

No. 10-250

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**In the Supreme Court of the United States**

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DOW CHEMICAL CANADA ULC,  
*Petitioner,*

v.

CARLOS ORLANDO FANDINO, CLAUDIA CASTILLO,  
DANIEL CASTILLO, JONATHAN CASTILLO, CARLOS  
RAFAEL FANDINO, KAYLIE FANDINO, ALEXIS MERCADO,  
ERIKA MERCADO, LIZANDRO MERCADO, SANDRA  
MERCADO, BOMBARDIER, INC., BOMBARDIER  
RECREATIONAL PRODUCTS, INC., BRP US INC., and  
DAN FITZGERALD'S JET WORLD, INC.,  
*Respondents.*

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*On Petition for a Writ of Certiorari to the  
Court of Appeal of the State of California,  
Second Appellate District, Division One*

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**PETITIONER'S SUPPLEMENTAL BRIEF**

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September 30, 2010

**Rule 29.6 Statement:** As stated in the petition, Dow Chemical Canada ULC is an indirect subsidiary of The Dow Chemical Company.

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Petitioner Dow Chemical Canada ULC (Dow Canada) presents this supplemental brief to address the impact of the Court's recent grant of certiorari petitions in two other personal jurisdiction cases, and to advise the Court of certain developments in the underlying litigation in the Superior Court of California for the County of Los Angeles.

**I. Grants of Certiorari in Nos. 09-1343 and 10-76 Underscore the Importance of Plenary Review in This Case**

**A. This Case Is the Ideal Vehicle to Decide the Longstanding Question of Stream-of-Commerce v. Stream-of-Commerce-Plus**

On September 28, 2010, the Court granted the certiorari petitions in *J. McIntyre Machinery Ltd. v. Nicastro* (No. 09-1343) and *Goodyear Luxembourg Tires v. Brown* (No. 10-76), to be argued in tandem. As here, both cases raise questions of personal jurisdiction involving foreign commerce.

The Court's decisions in these cases might address the longstanding question of stream-of-commerce v. stream-of-commerce-plus, but there is also the potential for this major issue to be left unresolved. While the New Jersey Supreme Court invoked the stream-of-commerce test in the *J. McIntyre* case, the New Jersey intermediate appellate court found jurisdiction as well under the stream-of-commerce-plus test. *J. McIntyre* (No. 09-1343) pet. at 5. Furthermore, the petition argued

that J. McIntyre should prevail under *either* test. *Id.* at 22. Although the *J. McIntyre* petition noted in a footnote the confusion among lower courts that has followed from the divided opinions in *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102 (1987), *pet.* at 20 n.3, there was no suggestion that this Court would be required to address the conflict to resolve the *J. McIntyre* case.

The petition in *Goodyear* concerns the use of the stream-of-commerce test as a basis for general jurisdiction rather than (as in this case) as a basis for specific jurisdiction. As the amicus brief filed by the Chamber of Commerce (USA) recognizes, the major unresolved issue in the personal jurisdiction field is stream-of-commerce v. stream-of-commerce-plus.

Unfortunately, for nearly 25 years, the lower courts have been in a state of upheaval over whether a company is subject to a State's jurisdiction simply because the "stream of commerce" carried the company's products into the state and a cause of action arose involving those products.

Chamber amicus br. (No. 10-76) at 1. The Chamber's brief went on to note, however, that the *Goodyear* decision created confusion in an area where the standards had previously been clear—determining whether there is general jurisdiction. *Id.* ("But amidst the confusion, one bedrock principal stood firm: the distinction between specific and general jurisdiction"). Thus, it remains

to be seen whether, and to what extent, the Court will be required to address the stream-of-commerce issue in the *Goodyear* case.

By contrast, as explained in Dow Canada's petition, this case is an excellent vehicle to decide the question left open in *Asahi*. The outcome of this case turns squarely on which test is applied: stream-of-commerce or stream-of-commerce-plus.

**B. This Case Should Be Argued in Tandem with Nos. 09-1343 and 10-76**

Dow Canada respectfully suggests that the logic of setting *J. McIntyre* and *Goodyear* for argument in tandem applies as forcefully to setting this case for argument in tandem as well—and then deciding the cases in a trilogy of opinions.

Given the grants of certiorari in *J. McIntyre* and *Goodyear*, Dow Canada respectfully suggests that the grant of certiorari in this case need not be delayed to request a response to Dow Canada's petition. The Court's consideration and analysis of the *J. McIntyre* and *Goodyear* cases would benefit from briefing and argument in this case, which would by necessity focus directly on the fundamental question of stream-of-commerce v. stream-of-commerce-plus.

**C. At a Minimum, This Case Should Be Held Pending the Decisions on the Merits in Nos. 09-1343 and 10-76**

In the course of deciding *J. McIntyre* and *Goodyear*, the Court might well address the question of stream-of-commerce v. stream-of-commerce-plus (whether definitively or otherwise), or it might at least address the contours of the governing test. Accordingly, if the Court does not grant plenary review in this case, Dow Canada respectfully requests that the Court hold this petition pending the Court's merits decisions in *J. McIntyre* and *Goodyear*.

**II. The Question Presented by the Petition Remains in Dispute between Dow Canada and the Other Defendants in the Underlying Litigation**

On September 20, 2010, the Superior Court entered a judgment in the underlying litigation in favor of Dow Canada against plaintiffs (Carlos Orlando Fandino et al.). Having determined that Dow Canada is not liable for their injuries, plaintiffs withdrew their opposition to a motion by Dow Canada for summary judgment against plaintiffs. The Superior Court granted the motion and entered a judgment for Dow Canada against plaintiffs. Dow Canada received a copy of this judgment on September 23, 2010.

However, the Superior Court continues to assert personal jurisdiction over Dow Canada in the same underlying litigation. Co-defendant Dan



Fitzgerald's Jet World, Inc., has a cross-complaint pending against Dow Canada, and co-defendants Bombardier, Inc., Bombardier Recreational Products, Inc., and BRP US Inc. have filed a motion to pursue a cross-complaint against Dow Canada in the same underlying proceeding as well.

Thus, the judgment as between Dow Canada and plaintiffs has not rendered moot the pending petition for a writ of certiorari. Notwithstanding its objection based on the Due Process Clause of the Fourteenth Amendment, Dow Canada is still being subjected to the assertion of personal jurisdiction in California by the Superior Court.

Further, the question of stream-of-commerce v. stream-of-commerce-plus is among the issues currently being litigated between Dow Canada and Bombardier Recreational Products in another Sea-Doo product-liability action pending elsewhere in California. Bombardier Recreational Products attempted to bring Dow Canada into that case by a cross-complaint. Dow Canada (again) objected to personal jurisdiction in California. The trial court in that case found that due process does not permit the assertion of personal jurisdiction over a foreign corporation simply because it placed products in the stream of commerce, aware that others would distribute them to the forum State; the trial court granted Dow Canada's motion to quash. *Boughton v. Bombardier Recreational Products, Inc.*, No. 09-0165714 (Cal. Super. Ct., Shasta County, June 7, 2010). Bombardier Recreational Products has appealed that decision to the California Court of Appeal, Third Appellate District, No. C065603.

Thus, the question presented by Dow Canada's petition remains in dispute between Dow Canada and Bombardier Recreational Products in other pending litigation as well. *See* pet. at 21 n.13 (citing personal jurisdiction decisions in still other Sea-Doo product-liability litigation).

Even in this case—where plaintiff's opposition to Dow Canada's motion to quash was premised on declarations by Bombardier employees (*see* pet. at 7 & n.6) and the Bombardier defendants filed their own appellate briefing below—it is no secret that the Bombardier defendants have been the driving force behind the assertion of personal jurisdiction over Dow Canada.

Based on its petition and the foregoing, Dow Canada respectfully requests that the Court grant its petition.

Respectfully submitted,

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