

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CIVIL TRIAL DIVISION

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SMITH :  
-VS- :  
U.S. STEEL CORP., et al : NO. 170207648

HILL :  
-VS- :  
SUNOCO, INC. : NO. 170301021

Thursday, July 20, 2017  
Courtroom 602 - City Hall  
Philadelphia, Pennsylvania

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BEFORE: THE HONORABLE ARNOLD L. NEW, J.

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MOTION

Molly A. Alber, Registered Professional Reporter

APPEARANCES:

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PLAINTIFF'S EVIDENCE

WITNESS: DR CR RDR RCR

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PLAINTIFF'S EXHIBITS

NO. DESCRIPTION MARKED ADMIT.

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**DEFENDANT'S EXHIBITS**

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THE COURT: This is the matter of Smith versus U.S. Steel 170207648 and Hill versus Sunoco 17031021. The matters have been joined together for argument purposes as to general jurisdiction.

Would counsel be kind enough to introduce themselves?

MR. DuPONT: Good morning, Your Honor, Andrew DuPont with the Locks Law Firm for both Hill and Smith plaintiffs.

MR. HOEY: James Hoey representing Ashland Inc. and Univar USA Inc. in Smith matter. I'll be speaking on behalf of all defendants in Hill and Smith.

MR. DOLAN: Good morning, Your Honor, Michael Dolan on behalf of Radiators Specialty Company.

MR. DANIE: Good morning, Frank Dante on behalf of Union Oil Company of California and Texaco, Inc.

THE COURT: Just for the record, the defendants in Smith are G.E.

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Warran Corp; Texaco, Inc.; Union Oil Company of California; Gulf Oil Limited Partnership; Safety-Kleen Systems, Inc.; Ashland, Inc.; Univar U.S.A., Inc. Defendants. And those are the defendants that have filed a judicial issue. And the defendants in Hill are Safety-Kleen Systems Inc. and Radiator Specialty Company.

I believe I have them all, correct?

MR. NEELY: Good morning, Your Honor, Atlantic Trading and Marketing is also a defendant in the Smith case.

THE COURT: Were you scheduled?

MR. NEELY: Yes.

THE COURT: Smith or Hill?

MR. NEELY: Smith, Your Honor.

THE COURT: Counsel.

MR. DuPONT: Thank you, Your Honor.

THE COURT: Focus right now on general jurisdiction.

MR. DuPONT: Correct, Your Honor. Your Honor is familiar with this issue of general jurisdiction by consent as

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this Court has already ruled on preliminary objections in benzene exposure cases filed by many of the same defendants in other matters, including the Bruce Rhyne matter; the James Jones matter, the lead case; and the Pennington case as well, Your Honor.

THE COURT: So the Court has ruled on those.

MR. DuPONT: The Court has ruled in separate cases.

THE COURT: But the reason why this argument is here, obviously I think we're all aware is that subsequent to that ruling, those series of rulings, there's been United States Supreme Court cases that certainly have in my own mind challenged my rulings. I think it was my law clerk that said, Well, Judge you had one Justice on your side.

So that's the nature, I think, based upon the Supreme Court rulings. So let's talk.

MR. DuPONT: Understood, Your Honor.

So the matter starts with the

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1 three ways in which jurisdiction can be  
 2 obtained, general jurisdiction can be  
 3 obtained over a defendant. Either  
 4 conditionally that defendant is in state,  
 5 physically in state, number one. Second,  
 6 the defendant consents to jurisdiction. And  
 7 in this matter we're talking about consent  
 8 through registration under 42 Pa.C.S.A. 5301  
 9 and 3 from neither being in state physically  
 10 or consenting, but having so many contacts  
 11 in state that you're considered to be at  
 12 home. So constructively in state in the  
 13 jurisdiction.

14 The recent case law through  
 15 Daimler and Bristol Myers Squibb we submit  
 16 speaks to the third issue when you are  
 17 neither physically in state or have consented  
 18 to jurisdiction through registering to do  
 19 business. But the issue of whether you are  
 20 at home and constructive in state based on  
 21 the nature of your contacts with the foreign  
 22 jurisdiction.

23 The Bristol Myers Squibb  
 24 decision, Your Honor, does not overrule or  
 25 in any way invalidate Pennsylvania's general

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1 jurisdiction through the registration  
 2 statute 42 Pa.C.S.A. Section 5301, and  
 3 accompanying statutes, 15 Pa.C.S.A. 402(d),  
 4 with a predecessor of 5301, which is 2004.  
 5 The general jurisdiction is conferred by a  
 6 foreign entity registering and qualifying to  
 7 do business in the Commonwealth of  
 8 Pennsylvania. And that's expressly set  
 9 forth in 42 Pa.C.S.A. 5301(a)(2)(1). And  
 10 that's partnerships since Gulf Oil  
 11 Partnership is a partnership (a)(3)(1).

12 And importantly, for one of the  
 13 defendants Texaco, discontinuance of  
 14 registration does not terminate the Court's  
 15 jurisdiction as long as the acts complained  
 16 of or the transactions or omissions happen  
 17 during a period that the defendant was  
 18 registered and did have status as being  
 19 qualified in Pennsylvania to do business.

20 And that's significant for  
 21 Texaco because while they are not currently  
 22 registered to do business, not registered to  
 23 do business when we filed suit, they were  
 24 registered to do business between 1941 and  
 25 2010. And the acts complained of in this

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1 matter, the benzene exposure from Texaco  
 2 products, occurred during that period,  
 3 specifically in 1973 up until approximately  
 4 1990.

5 So the Pennsylvania statutory  
 6 scheme provided defendants when they  
 7 register to do business in Pennsylvania they  
 8 have notice that they would be consenting to  
 9 general personal jurisdiction. And that has  
 10 been recognized by the Pennsylvania Superior  
 11 Court in the Simmers decision, 394 Pa. Super  
 12 464 1990, where the Court held that the  
 13 defendant voluntarily registered to do  
 14 business here and thereby consented to  
 15 general personal jurisdiction.

16 And the third circuit in 1991  
 17 in the Bain decision found that the  
 18 registration equals general jurisdiction  
 19 having consent. It's like a predecessor to  
 20 42 Pa. C.S.A. 5301 which was 15 of  
 21 Pennsylvania statute holding that gave the  
 22 defendant notice that it was subject to  
 23 personal jurisdiction in Pennsylvania and  
 24 should have anticipated being held in court.

25 There have been a number of

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1 cases that have post Daimler continued to  
 2 recognize the validity of consent —  
 3 jurisdiction by consent. And have also  
 4 continued to recognize the validity of 42  
 5 Pa.C.S.A. 5301 which we will discuss.

6 The Daimler Chrysler decision  
 7 did not overturn the concept. This is a  
 8 decades old jurisprudence in the  
 9 Pennsylvania Supreme Court and the United  
 10 States Supreme Court did not overturn the  
 11 concept of jurisdiction, general  
 12 jurisdiction by consent.

13 In fact, the Daimler Court  
 14 distinguished itself from general personal  
 15 jurisdiction by citing to and quoting  
 16 Goodyear (ph) for the proposition that  
 17 they're talking about at home jurisdiction  
 18 being the type of jurisdiction, quote, when  
 19 an entity has not consented to suit in the  
 20 forum, close quote.

21 So they're talking about  
 22 distinguishing this line of cases, the at  
 23 home line of cases, from consent to  
 24 jurisdiction.

25 That's been recognized as well,

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1 this distinction in Daimler Chrysler in the  
2 third circuit in the Gucci America decision  
3 2014 at 768 F.3d 122.

4 Now, the Court would not have  
5 through it's silence overruled decades of  
6 jurisprudence concerning general  
7 jurisdiction by consent. And that is  
8 something that was pointed out by the  
9 district of New Jersey in Otsuka vs. Mylan  
10 decision from March 2015 where the Court  
11 wrote that, Nor can the Court find any  
12 support of Mylan's position that Daimler, in  
13 essence, precludes general jurisdiction by  
14 consent. Requirements that it be limited to  
15 a corporation's placement — corporation's  
16 principal place of business or in  
17 exceptional circumstances and equivalent  
18 forum in which the corporation could be  
19 found at home. So that's Number 1,  
20 physically present and Number 2. Number 3,  
21 constructively present at home.

22 Indeed, Daimler in its entirety  
23 in the district in New Jersey continues one  
24 pleading reference to the concept of  
25 jurisdiction by consent. And this limited

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1 reference served only the distinction  
2 between conditional consensual jurisdiction  
3 and the non-consensual basis for  
4 jurisdiction addressed in the decision  
5 rather than to cast any doubt on the  
6 continued validity of consent based  
7 jurisdiction.

8 The district of New Jersey  
9 continued stating, moreover, though Federal  
10 Court has not addressed consent by  
11 registration theory of personal  
12 jurisdiction, this Court cannot ignore that  
13 the majority of Federal Courts of Appeals  
14 have considered the question and have  
15 concluded that compliance with registration  
16 statutes may constitute consent to personal  
17 jurisdiction.

18 Now, we cited for Your Honor a  
19 number of cases within the third circuit and  
20 other circuits that have continued to  
21 recognize the consent of general  
22 jurisdiction by consent, including after the  
23 Daimler decision was entered. They include  
24 the Court of Therapeutics from the federal  
25 circuit on March 18 of 2016, the Otsuka

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1 Pharmaceutical decision, 106 F.3 456  
2 District of New Jersey. And in the Court of  
3 Therapeutics decision, the courts  
4 specifically said — the federal circuit  
5 specifically said that Daimler does not  
6 change what Pennsylvania Fire Insurance and  
7 that line of cases on consent to  
8 jurisdiction established. So we have  
9 another federal circuit court distinguishing  
10 Daimler from consent to jurisdiction.

11 Other decisions cited is  
12 Century Pharmaceutical, District of New  
13 Jersey 2015, Gucci America the second  
14 circuit in 2014, Forest Laboratories  
15 decision in 2015, which I believe is the  
16 district court opinion within the third  
17 circuit and a number of other cases.

18 Now, there will be cases in  
19 other jurisdictions where a defendant or  
20 plaintiff argues that registering to do  
21 business is a contact for consideration  
22 under that second type of jurisdiction, the  
23 at home jurisdiction. And the Courts will  
24 say when looking at it just as a contact to  
25 determine whether that corporation is at

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1 home in that jurisdiction, that's not  
2 enough. But that's not what we're arguing.  
3 Those are cases talking about consent to  
4 jurisdiction.

5 And there are cases where, for  
6 example, the Connecticut statute analyzed  
7 the Brown decision from the second circuit  
8 in 2016. The Connecticut statute could  
9 arguably be said to confer jurisdiction by  
10 consent. But the second circuit looked at  
11 the statute and said, No, it doesn't  
12 expressly put the defendant on notice, that  
13 they are consenting to general jurisdiction  
14 through this statute. They said it's not  
15 like Pennsylvania which does expressly put  
16 the defendant on notice that they are  
17 consenting to jurisdiction by registering as  
18 a foreign corporation to do business in  
19 Pennsylvania.

20 So there the Brown court said  
21 yes, Pennsylvania statute is different.  
22 It's unique in that it is specifically  
23 giving the defendant notice that they're  
24 consenting to jurisdiction in the state of  
25 Pennsylvania, the Commonwealth of

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1 Pennsylvania.

2 Similar decisions seen by the  
3 Delaware Supreme Court, Your Honor, in a  
4 case involving Genuine Parts in 2016 where  
5 the Delaware Supreme Court said, Our statute  
6 is not strong and expressed like  
7 Pennsylvania statute. It doesn't give the  
8 defendant registering here due notice —  
9 registering to do business notice that they  
10 are consenting to general personal  
11 jurisdiction in this state.

12 Pennsylvania statute is  
13 different. It does expressly provide the  
14 defendant with notice that they are  
15 registering. By registering to do business  
16 they are consenting to general personal  
17 jurisdiction in this state.

18 The concept to consenting to  
19 waive one's constitutional rights is not a  
20 unique or novel concept. This happens every  
21 day in our society. When we walk into a  
22 convenience store and the convenience store  
23 has a security camera, you are consenting to  
24 give up your constitutional right to your  
25 image. Nobody said you had to go into that

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1 convenience store.

2 When you walk through airport  
3 security and you board a flight, you are  
4 being patted down, examined by x-rays and  
5 whatever new device it is that outlines your  
6 body. That is giving up privacy rights.  
7 You are voluntarily and knowingly consenting  
8 to do that.

9 It's no different when a  
10 jurisdiction registers to do business in a  
11 place like Pennsylvania where the statute  
12 puts them on notice that they are consenting  
13 to the jurisdiction of general jurisdiction  
14 of the Commonwealth of Pennsylvania.

15 Now, that is a long tenured  
16 line of case law in both this Commonwealth  
17 and federal courts. I've looked at the  
18 decision from Bristol Myers Squibb and I  
19 didn't see the word consent once in it. The  
20 Daimler Court expressly distinguished itself  
21 from the idea of consent to jurisdiction.  
22 And I read the Bristol Myers Squibb decision  
23 to be an extension of what Daimler court was  
24 saying with respect to at home general  
25 personal jurisdiction.

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1 So if these courts were  
2 abolishing and overruling the concept of  
3 consent establishing general personal  
4 jurisdiction they wouldn't have done it in  
5 silence. They would have expressly done  
6 that. It's not how our case law evolves.

7 There have been at least three  
8 decisions that have examined the validity of  
9 Section 5301 since the Daimler decision came  
10 out. And every decision that we have  
11 located examined the constitutionality of  
12 5301 following Daimler has found it remains  
13 valid.

14 Wards versus Johnson and  
15 Johnson decision, Johnson decision 2016 West  
16 Law 517 2816.

17 Kukich versus Electrolux  
18 decision 2017 West Law 345 851.

19 And a decision from Judge  
20 Massiah Jackson in the Whiting case versus  
21 U.S. Steel, Pennsylvania Court of Common  
22 Pleas, November Term, 2015 Number 4333 from  
23 April 13 of 2016.

24 And just recently this month,  
25 earlier this month, Your Honor, the Court's

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1 decision in the Pennington case as relates  
2 to general jurisdiction over Ford based on  
3 consent to do business here in Pennsylvania  
4 made its way up to the Supreme Court in  
5 Pennsylvania on a petition for review. And  
6 the Supreme Court of Pennsylvania denied the  
7 petition for review to accept it — it was  
8 an interlocutory opinion, interlocutory  
9 order. But if we would expect that if the  
10 Pennsylvania court, Supreme Court, found  
11 that this case law was such a strong  
12 indication that Pennsylvania statute is no  
13 longer constitutional or no longer valid by  
14 conferring general jurisdiction, it would  
15 have been interested in taking the matter up  
16 at that time.

17 So we allude to some of the  
18 cases that were cited by the defense as not  
19 being — or being in opposite to Your  
20 Honor's decision because they're from other  
21 jurisdictions dealing with other issues and  
22 not directly on point with the decision  
23 before the Court. Examples of those we have  
24 cited in our opposition papers, but several  
25 weren't addressed in our opposition papers.

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1 First is the Chatwell decision.  
 2 Chatwell decision is from New York. It's  
 3 addressing New York statute. And there the  
 4 plaintiff argued that registration not —  
 5 did not establish jurisdiction by consent,  
 6 but that registration was a contact, contact  
 7 in the scheme of many contacts conferring at  
 8 home personal jurisdiction, general personal  
 9 jurisdiction. That's the third way of  
 10 general personal jurisdiction. That case is  
 11 not relevant to this case because it's not  
 12 talking about jurisdiction by consent.

13 Second case is the Neely  
 14 decision which was from Missouri. The  
 15 plaintiff in that case did not raise the  
 16 issue of consent to jurisdiction at the  
 17 trial court level. So the appellate court  
 18 found that they had waived that issue and  
 19 was not before the appellate court because  
 20 it had been waived. That is in opposite and  
 21 cannot have any effect.

22 The third is the Keely decision  
 23 in the Eastern District of Missouri and that  
 24 decision was decided under the Daimler at  
 25 home analysis, and not a consent to

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1 jurisdiction issue.

2 So the case law cited by the  
 3 defendants is not controlling or not even  
 4 persuasive because it's not on point and  
 5 doesn't address the issue of consent to  
 6 jurisdiction.

7 Cepec decision I alluded to  
 8 earlier, Cepec versus General Parts Company  
 9 from Delaware Supreme Court, distinguished  
 10 itself in Pennsylvania registration statute  
 11 by saying that Pennsylvania statute that  
 12 currently and expressly provides that  
 13 registering to do business in the State of  
 14 Pennsylvania is a sufficient basis for  
 15 general jurisdiction over all foreign  
 16 corporations.

17 While they found that Delaware  
 18 statute did not have the same effect, it was  
 19 because it was distinguished from  
 20 Pennsylvania statute by not giving the same  
 21 notice. Finally, Your Honor, there's  
 22 arguments under the dormant commerce clause  
 23 that the defense has made. And those  
 24 arguments under the dormant commerce clause  
 25 and the unconstitutional doctrine clause

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1 essentially fail where Section 5301 is a  
 2 constitutional statute. And it's not unfair  
 3 for the defendants to comply with Section  
 4 5301 where it's constitutional and it  
 5 doesn't in any way discriminate between the  
 6 instate corporations and out-of-state  
 7 corporations. Because Section 5301 and the  
 8 accompanying statutes are putting  
 9 out-of-state corporations on the same  
 10 footing, giving them the same rights, but  
 11 also the same liabilities and  
 12 responsibilities as instate corporations.  
 13 So there can't be any issue under the  
 14 dormant commerce clause and unconstitutional  
 15 doctrine clause under that.

16 So the case law that had  
 17 developed by the Daimler Chrysler decision  
 18 and the Bristol Myers Squibb decision, Your  
 19 Honor, that's case law that addresses the  
 20 issue of jurisdiction, general jurisdiction  
 21 under the third quality at home analysis  
 22 which is separate from consent to  
 23 jurisdiction. Consent to jurisdiction being  
 24 a long tenured principle under federal and  
 25 Pennsylvania jurisprudence that have not

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1 been overruled by the Daimler or the Bristol  
 2 Myers Squibb decision.

3 THE COURT: Thank you.  
 4 Counsel.

5 MR. HOEY: Thank you, Your  
 6 Honor. I'm going to largely just start by  
 7 passing over the at home discussion in  
 8 Daimler and get right to what I think is the  
 9 point of this case. And that is that BNSF  
 10 Railway has explicitly decided this issue.  
 11 And it has changed the calculus for the  
 12 Court.

13 Now, the question before the  
 14 Court is can Pennsylvania haul an  
 15 out-of-state defendant into court —

16 THE COURT: Haul?

17 MR. HOEY: Haul, bring.

18 THE COURT: H-A-U-L.

19 MR. HOEY: H-A-U-L, is a word  
 20 that is used in BNSF — into court on the  
 21 basis of a statute that says if you register  
 22 to do business here, we have general  
 23 jurisdiction over you.

24 I'm going to just quote  
 25 directly from Justice Ginsburg in BNSF,

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1 which was decided on May 30th, so after I  
2 believe all the briefing in these cases.  
3 Justice Ginsburg said, The Fourteenth  
4 Amendment's due process clause does not  
5 permit each state to hail -- hail, not haul;  
6 apologizes -- an out-of-state corporation  
7 before its courts when the corporation is  
8 not at home in the state and the episode  
9 ensued/occurred elsewhere.

10 The defendants would submit  
11 that this decides the issue in the case.  
12 Because none of the defendants are at home  
13 in the state and the episode in both of  
14 these suits occurred elsewhere.

15 In Smith the only injuries are  
16 alleged to have occurred in New York. In  
17 Hill, my understanding is there's not  
18 specific allegation of where the injuries  
19 occurred but it's South Carolina  
20 plaintiffs -- I might be wrong, I think  
21 there is an allegation in there. But  
22 there's certainly no allegation that any  
23 injury occurred in either of these cases in  
24 Pennsylvania.

25 So the question that BNSF

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1 answered that Daimler had not is what if a  
2 state statute says by electing to do  
3 business in this state you are subjecting  
4 yourself to general personal jurisdiction?  
5 The Court in BNSF said --

6 THE COURT: BNSF -- go ahead,  
7 continue.

8 MR. HOEY: So specifically BNSF  
9 involved a Montana statute that said persons  
10 who establish a presence in Montana subject  
11 themselves to personal -- general personal  
12 jurisdiction in Montana. Specifically for  
13 corporations, that was understood to mean if  
14 you establish a business presence there.  
15 For BNSF the circumstances were a railroad  
16 that laid 2,000 miles of track in state,  
17 employed thousands of employees, got  
18 substantial revenue. Basically it said --  
19 Montana said if you want to do business in  
20 this state, then you have to consent to  
21 general personal jurisdiction. And BNSF  
22 seeing that statute, knowing it was good law  
23 at the time, laid tracks throughout Montana.

24 Respectfully, I think this has  
25 to change the Court's analysis. To my

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1 understanding the basis for asserting  
2 personal jurisdiction over defendants in  
3 cases like these has been -- there's a  
4 statute that says if you file a foreign  
5 registration statement in this state, you  
6 are subject to general personal  
7 jurisdiction.

8 In other words, the cost of  
9 doing business in this state is you sign  
10 this form, which is mandatory under 15 Pa.  
11 Section 411, and by signing this you create  
12 a contact with the state that allows the  
13 state to hail you into court.

14 Respectfully, I would submit  
15 that if building 2,000 miles of track is not  
16 a sufficient contact for a state to say  
17 then, Look if you do this you're consenting  
18 to general personal jurisdiction, then  
19 neither is signing a registration form and  
20 paying what I believe is \$150.

21 In other words, a state cannot  
22 say if you elect to do business in our state  
23 you will be subjected to general personal  
24 jurisdiction. Specifically, the Court said  
25 states cannot expand their jurisdiction by

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1 their own statutes.

2 Now, the buzz word for  
3 plaintiffs counsel is consent. Consent is  
4 not a magic word. Has specific meanings in  
5 different circumstances.

6 The Court in BNSF did not  
7 address an argument on consent. It did not  
8 address consent as a general proposition. I  
9 submit that's because there is no general  
10 proposition there. But more specifically, I  
11 think it spoke to consent when it said that,  
12 again, I'll read this, The Fourteenth  
13 Amendment due process clause does not permit  
14 a state court to hail an out-of-state  
15 corporation before its courts when the  
16 corporation is not at home and the episode  
17 occurred elsewhere. In other words, the  
18 state simply does not have the power to  
19 expand its jurisdiction by statute.

20 Now, if 5301, the section that  
21 says registering as a foreign corporation  
22 gives general personal jurisdiction, if that  
23 is no longer good law, or more specifically  
24 if it must be read in conjunction with the  
25 due process clause to only apply to

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1 corporations that are at home, then I would  
2 submit that consent doesn't even make sense  
3 as an argument anymore. Consent builds on a  
4 valid statute underneath. And a reading of  
5 that statute that has to be in excess of the  
6 due process clause.

7 Now, again, Mr. DuPont I  
8 imagine will get back up here and say,  
9 Listen, there's still Pennsylvania Fire,  
10 there's still this whole line of cases. I  
11 think you know that our argument throughout  
12 has been those cases have been outdated  
13 since International Shoe, frankly. There's  
14 been no Supreme Court precedent on  
15 registration by consent since International  
16 Shoe.

17 And more specifically, we're  
18 not even talking International Shoe, we're  
19 talking Daimler which everyone has  
20 recognized as a sea change in jurisdiction  
21 and now ENSF.

22 And I would also say that  
23 specifically if you look at a case called  
24 Chipman, which was also a Supreme Court case  
25 in 1920 that followed Pennsylvania Fire.

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1 Chipman showed that the narrowness of  
2 Pennsylvania Fire Holding which specifically  
3 is — it's not just a mere act of  
4 registration that equals consent. It's  
5 registration in doing business.

6 So in Chipman the corporation  
7 had registered, an agent had registered to  
8 do business in the state, had ceased to do  
9 business, but had not renounced or revoked  
10 its registration as required. So the  
11 registration was still active and good.

12 But the Court held that if the  
13 company is no longer doing business there  
14 then the consent argument no longer holds.  
15 Basically, registration is even less of a  
16 contact in doing business.

17 So again, if we're looking at  
18 the ENSF, laying tracks is a heck of a  
19 bigger contact with the state than signing a  
20 registration form.

21 And then, as for Bristol Myers,  
22 I would respectfully disagree with the  
23 characterization of Plaintiff's counsel in  
24 the case. I don't think it's directly on  
25 point in the same way that ENSF is, but I

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1 think it clearly signals the direction of  
2 the Court. Which is these are the rules of  
3 general personal jurisdiction, and there  
4 states do not have the power to get around  
5 them.

6 Now in ENSF it was a statute  
7 that corporations could agree to and come do  
8 business in the state by consenting to  
9 general personal jurisdiction.

10 In Bristol Myers it was an  
11 attempt to sidestep general personal  
12 jurisdiction by expensively interpreting  
13 specific jurisdiction.

14 Again, we're not arguing  
15 specific jurisdiction right now, so I don't  
16 think I need go to into the details of the  
17 case, although I'm happy to if you would  
18 like. But to me it merely confirms that the  
19 Court had set a clear precedent in Daimler.  
20 The only basis for hailing an out-of-state  
21 corporation into court is specific  
22 jurisdiction, which means the injury arose  
23 from the acts of that corporation in that  
24 state. Or the corporation is at home in the  
25 state which is a truly exceptional

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1 circumstance.

2 I would also just add that in  
3 Bristol Myers the Court had dicta that is at  
4 least worth reading about what paths still  
5 remains to plaintiffs given its rulings.  
6 The Court said plaintiffs can, A, find the  
7 corporation wherever they're incorporated or  
8 wherever their principal place of business  
9 is and sue them there; B, they can sue them  
10 where they're injured; C, federal district  
11 courts may still be open because they're  
12 subject to the Fifth Amendment due process  
13 clause rather than the Fourteenth Amendment.  
14 They didn't mention anything else.

15 I think even the dissent has  
16 been pretty clear and transparent on what  
17 she thinks the cases mean. Justice has  
18 repeatedly said this is curbing — there  
19 does not appear to be any way to get into  
20 court — to get an out-of-state corporation  
21 into court other than exceptional  
22 circumstances that are almost a one off.  
23 And that's the Perkins case which I can  
24 discuss, if you want. But I imagine you  
25 would prefer I not.

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1 THE COURT: Actually, it's a  
2 case that I always wanted to discuss but  
3 around a beer and not on the bench.

4 MR. HOEY: Understood. I did  
5 not bring any beer to court today so I will  
6 not be discussing. I understand that's  
7 where you're directing me.

8 On the other constitutional  
9 arguments, I think those are sufficiently  
10 brief, Your Honor. Nothing in either of  
11 these cases touches the dormant commerce  
12 clause or unconstitutional condition  
13 doctrine. I still think they're persuasive,  
14 that a state can't force you to abandon a  
15 constitutional right as to the cost of doing  
16 business in the state. And as I read the  
17 Pennsylvania statute and the interpretation  
18 of that statute to date, that's precisely  
19 what's happening.

20 But again, I think the key  
21 arguments have already been made. So with  
22 that I'm happy to answer any further  
23 questions the Court might have or to turn  
24 over to co-defense counsel who might want to  
25 speak or plaintiff's counsel for rebuttal.

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1 But before I do, you heard this  
2 argument a year ago in Rhyne and we did it  
3 then and we're doing it again now. I have  
4 draft orders on behalf of all the  
5 defendants. In the case that you overrule  
6 our preliminary objections, we would like  
7 the matter to be certified for appeal. So I  
8 would respectfully submit those to the Court  
9 now.

10 THE COURT: Counsel.

11 MR. DOLAN: I have nothing,  
12 Your Honor; we join.

13 MR. DANIE: Your Honor, Frank  
14 Dante on behalf of Texaco, Inc. and Union  
15 Oil Company of California. I just want to  
16 make two brief points and I will be brief.

17 I think the key take away for  
18 ENSF is that the Supreme Court has made it  
19 very clear that the due process clause of  
20 the Fourteenth Amendment prohibits a state  
21 in the instance of general personal  
22 jurisdiction from hailing in an out-of-state  
23 defendant corporation unless that defendant  
24 is considered at home in the state. That's  
25 whether it's by statute or for any other way

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1 whatsoever. So I think that is the key take  
2 away from ENSF here.

3 THE COURT: Is the well  
4 established rule of consent hereby totally  
5 abandoned?

6 MR. DANIE: If you read ENSF,  
7 Your Honor --

8 THE COURT: Is it totally  
9 abandoned, yes or no?

10 MR. DANIE: Of consent by --

11 THE COURT: Of consent; not  
12 consent by registration.

13 MR. HOEY: May I speak, Your  
14 Honor?

15 THE COURT: No, he brought it  
16 up.

17 MR. DANIE: Your Honor, the  
18 ENSF case does not address consent as if you  
19 wanted to waive personal jurisdiction, as if  
20 you come into a court and say I'm not going  
21 to raise personal jurisdiction. So if  
22 that's what you're referring to -- so if,  
23 for example, my client came in and said  
24 we'll be subject to personal jurisdiction in  
25 this court --

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1 THE COURT: The consent is not  
2 waived. We've agreed on principle of  
3 consent still exists.

4 MR. DANIE: It can in certain  
5 context, but not in this context, Your  
6 Honor.

7 THE COURT: Go ahead.

8 MR. DANIE: So I think that's  
9 the key take away from ENSF is that the  
10 Fourteenth Amendment prohibits the due  
11 process clause, prohibits a state from  
12 hailing in an out-of-state defendant unless  
13 an at home analysis is done.

14 Here plaintiffs have made no  
15 showing of an at home analysis with respect  
16 to the defendants who are sitting here  
17 today. They've relied solely on consent.  
18 For that reason alone the preliminary  
19 objections for personal jurisdiction, at  
20 least with respect to Union Oil Company in  
21 California and Texaco, Inc. should be  
22 granted.

23 The other brief point I just  
24 want to bring up is with respect to Texaco,  
25 Inc. And plaintiffs counsel alluded to it

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1 earlier and this is the first time we  
2 actually heard it.

3 In our preliminary objections  
4 we raise the issue of Texaco not being  
5 registered to do business in the State of  
6 Pennsylvania. Plaintiff came back and  
7 simply submitted zero evidence whatsoever of  
8 registration to do business.

9 Your Honor issued an order  
10 asking for defendants or any parties to come  
11 forward with affidavits. We submitted  
12 affidavits to this Court saying Texaco, Inc.  
13 is not registered to do business in  
14 Pennsylvania. Plaintiffs have submitted no  
15 evidence to the contrary. Today was the  
16 first time that we heard any evidence, and  
17 it wasn't even evidence, it was just  
18 argument from counsel that Texaco is  
19 registered or was registered to do business  
20 in Pennsylvania. We submit that plaintiffs  
21 have not met their burden on personal  
22 jurisdiction to show that Texaco, Inc. is or  
23 ever was registered to do business in  
24 Pennsylvania. For that reason Texaco, Inc.  
25 is in different position and should be

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1 dismissed for that reason.

2 THE COURT: Mr. DuPont.

3 MR. HOEY: Thank you.

4 MR. NEELY: Sorry, Your Honor.

5 I don't know if you wanted to hear from any  
6 other defendants before rebuttal.

7 THE COURT: Indicating for the  
8 record, no.

9 Mr. DuPont, is it mandatory to  
10 register in order to do business in  
11 Pennsylvania?

12 MR. DuPONT: Your Honor, I  
13 don't know the answer to that question. I  
14 don't think it's mandatory to register to do  
15 business because I know of other  
16 defendants --

17 THE COURT: Foreign business  
18 may not do business in the Commonwealth  
19 until it registers with the department.

20 MR. DuPONT: Then it is  
21 mandatory.

22 THE COURT: Can you force  
23 consent and call that a valid forum.

24 MR. DuPONT: It's not forcing  
25 consent if you're making a voluntary

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1 decision to do business in Pennsylvania.  
2 Nobody is forcing them to do business in  
3 Pennsylvania.

4 THE COURT: Here we go with  
5 interstate commerce clause. We're not going  
6 to go there because I don't feel it's  
7 necessary. I need you to explain despite  
8 the arguments of defense why Bristol Myers  
9 Squibb is not on point in telling me that I  
10 have no jurisdiction under the  
11 circumstances?

12 Are we in agreement that  
13 Bristol Myers Squibb is based upon the  
14 argument of Justice Alito of federalism, the  
15 sole argument, his sole opinion, is based on  
16 the federalistic system? Are we in  
17 agreement?

18 MR. DuPONT: The Court's  
19 analysis boils down to the issue of at home  
20 jurisdiction.

21 THE COURT: The sovereignty of  
22 each state argues limitation on the  
23 sovereignty of all of his sister states that  
24 go back to 1783. Even if the defendant  
25 would suffer minimal or no inconvenience for

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1 being forced to litigate before the tribunal  
2 of another state, even if the foreign state  
3 had strong interest in applying it's laws to  
4 the contrary, even if the foreign state is  
5 the most convenient location for the  
6 litigation, the due process clause, acting  
7 and administering of interstate federalism  
8 may sometimes act to divest the state of its  
9 power to render a valid judgment.

10 And I can go on with about  
11 seven other quotes.

12 So what I have here in Bristol  
13 Myers by my interpretation is the states are  
14 limited, states have limitation.  
15 California, you've gone beyond that  
16 limitation and you have forced by Court  
17 order the defendant to come into your state.

18 Now, if he is finding that  
19 under feudalistic principle that the Court  
20 cannot force because the state has  
21 limitations in order to protect the other  
22 states, how can this Court find that a  
23 statute of the state can create the same  
24 requirement?

25 MR. DuPONT: Because it's a

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1 voluntary act to register to do business.

2 THE COURT: Is it voluntary  
3 when you must?

4 MR. DuPONT: There is nobody  
5 forcing these companies to do business in  
6 Pennsylvania. This is a quid quo pro. If  
7 you want to benefit from Pennsylvania's  
8 protection in laws, then you play by the  
9 same rules as Pennsylvania corporations.

10 THE COURT: So California can  
11 take Bristol Myers Squibb, which has said  
12 specifically the Court, you definitely are  
13 here and they can pass a statute overruling  
14 Bristol Myers Squibb by saying if you want  
15 to do business in California you must — you  
16 must agree to general jurisdiction.

17 MR. DuPONT: Yes. Here's why  
18 that's fair. This all comes down to  
19 fairness.

20 THE COURT: No, no, no, it  
21 doesn't come down to fairness. Justice  
22 Sotomayor said that point blank in the  
23 dissent. That's what I said at the very  
24 beginning when my staff looked at me and  
25 said, Well, you have one on your side. I

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1 agreed with you. I agreed with you a year  
2 ago. I felt fundamental fairness was an  
3 issue. Is it when you evenly reviewed the  
4 dissent of Justice Sotomayor?

5 MR. DuPONT: Because what we  
6 have in Bristol Myers Squibb is important  
7 after the fact telling the defendant you  
8 come to Pennsylvania and be subject to my  
9 jurisdiction. You don't have a situation  
10 like here that is separate where  
11 Pennsylvania says you are voluntarily  
12 consenting to our general jurisdiction.  
13 You're big boys and ladies. You have a  
14 decision to make here. Nobody is forcing  
15 you to do anything. You can do business in  
16 Pennsylvania, but you have to voluntarily  
17 agree to the consent of this Court over you.

18 THE COURT: Let's look at the  
19 classic principle. Are you saying that  
20 every major corporation should pull out of  
21 Pennsylvania because of this?

22 MR. DuPONT: That's a decision  
23 that they have to make, Your Honor.

24 THE COURT: So having to make  
25 that decision what you're saying to me is

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1 there are now four places in the United  
2 States that are mandatory areas where you  
3 must accept jurisdiction. On general  
4 jurisdiction, not talking specific. There  
5 are four areas, place of injury or cause of  
6 accident, corporate principle place of  
7 business in Pennsylvania. Those are now  
8 four states that exist. And everybody can  
9 now bring their actions in Pennsylvania.

10 MR. DuPONT: If defendant is  
11 registered to do business in Pennsylvania  
12 then that's —

13 THE COURT: Which they must do  
14 under the laws of Pennsylvania. They do not  
15 have the option to do business in  
16 Pennsylvania without paying that \$100 fee,  
17 and they've incorporated that little bit in  
18 there that says and you must agree to  
19 jurisdiction.

20 MR. DuPONT: Your Honor, I see  
21 a lot of Texaco gasoline stations in  
22 Pennsylvania.

23 THE COURT: Correct.

24 MR. DuPONT: So to argue that  
25 they don't do business in Pennsylvania, I

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1 don't know if that's practical nature of  
2 what's happening in our system. This is how  
3 our jurisprudence evolved. It started off  
4 you have a jurisdiction over, general  
5 jurisdiction over a person or company if  
6 they're physically present in the state.

7 And then our economy evolved  
8 and we had these big companies that were  
9 doing business across the country. And the  
10 Court said people are getting hurt in our  
11 state, but why should we —

12 THE COURT: No, no, no, people  
13 are not getting hurt in our state. People  
14 are being hurt — I can't tell you where  
15 these two people are from. I know  
16 definitely they're not in our state getting  
17 hurt.

18 MR. DuPONT: No, that's  
19 correct. I'm not suggesting they were  
20 exposed in Pennsylvania. I'm talking about  
21 how the jurisprudence evolved.

22 The courts and legislatures  
23 recognize that they had to be able to exact  
24 jurisdiction over companies that were doing  
25 business in the state, but not necessarily

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1 physically located in the state. So they  
2 had to have some control over what was going  
3 on in our state.

4 In so doing, they had first  
5 option, the first jurisprudence evolved, I  
6 think, was to permit there to be consent as  
7 to general jurisdiction over an out-of-state  
8 company within the state.

9 And then as the case law  
10 evolved further, another basis for allowing  
11 for general jurisdiction came into play and  
12 that was your contacts are so significant in  
13 the state that you are considered to be  
14 constructively present within the state and  
15 therefore the state can exercise  
16 jurisdiction over you.

17 THE COURT: Not necessarily.  
18 Never actually happened — I believe Justice  
19 Ginsburg said that and we've been  
20 misinterpreting it for 50 years.

21 MR. DuPONT: None of this case  
22 law has overruled the concept of  
23 jurisdiction by consent.

24 THE COURT: The terminology  
25 "consent" is what bothers me. I would say

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1 that if there is an act that said you can do  
2 business in Pennsylvania and we would  
3 appreciate your consent, please check off  
4 the boxes to whether you consent, or some  
5 type of voluntarily aspect. I'm going to go  
6 back to Justice Alito, but the primary  
7 concern is the burden on the defendant.  
8 Assessing this burden obviously requires the  
9 Court to consider practical matters  
10 resulting from litigation in the forum. But  
11 it also encompasses the more abstract matter  
12 of submitting to the coercive power of the  
13 state that may have little legitimate  
14 interest in the claims in question.

15 Isn't that exactly what we're  
16 talking about? The coercive power of the  
17 state to require you to submit to  
18 jurisdiction in order to do business in the  
19 state? Isn't that the exact same principle  
20 that the Court of California Bristol Myers  
21 Squibb found?

22 MR. DuPONT: I submit that is  
23 not what they found respectfully consenting  
24 to jurisdiction. Because there's nothing  
25 coercive, there's nothing burdensome to

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1 voluntarily consenting to jurisdiction in a  
2 state.

3 And counsel has not pointed to  
4 anything in the case law that would change  
5 that — that would change that fact. The  
6 BNSF decision does not address —

7 THE COURT: BNSF, in my  
8 opinion, although it has that language  
9 really just addresses the act. That's how I  
10 view it but does it give dicta as counsel  
11 has stated?

12 MR. DuPONT: The last paragraph  
13 of the BNSF decision under Roman Numeral IV  
14 the Court says that the Montana Supreme  
15 Court did not address the plaintiff's  
16 argument of consent. So it wasn't really an  
17 issue before the Court at that time. So it  
18 could not have overruled the issue for the  
19 jurisprudence of jurisdiction by consent.

20 And certainly had the Bristol  
21 Myers Squibb court or the Daimler court  
22 wanted to overrule the issue of jurisdiction  
23 by consent, they could have done so and  
24 would have done so expressly.

25 THE COURT: Accept for we all

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1 know I believe — at least I'm fully in  
2 agreement of the Supreme Court says a  
3 specific question about that is before them  
4 and responds to a specific question and then  
5 does not wonder off.

6 And, in fact, that very  
7 question came up in Bristol Myers Squibb and  
8 Justice Ginsburg asked about consent. A  
9 response was that's not our issue right now.

10 Then Justice Alito gives this  
11 powers of the state and what powers they do  
12 not have. And that's my concern from the  
13 very beginning, I believe in Justice  
14 Sotomayor's interpretation. Now I need a  
15 basis that tells me that there was other  
16 bases for my ruling.

17 Anything further?

18 MR. DuPONT: No, Your Honor.

19 I would add and we apologize it  
20 was not submitted by July 6th, but I do have  
21 the Pennsylvania Department of States  
22 profile for Texaco, Inc. which indicates  
23 that they were registered to do business in  
24 Pennsylvania between 1941 and February 1 of  
25 2010. I have copy for counsel and with

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1 leave of the Court, understanding this is  
2 late, I apologize for that, I would like to  
3 submit that.

4 THE COURT: Not at all. That's  
5 a matter of record, that's public record.

6 MR. HOEY: May I?

7 THE COURT: You may.

8 MR. HOEY: I'll keep this  
9 pretty brief, just a few more points.

10 First, you mention that you're  
11 reading of BNSF is that it was about FEELA.  
12 And respectfully I could just point to  
13 Section 3 which says, Because FEELA does not  
14 authorize state court to exercise personal  
15 jurisdiction, the Montana Court's assertion  
16 must rest on, and then it states the Montana  
17 statute.

18 And that's relevant only  
19 because plaintiff's counsel continues to say  
20 that the difference in this case from  
21 Bristol Myers is there was a statute saying  
22 if you take this action then you're  
23 consenting to jurisdiction.

24 It's the exact same  
25 circumstance with BNSF. There was a statute

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1 that said if you lay your tracks here, state  
2 statute, arguably FEELA or not, it said if  
3 you lay your tracks in our state, you'll be  
4 subject to general personal jurisdiction.

5 And then briefly on consent. I  
6 think there is a very clear distinction to  
7 make about what survives and what doesn't  
8 after Bristol Myers and after BNSF. And  
9 that is that consent cannot be premised on  
10 some state coercive power, and arguably it  
11 cannot be premised or any state power. I  
12 think that would be a more relevant question  
13 for the Supreme Court because the dicta at  
14 least says states cannot expand their  
15 jurisdiction beyond the federal due process  
16 clause.

17 And to the extent that consent  
18 survives, it's very obvious. It's a  
19 defendant showing up in a Court and waiving  
20 his right to object. It's a defendant  
21 agreeing with a plaintiff in a contract  
22 suit, two voluntarily parties. It's not the  
23 state's power, it's other parties creating  
24 that consent. So that's all I have.

25 THE COURT: Thank you. As to

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1 general jurisdiction do we have specific  
2 jurisdiction arguments on specific —

3 MR. DuPONT: Your Honor, we  
4 have basis for indicating that some of these  
5 defendants have very significant contacts  
6 with State of Pennsylvania, not specific  
7 jurisdiction. Because we're not arguing  
8 that plaintiff was exposed to benzene in the  
9 state. That's what we have and I believe  
10 those were submitted, our papers.

11 THE COURT: I think it best be  
12 probably not argued at that point. Again,  
13 to me Daimler could be as about as busy as a  
14 bee in California, BNSF with Montana  
15 certainly had a huge track, and again,  
16 California and Bristol Myers, certainly the  
17 contacts in California were huge and I  
18 believe has been shifted by Justice Ginsburg  
19 into the specific jurisdiction category and  
20 not into the general jurisdiction.

21 MR. DuPONT: Understood, Your  
22 Honor.

23 THE COURT: Thank you.

24 MR. DANIE: Your Honor, may we  
25 just submit verification for Texaco and

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1 Union Oil of California?

2 THE COURT: So submitted.

3 If any other submissions, bring  
4 them.

5 **(Whereupon, a discussion was  
6 held off the record.)**

7 THE COURT: Read the  
8 affidavits.

9 THE CRIER: Unicut and Unocal,  
10 U-N-O-C-A-L, that's the Union Oil Company of  
11 California; Texaco, Inc; George E. Warran  
12 Corporation; Gulf Oil Limited Partnership,  
13 Atlantic Trading and Marketing,  
14 Incorporated.

15 THE COURT: Thank you.

16 THE CRIER: Court stands  
17 adjourned.

18 **(Whereupon, the proceedings  
19 were concluded.)**

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CERTIFICATION

I hereby certify that the proceedings and evidence are contained fully and accurately in the notes taken by me on the trial of the above cause and that this copy is a correct transcript of the same.

Molly A. Alber, RPR  
Official Court Reporter

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*Molly A. Alber, Registered Professional Reporter*

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