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

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 Respondent.

MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS CURIAE* ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF DEFENDANTS-RESPONDENTS

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Attorneys for Amicus Curiae

PLEASE TAKE NOTICE that, upon the annexed affirmation of Lanier Saperstein, dated July 22, 2021, and the accompanying proposed brief, the New York City Bar Association will move this Court on August 2, 2021, or as soon thereafter as counsel may be heard, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207, for an order pursuant to Rule 500.23 of the Rules of Practice of the Court of Appeals of the State of New York granting the New York City Bar Association leave to file the accompanying brief as *amicus curiae* in support of defendants-respondents in the above-captioned action, and for such other and further relief as the Court may deem just and proper.

Dated: July 22, 2021
New York, New York

Respectfully submitted,

NEW YORK CITY BAR ASSOCIATION

by:_____

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of Practice of the Court of Appeals of the State of New York, the New York City Bar Association states as follows:

The New York City Bar Association is a New York not-for-profit corporation. It has no shareholders, parent corporations or subsidiaries. It is not owned or controlled by any other entity. Nor does it own or control any other entity. Its purpose is to advocate reform of the law in the public interest, increase access to justice, and support the rule of law in the United States.

LANIER SAPERSTEIN, an attorney admitted to practice in the courts of the State of New York, and not a party to this action, hereby affirms the following to be true under the penalties of perjury, pursuant to CPLR 2106:

1. I am a partner with Jones Day, attorneys for the New York City Bar Association (the "City Bar") in the above-captioned action. I submit this affirmation in support of the City Bar's motion to appear as *amicus curiae*.

2. Submitted herewith is a copy of the brief the City Bar wishes to submit to the Court.

The Movant's Identity and Interest

3. Founded in 1870, the City Bar is one of the oldest bar associations in the United States. With more than 25,000 members and over 150 standing and special committees, the City Bar seeks to promote reform in the law and to improve the administration of justice at the state and local levels by commenting on proposed legislation, publishing reports on legal issues, and participating as *amicus curiae* in litigation that has the potential to impact the practice of law. In these ways, the City Bar serves as a voice for the legal profession in promoting the equitable, efficient administration of justice in New York.

4. The City Bar seeks leave to file this brief because it is well-situated to comment on the question in this case, which is whether a foreign corporation that complies with the Business Corporation Law ("BCL") by appointing the New York

Secretary of State as its agent for service of process consents to the general jurisdiction of the State's courts. As further stated below and in the proposed brief, the City Bar was closely involved in the Joint Legislative Committee to Study Revision of Corporation Laws ("the Committee")'s expansive and exhaustive study of the corporate laws in New York and the Committee's submission of the legislative proposal, which later became the BCL.

Non-Participation of Parties

5. No party or its counsel contributed content to this brief or otherwise participated in the brief's preparation.

6. No party or its counsel contributed money intended to fund preparation or submission of this brief.

7. No person or entity other than movant or its counsel contributed money intended to fund preparation or submission of this brief.

Basis for Amicus Curiae Relief

8. Pursuant to Rule 500.23(a)(4)(i) of the Rules of Practice of this Court, the Court should grant movant the City Bar permission to appear as *amicus curiae* because the movant's brief we believe would assist the Court by explaining the BCL's legislative history and related New York law, or would otherwise identify law or arguments that might escape the Court's consideration.

9. The City Bar was closely involved in the Committee's project of studying the corporate laws in New York and worked directly with the Committee to ensure a "maximum exchange of views" as the Committee drafted the BCL. Joint Legislative Committee to Study Revision of Corporation Laws, *Fourth Interim Report to 1960 Session of New York State Legislature* at 36–37, 2 N.Y. Leg. Doc. No. 15 (1960). In fact, the Committee made "special note" of the City Bar's extensive assistance, *id.* at 31, explaining that "[t]he development of the final text" of the BCL was accomplished only through "close cooperation with the Association of the Bar of the City of New York." Joint Legislative Committee to Study Revision of Corporation Laws, *Fifth Interim Report to 1961 Session of New York State Legislature* at 29, 2 N.Y. Leg. Doc. No. 12 (1961).

10. Given this background and its extensive involvement and contribution to the drafting of the BCL, the City Bar is uniquely positioned to provide the Court with information on, *inter alia*, any statutory basis with respect to personal jurisdiction generally and consent-by-designation specifically under the BCL, the BCL's legislative history in relation to the adoption of the consent-by-designation provision, New York law on consent-by-designation and New York courts' interpretation thereof.

11. For the reasons set forth herein, the City Bar respectfully requests that the Court grant this motion in all respects, grant the City Bar leave to file the attached brief in this appeal, and award such other and further relief as the Court may deem just and proper.

Affirmed: July 22, 2021
New York, New York

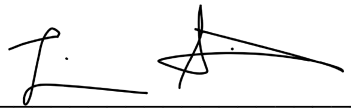

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EXHIBIT A

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PRELIMINARY STATEMENT AND INTEREST OF *AMICUS CURIAE*

Founded in 1870, *amicus curiae* the New York City Bar Association (the "City Bar") is one of the oldest bar associations in the United States. With more than 25,000 members and over 150 standing and special committees, the City Bar seeks to promote reform in the law and to improve the administration of justice at the state and local levels by commenting on proposed legislation, publishing reports on legal issues, and participating as *amicus curiae* in litigation that has the potential to impact the practice of law. In these ways, the City Bar serves as a voice for the legal profession in promoting the equitable, efficient administration of justice in New York.

The question in this case is whether a foreign corporation that complies with the Business Corporation Law ("BCL") by appointing the New York Secretary of State as its agent for service of process thereby consents to the general jurisdiction of the State's courts. This is, at root, a question about the meaning of the BCL.

The City Bar is well-situated to comment on that issue. The BCL was enacted after years of study by the Joint Legislative Committee to Study Revision of Corporation Laws ("the Committee"). The City Bar was closely involved in that project and worked directly with the Committee to ensure a "maximum exchange of views" as the Committee drafted the BCL. Joint Legislative Committee to Study Revision of Corporation Laws, *Fourth Interim Report to 1960 Session of New York State Legislature*, at 36-37, 1960 N.Y. Leg. Doc. No. 15 ("*Fourth Interim Report*"). In fact, the Committee made

"special note" of the City Bar's extensive assistance, *id.* at 31, explaining that "[t]he development of the final text" of the BCL was accomplished only through "close cooperation with . . . the Association of the Bar of the City of New York." Joint Legislative Committee to Study Revision of Corporation Laws, *Fifth Interim Report to 1961 Session of New York State Legislature*, at 29, 1961 N.Y. Leg. Doc. No. 12 ("*Fifth Interim Report*").

Given this background, the City Bar submits this brief to explain its view of the BCL, that statute's legislative history, and related New York law. Those sources make clear that the BCL does not provide for general jurisdiction over a foreign corporation based on the corporation's designation of the Secretary of State as its agent for service of process, either expressly or by incorporating a purported common-law rule to that effect. That is particularly clear in light of the Legislature's recent enactment of measures that would insert a consent-by-designation requirement into the BCL. *See* S.B. S7253, 2021 Reg. Sess. (N.Y. 2021) (passed June 10, 2021); Assemb. B. A7769, 2021 Reg. Sess. (N.Y. 2021) (passed June 10, 2021). Those enactments confirm what the statutory text and legislative history make plain: the BCL does not contain a consent-by-designation requirement.

This Court should therefore affirm the Appellate Division's order in this case.

STATEMENT OF THE CASE

A. Legal Background

The BCL was enacted in 1961 after years of study by the Committee. At the time, other states had modernized their corporation laws, and the Legislature decried New York's failure to accomplish "a similar revision and modernization." Joint Legislative Committee to Study Revision of Corporation Laws, *Interim Report to 1957 Session of New York Legislature*, at 54, 1957 N.Y. Legis. Doc. No. 17 ("*First Interim Report*"). The Legislature thus created the Committee in 1956 to conduct a "comprehensive study" of the corporate laws in New York and submit "such legislative proposals as it may deem necessary." *Id.* at 54-55.

The Committee's reach was expansive. Although formally composed of only seven members of the Legislature and a handful of staff, the Committee sought "maximum contact with interested groups" to ensure the "broadest possible participation" in its work and recommendations. *Id.* at 13. The Committee achieved this through its advisory subcommittees, which represented the full spectrum of affected parties, from business leaders, industry organizations, and labor unions, to practicing attorneys, the legal academy, and an array of government agencies. *See* Joint Legislative Committee to Study Revision of Corporation Laws, *Second Interim Report to 1958 Session of New York Legislature*, at 14-25, 1958 N.Y. Legis. Doc. No. 23 ("*Second Interim Report*").

The Committee's work was also exhaustive. Soon after its formation, the Committee resolved that the "present condition of the statutes and decisional law

relating to corporations require an over-all study and a general statutory revision as distinguished from piecemeal amendments." *First Interim Report* at 11. To do that, the Committee proposed a wide-ranging research project to fully understand the State's existing corporation laws, identify problems in the State's laws, and survey the approaches to those problems that had been taken in other jurisdictions. *Id.* at 13-14.

The Committee created an outline of over 150 substantive subjects. For most of those subjects, the Committee commissioned a Research Report that described the relevant provisions of New York law, compared them with analogous provisions in the American Bar Association's Model Business Corporation Act and the laws of ten other jurisdictions, and made substantive recommendations about how New York's law should be revised. *See Second Interim Report* at 31-33; *see also id.* app. B (research outline). Each of those reports or a summary, aptly called a Summary of Researcher's Report, was then disseminated to the Committee and its network of advisory subcommittees for review and comment. *See id.* at 34-38. Comments were incorporated into a Final Research Recommendation, which served as the substantive basis to guide drafting the Committee's proposed legislation. *See id.* at 34; *see also* Robert S. Stevens, *New York Business Corporation Law of 1961*, 47 Cornell L. Rev. 141, 143 (1962) (noting that the Committee received 1350 comments to its substantive recommendations).

The Committee submitted draft legislation in March 1961, and the Legislature enacted the Committee's proposal unanimously later that month, including provisions that required a foreign corporation to appoint an in-state agent for service of process. *See*

Fifth Interim Report at 27-28; *see also* Stevens, *supra*, at 142-43. In relevant part, the BCL provides that no foreign corporation is permitted to conduct business in New York unless it is authorized to do so. *See* N.Y. Bus. Corp. Law § 1301(a). To obtain authorization, a foreign corporation must file an application with the New York Secretary of State that designates the Secretary of State to act as the corporation's agent to receive service of process. *See id.* § 1304(a)(6). The foreign corporation may also designate an additional, private in-state agent to receive service of process. *See id.* § 1304(a)(7).

B. Factual Background

This case arises out of a fatal car accident in Virginia. *Aybar v. Aybar*, 169 A.D.3d 137, 139 (2d Dep't 2019). Plaintiffs are New York residents, who are the surviving passengers and representatives of deceased passengers' estates. *Id.* They assert negligent-manufacturing claims against Defendant Ford Motor Company, who manufactured the car involved in the accident, and Defendant Goodyear Tire & Rubber Company, who manufactured the tires on the car when the accident occurred. *Id.*

Defendant Ford is a Delaware corporation with its principal place of business in Michigan; Defendant Goodyear is an Ohio corporation with its principal place of business in Ohio. *Id.* Both conduct business in New York and both, in compliance with the BCL provisions described above, "registered to do business in New York" and designated the Secretary of State "as [their] agent for service of process." *Id.* at 140-41. Pointing to that fact, the trial court denied motions to dismiss the claims against

Defendants for lack of personal jurisdiction, holding they had "consented to general jurisdiction in New York by each registering to do business in New York as a foreign corporation and designating a local agent for service of process." *Id.* at 142.

The Appellate Division reversed. It observed that the BCL's provisions "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 business here has such an effect." *Id.* at 147. Citing *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916), the Appellate Division stated that "[t]here has been [a] longstanding judicial construction" of New York law that "registering to do business in New York and appointing an agent for service of process constitutes consent to general jurisdiction." *Aybar*, 169 A.D.3d at 147. But that construction of New York law, the court observed, no longer comported with federal due process given "the evolution of in personam jurisdiction jurisprudence, and, particularly the way in which *Daimler* [*AG v. Bauman*, 571 U.S. 117 (2014)] has altered that jurisprudential landscape." *Id.* The court pointed to the fact that this Court has not cited *Bagdon* since the landmark decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which is "a strong indicator that [*Bagdon*'s] rationale is confined to that era . . . and . . . it no longer holds in the post-*Daimler* landscape," *Aybar*, 169 A.D.3d at 152. This Court granted Plaintiffs leave to appeal.

ARGUMENT

APPOINTING THE SECRETARY OF STATE AS ITS AGENT FOR SERVICE OF PROCESS DOES NOT SUBJECT A FOREIGN CORPORATION TO GENERAL JURISDICTION

The question presented is whether a foreign corporation that registers to do business in New York and, pursuant to the BCL, designates the Secretary of State as its agent for service of process thereby "consent[s] to the general jurisdiction of New York courts." *Aybar*, 169 A.D.3d at 139. As all the parties agree, that is a question, at least in the first instance, of New York law. This Court may therefore affirm the Appellate Division's order under New York law without reaching the issue of whether a consent-by-designation state law comports with federal due process. *See Matter of Syquia v. Bd. of Educ. of Harpursville Cent. Sch. Dist.*, 80 N.Y.2d 531, 535 (1992) ("Under established principles of judicial restraint . . . , courts should not address constitutional issues when a decision can be reached on other grounds[.]").

A. The Text of the Business Corporation Law ("BCL") Does Not Create a Consent-by-Designation Rule.

Defendants argue, and Plaintiffs effectively agree, that the plain language of BCL does not provide for general jurisdiction over a foreign corporation based on its designation of the Secretary of State as its agent for service of process. Resp. Br. 9-15; *see* Reply Br. 3 ("There is no requirement that the [BCL] contain an explicit consent to general jurisdiction[.]"). The parties are correct in this regard.

The BCL provides that a foreign corporation "shall not do business in this state until it has been authorized to do so." N.Y. Bus. Corp. Law § 1301(a). To apply for authorization, a foreign corporation must designate the Secretary of State "as its agent upon whom process against it may be served." *Id.* § 1304(a)(6); *see id.* § 304(a), (b) (stating that the Secretary of State "shall be the agent of . . . every authorized foreign corporation upon whom process against the corporation may be served" and that no foreign corporation "may be formed or authorized to do business in this state under this chapter unless in its certificate of incorporation or application for authority it designates the secretary of state as such agent").

None of these provisions—nor any other provision of the BCL—states that New York courts acquire general jurisdiction over a foreign corporation by virtue of its designation of the Secretary of State as its agent for service of process, as required by the BCL.

The BCL's silence on this issue is not surprising. Article 13, entitled "Foreign Corporations," addresses only issues related to a foreign corporation's authority to do business in New York. And Article 3, entitled "Corporate Name and Service of Process," addresses only issues related to service of process on corporations. Personal jurisdiction is instead the subject of Article 3 *of the CPLR*—"Jurisdiction and Service, Appearance and Choice of Court." The only references to personal jurisdiction in Articles 3 and 13 of the BCL point the reader back to the CPLR. *See* N.Y. Bus. Corp. Law § 306-A(e)(1) ("[T]he personal or other jurisdiction of the courts of this state under

article three of the civil practice law and rules[.]"); *id.* § 307(a) ("[T]he personal or other jurisdiction of the courts of this state under article three of the civil practice law and rules[.]").[1]

Given the BCL's silence on personal jurisdiction generally and consent-by-designation specifically, there is no statutory basis for reading the BCL to establish general jurisdiction over every foreign corporation that complies with its designation requirement.

B. Legislative History Does Not Support Inferring a Consent-by-Designation Rule in the BCL.

There also is nothing in the BCL's legislative history to suggest New York intended to adopt a consent-by-designation rule. In fact, the legislative history confirms that the focus was on service, not jurisdiction.

[1] In fact, the BCL's drafters made clear that that statute was not intended to establish substantive jurisdictional rules. Several years after the BCL was originally enacted, the Legislature amended BCL § 307 to remove provisions from that section that subjected unauthorized foreign corporations to jurisdiction as a result of their having done business in New York. *See* Ch. 803, § 4, 1965 N.Y. Laws 1895, 1897. The revised provision provided simply that an unauthorized foreign corporation would be subject to jurisdiction as provided "under article three of the civil practice law and rules." *Id.* The Committee explained that the change was intended to remove unintended inconsistencies between the BCL and the CPLR, and to clarify that "the sole function" of BCL § 307 was "to provide an additional method for effecting service upon an unauthorized foreign corporation." Joint Legislative Committee to Study Revision of Corporation Laws, *Explanatory Memorandum on Amendments to Business Corporation Law and Labor Law*, at 2 (July 15, 1965), *reprinted in* Bill Jacket for 1965 N.Y. Laws 1895, ch. 803. That is, the amendment made clear that the drafters viewed the BCL as the source for rules about how to serve process on an unauthorized foreign corporation, not the source for rules about when an unauthorized foreign corporation could be subject to personal jurisdiction, which rules would instead reside in the CPLR.

First, the BCL's legislative history is telling for what it does not say. As part of its research leading up to the BCL's enactment in 1961, the Committee considered the then-existing statutory requirement that a corporation designate the Secretary of State to act as its agent for service of process. The Committee took as a given that every corporation should designate an in-state agent for service. The only question was whether a corporation should be permitted to designate its own private agent in place of, or in addition to, the Secretary of State.

In an early analysis of the issue, Committee staff recommended against allowing *foreign* corporations to designate a private service agent in lieu of the Secretary of State. The Committee reasoned that there should be "a central office" where "process served on a designee of a corporation may be examined" and where foreign corporations could turn to "ascertain whether process against them has been duly served." Joint Legislative Committee to Study Revision of Corporation Laws, *Research Report No. 13*, at 10 (Jan. 8, 1958). Permitting the designation of a private agent in place of the Secretary of State would frustrate that goal, the Committee explained, because a private agent could "pass away, be dissolved, move their office or resign." *Id.* The Committee thus initially recommended that a foreign corporation doing business in New York be required to designate the Secretary of State as its service agent, and that "[t]he designation of individual or corporate registered agents should not be permitted." *Id.* at 1.

Committee staff recommended, however, that *domestic* corporations should be permitted to designate an "alternative person upon whom service may be made," in

addition to the Secretary of State. Joint Legislative Committee to Study Revision of Corporation Laws, *Research Report No. 71*, at 2 (Aug. 12, 1958). The Committee explained that "[t]he basic consideration underlying any statute providing for a statutory agent should be convenience (in effecting service)." *Id.* at 12. Requiring a corporation to designate the Secretary of State advanced this interest by "providing an easily ascertainable agent to serve." *Id.* And allowing a corporation to designate its own private agent likewise would promote convenience because, in most cases, such agents would be located "in a place physically convenient" for litigants seeking to effect service. *Id.* at 14. The Committee thus recommended that domestic corporations be allowed to designate a private agent in addition to the Secretary of State, reasoning that the "more statutory agents from among whom he may choose the greater the litigant's ease in effecting service." *Id.*

After these recommendations were circulated for comment, one of the Committee's advisory subcommittees—the Advisory Subcommittee on Labor and Industry—recommended against treating domestic and foreign corporations differently. Emphasizing its members' "practical experience in the field of corporate activity," the subcommittee recommended a single rule for "all corporations." Letter from Edward J. Speno, Chairman, Advisory Subcommittee on Labor and Industry, to Warren M. Anderson, Chairman, Joint Legislative Committee to Study Revision of Corporation Laws, at 1, 3 (Mar. 11, 1960), *reprinted in Fourth Interim Report* at 47. To that end, the subcommittee proposed two alternatives. Under the first, every corporation

would be required to "establish and maintain a specific office address within the state for service." *Id.* at 3. Under the second, every corporation would be required to designate the Secretary of State as its agent, but would have "the right to choose a process agent in addition to the Secretary of State." *Id.* at 4.

The Committee agreed that a single rule was appropriate and selected the subcommittee's second proposal: Every domestic and foreign corporation would be required to appoint the Secretary of State as its agent for service of process, and would be permitted to designate an additional private agent. *See* Ch. 855, §§ 304-305, 1304, 1961 N.Y. Laws 2356, 2367-68, 2454.

The Revisers' Notes and Comments, which were published with the draft text "to assist in the understanding of the new Business Corporation Law," explained that the Secretary of State was "the designated agent for service of process for domestic and authorized foreign corporations," and that a corporation could also "designate an additional agent upon whom process against it may be served." Joint Legislative Committee to Study Revision of Corporation Laws, *Revised Supplement to Fifth Interim Report to 1961 Session of New York State Legislature*, at 3, 22-23, 1961 N.Y. Leg. Doc. No. 12.

As this history reveals, throughout the Committee's consideration, there was never any suggestion that appointing an in-state agent would subject a foreign corporation to general jurisdiction in New York. Rather, the Committee's focus was simply to establish a convenient and effective mechanism for New York litigants to

effect service on a foreign corporation. "[C]onvenience," the Committee explained, was the "basic consideration" and "touchstone" of the in-state agent requirement. *Research Report No. 71* at 12-13. That requirement was designed to maximize "the litigant's ease in effecting service" by ensuring the "ready availability, at a fixed location, of a person to validly accept service against the corporation . . . in a place physically convenient to the litigant." *Id.* at 14. There was no mention of personal jurisdiction, consent, *Bagdon*, or anything else that might suggest the Committee simultaneously was enacting a sweeping consent-by-designation theory.

Second, the BCL's legislative history is also telling in the little it *does* say about personal jurisdiction over foreign corporations. One research report was dedicated to "actions by and against foreign corporations." Joint Legislative Committee to Study Revision of Corporation Laws, *Research Report No. 97*, at 1 (Oct. 29, 1958). The sections of the General Corporation Law that were "in question" did not address personal jurisdiction over foreign corporations. *Id.* at 1-2. But the Committee did recognize the sea change brought about by *International Shoe*.

The Committee explained that, before *International Shoe*, jurisdiction over foreign corporations had been based on various "fictions." *Id.* at 22. One such fiction was that, "[w]here a foreign corporation voluntarily engaged in activities in the state, it was deemed to have *consented* to the jurisdiction of the courts of the courts of the state." *Id.* (emphasis in original). A second fiction was that "[a] corporation, by carrying on business in a foreign jurisdiction, was regarded as *present* in that state." *Id.* (emphasis in

original). And a third fiction was that "a foreign corporation which sent its agent into a state and carried on business there[] *submitted itself* to the jurisdiction of the courts of that state." *Id.* (emphasis in original). The Committee noted, however, that those "fictions" were "*discarded* in the *International Shoe* case which substituted a minimum contact theory." *Id.* (emphasis added). Instead, the Committee wrote, an action against a foreign corporation was permitted after *International Shoe* only if the foreign corporation had "sufficient minimum contacts with the forum to make it reasonable" to subject the corporation to jurisdiction in the forum State. *Id.*

This acknowledgement is critical because it demonstrates that the BCL's drafters were aware of the consent-by-designation "fiction" that had prevailed under the U.S. Supreme Court's earlier framework for analyzing personal jurisdiction questions. And it shows that the BCL's drafters were of the view that that "fiction" had been "discarded" with the U.S. Supreme Court's decision in *International Shoe*. The Committee cannot reasonably be deemed to have incorporated into the BCL a consent-by-designation scheme that the Committee explicitly described as having been "discarded" by the U.S. Supreme Court in *International Shoe*. For that additional reason, therefore, the BCL's legislative history cuts against reading a consent-by-designation rule into the BCL.

C. A Consent-by-Designation Rule Would Be Contrary to This Court's Understanding of the BCL.

This Court has also read the BCL in a way that forecloses Plaintiffs' consent-by-designation theory. As this Court has explained, there are two "independent" "components and constitutional predicates of personal jurisdiction." *Keane v. Kamin*, 94 N.Y.2d 263, 265 (1999). The first "involves service of process, which implicates due process requirements of notice and opportunity to be heard." *Id.* The other is "the jurisdictional basis," which "involves the power, or reach, of a court over a party, so as to enforce judicial decrees." *Id.* No matter how "flawless [the] service may be," "[t]o satisfy the jurisdictional basis[,] there must be a constitutionally adequate connection between the defendant, the State[,] and the action." *Id.*

In *Flick v. Stewart-Warner Corp.*, 76 N.Y.2d 50 (1990), this Court explained that the BCL's service-of-process provisions for foreign corporations address only one component of personal jurisdiction—service of process. The plaintiff in *Flick* mistakenly served a foreign corporation using the procedures for *authorized* foreign corporations, N.Y. Bus. Corp. Law § 306, rather than the procedures for *unauthorized* foreign corporations, *id.* § 307. Both provisions treat the Secretary of State as a foreign corporation's agent for service of process, but they differ on whether a plaintiff must serve the foreign corporation a copy of the process and attest to that service in an affidavit. The question was whether the service was valid notwithstanding the plaintiff's mistake on which set of procedures to use.

In answering that question, the Court explained that the BCL's service-of-process provisions assume a "predicate for general jurisdiction." *Flick*, 76 N.Y.2d at 55. For an unauthorized foreign corporation, the predicate was—consistent with the then-prevailing understanding of due process—"the fact that [the corporation] is doing business in the State and has thus created a constructive presence over which New York courts can exert general jurisdiction." *Id.* For an authorized foreign corporation, "[t]here are no theoretical uncertainties concerning the basis for jurisdiction since the foreign corporation is concededly doing business in the State[.]" *Id.* at 57. In both contexts, therefore—at least under governing law at the time—"by doing business in the State[,] a foreign corporation has submitted itself to the jurisdiction of our courts[.]" *Id.* at 56. Thus, as the Court has made clear, the BCL's service-of-process provisions become relevant only if the "jurisdictional basis" component of personal jurisdiction exists—"a constitutionally adequate connection between the defendant, the State and the action." *Keane*, 94 N.Y.2d at 265; *see also Stewart v. Volkswagen of Am., Inc.*, 81 N.Y.2d 203, 209 (1993) (the service-of-process provisions apply "where there is a basis for general jurisdiction").

In light of *Flick*, it would make little sense if a foreign corporation's designation of the Secretary of State as its agent for service of process establishes general jurisdiction over the corporation. On that view (which Plaintiffs advance), it would not matter whether there was an independent "basis for jurisdiction" over the corporation, as *Flick* required; designation alone would confer general jurisdiction over the corporation. That view has no basis in the BCL's service-of-process provisions, and it is directly

contradicted by *Flick*. *See also Laufer v. Ostrow*, 55 N.Y.2d 305, 310 (1982) ("[T]he authority of the New York courts [to exercise jurisdiction over a foreign corporation] is based *solely* upon the fact that the defendant is engaged in such a continuous and systematic course of doing business here as to warrant a finding of its presence in this jurisdiction" (cleaned up and emphasis added)).

D. There Is No Common Law Consent-by-Designation Rule.

Plaintiffs argue that the BCL's silence indicates an intent to incorporate a common-law consent-by-designation rule. Plaintiffs claim that the BCL should be interpreted "against a background of well established common law." Reply Br. 3. Citing *Bagdon*, Plaintiffs claim that the background law when the BCL was drafted included "a common law rule that preceded the Business Corporation Law by over 50 years" under which designation of an in-state agent constituted consent to jurisdiction in the State. Reply Br. 4. This argument fails for at least two reasons.

For one, the history of the BCL belies the claim that the statute's silence about the consent-by-designation connotes acquiescence in it. The drafters of the BCL recognized that *International Shoe* had "discarded" the "fiction" that a corporation's appointment of an agent for the service of process in the State constituted a consent to the State's jurisdiction. The drafters of the BCL thus took the view that the consent-by-designation theory of personal jurisdiction was no longer viable and could not possibly have sought to incorporate that theory through their silence on the issue.

Plaintiffs' acquiescence argument also fails because it misunderstands *Bagdon*. That decision did not hold that the mere designation of an agent for service of process establishes general jurisdiction over a foreign corporation. As explained below, *Bagdon* addressed the validity of service of process on the designated agent of a foreign corporation that was concededly doing business in New York, thus providing a "basis for jurisdiction" under the then-prevailing case law. Close examination of that decision and the context in which it issued thus makes clear that it did not establish the common law rule that Plaintiffs ascribe to it.

1. *Bagdon* should be interpreted in its historical context.

At the outset, it is important to place *Bagdon* in its historical context. At the turn of the century, *Pennoyer v. Neff*, 95 U.S. 714 (1878), set out the then-prevailing view of due process and personal jurisdiction. "*Pennoyer*'s territorial thinking," *Daimler*, 571 U.S. at 138 n.18, was straightforward: In a lawsuit that involves "a determination of the personal liability of the defendant," the defendant "must be brought within [a court's] jurisdiction by service of process within the State, or his voluntary appearance," *Pennoyer*, 95 U.S. at 733. Absent either of those two prerequisites, the legal proceedings lacked "any validity." *Id.*

In subsequent cases, the U.S. Supreme Court explained what it meant for a corporation to "be brought within [a court's] jurisdiction by service of process within the State." *Id.* These cases generally found personal jurisdiction over corporations where

(1) the corporation was doing business in the forum State, and (2) a corporate officer or agent who was a resident of the forum State was properly served, so long as they were "there officially, [that is,] there representing the corporation in its business." *Conley v. Mathieson Alkali Works*, 190 U.S. 406, 411 (1903); *see Kendall v. Am. Automatic Loom Co.*, 198 U.S. 477, 482-83 (1905); *Goldey v. Morning News of New Haven*, 156 U.S. 518, 521-22 (1895).

Within this line of cases, *Barrow S.S. Co. v. Kane*, 170 U.S. 100 (1898), added an important wrinkle relevant here. In *Barrow*, the Court considered a New Jersey plaintiff's lawsuit against a foreign corporation filed in New York federal court. *Id.* at 112. That lawsuit was unique because it concerned "a personal tort committed abroad," rather than in New York. *Id.* Although the cause of action arose outside of New York, the Court found personal jurisdiction over the foreign corporation in New York because—consistent with the *Goldey* line of cases—(1) the foreign corporation was "doing business" in New York, and (2) the plaintiff served "the regularly appointed agents of the corporation in New York." *Id.*

The upshot of the *Pennoyer* understanding of personal jurisdiction, as applied in *Barrow*, was that a foreign corporation could be haled into the courts of a forum State so long as the corporation did business there and its resident officers or agents (who officially represented the corporation in its forum State business) were properly served.

2. *Bagdon* appears to have addressed only the validity of service of process on a foreign corporation's designated agent.

It was against this backdrop that George Bagdon sued Philadelphia and Reading Coal and Iron Company ("P&R") in New York state court. Bagdon was a New York resident. *Bagdon*, 217 N.Y. at 433. P&R was a Pennsylvania corporation that did business in New York. *Id.* But Bagdon's cause of action arose out of P&R's business in Pennsylvania, not its business in New York. *Id.* at 433-34.

To hale P&R into New York state court, Bagdon served the New York agent that P&R—in compliance with New York law—designated as "a person upon whom process against the corporation may be served within the state." *Id.* at 433. P&R contested personal jurisdiction. Importantly, however, P&R "concede[d]" that it was "engaged in business in New York." *Id.* P&R instead challenged solely whether service on the designated agent constituted service on P&R, when the cause of action arose outside of New York. *Id.* at 434. This was a statutory question: Was the scope of agency "limited to actions which arise out of the business transacted in New York," as P&R believed? *Id.* at 433-34. P&R said yes on the ground that "any other construction would do violence to its rights under the Federal Constitution." *Id.* at 434.

Writing for this Court, Judge Cardozo made quick work of the statutory question. He described P&R as having entered into a "contract" with the State, under which P&R obtained "the right to sue [on any contract made in New York] in the courts of the state" in exchange for its designation of an in-state agent for service of process.

Id. at 436. As apparent from the statutory text, "[t]he actions in which [the agent] is to represent the corporation are not limited." *Id.* at 436-37. Thus, the Court held, "service on the agent shall give jurisdiction of the person" in "any action which under the laws of this state may be brought against a foreign corporation[.]" *Id.* at 437.

The Court also rejected P&R's constitutional argument based on "[t]he same reasoning" found in the Supreme Court cases above. *Id.* at 438. Reprising the two-pronged reasoning in the *Goldey* line of cases, Judge Cardozo observed that "[o]fficer and agent alike are in the service of a corporation engaged in business in this state." *Id.* at 439. Reprising *Pennoyer*'s reference to a defendant "brought within" a forum State, Judge Cardozo stated that P&R's agent's "presence in that service has brought the corporation within our jurisdiction." *Id.* And reprising *Barrow*'s holding regarding causes of action arising outside of the forum State, Judge Cardozo held that, "in coming here, [P&R] has become subject to the rule that transitory causes of action are enforceable wherever the defendant may be found." *Id.* The upshot of *Bagdon* was that, because P&R was (concededly) doing business in New York and Bagdon properly served P&R's designated agent, P&R was subject to general jurisdiction in New York state court, even though Bagdon's cause of action arose outside of New York.

In understanding *Bagdon*, it is critical to recall that P&R *conceded* the "jurisdictional basis" component of personal jurisdiction, *Keane*, 94 N.Y.2d at 265, namely, that it was doing business in New York, which (under the then-prevailing view) was sufficient to give a New York general jurisdiction over P&R. *Bagdon* would thus seem to have

addressed only the second component of personal jurisdiction—service of process—when holding that a foreign corporation doing business in New York could be haled into New York court based on service of its designated agent, even for causes of action arising outside of New York.

This Court's application of *Bagdon* a year later—in another decision authored by Judge Cardozo—provides support for this interpretation. The question in *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259 (1917), was "whether [a foreign corporation's] business is such that it is here." *Id.* at 267. In answering that question, Judge Cardozo emphasized that, "[*u*]*nless* a foreign corporation is engaged in business within the state, it is *not* brought within the state by the presence of its agents"—whether the agents are officers, managing agents, or "agent[s] designated by the corporation" as required by New York law. *Id.* at 268 (emphases added). "[T]he jurisdiction," he wrote, exists when "the defendant corporation is engaged in business within this state." *Id.* In other words, service of an in-state agent was necessary, but not sufficient, to establish general jurisdiction over the foreign corporation. The critical question—"[t]he essential thing," *id.*—was whether the corporation actually did business in New York.

Indeed, that is how this Court repeatedly articulated the personal jurisdiction question in numerous cases after *Bagdon* and *Tauza*. *See, e.g.*, *Pomeroy v. Hocking Valley Ry. Co.*, 218 N.Y. 530, 537 (1916) (service "upon [a foreign corporation's] secretary" satisfied due process because "the defendant was doing business within the state of New York at the time" (citing *Bagdon*)); *Holzer v. Dodge Bros.*, 233 N.Y. 216, 221 (1922)

("The extent to which a corporation must do business in the state to justify the service of process upon its representative is not clearly defined, but under all of the authorities to which my attention has been called, it must be some substantial part of its main business." (citing *Bagdon* and *Tauza*)); *Gaboury v. Cent. Vt. Ry. Co.*, 250 N.Y. 233, 236 (1929) ("A foreign corporation, to be subject to the service of process in New York, must have . . . . [been] doing business within our borders under the protection of our laws." (citing *Bagdon* and *Tauza*)); *Matter of Grand Jury Subpoenas Dated June 26, 1986*, 70 N.Y.2d 700, 702 (1987) (corporations "were within the State for jurisdictional purposes" because they "were doing business in New York" and "service upon the principal of the [corporations] constituted satisfactory service" (citing *Tauza*)).

As a result, this Court's cases do not clearly support the consent-by-designation rule that other courts and Plaintiffs have understood *Bagdon* to establish. To the contrary, these courts and Plaintiffs may have made the same mistake this Court highlighted in *Keane*: "mistak[ing] the *service* component of personal jurisdiction with the *jurisdictional basis* component." *Keane*, 94 N.Y.2d at 266. By conceding that it was doing business in New York, P&R could be viewed as conceding the "jurisdictional basis" component of personal jurisdiction—under then-prevailing federal due process principles that are no longer good law. *See Daimler AG*, 571 U.S. at 138 n.18 (specifically dismissing *Barrow* and *Tauza* as cases "decided in the era dominated by *Pennoyer*'s territorial thinking [that] should not attract heavy reliance today" (citation omitted)). Under that view, *Bagdon* was only about the "service" component of personal

jurisdiction; it was not the source of a New York "common law rule of consent to jurisdiction." Reply Br. 4.

Even if *Bagdon* could be read more broadly, that broad reading did not survive *International Shoe*. As the Appellate Division pointed out, this Court has not cited *Bagdon* since the landmark decision in *International Shoe*. That makes sense given *Bagdon* was decided in the era of "*Pennoyer*'s territorial thinking," and the U.S. Supreme Court moved away from that jurisprudential view. *Cf. Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1037 n.3 (2021) (Gorsuch, J., concurring in the judgment) (observing that it "is unclear what remains of the old 'consent' theory" after *International Shoe*).

CONCLUSION

The Appellate Division's order should be affirmed.

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Respectfully submitted,

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WORD COUNT CERTIFICATION

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