New York County Clerk's Index No. 652032/2021

# New York Supreme Court

**APPELLATE DIVISION—FIRST DEPARTMENT**

EPAC Technologies Ltd.,

*Plaintiff-Appellant,*

—against—

Interforum S.A., and Editis S.A.,

*Defendants-Respondents-Appellants,*

-and-

Vivendi S.E.,

*Defendant-Respondent*

-and-

and Bollore S.E.,

*Defendant-Respondent.*

**CASE NO. 2022-03478, 2022-03480**

## BRIEF FOR *AMICI CURIAE* JOHN COYLE, WILLIAM DODGE, AND ROBIN EFFRON IN SUPPORT OF DEFENDANTS-RESPONDENTS-APPELLANTS

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## Interest of Amici

Amici (listed in the Appendix) are law professors who teach and write about civil procedure, conflict of laws, and transnational litigation. They believe that asserting personal jurisdiction over a defendant who has not signed a forum selection clause consenting to jurisdiction in New York based solely on the fact that the defendant is so "closely related" to a person who has signed such a clause that it is "foreseeable" that the defendant would be bound by the clause violates the Due Process Clause of the Fourteenth Amendment. Amici seek to assist the Court by setting the closely-related-and-foreseeable test in a broader context.

Amici take no position on whether the defendants in this particular case are subject to personal jurisdiction in New York. Nor do amici take a position on the use of the closely-related-and-foreseeable test in cases not involving the assertion of personal jurisdiction. Rather, amici write to address the implications of using the test to assert personal jurisdiction over defendants who never signed a contract containing a forum selection clause choosing the courts in New York.

## I. Background

A. Inbound and Outbound Clauses

An inbound forum selection clause is a contractual provision whereby the parties agree to litigate in the court where the suit was filed. *See* John F. Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State*

*Court,* 53 ARIZ. ST. L.J. 65, 73 (2021). Inbound clauses are also known as "consent-to-jurisdiction" clauses. *Id.* By way of example, imagine a scenario where the parties have agreed that any disputes arising out of their contract may be litigated in the state courts of New York. One party files a lawsuit against the other in New York state court. The defendant moves to dismiss the suit for lack of personal jurisdiction. In this context, the forum selection clause functions as an inbound clause because it stipulates that litigation may occur in a forum (New York) where the suit has been filed (New York). An inbound clause may provide the basis for the court's assertion of personal jurisdiction over a defendant with no other connection to the chosen forum. Inbound clauses are used offensively by plaintiffs to obtain personal jurisdiction over unwilling defendant in the chosen forum. In the inbound context, the forum selection clause is a sword.

An outbound forum selection clause, by contrast, is a contractual provision stipulating that any litigation between the parties must occur in a forum other than the one in which the suit was filed. *See* John F. Coyle & Katherine C. Richardson, *Enforcing Outbound Forum Selection Clauses in State Court,* 96 IND. L.J. 1089, 1094-96 (2021). By way of example, imagine a scenario where the parties have agreed that any disputes relating to their contract must be litigated in California. This agreement notwithstanding, one party files a lawsuit against the other in New York state court. The defendant asks the New York court to enforce the forum selection

clause and dismiss the case because it should have been brought in California. In this context, the forum selection clause functions as an outbound clause because it stipulates that litigation must occur in a forum (California) other than the one in which the suit was filed (New York). The outbound clause does not deprive the New York court of jurisdiction to hear the case. It merely provides the New York court with a reason to refrain from exercising jurisdiction because the parties have agreed that the dispute must be resolved elsewhere. Outbound clauses are used defensively by defendants who want to redirect litigation to the chosen forum. In the outbound context, the forum selection clause is a shield.

It is impossible to know whether a particular contract provision functions as an outbound clause or an inbound clause merely by looking at the language in the clause. The distinction only manifests after a lawsuit is filed. This means that the exact same contract provision may operate as an outbound clause if the suit is filed in a forum that was not chosen and an inbound clause if the suit is filed in a forum that was chosen.

B. Enforcing Inbound and Outbound Clauses

Because inbound and outbound clauses serve different purposes, it is not surprising that the legal test in New York for determining whether an outbound

clause is enforceable is sometimes different from the legal test for determining whether an inbound clause is enforceable.

Under New York law, an outbound forum selection clause shall be given effect absent some showing by the plaintiff that the clause is "unreasonable, unjust, in contravention of public policy, invalid due to fraud or overreaching, or. . . that a trial in the selected forum would be so gravely difficult that the challenging party would, for all practical purposes, be deprived of its day in court." *Grant v. United Odd Fellow*, 2020 NY Slip Op 05454, ¶ 1, 187 A.D.3d 440, 441, 129 N.Y.S.3d 785, 785 (App. Div. 1st Dept.).

The enforceability of an inbound clause, by comparison, will in many cases be governed by N.Y. General Obligations Law 5-1402, which provides:

> [A]ny person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.

The New York courts must, in short, distinguish between outbound and inbound clauses in determining when these provisions should be given effect.

C. The Closely-Related-and-Foreseeable Test

Although forum selection clauses bring a welcome measure of efficiency and predictability to litigation arising out of contractual relationships, their existence has the potential to generate fragmented litigation proceedings. Imagine a scenario where a company signs a contract that contains a forum selection clause selecting the courts of California. A suit is brought against the company and its subsidiary in New York. The company moves to dismiss based on the clause. The court determines that the clause is enforceable and grants the motion. But what about the subsidiary? The subsidiary is not a party to the contract and, under traditional contract principles, may not invoke the clause as a basis for dismissal. This situation raises the very real possibility that the suit against the company will go forward in California and the suit against the subsidiary will proceed in New York. Such parallel proceedings are inefficient and a waste of scarce judicial resources. *See* John F. Coyle & Robin Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. 189, 190 (2021).

To avoid this outcome, federal courts developed a doctrine that makes it easier for a defendant to take advantage of an outbound forum selection clause even when it is not a party to the contract containing this provision. This doctrine is known as the closely-related-and-foreseeable test. *Hugel v. Corp. of Lloyd's*, 999 F.2d 206, 209 (7th Cir. 1993); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th

Cir. 1988); *Coastal Steel Corp. v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 203 (3d Cir. 1983). The purpose of this test is to "give[] parties who have come to an agreement the ability to enforce that agreement against the universe of entities who should expect as much—successors-in-interest, executive officers, and the like—without being overly persnickety about who signed on the dotted line." *Affiliated FM Ins. Co. v. Kuehne + Nagel, Inc.*, 328 F. Supp. 3d 329, 337 (S.D.N.Y. 2018). Under the closely-related-and-foreseeable test, non-signatories to an agreement may enforce "forum selection clauses where, under the circumstances, the non-signatories enjoyed a sufficiently close nexus to the dispute or to another signatory such that it was foreseeable that they would be bound." *Fasano v. Guoqing Li*, 47 F.4th 91, 103 (2d Cir. 2022).

The First Department adopted the closely-related-and-foreseeable test as New York state law in a case involving an outbound clause in 2003. In *Dogmoch Int'l Corp. v. Dresdner Bank AG*, 304 A.D.2d 396, 397, 757 N.Y.S.2d 557, 558 (App. Div. 1st Dept. 2003), the court granted a non-signatory defendant's motion to dismiss on the basis of a Swiss forum selection clause. It reasoned that "[a]though defendant was a nonsignatory to the account agreements, it was reasonably foreseeable that it would seek to enforce the forum selection clause given the close relationship between itself and its subsidiary." *Id.* The practical effect of the court's decision was

to modify the common law of New York relating to third-party beneficiaries to make it easier for defendants to take advantage of outbound forum selection clauses.

The outcome in *Dogmoch* is both defensible and correct. It is, however, important to highlight two salient facts. First, that case involved an outbound clause rather than an inbound clause. Second, the non-signatory defendant was actively seeking the benefits provided by the forum selection clause. It *wanted* to be covered by the clause. When a court is asked to enforce an *inbound* clause against an *unwilling* non-signatory defendant as part of an inquiry into personal jurisdiction, the use of the closely-related-and-foreseeable test presents very different concerns. In particular, it raises the critical question of whether the assertion of personal jurisdiction is consistent with the Due Process Clause of the Fourteenth Amendment.

This question was presented in the First Department for the first time in *Freeford Ltd. v. Pendleton*, 2008 NY Slip Op 3148, ¶ 7, 53 A.D.3d 32, 40, 857 N.Y.S.2d 62, 68 (App. Div. 1st Dept.). In that case, the court had to determine whether the test permitted it to assert personal jurisdiction over a non-signatory defendant based on a New York forum selection clause signed by a closely related party. In concluding that it did, the court did not distinguish between inbound and outbound clauses. It simply applied the test announced in prior cases involving outbound clauses. Subsequent cases similarly failed to distinguish between applying the test to outbound clauses and inbound clauses. *See Universal Inv. Advisory SA v.*

*Bakrie Telecom Pte., Ltd.*, 2017 NY Slip Op 06344, ¶ 3, 154 A.D.3d 171, 179, 62 N.Y.S.3d 1, 8 (App. Div. 1st Dept.); *Tate & Lyle Ingredients Ams., Inc. v. Whitefox Techs. USA, Inc.*, 2012 NY Slip Op 5888, ¶ 2, 98 A.D.3d 401, 402, 949 N.Y.S.2d 375, 377 (App. Div. 1st Dept.); *First Ins. Funding Corp. v. Kass*, 2011 NY Slip Op 2453, ¶ 2, 82 A.D.3d 642, 643, 920 N.Y.S.2d 311, 312 (App. Div. 1st Dept.).

In 2020, the First Department acknowledged that using the closely-related-and-foreseeable test to assert personal jurisdiction over unwilling non-signatories presented due process issues in *Highland Crusader Offshore Partners, L.P. v. Targeted Delivery Techs. Holdings, Ltd.*, 2020 NY Slip Op 02991, ¶ 5, 184 A.D.3d 116, 121-23, 124 N.Y.S.3d 346 (App. Div. 1st Dept.). In that case, however, the court held that there was no constitutional obstacle to using the test to assert personal jurisdiction over defendants who otherwise lacked minimum contacts with New York. It reasoned that the test "requires that the relation of the parties be such as to make application of the clause foreseeable, rendering a separate minimum-contacts analysis unnecessary." *Id.* at 121. Because the test incorporated an element of foreseeability, in other words, the court held that it was constitutional to rely upon it to assert personal jurisdiction over out-of-state defendants. The court went on to say that there was no need for it to conduct a separate minimum contacts analysis because "the concept of foreseeability is built into the closely-related doctrine, which explicitly requires that the relationship between the parties be such that it is

foreseeable that the non-signatory will be bound by the forum selection clause." *Id.* at 123.

## II. Argument

The use of the closely-related-and-foreseeable test to assert personal jurisdiction over non-signatory defendants in cases involving inbound forum selection clauses is inconsistent with prevailing Supreme Court precedent interpreting the Due Process Clause of the Fourteenth Amendment. There are three reasons why this is so. First, foreseeability is insufficient under existing Supreme Court doctrine to support the exercise of personal jurisdiction over an out-of-state defendant. Second, the test wrongly focuses on the contacts between the defendant and the contract rather than the contacts between the defendant and the forum. Third, a close relationship between business entities is an insufficient basis for a court to impute the forum contacts of one business entity to another.

### A. Foreseeability Is Insufficient Under Existing Doctrine to Support the Exercise of Personal Jurisdiction Over an Out-of-State Defendant

Since at least the 1960s, courts have struggled to assimilate foreseeability into the Due Process Clause's minimum contacts analysis. Foreseeability is an outgrowth of indirect forum contacts. The concept of foreseeability first emerged in the so-called "stream of commerce" cases in which a defendant manufacturer or seller would place an item in the stream of commerce, perhaps by selling it to another manufacturer that would incorporate that component into a larger product, or

perhaps by selling the product to a distributor or other seller who would eventually sell the product to someone in the forum state where the product would cause an injury. In other permutations, buyers themselves might decide to take the products with them to another state where the products would cause injuries. In each of these scenarios, the plaintiff could make a persuasive case that it was foreseeable that the defendant's conduct would lead to harm in the forum state.

In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 295 (1980), the Supreme Court announced that "'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." The Court did not foreclose the usage of foreseeability altogether. It did, however, caution that "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297. Although some Justices continued to flirt with the idea that strong foreseeability of the defendant's conduct causing harm in the forum state would be sufficient for minimum contacts, *see Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 119 (1987) (Brennan, J., concurring); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 893 (2011) (Ginsburg, J., dissenting), a majority for adopting a "foreseeability" test for minimum contacts never emerged. Time and again, lower courts have shied away from relying on the

"foreseeability" of conduct resulting in some sort of harm in or connection to the forum as a basis for constitutionally sufficient minimum contacts.

Even though foreseeability plays, at best, a supporting role in establishing minimum contacts in traditional *in personam* cases, foreseeability is front and center in the test that the New York courts now use to determine whether a non-signatory defendant is bound by an inbound forum selection clause. *Highland Crusader Offshore Partners, L.P.*, 2020 NY Slip Op 02991, ¶ 5, 184 A.D.3d at 121-23; *Universal Inv. Advisory SA v. Bakrie Telecom Pte., Ltd.*, 2017 NY Slip Op 06344, ¶ 3, 154 A.D.3d at 178-79. Although the "closely related" prong functions as a proxy for contact with the forum, the "foreseeability" prong appears to be a substitute for consent. The problem is that courts would not tolerate that use of foreseeability as a manifestation of purposeful availment of the forum or of fictitious consent in any other context.

Take the facts of *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011), as an example. There, the defendant, an English manufacturer, sold a metal shearing machine to its Ohio distributor who then sold it to the New Jersey employer of the injured plaintiff. None of the Justices expressed any doubt that a foreign manufacturer who engaged an exclusive distributor for the purposes of selling its products to U.S. customers in all fifty states could not foresee that its product might cause harm in one of those states. Nevertheless, Justice Kennedy emphasized that

"foreseeability[] is inconsistent with the premises of lawful judicial power." *McIntyre*, 564 U.S. at 883 (plurality opinion). No amount of clairvoyance by the defendant could overcome the absence of purposeful acts directed toward the forum state. Yet when a court binds a non-signatory to a forum selection clause in state where the defendant has no other contacts on the basis that it was foreseeable that the defendant would be bound by the clause, it is doing exactly what Justice Kennedy said was impermissible in *McIntyre*. It is using the defendant's "expectations" rather than its "actions" to "empower a State's courts to subject him to judgment."

Reimagining *McIntyre*'s facts emphasizes the problem. Suppose that Nicastro's employer had insisted on a forum selection clause naming New Jersey in the sales contract when it purchased the metal shearing machine from the Ohio distributor. According to the closely-related-and-foreseeable test, McIntyre might have known of such a clause and foreseen that it would be bound. Suddenly, expectations become a substitute for actions. The defendant's actions are no more purposeful than in the world with no forum selection clause. Consent as a form of submission to jurisdiction is just as fictional whether it is based on the consent of others or on benefiting from the laws and economy of that forum.

In summary, the basic problem with using of the closely-related-and-foreseeable test in the context of inbound forum selection clauses is that one class of non-resident defendants (non-signatories to these clauses) are subjected to

jurisdiction based on a foreseeability regime that the Supreme Court has rejected for other non-resident defendants. In light of these issues, it should come as no surprise that a number of courts have rejected the centrality of "foreseeability" when called upon to enforce inbound forum selection clauses against non-signatories. As one federal district judge bluntly stated, "[i]f foreseeability cannot establish minimum contacts, it should not be a sufficient basis for finding a waiver or implied consent either." *Guaranteed Rate, Inc. v. Conn*, 264 F. Supp. 3d 909, 926 (N.D. Ill. 2017); *see also Truinject Corp. v. Nestlé Skin Health S.A.*, C.A. No. 19-592, 2019 WL 6828984, at *11 (D. Del. Dec. 13, 2019) ("I have serious questions about the constitutionality of using the 'closely related' test to exercise personal jurisdiction over a non-signatory to a contract with a forum selection clause.").

B. The Test Wrongly Focuses on Contacts Between the Defendant and the Contract Rather than Contacts Between the Defendant and the Forum

The U.S. Supreme Court has long held that a defendant is subject to personal jurisdiction in a state if the defendant has "minimum contacts" with that state. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945). The minimum contacts test has always centered on whether a non-resident defendant has "sufficient contacts or ties with the state of the forum" to support a constitutional exercise of personal jurisdiction. *Id.* Since the Supreme Court's decisions in *Goodyear Dunlop Tires Operations v. Brown*, 564 U.S. 915, 919 (2011), and *Daimler AG v. Bauman*, 517 U.S. 117, 127 (2014), restricted the application of general jurisdiction to the few

jurisdictions where a defendant is "essentially at home," courts have focused most of their minimum contacts scrutiny on specific jurisdiction cases. These cases have probed the relatedness between the defendant, the cause of action, and the forum state.

The closely-related-and-foreseeable test, as per its name, has a relatedness inquiry. But its form of relatedness is out of sync with how courts treat relatedness in minimum contacts in two respects. First, the closely-related-and-foreseeable test does not ask about the defendant's relatedness to the forum. Instead, it looks at the relationship to the contract. Second, the "relatedness" of minimum contacts is narrower than the breezy "relatedness" that suffices for applying forum selection clauses to non-signatories. *Compare Walden v. Fiore*, 571 U.S. 277, 285 (2014) ("our 'minimum contacts' analysis looks to the defendant's contacts with the forum State itself") *with Diamond v. Calaway*, No. 18 Civ. 3238, 2018 WL 4906256, at *4–5 (S.D.N.Y. Oct. 9, 2018) (observing that non-signatory was "closely related" to a fraudulent scheme enabled by the signatory's "execution of a Written Note and Written Guaranty with a New York forum-selection clause" and hence subject to personal jurisdiction). The Supreme Court recently reaffirmed that minimum contacts demand a substantial connection between the defendant, the cause of action, and the forum state. *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. 256, 262 (2017) ("In order for a state court to exercise specific jurisdiction, the suit must arise

out of or relate to the defendant's contacts with the forum.") (internal quotation marks and citations omitted). Although a plaintiff need not show a causal relationship between the defendant's forum contacts and the lawsuit, *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1025 (2021), the relatedness must still run to the *forum state*. The issue is that the closely-related-and-foreseeable test is not concerned with the existence of any connection between the defendant and the *forum state*. Instead, that test focuses exclusively on the relationship between the defendant and the *contract* containing the forum selection clause.

This is problematic for two reasons. First, a non-signatory defendant who has some relationship to the contract will in many cases lack any meaningful relationship with the state named in the forum selection clause. Second, the state named in a forum selection clause will in many cases lack any connection to the parties or the contract. This disconnect is not significant when one contract signatory seeks to enforce a forum selection clause against another because the constitutionally relevant connection to the forum is the consent to the jurisdiction of the forum state manifested in the clause. When the defendant is a non-signatory, however, that cognizable connection to the forum is missing. The use of the closely-related-and-foreseeable test thus produces a bizarre scenario in which the contract containing the forum selection clause becomes a proxy for the forum state itself.

Even when the chosen forum does bear some relationship to the contract, its parties, or its performance, it is not a forgone conclusion that a non-signatory with some relationship to a contract would share the signatory's relationship to the forum, or that the relationship itself is sufficiently strong to pass minimum-contacts muster. To be clear, this gap is not an immutable feature of enforcement of forum selection clauses against non-signatories. There are situations in which a non-signatory defendant's relationship to the contract can also be construed as a set of constitutionally sufficient contacts with the forum state. To conclude that a court has personal jurisdiction over a defendant based solely on that defendant's connection to a contract, however, is to fundamentally misunderstand the Supreme Court's recent case law in this area.

C. A Close Relationship Between Business Entities Is an Insufficient Basis for a Court to Impute the Forum Contacts of One Business Entity to Another.

New York courts regularly invoke the closely-related-and-foreseeable test to enforce forum selection clauses against non-signatories when there is a "close relationship" between the non-signatory and the entities who own, operate, or manage the entity that executed the contract containing the clause. *Borden LP v. TPG Sixth St. Partners*, No. 657398/2017, 2019 WL 95431, at *5 (N.Y. Sup. Ct. Jan. 2, 2019), *rev'd in part*, 103 N.Y.S.3d 385 (N.Y. App. Div. 2019); *GlaxoSmithKline LLC v. Laclede, Inc.*, No. 18-CV-4945, 2019 WL 293329, at *4 (S.D.N.Y. Jan. 23,

2019). In *Pegasus Strategic Partners, LLC v. Stroden*, No. 653523/2015, 2016 WL 3386980, at *4 (N.Y. Sup. Ct. June 20, 2016), the court asserted personal jurisdiction over two directors in an LLC notwithstanding the fact that the LLC was the only signatory to the agreement. In *Universal Inv. Advisory SA v. Bakrie Telecom Pte., Ltd.*, 62 N.Y.S.3d 1, 8 (N.Y. App. Div. 2017), the court asserted personal jurisdiction over the parent company of the signatory entity even though the parent was a non-signatory to the agreement with the clause.

In some instances, these cases do not present serious constitutional personal jurisdiction problems because the non-signatory is, in fact, very closely intertwined with the signatory in its status and conduct. This creates room for two constitutional paths to personal jurisdiction. If consent alone forms the constitutional basis for personal jurisdiction, then the question should be wholly resolvable based on the generally applicable contract and agency principles. Use of the closely-related-and-foreseeable test in these circumstances is unnecessary and undesirable. There is no reason to use a different test to determine whether a non-signatory is bound by a forum selection clause than a court would use to determine whether a non-signatory is bound by any other part of the contract.

The same insight may be applied to the question of when a corporate affiliate is subject to minimum contacts. If the non-signatory's relationship with the signatory is so complete, then the concepts of alter ego and piercing the corporate

veil may be used to extend personal jurisdiction to the non-signatory. To cite a "close relationship" between the signatory and the non-signatory as a constitutional shortcut to jurisdiction when the relationship is *not* one where veil-piercing is appropriate and the non-signatory's conduct is *not* bound up with the conduct of the signatory, however, flies in the face of the most basic axioms of personal jurisdiction doctrine.

A "close relationship" between business entities is also an insufficient basis for a court to impute the forum contacts of one business entity to another. In *Daimler*, 571 U.S. at 134-35, the Court held that for general jurisdiction, a subsidiary's contacts may only be imputed to a foreign corporation if the subsidiary is the "alter ego" of the parent, a relationship that requires a finding that the businesses are "not really separate entities." *Ranza v. Nike, Inc.*, 793 F.3d 1059, 1072 (9th Cir. 2015) (quoting *Doe v. Unocal Corp.*, 248 F.3d 915, 926 (9th Cir. 2001)). Courts have noted the parallel between imputing contacts for purposes of personal jurisdiction and the "corporate veil fiction[, which] 'isolates "the actions, profits, and debts of the corporation from the individuals who invest in and run the entity."'" *Dill v. Rembrandt Grp., Inc.*, 474 P.3d 176, 183 (Colo. App. 2020) (quoting *Sedgwick Props. Dev. Corp. v. Hinds*, 456 P.3d 64, 68 (Colo. App. 2019)). It takes "extraordinary circumstances" to pierce the corporate veil, and simply acting in

concert with another entity for certain purposes would not justify imposing liability on the second entity.

*Daimler* foreclosed the use of agency alone to impute contacts for general jurisdiction, but courts can still impute contacts between affiliated entities for purposes of specific jurisdiction. *Daimler AG v. Bauman*, 517 U.S. at 135 n.13. Because a forum selection clause is itself a relevant forum contact, *see Burger King v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985), that contact may be imputed for purposes of specific jurisdiction. Awareness of a forum selection clause by a non-signatory, in other words, could be one factor that helps establish purposeful availment of the forum. But under the closely-related-and-foreseeable test, the presence of a forum selection clause allows a court to short-circuit the analysis of the connection between the defendant, the forum, and the cause of action that would be required of any other defendant. It is unclear why a forum selection clause should have such a gravitational pull in situations where agency law or other contract principles would not otherwise bind the non-signatory to the contract. As one District Court judge opined, "th[is] Court is skeptical that the 'closely related' doctrine adds meaningfully to existing agency and corporate law." *M3 USA Corp. v. Qamoum*, No. CV 20-2903 (RDM), 2021 WL 2324753, at *12 (D.D.C. June 7, 2021).

## III. Conclusion

Applying the closely-related-and-foreseeable test to assert personal jurisdiction over non-signatory defendants that lack minimum contacts with New York and that have not otherwise consented to jurisdiction in New York is inconsistent with Supreme Court precedent interpreting the Due Process Clause of the Fourteenth Amendment. While this test can and should be used to promote litigation efficiency in the context of outbound forum selection clauses, it should play no role in determining whether an inbound clause provides a basis for the assertion of personal jurisdiction by a New York court.

This is not to say that defendants may never be subjected to personal jurisdiction in New York on the basis of an inbound forum selection clause in a contract they did not sign. The courts have at their disposal a wide range of legal doctrines – including agency law, alter ego doctrine, assumption, incorporation by reference, successor liability, equitable estoppel, and the law of third-party beneficiaries – that may operate to bind non-signatories to agreements that were executed by others. *See* Coyle & Effron, *Forum Selection Clauses, Non-Signatories, and Personal Jurisdiction*, 97 NOTRE DAME L. REV. at 194-98. It is merely to say that the closely-related-and-foreseeable test should not be used in place of these doctrines to assert personal jurisdiction over a non-signatory defendant.

Dated: March 31, 2023

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## Appendix: List of Amici

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