To be Argued by:
JAY L. T. BREAKSTONE
(Time Requested: 30 Minutes)

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,

– and –

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

Defendants-Respondents.

U.S. TIRES AND WHEELS OF QUEENS, LLC,

Non-Party.

BRIEF FOR PLAINTIFFS-APPELLANTS

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Preliminary Statement

This case presents the jurisdictional question left open by the United States Supreme Court in the *Goodyear*[1]*-Daimler*[2]*-BNSF*[3] trilogy of cases; a contractual question uniquely one of New York jurisprudence. Rather than impacting the 14th Amendment, jurisdiction by corporate registration to do business in this state has been a matter of a free and open contract between the state and the corporation seeking registration since the Court's decision in *Bagdon v. Phil. and Reading C. & I. Co.*, 217 NY 432 [1916]. As the Supreme Court found in *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 US 165 [1939], that stipulation is "a true contract" that deals with "jurisdiction of the person." 308 US at 175.

But now, seeing what has been the bane of corporate defendants since *International Shoe*[4] under fire, defendants Ford and Goodyear have chosen to attempt to manipulate the long-standing rule of personal jurisdiction by agreement in New York into the constitutional ambit of

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[1] *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 US 915 [2011]
[2] *Daimler, AG v. Bauman*, 571 US 117 [2014]
[3] *BNSF Ry. Co. v. Tyrrell*, ___ US ___, 137 SCt 1773 [2017]
[4] *International Shoe Co. v. Washington*, 326 US 310 [1945]

the 14th Amendment, so as to take advantage of *Goodyear*, *Daimler* and *BNSF.* As discussed below, the two principles have no relationship to one another and never have.

STATEMENT OF FACTS

The Rollover

In 2011, Defendant Jose Aybar, a resident of New York, purchased a used Ford Explorer equipped with a Goodyear Wrangler AP Tire ("Tire") from Jose Velez, also a New York State resident. [R 8; 21][5] Goodyear, a foreign corporation registered with the New York State Department of State and authorized to do business in New York, manufactured the Tire. *Id.* In July, as Plaintiff drove the Ford Explorer northbound on Interstate Highway 85 in Virginia, the vehicle became unstable as a result of the failure of the Tire and rolled over several times. *Id.* Plaintiffs-Appellants ("Plaintiffs") Anna Aybar, Orlando Gonzalez, Kayla Cabral, Noelia Oliveras, Crystal N. Cruz-Aybar, and Tiffany Cabral were passengers in the Ford Explorer and were injured or killed as a result of the rollover. This action for, *inter*

[5]Numbers in brackets, preceded by the letter "R", refer to the record on appeal.p

alia, negligence and strict products liability, was brought in July 2015. *Id.*

Goodyear

In Supreme Court, Plaintiffs' attorney demonstrated that not only had Goodyear been registered to do business in New York for years, but that Goodyear had owned and operated a chemical plant in Niagara, New York since the 1940's; had been the exclusive supplier of tires and related products for the New York City Transit Authority bus fleet since 1987; had maintained at least 180 authorized Goodyear dealers for its products within New York State; and had owned and operated numerous service centers in New York State which employed many state residents.[6] [R 21]

No mere registrant to do business in New York, Goodyear had taken every economic advantage of its contractual authority. Since 1924, Goodyear had operated numerous stores in New York State, employing thousands of New York workers. [R 24] Goodyear's organization of facilities in New York State engaged in day-to-day

[6] Goodyear advertises to the public that it has one or more registered Goodyear Tire Stores in 365 different cities within New York State. *See*

activities and Goodyear's activities within New York State had been continuous and systematic. *Id.* Goodyear did not deny any of these factual allegations. [R 21]

Instead, Goodyear merely alleged that it was an Ohio corporation, with its principal place of business located in Akron and that the Tire was manufactured in its facilities in Tennessee. *Id.* At some point after the Tire was manufactured and was first sold by Goodyear, Jose Aybar acquired the Tire and brought it to New York where it was inspected and installed on the Ford Explorer approximately two weeks before the accident. *Id.*

Based on these facts, Supreme Court below found that Plaintiffs had demonstrated "Goodyear's extensive activities in this state since approximately 1924," [R 21], and held that "Goodyear's activities with the State of New York have been so continuous and systematic that the company is essentially at home here." [R 24]

Ford

Just as its co-defendant Goodyear, Ford claimed that it was nothing but a Delaware corporation with its principal place of business

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https://goodyear.com/en-US/tire-stores/NY.

in Michigan and that the Ford Explorer it manufactured was made in Missouri. [R 73] However, since 1920 Ford had been registered and authorized to do business in New York and had done so with aggressiveness. [R 9] It maintained property in New York and had hundreds of dealerships throughout the state selling Ford products under its brand name. [R 9, 12] Ford was ingrained in the day-to-day life of New York and it was unquestioned that the corporation had maintained a "continuous and substantial presence" here. [R 9]

Supreme Court

Goodyear and Ford moved under CPLR 3211(a)(8) to dismiss the complaint contending that New York lacked personal jurisdiction. [R 75; 27] Supreme Court, Queens County (*Butler, J.*) denied the applications [R 8], finding that both corporations had maintained a continuous and substantial presence in New York, which would have subjected them to general jurisdiction in the state. [R 13; 24] In addition, as a separate ground for personal jurisdiction, the motion court held that each corporation had been on notice, prior to their registration as foreign corporations to do business in New York and designating the Secretary of State as their agent for the service of

process, that "[i]n New York, it has long been the rule that a foreign corporation may consent to general jurisdiction in this state under CPLR 301 by registering as a foreign corporation and designating a local agent for the service of process." [R 13-14; 25-26] Continuing, the court held that when a foreign corporation does so and designates an agent in New York as its agent for the service of process, an action served upon that designated agent "need not have arisen out of any business conducted by the foreign corporation in New York." [R 13; 25 (quoting Alexander, Practice Commentaries, McKinney's Con. Law of NY, Book 7B, C301:6[c], p. 21); 13-15, 25-26 (BCL §§ 304 and 1304)] Citing to the Court's decision in *Bagdon*, the court explained that such registration and designation was a consent to general jurisdiction in this state. [R 13; 25, citing *Bagdon*, 217 NY at 436]

The Appellate Division

Upon Goodyear and Ford's appeal to the Second Department, that court discarded each and every portion of Supreme Court's holding. Instead, the Appellate Division framed the issue at hand as whether, following *Daimler*, "a foreign corporation may still be deemed to have consented to the general jurisdiction of New York courts by virtue of

having registered to do business in New York and appointed a local agent for the service of process[,]" concluding that "it may not." 169 AD3d 137, 139 [2019][7]

The Appellate Division began its analysis by noting that both corporations, as plaintiffs had alleged, were registered to do business in New York and had done so over the years, deriving substantial revenues as the facts demonstrated. 169 AD3d at 139-141. However, both corporations took the position that registering to do business in New York "did not constitute consent to general jurisdiction in New York." *Id.* at 141. The court seemingly agreed that the case law plainly demonstrated that "a defendant may consent to a court's exercise of personal jurisdiction or waive the right to object to it (under CPLR 3211[e])" as the case may be. 169 AD3d at 142 (citations omitted). Necessarily, when a defendant objects to the court's exercise of personal jurisdiction, it becomes the plaintiff's burden to prove that such jurisdiction exists.[8] *Id.*

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[7]An identical holding was made in the appeal of the vehicle's driver, Jose Aybar, relying on the holding in the instant case. *Aybar v. Goodyear Tire & Rubber Company*, 175 AD3d 1373 [2019].

[8]The Appellate Division recognized that since plaintiffs had not asserted

The court recognized that neither plaintiffs nor defendants disputed that "there is statutory authority for the exercise of general jurisdiction over Ford or Goodyear" and that "the exercise of such jurisdiction would be consistent with New York law." 169 AD3d at 143. The question the court would decide now, however, was "whether the exercise of such jurisdiction would comport with the limits imposed by federal due process since *Daimler*." *Id.* In doing so, the court's discussion of the *Goodyear-Daimler-BNSF* trilogy, unremarkably, contained no review of any consent by registration cases. *Id.* at 144-146.

In Section III of the court's opinion, consent by registration is finally addressed. 169 AD3d at 146. The court recognizes that while "New York's business registration statutes do not expressly require consent to general jurisdiction as a cost of doing business in New York, nor do they expressly notify a foreign corporation that registering to do

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specific jurisdiction over defendants, the court would not consider that question under New York's long-arm statute, CPLR 302. 169 AD3d at 143. Consequently, only general jurisdiction is discussed in this brief. The specific jurisdiction arguments raised by non-party U.S. Tires were not properly before the appellate court, having not been raised in the motion court. *Id.* U.S. Tires is not before this Court, as its motion for leave to the Court was dismissed upon the ground that is was not a party aggrieved. 33 NY3d 1044 [2019].

business here has such an effect," there is little doubt that corporations such as Goodyear and Ford could have had any confusion on the matter:

> There has been longstanding judicial construction, however, by New York courts and federal courts interpreting New York, that registering to do business in New York and appointing an agent for service of process constitutes consent to general jurisdiction.

169 AD3d at 147, citing *Bagdon* and others (state and federal) to same effect. In the absence of any controlling authority to the contrary, the Appellate Division held that it was "the evolution of in personam jurisdiction jurisprudence" and the particular way in which *Daimler* accomplished that task which doomed consent by registration in New York. *Id.*

Judge Cardozo's undisturbed 1916 opinion in *Bagdon* was dismissed by the court as an historical anachronism, decided in the "conceptual structure" of *Pennoyer v. Neff*, 95 US 714 [1877]. 169 AD3d at 148.[9] Freed from that miasma by *International Shoe*, the Appellate

[9]The Appellate Division's observation that it was a "19th century view" that

Division took the position that *Bagdon* could no longer be permitted to stand. The passage of time, it seemed, allowed *Bagdon* to decay, from Judge Cardozo's original opinion in 1916, to the United States Supreme Court's 1939 affirmance of *Bagdon* in *Neirbo*, to *International Shoe* in 1945, and finally *Daimler*, in 2014. However, the Appellate Division could point to no decision of this Court, or any other controlling authority, which had seen fit to abrogate the ruling in *Bagdon* in those 98 years, or in the five years since the case at bar.

Instead, the court found that consent by registration in New York was no different than exercising general jurisdiction based solely on presence in the state, in violation of *Daimler*. 169 AD3d at 151-152. The court felt that New York's consent by registration process "would be

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corporations could have "no legal existence" outside of their state of incorporation stands in curious apposition to Justice Ginsburg's observation that the modern 21st century corporation has only two "paradigm bases" for jurisdiction, its state of incorporation and the state of its principal place of business. *Daimler*, 571 US at 137 ("With respect to a corporation, the place of incorporation and principal place of business are 'paradig[m] ... bases for general jurisdiction'." [internal citations omitted]). In the case of Goodyear, this leaves only one place in which general jurisdiction would apply, Ohio; in the case of Ford, only Delaware and Michigan. 169 AD3d at 139-140. Despite their multi-state and, indeed, multi-national profit and manufacturing centers, the Court in *Daimler* assured that the modern 21st century corporation may only be "at home" in one state. *Daimler*, 571 US at n. 20 ("A corporation that operates in many places can scarcely be deemed at home in all of them.")

'unacceptably grasping'" under *Daimler*. Finally, the court took support for its unilateral overruling of *Bagdon* in the fact that this Court "does not appear to have cited to *Bagdon* or relied upon its consent-by-registration theory since *International Shoe* was decided." 169 AD3d at 152. Such was a "strong indicator" that *Bagdon* had been abandoned by the Court, its rationale defined by the *Pennoyer* era.

The Second Department denied leave to reargue or, in the alternative, permission to appeal to this Court. [M263225, June 11, 2019] This Court granted leave to appeal. [R 254]

A R G U M E N T

POINT

CONSENT BY REGISTRATION IS A CONTRACT QUESTION AND NOT SUBJECT TO THE 14TH AMENDMENT JURISDICTIONAL ANALYSIS OF *DAIMLER*

In its trilogy of 14th Amendment jurisdictional cases, the Supreme Court was very careful to avoid stepping over into jurisdiction by consent. The penultimate paragraph of its decision in *BNSF* refused to consider respondents' claims that *BNSF* had consented to personal

jurisdiction in Montana, as the Montana Supreme Court had not addressed the issue below. Citing *Cutter v. Wilkinson*, 544 US 709, 718 n 7 [2005], the Court made it clear that it was "a court of review, not of first view." Consequently, the effect of both *Goodyear* and *Daimler* on consent to personal jurisdiction by registration "remains to be seen." 4A Fed. Prac. & Proc. Civ. (*Wright & Miller*) § 1069.2 (4th ed.) at 2. It is this Court, with its controlling decision by Judge Cardozo in *Bagdon*, which can do so.

The framework for New York jurisdiction after the effective date of the CPLR in 1963 is stated in CPLR 301 and 302. Though CPLR 302 set out New York's parameters for long-arm jurisdiction, the text of CPLR 301 specifically preserved all prior grounds for jurisdiction: "A court may exercise such jurisdiction over persons, property, or status as might have been exercised heretofore." *See* Hutter and Powers, *What Happens in Vegas Stays in Vegas: Asserting a Tort Claim in New York Courts Against a Foreign Corporation Arising from a New Yorker's Out-Of-State Accident Post-Daimler*, 82 Alb. L. Rev. 1139, 1141 [2019]. This included a foreign corporation's registering to do business in New York and appointing the Secretary of State as its agent for the service of

process.[10] *Id.* at 1145. The failure to register to do business in New York, however, had only one statutory penalty: it precluded the errant corporation from maintaining an action or special proceeding in New York until it did under BCL § 1312(a). *Id.* at 1146. Moreover, even that "penalty" could be overlooked, as courts routinely stayed the entry of judgment by the unregistered corporation until it did.[11]

Not since the United States Supreme Court's affirmance of New York's jurisdiction by consent framework in *Bagdon* has the Court addressed the issue and this includes *Goodyear, Daimler,* and *BNSF*. Indeed, Justice Ginsburg, who penned all three decisions, was careful to *exclude* jurisdiction by consent from each one.

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[10]Now provided for in BCL §§ 1301(a) [foreign corporation shall not do business in state without authorization], 304(a)-(b) [in pertinent part, no foreign corporation can be authorized to do business in state without designating Secretary of State as agent for process], and 1304(a)(6) designation of Secretary of State requires address, inside or outside state, where process can be mailed]. Hutter and Powers at 1146.

[11]*See, e.g., SD Protection, Inc. v. Del Rio*, 498 FSupp2d 576, 581 [EDNY 2007] (New York case law "indicate(s) a strong opposition of New York courts to dismissing a Complaint on the ground that the plaintiff lack a certificate [of doing business], and a preference for giving the plaintiff a chance to remedy this defect"), citing *Uribe v. Merchants Bank of New York*, 266 AD2d 21 [1st Dept, 1999] ("the failure of plaintiff to obtain a certificate pursuant to BCL 1312 may be cured prior to the resolution of the action" and *Tri-Terminal Corp. v. CITC Industries, Inc.*, 78 AD2d 609 (1st Dept 1980); *Nasso v. Seagal*, 263 FSupp2d 596, 606 [EDNY 2003] (same, collecting cases).

In *Daimler*, the Court took great pains to make it clear that it had never stepped back from its historical position that jurisdiction by consent was *contractual* in nature and therefore outside the purview of its decisions on general jurisdiction imposed upon a corporation by other means in derogation of the 14th Amendment. The question decided under *Daimler* was explicitly limited to "[w]hether the *Due Process Clause of the Fourteenth Amendment* precludes the District Court from exercising jurisdiction over Daimler in this case, given the absence of any California connection to the atrocities, perpetrators, or victims described in the complaint." *Daimler* at 121 (emphasis added). Since *International Shoe,* little has been said about general, as opposed to specific, jurisdiction over the out-of-state defendant. The Court conceded in *Goodyear* that "general jurisdiction [has played] a reduced role" in modern jurisdictional theory. *Id.* at 128. "Our post-*International Shoe* opinions on general jurisdiction, by comparison [to specific jurisdiction]*"* said Justice Ginsburg, "are few." *Daimler* at 129.

The *Daimler* court found only two cases on general jurisdiction in its post-*International Shoe* inventory, and only one of those cases pertinent to our discussion here, *Perkins v. Benquet Consol. Mining*

Co., 347 US 437 [1952]. Justice Ginsburg took careful pains to quote her own decision in *Goodyear* to set that particular limitation to *Perkins*: "[The Court's] 1952 decision in *Perkins v. Benguet Consol. Mining Co.* remains the textbook case of general jurisdiction appropriately exercised over a foreign corporation *that has not consented to suit in the forum*." *Daimler* at 129 (emphasis added), quoting *Goodyear* at 928.

Finally, in *BNSF*, Justice Ginsburg again eliminated consent jurisdiction from constitutional review, carefully stating that "*absent consent*, a basis for service of a summons on the defendant is prerequisite to the exercise of personal jurisdiction." *BNSF*, 581 US ___, 137 S Ct at 1556 (emphasis added).

With nothing from the Supreme Court which denies corporate registration as a basis for consent to personal jurisdiction, this Court is justified in asking whether there is anything which supports such a consent to jurisdiction. Substantial authority confirms that there is.

In *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 US 165 [1939], the Court underscored the reasoning behind New York's consent to jurisdiction by registration process by citing the words of Judge

Cardozo in *Bagdon*:

> 'The stipulation is therefore a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent . . . . The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject-matter. It means that whatever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person.'

Neirbo, 308 US at 175, quoting with approval, *Bagdon*, 217 NY at 436-437.

In *Bagdon*, the Court faced the same argument it faces here. The defendant conceded that it was engaged in business in New York, had registered to do business in New York, and had designated an agent for the service of process in New York, never having revoked that authority. "It insists, however, that his agency must be limited to actions which arise out of the business transacted in New York. It says that any other construction would do violence to its rights under the federal Constitution." *Bagdon* at 433-434. The Court discarded that argument entirely. "We think there is nothing to the contrary either in

the decision[s] of the Supreme Court of the nation or in the guaranty of due process under the federal Constitution."[12] *Id.* at 438-439. In the same way that *Daimler* was not based on the 14th Amendment, neither was *Bagdon*. It was the contractual nature of New York's consent by registration protocol that controlled.

Neirbo also confirmed that there was nothing unconstitutional about consent by registration jurisdiction, as the Court had confirmed in *Pennsylvania Fire Ins. Co. v. Gold Issuing Mining Co.*, 243 US 93 [1917]. *Neirbo* at 175. Neither *Neirbo* nor *Pennsylvania Fire* have ever been reversed by the Supreme Court, nor *Bagdon* reversed by this one.

The carefully orchestrated attack on consent by registration is understandable, as corporate defendants, having bested *International Shoe*, now move on to the only general jurisdictional ground remaining to the states. Once eliminated, foreign corporations, both international and domestic, will have a *superior* defensive position to those domestic

[12]The Court's rejection of any control over consent by registration being violative of Constitutional due process was not reached in a vacuum. Judge Learned Hand had said as much in *Smolik v. Philadelphia & Reading Coal & Iron Co.*, 222 F 148, 150-151 [SDNY 1915] (consent by registration not a legal fiction; requirement of registration in order to do business in New York raises no constitutional objection). The defendant in *Smolik* would find its argument fail in another case — *Bagdon v. Philadelphia & Reading Coal & Iron Co.* — and *Smolik*

corporations who are actually incorporated within the same state in which both of them do business. The foreign corporation will be immune from suit within the state under general jurisdiction. Chase, *Consent to Judicial Jurisdiction: The Foundation of "Registration" Statutes*, 73 N.Y.U. Ann. Surv. Am. L. 159, 166 [2018] ("In addition, it is important to keep sight of the reason registration statutes exist. States enacted them in large part because they wanted to keep foreign corporations on a level playing field with locally incorporated entities.") The assault has not only dismissed the efficacy of *stare decisis* and respect for the concept of consent to contract, but ignored the incongruity of *Daimler*'s construct that a corporation can only be subject to general jurisdiction in two places, where it is "at home" and where it is incorporated. "Ironically," notes one commentator, "incorporation by no means indicates that the corporation has any other activities in the state, whereas only a corporation that has active business in that state would comply with its registration requirement." Chase at 166.

The Restatement (Second) of Conflict of Laws summary of the consent doctrine is illustrative of its vitality. It recognizes the validity

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would find support in *International Shoe*, 326 US at 318.

of consent to general jurisdiction by registration and designation:

> A state has power to exercise judicial jurisdiction over a foreign corporation which has authorized an agent to 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.

Restatement (Second) of Conflict of Laws § 44 [1971]. The comments to Section 44 further bolster the solidity of these concepts. *Id.* at § 44 cmt. a ("By authorizing an agent or public official to accept service of process in actions brought against it, the corporation consents to the exercise by the state of judicial jurisdiction over it as to all causes of action to which the authority of the agent or official extends. *This consent is effective even though no other basis exists for the exercise of jurisdiction over the corporation.*") [emphasis added]; § 44 cmt. b ("It is commonly provided by statute that a foreign corporation shall not do business in a state until it has procured a license to do so from some public official. As a condition precedent to obtaining such a license, it is commonly provided that the corporation shall authorize an agent or public official to accept

service of process for it in actions brought against it in the state. Once such authorization has been given and service of process made upon the designated agent or official, the state may exercise judicial jurisdiction over the corporation as to all causes of action which fall within the terms of the authorization. *This is true even though such authorization was a condition precedent to the corporation being permitted to do business in the state.*") [emphasis added]; § 44 cmt. c ["If a corporation has authorized an agent or a public official to accept service of process in actions brought against it in the state, the extent of the authority thereby conferred is a question of interpretation of the instrument in which the consent is expressed and of the statute, if any, in pursuance of which the consent is given. … *By qualifying under one of these statutes, the corporation renders itself subject to whatever suits may be brought against it within the terms of the statutory consent as interpreted by the local courts provided that this interpretation is one that may fairly be drawn from the language of the enactment.*"] [emphasis added].

Those who support a view that, despite refraining from doing so, the Supreme Court has decided that consent to jurisdiction through

corporate registration violates the 14th Amendment, seize upon their belief that such consent is not a "real" consent at all, but a coercive scheme to ensnare the unwary corporate defendant. An oft-cited proponent of such a principle maintains that "[i]t is not entirely clear, however, that the 'consent' given by a corporation is actually a 'real consent' as Justice Cardozo suggested" and that "[i]n the vast majority of circumstances, a corporation does not know in advance what it is consenting to in registering to do business." Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 Cardozo L. Rev. 1343, 1387 [2015]. The authority for this startling statement of fact is the author's own opinion, not that of any court.

Ignoring the facts of the case at bar, where two major international corporations have been registered to do business in New York for scores of years, never revoked that registration, and have never contended that they were "shocked" to discover that they were thereby subject to general jurisdiction by consent within the state, it would be hard to view New York's consent by registration framework as coercive in any sense. First, no corporation is compelled to do business in New York, nor having decided to do so at one point, prevented from

withdrawing that consent at some later date. In the same manner, no corporation is required to choose Delaware as its state of incorporation, such as Ford; a state in which it need do no business whatsoever in order to do so. Having decided that it would be advantageous to register to do business in New York, the failure to register is hardly the stuff of which "coercion" is made. "[T]he only realistic penalty is the inability to institute an action in the state's courts if the court finds that the corporation is 'doing business' without having registered. And even in that event, the problem is readily cured by registration at that time, rendering the rule hardly any penalty at all." Chase at 180.

The Appellate Division recognized that, at the end of the day, in order to revoke consent jurisdiction in New York, it would simply have to ignore it. "The parties do not dispute that there is statutory authority for the exercise of general jurisdiction over Ford or Goodyear, or that the exercise of such jurisdiction would be consistent with New York law." 168 AD3d at 143. "The disagreement lies in whether the exercise of such jurisdiction would comport with the limits imposed by federal due process since *Daimler*." *Id.* In reality, however, the Appellate Division's summary begs the question, which is more properly

whether consent jurisdiction, being contractual in nature, impacts Constitutional due process at all. The problem for the court below, besides the fact that *Bagdon* is binding authority in this state and that the Court has not seen any reason to change the rule it set, was that *Daimler* expressed no federal due process limits on contractual consent to jurisdiction, nor did *BNSF*.

In discarding *Bagdon* as authority, the Appellate Division made it plain that it was clearing the field of any claim that it was basing its decision on New York's consent by registration rule being coercive. Corporations know precisely what registering to do business in New York means and its effect. "There has been a longstanding judicial construction, however, by New York courts and federal courts interpreting New York law, that registering to do business in New York and appointing an agent for service of process constitutes consent to general jurisdiction." *Id.* at 147, citing *inter alia Bagdon* at 436-437 and *Rockefeller Univ. v. Ligand Pharmaceuticals*, 581 FSupp2d 461, 464-467 [SDNY 2008] (listing numerous federal cases finding consent by registration).

Instead, the Appellate Division forged off on its own constitutional

pathway, one not shared by either this Court or the United States Supreme Court. In personam jurisdiction had "evolved," it said, "particularly in the way in *Daimler* has altered that jurisprudential landscape" to the extent that consent to general jurisdiction in New York could no longer be permitted to exist. 169 AD3d at 187. The Appellate Division assured that it was free to ignore *Bagdon* entirely, for it was an old case and could only be "understood within the historical context in which it was decided." *Id.* at 148.

However, no case in the *Goodyear-Daimler-BNSF* trilogy did any such thing and, in fact, the Court purposefully removed consent jurisdiction from its consideration. The Appellate Division's analysis, on the other hand, relying on the history of consent jurisdiction in New York, comes to an argumentative dead-end, for no case decided by the Supreme Court undercuts or dilutes the decision of this Court in *Bagdon*. The Appellate Division is incorrect when it equates consent by registration as "unacceptably grasping" under *Daimler*, for *Daimler* never considered consent jurisdiction at all.

Finally, to say that this Court's failure to cite *Bagdon* since *International Shoe* bears any relationship to its vitality ignores the

caution of the author of *Bagdon* that "not likely to be vacated is the verdict of quiescent years." *Coler v. Corn Exch. Bank*, 250 NY 136, 141 [1928], *aff'd* 280 US 218 [1930]. A bad decision does not get better through use, while a good decision can stand proudly silent through time.

CONCLUSION

The decision of the Appellate Division should be reversed, the decision of Supreme Court reinstated, and the matter returned to Supreme Court for all purposes; together with such other, and further, and different relief as the Court deems just and proper within the premises.

Respectfully submitted,

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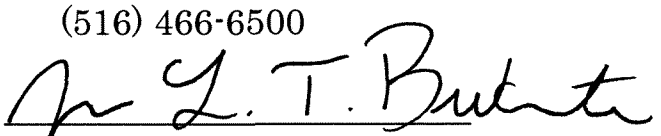
By: 
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April 30, 2020

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NEW YORK STATE COURT OF APPEALS
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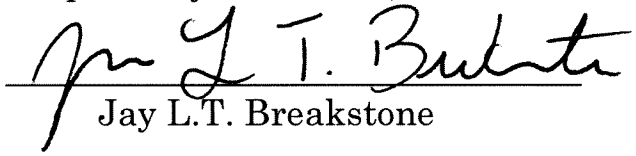
Dated: April 30, 2020

Respectfully submitted,



Jay L.T. Breakstone