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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

ANSWERING BRIEF OF APPELLEES RALPH ALLEN CEPEC AND SANDRA FAYE CEPEC

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NATURE OF PROCEEDINGS

This is an asbestos exposure case brought by Plaintiffs/Appellees Ralph and Sandra Cepec against Appellant/Defendant Genuine Parts Company ("GPC") and six other defendants. The suit alleges that Ralph Cepec was exposed to asbestos while employed at GPC for three years in Jacksonville, Florida. GPC's co-defendants are some of the manufacturers of the asbestos-containing products to which Cepec was exposed. As a result of his asbestos exposure, Mr. Cepec developed malignant mesothelioma, an asbestos-related cancer that is almost always fatal.

Five of the seven defendants are Delaware corporations. GPC is a Georgia corporation but is registered to do business in Delaware, has appointed an agent for service of process in Delaware, and was served on its registered agent in this case.

GPC sought to dismiss this case for lack of personal jurisdiction. The Superior Court denied GPC's motion to dismiss by order dated August 31, 2015, based on GPC's having consented to general personal jurisdiction through its voluntary compliance with Delaware's statutory requirement that foreign corporations register and appoint an agent for service of process in order to lawfully conduct business in this State. The Superior Court's ruling was based on *Sternberg v. O'Neil*, 550 A.2d 1105 (Del. 1988), in which this Court held that such

compliance with Delaware's registration and appointment statutes constitutes consent to general personal jurisdiction.

In its order, the Superior Court also expressly incorporated the analysis which it had provided first in a bench ruling which it had issued the preceding month on the identical issue in another asbestos exposure case,[1] and in its subsequent written decision in that other case.[2] In those rulings, the Superior Court had explained in detail why *Sternberg* remained valid and controlling, contrary to the defendant GPC's argument that *Sternberg* was no longer good law after the United States Supreme Court decision in *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014).

GPC requested that the Superior Court certify its August 31 order for interlocutory appeal, which that court declined to do. This Court subsequently granted GPC's application for certification of interlocutory appeal on October 13, 2015.

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[1] *Hudson v. International Paper Co.*, Del. Superior Court, Case No. N14C-03-247; Hearing transcript (partial; Bench Ruling by Wallace, J.) (July 9, 2015), AT PP. 33-41. (B 22-30).

[2] *In re: Asbestos Litigation (Hudson v. International Paper Co.)*, 2015 WL 5016493 (Del. Super., Aug. 31, 2015).

SUMMARY OF ARGUMENT

1. Denied. *Sternberg* remains good law. Personal jurisdiction is "an individual right" that "can, like other such rights, be waived" through knowing and voluntary consent. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982). The United States Supreme Court's recent decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), did not overrule longstanding U.S. Supreme Court precedent, relied on by this Court in *Sternberg*, that consent to jurisdiction is a valid and independent basis for the exercise of general personal jurisdiction.

2. Denied. The U.S. Supreme Court's decision in *Daimler* and its other leading opinions on general personal jurisdiction all expressly distinguish between general jurisdiction based on a corporation's contacts with the forum state and general jurisdiction based on consent. *See Daimler*, 134 S.Ct. at 755–56; *see also Goodyear Dunlop Tires Ops., S.A. v. Brown*, 131 S. Ct. 2846, 2856 (2011). Although a corporation is subject to general personal jurisdiction based on its contacts in those states where it is "essentially at home," *Daimler*, 134 S. Ct. at 751 (internal quotation marks omitted), corporations remain free to consent to general personal jurisdiction in other states.

3. Denied. The "minimum contacts" analysis of *Daimler* does not apply in cases of consent to jurisdiction. Under *Sternberg*, GPC knowingly and

voluntarily consented to general personal jurisdiction in Delaware when it registered to do business in this State and appointed an agent for service of process pursuant to applicable Delaware statutes. 550 A.2d at 1116. "If a foreign corporation has expressly consented to the jurisdiction of a state by registration, due process is satisfied and an examination of 'minimum contacts' to find implied consent is unnecessary." *Id.* at 1113.

4. Denied. *Sternberg* rightly interpreted Delaware's business registration and appointment statutes to require consent to personal jurisdiction. In a holding which has never been overturned nor qualified, the U.S. Supreme Court has upheld – and later reaffirmed – that the exercise of general jurisdiction based on registration-and-appointment procedures are valid because nothing in the Due Process Clause prevents a state from making consent to general personal jurisdiction "part of the bargain by which [the corporation] enjoys the business freedom of the State." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939).

5. The policy arguments urged by the *Amici* who support Appellant GPC are overwrought and misdirected.

STATEMENT OF FACTS

Plaintiff Ralph Cepec was exposed to asbestos from brake friction products during his employment at a GPC warehouse in Jacksonville, Florida, from 1988 to 1991. (B 3-4). Independent of his employment at GPC, Cepec purchased asbestos-containing brakes from GPC stores for use in maintaining his own cars over a twenty-year period spanning the 1970s to the 1990s. (B 3). In August 2014, Cepec developed asbestos-related malignant mesothelioma. (B 4; A428). This suit was brought against GPC and six other defendants on February 23, 2015. (B 1). Most of the other defendants in this case are asbestos brake manufacturers. (B 5).

According to records of the Delaware Secretary of State, GPC has been registered to do business in Delaware at least since December 27, 2012 and is currently in good standing. This document also indicates that GPC's registered agent is The Corporation Trust Company in Wilmington. (B 17). GPC was served in this case through service upon its registered agent, The Corporation Trust Company. (B 16).

Five of the seven defendants in this case are Delaware corporations. GPC and one other defendant, Union Carbide Corporation, are foreign corporations. (B 2-3). Union Carbide Corporation has not challenged the jurisdiction of Delaware courts.

ARGUMENT

I. Question Presented

Whether Delaware may exercise general personal jurisdiction over GPC under longstanding Delaware law, consistent with United States Supreme Court precedent, which provides that a foreign corporation consents to general jurisdiction through registering to do business as a foreign corporation and appointing an agent for service of process. (The Plaintiff/Appellees' position on this question was presented in its Response in Opposition to Defendant Genuine Parts Company's Motion to Dismiss. A372-84.)

II. Scope of Review

Whether personal jurisdiction may be validly exercised is a mixed question of fact and law. *Plummer v. Sherman*, 861 A.2d 1238, 1242 (Del. 2004). However, when, as here, the facts are not in dispute, personal jurisdiction is a legal question subject to *de novo* review. *Id.*

III. Merits of Argument

A. Personal jurisdiction may be waived by consent.

Personal jurisdiction "represents . . . an individual right" that "can, like other such rights, be waived." *Ins. Corp. of Ireland.*, 456 U.S. at 703. Personal jurisdiction may be waived because it is not "fundamentally preliminary in the sense that subject-matter jurisdiction is," and instead is a "personal privilege[] of

the defendant, rather than [an] absolute stricture[] on the court . . . ." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979). In cases of waiver, the "actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not." *Ins. Corp. of Ireland.*, at 704-05.

As catalogued in *Insurance Corp. of Ireland*, at 703-04, parties may waive a personal jurisdiction defense in various ways, both express or implied. Of course they may have contracted to submit to the jurisdiction of a specified court. A party may also waive the defense by failing to timely assert it in a particular case. And, most pertinent here, a party may have constructively consented to personal jurisdiction through "the voluntary use of certain state procedures." As the Supreme Court noted with respect to that latter point, just "what acts of the defendant shall be deemed a submission to [a court's] power is a matter upon which States may differ." *Id.* (quoting *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25, 29-30 (1917)).

GPC takes the position that it did not consent to general personal jurisdiction when it registered to do business in Delaware and appointed an agent for service of process. It is simply incorrect in this assertion. For almost thirty years, such acts have constituted consent to jurisdiction in Delaware, – which was twenty-four years before GPC qualified and registered to do business here. In *Sternberg*, this Court held that a foreign corporation, *i.e.*, one organized under the laws of another

state, expressly consents to general jurisdiction in Delaware by registering to do business in Delaware and appointing an agent for service of process. *See* 550 A.2d at 1116.

Under Delaware's statutory scheme, a foreign corporation can only conduct business in Delaware if it complies with 8 Del. C. § 371(b) by registering with the Secretary of State and also complies with 8 Del. C. § 376(a) by appointing a registered agent for service of process. *See id.* at 1115. Consistent with U.S. Supreme Court precedent, in *Sternberg* this Court observed, that "[a] corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal jurisdiction in any action that is within the scope of the agent's authority." *Id.* at 1116. Because 8 Del.C. § 376 provides *no limits* on the authority of a foreign corporation's registered agent to accept service, suits involving claims arising outside the state of Delaware may be served on a registered agent and thereby confer general jurisdiction.

In succeeding years, the constitutionality and effect of similar statutory consent procedures had been upheld. For example, the Eighth Circuit Court of Appeals reached the same conclusion when interpreting Minnesota law. It reasoned that, independent of a state's long-arm statute, "[c]onsent is the other traditional basis of jurisdiction," and that "[o]ne of the most solidly established

ways of giving such consent is to designate an agent for service of process within the State." *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1199 (8th Cir. 1990). The court reasoned that, "[t]he whole purpose of requiring designation of an agent for service is to make a nonresident suable in the local courts." *Id.* It was also persuaded by the fact that the Minnesota statute providing for service on a foreign corporation's registered agent was not limited to claims arising out of in-state activities, as in some jurisdictions. *See id.*

The Third Circuit has upheld a similar Pennsylvania law. In *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991), the court upheld a Pennsylvania statute that stated that general personal jurisdiction over corporations could be established by "qualification as a foreign corporation under the laws of" Pennsylvania. *Id.* at 640. The court reasoned that in light of the statute's language, the defendant had "notice that [it] was subject to personal jurisdiction in Pennsylvania" when it had qualified to do business in the State. *Id.* at 641. *See also, Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984) (finding that New Hampshire law provides that "a corporation that authorizes an agent to receive service of process in compliance with the requirements of a state statute, consents to the exercise of personal jurisdiction in any action that is within the scope of the agent's authority").

Further, in a recent, post-*Daimler* decision rejecting a similar challenge as is being attempted here by GPC, it was observed "that the majority of federal Courts of Appeals to have considered the question have concluded that compliance with registration statutes may constitute consent to personal jurisdiction." *Otsuka Pharm. Co. v. Mylan Inc.*, 2015 WL 1305764 at *10 (D.N.J. Mar. 23, 2015). *See also* 4B Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1116 (4th ed. 2015) ("[A] company's registration under a state appointment statute can also constitute consent to be sued in the courts of that state and a waiver of objections to the assertion of personal jurisdiction over the corporation.").

Here, the trial court was entirely correct to follow *Sternberg* and rule that GPC had consented to general personal jurisdiction in Delaware by registering to do business in this State and appointing an agent for service of process. In 2012, when GPC took those actions in accordance with Delaware's statutory procedures for foreign corporations, it had long been established that such compliance constituted consent to jurisdiction.

B. Consent-based personal jurisdiction is separate and independent from personal jurisdiction based on minimum contacts.

Sternberg correctly concluded that in cases of consent through business registration, a "minimum contacts" analysis is not necessary. *Sternberg*, 550 A.2d at 1113, 1116. This Court explained that "[a]n express consent to jurisdiction, in and of itself, satisfies the requirements of due process." *Id.* Thus, "[i]f a foreign corporation has expressly consented to the jurisdiction of a state by registration, due process is satisfied and an examination of 'minimum contacts' to find implied consent is unnecessary." *Id.* at 1113.[3]

In distinguishing between jurisdiction based on consent and jurisdiction based on minimum contacts, this Court followed a long line of U.S. Supreme Court cases holding that consent is a valid basis for the exercise of jurisdiction and that states may decide for themselves whether compliance with business registration statutes is sufficient to signal such consent. *See Sternberg*, 550 A.2d at 1109-1113. Starting with *Pennsylvania Fire Insurance Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917), the U.S. Supreme Court upheld the constitutionality of the Missouri Supreme Court's determination that foreign corporations which had appointed an agent for service of process in Missouri, as required by Missouri

[3] For corporations that have not registered to do business in Delaware but nonetheless transact business here, Section 382 of the GCL provides that they have "deemed and thereby constituted the Secretary of State its agent for the acceptance of legal process" arising out of any business it transacts within the State. *Sternberg*, 550 A.2d at 1115-16.

statute, had thereby consented to general personal jurisdiction in that state. The Supreme Court expressed "little doubt" that appointing an agent for service of process can constitute consent to personal jurisdiction if a state statute may "rationally be held to go to that length." *Id.* at 95. Further, such "construction did not deprive the defendant of due process of law . . . ." *Id.*

Thereafter, *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 167, 172-75 (1939), upheld the constitutionality of a New York state statute that treated a corporation's appointment of an agent for service of process as consent to general personal jurisdiction. The Court reasoned that, "the designation of the agent [is] a voluntary act" that constitutes "actual consent" and is "part of the bargain by which [the corporation] enjoys the business freedom of the State of New York." *Id.* at 175 (internal quotation marks omitted).

States are thus free to require foreign corporations to consent to jurisdiction as a condition of doing business in the state. Whether registration and appointment of an agent will be deemed consent to general personal jurisdiction is entirely a matter of state law, as construed by the state's courts. *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, 257 U.S. 213, 215-16 (1921).

Sternberg rejected an argument that the *Pennsylvania Fire* line of cases were no longer viable after the "minimum contacts" framework instituted by *International Shoe Co. v. Washington,* 326 U.S. 310 (1945). *See Sternberg*, 550

A.2d at 1110-1113. Under *International Shoe*, personal jurisdiction could be exercised over a foreign corporation that had implicitly consented to jurisdiction by maintaining certain minimum contacts with the forum state. *See id.* at 1109-1110 (citing *International Shoe*, 326 U.S. at 316). *Sternberg* explained that, "the due process holdings of *Pennsylvania Fire Ins. Co.* (express consent by registration) and *International Shoe* (implied consent by minimum contact) complement one another and are neither inconsistent nor mutually exclusive." *Id.* at 1110. Therefore, "express consent is a valid basis for the exercise of personal jurisdiction in the absence of any other basis for the exercise of jurisdiction, i.e. 'minimum contacts.'" *Id.* at 1111.

Sternberg found support for this conclusion in the U.S. Supreme Court's more recent, post-*International Shoe* personal jurisdiction case law. For example, it noted that in *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), the U.S. Supreme Court had applied the minimum contacts test to a question of general personal jurisdiction, but expressly did so only because the foreign corporation had not been registered to do business in Ohio and had not appointed an agent for service of process in that State. The *Perkins* Court distinguished the situation before it from one in which there had been express consent, noting that "the doing of business in a state by a foreign corporation, *which has not appointed a statutory agent upon whom service of process against the corporation can be made in that*

state or otherwise consented to service," will not subject the corporation to general jurisdiction. *Perkins*, 342 U.S. at 443 n.4 (emphasis added). In *Sternberg*, this Court relied on this distinction between express and implied consent as separate bases for personal jurisdiction:

> *Perkins* reaffirmed the principle that there would have been no need to search for minimum contacts to support an implied consent to jurisdiction, if express consent had been given:
>
> > Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative.

Sternberg, 550 A.2d at 1111-1112 (quoting *Perkins*, 342 U.S. at 444).

Similarly, *Sternberg* noted that in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985), the U.S. Supreme Court had made the same distinction in due process considerations between express and implied consent situations, indicating that a minimum contacts analysis was only required for the latter. While *Burger King* emphasized that due process protects a corporation from being subject to suit in a forum where it lacks minimum contacts, the Court also repeated the principle that personal jurisdiction is a waivable right. *See Burger King*, 471 U.S. at 471-72, and 472 n.14. Thus, a minimum contacts analysis is only required "where a forum

seeks to assert specific jurisdiction over an out-of-state defendant who has *not consented to suit there* . . . ." *Id.* at 472 (emphasis added).

Several other U.S. Supreme Court cases decided after *International Shoe* similarly indicated that nothing about the minimum contacts test undermines the principle that corporations may expressly consent to jurisdiction through compliance with business registration statutes. For example, in *Olberding v. Illinois Central Railroad Co.*, 346 U.S. 338, 341-42 (1953), the Court remarked that it was a "fair rule of law" for states to subject a non-resident tortfeasor motorist to jurisdiction for suit, but recognized that "implied consent" in such a situation was a fiction contrasted with the "actual consent" that had been given by the foreign corporation in *Neirbo*. Such actual consent to suit is established "in situations where a state may validly require the designation of an agent for service of process as a condition of carrying on activities within its borders, and such designation has in fact been made." *Olberding*, 346 U.S. at 341-42. *See also Suttle v. Reich Bros. Constr. Co.*, 333 U.S. 163, 167-68 (1948) (reaffirming *Neirbo* as to waiver through appointment of an agent).

The decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), which GPC cites throughout its brief, addressed another type of fictional consent which *Olberding* had distinguished from the actual, express consent that exists in this case. Far from being outdated, this particular form of express consent remains a viable basis for

personal jurisdiction after *International Shoe*. Indeed, GPC has not and cannot point to a single case in which the U.S. Supreme Court has undertaken a minimum-contacts inquiry with respect to a defendant who consented to personal jurisdiction.[4] Thus, under longstanding U.S. Supreme Court and Delaware law, GPC's voluntary and express consent to general personal jurisdiction in Delaware obviates the need for a minimum contacts analysis.

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4 *Accord Forest Laboratories, Inc. v. Amneal Pharm., LLC*, 2015 WL 880599, at *7 (D. Del., Feb. 26, 2015); *Magistrate Judge report adopted*, 2015 WL 1467321 (D. Del. Mar. 30, 2015). ("First, the Supreme Court has never explicitly stated that the holdings in *Pennsylvania Fire* and *Neirbo* were overruled by *International Shoe* . . . . It is well established that courts should be wary in declaring Supreme Court precedent overruled in the absence of an explicit statement by the Supreme Court to that effect.") (Citns. omitted.)

C. *Daimler* only addressed the minimum contacts test and has no bearing on consent-based jurisdiction.

Daimler did not change the law regarding consent to personal jurisdiction through compliance with business registration statutes. The U.S. Supreme Court did not mention the *Pennsylvania Fire* line of cases at all. Rather, the Court merely refined what contacts would be necessary when general personal jurisdiction is based on a corporation's minimum contacts with the forum state. In *Goodyear*, the Court had held that in the absence of consent, general personal jurisdiction may only be exercised when a corporation's "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State." 131 S. Ct. at 2851 (quoting *International Shoe*, 326 U.S. at 317). And *Daimler* clarified that the corporation's place of incorporation and principal place of business are the states where it will be considered "at home" for purposes of the minimum contacts analysis. *Daimler*, 134 S. Ct. at 760.

However, the jurisprudence regarding consent-based jurisdiction was not altered either by the introduction of the minimum contacts test in *International Shoe* nor by the refinement of that test in *Goodyear* and then *Daimler*. This conclusion flows from the logic of the *Daimler* opinion, as well as the Court's indication that it continues to consider consent as a separate and independent basis of jurisdiction. In discussing general jurisdiction, the Court quoted *Goodyear*'s observation that, "'[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*, 134 S. Ct. at 755-56 (quoting *Goodyear*, 131 S. Ct. at 2856) (alteration in original, emphasis added).

After *Daimler*, *Sternberg* has been followed three times by the federal district court for the District of Delaware, which has repeatedly held that the Delaware statutes validly provide for exercise of general personal jurisdiction over a foreign corporation that has consented to jurisdiction by registering to do business in Delaware. *See Novartis Pharm. Corp. v. Mylan Inc.*, 2015 WL 1246285 at *3-4 (D. Del. Mar. 16, 2015); *Forest Labs, Inc. v. Amneal Pharm, LLC*, 2015 WL 880599 at *12 (D. Del. Feb. 26, 2015); *Acorda Therapeutics, Inc. v. Mylan Pharms. Inc.*, 78 F. Supp. 3d 572, 587 (D. Del. 2015).[5] *But see, Astrazeneca AB v. Mylan Pharms., Inc.*, 72 F. Supp. 3d 549 (D. Del. Nov. 5, 2014).

In *Forest Laboratories*, Magistrate Judge Burke thoroughly considered and rejected the argument that *Daimler* had impaired the power of Delaware courts to exercise general jurisdiction over corporations that have consented to jurisdiction in this State. Referring to the passage from *Daimler* quoted above – 134 S.Ct. at 755-56 – *Forest Labs* accurately observed that "in the entire *Daimler* opinion, the

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5 *See also, Novartis Pharm. Corp. v. Zydus Noveltech, Inc.*, 2015 WL 4720578 at *4 (Del. Aug. 7, 2015) (consent to general jurisdiction could not be found when the foreign corporation had *not* registered to do business in Delaware).

concept of consent to jurisdiction is mentioned just one time – and then in a way that hurts, not helps, (defendant) Mylan's argument." It concluded that passage with the trenchant observation that, "it is difficult for the Court to read *Daimler* as overruling nearly century-old Supreme Court precedent regarding what amounts to voluntary consent to jurisdiction when: (1) *Daimler* never says it is doing any such thing; and (2) what *Daimler* does say about consent to jurisdiction suggests just the opposite." *Forest Labs*, 2015 WL 880599 at *13.[6]

A large number of other courts agree that *Daimler* has not changed the law regarding consent-based jurisdiction. The U.S. District Court for the District of Nebraska has explained that "*Daimler* only speaks to whether general jurisdiction can be appropriately exercised over a foreign corporation that *has not consented to suit* in the forum. It does nothing to affect the long-standing principle that a defendant may consent to personal jurisdiction." *Perrigo Co. v. Merial Ltd.*, 2015 WL 1538088 at *7 (D. Neb. Apr. 7, 2015) (internal citations omitted, emphasis in original). Similarly, the court in *Senju Pharmaceutical Co., Ltd., v. Metrics, Inc.*, 96 F.Supp.3d 428 (D.N.J., 2015), held that *Daimler* "did not disturb" the law regarding jurisdiction through consent to service. *Id.* at *17-*18. Rather, "*Daimler* did not discuss in-state service and there was no indication in *Daimler*

6 When issuing its bench ruling in *International Paper v. Hudson*, which ruling it expressly incorporated into its decision here, the Superior Court remarked that it had found *Forest Labs* and two other recent District of Delaware decisions to be "persuasive on this issue." (Trans. p. 39, *l.* 10-15; B 28.)

that the defendant had registered to do business in the state or been served with process there." *Id.* at 437-38. Similarly in *Otsuka Pharm v. Mylan,* 2015 WL 1305764 at *9-10 (D.N.J., Mar. 23, 2015) in which the court observed "[I]t cannot be genuinely disputed that consent, whether by registration or otherwise, remains a valid basis for personal jurisdiction following *International Shoe* and *Daimler,*" and provided an extended analysis for that conclusion.

The federal Second Circuit Court of Appeal also agrees. After *Daimler* was decided, that court found that a foreign bank was not at home in New York, but remanded for the district court to "consider whether [the bank] has consented to personal jurisdiction in New York by applying for authorization to conduct business in New York and designating the New York Secretary of State as its agent for service of process." *Gucci Am. v. Bank of China*, 768 F.3d 122, 136 n.14 (2d Cir. 2014) (citing *Daimler*, 134 S. Ct. at 755-56).

Courts continue to note that the due process concerns underlying the holding in *Daimler* are absent in cases of consent. *Senju Pharm.*, 96 F.Supp.3d at 438 n.6. In *Daimler*, the Court placed importance on predictability of general jurisdiction—if a corporation can only be sued where its contacts are so continuous and systematic as to make it at "home," then it should be able to easily ascertain where it will be subject to suit. 134 S. Ct. at 760. But a consent rule serves this same function: voluntary compliance with a state registration statute, appointing an agent

for service of process and accepting service in the forum state is conduct that has been interpreted as constituting consent to general jurisdiction and, consequently, the foreign corporation "can have little uncertainty as to the judicial consequences of his actions." *Senju Pharm.* at 438 n.6.

GPC could not possibly have been surprised by the trial court's ruling that it is subject to personal jurisdiction in Delaware. GPC registered to do business here and appointed an agent for service of process twenty-four years after this Court established in *Sternberg* that those actions constitute consent to general personal jurisdiction. 550 A.2d at 1116. Its supporting affidavit[7] – which fails to mention GPC's auto parts warehouse in Middletown, Delaware – does not suggest nor mention that there was any element of "surprise" in the corporate offices when this Delaware-filed asbestos case on behalf of one of its former warehouse workers arrived through its registered agent. Instead of pointing to any surprise, nor claiming hardship under a *forum non conveniens* stance, GPC overstates its case by contending that affirming consent-based jurisdiction here would have the effect of "subjecting national corporations to suit in every state in which they are registered, regardless of the relationship between defendant, suit and forum." GPC Br. 4. However, although all states have a foreign corporation registration statute, relatively few of them have expressly and unambiguously declared, through

[7] A169-171.

decision or statute, that registration and appointment of an agent for service of process will be deemed consent to general jurisdiction.[8]

Some states have chosen to limit the effect of appointing a registered agent for service of process, providing that such appointment does not operate as consent to personal jurisdiction. *See, e.g.*, Miss. Code Ann. § 79-35-15 ("The appointment or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state."). Such a provision is included in the Model Registered Agents Act § 15, which has been adopted by ten states and the District of Columbia. *See* Nat'l Conference of Comm'rs on Uniform State Laws, *Registered Agents Act, Model (2006)* (Last Amended 2011).[9]

Because states have taken different positions on this issue, there is no danger that corporations will be subject to suit in every state where they are registered to conduct business. Rather, they will only be subject to suit in those states that have provided for such consent through registration, either in their statutory or

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[8] *See Merriman v. Crompton Corp.*, 146 P.3d 162, 170 (Kan. 2006); *Werner v. Wal-Mart Stores, Inc.*, 861 P.2d 270, 272–73 (N.M. 1993); *Allstate Ins. Co. v. Klein*, 422 S.E.2d 863, 864–65 (Ga. 1992); *Rykoff-Sexton, Inc. v. Am. Appraisal Assocs., Inc.*, 469 N.W.2d 88, 90–91 (Minn. 1991); *Litton Indus. Sys., Inc. v. Kennedy Van Saun Corp.*, 283 A.2d 551, 556 (N.J. Super. Ct. 1971); *Confederation of Can. Life Ins. Co. v. Vega y Arminan*, 144 So. 2d 805, 810 (Fla. 1962); 42 Pa. Cons. Stat. § 5301 (Pennsylvania).

[9] Found at http://www.uniformlawcommission.com/Act.aspx?title=Registered%20Agents%20Act,%20Model%20(2006)%20(Last%20Amended%202011) (last visited December 3, 2015).

decisional law. "[W]hen courts have clearly held that compliance with a state's registration statute confers general jurisdiction, corporations have the requisite notice to enable them to structure their conduct so as to be assured where they will, and will not, but subject to suit." *Acorda Therapeutics*, 78 F. Supp. 3d at 591. Due process is not compromised when the corporation is able to have certainty about the jurisdictional consequences of its actions.

D. Delaware's business registration statute does not impose an unconstitutional condition on foreign corporations.

GPC, and *Amicus* U.S. Chamber of Commerce, argue that if a state requires consent to general jurisdiction as a condition of doing business as a foreign corporation, that violates the "unconstitutional conditions doctrine." GPC Br. 18; Chamber Br. 11-12. The flaw in that argument is that the U.S. Supreme Court has already found the condition that a foreign corporation consent to general personal jurisdiction to be constitutional. *Neirbo* directly addressed this in its discussion of the New York statute that requires a foreign corporation to designate an agent for service of process, "[t]he scope and meaning of such a designation [being] part of the bargain by which [the defendant] enjoys the business freedom of the State of New York . . . ." 308 U.S at 174. The Court concluded that, "[a] statute calling for such designation is constitutional, and the designation of the agent 'a voluntary act.'" *Id.* (quoting *Pennsylvania Fire*, 243 U.S. at 96).

Instead of addressing *Neirbo*, GPC cites *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). There, the Court held that a land-use permit could not be conditioned on the owner surrendering an interest in part of the land unless there is a "nexus" and "rough proportionality" between the property that the government demands and the particular land use the owner proposes. *Id.* at 2595 (citations omitted). That rule protects the Fifth Amendment right not to have property taken without just compensation. *See id.* at 2596. However, *Koontz*

provides little guidance in comparison to *Neirbo*, which directly upheld the conditioning of a foreign corporation's right to conduct business on consent to personal jurisdiction.

Even reading *Koontz* more broadly, GPC also mistakes the scope of the unconstitutional conditions doctrine. A state-imposed condition is not "unconstitutional" if it is reasonable. *See also Burgess v. Lowery*, 201 F.3d 942, 947 (7th Cir. 2000). State registration and agent appointment statutes that require consent to general personal jurisdiction readily meet this reasonableness requirement because states retain an undeniable interest in ensuring that their courts have jurisdiction to adjudicate claims against foreign corporations that transact business in the state.

GPC and *amici* have failed to demonstrate that consent to personal jurisdiction is an "unconstitutional condition" on the right to conduct business as a foreign corporation. Despite GPC's protestations, such consent is based on its election to comply with the business registration and appointment statutes, conduct which the U.S. Supreme Court has determined to be a "voluntary act." *Neirbo*, 308 U.S at 175; *Pennsylvania Fire*, 243 U.S. at 96. *Neirbo*'s treatment of GPC's unconstitutional conditions argument remains dispositive here.

E. Delaware is a proper forum for this case.

The Cepecs, Plaintiffs/Appellees, have sued seven defendants that manufactured and/or supplied the asbestos brake products to which Mr. Cepec was exposed. Five of those defendants are Delaware corporations, and there has been no argument by the only other foreign defendant, Union Carbide Corporation, that Delaware is an improper forum. The Plaintiffs appropriately chose to bring their case against all seven defendants in this one action. Mr. Cepec's asbestos-related cancer is one, indivisible injury caused by his exposure to asbestos manufactured and sold by a number of different companies. This is a very serious case, involving a disease, malignant mesothelioma, that is invariably fatal. This Court has previously upheld a jury verdict in favor of a plaintiff who, like Cepec, developed malignant mesothelioma from exposure to asbestos brakes, agreeing with the trial court that there was sufficient scientific causation evidence. *See GMC v. Grenier*, 981 A.2d 531, 538-39 (Del. 2009).

Delaware is a proper forum inasmuch as all of the defendants are Delaware corporations and/or registered to conduct business in this State as foreign corporations. It is not an attenuated forum, as *Amici* suggest, but is instead a state that connects all the parties. The very fact that Plaintiffs chose to bring their suit in the state that serves as the home for most of the *defendants* in this case refutes *Amici*'s suggestion that Delaware is not a proper or fair forum for this case. Policy

considerations therefore weigh strongly in favor of upholding *Sternberg*'s plainly constitutional approach to recognizing that foreign corporations expressly consent to general personal jurisdiction in Delaware through compliance with Delaware's registration and appointment statutes.

Amici Coalition for Litigation Justice and American Insurance Association (the "Insurance *Amici*") nonetheless contend that the Court should reverse *Sternberg* for policy reasons, primarily to prevent forum shopping by asbestos plaintiffs. However, because there is no actual evidence of an overburdened asbestos docket in Delaware, Insurance *Amici* go on at critical length regarding the concentration of asbestos cases in Madison County, Illinois. That "canned" discussion is irrelevant. There is in fact no reason to conclude that there is excessive forum shopping in Delaware generally, or in this case in particular.

Delaware has long been known for having a tort system that is exceptionally fair and reasonable to U.S. businesses. This reputation is confirmed by the U.S. Chamber Institute for Legal Reform's annual ranking that places Delaware first in fairness of its litigation environment, as perceived by U.S. businesses. *2015 Lawsuit Climate Survey, Ranking The States* at pp. 1-2 & 31. (B 37-38, 67.) Since this survey was initially taken in 2002, corporate attorneys and senior executives have voted Delaware the state with the fairest judicial system every single time. Id. at 32. (B 68.) In 2015, Delaware was also first in most key elements, including

"overall treatment of tort and contract litigation," and "having and enforcing meaningful venue requirements." Id. at 14. (B 50.) Delaware also ranked first in the nation on the element of judges' competence, and second on judges' impartiality and juries' fairness. Id. at 15. (B 51.) (Madison County, Illinois, on the other hand, has a reputation of being one of the most "problematic" jurisdictions in the country.) Id. at 7, 12. (B 43, 48.)

Delaware's consistent top ranking as a fair jurisdiction for businesses in tort litigation has coincided with the State's requirement that foreign corporations consent to general personal jurisdiction in Delaware when they register to do business here. *Sternberg* presents no barrier to the fair treatment of the business community by Delaware's courts.

As an indicator of that fair treatment, Delaware courts are not shy about dismissing under the *forum non conveniens* doctrine. Insurance *Amici* complain that *forum non conveniens* "has proven to be largely chimerical with little impact on forum shopping practices in asbestos cases other than at the margins." [10] While that may be so with respect to the situation in Madison County, Illinois (the evident wellspring of their ire), that is not so in Delaware. Witness the outcome, first in the Superior Court and then in this Court, when E.I. Dupont de Nemours – a bedrock Delaware corporation and one of the state's largest employers, having its

10 Brief of Insurance *Amici*, at p. 3.

law department located here – was sued on a claim arising out of Argentina. The FNC dismissal was affirmed on the basis that the underlying issue was a matter best addressed by the courts in Argentina, along with other hardship and inconvenience factors which tipped the balance. *Martinez v. E.I. Dupont de Nemours & Co.*, 86 A.3d 1102 (Del. 2014).

Further evidencing the overall fairness of the courts in this state, vigilant against runaway verdicts, one need look no further than *Barba v. Boston Scientific Corporation,* 2015 WL 6336151 (Del. Super. Oct. 9, 2015) in which a pelvic mesh verdict of $100 million ($25 million in compensatory damages and $75 million in punitive damages) was remitted on motion by 90%, down to $2,500,000 in compensatory damages and $7,500,000 in punitives.

Insurance *Amici* damn with faint praise as "well-intentioned (albeit frequently counterproductive)" efforts in several jurisdictions to adopt special procedures for the handling of large asbestos dockets.[11] Once again that trade association's broadside should gain no traction here. In fact, Delaware's overall No. 1 ranking – by the business community – would seem to auger that Delaware's specialized asbestos court and handling procedures are to be praised, not criticized with misdirected innuendo.

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11 Brief of Insurance *Amici* at p. 10.

The Delaware statute most on point here – 8 *Del.C.* § 376(a) – with emphasis, reads as follows:

> All process *issued out of any court of this State*, all orders *made by any court of this State*, all rules and notices of any kind required to be served on any foreign corporation which has qualified to do business in this State may be served on the registered agent of the corporation designated in accordance with § 371 of this title ....

The Superior Court of Delaware is up to the task, and has been for decades.

Due Process requires "fair warning" and "predictability," and the case law respects "traditional notions of fair play and substantial justice." Those standards are well met by upholding jurisdiction over GPC here. General jurisdiction as a consequence of registration – depending on state statute or case law – has been upheld since *Neirbo* in 1939. And since *Sternberg*, for the past twenty-seven years it has been declared and understood that a foreign corporation's registration in Delaware exposes it to general personal jurisdiction. That principle has been applied to asbestos cases, along with others, with great fairness and efficiency.[12] It would highly distort traditional notions of fair play and substantial justice to reverse that history and ongoing practice in the name of a principle not expressly articulated by the U.S. Supreme Court in *Daimler* just last year.

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[11] Which efficiency is to be encouraged in the interstate judicial system. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980). *See also Novartis Pharm. Corp. v. Mylan*, 2015 WL 1246285 at *4 (noting that if objecting defendant were correct, the result would likely be three judges dealing with the same matter in three different locales, – "Not very efficient.")

CONCLUSION

Delaware courts may exercise general personal jurisdiction over GPC consistent with due process because GPC has expressly and knowingly consented to general jurisdiction in Delaware. As most courts have concluded, nothing in *Daimler* changed the law regarding consent to personal jurisdiction. The Superior Court's denial of GPC's motion to dismiss should therefore be affirmed by this Court.

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December 15, 2015

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