the Hague Evidence Convention) sets up a system in which litigants seeking discovery from nonparties abroad transmit a request for evidence to the central authority of the forum state, which in turn transmits the request to the central authority of the foreign state where the witness is located. The Hague Evidence Convention, like the UIDDA, relies on the cooperation of the foreign state.

In its landmark case on transnational discovery from foreign parties, *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, the Supreme Court expressly rejected the arguments that the United States' accession to the Hague Evidence Convention could "be read as requiring its use to the exclusion of any other discovery procedures whenever evidence located abroad is sought for use in an American court" or even be "interpreted to require first, but not exclusive, use of its procedures."[41] The *Aerospatiale* decision preserved the ability of US courts to gather evidence unilaterally from persons abroad (if a valid basis for jurisdiction existed), even as state courts rejected that approach in interstate discovery.

B. Daimler v. Bauman

Daimler v. Bauman was not a case about nonparties. It was initially not even a case about the appropriate constitutional standard for general jurisdiction.[42] *Daimler* was a case about imputation of jurisdictional contacts from a corporate subsidiary to a parent corporation.[43] The US Supreme Court did not signal its intent to issue

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39. *Id.*

40. *Id.*

41. Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 533 (1987).

42. *See* Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 678 (2015) ("It is not quite clear why the Supreme Court chose to make the Daimler case the vehicle to further refine the "at home" point. The more significant question in the case--and the one on which the Court granted certiorari—was whether the activities of a subsidiary of a foreign parent could be attributed to the parent.").

43. Daimler's petition for certiorari makes clear the issue that they thought they were putting before the court: "The Ninth Circuit's decision vastly expands the circumstances in which general personal jurisdiction can be exercised over a foreign

a broader holding until the oral argument. The Court itself is therefore responsible for the failure of briefing and deliberation on the implications of dramatically narrowing the standard for general jurisdiction. It is likely that the Court simply did not consider the impact of its *Daimler* holding on nonparty practice.

In *Daimler*, foreign plaintiffs sought a US forum to adjudicate their human rights claims based on the actions of a Daimler subsidiary in Argentina.[44] The plaintiffs requested relief against the ultimate corporate parent, located in Stuttgart, Germany. The basis for bringing suit in California was the "continuous and systematic" contacts of a US corporate subsidiary, MBUSA, incorporated in Delaware with its principal place of business in New Jersey.[45]

The argument for jurisdiction therefore required two leaps—one simple and one complex, at least under pre-*Daimler* case law. The simple step: Plaintiffs asked the California district court to find that the US subsidiary had "continuous and systematic contacts" with California based on its "multiple California-based facilities" and its status as the leading seller of luxury vehicles in California. This question was easy pre-*Daimler*. Before the district court, Daimler did "not dispute that MBUSA [was] subject to general jurisdiction in California" and argued only that MBUSA's contacts should not "be imputed to DCAG," the foreign parent company.[46]

And then the complex step: Plaintiffs asked that the US subsidiary's jurisdictional contacts be imputed to the German corporate parent. A subsidiary's contacts can be imputed to the parent when it is the parent's alter ego or when it is acting as the parent's

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corporation based solely on the forum-state contacts of a corporate subsidiary." Petition for Writ of Certiorari at 9, Daimler AG v. Bauman, 571 U.S. 117 (2014) (No. 11-965) 2012 WL 379768. Daimler argued that the lower court's decision deepened a circuit split on whether and when "due process permits a court to exercise personal jurisdiction over a defendant by imputing the jurisdictional contacts of a subsidiary corporation to an out-of-state parent" and offended "[the] respect for corporate separateness that animate[s] this Court's personal-jurisdiction jurisprudence." Petition for Writ of Certiorari at 9, *Daimler AG*, 571 U.S. 117 (No. 11-965). Daimler framed the question presented as "whether it violates due process for a court to exercise general personal jurisdiction over a foreign corporation based solely on the fact that an indirect corporate subsidiary performs services on behalf of the defendant in the forum State." Brief for Petitioner at (i), *Daimler AG*, 571 U.S. 117 (No. 11-965).

44. *Daimler AG*, 571 U.S. 117 at 120–21 ("The litigation commenced in 2004, when twenty-two Argentinian residents filed a complaint in the United States District Court for the Northern District of California against Daimler Chrysler Aktiengesellschaft (Daimler), a German public stock company, headquartered in Stuttgart, that manufactures Mercedes–Benz vehicles in Germany.").

45. *See id.* at 121 ("Jurisdiction over the lawsuit was predicated on the California contacts of Mercedes–Benz USA, LLC (MBUSA), a subsidiary of Daimler incorporated in Delaware with its principal place of business in New Jersey. MBUSA distributes Daimler-manufactured vehicles to independent dealerships throughout the United States, including California.").

46. Bauman v. Daimler Chrysler AG, No. C-04-00194 RMW, 2005 WL 3157472, at *10 (N.D. Cal. Nov. 22, 2005).

agent.[47] Plaintiffs did not allege that MBUSA was Daimler's alter ego—rather, they relied only an agency theory of jurisdictional imputation. The district court held that, "[a]lthough admittedly a close question . . . the activities of MBUSA should not be imputed to defendant for the purpose of establishing personal jurisdiction over DCAG"—but did allow "limited jurisdictional discovery . . . on whether an agency relationship exists."[48] This question was the only one on which the Court granted certiorari and which the parties and *amici curiae* briefed. Only at argument did the Court indicate that it might be inclined to rule more broadly. In the words of Justice Sotomayor to Thomas Dupree, Daimler's counsel: "Do you care how you win?"[49] They did.[50]

In the end, the Court opted for Daimler's most preferred outcome: the Court dramatically curtailed the breadth of all assertions of general jurisdiction.[51] The Court essentially eliminated "doing business" jurisdiction, the power of a court to hear all claims against a foreign party with "continuous and systematic" contacts in the forum.[52] The Court redefined "continuous and systematic" contacts to encompass only those contacts that rendered a corporation "essentially at home," its place of incorporation or principal place of business.[53] The

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47. *See id.* ("A subsidiary's contacts may be imputed to the parent where the subsidiary is the parent's alter ego or where the subsidiary acts as the general agent of the parent.").

48. *Id.* at *12, *19.

49. Oral Argument at 56:12–13, Daimler AG v. Bauman, 571 U.S. 117 (2014) (No. 11-965), https://www.oyez.org/cases/2013/11-965 [https://perma.cc/HXR4-ULKX] (archived Oct. 28, 2021). Moments before, Justice Sotomayor expressed her frustration with how the issues had come before the Court: "Do you really care how we do it? Given that so many issues have not been adequately briefed, conceded when they are, obviously, fallacious and unsupportable, why don't we just say, simply, exercise of jurisdiction is unreasonable in this case?" *Id.* at 55:39–55.

50. *Id.* at 56:14–7 ("Well, yes, Your Honor, I think we do. I think we do.").

51. Although *Daimler* did not by its terms apply to all state court assertions of jurisdiction, the Supreme Court soon expanded its holding to do so. *See* BNSF Ry. Co. v. Tyrrell, 137 S. Ct. 1549, 1558–59 (2017) ("The Fourteenth Amendment due process constraint described in *Daimler*, however, applies to all state-court assertions of general jurisdiction over nonresident defendants; the constraint does not vary with the type of claim asserted or business enterprise sued."). The *Daimler* holding still stands in some tension with the continued vitality of "tag jurisdiction" over natural persons. *See* Richard D. Freer, *Some Specific Concerns with the New General Jurisdiction*, 15 NEV. L.J. 1161, 1167–68 (2015) ("The Court gives no hint about why general jurisdiction over corporations should be so much narrower than it is over humans.").

52. *See Daimler AG*, 571 U.S. at 139 n.20 ("General jurisdiction instead calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise, "at home" would be synonymous with "doing business" tests framed before specific jurisdiction evolved in the United States.").

53. *See id.* at 139 (holding that the general jurisdiction inquiry is "not whether a foreign corporation's in-forum contacts can be said to be in some sense continuous and systematic, it is whether that corporation's affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum State." Goodyear Dunlop

Court carved out an exception for "extraordinary circumstances," but made plain that this exception should be sparingly used.[54]

The Court—particularly Justice Ginsburg—likely did not view the *Daimler* decision as a pure bolt from the blue. In 2011, the Court decided *Goodyear Dunlop Tires v. Brown*, in which Justice Ginsburg, writing for the majority, noted in dicta that "the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."[55] But *Goodyear* was an easy case that demanded reversal—the court below, the Supreme Court of North Carolina, had simply erred in confusing general and specific jurisdiction.[56] The meaning of *Goodyear*'s dicta was hotly debated by scholars[57]—but mostly ignored by courts accustomed to decades of "doing business" jurisdiction. The US Court of Appeals for the Second Circuit held that the banks had not waived their due process arguments by failing to raise them after the *Goodyear* decision.[58]

Simply put, the Court regarded *Daimler* as a case about whether US courts could adjudicate claims against foreign defendants brought by foreign plaintiffs based on foreign conduct.[59] These so-called "f-

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Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (internal quotation marks removed)).

54. The Court noted that "[w]e do not foreclose the possibility that in an exceptional case . . . a corporation's operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render the corporation at home in that State," but cited as an example Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952), in which a Philippines corporations had relocated all of its operations to Ohio to avoid foreign occupations and armed conflict. *Daimler AG*, 571 U.S. at 139 n.19. *See also id.* at 130 n.8 (emphasizing Perkins' "wartime circumstances" and citing von Mehren and Trautman for the proposition that *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" (internal quotations marks removed) (citing Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144 (1966)).

55. *Goodyear*, 564 U.S. at 924 (citing Lea Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX. L. REV. 721, 728 (1988), for the proposition that "domicile, place of incorporation, and principal place of business" are the paradigmatic "bases for exercise of general jurisdiction").

56. *Goodyear*, 564 U.S. at 917 ("The North Carolina court's stream-of-commerce analysis elided the essential difference between case-specific and general jurisdiction.").

57. For example, South Carolina Law Review ran an excellent symposium on "*Personal Jurisdiction for the Twenty-First Century: The Implications of* McIntyre *and* Goodyear Dunlop Tires." Howard B. Stravitz, Introduction, *Personal Jurisdiction for the Twenty-First Century: The Implications of* McIntyre *and* Goodyear Dunlop Tires, 63 S.C. L. REV. 463 (2012).

58. *See* Gucci Am., Inc. v. Bank of China, 768 F.3d 122, 136 (2d Cir. 2014) ("Prior to *Daimler*, controlling precedent in this Circuit made it clear that a foreign bank with a branch in New York *was* properly subject to general personal jurisdiction here." (citing Wiwa v. Royal Dutch Petroleum Co., 226 F.3d 88, 93–95 (2d Cir. 2000)).

59. The first line of Justice Ginsburg's opinion: "This case concerns the authority of a court in the United States to entertain a claim brought by foreign plaintiffs against

cubed" cases have led the Court into aggressively broad holdings in several doctrinal areas.[60] There is some evidence that the Court considered the impact of its holding on federal statutes such as the Alien Tort Statute and the Torture Victims Protection Act—but believed that there was no conflict in the *Daimler* case specifically.[61] In dissent, Justice Sotomayor raised the possibility that the *Daimler* holding could curtail human rights claims. But neither the parties, nor the *amici curiae*, nor the Court raised the impact of the Court's broad holding on other areas of US law and practice that relied on the old "doing business" standard.

C. *Nonparties after* Daimler

The impact has been dramatic. Courts have been confused as to how to handle cross-border discovery requests in the aftermath of *Daimler*. Courts have been frustrated by arguments that nonparties with a significant presence in the United States are not under any obligations to respond to US discovery orders—arguments that may appear consistent with *Daimler*. US courts have split in their analytical approach to post-*Daimler* cross-border discovery disputes but have been consistent in some of their results. For example, courts seem to agree that documents physically present in the United States should be discoverable in the United States—but cannot agree on a sound analytical path to that result. The confusion resulting from this results-oriented approach will no doubt be felt in more complicated cases, such as those involving data or documents held abroad but generated by domestic conduct.

The first significant test case for post-*Daimler* cross-border discovery was not a typical request for documents. In *Gucci v. Li*, luxury brand companies pursued trademark infringement claims against Chinese manufacturers of counterfeit luxury goods.[62] The Lanham Act applies extraterritorially, so there was no obstacle to the

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a foreign defendant based on events occurring entirely outside the United States." *Daimler AG*, 571 U.S. at 120.

60. *See, e.g.*, Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1099 (2015) ("This shift foreclosed a large amount of transnational litigation that had formerly been taken for granted, including suits by U.S. plaintiffs.").

61. *See Daimler AG*, 571 U.S. at 140–41 ("Finally, the transnational context of this dispute bears attention. The Court of Appeals emphasized, as supportive of the exercise of general jurisdiction, plaintiffs' assertion of claims under the Alien Tort Statute (ATS) . . . Recent decisions of this Court, however, have rendered plaintiffs' ATS and TVPA claims infirm."). For an analysis and proposed solution to the tension between *Daimler* and numerous federal statutes, *see generally* Aaron D. Simowitz, *Legislating Transnational Jurisdiction*, 57 VA. J. INT'L L. 325 (2018).

62. *See Gucci Am., Inc.*, 768 F.3d at 129 ("We conclude that in light of Daimler AG v. Bauman, 134 S. Ct. at 746, decided only this year, the district court erred in finding that [Bank of China] is properly subject to general jurisdiction.").

application of US law.[63] But the plaintiffs had another problem: shutting down the counterfeiters themselves was easy, but largely pointless. A favorable judgment under the Lanham Act would typically force the shutdown of the counterfeiter's website—and a new website, likely run by the same operation, would appear in short order. It was whack-a-mole, except that the moles never stopped, and it cost a lot more than a quarter to play.

Plaintiff Gucci decided to follow the money. The purchase of these luxury-goods counterfeits was typically conducted online. Multinational banks, like the Bank of China and China Merchants' Bank, processed the transactions. These banks held the purchasers' payments in accounts belonging to the counterfeiters before disbursing them on demand. Gucci lawyers reasoned that, while counterfeiter websites might disappear and reappear at will, multinational banks do not.

The plaintiffs sought the equitable remedy of an accounting of profits against the banks. An accounting is an equitable proceeding designed to determine the amount of damages suffered by the plaintiffs. To that end, the accounting remedy requires nonparties to disclose information relevant to the quantum of damages and, notably, freeze any assets generated by the alleged tortious conduct. This strategy was far more appealing from the plaintiffs' perspective—either the banks would comply, effectively blocking the sale of counterfeit luxury goods, or refuse and thereby run the risk of themselves becoming liable for damages sustained by the luxury-goods companies.

This litigation began prior to the Supreme Court's decision in *Daimler*. Before *Daimler*, *Gucci* was an easy case. The Bank of China has a brick-and-mortar branch on Forty-Second Street in downtown Manhattan (among other locations). These contacts would have met any definition of "continuous and systematic contacts" under the pre-*Daimler* test. Accordingly, jurisdiction was not raised in the case's first trip to the district court.[64] Other issues predominated, such as whether the US district court could restrain assets abroad (it could)[65] and

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63. Steele v. Bulova Watch Co., 344 U.S. 280, 287 (1952) ("Even when most jealously read, that [Lanham] Act's sweeping reach into 'all commerce which may lawfully be regulated by Congress' does not constrict prior law or deprive courts of jurisdiction previously exercised."). Whether it is possible to square *Bulova Watch Company* with the Court's *Morrison* decision is a question best left for another day. It may reside in the same awkward limbo as Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993)—but, for now, it remains good law.

64. *See* Gucci Am., Inc. v. Weixing Li, No. 10 CIV. 4974 RJS, 2011 WL 6156936, at *4 (S.D.N.Y. Aug. 23, 2011) ("Here, there is no dispute that Defendants, despite failing to appear in this action, are subject to this Court's jurisdiction."), *vacated*, 768 F.3d 122 (2d Cir. 2014).

65. *See id.* ("The fact that the some of the funds subject to the Injunction are located outside of the United States does not, contrary to the Bank's arguments, deprive the Court of authority to issue the asset restraint. . . .").

whether Chinese bank secrecy law barred the US court from ordering disclosure (it did not).[66] When the Bank of China failed to comply with the entirety of the order, the US court held it in civil contempt and imposed escalating sanctions.[67]

The US Supreme Court decided *Daimler* during the pendency of the appeal. The US Court of Appeals for the Second Circuit held that *Daimler*'s standard did apply to the Bank of China as a nonparty, that the standard of "essentially at home" was not met, and that the Bank of China had not waived the jurisdictional arguments by failing to raise them after *Goodyear*.[68] The Second Circuit reversed the district court and remanded for further proceedings to determine whether specific jurisdiction could support the orders to compel discovery and to impose sanctions. The court noted that before *"Daimler*, courts in this Circuit often asserted general jurisdiction over nonparty foreign corporations based on the presence of corporate branches, subsidiaries, or affiliates in the Circuit" and that "[i]n light of that pre-*Daimler* case law, the district court had no need to consider specific jurisdiction."[69]

On remand, the district court found that specific jurisdiction existed over the Bank of China.[70] Its exact reasoning, however, was unclear. The court first addressed the New York long-arm statute, holding that the requirements of N.Y. CPLR § 302(a)(1) were satisfied by repeated use of a New York correspondent bank account on the

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66. *See id.* at *12 ("After careful consideration of the various interests implicated in this dispute, the Court finds that a balancing of the Restatement factors strongly weighs in favor of ordering the Bank to comply with the Subpoena."). Subsequently, the Bank of China submitted letters from two Chinese regulatory bodies stating "their positions as to, *inter alia*, the application of Chinese bank secrecy laws to disclosures of customer information outside of China, China's commitment to using Hague Convention procedures for document requests, and whether BOC might face sanctions as a result of its compliance. . . ." Gucci Am., Inc. v. Weixing Li, No. 10 CIV. 4974 RJS, 2012 WL 1883352, at *1 (S.D.N.Y. May 18, 2012), *vacated*, 768 F.3d 122 (2d Cir. 2014). The district court held that the Bank's Rule 60(b) motion based, in part, on these letters failed both procedurally and on the merits. *See id.* at *2, *5.

67. Gucci Am., Inc. v. Weixing Li, No. 10 CIV. 4974 RJS, 2012 WL 5992142, at *9 (S.D.N.Y. Nov. 15, 2012), *rev'd*, 768 F.3d 122 (2d Cir. 2014) ("For the foregoing reasons, the Court holds BOC in civil contempt for failing to comply with the Court's August 23 Order. The Court also sanctions BOC for its civil contempt . . . .").

68. *See* Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 135 (2d Cir. 2014) ("We conclude that applying the Court's recent decision in *Daimler*, the district court may not properly exercise general personal jurisdiction over the Bank. Just like the defendant in *Daimler*, the nonparty Bank here has branch offices in the forum, but is incorporated and headquartered elsewhere.").

69. *Id.* at 138, 142. The appellate court decided several other issues as well, including that the district court did not require jurisdiction over the nonparties, but only over the defendants to issue the asset freeze injunction. The court also held that the district court had abused its discretion by imposing sanctions because the order violated had not been clear and unambiguous.

70. Gucci Am., Inc. v. Weixing Li, 135 F. Supp. 3d 87, 104 (S.D.N.Y. 2015), *appeal withdrawn* (Feb. 16, 2016) ("[T]he Court concludes that it has specific personal jurisdiction over BOC with respect to the 2010 and 2011 Subpoenas and that exercising such jurisdiction comports with due process and principles of comity.").

defendants' behalf.[71] As for constitutional due process, the court held that use of the correspondent bank account constituted the required minimum contacts. On the question of relatedness, the court applied a "sliding scale" approach—it would require a tighter nexus between the jurisdictional contacts and the claim if there were few overall contacts but would require only a loose nexus if there were many contacts.[72] The court found that the Bank of China had an overwhelming number of contacts—as such, it held that that it would require a looser nexus between the contacts and the claim.[73] The court then held that there was a sufficient nexus between the contacts and the claim.[74]

But the district court never explained a crucial component of the analysis: Which claim matters? The familiar specific jurisdiction analysis looks to whether the jurisdictional contacts "arise out of or relate to the claim."[75] The district court never examined which claim was relevant for these purposes—the underlying Lanham Act claims against the counterfeiters for which discovery was sought or the proceeding directly against the Bank of China for an accounting. Not having addressed this initial question, the court did not reach the following question of what it would mean for jurisdictional contacts to "arise out of or relate" to what was, in essence, a demand for documents. Nonetheless, the district court found jurisdiction and re-imposed sanctions. The case settled.

Other post-*Daimler* cases have raised the issue of US courts' power over a foreign nonparty—but with a potentially significant variation: the requests for discovery and restraints of the debtors'

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71. The district noted that "BOC is a bank that is in the business of providing banking services to individuals in China and the United States," and that, "[c]ritical to serving those clients is the existence of a correspondent account at a reputable New York bank to conduct secure, efficient, and quick wire transfers." *Id.* at 95. It concluded that "BOC cannot credibly compare itself to a passive recipient of a few one-off wire transfers that by pure happenstance were routed through a domestic correspondent bank account." *Id.*

72. *Id.* at 98 ("Relatedness, the second prong of the minimum contacts inquiry, is a sliding-scale test: when an entity has only limited contacts with a forum, relatedness requires that the plaintiff's injury was proximately caused by those contacts, but when an entity's contacts with the forum are more substantial, it is not unreasonable to exercise personal jurisdiction even though the acts within the state are not the proximate cause of the plaintiff's injury." (internal quotation marks omitted)). Recent Supreme Court case law throws this approach into doubt. *See* Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cnty., 137 S. Ct. 1773, 1776 (2017) ("The California Supreme Court's "sliding scale approach"—which resembles a loose and spurious form of general jurisdiction—is thus difficult to square with this Court's precedents.").

73. *Gucci Am., Inc.*, 135 F. Supp. 3d at 98 (noting that "BOC's contacts with New York are sufficiently "substantial" that they need only be a "but for" cause of Gucci's 2010 and 2011 Subpoenas," as "BOC has significant operations, employees, and physical locations in New York, actively solicits business and customers in New York, and has deliberate and recurring contacts with New York").

74. *Id.* at 99.

75. *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 414 (1984).

assets arose post-judgment. For example, in *Gliklad v. Bank Hapoalim* plaintiff Gliklad obtained a half-billion dollar New York judgment against defendant Cherney.[76] Gliklad served a post-judgment subpoena and restraining notice on one of Bank Hapoalim's three New York branches. Pre-*Daimler*, this was an easy case for general jurisdiction—but post-*Daimler*, the bank argued that as an Israeli bank it was not "at home" in New York.[77] Bank Hapoalim objected to turning over funds that had been transferred to its Tel Aviv branch as it was not subject to general jurisdiction in New York. The New York trial court held that *Daimler* applied to enforcement proceedings with the same force as plenary proceedings and found that the Bank was not subject to general jurisdiction in New York.

The court did go on to speculate about the possible applicability of specific jurisdiction. The court queried whether the debtor had initiated the transfers from the New York to the Tel Aviv branch with the intent to avoid the judgment. The court did not explain how the actions of the *debtor* could satisfy the standard of "purposeful availment" required to subject the *garnishee* to specific jurisdiction.[78] Presumably purposeful availment by the garnishee would be required to subject it to specific jurisdiction in the forum. Nonetheless, the court seemed to suggests that specific jurisdiction could exist if there was a nexus between the subpoena and the garnishee's contacts in the forum.[79]

The case of *Leibovitch v. Islamic Republic of Iran* had very different origins. *Leibovitch* stemmed from an Illinois "citation action" to enforce a judgment rendered against Iran and its instrumentality for support of terrorist groups. The underlying claim for liability again had no nexus to Illinois. Perhaps predictably, the judgment creditors did not obtain the requested discovery—but the opinions of the district

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76. *See* Gliklad v. Bank Hapoalim B.M., No. 155195/2014, 2014 WL 3899209, at *1 (N.Y. Sup. Ct. Aug. 4, 2014). *See generally* Aaron Simowitz, *Case of the Day:* Gliklad v. Bank Hapoalim B.M., *Letters Blogatory*, LETTERS BLOGATORY (Sept. 3, 2014), https://lettersblogatory.com/2014/09/03/case-day-gliklad-v-bank-hapoalim-b-m/ [https://perma.cc/3P25-VXRC] (archived Oct. 21, 2021).

77. *Gliklad*, 2014 WL 3899209, at *1, *3–4.

78. *See* Silberman & Simowitz, *supra* note 7, at 391 ("In order to meet this standard, a garnishee would have to have taken purposeful actions that led to the institution of the recognition and enforcement action in the forum state, such as purposeful assistance of the debtor in dissipation or concealment of assets."); *Id.* at 391 n.233 ("The Supreme Court's recent decision in Walden v. Fiore may make such a showing even more difficult . . . A third-party bank could plausibly argue that *Walden*, if extended to the recognition and enforcement context, indicates that the bank's mere knowledge that its actions could frustrate satisfaction of an award or judgment in another forum is insufficient to subject it to specific jurisdiction there.").

79. *Gliklad*, 2014 WL 3899209, at *1 ("Without any suggestion that [the debtor] initiated these transfers for the specific intent of depriving Mr. Gliklad of the opportunity to receive payment on the promissory note, there is no basis for establishing specific jurisdiction over Bank Hapoalim.").

court[80] and the appellate panel (written by Judge Posner)[81] reveal much about the potential future contours of cross-border discovery after *Daimler*.

Plaintiffs obtained a $67 million default judgment against the Islamic Republic of Iran and its Ministry of Information and Security based on a terrorist attack against an American and several Israeli citizens on a Jerusalem highway.[82] Unable to collect from Iran directly, the plaintiffs sought to locate Iranian assets in the hands of multinational banks, including Bank of Tokyo-Mitsubishi and BNP Paribas. The plaintiffs served both federal subpoenas and Illinois "citations" on the banks, seeking to obtain information on any Iranian assets held by any of their branches and to freeze those assets.[83] The banks voluntarily supplied information indicating that none of their American branches maintained accounts owned by Iran or its Ministry. However, the banks refused to provide any information relating to assets maintained by other branches.

Analytically, the chief difference between *Gucci* and *Leibovitch* was that, in *Leibovitch*, none of the underlying conduct was connected with Illinois. Judge Posner, writing for a panel of the US Court of Appeals of the Seventh Circuit, held that there was no jurisdiction over the foreign nonparty banks sufficient to obtain documents located abroad.[84] But his opinion blithely stated that if "the subpoenas sought only to discover whether, and if so what, Iranian government assets were in either or both of the two Chicago branch banks, the district court would have jurisdiction to enforce the subpoenas (and citations) because the branches are in the court's district."[85] Judge Posner did not specify whether he was referring to general or specific jurisdiction. If general jurisdiction—he was simply wrong. If the *Daimler* rule does apply in this context, the Supreme Court's reasoning in *Daimler* makes clear that general jurisdiction cannot be had over a branch of a single corporate entity. If specific jurisdiction—he was overly optimistic.[86]

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80. Leibovitch v. Islamic Republic of Iran, 188 F. Supp. 3d 734 (N.D. Ill. 2016), *aff'd*, 852 F.3d 687 (7th Cir. 2017).

81. Leibovitch v. Islamic Republic of Iran, 852 F.3d 687 (7th Cir. 2017).

82. *Id.* at 740–42.

83. Bank accounts are classic intangible assets but are commonly "sited" at the location of a bank branch. *See generally* Aaron D. Simowitz, *Siting Intangibles*, 48 N.Y.U. J. INT'L L. & POL. 259 (2015) (critiquing the conventional approach to asset jurisdiction over intangibles).

84. *Leibovitch*, 852 F.3d at 689–90 ("It's not as if the foreign banks are incorporated or headquartered in the United States. If they were, they would be within the court's personal jurisdiction, and the district court could force them to comply with any discovery request that didn't present an undue burden.").

85. *Id.* at 690.

86. A third possibility is that Judge Posner was thinking of post-judgment quasi-in-rem jurisdiction. On one hand, this would be a mistake in that the creditors were looking for *information* relating to Iranian assets, not assets themselves. On the other hand, Judge Posner might have been thinking of jurisdictional discovery to determine

The *Gucci* and *Gliklad* cases illustrate the uncertainties of even formulating a specific jurisdiction test for nonparty actions.[87]

Stymied by the confusion surrounding specific jurisdiction, other courts have turned to state registration statutes, which may provide general or specific jurisdiction when a foreign corporation registers to do business in a forum state. In *Vera v. Republic of Cuba*, two multinational banks with physical branches in Manhattan refused to turn over documents located in their New York branches because the banks were neither "at home" in New York nor was there any nexus between the underlying action (to collect on a judgment against the Republic of Cuba) and New York.[88] The district court refused to accept this result, holding that the relevant New York registration statute imposed general jurisdiction over the bank branches.[89]

The court's reasoning had two problems:[90] First, general jurisdiction cannot be asserted over subdivisions of a single corporate entity. (Judge Posner made the same error.) Second, the New York statute plainly uses the language of *specific* jurisdiction, applying only to "any action or proceeding . . . arising out of a transaction with its New York . . . branch or branches."[91] The district court made no attempt to square its holding with either *Daimler* or the New York statute, simply stating that "*Daimler* and *Gucci* should not be read so broadly as to eliminate the necessary regulatory oversight into foreign entities that operate within the boundaries of the United States."[92] This decision was later overturned on other grounds[93]—but not before it was adopted

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whether assets existed in the United States. His brief opinion gives no indication one way or another. *See generally id.*

87. *See* Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 135 (2d Cir. 2014); Gliklad v. Bank Hapoalim B.M., No. 155195/2014, 2014 WL 3899209, at *1 (N.Y. Sup. Ct. Aug. 4, 2014). The careful opinion of the district court acknowledged the competing formulations but held that there was no theory under which the banks could be subjected to jurisdiction. *See* Leibovitch v. Islamic Republic of Iran, 188 F. Supp. 3d 734, 751 (N.D. Ill. 2016), *aff'd*, 852 F.3d 687 (7th Cir. 2017) ("But even if the narrower inquiry is the proper one, there is still an insufficient link between the in-state activities of these foreign banks and the discovery sought by Plaintiffs.").

88. Vera v. Republic of Cuba, 91 F. Supp. 3d 561, 570 (S.D.N.Y. 2015), *appeal dismissed*, 802 F.3d 242 (2d Cir. 2015), and *appeal dismissed*, 651 F. App'x 22 (2d Cir. 2016).

89. *Id.* at 570–71.

90. Or perhaps three, if one includes that the United States Court of Appeals for the Second Circuit subsequently cast doubt on whether a registration statute can confer general jurisdiction at all. *See* Brown v. Lockheed Martin Corp., 814 F.3d 619, 636–41 (2d Cir. 2016) (interpreting Connecticut's registration statute); *see generally* Kevin D. Benish, Pennoyer*'s Ghost: Consent, Registration Statutes, and General Jurisdiction After* Daimler AG v. Bauman, 90 N.Y.U. L. REV. 1609 (2015) (arguing that the general personal jurisdiction based on a "consent-by-registration theory" is unconstitutional after *Daimler*).

91. N.Y. BANKING LAW § 200(3) (McKinney 2006).

92. *Vera*, 91 F. Supp 3d at 570.

93. The United States Court of Appeals for the Second Circuit reversed the decision the basis that the "subpoena was void *ab initio* because the District Court lacked

by New York's intermediate appellate court for Manhattan.[94] In the *Leibovitch* case, the district court rejected a similar argument under the Illinois registration statute, expressly distinguishing and critiquing the *Vera* decision.[95]

Government investigators will have to search for new jurisdictional bases that can support the investigative authorities they enjoyed under the pre-*Daimler Bank of Nova Scotia* approach. One recent case involved interpretation of federal long-arm statutes to obtain jurisdiction over nonparty banks. Although the banks did not raise constitutional arguments, the court's approach to the relevant jurisdictional statutes illustrates how it might tackle the constitutional inquiry.

In *In re Sealed Case*, government prosecutors sought documents from three banks, "headquartered in China," that held "records that the United States government thinks may clarify how North Korea finances its nuclear weapons program."[96] According to the government, North Korea would use Chinese front companies "to make or receive payments in U.S. dollars" and that these "transactions helped North Korea access resources that would otherwise have been beyond its reach" to generate revenue "vital to its weapons program."[97] These front companies "routinely took advantage of U.S. correspondent bank accounts" maintained by the Chinese banks.[98]

Two of the three banks maintained branches in the United States. After *Daimler*, presence of a brick-and-mortar branch standing alone was plainly insufficient to establish general jurisdiction. However, government investigators were able to turn to two bank-specific approaches to jurisdiction. Both banks with branches in the United States "consent[ed] to the jurisdiction of the federal courts of the United States . . . for purposes of any and all . . . proceedings initiated by . . . the United States . . . in any matter arising under U.S. Banking Law," as part of their agreements with the Federal Reserve that allowed them to operate a branch in the United States.[99] The grand

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subject matter jurisdiction over the action . . . because the terrorism exception to sovereign immunity in the FSIA—the only possible basis for subject matter jurisdiction over Cuba—did not apply." Vera v. Republic of Cuba, 867 F.3d 310, 314–315 (2d Cir. 2017). The appellate court held that the subpoena was not based on a valid underlying judgment and therefore did not reach the jurisdictional arguments. *See id.* at 320 n.9 ("In the absence of a statutory exception to sovereign immunity, the District Court did not have adjudicatory authority to entertain Vera's cause of action seeking recognition and entry of the Florida judgment. Our analysis ends there—as the District Court's should have.").

94. *See In re* B&M Kingstone, LLC v. Mega Int'l Com. Bank Co., 131 A.D.3d 259, 264–65 (N.Y. App. Div. 2015), *leave to appeal dismissed*, 26 N.Y.3d 995 (2015).

95. Leibovitch v. Islamic Republic of Iran, 188 F. Supp. 3d 734, 750, *aff'd*, 852 F.3d 687 ("The Court does not find *Vera* persuasive.").

96. *In re* Sealed Case, 932 F.3d 915, 918–19 (D.C. Cir. 2019).

97. *Id.* at 919–20.

98. *Id.* at 920.

99. *Id.* at 923.

jury investigation of criminal violations of the Bank Secrecy Act plainly met these requirements.[100] As for the bank with no US branch, the government investigators issued a Patriot Act subpoena, which gives the government special powers to investigate correspondent banking relationships.[101] The third bank "placed all its eggs in the forum-identification basket," arguing only that the Patriot Act did not permit aggregation of national contacts.[102] The bank lost on this front and failed to even argue that the constitutional standard for specific jurisdiction was not met.[103] In other words, jurisdiction to gather evidence in a cross-border money laundering investigation continues to exist, but only by dint of agreements with the Federal Reserve and by incomplete briefing.[104]

III. *DAIMLER*'S DEAD ENDS

The *Daimler* crisis presents both necessity and opportunity. US courts must resolve the confusion over their power over foreign nonparties. But this moment of confusion presents an opportunity to consider anew the role of US courts in transnational dispute resolution. Courts have gestured at every possible solution along a wide spectrum, from expanding discovery by divorcing it from a requirement of jurisdictional contacts to radically constricting it by letting the pre-*Daimler* nonparty practice wither on the vine.

A. *Jurisdictional Contacts Not Required*

Courts could adopt the position that mere witnesses do not receive jurisdictional protections at all. For a time, this view prevailed for actions against judgment debtors.[105] New York courts reasoned that the debtor had already received the sum total of the process to which it was entitled in the litigation of the initial suit.[106]

These decisions were seriously criticized[107] and would not make for a compelling analogy to nonparties. Nonparties have received no process as yet—they are not subject to any pre-existing judgment. Even if there has been a judgment in the underlying plenary action, it is not a judgment against the nonparty witness or garnishee.

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100. *Id.*

101. *Id.* at 927.

102. *Id.* at 925–27.

103. *Id.* at 927.

104. Courts have largely assumed that the jurisdictional analysis is the same for criminal grand jury subpoenas as it is for civil subpoenas, although this question remains open. *Id.* at 919–22.

105. *See* Abu Dhabi Com. Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co., 117 A.D.3d 609, 611, 986 N.Y.S.2d 454, 457 (2014) (citing Lenchyshyn v. Pelko Elec., 281 A.D.2d 42, 49, 723 N.Y.S.2d 285 (4th Dept. 2001)).

106. *See id.*

107. *See* Silberman & Simowitz, *supra* note 7, at 354–55.

Even in the judgments context, New York courts have now retreated significantly from previous cases holding that judgment debtors do not receive jurisdictional protections. In *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, an intermediate New York appellate court held that judgment debtors enjoy some measure of jurisdictional protections unless their arguments against recognition and enforcement are frivolous.[108]

Nevertheless, the US Supreme Court has never explicitly held that nonparties to a suit have any jurisdictional due process right at all. The Court came closest in *Phillips Petroleum v. Shutts*, where it implied that nonparty plaintiffs to a class action proceeding did indeed have due process interests, but these interests were sufficiently protected by the requirements of Federal Rule of Civil Procedure 23 and state law and by the vigilance of the named plaintiffs and presiding judge.[109] Lower courts have consistently taken the US Supreme

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108. AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A., 160 A.D.3d 93, 109, 73 N.Y.S.3d 1, 14 (2018) ("To go beyond *Abu Dhabi* and hold, as ABA urges, that no jurisdictional nexus is ever required for a proceeding under article 53, even if the defendant asserts substantive defenses to recognition of the foreign judgment, would be a substantial departure from the prior general understanding of the law."). Any attempt to analogize judgment debtors to nonparties would have to rely on the notion that neither group faces serious burdens as a result of the actions against them. However, even the pre-*AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.* decisions do not go so far as to suggest that the judgment debtors face no burden—they have to turn over assets to be seized and sold. Nonparties have, at the very least, the burden of gathering relevant information or debtor assets and handing them over. Of course, the nonparty does not necessarily have an ownership interest in the information or assets, but may have other interests at stake. For example, in one prominent New York case, the garnishee was holding stock certificate subject to competing security interest. When this interest was satisfied, the garnishee released the certificate in accordance with local law. *See* Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533, 536–37 (2009) ("The obligations for which BBL had held the certificates as collateral had been satisfied and BBL—despite the District Court's turnover order—had transferred the stock to a Bermudan company existing for Dodwell's benefit in July 1994."). Turning over these documents or assets may subject the nonparty to legal liability—in addition to other dangers associated with, say, handing over client banking records. (Although courts seem to care about some burdens, such as damages or other remedies arising from violations of local banking law, and not about others, such as reputational damage. *See, e.g.*, United States v. First Nat'l City Bank, 396 F.2d 897, 899 (2d Cir. 1968) ("[T]he judge was told that Boehringer had informed Citibank that it would have to 'suffer the consequences' if it obeyed the subpoena. It was suggested that Boehringer would sue the bank for breach of contract and would also use its influence within German industrial circles to cause Citibank to suffer business losses.")). Though one could argue that judgment debtors and nonparties (particularly garnishees) face similar burdens, one would be hard-pressed to say that nonparties face no significant burdens at all. In addition, nonparties also have defenses that must be asserted or lost, though these differ from debtors' defenses. Nonparty witnesses may question the breadth of a subpoena, may assert privilege, or may argue that other types of foreign law bar disclosure (bank secrecy laws are the classic example). As with judgment debtors, nonparties have a due process interest in whether they are haled into a foreign court to assert or lose these defenses.

109. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809–10 (1985) ("Unlike a defendant in a civil suit, a class-action plaintiff is not required to fend for himself. The

Court's suggestion in *Shutts* and extended due process jurisdictional protections to nonparties.

The breadth of "doing business" jurisdiction explains the absence of jurisprudence in transnational cases. In interstate cases, courts were bound by restrictive long-arm statutes. More recently, there have been some deviations from this general rule, particularly in the realm of post-judgment subpoenas.[110] It is probably telling that the state courts venturing into this area have consistently rejected the notion that the Constitution should be removed from the nonparty jurisdictional analysis.[111]

B. *Jurisdiction by Injunction*

A knowing violation of an injunction—even a jurisdiction-less injunction—may subject the violator to personal jurisdiction in the courts of the forum that issued the injunction. This principle has been uncontroversial in intrastate cases. It has a more complicated history in the transnational arena. The US Court of Appeals for the Second Circuit issued, in a sense, a fairly narrow holding in the *Gucci* appeal. The court held that a district court did not need personal jurisdiction over a foreign entity to issue an injunction but did require personal jurisdiction to enforce an injunction—in that case, with contempt sanctions.[112]

Federal Rule of Civil Procedure 65(d) provides that injunctions bind aiders and abettors when two elements are present: actual notice of the injunction and a shared purpose with the enjoined party to violate the terms of the injunction.[113] Every US appellate court to consider the issue has held that when these requirements of 65(d) are satisfied, domestic nonparties will be subject to personal jurisdiction in the court that issued the injunction.[114] Because this approach to

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court and named plaintiffs protect his interests. Indeed, the class-action defendant itself has a great interest in ensuring that the absent plaintiff's claims are properly before the forum." (internal citations omitted)).

110. See DAVID D. SIEGEL, NEW YORK PRACTICE, § 383 (5th ed. 2011) (discussing developments in the extraterritorial service and effect of New York enforcement subpoenas).

111. *See* Scott, *supra* note 2, at 997 ("For these reasons, due process must impose some personal jurisdiction limit on nonparty discovery. Despite a number of basic differences between defendants and nonparty witnesses, the nature of the liberty interest protected by the Due Process Clause, as explained in *Phillips Petroleum*, supports a limit on the territorial reach of American courts in both contexts.")

112. Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 125 (2d Cir. 2014).

113. *See* FED. R. CIV. P. 65(d)(2) ("The order binds only the following who receive actual notice of it by personal service or otherwise: (A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).").

114. See Julia K. Schwartz, *"Super Contacts": Invoking Aiding-and-Abetting Jurisdiction to Hold Foreign Nonparties in Contempt of Court*, 80 U. CHI. L. REV. 1961,

jurisdiction is so different from the typical "minimum contacts" approach to jurisdiction, it is sometimes referred to as the "super contacts" approach.[115] The super contacts approach has a similar flavor to so-called conspiracy jurisdiction, which has provoked its own controversies.[116]

US courts have sharply split over whether this super-contacts approach should extend to foreign nonparties. The US Court of Appeals for the Ninth Circuit held in *Reebok International v. McLaughlin* that the Banque Internationale à Luxembourg could not be held in contempt for assisting the defendant in removing money from his accounts.[117] The court relied in part on an apparent conflict with Luxembourg banking law and in part on its conclusion that the domestic super contacts cases did not apply to a foreign nonparty.[118] The US Court of Appeals for the Second Circuit implied that it would have come to the same result when, in instructions on remand, it stated that a "court cannot exercise personal jurisdiction over a nonparty to a litigation, on the basis that the nonparty is acting 'in active concert or participation,' within the meaning of Fed.R.Civ.P. 65(d), with a party who is subject to an injunction, unless personal jurisdiction is established over the nonparty."[119]

1972 (2013) ("[E]very court to address the issue has held that nonparties residing in other US jurisdictions can be held in contempt for aiding and abetting the violation of an injunction.").

115. See Reebok Int'l Ltd. v. McLaughlin, 827 F. Supp. 622, 624 (S.D. Cal. 1993), *rev'd*, 49 F.3d 1387 (9th Cir. 1995) ("In essence, to the extent that minimum contacts are required, personal jurisdiction over a non-party in a case such as this one may found by construing the non-party's act of assisting in the violation of an injunction as a 'super-contact.'"); *see also* Schwartz, supra note 114, at 1961 ("Many circuits have held that a district court can hold a nonparty in contempt for knowingly aiding and abetting the violation of an injunction or restraining order, even when the court could not otherwise establish personal jurisdiction over that individual . . . This principle has been referred to as a 'super contact.'" (quoting Eagle Traffic Control, Inc. v. James Julian, Inc., 933 F. Supp. 1251, 1255 (E.D. Pa 1996)).

116. *See* Alex Carver, *Rethinking Conspiracy Jurisdiction in Light of Stream of Commerce and Effects-Based Jurisdictional Principles*, 71 VAND. L. REV. 1333, 1333 (2018) ("For decades, some courts have been willing to exercise personal jurisdiction over nonresident defendants based solely on the forum contacts of their coconspirators. This practice, termed 'conspiracy jurisdiction,' has proven controversial among courts and commentators alike.").

117. Reebok Int'l Ltd. v. McLaughlin, 49 F.3d 1387, 1393–95 (9th Cir. 1995).

118. *See id.* at 1388–92.

119. Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 40 (2d Cir. 1989). The US Court of Appeals for the Fourth Circuit recently seemed to endorse the approach of the Ninth and Second Circuit in holding that a foreign aider-and-abettor of a violation of an injunction could not be subjected to the jurisdiction of a US court without proper service to establish jurisdiction. *See* Receiver for Rex Venture Grp., LLC v. Banca Comerciala Victoriabank SA, 843 F. App'x 485, 492 (4th Cir. 2021) ("Yet any minimum contacts analysis of Victoriabank is dead in the water. . . . The Receiver concedes that he never properly served Victoriabank in the instant contempt proceeding. Accordingly, the Receiver's freeze-order theory of jurisdiction fails."); *see also* Hawkins v. i-TV Digitalis Tavkozlesi zrt., 935 F.3d 211, 230 (4th Cir. 2019) ("[T]he mere act of aiding and abetting is not always enough to provide minimum contacts.").

The US Courts of Appeals for the Seventh Circuit has disagreed. In *S.E.C. v. Homa*, the Seventh Circuit held that it could exert personal jurisdiction over two US nationals residing abroad who had taken actions abroad, in concert with the defendant, to violate an asset freeze order.[120] The court noted that it had "independent authority to enforce its own injunctive decrees" and that Rule 65(d) must therefore "be regarded as a codification rather than a limitation on a federal court's inherent power to protect its ability to render a binding judgment."[121] The court observed that "the injunctive mandate of a federal court runs nationwide, and the issuing court has the authority to deal with defiance of its orders regardless of where that defiance occurs," and that "an injunction binds not only the parties to the injunction but also nonparties who act with the named party."[122] The court emphasized that, "if courts did not have the power to punish those who cooperate with those named in an injunction, the named parties could easily thwart the injunction by operating through others."[123] The court held that "a person who knowingly circumvents a freeze order is subject to a show cause order and contempt and thereby submits to the jurisdiction of the court for contempt proceedings" and that "[j]urisdiction over persons who knowingly violate a court's injunctive order, even those without any other contact with the forum, 'is necessary to the proper enforcement and supervision of a court's injunctive authority and offends no precept of due process.'"[124]

The court did not regard the super contacts approach to jurisdiction as an exception to the usual minimum contacts analysis. Rather, the court reasoned that it is "simply an application of two basic principles" governing personal jurisdiction: first, "that, when an individual undertakes activity designed to have a purpose and effect in the forum, the forum may exercise personal jurisdiction over that person with respect to those activities"; and second, "citizens of the United States . . . once they ha[ve] adequate notice," are required "to obey the order of a United States court directed at them and their activities."[125]

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120. S.E.C. v. Homa, 514 F.3d 661, 671–75 (7th Cir. 2008) ("[T]he district court found by clear and convincing evidence that Mr. Pollock and Mr. Jones, by their direct and indirect actions, had violated the freeze orders and engaged in three contemptuous acts.").

121. *Id.* at 673–74.

122. *Id.* at 674.

123. *Id.*

124. *Id.* at 674–75.

125. *Id.* at 675. The relevant nonparties in the *S.E.C. v. Homa* were both U.S. citizens who had resided abroad for several years at the time they violated the court's injunction. The court's decision is not clear on whether their citizenship was essential to the holding. *Id.* ("There can be no doubt that Mr. Jones and Mr. Pollock undertook activities outside the United States that were designed to have the purpose and effect within the United States of frustrating the district court's freeze order. More important,

Multiple district courts outside these circuits have exerted personal jurisdiction against foreign nonparties under this theory. One district court issued an anti-suit injunction against a plaintiff that had commenced simultaneous actions in the United States and in Liberia.[126] The injunction barred the plaintiff from "taking any action" to enforce a judgment from the Liberian action.[127] When the plaintiffs did so, the defendant moved for contempt sanctions against other foreign nonparties that it alleged were aiders and abettors.[128] The district court disagreed with the *Reebok* holding "that the scope of a nationwide injunction cannot be broadened to encompass a foreign national"[129] and instead held that "minimum contacts exist where one has actively aided and abetted a party in violating a court order," concluding that the foreign nonparty was subject to the court's power.[130]

The jurisdiction-less injunction therefore raises another possibility for obtaining jurisdiction over nonparties. In *Gucci*, the district court issued a preliminary injunction freezing the counterfeiters' assets and enjoining them from manufacturing, distributing, marketing, or selling counterfeit goods. Because Gucci had obtained evidence that the Defendants had wired proceeds of the sale of the counterfeit goods to accounts maintained by the main office of Bank of China, the district court enjoined any banks "who receive actual notice of this order . . . from transferring, disposing of, or secreting any money, stocks, bonds, real or personal property, or other assets of Defendants."[131] Upon hearing evidence that the relevant nonparties had knowingly violated the injunction, the district court

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as citizens of the United States, Mr. Jones and Mr. Pollock were required, once they had adequate notice, to obey the order of a United States court directed at them and their activities.").

126. ABI Jaoudi & Azar Trading Corp. v. CIGNA Worldwide Ins. Co., No. CIV.A. 91-6785, 2009 WL 80293, at *1 (E.D. Pa. Jan. 12, 2009), *vacated and remanded sub nom.*, 391 F. App'x 173 (3d Cir. 2010).

127. Younis Brothers & Co v CIGNA Worldwide Ins Co, 167 F Supp 2d 743, 747 (ED Pa 2001).

128. *ABI Jaoudi & Azar Trading Corp.*, 2009 WL 80293, at *1.

129. *Id.*

130. *Id.* The nonparties at issue were: "Josie Senesie, the Commissioner of Insurance for the Republic of Liberia and Court–Appointed Receiver for the Liberian Branch of CIGNA, and Samuel M. Lohman, an American attorney residing in Switzerland." The district court stated that it was applying the holding in *S.E.C. v. Homa*, but did not consider what role the citizenship of the nonparties may have played in that case. *See id.*; *see also* Select Creations, Inc. v. Paliafito Am., Inc., 852 F. Supp. 740, 774 (E.D. Wis. 1994) (overturning on sovereign immunity grounds without considering the personal jurisdiction holding below).

131. The injunction also provided for expedited discovery, specifically that "any third party receiving a subpoena pursuant to this Order shall produce documents responsive to such requests within ten (10) days of service of such subpoena." Gucci Am., Inc., 768 F.3d at 129.

levied contempt sanctions without requiring any further showing that the nonparty banks were subject to personal jurisdiction.[132]

The contemnors appealed to the US Court of Appeals for the Second Circuit.[133] The court reversed the contempt sanctions, holding, *inter alia*, that contempt sanctions required personal jurisdiction and remanding for the district court to determine whether jurisdiction existed.[134] In the end, the district court found that specific jurisdiction existed and did not need to reach the issue of jurisdiction-by-injunction.[135]

The notion that jurisdiction-by-injunction can fill the void left by *Daimler* has both practical and theoretical problems. First, courts are unlikely to issue injunctions that would affect all types of witnesses. The most common type of injunction in this context would be to freeze the defendant or debtor's assets.[136] Therefore jurisdiction-by-injunction would likely only be available against garnishees.

Moreover, discovery is principally initiated by the parties themselves. Courts issue injunctions. The incidence of cross-border injunctions should be far lower than that of cross-border discovery requests. Linking the two could either reduce the frequency of cross-border discovery or reduce courts' reluctance to issue cross-border injunctions.

Jurisdiction-by-injunction therefore presents practical problems. It is also on shaky theoretical ground. Courts weigh different concerns when considering whether to issue injunctions—which are discretionary invocations of a sovereign's power—than when deciding whether to exercise adjudicative jurisdiction—nominally considered mandatory but in practice a weighing of factors focused on fairness to a particular foreign entity. The practice of jurisdiction-by-injunction elides the two.

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132. *See* Gucci Am., Inc. v. Weixing Li, No. 10 CIV. 4974(RJS), 2012 WL 5992142, at *7 (S.D.N.Y. Nov. 15, 2012), *rev'd*, 768 F.3d 122 (2d Cir. 2014).

133. Gucci Am., Inc., 768 F.3d at 125.

134. *Id.* at 142–45.

135. Gucci Am., Inc. v. Weixing Li, 135 F. Supp. 3d 87, 93–101 (S.D.N.Y. 2015).

136. General asset freezing injunctions are only available in U.S. courts after a judgment has been rendered. *See* Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 333 (1999) ("Because such a remedy was historically unavailable from a court of equity, we hold that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages."). The plaintiff in the *Gucci* action avoided this bar by seeking an accounting action, which includes a freeze of the defendant's gains from its activity, in that case, money held in Chinese banks. *See* Gucci Am., Inc. v. Weixing Li, No. 10 CIV. 4974 RJS, 2011 WL 6156936, at *4 (S.D.N.Y. Aug. 23, 2011), *vacated*, 768 F.3d 122 (2d Cir. 2014).

C. *In Rem Jurisdiction*

A pattern has emerged even in the relatively few cases where these nonparty jurisdictional issues have been litigated post-*Daimler*. The nonparty initially resists turning over any evidence on the basis that it is neither "at home" in the forum of the issuing court nor is it subject to specific jurisdiction. After some initial jousting, the nonparty either turns over any evidence in the forum or denies that there is any evidence in the forum—conceding nothing on jurisdiction—and refuses to turn over any information held abroad. The *Gucci*, *Leibovitch*, *Gliklad*, and *Vera* cases all followed this script. In each of these cases, the courts took that opportunity to emphasize that *of course* documents located in the forum would be under the court's power.

The conclusion does not follow from *Daimler*. Evidence gathering in the United States has always proceeded under personal jurisdiction, rather than some theory of asset-based jurisdiction. The Federal Rules of Civil Procedure look to the entity with "custody or control" over the evidence.[137] Pre-*Daimler*, this "custody and control" approach to discovery led to the very breadth of transnational discovery that characterized US-based, cross-border litigation. Post-*Daimler*, this approach has led multinational banks to argue—at least initially—that although they might have a brick-and-mortar in Midtown Manhattan, they have no obligation to turn over any documents anywhere because they are not subject to personal jurisdiction in New York.

The US Supreme Court certainly did not believe that the *Daimler* decision was discarding decades of case law supporting and explicating the "custody and control" approach. It is difficult to imagine that an unspoken hostility to broad US discovery motivated the *Daimler* decision. Ten years prior, Justice Ginsburg authored one of the most aggressive US Supreme Court cases on transnational discovery, *Intel v. AMD*.[138] Nothing in the decade since, nor in *Daimler* itself, suggests a retreat from the Court's embrace of broad transnational discovery.[139]

A retreat from the "custody and control" approach would lead to debates about the location of evidence—frequently data with no

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137. FED. R. CIV. P. 34(a)(1) ("A party may serve on any other party a request within the scope of Rule 26(b) . . . to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control: . . .").

138. Intel Corp. v. Advanced Micro Devices, Inc., 542 U.S. 241 (2004).

139. The Supreme Court's most recent case concerning transnational discovery reaffirmed a broad role for U.S. discovery even in the face of concerns about sovereign immunity. *See* Republic of Argentina v. NML Capital, Ltd. 134 S. Ct. 2250 (2014). Justice Ginsburg dissented in NML, expressing concern about the United States acting as a clearinghouse for information about sovereign assets, but was not able to command any other votes. *Id.* at 2259; *see* Aaron D. Simowitz, *Transnational Enforcement Discovery*, 83 FORDHAM L. REV. 3293, 3296 (2015) (critiquing Justice Ginsburg's dissent as a "local, territorial view of enforcement discovery").

physical location—rather than the simpler inquiry into which courts have power over the custodians.[140] And yet, a strong flavor of asset-based jurisdiction seems to inflect decisions on the subject. Judge Posner's dicta in *Leibovitch* is an excellent example: "If the subpoenas sought only to discover whether, and if so what, Iranian government assets were in either or both of the two Chicago branch banks, the district court would have jurisdiction to enforce the subpoenas (and citations) because the branches are in the court's district."[141] This logic seems drawn from the world of in rem jurisdiction (including quasi-in-rem type I jurisdiction). Under an in rem theory of jurisdiction, a court is empowered to decide rights in a particular piece of property because it is located in the forum. The location of the asset both legitimizes the forum's claim to determine rights in the property and serves a coordinating function, naturally indicating to other courts that the court with physical power over the asset will have primary jurisdiction.[142] In addition to in rem jurisdiction, US courts for decades endorsed so-called quasi-in-rem type II jurisdiction, in which a court can adjudicate an unrelated claim by seizing property of the defendant located in the forum. However, the US Supreme Court eliminated this basis of jurisdiction in *Shaffer v. Heitner*, at least as a basis for asserting power to adjudicate a claim.[143]

The implicit analogy between in rem jurisdiction and discovery is inapt. In rem jurisdiction exists—and survives *Shaffer*—because it applies only to determination of rights in the particular piece of property in the forum.[144] Adjudication of any issues beyond that was forbidden by *Shaffer*.[145] Discovery disputes do not concern rights in the property—they concern disclosure of information. It is not at all clear that the forum where a pile of documents sits—even in the happy

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140. See Aaron D. Simowitz, *The Extraterritorial Formalisms*, 51 CONN. L. REV. 375, 394–96 (2019) (discussing how the dispute of the fictional location of email metadata frustrated discovery under the Stored Communication Act); *see also* Simowitz, *supra* note 83, at 259 ("Courts have uniformly addressed the question of where intangible assets can be seized and applied to a judgment by attempting to imagine a situs for assets that have none. This process has produced a fog of conflicting and arbitrary rules that has clouded enforcement of judgments.").

141. Leibovitch v. Islamic Republic of Iran, 852 F.3d 687, 690 (7th Cir. 2017).

142. *See* Simowitz, *supra* note 83, at 301("There is no due process unfairness in haling a debtor into court wherever its tangible asset is. But the presence of a tangible asset also serves as a proxy for another conflict of laws determination: It serves as a prima facie basis on which a court can say that it sets the agenda for the that particular asset, at least with regard to the interests of the parties that can be reasonably called before the court.").

143. Shaffer v. Heitner, 433 U.S. 186, 196–206 (1977).

144. *Id.* at 207–12.

145. *Id.* at 211–12.

instance that there are physical documents—is the forum with the keenest regulatory interest in disclosure of their contents.[146]

Even statutes that specifically target assets in the hands of nonparties reject reliance on an in rem approach to jurisdiction. The New York turnover statute requires disclosure of information but specifically targets turnover of the debtor's assets held by a nonparty.[147] Nevertheless, the turnover statute requires personal jurisdiction over the nonparty, recognizing the independent rights of the nonparty garnishee.[148] Indeed, the turnover statute does not rest at all in rem jurisdiction; in other words, the asset need *not* be present in the territorial jurisdiction of New York.[149] Once a nonparty garnishee is subject to personal jurisdiction before the New York court, the nonparty garnishee can be compelled to bring assets in New York.[150]

D. Daimler *Applies to Nonparties Without Modification*

The final possibility is that *Daimler* marks "the end of another era"[151]—the era of broad US discovery in transnational litigation. There were always some parties that could not easily be subjected to discovery in a US court—those that lacked continuous and systematic contacts with a US state or, in some cases, the United States. That pre-

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146. Indeed, the amendments to Federal Rule of Civil Procedure 45 suggest that the court with power over the underlying dispute is authority most directly implicated by disclosure. FED. R. CIV. P. 45.

147. N.Y. C.P.L.R. 5225(b) ("Upon a special proceeding commenced by the judgment creditor, against a person in possession or custody of money or other personal property in which the judgment debtor has an interest, or against a person who is a transferee of money or other personal property from the judgment debtor, where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money, or so much of it as is sufficient to satisfy the judgment, to the judgment creditor and, if the amount to be so paid is insufficient to satisfy the judgment, to deliver any other personal property, or so much of it as is of sufficient value to satisfy the judgment, to a designated sheriff.").

148. *See, e.g.*, IMAX Corp. v. The Essel Grp., 154 A.D.3d 464, 465, 62 N.Y.S.3d 107, 108 (2017) (affirming a denial a petition for turnover of assets due to lack of personal jurisdiction).

149. *See* Koehler v. Bank of Bermuda Ltd., 12 N.Y.3d 533, 541 (2009) ("In short, the principle that a New York court may issue a judgment ordering the turnover of out-of-state assets is not limited to judgment debtors, but applies equally to garnishees. Consequently, we conclude that a court sitting in New York that has personal jurisdiction over a garnishee bank can order the bank to produce stock certificates located outside New York, pursuant to CPLR 5225(b).").

150. *See id.*

151. *See* Silberman, *supra* note 42, at 675 ("The Supreme Court's decision in Daimler AG v. Bauman confirmed what the Court hinted at in its earlier decision in Goodyear Dunlop Tires v. Brown -- that a corporation must be sued "at home" unless the claims being asserted relate to the corporation's activity in the forum state. Together, the decisions put an end to an era of general jurisdiction jurisprudence in the United States.").

Daimler standard, however, was broad enough to cover many foreign nonparties, particularly corporate multinationals. If *Daimler* applies with full force to nonparties and another jurisdictional theory cannot fill the gap, US courts will be unable to take direct discovery from any nonparties not "at home" in the United States. US courts would become much more reliant on the Hague Evidence Convention to obtain information from foreign nonparties.

The US Supreme Court surely did not intend this result. A generation before *Daimler*, the United States acceded to the Hague Evidence Convention.[152] The Convention provides a mechanism whereby the national courts of contracting states can request that their "central authority" (in the United States, the Office of Foreign Litigation at the U.S. Department of Justice) transmit a request to the "central authority" of another contracting state to then transmit the request for information (if it complies with the requirements of the Convention) "to the authority competent to execute" the request, usually a foreign court.[153] The aim of the Convention was to replace the old diplomatic system of cross-border evidence taking—the so-called letters rogatory—with a more reliable, systematized structure.[154] It was also the aim of many of the signatory states to halt the domestic courts of contracting states from attempting to directly take evidence from nonparties abroad.[155]

In *Societe Nationale Industrielle Aerospatiale v. U.S. District Court*, the Court held that the Hague Evidence Convention "does not speak in mandatory terms which would purport to describe the procedures for all permissible transnational discovery and exclude all other existing practices," contrasting it to the plainly mandatory language used in the Hague Service Convention.[156] The Court deployed various additional arguments against the mandatory nature of the Evidence Convention, including that "Article 23 expressly authorizes a

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152. Convention adopted at the Eleventh Session of The Hague Conference on Private International Law, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555 [hereinafter Hauge Evidence Convention].

153. *Id.* art. 2.

154. THE HAGUE EVIDENCE CONVENTION, 3 BUS. & COM. LITIG. FED. CTS. § 27:89 (5th ed.) ("Because letters of request that are issued and executed pursuant to the Hague Evidence Convention circumvent the diplomatic channels that are used to process traditional letters rogatory, they can be executed somewhat faster than letters rogatory.").

155. *See* Georges A.L. Droz, *A Comment on the Role of the Hague Conference on Private International Law*, L. & CONTEMP. PROBS., Summer 1994, at 3, 9 ("With a few notable exceptions, the tendency of the trial courts since Aérospatiale seems to be to order use of the Federal Rules of Civil Procedure rather than the Evidence Convention. While the Permanent Bureau may regret this, the regret is not simply because of loss of influence or 'turf.' It is because the Permanent Bureau feels that the convention truly reflects a multinational 'comity analysis' that should facilitate international evidence-taking with a minimum of friction.").

156. Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 534 & n. 15 (1987).

contracting state to declare that it will not execute any letter of request in aid of pretrial discovery of documents in a common-law country," and that, "[s]urely, if the Convention had been intended to replace completely the broad discovery powers that the common-law courts in the United States previously exercised over foreign litigants subject to their jurisdiction, it would have been most anomalous for the common-law contracting parties to agree to Article 23."[157] The Court seemed particularly troubled that "[a]n interpretation of the Hague [Evidence] Convention as the exclusive means for obtaining evidence located abroad would effectively subject every American court hearing a case involving a national of a contracting state to the internal laws of that state," and would effectively "subordinate the court's supervision of even the most routine of these pretrial proceedings to the actions or, equally, to the inactions of foreign judicial authorities."[158]

The Court also rejected "petitioners' invitation to announce a new rule of law that would require first resort to convention procedures whenever discovery is sought from a foreign litigant" because "such a general rule would be unwise."[159] The Court justified this second holding by praising the efficiency of discovery under the Federal Rules of Civil Procedure, deriding the convention procedures as sometimes "unduly time consuming and expensive" and unnecessary "to accord respect to the sovereignty of states in which evidence is located," particularly in light of more particularized doctrines of international comity.[160] The Court then laid out a multi-factor test for the application of domestic discovery rules when convention procedures could also be used.[161] US courts would overwhelmingly use these factors to justify application of US procedure to cross-border discovery disputes.[162]

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157. *Id.* at 536–37.
158. *Id.* at 539.
159. *Id.* at 542.
160. *Id.* at 542–43.
161. *Id.* at 545.
162. Geoffrey Sant, *Court-Ordered Law Breaking U.S. Courts Increasingly Order the Violation of Foreign Law*, 81 BROOK. L. REV. 181, 182 (2015) ("Courts applying the *Aérospatiale* test have found each of the subjective factors to weigh in favor of U.S. discovery (that is, in favor of violating foreign law) by a ratio of at least four to one."). Indeed, some would applaud if *Daimler* brought an end to this era of aggressive cross-border discovery in U.S. courts. Several countries filed *amicus* briefs in *Aerospatiale* arguing for mandatory application of the Hague Evidence Convention. *See* Brief for the Federal Republic of Germany as Amicus Curiae at 11, Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522 (1987) (No. 85-1695), 1986 WL 727492. ("Since the treaty's specific purpose is to regulate the taking of evidence on the territory of another country, the Convention, as the lex specialis, governs extraterritorial discovery, rather than the Federal Rules of Civil Procedure. The Convention replaces the need of U.S. courts to rely on comity when seeking evidence abroad under the Federal Rules with an assurance that judicial assistance, including the extraterritorial conduct of U.S. style pre-trial discovery, is a matter of treaty right."); Brief of Government of Switzerland as Amicus Curiae in Support of Petitioners at 3,

IV. POST-*DAIMLER* PATHS

The possibilities set forth above all face both theoretical and practical problems. The Supreme Court surely did not intend to radically restrict evidence gathering in transnational cases when it decided *Daimler*. There are multiple paths to a rational regime for nonparty actions that are consistent with *Daimler*, though each presents novel challenges.

A. *A Different General Jurisdiction Standard*

Daimler imposed limitations on where transnational claims should be adjudicated. And yet, *Daimler*'s dramatic changes to general jurisdiction have also been felt outside this context. The spread of *Daimler*'s holding is attributable to the constitutional stature of jurisdiction in the United States. Because constitutional law tends to be trans-substantive, US courts have reflexively applied *Daimler*'s

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Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522 (1987) (No. 85-1695), 1986 WL 727499. ("If a U.S. court unilaterally attempts to coerce the production of evidence located in Switzerland, without requesting governmental assistance, the U.S. court intrudes upon the judicial sovereignty of Switzerland. Use of the Convention will satisfy the requirements of both nations by providing the needed evidence to the U.S. litigant through a procedure consistent with Swiss law and sovereignty."); Brief of Amicus Curiae the Republic of France in Support of Petitioners at 2, Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522 (1987) (No. 85-1695), 1986 WL 727501. ("The Republic of France ratified the Hague Convention intending it to provide the sole means by which discovery demands emanating from other signatory countries would be carried out on French soil. The French Code of Civil Procedure was extensively amended in order to make the Convention procedures an integral part of domestic French law."). Even the United Kingdom and Northern Ireland—presumably fans of the common-law system—argued for presumptive resort to convention procedures. *See* Brief of the Government of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioners at 8, Societe Nationale Industrielle Aerospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522 (1987) (No. 85-1695), 1986 WL 727497. ("It is the view of the Government of the United Kingdom that where a state signatory to the Convention has signified by domestic law or practice-as the French Republic has done-that information located in that state should be obtained by foreign litigants exclusively under the Hague Evidence Convention or some other international agreement, due regard for foreign sovereign interests counsels that the Convention machinery should be employed in the first instance. If such an endeavor does not succeed, U.K. courts are not barred, after balancing the relevant interests of the state of origin and the state of execution, from ordering the production of relevant information in the United Kingdom, drawing unfavorable inferences from the failure to produce such evidence, or in an extreme case, imposing sanctions."). Four justices agreed with this position, arguing that "[s]ome might well regard the Court's decision in this case as an affront to the nations that have joined the United States in ratifying the Hague [Evidence] Convention," and that "[t]he Court ignores the importance of the Convention by relegating it to an 'optional' status, without acknowledging the significant achievement in accommodating divergent interests that the Convention represents." *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 547–48 (Blackmun, J., dissenting).

holding in contexts far removed from *Daimler*'s original concern with "f-cubed" transnational torts.

But constitutional law is not inflexibly trans-substantive. Indeed, the state appellate court for Manhattan recently rejected the reflexive trans-substantive application of *Daimler* by the US Court of Appeals for the Second Circuit.[163] Other courts have suggested that the constitutional jurisdictional analysis should be tailored for nonparties—though they cannot agree on how.[164] One possible path forward for nonparty actions is to acknowledge their many differences from plenary actions and to institute a different jurisdictional standard for general jurisdiction over nonparties.

The state appellate court for Manhattan endorsed this argument with regard to judgment debtors.[165] The court recognized that proceedings to recognize and enforce a foreign judgment stand on fundamentally different constitutional footing than plenary actions.[166] The US Supreme Court itself noted as much in its landmark opinion in *Shaffer v. Heitner*, when it preserved quasi-in-rem jurisdiction for post-judgment actions even as it eliminated it for plenary actions.[167] The Manhattan court seemed to admit the possibility that general jurisdictional standards might differ in other post-judgment actions as well, but did not go beyond that.[168]

The Manhattan court felt comfortable taking this step (even in the face of contrary federal precedent) in part because judgment debtors stand in a clearly different position than defendants.[169] By definition, they have either already received some measure of process or have defaulted. That does not mean, as some previous courts had held, that they are entitled to no constitutional jurisdictional protections whatsoever.[170] It does strongly suggest, however, that a lesser

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163. *See* AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A., 73 N.Y.S.3d 1, 13 (N.Y. App. Div. 2018).

164. *Compare* Licea v. Curacao Drydock Co., C.A. No. 4:13-MC-00874, slip op. at 7 (S.D. Tex. Sept. 9, 2014) *with* Leibovitch v. Islamic Republic of Iran, No. 08 C 1939, 2016 WL 2977273, at *7 (N.D. Ill. May 19, 2016).

165. *See* AlbaniaBEG Ambient Sh.p.k., 73 N.Y.S.3d at 13.

166. *See id.*

167. Shaffer v. Heitner, 433 U.S. 186, 210 n. 36 (1977) ("Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.").

168. *See* AlbaniaBEG Ambient Sh.p.k., 73 N.Y.S.3d at 13.

169. *See id.*

170. *See, e.g.*, Lenchyshyn v. Pelko Elec., 281 A.D.2d 42, 723 N.Y.S.2d 285 (4th Dept. 2001). The Manhattan court also acknowledged that recognition and enforcement proceedings differ from plenary proceedings. Post-judgment proceedings do not entail the same burdens on defendants as plenary proceedings. No claims are adjudicated; no liability is imposed. Post-judgment civil proceedings principally concern execution and turnover of the debtor's assets. Nonparty witnesses stand in a very different position from defendants in a merits action and from judgment and award debtors. *See* AlbaniaBEG Ambient Sh.p.k., 73 N.Y.S.3d at 13.

standard, such as the pre-*Daimler* "continuous and systematic" contacts or a brick-and-mortar standard, would be appropriate.

The US Supreme Court has never been wholly clear on the theories, concerns, or principles that underlie its approach on adjudicative jurisdiction. Its most recent decisions have only deepened the confusion.[171] Two values dominate the analysis: burden of the defendant and the competing interests of different states—normally referred to as "horizontal federalism." The Court has also never been particularly clear about exactly what "burdens" it is concerned about. It usually seems to invoke the inconvenience of travelling to a distant forum—though the weight of this concern becomes ever more questionable, especially for large multinational defendants. The Court's failure to specifically delineate the burdens motivating jurisdictional limitations has caused confusion in the lower courts.

In nonparty actions, this confusion has led to direct contradictions among lower courts. US courts have stated, with equal confidence, that nonparties are subject to greater or to lesser burdens.[172] To be sure, the burdens faced by nonparties are different from those faced by parties. There are burdens of responding, contesting, and losing, all of which may differ between parties and nonparties—but not in a predictable way. This ambiguity distinguishes nonparty actions from recognition and enforcement actions.

However, the most troubling burden on nonparties is not necessarily part of the jurisdictional analysis. Nonparties are notoriously likely to get caught in the vise of foreign compulsion. The broad US discovery regime can place multinationals in the uncomfortable position of complying with either the orders of a US court or the law of foreign country that, for a variety of reasons, forbids disclosure. One experienced banking lawyer has described this as "court-ordered lawbreaking."[173]

Nevertheless, both Restatements cautioned against "double-counting" the problem of foreign compulsion.[174] The restaters handled foreign compulsion in a separate section with a separate analysis.[175] The Restatement (Fourth) observes that the "defense of foreign state

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171. Simowitz, *supra* note 61, at 342 (describing the Court's "struggle[s] to articulate the constitutional values protected by jurisdiction").

172. *Compare* Licea v. Curacao Drydock Co., C.A. No. 4:13-MC-00874, slip op. at 7 (S.D. Tex. Sept. 9, 2014), *with* Leibovitch v. Islamic Republic of Iran, No. 08 C 1939, 2016 WL 2977273, at *7 (N.D. Ill. May 19, 2016).

173. Sant, *supra* note 162, at 181.

174. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 405, cmt. c (AM. LAW INST. 2018); *see* Franklin A. Gevurtz, *Extraterritoriality and the Fourth Restatement of Foreign Relations Law: Opportunities Lost*, 55 WILLAMETTE L. REV. 449, 471 (2019) (noting the Restatement's position that "the presumption against extraterritoriality might render further consideration of comity unnecessary and warn against double counting such considerations").

175. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 442 (AM. LAW INST. 2018).

compulsion allows a court in the United States to excuse violations or moderate sanctions on the ground that the violation was compelled by another state's law," but only "if the person in question is likely to suffer severe sanctions for failing to comply with foreign law and has acted in good faith to avoid the conflict."[176] Neither Restatement (Third) nor the Restatement (Fourth) treated the problem of foreign compulsion as relevant to the determination of whether jurisdiction exists.[177]

If foreign compulsion is removed from the jurisdictional equation, the analysis shifts. In most cases, foreign compulsion is the only likely circumstance in which a nonparty could be subjected to liability. (A foreign witness or garnishee subject to a U.S. court order is unlikely simply to refuse to comply without a very good reason.) As with recognition and enforcement of judgments and awards, the *Daimler* "at home" standard should therefore not apply of its own force to the very different context of nonparty discovery or other nonparty actions.

B. *Specific Jurisdiction Adapted for Nonparty Actions*

One of the few certainties from the *Gucci* litigation is that, in the end, specific jurisdiction carried the day and provided Judge Sullivan's court with power to enforce contempt sanctions against the Bank of China. Beyond that, however, little is certain. The court did not specify many important aspects of its analysis. For example, it did not explain whether it was requiring a nexus between the bank's jurisdictional contacts and the subpoena or with the underlying Lanham Act action. If with the subpoena, it did not explain which contacts would be relevant to the subpoena. And to further muddy the waters, the US Supreme Court's decision in *Bristol-Myers Squibb v. Superior Court of California* eliminated a key cog—the "sliding scale" test—in the district court's reasoning.[178]

Other decisions in the area have done little to provide clarity. The *Leibovitch* case involved no contacts of any sort in Illinois, making it an easy case. Judge Posner's comments on appeal add little, except the

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176. *See id.* at intro.

177. The Restatement (Third) considered the problem to arise only once a US court had established jurisdiction over a party or nonparty. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, §§ 441, 442. *See generally* Don Wallace, Jr. & Joseph P. Griffin, *The Restatement and Foreign Sovereign Compulsion: A Plea for Due Process*, 23 INT'L L. 593 (1989). The Restatement (Fourth) states that courts have discretion to excuse noncompliance with a discovery request as a matter of comity, but that does not mean the question should be imported into the personal jurisdiction analysis when it can be handled by a more specific inquiry elsewhere. The Restatement (Fourth) takes the view that a defense of foreign-state compulsion is not required by international law. *See* RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 442 cmt. a (AM. L. INST. 2018).

178. Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cnty., 137 S. Ct. 1773, 1776 (2017).

conviction that there ought to be some constellation of jurisdictional contacts that could lead the court to exercise its power over a multinational bank not at home in the state.[179] The *Gliklad* case made the perplexing suggestion that the purposeful conduct of the defendant or debtor could be relevant to jurisdiction of the nonparty bank.[180]

The initial and perhaps most important question goes to the reliance of specific jurisdiction on a nexus between jurisdictional contacts and the claim. But these various post-*Daimler* decisions have done little to explore this question.[181]

The problems of specific jurisdiction for evidence gathering or other nonparty actions are similar. Requiring a nexus with the underlying action would limit evidence gathering to the forums where a witness is "at home" (general jurisdiction), where physical evidence is located (asset-based jurisdiction), or where the underlying action had arisen (specific jurisdiction). The notion of tying evidence gathering to the forum of the underlying action would be a wholly novel addition to US procedure. Domestically, that approach has been rejected by the Rule 45 amendments.[182] Transnationally, it has never been a feature of the US system, which has considered broad discovery in aid of actions—here or abroad—a feature of our transnational litigation system.

Unfortunately, a nexus requirement referencing jurisdictional contacts to the instant action—for example, a subpoena—presents its own problems. As in the recognition and enforcement context, the very question betrays specific jurisdiction's roots in merits actions. It is far from clear what contacts would "arise out of or relate" to a subpoena. Perhaps the easiest case is physical evidence—paper documents, for example. And if physical evidence is the relevant jurisdictional contact,

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179. *See* Leibovitch v. Islamic Republic of Iran, 188 F. Supp. 3d 734 (N.D. Ill. 2016), *aff'd*, 852 F.3d 687 (7th Cir. 2017).

180. *See* Gliklad v. Bank Hapoalim B.M., No. 155195/2014, 2014 WL 3899209, at *1 (N.Y. Sup. Ct. Aug. 4, 2014) ("Without any suggestion that Mr. Cherney initiated these transfers for the specific intent of depriving Mr. Gliklad of the opportunity to receive payment on the promissory note, there is no basis for establishing specific jurisdiction over Bank Hapoalim.").

181. The very nature of the specific jurisdiction analysis indicates its origins in plenary cases. Indeed, a similar problem arises with actions to recognize and enforce a foreign judgment or award. An early draft of the Restatement (Fourth) of Foreign Relations Law suggested that, for specific jurisdiction to exist, a debtor must have jurisdictional contacts in the forum "arising out of or related to" the underlying action that gave rise to the judgment. By contrast, the proposed requirement in the Restatement (Fourth)—later revised—would have permitted recognition and enforcement of a judgment or award only where the debtor was "at home" (general jurisdiction), where it has assets (asset-based jurisdiction), or where the underlying action had arisen (specific jurisdiction). This tying of recognition and enforcement to the forum of the original action would have been a sharp limitation on the powers of the judgment creditor and a failure to recognize the differences between adjudication and enforcement.

182. FED. R. CIV. P. 45.

perhaps a witness's purposeful conduct to move evidence out of the forum could by extension give rise to specific jurisdiction.

This narrow approach does nothing to resolve debates over electronic discovery, which constitutes the overwhelming majority of discoverable material.[183] This theory also does nothing to resolve the evidence actually at issue in *Gucci*—evidence held abroad arguably generated by conduct in the forum. In *Gucci*, the nonparty bank has processed transactions routed through New York that led to account information held abroad.

Specific jurisdiction was plainly designed for merits actions. Nevertheless, there are several reasons that it may offer the most promising path forward for nonparty actions. First, the *Daimler* decision itself holds out specific jurisdiction as the path forward to fill that gap left by the retreat of general jurisdiction.[184] Second, the acts of evidence gathering and restraining assets fit the purposes of specific jurisdiction better than the other possibilities. Over time, disclosure of information has been recognized as an appropriate and important subject of regulatory power.[185] Commentators have theorized that specific jurisdiction is designed to support exercises of state regulatory power, while general jurisdiction is best suited to governance of political insiders.[186] If that is so, specific jurisdiction may be made to fit transnational nonparty practice.

However, US courts will be required to answer many questions if they decide to use specific jurisdiction for nonparty actions. First among these is the question of nexus. Arguably, the defining attribute of specific jurisdiction, in contrast to general jurisdiction, is the requirement that the claims heard must have some nexus to the forum. This nexus requirement ensures that the forum court is properly exercising the regulatory power of the state and not acting to unduly coerce foreign litigants and therefore violate their liberty interests. In merits actions, the hotly litigated question is whether a defendant's contacts in the forum "arise out of or relate to" the claim asserted.

But in nonparty actions, there is an antecedent question: What is the relevant claim? The two contenders are the underlying merits action for which evidence is sought or the action seeking the evidence itself. Post-judgment or post-award proceedings introduce a third candidate: an action seeking to recognize or enforce the existing

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183. *See generally* Diego A. Zambrano, *Discovery as Regulation*, 119 MICH. L. REV. 71 (2020) (analyzing the current framework of discovery and proposing a new method grounded in regulatory theory).

184. Daimler AG v. Bauman, 571 U.S. 117, 136–41 (2014).

185. *See id.*

186 . *See, e.g.*, Lea Brilmayer, *Jurisdictional Due Process and Political Theory*, 39 U. FLA. L. REV. 293, 294 (1987) ("The link with political theory lies in the argument that such issues should be analyzed in terms of a state's right to exercise coercive power over the individual or dispute. Traditionally, political theory has treated as central the issue of the legitimacy of the state's exercise of coercive power.").

judgment or award. How one answers this nexus question has profound consequences for the nature of transnational discovery after *Daimler*.

Judge Posner expressed concern that the underlying merits action in *Leibovitch* had no nexus to Illinois.[187] However, requiring a nexus to the underlying proceeding would paint a very restrictive picture of nonparty discovery and asset recovery. Evidence would be obtainable in US courts only if the underlying action could have been brought in the United States. It may be true that evidence related to a merits claim is more likely to be in the forums where the actions giving rise to the claim occurred. This argument becomes strained when one considers asset discovery, where the only relationship between the underlying merits action and the information sought is solely that there is property somewhere owned by the debtor that it now owed to the prevailing judgment creditor.

The practical effect of requiring a nexus to the underlying merits action would be to push plaintiffs to view the location of the evidence as a central factor in choosing a forum in which to sue. In the other contexts, the location of evidence is considered one factor among many in determining the appropriate forum, but by no means the most important. For example, it is one factor in *forum non conveniens* dismissal but not typically the dispositive one.[188] The problem becomes even more finely drawn when forum selection clauses are concerned. In its marquee case on the subject, the Supreme Court rejected the argument that location of evidence elsewhere counseled against enforcement of a forum selection clause.[189]

The problems of tying nonparty actions to the jurisdictional contacts related to the underlying claim should prompt courts to consider a nexus requirement that looks to the nonparty action itself.[190] However, specific jurisdiction has never been used in this context before. Courts are accustomed to the inquiry of what contacts "arise out of or relate to" a claim on the merits—but they have seldom had to consider what contacts "arise out or relate to" a nonparty action, such as subpoena. In one of the rare examples, the US Court of Appeals

187. Leibovitch v. Islamic Republic of Iran, 852 F.3d 687 (7th Cir. 2017).

188. *See* Maggie Gardner, *Retiring Forum Non Conveniens*, 92 N.Y.U. L. REV. 390, 414 (2017) (arguing for the reduced importance of the location of evidence as "transnational evidence collection is far less burdensome today than it was even at the time of *Piper*").

189. *See* M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 18–19 (1972) ("Moreover, the finding falls far short of a conclusion that Zapata would be effectively deprived of its day in court should it be forced to litigate in London. Indeed, it cannot even be assumed that it would be placed to the expense of transporting its witnesses to London. It is not unusual for important issues in international admiralty cases to be dealt with by deposition.").

190. *See* Scott, supra note 2, at 1005–06 ("The proper analysis would focus on the relationship between (1) the discovery request and (2) the nonparty's contacts with the forum. This interpretive middle ground cures the defects of both the broad and narrow readings by focusing on the discovery request that targets the nonparty, and requiring contacts with the forum to reflect the underlying territorial limitation at issue.").

for the Tenth Circuit did not find it necessary to answer the nexus question. The court held that both the "underlying investigation and this subpoena enforcement action arise out of [the witness's] contacts with the United States and thus support the exercise of specific jurisdiction in order to secure enforcement."[191]

The easiest case for specific jurisdiction in nonparty actions is where the documents, witnesses, or other evidence or assets are located within the forum itself. The evidence or the assets sought are the subject of the nonparty action. The presence of those documents or assets would constitute the jurisdictional "contacts" that would "relate to" the action to produce or seize them. This may not add much to post-judgment proceedings seeking to execute assets, where quasi-in-rem jurisdiction does much the same job. However, it would add certainty to discovery proceedings, where concepts familiar in asset-based jurisdiction are not generally used. In the first wave of post-*Daimler* nonparty actions, multinational banks refused to turn over documents located in the forum itself on the basis that they were not subject to jurisdiction under *Daimler*.[192] Over time, banks began to voluntarily produce information in the forum (or about their holdings in the forum) even as the jurisdictional basis for compelling them remained murky.[193]

The most extreme case for specific jurisdiction would be when evidence is located abroad and the production or content of this evidence has no connection to the forum. Judge Posner observed that in regard to the discovery sought in Illinois in the *Leibovitch* case.[194] *Leibovitch* did not address the relevance of Federal Rule of Civil Procedure 4(k)(2), however. Rule 4(k)(2) provides that, for "a claim that arises under federal law," contacts may be aggregated throughout the United States, rather than within an individual state, to determine whether the respondent is subject to jurisdiction if the respondent would not be subject to jurisdiction in any individual state.[195] This once again raises the question of which claim is the relevant "claim." If the subpoena functions as the relevant claim, a federal subpoena would permit aggregation of national contacts when dealing with the typical foreign respondent. In enforcement proceedings, Federal Rule of Civil Procedure 69 permits judgment creditors to use either federal or state subpoenas.[196] This would open up national aggregation of contacts in at least some cases where creditors sought to execute a judgment based on state law claims.

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191. Application to Enforce Admin. Subpoenas Duces Tecum of S.E.C. v. Knowles, 87 F.3d 413, 418 (10th Cir. 1996) (enforcing an SEC administrative subpoena).

192. *See generally* Aaron D. Simowitz, *Transnational Enforcement Discovery*, 83 FORDHAM L. REV. 3293, 3300 (2015).

193. *See id.*

194. Leibovitch v. Islamic Republic of Iran, 852 F.3d 687 (7th Cir. 2017).

195. FED. R. CIV. P. 4(k)(2).

196. FED. R. CIV. P. 69.

The closer case is when the evidence is abroad but was generated by conduct in the forum. In the *Gucci* case, the accounts and account information were held abroad, but the funds were generated by payments from and processed through the United States (specifically, through correspondent bank accounts in New York). In the *Leibovitch* case, the information sought was generated by banking activity in the United States, although not in Illinois. In this circumstance, the nonparty is holding information or assets abroad that arguably arise out of or relate to conduct in the United States. The inquiry would then turn to the more traditional question of specific jurisdiction: How close must the nexus be to support jurisdiction?

This second question of fit or "relatedness" is not fundamentally different for nonparties than it is for parties. The principal difficulty is the question of nexus fit has not been raised before with regard to the "claim" of a subpoena or other nonparty claim. The most prominent example, Judge Sullivan's finding of specific jurisdiction in *Gucci*, relied on the sliding scale test that was expressly rejected by the US Supreme Court in *Bristol-Myers Squibb*.[197]

The question of what contacts arise out of or relate to other claims based on cross-border banking activity is well-explored in other plenary cases, however. In *Licci v. Lebanese Canadian Bank*, the US Court of Appeals for the Second Circuit held that that a foreign bank could be subjected to jurisdiction on a claim for material support of terrorism where its activity in the forum had consisted of banking activity that permitted the foreign terrorist organization to conceal or shield assets.[198]

This form of specific jurisdiction requires not only a certain number of contacts related to the claim but also that these contacts be "purposeful."[199] The contacts must be "volitional acts," through which a defendant "avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."[200] New York state and federal courts have carefully calibrated when this inquiry is satisfied by cross-border banking activity, both under New York's long-arm statute and under the constitutional standard. In an early case involving a correspondent banking relationship, *Amigo Foods v. Marine Midland Bank*, the New York Court of Appeals held that "standing by itself, a correspondent bank

197. Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cnty., 137 S. Ct. 1773, 1776 (2017).

198. Licci *ex rel.* Licci v. Lebanese Canadian Bank, SAL, 732 F.3d 161, 171 (2d. Cir. 2013).

199. *See* Fischbarg v. Doucet, 880 N.E.2d 22, 26 (N.Y. 2007) ("[J]urisdiction is proper even though the defendant never enters New York, so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted." (internal quotation marks omitted)).

200. Licci v. Lebanese Can. Bank, SAL, 984 N.E.2d 893, 899 (N.Y. 2012) (citing *Fischbarg*, 880 N.E.2d at 26).

relationship, without any other indicia or evidence to explain its essence, may not form the basis for long-arm jurisdiction,"[201] and in later proceedings affirmed the Appellate Division's dismissal because the defendant had "passively and unilaterally been made the recipient of funds."[202]

Many years later, the Court of Appeals returned to the subject in a terrorism case. In *Licci v. Lebanese Canadian Bank*, the plaintiffs sued the Lebanese Canadian Bank (LCB) for "facilitating terrorist acts by providing banking services to Hizballah" and based personal jurisdiction "on LCB's use of a New York correspondent bank account to effectuate the wire transfers that provided the funds to Hizballah's 'financial arm,' the Shahid Foundation, necessary to the commission of the illegal attacks."[203] The Court of Appeals distinguished its earlier case, noting that here LCB "deliberately used a New York account again and again," and did so "[p]resumably" because it was "cheaper and easier for LCB than other options."[204] LCB's "repeated use of a correspondent account in New York on behalf of a client" established a "course of dealing" that demonstrated "purposeful availment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States."[205]

In a 2016 case, the Court of Appeals synthesized these cases on specific jurisdiction arising from cross-border banking activity. In *Al Rushaid v. Pictet*, the court observed that "unintended and unapproved use of a correspondent bank account, where the nondomiciliary bank is a passive and unilateral recipient of funds later rejected—as in *Amigo Foods*—does not constitute purposeful availment," whereas "[r]epeated, deliberate use that is approved by the foreign bank on behalf and for the benefit of a customer—as in *Licci*—demonstrates volitional activity constituting transaction of business."[206]

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201. Amigo Foods Corp. v. Marine Midland Bank-N.Y., 348 N.E.2d 581, 584 (N.Y. 1976).

202. Amigo Foods Corp. v. Marine Midland Bank-N.Y., 402 N.Y.S.2d 406, 408 (N.Y. App. Div. 1978) (construing N.Y. C.P.L.R. § 302(a)(1) (MCKINNEY 2008)), *aff'd*, Amigo Foods Corp. v. Marine Midland Bank–N.Y., 387 N.E.2d 226, 226 (N.Y. 1979).

203. Al Rushaid v. Pictet & Cie, 68 N.E.3d 1, 6 (N.Y. 2016).

204. Licci v. Lebanese Canadian Bank, 984 N.E.2d 893, 901 (2012).

205. *Id.* at 900 (citing Indosuez Intl. Fin. v. Nat'l Rsrv. Bank, 774 N.E.2d 696, 701 (N.Y. 2002)).

206. *Al Rushaid*, 68 N.E.3d at 9–12 ("These claims depend on the assertions that defendants established the banking structure in New York and Geneva through which they orchestrated the money laundering part of the bribery/ kickback scheme. Defendants served as the employees' bankers, without whom the employees could not launder and conceal millions in kickbacks and bribes. In *Licci*, the Court found the requisite nexus where the bank effected wire transfers which financed terrorist activities. Similarly, the complaint alleges that Pictet and defendants effected the transfers of money to the New York correspondent bank as part of the money-laundering scheme that put the bribes/kickbacks in the hands of the employees. Those allegations

Courts have already begun to use this analysis from plenary actions for actions against nonparties. The US District Court for the Southern District of New York applied this synthesis to nonparty banks in late 2018 in *Nike v. Wu*.[207] The *Nike* case was substantially similar to the *Gucci* litigation. (Indeed, the judgment creditors were represented by the same team of lawyers.) Plaintiff brand manufacturers sued online counterfeiters, mostly based in China, obtained a default judgment, and assigned that judgment to an investment firm, which served the counterfeiters' banks with subpoenas. For the first time, the magistrate judge cited as settled law the principle that where "the jurisdictional analysis concerns the question of whether a foreign nonparty should be required to comply with a *Rule 45* subpoena," the focus is on "the connection between the nonparty's contacts with the forum and the discovery order at issue," citing the prior appellate decision in *Gucci*.[208]

The magistrate judge determined that the nonparty banks transacted business within New York, noting that, "of particular importance here, all of the Banks have been shown by the Assignee to maintain multiple correspondent accounts with New York banks."[209] The magistrate judge held that this conduct was purposeful where "the Banks deliberately established, and repeatedly used, correspondent accounts in New York in order to conduct business in the state."[210] The magistrate judge further held that the requirement for an articulable, not necessarily causal, nexus was satisfied because the judgment creditor sought information about funds processed through the US-based transfers—though the court also mentioned that the transfers

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are enough to show the minimum level of relatedness to the Citibank transactions."); *see also Licci*, 984 N.E.2d at 901.

207. Nike, Inc. v. Wu, 349 F. Supp. 3d 346, 351 (S.D.N.Y. 2018) ("NIKE, Inc. and Converse, Inc. sued over six hundred online retailers for selling products that infringed their trademarks [and] won a default judgment for $1.8 billion, which they assigned to an investment firm. The investment firm sought to enforce the judgment by, among other things, subpoenaing six nonparty Chinese banks for account information related to the defendants.").

208. Nike, Inc. v. Wu, 349 F. Supp. 3d 310, 323 (S.D.N.Y. 2018) (citing Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 141–42 (2d Cir. 2014), *aff'd*, 349 F. Supp. 3d 346 (S.D.N.Y. 2018)).

209. *Id.* The court also looked to the banks' use of acquiring accounts in New York, used for roughly the same purpose as correspondent account for the processing of U.S.-based wire transfers, but could help but allude to the underlying claim in finding that these accounts supported jurisdiction. *Id.* at 327 ("Further, as the Assignee contends here that the acquiring banks' 'credit card processing systems . . . actually allowed for the purchase of counterfeit products in New York,' a finding that these banks transacted business within the state is more than appropriate." (citing Gucci Am., Inc. v. Frontline Processing Corp., 721 F. Supp. 2d 228, 245 (S.D.N.Y. 2010))).

210. *Id.* at 324.

formed a "crucial component" of the underlying counterfeiting scheme.[211]

Turning to the constitutional inquiry, the magistrate judge held that the same conduct established minimum contacts and purposeful availment. However, the magistrate judge then muddied the waters by looking to the underlying claim in considering whether the constitutional nexus requirement was met. The magistrate judge first observed that the subpoenas "seek discovery related to transactions routed through these New York accounts" and therefore "connected to the Banks' contacts with the forum," but then also noted that, as in the *Gucci* litigation "because the Subpoenas 'are premised on the fact that Defendants' proceeds from the sale of counterfeit goods were transferred through [the Banks' accounts] in New York,' this Court may readily conclude that there is a sufficient nexus between the Banks' activities in the forum and the Subpoenas."[212] Finally, the magistrate judge held that the banks had failed to make "a compelling case that the presence of some other considerations would render jurisdiction unreasonable."[213] In doing so, the magistrate judge observed that the burdens on the banks were minimal and that the forum (and the United States) had a substantial interest in enforcing the Lanham Act.[214] The court also echoed the *Gucci* courts in observing that concerns about countervailing Chinese law were better considered in a separate comity analysis.

The district court affirmed. The district court emphasized that the nonparty bank need not direct the payments themselves and would be shielded from the court's jurisdiction where they had engaged in banking "by happenstance."[215] The district court further emphasized that the nonparty banks need not aid illegal activity "knowingly" or act "in complicity" with counterfeiters, echoing Judge Sullivan's similar holding made prior to *Rushaid*.[216] The nonparty need only have "encouraged its clients to rely on its relationships with [the correspondent bank] so that they could effectuate frequent wire transfers from the United States to China, which is exactly what Defendants did."[217] Indeed, the district court rejected the bank's

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211. *Id.* at 328–29 ("The Subpoenas seek documents relating to Judgment Debtors' accounts with the Banks and relating to the transactions that the Banks made on behalf of Judgment Debtors, specifically the movement of U.S. dollars through New York-based correspondent or settlement accounts and into the accounts of Judgment Debtors in China.").

212. *Id.* at 332 (noting that "this nexus is not undermined by the fact that relevant book entries and other requested records are likely located in China").

213. *Id.* (quoting Gucci Am., Inc. v. Weixing Li, 135 F. Supp. 3d 87, 96 (S.D.N.Y. 2015)).

214. *Id.* at 339.

215. Nike, Inc. v. Wu, 349 F. Supp. 3d 346, 356 (S.D.N.Y. 2018).

216. *Id.*

217. *Id.* The district specifically endorsed Judge Sullivan's application of *Licci III* to the nonparty.

attempt to distinguish prior case law on the basis that "Plaintiffs did not plead a tort or trademark infringement claim against the Banks."[218]

The *Nike* case makes plain the tensions between looking to the underlying claim or to the subpoena itself for the required nexus. The party seeking discovery in the *Nike* action was not attempting to obtain information to litigate the underlying claim; it was on the search for assets to satisfy the judgment. It is fundamental to the nature of judgment enforcement that the assets seized do not need to relate to the underlying action. The Supreme Court made as much plain in *Shaffer*. The creditor steps into the shoes of the debtor and succeeds to all its rights. In judgment enforcement proceedings, the nature of the underlying proceeding that gave rise to the judgment should be irrelevant.[219]

C. *The Special Problem of 28 U.S.C. § 1782*

The above analysis addresses the problems of direct discovery—discovery sought by a US court in aid of a US proceeding, even if that proceeding is the comparatively summary nature used for judgment recognition and enforcement proceedings. However, the jurisdictional uncertainty created by *Daimler* has impacted discovery in aid of foreign proceedings as well.

In Congress's eyes, *Daimler*'s limitation may be even more troubling. Congress established a distinct federal scheme for discovery in aid of foreign proceedings by enacting 28 U.S.C. § 1782. Section 1782 provides:

> The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal or upon the application of any interested person.[220]

Congress was pursuing a particular federal policy: that by opening up US discovery procedures in aid of foreign litigation, it could

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218. *Id.* at 358.

219. *Id.* at 359 (rejecting the argument that "the money generated by those sales would be entirely unrelated to the funds that Next is seeking to collect under the Judgment," because "the key question is whether the transactions, which took place through ABC's New York-based settlement account, are related to the discovery order, which seeks information related to the assets of the Judgment Debtors").

220. 28 U.S.C. § 1782.

encourage other nations to adopt broader US-style discovery.[221] Congress's aim was clear, even if its success has been less so.

Section 1782 discovery has been controversial and extensively litigated. It sometimes seems that every noun, verb, and adjective of this short statute has been argued over, including how one ought to understand a "proceeding," a "tribunal," or an "interested" person. The *Daimler* decision has highlighted the question of when a person "resides or is found" in a district.

This debate did not begin with *Daimler*, however. Section 1782 appears to use the language of jurisdiction—whether a person "is found"—to supplement the first category of persons covered in the statute, those who reside in the district.[222] Some courts therefore held that Section 1782 could be used to obtain discovery for use in foreign proceedings from foreign nonparties.[223] Typically, these nonparties would have satisfied personal jurisdiction under the pre-*Daimler* standard for general jurisdiction. After *Daimler*, such foreign nonparties no longer satisfied the constitutional standard for general jurisdiction. Some courts therefore questioned whether the "is found" language of Section 1782 could accommodate specific jurisdiction.[224]

The special problem of Section 1782 discovery raises and recasts the stakes of the problem of jurisdiction over nonparties after *Daimler*.[225] Section 1782 raises all the same problems of pressing new

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221. *See* Ishihara Chemical Co. v. Shipley Co., 251 F.3d 120, 124 (2d Cir. 2001) (describing the "[t]win aims of statute which permits a district court to provide assistance to foreign and international tribunals, and litigants before such tribunals, are to provide efficient means of assistance to participants in international litigation in federal courts, and to encourage foreign countries by example to provide similar means of assistance to United States courts"); Lancaster Factoring Co. Ltd. v. Mangone, 90 F.3d 38 (2d Cir. 1996) ("Goals of statute permitting federal district court to allow interested persons to obtain discovery for use before foreign tribunals are to provide equitable and efficacious discovery procedures in United States courts for the benefit of tribunals and litigants involved in litigation with international aspects, and to encourage foreign countries by example to provide similar means of assistance to American courts.").

222. *See* In re Edelman, 295 F.3d 171, 179 (2d Cir. 2002) ("Given that this so-called tag jurisdiction is consistent with due process, we do not think that § 1782(a), which is simply a discovery mechanism and does not subject a person to liability, requires more.")

223. *See, e.g.*, Ayyash v. Crowe Horwath LLP, No. 17 MC 482, 2018 WL 1871087 (S.D.N.Y. Apr. 17, 2018); In re Ex Parte Application of Kleimar N.V., 220 F. Supp. 3d 517, 521 (S.D.N.Y. 2016); In re Application of Yukos Hydrocarbons Invs. Ltd., No. 5:09-MC-0078 NAM DEP, 2009 WL 5216951 (N.D.N.Y. Dec. 30, 2009).

224. *See* In re Petrobras Sec. Litig., 393 F. Supp. 3d 376, 383 (S.D.N.Y. 2019) ("A closer question is whether this Court has specific personal jurisdiction over Petrobras with respect to this motion.").

225. Foreign sovereigns and their organs and instrumentalities are sometimes targets of applications for discovery under Section 1782. *See, e.g.*, Jacubovich v. State of Israel, 816 F. App'x 505, 507 (2d Cir. 2020) (noting that Israel had voluntarily complied with a 1782 order but did not waive its sovereign immunity in related litigation by doing so). It is not clear whether an application for discovery under Section 1782 must satisfy an exception to sovereign immunity under the Foreign Sovereign Immunities Act (the FSIA), the sole means of obtaining statutory personal or subject matter jurisdiction over

bases of jurisdiction into service with the retreat of general jurisdiction, but does so in the context of a particular federal scheme with a purpose that leaves US courts free to serve as international clearinghouses for evidence.

This dynamic has already begun to play out in several cases. In *Australia & New Zealand Banking Grp. Ltd. (ANZ Bank) v. APR Energy Holding Ltd.*, APR sought Section 1782 discovery from ANZ's New York branch for evidence to aid an arbitral proceeding concerning ANZ's security interest in several turbines that had been involved in an Australia insolvency proceeding.[226] ANZ argued that it was not subject to general jurisdiction in New York, that general jurisdiction could not be asserted over a mere branch, that it had not consented to jurisdiction in New York under the relevant banking laws, and that its contacts did not satisfy the standard for specific jurisdiction laid out in *Gucci*. This district court agreed and granted the motion to quash the application.[227]

In *In re application of Del Valle Ruiz*, investors in Banco Popular Español, S.A. petitioned a US district court for evidence to support their action in the General Court of the Court of Justice of the European Union to annul European regulators' decision to allow the sale of Banco Popular to Bank Santander, S.A. for one euro after European regulators determined that Banco Popular was on the brink of failure.[228] Petitioners sought discovery from Bank Santander and Santander Investment Securities Inc.[229] The district court had acknowledged some ambiguity in the district's prior decisions on the interaction of Section 1782 discovery and general jurisdiction, but it ultimately expressed the view that that the approach to specific jurisdiction for party discovery could be applied to nonparty

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foreign sovereigns and their organs and instrumentalities. A second and separate issue involves whether the reach of Section 1782 is limited to evidence within the territorial borders of the United States. Two federal circuit courts have rejected this argument. *See* Sergeeva v. Tripleton Int'l Ltd., 834 F.3d 1194, 1200 (11th Cir. 2016) ("[T]he location of responsive documents and electronically stored information—to the extent a physical location can be discerned in this digital age—does not establish a *per se* bar to discovery under § 1782. To hold otherwise would categorically restrict the discretion Congress afforded federal courts to allow discovery under § 1782 'in accordance with the Federal Rules of Civil Procedure.'" (quoting 28 U.S.C. § 1782(a))); In re del Valle Ruiz, 939 F.3d 520, 533 (2d Cir. 2019) ("[W]e join the Eleventh Circuit in holding that a district court is not categorically barred from allowing discovery under § 1782 of evidence located abroad. That said, we note that a court may properly, and in fact should, consider the location of documents and other evidence when deciding whether to exercise its discretion to authorize such discovery.").

226. Austl. & N.Z. Banking Grp. Ltd. v. APR Energy Holding Ltd., No. 17-MC-00216 (VEC), 2017 WL 3841874, at 1* (S.D.N.Y. Sept. 1, 2017).

227. *Id.* at *3–6.

228. *In re* Del Valle Ruiz, 939 F.3d 520, 523 (2d Cir. 2019) ("Petitioners filed in the Southern District of New York two applications under 28 U.S.C. § 1782 seeking discovery from Santander and its New York-based affiliate, Santander Investment Securities Inc. ('SIS'), concerning the financial status of BPE.").

229. *Id.*

Section 1782 discovery and proceeded to apply *Licci* and *Gucci*.[230] The US Court of Appeals for the Second Circuit declined to consider the petitioners argument that "there is good reason to believe that the district court had general jurisdiction over Santander for discovery purposes," because the petitioners did not "press this argument on appeal."[231]

The US Court of Appeals for the Second Circuit then fell into the same analytical confusion as its predecessors when considering specific jurisdiction. The district court had been skeptical from the outset that claim-specific jurisdiction could even be used in this context.[232] Petitioners presented some evidence that activities in the forum could have led to the production of relevant evidence, including a meeting in New York concerning the purchase of Banco Popular, letters sent to the US Securities and Exchange Commission, and the hiring of New York-based investment bankers used to explore financing options.[233] The US Court of Appeals for the Second Circuit cited *Gucci* extensively for two conclusions. First, the court "decline[d] to hold that there is a categorically lower showing of due process needed to obtain discovery from a nonparty."[234] Second, the court answered the nexus question by stating that "we think it enough for purposes of due process in these circumstances that the nonparty's contacts with the forum go to the actual discovery sought rather than the underlying cause of action."[235]

Nonetheless, the court then proceeded to conduct the nexus analysis as if it were looking to the underlying action. The court accepted Bank Santander's argument that its contacts could not give rise to specific jurisdiction because all the contacts except one had taken place after the European regulators' decision to approve the sale of Banco Popular to Bank Santander.[236] Bank Santander argued successfully that information derived from the Section 1782 discovery could not shed light on the "Petitioners' claim here (and likewise the

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230. *In re* Del Valle Ruiz, 342 F. Supp. 3d 448, 451 (S.D.N.Y. 2018).

231. *In re Del Valle Ruiz*, 939 F.3d at 528 n.9.

232. *See In re Del Valle Ruiz*, 342 F. Supp. 3d at 458 ("Petitioners, in a final effort, make what can only be described as an argument for the exercise of *specific* personal jurisdiction." (emphasis in original)).

233. *Id.*

234. *In re Del Valle Ruiz*, 939 F.3d at 530.

235. *Id.* Similarly, the district court cited *Gucci* for the proposition that, "[w]ith respect to specific jurisdiction over a nonparty, as is the case here," courts "first assess the connection between the nonparty's contacts with the forum and the [discovery] order at issue, and then decide whether exercising jurisdiction for the purposes of the order would comport with fair play and substantial justice." *In re Del Valle Ruiz*, 342 F. Supp. 3d at 458 (citing Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 137 (2d Cir. 2014)).

236. *In re Del Valle Ruiz*, 939 F.3d at 531 ("The district court concluded that Santander's related forum contacts all postdated the acquisition of BPE and could therefore not be even but-for "causes" of the availability of the evidence sought in discovery. With one exception, we agree.").

bulk of the discovery sought) [that] arises from a separate financial transaction: the forced sale of [Banco Popular]."[237]

The court said that it was adopting the test used in *Gucci* that the required nexus is with the action seeking discovery. However, the court then required a nexus between the underlying action and the alleged contacts. If the court had asked, consistent with the *Gucci* decision, whether the contacts in the forum gave rise to the information, the answer would clearly have been yes. The information sought was produced by conduct in and directed towards New York. In effect, the court leapt past the jurisdictional inquiry to assess the relevance of the information sought to the merits of the underlying action.

There is at least some statutory basis for the district court's restrictive interpretation. Section 1782 does require that the "document or other thing" must be sought "for use in a proceeding in a foreign or international tribunal."[238] That could be a sort of statutory hook for looking to the subject matter of the foreign or international proceeding even when considering jurisdiction to hear a Section 1782 petition. But using that part of the statute as a limiting grant of jurisdiction is at odds with the liberal construction that courts have given to nearly every other part of the statute. Courts have consistently held that the requirement that the evidence be "for use in a proceeding in a foreign or international tribunal" does not require that such a proceeding be pending, only that it be in "reasonable contemplation." Courts have similarly rejected any requirement that an "interested" person be a party in the proceeding or even a nonparty with some legal connection to the proceeding. It could encompass, for example, petitioners with only an economic interest in the outcome. Courts have also rejected the argument that evidence sought can only be used in aid of that foreign proceeding. Rather, the default rule remains in effect—information, once disclosed, can be used for any purpose.

V. CONCLUSION

On January 14, 2014, the Supreme Court dramatically narrowed transnational litigation in US courts. This may well have been warranted, or even overdue, for merits actions. But neither the Court nor the other critics of "doing business" jurisdiction considered the impact of this demolition on other precincts of transnational litigation

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237. *Id.* at 531 ("We thus conclude that the district court properly held that it lacked personal jurisdiction over Santander."). The district made the same swerve, announcing a standard that looked for a nexus with the discovery request, but then denying discovery because the regulator's forced sale was "the specific focus of all of Petitioners' foreign proceedings." *In re Del Valle Ruiz*, 342 F. Supp. 3d at 458 (citing *Gucci Am.*, 768 F.3d at 137). The district court reasoned that therefore "the litigation abroad cannot be said to arise out of or relate to Santander's activities in the forum." *In re Del Valle Ruiz*, 342 F. Supp. 3d at 458.

238. 28 U.S.C. § 1782(a).

in US courts. Nevertheless, lower US courts have reflexively treated *Daimler* as a holding that should (or must) be applied to very different types of actions and parties. This extension of *Daimler* into recognition and enforcement of judgments caused significant problems there and now threatens the same for evidence gathering in US courts from nonparties.

The resulting confusion has prompted a welter of approaches. This Article has attempted to identify the dead-ends while exploring the most promising paths forward. A different standard of general jurisdiction is appropriate for nonparty actions. In addition, specific jurisdiction can be adapted to fill the void left after *Daimler*—though with some difficulty. It may be that on January 14, 2014, civil litigants, judgment creditors, and government prosecutors woke up in a world where the broad discovery that characterized transnational litigation in US court was suddenly extinct. But the Supreme Court certainly did not intend this result, and it is by no means the only, or the best, path forward.

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