APL-2019-00239
Queens County Clerk's Index No. 706909/15
Appellate Division-Second Department Docket Nos. 2016-06194 and 2016-07397

COURT OF APPEALS
of the
STATE OF NEW YORK

-----♦-----

ANNA AYBAR, ORLANDO GONZALEZ, JESENIA AYBAR, as legal guardian on behalf of K.C., an infant over the age of fourteen (14) years, JESENIA AYBAR, as Administratrix of the ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR, as Administratrix of the ESTATE OF T.C, a deceased infant under the age of fourteen (14) years and ANNA AYBAR, as Administratrix of the ESTATE OF CRYSTAL CRUZ-AYBAR,

Plaintiffs-Appellants,

-against-

JOSE A. AYBAR, JR. and "JOHN DOES 1 THRU 30,"

Defendants,

(For Continuation of Caption see Inside Cover)

AMICUS CURIAE BRIEF ON BEHALF OF NEW YORK STATE BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

New York State Bar Association
Amicus Curiae
Scott M. Karson, Esq.
President of NYSBA
One Elk Street
Albany, NY 12207
Tel: (518) 463-3200
Fax: (518) 463-8844

Michael J. Hutter, Esq.
Souren A. Israelyan, Esq.
Domenick Napoletano, Esq.

Of Counsel

Date Completed: February 10, 2021

-and-

FORD MOTOR COMPANY and THE GOODYEAR TIRE & RUBBER CO.,

Defendants-Respondents.

U.S. TIRES AND WHEELS OF QUEENS, LLC,
Non-Party.

STATEMENT PURSUANT TO RULE 500.1(f) OF THE RULES OF PRACTICE OF THE COURT OF APPEALS

Amicus Curiae – New York State Bar Association - is a registered New York not-for-profit corporation with tax exempt status under I. R. C. §501(c)(6). It has no parents, subsidiaries or affiliates.

STATEMENT PURSUANT TO RULE 500.23(a)(4)(iii) OF THE RULES OF PRACTICE OF THE COURT OF APPEALS

Amicus Curiae - New York State Bar Association – states that no party to the appeal or a party's counsel has contributed content to the brief or participated in the preparation of the brief in any other manner; no party to the appeal or a party's counsel has contributed money that was intended to fund preparation or submission of the Brief of *Amicus Curiae*; and no person or entity, other than movant, has contributed money that was intended to fund preparation or submission of the Brief of *Amicus Curiae*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No.

Cases:

Statutes:

Other Authorities:

PRELIMINARY STATEMENT

At issue on this appeal is the continued viability of New York's longstanding doctrine, established by judicial interpretation of New York's statutory scheme governing foreign corporations, that a foreign corporation's voluntary registration to do business in New York and accompanying appointment of an agent for service of process (Secretary of State) constitutes consent to a New York court's exercise of general personal jurisdiction over it. Defendants Ford Motor Company ("Ford") and Goodyear Tire & Rubber Company ("Goodyear") urge this Court to reject this consent by registration doctrine, advancing two separate arguments. They argue initially that the doctrine must be rejected because it is the result of a fundamental misinterpretation by this Court of New York's statutory scheme governing foreign corporations, emphasizing that said scheme does not expressly state that registration and appointment confers general jurisdiction. Alternatively, Ford and Goodyear argue that the consent by registration doctrine must be rejected as it is not a constitutionally permissible basis for the exercise of general jurisdiction in the aftermath of *Daimler A.G. v Bauman* (571 US 117 [2014]). The Second Department below declined to address the first argument, addressing only the second. It held personal jurisdiction based on the consent doctrine is unconstitutional as the doctrine "no longer holds in the post-*Daimler* landscape" (*Aybar v Aybar*, 169 AD3d 137, 152 [2d Dept 2019]).

The NYSBA, the largest voluntary state bar association in the nation, urges this Court to recognize the continued viability of New York's consent by registration doctrine. In doing so, the Court will ensure an appropriate state jurisdictional reach for injured New Yorkers over foreign corporations inflicting the injuries, operating within the Supreme Court's constitutional framework for the exercise of personal jurisdiction. New York's sovereign interest in ensuring that its citizens who are injured by foreign corporations have access to justice in the New York courts will as well be satisfied.

STATUTORY FRAMEWORK FOR ISSUE

A quartet of statutes in the Business Corporation Law ("BCL") governs foreign corporations doing business in New York. They are:

•**BCL § 1301** (a) provides that "[a] foreign corporation shall not do business in this state until it has become authorized to do so."

•**BCL § 304** in its subdivision (a) states the "secretary of state shall be the agent of . . . every authorized foreign corporation upon whom process against the corporation may be served;" and in its subdivision (b) states that no foreign corporation may be "authorized to do business in this state . . . unless in its . . . application for authority it designates the secretary of state" as its agent upon whom process against the corporation may be served.

•**BCL § 1304 (a) (6)** requires the foreign corporation in its application to do business in New York to designate "the secretary of state as its agent upon whom process against it may be served and (to provide) the post office address within or without the state to which the secretary of state should mail a copy of any process against it served upon him."

•**BCL § 1312** (a) bars access to the courts of the state to foreign corporation doing business in New York who are not authorized to do business in the State.

Notably, the New York courts have placed "meaningful restrictions on the reach of New York's registration statute[s]" (Oscar Chase, *Consent to Judicial Jurisdiction: The Foundation of "Registration" Statutes*, 73 NYU Ann. Survey of Amer. Law, 159, 172 [2018] ["Chase"]). Thus, not every foreign corporation that is engaged in commercial activities in New York is required to register. As stated in *International Fuel & Iron Corp. v Donner Steel Co., Inc.* (242 NY 224 [1926]): "To come within this section, the foreign corporation must do more than make a single contract, engage in an isolated piece of business, or an occasional undertaking; it must maintain and carry on business with some continuity of act and purpose" (*id.* at 230; *see also* Siegel and Connors, NY Prac § 83 [6th ed 2018] ["Siegel and Connors"]).

Furthermore, New York's foreign corporation registration scheme shows that "foreign corporations considering commercial activities in New York have several

reasonable choices" (Chase, at 172 [discussing those choices]), including, of course, cease doing business if it views the registration obligations too burdensome. Unlike the plight of the "out-of-state defendants" that worried Justice Ginsburg in *Daimler*, New York's registration rules do allow foreign corporations "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit" (Chase, at 173).

ARGUMENT

POINT I

FORD AND GOODYEAR KNOWINGLY AND VOLUNTARILY CONSENTED TO GENERAL PERSONAL JURISDICTION IN NEW YORK BY REGISTERING TO DO BUSINESS IN THE STATE

A. Introduction

CPLR 301 provides: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." Taking effect on September 1, 1963 when the CPLR became effective, CPLR 301 incorporated all of the bases of jurisdiction over persons, property and status that existed prior to September 1, 1963.

Prior to September 1, 1963, New York recognized four potential bases for personal jurisdiction for any cause of action irrespective of whether it arose from the defendant's contacts with or activities in New York: presence, domicile,

consent, and "doing business" (*see* Siegel and Connors, NY Prac § 60; Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 301.04 ["Weinstein"]).

The consent basis has always played an important role in determining personal jurisdiction (*see Pennoyer v Neff*, 95 US 714, 720 [1877] [observing that personal jurisdiction based on voluntary appearance is a "principle of general, if not, universal law"]; *see also* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7, C301:6 [2020]). Consent to suit could be manifested in several ways, including by appointment of an agent under CPLR 318; by appointment pursuant to some other statute; by private contract party; or by waiver of an objection to jurisdiction (*see* Siegel and Connors, NY Prac § 60; Weinstein, CPLR ¶ 301.04).

Here, plaintiffs invoke personal jurisdiction in New York over Ford and Goodyear on its recognized consent prong, specifically, the consent by registration doctrine.

B. New York's Consent By Registration Doctrine Is Properly Invoked

This Court's inquiry into whether Ford and Goodyear are subject to personal jurisdiction in New York in this action commenced by New Yorkers is exceedingly simple. The answer to the inquiry is "yes" because Ford and Goodyear consented to be sued in New York. They are foreign corporations doing business in New York, and thus subject to New York's "door-closing" statute applicable to foreign corporations, BCL § 1312 (a); they voluntarily procured authority to do business in

New York and thus avoid the door-closing result; and they have thus designated the Secretary of State as their agent for service of process. For over a century, New York courts, both state and federal, have held that this conduct serves as consent to general jurisdiction in New York courts allowing the exercise of personal jurisdiction over foreign corporations for causes of action arising outside New York (*see Bagdon v Philadelphia & Reading Coal & Iron Co.*, 217 NY 432, 436-437 [1917, Cardozo, J.]; *Augsbury Corp. v Petrokey*, 97 AD2d 173, 175 [3d Dept 1983]; *STX Panocean (U.K.) v Glory Wealth Shipping PTE, Ltd.*, 560 F 3d 127, 131 [2d Cir 2009]; *The Rockefeller Univ. v Ligand Pharm., Inc.*, 581 F Supp 2d 461, 466-467 [SD NY 2000]; *see also* Chase, at 174-180 [2018]). No further analysis is required (*Augsbury*, 97 AD3d at 176 [consent created by BCL § 304 is an "automatic basis for personal jurisdiction"]).

A foreign corporation's registration to do business in New York carries with it consent to be sued in New York courts, regardless of the extent of any contacts it may or may not have with New York or where the cause of action against the foreign corporation arose. This is "part of the bargain by which [the foreign corporation] enjoys the business freedom of the State of New York" (*Nierbo Co. v Bethlehem Shipbuilding Corp.*, 308 US 165, 175 [1939]). Although the BCL statutes do not explicitly state that registration confers general jurisdiction, judicial interpretation of the statutes is what matters (*see Pennsylvania Fire Ins. Co. of Phila. v Gold Issue*

Min. & Milling Co., 243 US 93, 96 [1917]; *Robert Mitchell Furniture Co. v Selden Breck Constr. Co.*, 257 US 213, 216 [1921] [scope of consent conferred by corporate registration statute is matter of state court construction]).

The New York courts have construed the BCL statutes and their predecessors as expressing the legislature's intent to extend general jurisdiction over foreign corporations registered to do business in New York. They have done so to affect the further legislative intent to ensure that foreign corporations will not be on a more advantageous footing than domestic corporations (*see Von Arx, A.G. v C.J. Breitenstein*, 52 AD2d 1049, 1050 [4th Dept 1976], *affd* 41 NY2d 958 [1977]); and to secure a remedy for New York residents harmed by the activities of a foreign corporation (*see Gibbs v Queen Ins. Co.*, 63 NY 114, 128 [1875]), as it was constitutionally permitted to do so (*Paul v Virginia*, 75 US 168, 181 [1868] ["They [the states] may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion."]). In this connection, foreign corporations deriving substantial revenues from their New York activities upon their voluntary decision to register certainly "do not suffer an undue burden by being required to answer for their obligations to [New York] citizens" (Cassandra Robertson & Charles "Rocky" Rhodes, *A Shifting Equilibrium: Personal*

Jurisdiction, Transnational Litigation, 19 Lewis & Clark L Rev 643, 663 [2015] ["Robertson"]).

In sum, New York's century-old consent by registration doctrine has set forth a basis that allows New York residents to assert causes of action against foreign corporations that avail themselves of the benefits of registering to do business in New York. Ford registered in 1920 and Goodyear registered in 1956, acknowledging their business presence in the State, and they have continued their business presence since then and in fact have greatly expanded it. They should be bound by the consequences of that voluntary conduct.

POINT II

NEW YORK'S CONSENT BY REGISTRATION DOCTRINE, AS JUDICIALLY RECOGNIZED BY CONSTRUCTION OF NEW YORK'S REGISTRATION STATUTE FOR FOREIGN CORPORATIONS, IS A PROPER INTERPRETATION OF STATE LAW AND NO PRINCIPLED BASIS FOR REJECTING SUCH INTERPRETATION HAS BEEN DEMONSTRATED

A. Introduction

Ford and Goodyear initially seek to have this Court reject its own precedent, most notably *Bagdon* (217 NY 432). They argue that *Bagdon* was wrongly decided on the incorrect theory that its holding is contrary to both the plain text of the registration statute and legislative intent (Ford/Goodyear Brief, at 16-17). Paying lip service to the principles of *stare decisis,* which strongly augurs against their arguments (Chase, at 164-165), they ignore the long held judicial adherence to

Bagdon over the course of a century in decisions authored by eminent state jurists, as discussed *infra* at pp. 5-7.

The argument must be rejected. An analysis of the emergence of New York's foreign corporation registration statutes and *Bagdon* itself within that historical context clearly shows that the consent by registration doctrine recognized in *Bagdon* has a sound basis.

B. Emergence Of The Consent By Registration Doctrine In New York As A Permissible Basis To Assert General Personal Jurisdiction Over A Foreign Corporation

To fully understand New York's consent by registration doctrine, it is necessary to consider its statutory foundation, the legislatively created registration system for foreign corporations, and how the doctrine grew out of this statutory foundation. Thus, a brief history of the relevant BCL provisions, BCL §§ 304, 1301, 1312, will be set forth before discussing the development of the doctrine by *Bagdon* and its progeny. This review of the doctrine's statutory underpinnings demonstrates that the statutory scheme was enacted to protect New York residents against the hardship of pursuing their rights in out-of-state forums, and to afford them the opportunity, consistent with the dictates of due process, to pursue remedial action in the New York courts, while ensuring that New York corporations were on equal footing with foreign corporations. The consent by registration doctrine then logically followed to give effect to the statutory scheme.

1. Enactment of New York's Foreign Corporation Registration Scheme as the Doctrine's Statutory Foundation

New York's foreign corporation registration scheme came into existence during the latter half of the nineteenth century. At that time under the common law a corporation had no existence outside its state of incorporation, and state legislatures began considering ways to address this situation (William A. Walker, *Foreign Corporation Laws: The Loss of Reason*, 47 NC L Rev 1, 12 [1968]).

Statutory enactments initially addressed service of process upon foreign corporations, requiring a foreign corporation to designate an agent for service of process and to file such designation with the Secretary of State. (L 1853, ch 463, §§ 14, 15, L 1853, ch 466, § 23 [foreign insurance companies]; L 1855, ch 279 [all foreign corporations]). These provisions were adopted in order to remedy an actual or feared defect in the jurisdiction of the New York courts over foreign corporations doing business in the state, and to require corporations doing such business to directly submit themselves to such jurisdiction. In the absence of such a statute, the New York courts, like other state courts, had disclaimed all power to compel foreign corporations to appear before them (*see M'Queen v Middletown Mfg. Co.*, 16 Johns 5, 6-7 [NY Sup Ct 1819] ["We think, a foreign corporation never could be sued here. The process against a corporation, must be served on its head, or principal officer, within the jurisdiction of the sovereignty where this artificial body exists."]; *see generally* Edward Q. Keasbey, *Jurisdiction over Foreign Corporations*, 12 Harv L

Rev 1, 2 [1898]). However, the requirement that ordinary business corporations designate an agent for service of process was repealed in 1877 (L 1877, ch 417, § 29).

In 1890, the legislature adopted the General Corporation Law, which amended and amplified New York law regarding corporations (L 1890, ch 563). Of note, foreign corporations were in no way regulated, which caused this Court to observe that the legislature had evinced a policy permitting foreign corporations to do business in New York without conditions or restraints (*Demarest v Flack*, 128 NY 205, 216-218 [1891]). This Court further stated: "The supervision of a foreign corporation by this state may easily be exercised by imposing terms as a condition of permitting it to do business here" (*id.* at 217). This Court's view as to how the situation might be remedied was further addressed the same day in *Teal v Yost* (128 NY 387, 397 [1891]), where this Court stated:

> "In *Gibbs v Queens Ins. Co.* (63 NY 114) it was held that where a foreign fire insurance company has designated an agent in compliance with the state insurance laws, making the appointment of an attorney or agent in this state, upon whom process in suits against the company may be served, a prerequisite to its doing business in the state, it hereby submits itself to the jurisdiction of the state courts having authority to act; and by service of a summons on an agent so designated, the court acquires jurisdiction and my render a judgment valid and capable of being enforced upon any property within the jurisdiction."

Thus, by the failure to enact statutory restrictions on the right of foreign business corporations to commence and carry on business in the state, New York

opened its courts to them as plaintiffs while casting serious doubt on the power of the New York courts to obtain personal jurisdiction over them as defendants.

These alarming possibilities and the plain hints as to remedy did not go unheeded. At the very next session, the legislature amended the General Corporation Law by addressing two new provisions: §§ 15 and 16 (L 1892, ch 687). Section 15 provided that a foreign corporation other than a moneyed corporation should not do business in New York without first obtaining from the Secretary of State a certificate of authority to do business in New York; and a foreign corporation could not maintain an action in New York until it acquired such a certificate. Section 16 required the foreign corporation to designate some corporate officer or agent within the state as its agent for the service of process.

These provisions were subsequently amended and renumbered several times (*see* White, *New York Corporations* at 762 [1929] [summarizing changes]). In 1923, a statutory revision required a foreign corporation to designate the Secretary of State, rather than a corporate officer or agent as its agent for service of process (L 1923, ch 687, § 111). These provisions remained in effect until superseded by the BCL provisions governing foreign corporations which continued their substance with no major change (*see* 7th Interim Rep of Joint Legis Comm to Study Revision of Corporation Laws at 170-171 [1963]).

2. Judicial Recognition of the Consent by Registration Doctrine Based on the Foreign Corporation Registration Scheme

The concept of personal jurisdiction has two components: a predicate or basis of jurisdiction and method of service of process calculated to appraise the defendant of the action. In 1916, while the required statutory designation of an agent for the receipt of process satisfied the service requirement, the existence of a proper basis to exercise personal jurisdiction over a foreign corporation was left to be resolved. Casting about for a personal jurisdiction basis was in order. The issue that thus arose was whether the foreign corporation's voluntary and deliberate act of acquiring authorization to do business in New York, with the corresponding benefits that flow from such authorization, could serve as a basis for the assertion of personal jurisdiction over the foreign corporation.

Consent played an important role in determining the existence of personal jurisdiction over a defendant at the time (*see Pennoyer*, 95 US at 720). The Supreme Court in *Lafayette Ins. Co. v French* (59 US 404, 407 [1855]) indicated that "consent was a valid basis for jurisdiction, even if the consent was implicit, so long as state law so provided" (Chase, at 174-175). Subsequent Supreme Court decisions expressly recognized that a foreign corporation may be required to consent to personal jurisdiction as a condition of being able to do business in the state (*see Ex Parte Schollenberger*, 96 US 369, 377 [1877]; *St. Clair v Cox*, 106 US 350, 356 [1882]).

The seminal decision in New York addressing the issue is *Bagdon* (217 NY 432). In *Bagdon*, a Pennsylvania corporation, authorized to do business in New York, was sued in New York by a New York resident, who alleged that the corporation had breached a contract made in Pennsylvania. Process was served on an agent designated by the defendant, pursuant to the then applicable registration provision for a foreign corporation (*id.* at 433). The defendant argued that the service was not valid as there was no basis for personal jurisdiction in New York to be asserted over it, the statutory scheme lacking a grant of jurisdiction by such service (*id.* at 434). This Court in an opinion authored by Judge Cardozo rejected the defendant's argument. It held the defendant had consented to personal jurisdiction in New York by voluntarily registering to do business in New York and by appointing an agent for service of process against it in New York (*id.* at 436-437).

Judge Cardozo held that the designation of an agent for service of process constituted a stipulation as to who could be served. As such it was a "true contract" and the consent that the designated agent should represent the corporation is a "real consent" (*id.* at 436). Thus, "service on the agent shall give jurisdiction of the person" (*id.* at 437).

Notably, Judge Cardozo emphasized the voluntary nature of the defendant's conduct (*id.* at 438). He noted that the failure to obtain authorization to do business on the part of a foreign corporation had a cost, namely, "[t]he penalty . . . that [the

corporation] may not maintain an action in our courts 'upon any contract made by it in this state, unless before the making of the contract it has procured such [authorization]'" (*id.* at 436).

Two United States Supreme Court decisions must be noted in this discussion of *Bagdon*. In *Pennsylvania Fire Ins. Co. v Gold Issue Min. and Milling Co.* (243 US 93 [1917]), decided one year after *Bagdon*, the Supreme Court endorsed the legitimacy of the consent by registration doctrine, citing to New York case law (*id.* at 95, 97). In *Pennsylvania Fire*, an Arizona company purchased an insurance policy covering buildings located in Colorado, and then brought suit against the insurer in Missouri. The insurance company argued that its registration to do business in Missouri made it amenable only to suits airing out of its Missouri contracts. The Supreme Court disagreed, holding that the exercise of jurisdiction was valid because the company had consented to suit by registering to do business (*id.* at 95). While the Court conceded that consent may be a "mere fiction," that fiction justified because it placed the out-of-state corporation on the same footing as a local corporation operating within the state borders" (*id.* at 96). The Court observed further that the company ran the "risk of the interpretation that might be put upon [the statute] by the [Missouri] court" as a result of the company's act of registration (*id.*).

Twenty-two years later the Supreme Court in *Neirbo* (308 US 165) reaffirmed its holding in *Pennsylvania Fire*. It did so in the context of interpreting a post-*Bagdon* successor to New York's registration statute in accordance with *Bagdon*. The Supreme Court concluded that the defendant had consented to be sued in New York by designating an agent in New York for the service of process, calling the designation of the agent "a voluntary act" (*id.* at 175). The Supreme Court in so concluding observed the issue had "been authoritatively determined by the [New York] Court of Appeals, speaking through Judge Cardozo" (*id.*).

In sum, for over a century since *Bagdon*, New York courts, both state and federal, have held that this registration by a foreign corporation serves as consent to general jurisdiction in New York (*see Augsbury Corp. v Petrokey Corp.*, 97 AD2d at 175; *LeVine v Isoserve, Inc.*, 70 Misc 2d 747 [Sup Ct, Albany County 1972, Casey, J.]; *Flame S.A. v Worldlink Intl. [Holding] Ltd.*, 107 AD3d 436 [1st Dept 2013]; *Devlin v Webster*, 199 Misc 891, 894 [Sup Ct, NY County 1946, Botein, J.]; *Robfogel Mill-Andrews Corp. v Cupples Co.*, 67 Misc 2d 623 [Sup Ct, Monroe County 1971, Boomer, J.]; *STX Panocean*, 560 F 3d at 131; *The Rockefeller Univ.*, 581 F Supp 2d at 466-467; *see also* Chase, at 174-180 [2018]).

3. The Consent by Registration Doctrine in Other Jurisdictions in the Aftermath of *Bagdon*

New York's foreign corporation registration system and its consent by registration doctrine is not an outlier. Every state statutorily requires foreign

corporations conducting business within their state to register with the state and appoint an agent for service of process in order to do business in the state (*see* Tanya J. Monestier, *Registration Statutes, General Jurisdiction and the Fallacy of Consent*, 36 Cardozo L Rev 1343, 1363-1366 [2015] ["Monestier"] [collecting and discussing the statutes]). As to the jurisdictional consequences of registration and appointment of an agent, only Pennsylvania's statutory scheme expressly confers general jurisdiction over a foreign corporation (42 Pa Cons Stat § 5301 [a] [2] [i] [2014]; *see also Bane v Netlink, Inc.*, 925 F 2d 637, 641 [3d Cir 1991]). The remaining state statutes, like New York, are silent as to the jurisdictional consequences of registration and appointment (Monestier, at 1368).

Many state courts have interpreted their state registration and appointment statutes as establishing a basis to exercise general jurisdiction (*see e.g. Rykoff-Sexton, Inc. v American Appraisal Assocs., Inc.*, 469 NW2d 88, 90-91 [Minn 1991] [consent to personal jurisdiction "exacted as a condition of doing business in Minnesota, [was] one of the time-honored bases of personal jurisdiction"]; *Rodriguez v Ford Motor Co.*, 458 P 3d 569, 580-582] [NM 2018] ["Ford consented to personal jurisdiction in New Mexico and was on notice that it should 'anticipate being hauled into court in New Mexico"]; *Merriman v Crompton Corp.*, 146 P 3d 162, 177 [Kan 2006] ["statutory provisions make clear that [they] require a consent to personal jurisdiction"]; *Sternberg v O'Neill*, 550 A 2d 1105, 1109, 1114-1115

[Del 1988] [same];[1] *Bohreer v Erie Ins. Exch.*, 216 Ariz 208, 213-214 [2007] [same]; *Green Mountain Coll. v Levine*, 120 Vt 332, 335-336 [1958] [same]). On the other hand, a few courts have interpreted their state's registration statutes differently, concluding that no consent to personal jurisdiction was established (*see e.g. Freeman v District Ct.*, 1 P 3d 963, 968 [Nev 2000]; *Stanley Wynne Oil Corp. v Loring Oil Co.*, 162 So 756, 757-759 [La 1935]; *see also Freeman Funeral Home Inc. v Diamond S. Constructors, Inc.*, 266 So 2d 794, 795-796 [Ala 1972]). Of note, the majority of state courts have not addressed the issue of whether their state's registration and appointment scheme gives rise to consent to personal jurisdiction (*see* Walter W. Heiser, *General Jurisdiction in the Place of Incorporation: An Artificial "Home" For an Artificial Person*, 53 Hous L Rev 631, 672-673 [2016]).

C. New York's Consent By Registration Doctrine Remains Valid Today As A Matter Of State Law

Bagdon's rationale, sound in 1916, remains sound today. In this regard, it is difficult to conclude that a consensual agreement between a foreign corporation and New York does not exist where a *quid pro quo* agreement is plainly present, *i.e.*, the foreign corporation gains the privileges and protections of the State and New York gains the right to hold the foreign corporation operating within its borders accountable. Importantly, such result is not only consistent with but furthers the

[1] The consent holding was subsequently abrogated on constitutional grounds (*see Genuine Parts Co. v Cepec*, 137 A 3d 123 [Del 2015]).

legislative intent of the foreign corporation registration statutory scheme. Nonetheless, Ford and Goodyear contend that *Bagdon* was wrongly decided. This argument is meritless.

Ford and Goodyear's effort to upend a century of black letter law is predicated upon the absence of statutory language expressly conferring personal jurisdiction as a consequence of compliance with the registration scheme. Of course, in construing a statute, analysis generally "begins with the language of the statute itself" (*People v Litto*, 8 NY3d 692, 697 [2007]). However, a point ignored by Ford and Goodyear, the legislative history of a statute, is also highly relevant and "is not to be ignored, even if words be clear" (*Riley v County of Broome*, 95 NY2d 455, 463 [2000]). Thus, it is appropriate to consider "the history of the times, the circumstances surrounding the statute's passage . . . " (*id.* at 464).

These basic rules of statutory construction clearly show that Judge Cardozo properly and wisely found the existence of a "true contract" and "real consent" to personal jurisdiction once a foreign corporation registered to do business in New York and appointed an agent for service of process. This inference of consent is a reasonable and necessary judicial construction that gives effect to the legislative intent of the statutory scheme governing foreign corporations, as discussed *supra* at pp. 13-16.

It is also a fundamental rule of statutory interpretation that, while the courts generally cannot supply matters omitted from a statute, "necessary implications and intendments from the language employed in a statute may be resorted to in order to give effect to the legislative intent, and whatever is necessarily implied in a statute is as much a part thereof as if written therein" (McKinney's Cons Laws of NY, Book 1, Statutes § 364 [a], at 528, 529; *People ex rel. Huntington v Crennan*, 141 NY 239, 243-244 [1894]; *People v Meakin*, 133 NY 214, 220 [1892]). Numerous decisions from this Court confirm this rule (*see e.g. Doe v Axelrod*, 71 NY 484, 489-490 [1988] [state health commissioner's power to overrule rulings made by administrative officer at professional medical misconduct hearing, although not "specifically authorized" by statute, was "essential to the exercise" of the "broad[er] powers" expressly granted to commissioner by Legislature]; *Electrolux Corp. v Miller*, 286 NY 390, 397 [1941] [labor law statute authorizing industrial commissioner to determine amount of contributions due from all "employers" conferred upon commissioner, "by necessary implication," power and duty to determine who qualifies as "employers"]; *Mayor of the City of New York v Sands,* 105 NY 210, 218 [1887] ["[s]tatutes containing grants of power shall be construed, so as to include the authority to do all things necessary to accomplish the grant of the act, and to enable the donee of the power to effect the purpose of the act"]).

Ford's and Goodyear's claim that the doctrine is fatally flawed because foreign corporations have not been put on notice of its existence by express statutory language is a complete red herring – foreign corporations have been put on notice for over a hundred years that their voluntary registration to do business in New York would have that result. The absence of express statutory language to that effect in the statute is of no moment. An observation by Professor Chase is instructive as to this point:

> A corporation considering conducting business in New York could easily learn of the registration statute and its legal effect through competent counsel. That becoming informed may entail consultation with counsel hardly suggests unfairness to the corporation. Reasonable corporate leaders would not proceed without due diligence, including receiving legal advice from both New York and its "home" place of business. Nor is the lack of explicit notice of the jurisdictional effect of registration problematic.

(Chase, at 173).

To the extent Ford's and Goodyear's argument further rests upon the "many courts" that supposedly have rejected claims that consent can be implied from statutory schemes similar to New York's (Ford/Goodyear Brief, at 16), the argument is misleading. As noted *supra* at pp. 17-18, numerous state courts follow New York's consent by registration doctrine. In any event, there is no reason why this Court should reject Judge Cardozo's opinion in *Bagdon* merely because courts in Wisconsin, Illinois, Missouri, Oregon and New Jersey disagree with his opinion.

This is especially true when one considers that those decisions are based on matters unique to those states, and not necessary to New York.

Ford and Goodyear also bemoan the continued existence of the doctrine because it means "any plaintiff anywhere in the country with any grievance against Ford or Goodyear could file suit in New York," overwhelming the New York courts. (Ford/Goodyear Br., at 17). They advance an illusory claim. In this regard, no Pandora's box of litigation has occurred since 1916 and Ford and Goodyear offer no reason to expect it will start now (*see* Chase, at 167). In any event, application of New York's forum non conveniens doctrine (CPLR 327 [a]) and venue transfer provision (CPLR 510 [3]) will enable the courts to deal with such a situation in a fair manner (*see* Mary Twitchell, *The Myth of General Jurisdiction*, 101 Harv L Rev 610, 666 [1988]).

In sum, Ford and Goodyear fail to offer any legitimate reason why this Court should abandon the black letter law established by *Bagdon*.

POINT III

NEW YORK'S CONSENT BY REGISTRATION DOCTRINE SURVIVES A DUE PROCESS CHALLENGE BASED ON *DAIMLER*

Ford and Goodyear argue that New York's consent by registration doctrine giving rise to general jurisdiction over them runs afoul of the due process guaranteed them under the Fourteenth Amendment. They contend this result is mandated by the

Supreme Court's decision in *Daimler* (571 US 117). Citing the Supreme Court's "at home mandate" in *Daimler,* Ford and Goodyear argue that mandate means a foreign corporation's substantial, continuous, and systematic contacts (an apt description of their own contacts with New York) alone are not sufficient to establish personal jurisdiction. They then assert that if those contacts are not enough, then mere registration as foreign corporations creates a "grasping form of jurisdiction" that would deprive them of due process. (*Daimler*, 571 US at 138). In support, Ford and Goodyear cite cases rejecting personal jurisdiction under a theory of consent by registration.

The argument must be rejected. Ford and Goodyear embrace an overbroad reading of *Daimler* to claim that New York's consent by registration doctrine has been constitutionally overruled, and misrepresents that a majority of courts have determined that a consent by registration statutory scheme like New York's is unconstitutional. As will be shown, neither proposition is accurate. *Daimler* has no bearing on consent based general personal jurisdiction; and a number of courts have held that a consent by registration doctrine, similar to New York's is constitutionally valid.

The requirement that a court have personal jurisdiction over a defendant before it may act "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty" (*Insurance Corp. of Ireland, Ltd.*

v Compagnie des Bauxites de Guinee, 456 US 694, 702 [1982]). As such, personal jurisdiction is a "personal privilege respecting the venue or place of suit, which [a defendant] may assert or may waive at his election. Being a privilege, it may be lost" (*Neirbo*, 308 US at 168). Thus, as the Supreme Court has long recognized, a defendant may consent to personal jurisdiction, and thereby waive any protection afforded by the Due Process Clause (*see Pennoyer*, 95 US at 733 [personal jurisdiction extends to "cases in which that mode of service may be consented to have been asserted to in advance"]). That consent can be manifested in various ways (*see e.g. Burger King Corp. v Rudzewicz,* 471 US 462, 472 n 14 [1985] ["[B]ecause the personal jurisdiction requirement is a waivable right, there are a 'variety of legal arrangements' by which a litigant may give 'express or implied consent to the personal jurisdiction of the court'"]; *Hess v Pawloski*, 274 US 352 [1927] [designation of secretary of state as agent for service of process against out-of-state motorist involved] [in accident in New York]; *see also* Chase, at 165 ["The Supreme Court has accepted consent as a basis of jurisdiction in any number of situations in which the incentives to consent were powerful – whether the consent was explicit or implicit"]).

As discussed *supra* at pp. 15-16, in 1917 the Supreme Court addressed the consent by registration doctrine as a basis for personal jurisdiction in *Pennsylvania Fire* (243 US 93). In upholding the doctrine, the Supreme Court held that the

pertinent statute's "language . . . rationally might be held to [apply to the suit at issue]," and that such a "construction did not deprive the defendant of due process of law" (*id.* at 95; *see also Acorda Therapeutics Inc. v Mylan Pharm. Inc.*, 817 F 3d 755, 767-768 [Fed Cir 2016, O'Malley, J., concurring] [discussing *Pennsylvania Fire* and the history of consent to jurisdiction through registration]).

The constitutionality of the consent by registration doctrine was similarly upheld twenty-two years later in *Neirbo*, a case involving New York's consent by registration scheme. Quoting *Pennsylvania Fire*, the Supreme Court stated that "[a] statute calling for such a designation [appointment of an agent] is constitutional" (308 US at 175).

Furthermore, as noted by Professor Chase, the constitutionality of the consent by registration doctrine, was accepted, at least implicitly in *International Shoe Co. v Washington* (326 US 310 [1945]), which was described in *Daimler* (571 US at 126) as the canonical opinion in the area of personal jurisdiction (Chase, at 179). The Supreme Court in discussing the concept of corporate "presence" observed that "'presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued or, *even though no consent to be sued or authorization to an agent to accept service of process has been given*" (*International Shoe*, 326 US at 317 [emphasis added]). The "obvious reference is to *Pennsylvania Fire* and the

implication is that where consent has been given, jurisdiction is available" (Chase, at 179).

While much has changed in the jurisprudence of personal jurisdiction since *Pennsylvania Fire* was decided in 1917, the Supreme Court has not expressly overruled that decision or rejected the consent by registration doctrine on due process grounds. Of note, the Second Restatement adopted the *Pennsylvania Fire* view in 1971 (Restatement [Second] of Conflict of Laws § 44 [1971] ["A state has power to exercise judicial discretion over a foreign corporation which as authorized an agent or a public official to accept service of process in actions brought against the corporation in the state as to all causes of action to which the authority of the agent or official to accept service extends."]).

In sum, under established Supreme Court precedent Ford's and Goodyear's knowing and voluntary consent to general personal jurisdiction under New York's consent to registration doctrine cannot be viewed as violative of their due process rights. Due process, in other words, creates no barrier to the recognition of this basis for general personal jurisdiction.

Contrary to Ford's and Goodyear's argument, nothing in *Daimler* changes the law applicable to New York's consent by registration doctrine. *Daimler* addressed only the minimum contacts basis for personal jurisdiction, *i.e.*, specific jurisdiction, first recognized in *International Shoe.* In *Daimler*, personal jurisdiction in California

was sought to be exercised over a German corporation to adjudicate claims of human rights violations in Argentina committed by a wholly owned subsidiary. The Supreme Court held that the "Due Process Clause of the Fourteenth Amendment precludes the [California] Court from exercising jurisdiction over [defendant] in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint" (*Daimler*, 571 US at 121).

Consent as a basis for personal jurisdiction was not addressed by the Supreme Court, much less consent by registration. Moreover, as observed by Judge O'Malley:

> The Supreme Court had no occasion to consider the rule it laid down in *Pennsylvania Fire* because California—the state where the action at issue was pending—had interpreted its registration statute as one that did not, by compliance with it, give rise to consent to personal jurisdiction. The only question the Court considered was whether the foreign defendant was subject to jurisdiction solely by virtue of its contacts with the state, which were unrelated to the cause of action.

(*Acorda Therapeutics,* 817 F 3d at 769 [O'Malley, J., concurring]). In this connection, the Supreme Court made clear that merely because a foreign corporation regularly conducted business in state was not sufficient to establish general personal jurisdiction over that corporation in that state.

Indeed, *Daimler* confirms that consent to jurisdiction is an alternative to the minimum contacts analysis discussed in that case. This was clearly shown by its citation to *Perkins v Benguet Consol. Min. Co.* (342 US 437 [1952]), as "the textbook case of general jurisdiction appropriately exercised over a foreign corporation that

has *not consented* to suit in the forum" (*Daimler*, 571 US at 129 [emphasis added]). Thus, as Judge O'Malley further observed: "*Daimler* did not impliedly eradicate the distinction between cases involving an express consent to general jurisdiction and those analyzing general jurisdiction in the absence of consent; it actually maintains it" (*Acorda*, 817 F 3d at 769 [concurring]).

This same conclusion has been reached in thoughtful opinions by the New Mexico Court of Appeals in *Rodriguez v Ford Motor Co.* (458 P 3d 569, 575-578 [NM 2018]; an eminent federal jurist in *Acorda* (817 F 3d at 765-770 [O'Malley, J., concurring]; a respected state jurist in *Genuine Parts Co. v Cepec*, 137 A3d 123, 148-149 [Del 2015, Vaughn, J., dissenting]; numerous federal district court decisions (*see American Dairy Queen Corp. v W.B. Mason Co., Inc.*, 2019 WL 135 699, *4 [D Minn 2019] [collecting cases]; and commentary by authoritative civil procedure commentators (*see* Chase, at 194-197 [refuting as well contrary conclusions reached by other commentators, including Montestier]; Robertson, at 661-666 [addressing New York's doctrine]).

In sum, when a foreign corporation such as Ford or Goodyear consents to jurisdiction in New York, as Ford and Goodyear indisputably have done, "resort to minimum-contacts or due process analysis to justify jurisdiction is unnecessary." (*Knowlton v Allied Van Lines, Inc.*, 900 F 2d 1196, 1200 [8th Cir 1990]). Because personal jurisdiction is a right that can be waived, due process imposes no limits

where a defendant has knowingly and voluntarily consented to personal jurisdiction. And here, there can be no doubt as to Ford's and Goodyear's voluntary consent. (Chase, at 180-194). *Daimler* as a result does not render New York's consent by registration doctrine unconstitutional as violative of due process.

CONCLUSION

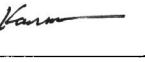
Ford and Goodyear have made numerous knowing and voluntary decisions to establish jurisdictional ties to New York. They decided to register to do business in New York, appointed the Secretary of State as their agent for service of process in New York, and have continued to do so, Ford since 1920 and Goodyear since 1954, after this Court authoritatively held that those actions constitute consent to general personal jurisdiction. Under these circumstances exercising general personal jurisdiction over these New York connected defendants in this New York connected litigation is fair, reasonable and consistent with long-settled jurisdictional principles.

Accordingly, the order of the Appellate Division should be reversed, and the motions by Ford and Goodyear denied.

Dated: February 10, 2021

Respectfully submitted,

NEW YORK STATE BAR ASSOCIATION

By: 

Scott M. Karson, Esq
President of NYSBA
One Elk Street
Albany, NY 12207

Tel: (518) 463-3200
Fax: (518) 463-8844

Michael J. Hutter, Esq.
Souren A. Israelyan, Esq.
Domenick Napolentano, Esq.
Of Counsel

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Rule 500.13(c) of the Rules of Practice of the Court of Appeals, that the foregoing *Amicus Curiae* Brief was prepared on a computer using Microsoft Word.

Type. A proportionally spaced typeface was used as follows:

Name of typeface: Times New Roman

Point size: 14 for body and 12 for footnotes

Line spacing: Double

Word Count. The total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum is 6990.

Dated: February 10, 2021

Scott M. Karson, Esq.