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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GENUINE PARTS COMPANY, *Defendant Below, Appellant,* v. RALPH ALLAN CEPEC AND SANDRA FAYE CEPEC, *Plaintiffs Below, Appellees.*	: : : : : : : : : : :	No. 528, 2015 On Appeal from the Superior Court of the State of Delaware, in and for New Castle County, C.A. No.: N15C-02-184 ASB

APPELLANT'S CORRECTED OPENING BRIEF ON APPEAL

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NATURE OF PROCEEDINGS

Defendant below-Appellant Genuine Parts Company ("GPC") pursues this interlocutory appeal of an order of the Delaware Superior Court for the State of Delaware, in and for New Castle County, dated August 31, 2015 that denied GPC's motion to dismiss plaintiffs' personal injury complaint for lack of personal jurisdiction (the "Order").[1]

In early 2015, Plaintiffs, Ralph and Sandra Faye Cepec (the "Plaintiffs") filed an asbestos-related lawsuit (the "Complaint") in the Delaware Superior Court against seven defendants, including GPC, for alleged injuries caused by asbestos exposure. Plaintiffs are Georgia residents and the alleged exposures occurred in Georgia and Florida. GPC answered the Complaint and raised as a defense lack of personal jurisdiction. Thereafter, GPC moved to dismiss the Complaint pursuant to Superior Court Rule 12(b)(2) (the "Motion to Dismiss") for lack of specific or general personal jurisdiction over GPC in Delaware because (1) GPC was not subject to specific jurisdiction since the underlying (and undisputed) facts of Plaintiffs' case had absolutely no connection to Delaware, and (2) GPC was not subject to general jurisdiction in Delaware since it is a Georgia corporation with its principle office in Georgia and is not "at home" in Delaware.

[1] Attached hereto as Exhibit A.

On August 31, 2015, the trial court denied GPC's Motion to Dismiss based in part upon this Court's opinion in *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988), under a theory that GPC expressly consented to personal jurisdiction in Delaware because it complied with Delaware's registration statute. (Exhibit A, ¶9). The court incorporated the analysis set forth in its oral ruling at the July 9, 2015 hearing and its later order on reargument in *In re: Asbestos Litigation (Hudson) v. International Paper Co.*, C.A. No. N14C-03-247 ASB (Del. Super. Ct. July 9, 2015)(TRANSCRIPT) and *Hudson v. International Paper Co. (In re Asbestos Litig.)*, 2015 Del. Super. LEXIS 502 (Del. Super. Ct. Sept. 24, 2015). (Exhibit A, ¶8). The trial court thereafter denied GPC's application for certification of interlocutory appeal. This appeal was initiated by GPC on September 30, 2015, and on October 13, 2015, this Court issued an Order accepting the appeal.

SUMMARY OF ARGUMENT

1. The trial court's denial of GPC's Motion to Dismiss is reversible error. This Court's ruling in *Sternberg*, that a corporation consents to the general jurisdiction of Delaware courts when it registers to do business and appoints an in-state agent to receive service of process pursuant to 8 *Del. C.* § 371(b), 373, is now in direct contradiction to the U.S. Supreme Court's rationale in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014) and its due process-based restrictions on the exercise of general jurisdiction.

2. Under *Daimler*, general jurisdiction over a corporate defendant may be imposed only where that defendant can be regarded as "essentially at home" – in other words, only "where [that defendant] is incorporated or has its principal place of business." *Id.* at 760. A corporate defendant may be subject to general jurisdiction outside of these two "paradigmatic" forums only in an "exceptional" case: where its contacts are so significant as to function as a surrogate place of incorporation or principal place of business. The *Daimler* Court made clear that simply doing business in a forum – even if that business is "substantial, continuous, and systematic" – is alone insufficient to justify the exercise of general personal jurisdiction. *Id.* at 761.

3. In this case, there is no dispute that GPC is neither incorporated nor principally based in Delaware. GPC's Delaware contacts – far from being

exceptional – are dwarfed within the context of GPC's business nationwide, and in no way approach that of a surrogate place of incorporation or principal place of business. Thus, a straightforward application of *Daimler* and its due process analysis requires the finding that GPC is not subject to general personal jurisdiction in Delaware.

4. GPC's compliance with Delaware's mandatory business registration statutes and its appointment of an in-state agent for service of process does not change this result. Business registration statutes are a part of doing business in all fifty states. To equate compliance with registration statutes with express consent to general jurisdiction (the analysis employed in *Sternberg*) eviscerates both the holding and reasoning of *Daimler* by subjecting national corporations to suit in every state in which they are registered, regardless of the relationship between the defendant, suit and forum. In fact, this is *exactly* the type of overreaching jurisdiction that the Supreme Court condemned and precluded in *Daimler*. Consequently, for these reasons, and those set forth below, this Court must reverse the trial court's denial of GPC's Motion to Dismiss.

STATEMENT OF FACTS

Plaintiffs Ralph and Sandra Cepec are residents of Georgia. (A29). They nevertheless sued GPC and others in the Superior Court for the State of Delaware. (A17-A42). The Complaint alleged that Mr. Cepec was exposed to asbestos from approximately the 1970's through the 1990's while performing maintenance on personal automobiles in or near Statesboro, Georgia. (A30). The Complaint further alleged that Mr. Cepec was exposed to asbestos from 1988 to 1991 while working as a warehouseman for GPC in Jacksonville, Florida. (A30-A31). There was no allegation that the Plaintiffs, their claims, or GPC had any connection to Delaware. (A17-A42). The Complaint's only jurisdictional allegation against GPC was that it "is a foreign corporation doing business in the State of Delaware" that may be served via its registered agent in Wilmington, Delaware. (A29).

GPC moved to dismiss for lack of both specific and general personal jurisdiction. (A63-A371). The underlying facts of Plaintiffs' case have absolutely no connection to Delaware. (A63-A76). Plaintiffs are, and have always been, non-residents of Delaware. (A403-A404). All activities that gave rise to the Complaint occurred outside of Delaware. (A30-A31).

The undisputed evidence shows that GPC is incorporated in Georgia. (A71, A169). GPC's principal place of business is in Atlanta, Georgia. (A169). GPC has never had any corporate offices within the State of Delaware. (A71, A169).

GPC does not conduct board or shareholder meetings within the State of Delaware. (A71, A170). GPC does not have any officers within the State of Delaware. (A71, A170). Less than 1% of GPC's employees nationwide work in Delaware. (A71, A170). Less than 1% of the automotive parts stores owned by GPC nationwide are in Delaware. (A71, A170). Less than 1% of the real properties operated by GPC nationwide are in the State of Delaware. (A71, A170). The revenue GPC generates in the State of Delaware is less than 1% of revenue generated nationwide. (A71, A170).

Plaintiffs responded to GPC's Motion to Dismiss and did not contest the absence of specific personal jurisdiction over GPC. (A372-A384). Plaintiffs argued, however, that GPC expressly consented to general jurisdiction in Delaware because it registered to do business in Delaware, appointed an agent for service of process in Delaware, and process was served on its registered agent in the case. (A383-A384).

Relying, in part, on this Court's ruling in *Sternberg*, the trial court denied GPC's Motion to Dismiss finding that "[Genuine Parts] expressly consented to personal jurisdiction in Delaware through compliance with Delaware's registration statute." (Exhibit A, ¶9). The trial court incorporated its analysis set forth in its oral ruling at the July 9, 2015 hearing and its later order on reargument in *In re: Asbestos Litigation (Hudson) v. International Paper Co.*, C.A. No. N14C-03-247

ASB (Del. Super. Ct. July 9, 2015) (TRANSCRIPT) and *Hudson v. International Paper Co. (In re Asbestos Litig.)*, 2015 Del. Super. LEXIS 502 (Del. Super. Ct. Sept. 24, 2015). (Exhibit A, ¶8). GPC now appeals.

LEGAL ARGUMENT

QUESTION PRESENTED

Whether the trial court's application of *Sternberg* - that a corporation consents to the general jurisdiction of Delaware courts when it registers to do business and appoints an agent for service of process as required by Delaware statutory law - was error, and was a violation of GPC's constitutional guarantees under *Daimler,* which restricts the imposition of general jurisdiction to only those states in which a defendant could be seen as "essentially at home." (A64-A75, A506-A512).

SCOPE OF REVIEW

The Court reviews *de novo* the denial of a motion to dismiss for lack of personal jurisdiction. *AeroGlobal Capital Mgmt., LLC v. Cirrus Indus.*, Inc., 871 A.2d 428, 437-38 (Del. 2005).

MERITS OF ARGUMENT

Due process requires that a court have personal jurisdiction over a defendant before a lawsuit against that defendant may proceed. *See, e.g., Walden v. Fiore*, 134 S. Ct. 1115, 1120 (2014); *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 315-16 (1945). Personal jurisdiction may be either specific or general. Specific jurisdiction exists only when the suit arises out of, or relates, to the defendant's contacts with the forum. *Daimler,* 134 S. Ct. at 754. Here, there is plainly no

specific jurisdiction over GPC, since Plaintiffs' claims have nothing whatsoever to do with Delaware. (A372-A384). And, Plaintiffs concede as much.

On the other hand, general jurisdiction may exist in a suit that has no nexus to the forum, but only when the defendant's forum contacts are "so 'continuous and systematic' as to render [the defendant] essentially at home" there. *Daimler*, 134 S. Ct. at 754 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011)). To comport with the exigencies of due process, and to enhance "a degree of predictability" on amenability to suit, the exercise of general jurisdiction is sharply circumscribed: only a "*limited* set of affiliations" with the forum will suffice. *Daimler*, 134 S. Ct. at 760 (emphasis added). These limitations are intended to provide non-forum defendants with some "minimum assurance as to where . . . conduct will and will not render them liable to suit," *id.* at 762 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)), and to prevent jurisdictional overreach on the part of states, *see id.* at 762, n.20 ("[n]othing in *International Shoe* and its progeny suggests that 'a particular quantum of local activity' should give a state authority over a 'far larger quantum of . . . activity' having no connection to any in-state activity." (internal citations omitted)).

In its now-seminal *Daimler* opinion, the Supreme Court revisited the issue of personal jurisdiction in a way not seen since *International Shoe* and *Pennoyer v. Neff*, 95 U.S. 714 (1878) and confirmed unequivocally that a court cannot assert

general jurisdiction over a corporation unless that corporation (1) is either incorporated or principally based in that forum; or (2) has affiliations with the forum that are "so continuous and systematic as to render it essentially at home" there. *Id.* (quotation marks and brackets omitted) (quoting *Goodyear,* 131 S. Ct. at 2851). If nothing else, *Daimler* was an attempt to maintain restrictions on the exercise of general jurisdiction, *not* to expand it, and to provide corporations some predictability on where they may be sued.

Here, however, the trial court has expanded general jurisdiction by relying on *Sternberg* and a *Pennoyer*-era analysis that the Supreme Court cautioned was no longer applicable, *Daimler,* 134 S. Ct. at 754-58, to find general jurisdiction over GPC on the theory that GPC expressly consented to personal jurisdiction in Delaware when it complied with Delaware registration regulations and appointed a registered agent. This holding (1) squarely conflicts with United States Supreme Court precedent; (2) violates GPC's constitutional guarantees; and (3) creates a false and unsupported theory of "consent" jurisdiction based on *compliance* with Delaware state law. It must therefore be reversed.

I. *Daimler* Establishes That GPC Cannot Be Subject to General Jurisdiction in Every State in which it Conducts Business

The Supreme Court's ruling in *Daimler* is clear: a corporation like GPC cannot be subject to general jurisdiction in every state in which it conducts business. *Daimler*, 134 S. Ct. at 761. Such an "exorbitant" view of personal jurisdiction is "barred by due process constraints on the assertion of adjudicatory authority." *Id.* at 751. A corporation is instead subject to general jurisdiction only in its place of incorporation, principal place of business, or where its in-state contacts are sufficiently exceptional so as to render the corporation "at home." *Id.* at 760. An example of an exceptional case is one in which the in-forum affiliations of a foreign defendant are, within the context of that corporation's activities nation- or world-wide, of such a nature as to constitute, in essence, a "surrogate . . . place of incorporation or head office." *See id.* at 756 n.8, 761 n.19; 762 n.20. Simply doing business in a forum state is not enough. And, *a fortiori*, neither is having a business registration or registered agent.

In *Daimler*, twenty-two Argentinian plaintiffs brought claims against the German corporation Daimler AG based on alleged human rights violations committed in Argentina. The plaintiffs asserted that Daimler AG was subject to general jurisdiction in California because its subsidiary Mercedes-Benz USA, LLC ("MBUSA") did substantial business there. *Id.* at 750-51. In particular, MBUSA had "multiple California-based facilities," was "the largest supplier of luxury

vehicles to the California market," and had California sales "account[ing] for 2.4% of Daimler's worldwide sales." *Id.* at 752.

Upon review, the Supreme Court ordered the case dismissed for lack of personal jurisdiction. In an opinion joined by eight justices,[2] the Supreme Court concluded that MBUSA's California contacts, even if they could be imputed to Daimler AG, were unexceptional:[3] to approve the extension of general jurisdiction would be to "presumably [subject Daimler to suit] in every other State in which MBUSA's sales are sizable." *See Id.* at 760-61.[4] Such an "exorbitant exercise[] of all-purpose jurisdiction," determined the Court, would undercut the "minimum assurances" over where a defendant's conduct "will and will not render [it] liable to suit." *Id.* at 761-62 (quoting *Burger King*, 471 U.S. at 472). The Supreme Court clarified that the jurisdictional inquiry goes beyond the "magnitude of the defendant's

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[2] Justice Sotomayor concurred in the judgment, finding a lack of personal jurisdiction on other grounds. *Daimler*, 134 S. Ct. at 763.

[3] MBUSA, the subsidiary at issue in *Daimler,* was a Delaware limited liability company registered to do business in California, with an appointed agent for services of process. The Supreme Court did not specifically discuss whether this specific fact amounted to consent.

[4] As the sole example of an exceptional case, the Supreme Court pointed to *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). In *Perkins*, a Filipino company suspended its regular activities in its home forum during the Japanese occupation, and temporarily relocated its principal place of business to Ohio. *See Daimler*, 134 S. Ct. at 761 n.19. Once there, the company president proceeded to maintain an office, draw and distribute salary checks, use two active bank accounts, supervise the rehabilitation of the company's foreign properties, and hold director's meetings in Ohio. *Perkins*, 342 U.S. at 419. Significantly, all of the company's activities "were directed by the company's president from *within* Ohio. . . [such that] Ohio could be considered 'a surrogate for the place of incorporation or head office.'" *Daimler*, 134 S. Ct. at 756 n.8. An exceptional case, therefore, "is one in which the defendant's forum contacts are so pervasive that they may substitute for its place of incorporation or principal place of business." *Asbestos Prods. Liab. Litig. (No. VI) Cowart v. Various Defendants*, 2014 U.S. Dist. LEXIS 150819, *19 (E.D. Pa. Oct. 23, 2014).

in-state contacts," and "instead calls for an "appraisal of a corporation's activities in their entirety, nationwide and worldwide." *Id.* at 762 n.20.

In this case, it is clear that GPC's Delaware contacts simply cannot meet the jurisdictional standard for general jurisdiction enumerated in *Daimler*. GPC is neither incorporated nor headquartered in Delaware. Its Delaware contacts are far from exceptional and, indeed, are substantially less significant than the extensive California contacts at issue in *Daimler*. For instance, GPC has never maintained a corporate office in Delaware, does not conduct board or shareholder meetings in Delaware and has no officers in the state. Its total connection with Delaware includes less than 1% of its employees, company-owned automotive parts stores, company operated real estate and national revenue generation. *Cf. Daimler*, 134 S. Ct. at 752. Due Process clearly dictates that general jurisdiction does not exist when, as here, the plaintiff, the defendant corporation, and the cause of action have no connection to the forum. "Jurisdiction over such unrelated claims violates 'fair play and substantial justice' in the absence of defendant's relationship with the forum that approaches that of a citizen."[5] Under any reading of *Daimler*, GPC's contacts with this forum are plainly insufficient to make it "at home" in Delaware, or to otherwise subject GPC to the exercise of general jurisdiction here.

[5] Charles W. "Rocky" Rhodes, IV, *Nineteenth Century Personal Injury Jurisdiction Doctrine in a Twenty-First Century World*, 64 FLA. LAW REVIEW 387, 444, fnt. 343 (2012) ("Most commentators agree that exacted consent for unrelated claims is unconstitutional.")

II. GPC Did Not Consent to General Personal Jurisdiction in Delaware Merely by Registering to do Business in Delaware

Because GPC is incorporated and has its principal place of business in Georgia, it is not "at home" in Delaware under *Daimler* and, under *Daimler*, cannot be subject to Delaware general jurisdiction. The trial court, however, avoided both the letter and spirit of *Daimler* to find GPC subject to general jurisdiction in Delaware because it consented to jurisdiction by (1) registering to do business in Delaware; and (2) appointing an agent for service of process. This theory of consent to personal jurisdiction is simply now invalid in the wake of *Daimler* and its due process restrictions on general jurisdiction.

GPC's compliance with Delaware's business registration statutes did not constitute consent – express or otherwise – to general jurisdiction within the state. Non-Delaware corporations wishing to do business in Delaware are *required*, subject to certain enumerated exceptions, to register with the Delaware Secretary of State, 8 *Del. C.* §§ 371(b), 373, and to provide "the name and address of its registered agent in th[e] State." *Id.* § 371(b)(2)(i). A non-Delaware corporation doing business in Delaware that does *not* comply with Delaware statutory law and register to do such business faces statutory fines for violating the mandatory registration requirement. 8 *Del. C.* § 378. Moreover, any foreign corporation that fails to register "shall be deemed" to have appointed the Delaware Secretary of

State as its agent for service of process, although only for suits "arising or growing out of any business transacted … within th[e] State." 8 *Del. C.* § 382(a).

General jurisdiction is not addressed in any of these Delaware registration statutes, and nothing in them even remotely suggests something like "consent to jurisdiction." Therefore, there is no statutory authority to support the proposition that registration constitutes voluntary consent to general personal jurisdiction in Delaware courts. Rather, in *Sternberg*, this Court, relying in part upon early 20th century conceptions of due process, stated that the appointment of an agent for service of process and other compliance with Delaware's business registration statute constituted consent to general jurisdiction in Delaware. *Sternberg,* 550 A.2d at 1116 (citing *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165 (1939) and *Pa. Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917)).[6] The due process principles in *Daimler*, however, cannot now be circumvented on a theory of consent which, in fact, is compliance with state law or, worse, "coerced consent."

The validity of jurisdictional consent, as with any jurisdictional analysis, is "rooted in due process." *AstraZeneca AB v. Mylan Pharms., Inc.*, 72 F. Supp. 3d 549 (D. Del. 2014)(interlocutory appeal accepted March 17, 2015). "All assertions

[6] *Sternberg* is also inconsistent with pre-*International Shoe* Supreme Court precedents. The Supreme Court long ago explicitly held that where a statute requiring a corporation to appoint an agent is ambiguous as to its scope, a court "should not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere." *Robert Mitchell Furniture Co. v. Selden Breck Constr. Co.*, 257 U.S. 213, 216 (1921).

of state-court jurisdiction," – including findings of "consent" – "must be evaluated according to the [due process] standards set forth in *International Shoe* and its progeny." *AstraZeneca*, 72 F. Supp. 3d at 556 (citing *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (U.S. 1945)); *Sternberg*, 550 A.2d at 1116 (citing *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977)); *Brown v. CBS Corp.*, 19 F. Supp. 3d 390 (D. Conn. 2014)(explaining that even when the state business registration statute confers personal jurisdiction on a registered foreign defendant, "the requirements of due process must also be met"); *Smith v. Union Carbide Corp., et al.*, Cause No. 1422-CC00457 (Mo. Cir. Ct., City of St. Louis Jan. 12, 2015) ("plaintiff...must show that the exercise of general personal jurisdiction over a foreign corporation complies with the Due Process Clause... .")

Here, however, the trial court avoided all due process inquiry by finding "consent by registration." This theory and the tenets of due process are simply incompatible, a fact affirmed by numerous courts in the wake of *Daimler*. As explained by a Delaware Federal District Court Judge when declining to exercise jurisdiction over non-forum defendants registered to do business in Delaware, *Daimler* rejected the idea that merely "doing business" in a state satisfies due process. *AstraZeneca,* 72 F. Supp. 3d at 556. To find registration – an activity conducted in the normal course of business – to constitute consent would be

"specifically at odds with *Daimler*" and would "expose companies with a national presence . . . to suit all over the country." *Id.*

Similarly, in *Surita v. Am General LLC, et al.*, C.A. No. 1:15-cv-07164 (N.D. Ill. Nov. 4, 2015) (ORDER), the Court rejected all purpose jurisdiction over a Wisconsin entity with its principal place of business in Wisconsin even though it registered to do business and had a registered agent in Illinois. "The Surita's desire for this court to exercise 'all-purpose jurisdiction' over Blain based on the presence of its registered agent in Illinois and Blain's registration to do business in Illinois is unavailing, especially in light of *Daimler*." (*Surita*, at 5, citing *Daimler*, 134 S. Ct. at 762.) The court found that plaintiff's arguments "...mistakenly rely on pre-*Daimler* cases." *Surita*, at 5. The court also acknowledged that the Illinois Business Corporation Act, like Delaware's Act, was silent on jurisdiction over a corporation that registers to do business.

The opinions of Judge Sleet in *AstraZeneca* and the court in *Surita* join numerous courts both before and after *Daimler* in rejecting the "consent by registration" theory advanced by the trial court. *See, e.g., Public Impact, LLC v. Boston Consulting Grp.*, 2015 U.S. Dist. LEXIS 101398 (M.D.N.C. Aug. 3, 2015) (holding that the principles of due process require [more than] mere compliance with state [registration] statutes, based upon both pre- and post-*Daimler* jurisprudence); *Keeley v. Pfizer Inc.*, Case No. 4:15-cv-00583-ERW (E.D. Mo.

July 1, 2015) (consent by registration does not satisfy due process, thus defendant did not consent to jurisdiction); *Neeley v. Wyeth, LLC*, 2015 U.S. Dist. LEXIS 39879 (E.D. Mo. Mar. 30, 2015) (finding *Daimler* "clearly rejects" consent by registration where such finding would subject every foreign corporation transacting business in Missouri to general jurisdiction); *McCourt v. A.O. Smith Water Prods. Co.*, 2015 U.S. Dist. LEXIS 110111, *15 (D. N.J. Aug. 20, 2015) ("[The] fact that Defendant registered to do business in New Jersey is insufficient to conclude it 'consented' to jurisdiction here."). *See also, Cossaboon v. Maine Med. Ctr.*, 600 F.3d 25, 37 (1st Cir. 2010); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745 (4th Cir. 1971); *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179 (5th Cir. 1992); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239 (7th Cir. 1990); *Consol. Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286 (11th Cir. 2000).

Moreover, requiring a foreign corporation to consent to general jurisdiction by the mere registration to do business violates the unconstitutional conditions doctrine. Under this doctrine a government "may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013)(citations omitted). The doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Id.* Conditioning a corporation's ability to transact business within a state on the corporation's waiver of its due

process right not to be subject to general jurisdiction thus, violates this principle. The Supreme Court has long recognized that a state may not 'requir[e] [a] corporation, as a condition precedent to obtaining a permit to do business within [a] State, to surrender a right and privilege secured to it by the Constitution. *Koontz,* 133 S. Ct. at 2596 (quoting *Southern Pac. Co. v. Denton*, 146 U.S. 202, 207 (1892)). The government may not deny a benefit to a person because he exercises a constitutional right. *Koontz,* 133 S. Ct. at 2594.

As applied here, Delaware requires foreign corporations to register to do business and thereby presumably consent to general jurisdiction for any action in the State of Delaware by application of this Court's holding in *Sternberg*. Failure to register bars the corporation from doing business in Delaware and opens the corporation up to imposition of penalties for non-registration. 8 *Del. C.* § 378. Imposition of such penalties forces companies to choose to suffer such adverse consequences or forego their constitutional rights – namely, the due process protection recognized in *Daimler*.

The trial court's denial of GPC's Motion to Dismiss based upon GPC's compliance with Delaware's mandatory registration requirements simply cannot be squared with the fundamental principles of due process enumerated in *Daimler*. While GPC does not dispute that a defendant may voluntarily consent to jurisdiction in a forum, or expressly waive a personal jurisdiction objection, such

consent or voluntary relinquishment stems from voluntary conduct and the known relinquishment of the right given. *See Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982).[7] Here, GPC must register and appoint an agent for service of process in order to conduct business in the state; but compliance with this requirement is not the "knowing consent to general jurisdiction" and the relinquishment of due process protections created by the Constitution.

If a foreign corporation cannot be subjected to general jurisdiction even when it has an office in the state or does "substantial, continuous, and systematic" business in the forum, it surely cannot be subjected to general jurisdiction just because it registers and appoints a service agent. Such an outrageous reach of general jurisdiction would expose nationwide corporations to suit on any cause of action asserted against them not only "at home" but in every other state where they are required to register to do business. *Daimler*, 134 S. Ct. at 761. Such a result "would sweep beyond even the 'sprawling view of general jurisdiction'" rejected in *Daimler*. *Id.* at 760 (quoting *Goodyear*, 131 S. Ct. at 2856). Thus, compliance with a *mandatory* registration requirement and an equally *mandatory* obligation to

[7] A personal jurisdiction objection may also be forfeited by, for example, filing a responsive substantive pleading. *Cf. Ins. Corp. of Ir.*, 456 U.S. at 704. But there too, the forfeiture stems from voluntary conduct by the defendant.

appoint an agent for service of process cannot support a basis for finding consent to general jurisdiction.

It is equally obvious that the trial court's ruling in this case renders *Daimler* a practical nullity. All fifty states require foreign corporations to register and appoint a local agent for service of process as a condition to do business. *See Sternberg*, 550 A.2d at 1109 n.5; *see also AstraZeneca*, 72 F. Supp. 3d at 556-57. "Finding mere compliance with such statutes sufficient to satisfy jurisdiction would expose companies with a national presence (such as GPC) to suits all over the [United States], a result specifically at odds with *Daimler*." *Id.* at 557. If mere compliance with these mandatory registration requirements constitutes "consent," then every national corporation would be subject to general jurisdiction in every state where they do business - the *exact* scenario *Daimler* condemned as overreaching, exorbitant, and a violation of due process.

Daimler forecloses the trial court's result, and makes clear that "[a] corporation that operates in many places can scarcely be deemed at home in all of them." *Daimler,* 134 S. Ct. at 762 n.20. As such, the trial court's order should be reversed.

III. The Rulings Relied Upon by the Superior Court Do Not Support the Interpretation that Business Registration Compels Consent to General Jurisdiction

In addition to this Court's previous ruling in *Sternberg*, the trial court also relied on three[8] recent Delaware District Court opinions that cite to archaic, *Pennoyer*-era Supreme Court cases from before the dawn of modern personal jurisdiction jurisprudence[9] and certainly before *Daimler's* watershed effect on the evolution of general jurisdiction.

In *Pennoyer v. Neff*, 95 U.S. 714 (1878), the Supreme Court held that a court could not extend personal jurisdiction over persons outside the geographic bounds of the forum. *Id.* at 720. Under that strict rule, a court could only hear claims against a defendant who was served with process in the forum or who agreed to appear there. *Id.* at 733; *see also, Burnham v. Superior Court*, 495 U.S. 604, 616-17 (1990) (plurality opinion).

But with "changes in the technology of transportation and communication, and the tremendous growth of interstate business activity," states sought broader jurisdiction over persons (especially corporations) outside their boundaries. *Burnham*, 495 U.S. at 617 (plurality opinion); *see McGee v. Int'l Life Ins. Co.*, 355

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[8] *See Novartis Pharm. Corp. v. Mylan Inc.*, 2015 U.S. Dist. LEXIS 31812 (D. Del. Mar. 16, 2015); *Forest Labs., Inc. v. Amneal Pharm. LLC*, 2015 U.S. Dist. LEXIS 23215 (D. Del. Feb. 26, 2015); *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, 78 F. Supp. 3d 572 (D. Del. Jan. 14, 2015); *contra AstraZeneca AB v. Mylan Pharm. Inc.*, 72 F. Supp. 3d 549 (D. Del. 2014). *See also* Hr'g Tr. July 9, 2015, at 39-41 (discussing district court cases). (A834-A835).

[9] *See, e.g., Forest Labs, Inc.*, 2015 U.S. Dist. LEXIS 23215 (discussing *Neirbo Co.*, 308 U.S. 165), *Pa. Fire Ins. Co.*, 243 U.S. 93, and *Robert Mitchell Furniture Co.*, 257 U.S. 213.).

U.S. 220, 222-23 (1957). One mechanism for obtaining that jurisdiction was to "require[] ... that nonresident corporations appoint an in-state agent upon whom process could be served," thereby satisfying *Pennoyer* by making the corporation "present" within the state and establishing jurisdiction through in-state service. *Burnham*, 495 U.S. at 617; *see also Pennoyer*, 95 U.S. at 735-36.

Some states also declared that doing business without a registered agent would constitute implied "consent" to service on an agent appointed by statute, generally a state official. *See, e.g., Old Wayne Mut. Life Ass'n v. McDonough*, 204 U.S. 8, 21-22 (1907). Such implied "consent" was limited to cases arising from business the corporation did in the forum state. *Id.* at 22-23. At the same time, the appointment of an in-state agent chosen by the corporation came to be seen as express consent to suit on any claim for which the agent was authorized to accept service. *See, e.g., Bagdon v. Phila. & Reading Coal & Iron Co.,* 111 N.E. 1075 (N.Y. 1916).[10]

"As many observed, however, the consent and presence [on which these theories rested] were purely fictional." *Burnham*, 495 U.S. at 617-18 (plurality opinion); *see Shaffer*, 433 U.S. at 201-03. In *International Shoe*, decided in 1945,

[10] The artificial distinction these cases drew between corporations that comply with state registration statutes by appointing an agent, and corporations that do not— exposing the former to general jurisdiction, but the latter only to specific jurisdiction—was one of the considerable problems of the *Pennoyer* framework. *See Smolik v. Phila. & Reading Coal & Iron Co.,* 222 F. 148, 150-51 (S.D.N.Y. 1915) (Hand, J.); 4 Wright & Miller, *Federal Practice & Procedure* §1066 (West 3d ed. 2015) (calling this point "a particular source of objection to the use of the consent theory").

the Supreme Court "cast those fictions aside." *Burnham*, 495 U.S. at 618 (plurality opinion). The Supreme Court in that opinion and its progeny "abandoned 'consent' ...and 'presence' as the standard for measuring the extent of state judicial power over [foreign] corporations." *McGee*, 355 U.S. at 222. Instead of relying on personal service in the forum, the new approach elaborated in *International Shoe* focused on whether the defendant had "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe,* 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

Since then, the Supreme Court has consistently reaffirmed that "the central concern of the inquiry into personal jurisdiction" is "the relationship among the defendant, the forum, and the litigation," rather than a narrow focus on the appointment of an agent for service in the forum or some purely fictional theory of consent. *Daimler,* 134 S. Ct. at 754 (*quoting Shaffer*, 433 U.S. at 204); *see Walden*, 134 S. Ct. at 1121; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980); *cf. Burnham*, 495 U.S. at 618 (plurality opinion) ("Subsequent cases have derived from the *International Shoe* standard the general rule that a State may dispense with in-forum personal service on nonresident defendants in suits arising out of their activities in the State."). Today, every assertion of jurisdiction over an absent and nonresident defendant "must be evaluated

according to the standards set forth in *International Shoe* and its progeny." *Shaffer,* 433 U.S. at 212; *see Burnham*, 495 U.S. at 621 (opinion of Scalia, J.).[11]

In the instant matter, the trial court ignored such a doctrinal evolution. The trial court relied upon case law and reasoning developed prior to *International Shoe*, including *Pa. Fire Ins. Co. v. Gold Issue Mining Co., Neirbo Co. v. Bethlehem Shipbuilding Corp.*, and *Robert Mitchell Furniture Co. v. Selden Breck Const. Co.* These cases were decided in the era dominated by *Pennoyer's* territorial thinking and, "...should not attract heavy reliance today." *See Daimler,* 134 S. Ct. at 761 n.18. "Assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer,* 433 U.S. at 212. And "[t]o the extent that prior decisions are inconsistent with this standard," they have long since been "overruled." *Id.* at 212 n.39; *see also McGee*, 355 U.S. at 222 (explaining that the Court has "abandoned" its previous theories of consent and presence); *Freeman v. Second Judicial Dist. Court*, 1 P.3d 963, 968 (Nev. 2000) (same).

Judge Sleet addressed precisely this issue in his *AstraZeneca* opinion. Confronted with plaintiffs' arguments that a theory of "consent by registration" had survived *International Shoe* and the line of cases that followed, Judge Sleet

[11] The Delaware Supreme Court in *Sternberg* reached the opposite conclusion by relying on dicta in *Bendix Autolite Corp. v. Midwesco Enters.*, 486 U.S. 888 (1988), to the effect that the appointment of a registered agent in Ohio would subject an out-of-state corporation to general jurisdiction there. *Sternberg*, 550 A.2d at 1112-13. But *Bendix* did not consider whether that assertion of general jurisdiction would comply with due process. *See Bendix*, 486 U.S at 892-93.

affirmed that a consent analysis cannot be divorced from the Supreme Court's due process analysis in *Daimler*. *AstraZeneca*, 72 F. Supp. 3d 549, 555-556. Because the Supreme Court had "rejected the idea that a company could be haled into court merely for 'doing business' in a state," Judge Sleet concluded that "compliance with Delaware's registration statutes – mandatory for *doing business* in the state – cannot constitute consent to jurisdiction, and the Delaware Supreme Court's decision in *Sternberg* can no longer be said to comport with federal due process." *Id.* at 556. Judge Sleet's conclusion – as demonstrated throughout this brief – has been heavily supported by courts and legal scholars alike.[12] Even Judge Sleet's colleague, Judge Leonard Stark, who came to the opposite conclusion in his *Acorda* opinion (which the trial court relied upon below), recognized Judge Sleet's opinion as "well-reasoned," and perhaps "the correct view," but felt constricted by *Sternberg* and outdated Supreme Court precedent to endorse a theory of consent that he found "odd" and in conflict with *Daimler*." *See Acorda Therapuetics, Inc. v. Mylan Pharms. Inc.*, 78 F. Supp. 3d 572, 591-92 (D. Del. 2015)(interlocutory appeal accepted March 17, 2015).

[12]*See, e.g.*, Kevin D. Benish, *Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction After Daimler AG v. Bauman*, N.Y.U. L. REV. (forthcoming Nov. 2015) (the author argues that consent by registration is unconstitutional after *Daimler*) and Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L.R. 1343 (2015) (the author maintains that registration-based jurisdiction does not fit well into the landscape of general jurisdiction).

In sum, treating mere registration or appointment of an agent for service in the present day as sufficient to create general jurisdiction through some fiction of consent or presence "perpetuat[es] … ancient forms" that cannot be squared with fair play and substantial justice. *Shaffer*, 433 U.S. at 212; *see Burnham*, 495 U.S. at 630 (Brennan, J., joined by Marshall, Blackmun, and O'Connor, JJ., concurring in the judgment). The *Pennoyer*-era fiction of consent through appointment of an agent simply cannot provide an end-run around *Daimler.*

True consent—as well as forfeiture through voluntary litigation conduct—will be alive and well no matter how this Court decides this appeal. The question in this case is only whether—consistent with due process—mere compliance with a state's mandatory business registration statute can be held to substitute for voluntary consent and result in general jurisdiction without applying any due process analysis. After *Daimler*, it is crystal clear that the requirements of due process are implicated when a state requires corporations, as a condition of doing business, to appoint a local agent for service of process—and then treats the appointment of that agent as consent to *general personal jurisdiction* over any claim, by any plaintiff, arising anywhere in the world. Such an outcome simply cannot be squared with the constitutional guarantees enumerated in *Daimler*, and must not be permitted here. The trial court's order finding that GPC consented to

general jurisdiction when it complied with Delaware's mandatory business registration requirements both should and must be reversed.

CONCLUSION

The trial court's ruling that GPC consented to general jurisdiction in Delaware courts by virtue of its compliance with the mandatory registration to do business statutes obliterates *Daimler* and the Supreme Court's ruling that due process requires that a corporation be sued only where it is "at home". For the reasons, set forth above, this Court should reverse the trial court's denial of GPC's Motion to Dismiss and order the case dismissed for lack of personal jurisdiction.

Respectfully submitted,

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