

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE *ex rel.* THE BANK OF NEW YORK  
MELLON,

Relator,

v.

THE HONORABLE STEVEN E. MARTIN,

Respondent.

Case No. 14-1690

**Original Action in Mandamus and  
Prohibition**

**RELATOR'S NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING INTERVENING  
RESPONDENTS' MOTION TO DISMISS**

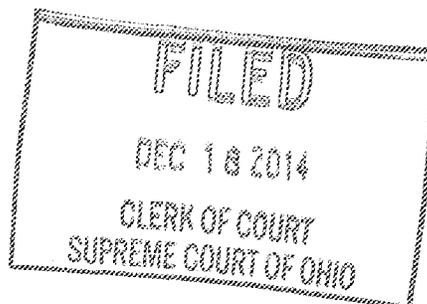
John Gilligan (0024542)  
*Counsel of Record*  
Daniel Anderson (0067041)  
ICE MILLER LLP  
250 West Street  
Columbus, Ohio 43215  
Tel: (614) 462-2221  
Fax: (614) 222-3438  
Email: John.Gilligan@icemiller.com

MAYER BROWN LLP  
Matthew D. Ingber (pro hac vice)  
Michael Martinez (pro hac vice)  
Christopher J. Houpt (pro hac vice)  
1675 Broadway  
New York, New York 10019  
Tel: (212) 506-2500

*Counsel for Relator*  
*The Bank of New York Mellon*

Joseph T. Deters (0012084)  
Prosecuting Attorney  
Hamilton County, Ohio  
Christian J. Schaefer (0015494)  
Andrea B. Neuwirth (0091348)  
Assistant Prosecuting Attorneys  
230 East Ninth Street, Suite 4000  
Cincinnati, Ohio 45202  
Tel: (513) 946-3040  
Fax: (513) 946-3018  
chris.schaefer@hcpros.org  
andra.neuwirth@hcpros.org

*Attorneys for Respondent*  
*The Honorable Stephen E. Martin*



David Kamp (0020665)  
Jean Geoppinger McCoy (0046881)  
White, Getgey & Meyer Co., L.P.A.  
1700 Fourth & Vine Tower  
One West Fourth Street  
Cincinnati, Ohio 45202  
Tel: (513) 241-3685  
Fax: (513) 241-2399  
dkamp@wgmlpa.com  
jmccoy@wgmlpa.com

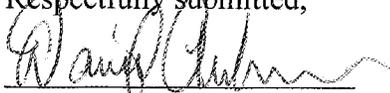
David H. Wollmuth  
Thomas P. Ogden  
Stephen S. Fitzgerald  
Ryan A. Kane  
Wollmuth Maher & Deutsch LLP  
500 Fifth Avenue  
New York NY 10110  
Tel: (212) 382-3300  
Fax: (212) 382-0050  
dwollmuth@wmd-law.com  
togden@wmd-law.com  
sfitzgerald@wmd-law.com  
rkane@wmd-law.com

*Attorneys for Intervening Respondents  
Western & Southern Life Ins. Co.,  
Western-Southern Life Assurance Co.,  
Columbus Life Ins. Co.,  
Integrity Life Ins. Co.,  
National Integrity Life Ins. Co., and  
Fort Washington Investment Advisors, Inc.*

**RELATOR'S NOTICE OF SUPPLEMENTAL AUTHORITY REGARDING  
INTERVENING RESPONDENTS' MOTION TO DISMISS**

In both the Intervening Respondents' Motion To Dismiss Petition and Complaint For Writ Of Mandamus And Prohibition And Memorandum In Support Thereof (filed October 20, 2014) and the Relator's Memorandum In Opposition To Intervening Respondents' Motion To Dismiss (filed October 30, 2014), the parties addressed a decision from the United States District Court for the Western District of Oklahoma styled *American Fidelity Assurance Co. v. Bank of New York Mellon*, W.D. Okla. No. CIV-11-1284, 2014 WL 4471606 (Sept. 10, 2014). In order to provide subsequent history for that case, Relator hereby gives notice that, on December 12, 2014, the judge presiding over *American Fidelity Assurance* issued the attached order certifying his September 10, 2014 decision for interlocutory appellate review pursuant to 28 U.S.C. § 1292(b) before the United States Court of Appeals for the Tenth Circuit and staying the case pending that appeal.

Respectfully submitted,



John Gilligan (0024542)

*Counsel of Record*

Daniel Anderson (0067041)

ICE MILLER LLP

250 West Street

Columbus, Ohio 43215

Tel: (614) 462-2221

Fax: (614) 222-3438

Email: [John.Gilligan@icemiller.com](mailto:John.Gilligan@icemiller.com)

Matthew D. Ingber (pro hac vice)

Michael Martinez (pro hac vice)

Christopher Houpt (pro hac vice)

MAYER BROWN LLP

1675 Broadway

New York, New York 10019

Tel: (212) 506-2500

*Counsel for Relator*

*The Bank of New York Mellon*

**CERTIFICATE OF SERVICE**

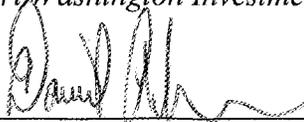
I hereby certify that a copy of the foregoing pleading was served upon the following this

10/14 day of December, 2014 via electronic mail:

Joseph T. Deters  
Prosecuting Attorney  
Hamilton County, Ohio  
Christian J. Schaefer  
Andrea B. Neuwirth  
Assistant Prosecuting Attorneys  
230 East Ninth Street, Ste. 4000  
Cincinnati, Ohio 45202  
**Chris.schaefer@hcpros.org**  
**Andrea.neuwirth@hcpros.org**  
*Counsel for Respondent, The Honorable Steven E. Martin*

David P. Kamp  
Jean Geoppinger McCoy  
White, Getgey & Meyer Co., LPA  
1700 Fourth & Vine Tower  
One West Fourth Street  
Cincinnati, Ohio 45202  
**dkamp@wgmlpa.com**  
**jmccoy@wgmlpa.com**

David H. Wollmuth  
Thomas P. Ogden  
Steven S. Fitzgerald  
Ryan A. Kane  
Wollmuth, Maher & Deutsch, LLP  
500 Fifth Avenue  
New York, New York 10110  
**dwoollmuth@wmd-law.com**  
**togden@wmd-law.com**  
**sfitzgerald@wmd-law.com**  
**rkane@wmd-law.com**  
*Counsel for Intervening Respondents, Western & Southern Life Ins. Co., Western-Southern Life Assurance Co., Columbus Life Ins. Co., Integrity Life Ins. Co., National Integrity Life Ins. Co., and Fort Washington Investment Advisors, Inc.*



\_\_\_\_\_  
Daniel Anderson

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

AMERICAN FIDELITY ASSURANCE )  
COMPANY, )

Plaintiff, )

v. )

Case No. CIV-11-1284-D

THE BANK OF NEW YORK MELLON, )

Defendant. )

**ORDER DENYING MOTION TO RECONSIDER**  
**AND AMENDING ORDER DENYING DEFENDANT'S MOTION TO DISMISS**  
**TO GRANT CERTIFICATION FOR INTERLOCUTORY APPEAL**

Before the Court is the Motion [Doc. No. 63] of Defendant, The Bank of New York Mellon (Defendant), asking the Court to reconsider its September 10, 2014 Order denying Defendant's motion to dismiss for lack of personal jurisdiction. In the alternative, Defendant asks the Court to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Plaintiff has filed a response in opposition [Doc. No. 65] and Defendant has replied [Doc. No. 66]. For the reasons set forth below, the Court denies Defendant's request for reconsideration but grants Defendant's request for certification of an interlocutory appeal.

**Discussion**

The Court previously determined that Defendant waived the defense of personal jurisdiction pursuant to Fed. R. Civ. P. 12(h)(1). In reaching this holding, the Court determined that the legal basis for the Defendant's challenge to the Court's exercise of general personal jurisdiction was available to it pursuant to the decision of the United States Supreme Court in *Goodyear Dunlop Tires Operations, S.A. v. Brown*, – U.S. –, 131 S.Ct. 2846 (2011). In that case the Supreme Court held that the proper consideration when determining general jurisdiction is whether the defendant's

“affiliations with the State are so continuous and systematic as to render [it] essentially at home in the forum state.” *Id.* at 2851. Defendant contends this Court is wrong and that not until the Supreme Court’s later decision in *Daimler AG v. Bauman*, – U.S. –, 134 S.Ct. 746 (2014), could it challenge the Court’s exercise of general personal jurisdiction.

**I. Motion to Reconsider**

“The Federal Rules of Civil Procedure do not recognize a ‘motion to reconsider.’” *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir.1991); *see also Warren v. American Bankers Ins.*, 507 F.3d 1239, 1243 (10th Cir.2007). However, a district court has inherent power to revise interlocutory orders at any time before the entry of a final judgment. *See Warren*, 507 F.3d at 1243; *Riggs v. Scrivner, Inc.*, 927 F.2d 1146, 1148 (10th Cir.1991). The appropriate circumstances for seeking reconsideration of issues previously decided in a case are limited:

Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice. Thus, a motion for reconsideration is appropriate where the court has misapprehended the facts, a party’s position, or the controlling law. It is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing.

*Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir.2000) (citations omitted); *see also Van Skiver*, 952 F.2d at 1243; *Devon Energy Prod. Co., L.P. v. Mosaic Potash Carlsbad, Inc.*, 693 F.3d 1195, 1212 (10th Cir.2012).

Here, Defendant contends there has been an “intervening change in the controlling law,” relying on the Second Circuit Court of Appeals’ decision in *Gucci American, Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014), a case decided on September 17, 2014, after this Court’s entry of its order. The error in Defendant’s argument is that Defendant hones the issue as premised on the proper

application of *Daimler*, rather than whether the defense of personal jurisdiction was waived pursuant to Fed. R. Civ. P. 12(h) due to the availability of the defense under *Goodyear*.

In *Gucci*, the Second Circuit, addressing the issue of general personal jurisdiction in light of *Daimler* for the first time on appeal, found personal jurisdiction lacking over a non-party. The non-party was a foreign bank ordered to comply with the terms of an asset freeze injunction. The injunction could be enforced against the non-party bank only if personal jurisdiction existed over it.

Critically, the Second Circuit did not address the issue presented to this Court – waiver of the defense of personal jurisdiction pursuant to Fed. R. Civ. P. 12(h). As it expressly acknowledged, it could not address that issue as “the waiver provisions of [Fed. R. Civ. P. 12(h)] are inapplicable because the Bank is not a ‘party’ that could fail to assert its personal jurisdiction defense in an answer or a motion to dismiss.” *Id.* at 136 n. 14. The Second Circuit nonetheless found that the nonparty bank did not waive the defense of personal jurisdiction because “[u]nder prior controlling precedent of *this Circuit*, the Bank was subject to general jurisdiction . . .” and, therefore, the defense was not previously available to the bank. *Id.* at 136 (emphasis added) (*citing Hoffriz for Cutlery, Inc. v. Amajac, Ltd.*, 763 F.2d 55 (2d Cir. 1985)). Nowhere did the Second Circuit address the issue whether the “at home” standard announced in *Goodyear* deemed waiver appropriate.<sup>1</sup>

---

<sup>1</sup>Another decision of the Second Circuit Court of Appeals clearly recognizes that the at home standard relied upon by Defendant was established in *Goodyear*. See *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 226 (2d Cir. 2014) (“[A]lthough *Daimler and Goodyear* do not hold that a corporation may be subject to general jurisdiction *only* in a forum where it is incorporated or has its principal place of business, *those cases* make clear that even a company’s engage[ment] in a substantial, continuous, and systematic course of business is alone insufficient to render it at home in New York.”) (emphasis in original and emphasis added) (citation and internal quotation omitted). Other courts have similarly recognized *Goodyear* as establishing the change in law resulting from the at home standard. Compare *NExTT Solutions, LLC, v. XOS Technologies, Inc.*, 2014 WL 6674619 at \*4 (N.D. Ind. Nov. 25, 2014) (unpublished op.) (“In 2011, the Supreme Court of the United States [in *Goodyear*] clarified that general jurisdiction cannot be premised solely upon ‘continuous and systematic’ contacts with a forum state” and that “[a]fter *Goodyear* was (continued...)”) (continued...)

Indeed, the Second Circuit focused on concerns of international comity in addressing the issue of exercising general jurisdiction over a foreign bank. *See Gucci*, 768 F.3d at 135 (Noting that the Court in *Daimler*, “expressly warned against the ‘risks to international comity’ of an overly expansive view of general jurisdiction inconsistent with ‘the “fair play and substantial justice’ due process demands.”) (quoting *Daimler*, 134 S.Ct. at 763 (additional citations omitted).

Defendant also cites *Federal Home Loan Bank of Boston v. Ally Financial, Inc.*, 2014 WL 4964506 (D. Mass. Sept. 30, 2014) (unpublished op.). In that case, the district court was called upon to reconsider its prior order holding that under *Goodyear*, “[t]he defendants were sufficiently ‘at home in the forum State,’ making the exercise of general jurisdiction over them proper.” *Id.* at \* 1 (quoting *Goodyear*, 131 S.Ct. at 2851)). The Court determined that “[t]he *Daimler* decision requires a *tighter assessment* of the standard than perhaps was clear from *Goodyear*” and vacated its prior order. *Id.* at \*2 (emphasis added). The Court did not address a waiver issue like the issue confronted by this Court.

Defendant further cites *Weinfeld v. Minor*, 2014 WL 4954630 (E.D. N. Y. Sept. 30, 2014) (unpublished op.). There, in deciding whether to transfer the action to a different forum, the court in dicta recognized that *Daimler* “call[ed] into question the current scope of New York’s general jurisdiction statute.” Significantly, the court cited *both Daimler and Goodyear* for the genesis of the “at home” standard governing the exercise of general personal jurisdiction. *Id.* at \* 6. Again, however, the court did not address in any fashion the waiver issue presented to this Court.

---

<sup>1</sup>(...continued)

decided in 2011, courts in [the Seventh] [C]ircuit rarely found general jurisdiction to exist.”). This Court has not canvassed all of the post-*Daimler* decisions to address the at-home standard but merely cites these cases as illustrative.

In sum, the Court has considered Defendant's argument and reviewed the case law cited by Defendant but finds Defendant has failed to establish grounds for reconsideration. Accordingly, Defendant's Motion to Reconsider is DENIED.

**II. Certification Pursuant to 28 U.S.C. § 1292(b)**

Alternatively, pursuant to 28 U.S.C. § 1292(b), Defendant requests that the Court certify its order for interlocutory appeal. Pursuant to § 1292(b), district courts have the discretionary authority to authorize an appeal of an interlocutory order where such appeal is not otherwise provided by statute. *Swint v. Chambers County Comm'n.*, 514 U. S. 35, 47 (1995). When analyzing whether certification is appropriate under § 1292(b) the Court must find that its order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" 28 U.S.C. § 1292(b).

Certification of interlocutory appeals under § 1292(b) is "limited to extraordinary cases in which extended and expensive proceedings probably can be avoided by immediate and final decision of controlling questions encountered early in the action." *State of Utah by and through Utah State Dept. of Health v. Kennecott Corp.*, 14 F.3d 1489, 1495 (10th Cir. 1994) (citation omitted). A primary purpose of § 1292(b) is to provide an opportunity to review an order when an immediate appeal would "materially advance the ultimate termination of the litigation." *Id.* See also *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) (Section 1292 is "a rare exception to the final judgment rule that generally prohibits piecemeal appeals.").

The September 10, 2014 Order is not otherwise appealable by statute, satisfying the initial requirement of § 1292(b). Thus, the Court proceeds to address the three prongs of the § 1292(b) analysis.

**A. Controlling Question of Law**

The Court's September 10, 2014 Order decides that Defendant has waived the right to challenge the Court's exercise of general personal jurisdiction over it. That decision is grounded in the Court's determination that the basis for Defendant's challenge to the exercise of general personal jurisdiction existed at the time of *Goodyear*. The Court's order does not address application of the *Goodyear* standard to the facts of this case. The Court did not need to conduct that analysis, having concluded the defense of lack of personal jurisdiction had been waived. The Court therefore finds the issue of waiver involves a question of law.

The Court further finds the issue qualifies as controlling. An issue is controlling if interlocutory reversal would terminate the action or substantially affect the course of litigation conserving resources for either the district court or the parties. *See Pack v. Investools, Inc.*, Case No. 2:09-cv-1042-TS, 2011 WL 2161098 at \*1 (D. Utah June 1, 2011) (unpublished op.); *see also Sokaogon Gaming Enterprise Corp. v. Tushie-Montgomery Assoc., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996) (stating question of law may be "controlling" if resolution is likely to affect the further course of litigation); and 16 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice & Procedure*, § 3930 n. 25 (2d Ed. 1996) (growing number of decisions have accepted question as controlling if possible reversal may save time for court or litigants). A question is considered controlling for § 1292(b) purposes if its incorrect disposition would require reversal of a final judgment. *Id.* at n. 19.

Here, if the appellate court were to find no waiver, the action would be subject to dismissal if the court further determined general personal jurisdiction does not exist over Defendant. *See id.*, § 3929, at 388 ("The court may . . . consider any question reasonably bound up with the certified order, whether it is antecedent to, broader or narrower than, or different from the question specified

by the district court.”); *see also Homeland Stores, Inc. v. Resolution Trust Corp.*, 17 F.3d 1269, 1272 (10th Cir. 1994) (“If we find that a particular question other than the question specifically identified by the district court controls the disposition of the certified order, we may, and indeed should, address that question.”). If that conclusion were reached, especially in this case involving complex factual and legal issues, a substantial savings of time for the court and the litigants would be accomplished by allowing an interlocutory appeal.

**B. Substantial Ground for Difference of Opinion**

For a substantial ground for difference of opinion to exist, the question presented for certification must be difficult, novel, and involve “a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions.” *In re Grand Jury Proceedings June 1991*, 767 F. Supp.222, 226 (D. Colo. 1991). “[T]he mere presence of a disputed issue that is a question of first impression, standing alone, is insufficient to demonstrate a substantial ground for difference of opinion.” *Northern Arapaho Tribe v. Ashe*, 925 F. Supp.2d 1206, 1223-24 (D. Wyo. 2012) (citations omitted). Defendant repeatedly urges that *Daimler* announces a new standard for the exercise of general personal jurisdiction. Defendant does not address the more narrow issue decided by this Court – whether the standard Defendant relies upon was available to it in *Goodyear* and, consequently therefore, whether Defendant waived the right to present its challenge.

Nonetheless, the ultimate scope of *Daimler* and its application to specific facts of a particular case may be subject to dispute among the courts. Defendant has identified authority from other jurisdictions that may support its position that it has not waived the defense of personal jurisdiction because *Daimler* provided new grounds for the defense. Conversely, this Court has noted at least one other district court that directly agrees with the Court’s analysis of the same issue.

See Order [Doc. No. 62] at p. 8 citing *Gilmore v. Palestinian Interim Self-Government Authority*, 8 F. Supp. 3d 9 (D.D.C. 2014). While the Court remains convinced its analysis of the narrow issue presented is correct, Defendant presents a tenable argument that there may be a substantial ground for disagreement sufficient to satisfy this requirement of § 1292(b).<sup>2</sup>

**C. Materially Advance Litigation**

Finally, the Court must determine whether an immediate appeal would materially advance the termination of this litigation. According to the Tenth Circuit, this requirement reflects the primary purpose of § 1292(b). *State of Utah v. Kennecott Corp.*, 14 F.3d 1489, 1495 (10th Cir. 1994). As a result, § 1292(b) interlocutory appeals are “limited to extraordinary cases in which extended and expensive proceedings probably can be avoided by immediate and final decision of controlling questions encountered early in the action.” *Id.* (citing S. Rep. No. 85- 2434 (1958), as reprinted in 1958 U. S. C. C. A. N. 5255).

The Court is not aware of any decision of the Tenth Circuit Court of Appeals addressing the propriety of certifying a § 1292(b) interlocutory appeal of an order addressing waiver of a defense pursuant to Fed. R. Civ. P. 12(h)(1). Similarly, the Court is not aware of a Tenth Circuit decision addressing certification of an order addressing personal jurisdiction. However, in *Cudd Pressure Control, Inc. v. Cornelius*, 1996 WL 122018, at \*1, \*3 (10th Cir. Mar. 20, 1996) (unpublished opinion), the Tenth Circuit addressed the merits of a personal jurisdiction issue without discussing the propriety of the discretionary § 1292(b) certification.

---

<sup>2</sup>As the Court noted in its prior Order, even after *Daimler*, courts have not restricted analysis of *Goodyear's* at home standard to simply determine whether a corporate defendant is incorporated or has its principal place of business in the forum state. See, e.g., *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 432 (5th Cir. 2014) (“Because Butterfield is neither incorporated nor has its principal place of business in Texas, and because Ritter has not pleaded facts showing that Butterfield’s contacts with Texas are ‘continuous and systematic’ enough to render it ‘at home’ in Texas, general jurisdiction is improper.”) (emphasis added) (quoting *Daimler*, 134 S.Ct. at 761).

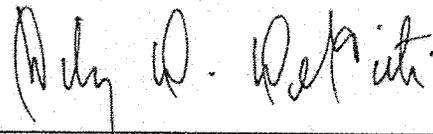
As stated above, if the appellate court were to disagree with this Court's waiver analysis and further determine general personal jurisdiction is lacking, such a determination would terminate the litigation before this Court. Because the scope of Supreme Court precedent is at issue, and due to the complexities of the issues involved in the instant case, granting Defendant leave to appeal at this stage may materially advance the termination of the litigation. In sum, therefore, the Court finds that certification under § 1292(b) is warranted.

**III. Conclusion**

For the foregoing reasons, Defendant's motion to reconsider is DENIED. Defendant's alternative motion for immediate certification of an appeal is GRANTED. The Court's September 10, 2014 Order [Doc. No. 62] is DEEMED AMENDED to reflect that the Court finds under 28 U.S.C. § 1292(b), the issue of whether Defendant has waived the defense of general personal jurisdiction pursuant to Fed. R. Civ. P. 12(h) is a controlling question of law to which there is substantial ground for difference of opinion and that an immediate interlocutory appeal from the Court's September 10, 2014 Order may materially advance the ultimate termination of this litigation.

The action shall be STAYED until either the time for Defendant to file an interlocutory appeal under 28 U.S.C. § 1292(b) expires or until the Tenth Circuit Court of Appeals finally disposes of any such appeal, whichever is later.

IT IS SO ORDERED this 12<sup>th</sup> day of December, 2014.



---

TIMOTHY D. DEGIUSTI  
UNITED STATES DISTRICT JUDGE