August 26, 2021

Honorable Kathy Hochul
Governor of the State of New York
State Capitol
Albany, New York 12224

Re: Opposition to A.7769 (M. of A. Weinstein) / S.7253 (Sen. Gianaris), which provides that a foreign corporation's application for authority to do business in this state constitutes consent to jurisdiction of the courts of this state

Dear Governor Hochul:

The New York City Bar Association ("City Bar") opposes the enactment into law of the above-referenced legislation and respectfully asks that you veto it.

I. INTRODUCTION

The legislation provides that a non-New York business entity's application for authority to do business in New York constitutes that entity's consent to jurisdiction in New York courts for any claims arising anywhere in the world, even if those claims and the entity's conduct in question have nothing to do with New York. The City Bar opposes this legislation for multiple reasons:

1) it is out of step with current United States Supreme Court jurisprudence and raises significant issues under the Due Process and Commerce Clauses of the United States Constitution, guaranteeing years of follow-up litigation likely resulting in courts striking down the legislation as unconstitutional;

2) the stated policy rationales do not counteract these constitutional impediments, and significant policy concerns, such as the prospect of deterring businesses from coming to New York, weigh against the legislation;

3) despite the weighty constitutional and policy concerns that it implicates, the legislation seemingly was passed by both houses with some urgency at the end of session, yet the apparent urgency is belied by the fact that this very issue is pending before New York's

highest court, *see Aybar v. Aybar*, APL-2019-00239, with oral argument scheduled for September 1, 2021.

II. ANALYSIS

We append our Report on Legislation that we prepared in June 2019 in response to similar bills introduced during the 2019-2020 legislative cycle, addressing our objections (1) and (2) above.[1] In our Report, we explain why this type of consent-to-jurisdiction legislation is likely unconstitutional, why the policy rationales do not outweigh the constitutional impediments, and how such legislation threatens to negatively affect New York's business environment.

There has been considerable opposition to the legislation, as the City Bar and others have long objected to prior iterations of the bill. Indeed, as early as 2015, commentators noted that legislative efforts to force consent by registration were constitutionally problematic after the United States Supreme Court's decision in *Daimler AG v. Bauman*, 571 U.S. 117 (2014).[2] Moreover, the New York Court of Appeals, New York's highest court, is poised to decide in *Aybar* whether the current version of New York's business registration statute contains a consent-by-registration rule and, if it does, whether the statute is constitutional in light of *Daimler* and its progeny. The parties' briefing is complete and oral argument is scheduled for September 1, 2021.[3]

We reviewed the Sponsor's Memo, and we offer two points in response to it:

First, the Memo claims that: "There is substantial judicial support for the proposition that the proposed addition to BCL sec. 1301 would pass constitutional muster." We respectfully disagree.

In *Aybar*, the Appellate Division held that "asserting jurisdiction over a foreign corporation based on the mere registration and the accompanying appointment of an in-state agent by the foreign corporation, without the express consent of the foreign corporation to general jurisdiction, would be 'unacceptably grasping' under *Daimler*." *Aybar v. Aybar*, 169 A.D.3d 137, 152 (2d Dep't 2019). In October 2020, a New York trial court offered a similar observation, noting that the

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[1] Report on Legislation in opposition to A.7595/S.6352, NEW YORK CITY BAR ASSOCIATION (June 2019), *available at:* https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/report-on-legislation-regarding-consent-to-jurisdiction-by-foreign-businesses-authorized-to-do-business-in-new-york.

[2] *See, e.g.*, L. Saperstein, et al., *New York State Legislature Seeks to Overturn Daimler*, New York Law Journal (May 20, 2015) ("The proposed legislation flies in the face of the U.S. Supreme Court's ruling in Daimler, violates the principles of due process and of the exclusive federal power to regulate interstate and international commerce, and is opposed by legal groups, including, among others, the New York City Bar Association. The legislation will generate unnecessary litigation, and it is bad public policy."); *accord* M.J. Gootridge, et al., *Does New York Banking Law §200(3) Undo 'Daimler'*?, New York Law Journal (March 17, 2016) (observing that, in response to *Daimler*, the consent to general jurisdiction by registering to do business in the forum state "emerged as 'the go-to alternative'" to *Daimler*, but it was "doubtful" that theory could be "reconciled with *Daimler's* due process analysis.").

[3] Note: the City Bar has filed an amicus brief in the case. *See* Motion for Leave to File Brief for Amicus Curiae, NEW YORK CITY BAR ASSOCIATION (APL-2019-00239, Queens County Clerk's Index No. 706909/15, App. Div. 2d Dep't Docket Nos. 2016-06194 and 2016-07397), (July 22, 2021), *available at:* https://s3.amazonaws.com/documents.nycbar.org/files/2020809_MotionforLeavetoFileAmicusCuriaeBrief.pdf.

"number of New York courts rejecting general personal jurisdiction based solely on a foreign corporation's registration to do business here continues to grow, under the reasoning that *Daimler* . . . renders the reasoning of old cases upholding general jurisdiction on the basis of consent-by-registration outmoded and inapplicable." *Malczuk v. Michaels Org*., 70 Misc. 3d 218, 221 (Sup. Ct. Queens Co. 2020).

This writing on the constitutional wall is not unique to New York. Courts in Nebraska, Delaware, Illinois, Missouri, and New Jersey likewise have recently held that businesses may not be deemed to have consented to general jurisdiction in state courts simply by registering to do business in those states. *Lanham v. BNSF Ry. Co.*, 939 N.W.2d 363 (Neb. 2020); *Genuine Parts Co. v. Cepec*, 137 A.3d 123 (Del. 2016); *Aspen Am. Ins. Co. v. Interstate Warehousing, Inc*., 90 N.E.3d 440 (Ill. 2017); *State ex rel. Norfolk S. Ry. v. Dolan*, 512 S.W.3d 41 (Mo. 2017); *Dutch Run-Mays Draft, LLC v. Wolf Block, LLP*, 164 A.3d 435 (N.J. Super. Ct. App. Div. 2017). In *Rodriguez v. Ford Motor Co*., 458 P.3d 569, 583 (N. M. Ct. App. 2018), the New Mexico Court of Appeals went the other way, but even that court admitted the United States Supreme Court, if it squarely addressed the issue, "may hold that registration pursuant to a state statute, does not, by itself, indicate consent to general jurisdiction that is consistent with due process."

Second, the Sponsor's Memo contends that: "Enactment of the proposed addition to BCL sec. 1304 will not burden the New York courts with cases which ought not to be litigated here . . . [because] courts retain the discretionary power to decline the exercise of jurisdiction over them in the interests of justice and convenience pursuant to the doctrine of forum non conveniens." Again, we respectfully disagree.

If this legislation becomes law, (i) any party (ii) with any claims (iii) arising anywhere in the world (iv) against any business registered in New York may bring those claims against that business in New York state court. New York will become the world's courtroom. At a minimum, New York courts will have to resolve forum non conveniens arguments on a case-by-case basis—a tedious, fact-specific inquiry—thereby embroiling New York's courts in the intricacies of legal affairs far and wide. Any New York court that decides to keep a case will be required to resolve all procedural and substantive issues that case presents.

In sum, no reason supports subjecting New York courts to the thankless exercise of resolving legal disputes that may have nothing more to do with New York than the defendant's registration to do business here.

III. CONCLUSION

We respectfully request that you veto the bill. The legislature always may revisit the bill once the New York Court of Appeals has ruled in *Aybar*.

Respectfully,

Michael Regan /s/
Michael P. Regan
Chair, Council on Judicial Administration

Bart Eagle /s/
Bart J. Eagle
Chair, State Courts of Superior Jurisdiction Committee

John Lundin /s/
John M. Lundin
Chair, Litigation Committee

Cc: Hon. Michael Gianaris
Hon. Helene Weinstein

Enclosure

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REPORT ON LEGISLATION

A.7595 **M. of A. Weinstein**
S.6352 **Sen. Kaplan**

AN ACT to amend the civil practice law and rules, the business corporation law, the general associations law, the limited liability company law, the not-for-profit corporation law and the partnership law, in relation to consent to jurisdiction by foreign business organizations authorized to do business in (New York Office of Court Administration (Internal # 59 - 2019))

THIS BILL IS OPPOSED

The New York City Bar Association does not support this legislation because the rationales presented in favor of the legislation do not outweigh the constitutional issues the bill raises. The proposed legislation raises significant issues under the Due Process and Commerce Clauses of the United States Constitution. The continuing appellate litigation over these issues of personal jurisdiction and the further pronouncements from the United States Supreme Court confirm that further judicial precedent is necessary before this legislation might be enacted.

DUE PROCESS CONCERNS

The exercise of general, all-purpose jurisdiction over an out-of-state entity raises due process questions under the United States Constitution. In Daimler AG v. Bauman, the United States Supreme Court held that exercising "general jurisdiction in every State in which a corporation engages in a substantial, continuous, and systematic course of business" is "unacceptably grasping" and thus violates due process. Daimler AG v. Bauman, 134 S. ct. 746, 760-61 (2014) (internal quotation marks and citation omitted).

Many federal courts considering statutes similar to the proposed legislation have held that, under Daimler, imposing general jurisdiction over out-of-state entities based on state registration requirements violates due process. After Daimler a defendant's mere registration to conduct business in a state is insufficient to confer general personal jurisdiction in a state that is neither the defendant's state of incorporation nor its principal place of business. Gucci America, Inc. v. Lui, 768 F.3d 122, 135 (2d Cir. 2014); Chatwal Hotels & Resorts LLC v. Dollywood Co., 2015 WL 539460, at *6 (S.D. N.Y. Feb. 6, 2015).

Imposition of general jurisdiction pursuant to a Connecticut statute on an out-of-state entity registered to conduct business in Connecticut violated due process. Brown v. CBS, 19 F. Supp. 3d 390, 398-99 (D. Conn. 2014). Absent a statute but despite pre-Daimler state court

precedent imposing jurisdiction, an out-of-state entity's compliance with Delaware business registration requirements "cannot constitute consent to jurisdiction" and the state court precedent to the contrary can no longer be said to comport with federal due process." AstraZeneca AB v. Mylan Pharms., Inc., 72 F. Supp. 3d 549, 556 (D. Del. Nov. 5, 2014) (citing Daimler AG v. Bauman, 134 S. Ct. at 761-62), aff'd on other grounds, No. 2015-1460 (Fed. Cir. Mar. 18, 2016). In Louisiana, "in light of Daimler, interpreting a registration statute as giving consent to general jurisdiction is untenable." Gulf Coast Bank & Trust Co. v. Designed Conveyor Sys. LLC, 2017 WL 120645, at *4 (M.D. La. Jan. 12, 2017). In the Seventh Circuit, by the end of 2016, "many district courts have held that registering to do business or maintaining a registered agent is not enough to confer general jurisdiction over a foreign corporation." Perez v. Air & Liquid Sys. Corp., 2016 WL 7049153, at *6 (S.D. 111. Dec. 2, 2016) (collecting decisions).

The proposed legislation also raises an issue under the due process doctrine of unconstitutional conditions. "[T]he government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property" right given up. Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (regulatory taking). Pickering v. Board of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 568 (1968) (public school teachers' First Amendment rights). "It is settled law that the government may not, as a general rule, 'grant even a gratuitous benefit on condition that the beneficiary relinquish a constitutional right.'" O'Connor v. Pierson, 426 F.3d 187, 201 (2d Cir. 2005) (quoting United States v. Oliveras, 905 F.2d 623, 628 n. 7 (2d cir. 1990)).

Before Daimler, the due process implications of requiring out-of-state entities conducting business in New York to register, thus subjecting themselves to general jurisdiction, may not have been apparent. Daimler now makes clear, however, that, if out-of-state business entities subject themselves to general jurisdiction in New York, they are relinquishing a substantial, valuable constitutional defense. Although the only penalty out-of-state entities may face for conducting business in New York without registering is loss of the right themselves to sue in the New York courts, N.Y. Bus. Corp. Law §§ 1312(a), 1314(b), it is questionable whether there is a reasonable relationship, for due process purposes, between that penalty and consent to general jurisdiction over actions arising outside New York. See Kevin D. Benish, Note, *Pennoyer's Ghost*: Consent, Registration Statutes, and General Jurisdiction after *Daimler AG v. Bauman*, 90 N.Y.U. L. Rev. 1609 (2015) (determining, based on a survey of decisions, that an out-of state corporation's registration to conduct business in a state may not constitute consent to general jurisdiction under due process principles after Daimler).

COMMERCE CLAUSE CONCERNS

The "dormant Commerce Clause" doctrine invalidates state laws that discriminate against or place impermissible burdens on interstate commerce." Department of Revenue of Ky. v. Davis, 553 U.S. 328, 338-39 (2008). The United States Supreme Court has condemned the conditioning of the right to conduct business in a state on consent to general jurisdiction over claims arising outside the state as an undue burden on interstate commerce under the Commerce Clause. E.g., Michigan Cent. R. Co. v. Mix, 278 U.S. 492, 494 (1929); Atchison, T. & s. F Ry. co. v. Wells, 265 U.S. 101, 103 (1924); Davis v. Farmers' Co-op. Equity Co. 262 U.S. 312, 315

(1923). The Association is concerned that this doctrine similarly proscribes the proposed legislation.

New York Business Corporation Law § 1312(a), cited above, denies unregistered out-of state entities conducting business in New York capacity to sue here. Before Daimler, New York courts held that § 1312(a) did not impose undue burdens on interstate commerce, because the statute applied only to businesses engaged in "systematic and regular" activity here, implicating intrastate regulation rather than interstate commerce. Airtran N.Y. LLC v. Midwest Air Group. Inc. 46 A.D.3d 208, 214 (1st Dep't 2007); Acno-Tec Ltd. v. Wall St. Suites L.L.C., 24 A.D.3d 392, 393 (1st Dep't 2005). This interpretation of § 1312(a) employed "a heightened 'doing business' standard, fashioned specifically to avoid unconstitutional interference with interstate commerce under the Commerce Clause," Airtran N.Y. LLC v. Midwest Air Group, Inc., 46 A.D.3d at 214 (citing Tauza v. Susquehanna Coal co., 220 N.Y. 259, 267-68 (1917)), "since a lesser showing might infringe on Congress's constitutional power to regulate interstate commerce." Airtran N.Y., LLC v. Midwest Air Group, Inc. 46 A.D.3d at 214.

This saving interpretation offered by New York courts for the bar against unregistered out-of-state entities availing themselves of New York courts, that it applies only to businesses systematically and regularly active in New York and therefore considered functionally in New York, no longer may be viable for personal jurisdiction purposes. Daimler now expressly has overruled the "doing business" theory of presence in a state for purposes of general jurisdiction. Therefore that theory no longer may save an interpretation or amendment of the Business Corporation Law that treats out-of state entities' registration to conduct business in New York as consent to personal jurisdiction here from conflict with the Commerce Clause.

POLICY RATIONALES OFFERED FOR THE PROPOSED LEGISLATION

According to the Sponsor's Memorandum, "the measure serves a substantial public interest. Being able to sue New York-licensed corporations in New York on claims that arose elsewhere will save New York residents and others the expense and inconvenience of traveling to distant forums to seek the enforcement of corporate obligations." The legislation also is advanced as a means to provide certainty regarding personal jurisdiction over out-of state businesses, a certainty disrupted by Daimler; Goodyear Dunlop Tires Operations, S.A. v. Brown, 131 S. Ct. 2846, 2853 (2011); and other decisions in the wake of those decisions. The Sponsor's Memorandum anticipates that the measure may provide "the certainty of a forum with open doors for the enforcement of obligations of New York-licensed corporations without the expense and burden of proving jurisdiction on a case-by-case basis."

The City Bar recognizes, as does the Sponsor's Memorandum, that: "From 1916 to the present, New York courts-State and Federal--have held that a foreign corporation's registration to do business in New York constitutes consent by the corporation to general personal jurisdiction in the New York courts." While the policy this measure embodies was embraced by New York for many years, Daimler and Goodyear Dunlop Tires changed the due process analysis for personal jurisdiction and provide out-of state entities conducting business in New York that are defendants in actions commenced here a new defense to personal jurisdiction based on due process.

The policy rationales offered do not counteract or outweigh the constitutional impediments to the bill. Other policy considerations, moreover, weigh against the bill. The possibility of saving New York residents and unidentified "others" the trouble of traveling to distant forums may be beneficial, but ignores the costs of processing litigation with only tangential ties to New York and of increasing exposure to civil liability of out-of-state entities conducting business in New York. New York residents' interests are not necessarily served by giving out-of-state entities increased access to New York courts to sue both New York residents and nonresidents, without regard to such lawsuits' lack of connection to New York. A further, likely unintended consequence of the legislation may be, for example, that it will provide out-of-state entities a significant disincentive to register and appoint a New York agent for service of process, increasing the difficulties of effecting service of summonses and subpoenas on those entities. If this measure serves as a model to other states to enact similar legislation, New York entities would be subject to suits in various forums around the country to which, without such legislation, those entities retain a jurisdictional defense.

Although the legislation may be intended to provide certainty, its questionable constitutionality makes that outcome unlikely. Substantial litigation over the constitutional issues raised by the legislation already is occurring in New York trial and appellate courts and other courts across the country. The constitutional impediments posed by Daimler constrained the federal Second Circuit Court of Appeals from construing out-of-state corporations' registration and appointment of an agent for service in Connecticut, under the current Connecticut registration statute, as consent to general jurisdiction in Connecticut over claims arising outside the state. Brown v. Lockheed Martin Corp., 814 F.3d 619, 631 (2d Cir. 2016). This result is similar to the decisions cited above, but the Second Circuit specifically acknowledged that it was rejecting for Connecticut's statute the construction of New York's registration statute that New York courts, before Daimler, had adopted. Brown v. Lockheed Martin Corp., 814 F .3d at 640. Noting the New York Legislature's consideration of this bill, the Second Circuit expressed concern that even "a carefully drawn state statute that expressly required consent to general jurisdiction as a condition on a foreign corporation's doing business in the state" may violate due process. Id. at 640-41.

In 2017, the United States Supreme Court only reinforced Daimler's constraints that drove the Second Circuit. The only recognized bases for general jurisdiction over a corporate entity are its place of incorporation and its principal place of business. BSNF Ry. co. v. Tyrrell, 137 S. ct. 1549, 1558-59 (2017); Daimler AG v. Bauman, 134 S. Ct. at 760. A corporation that conducts business in many states outside the corporation's states of incorporation and principal place of business will register in all or most of those other states. Applying Daimler's standard that a corporation must be "at home" in a state to confer general jurisdiction there, the Court concluded that a "corporation that operates in many places can scarcely be deemed at home in all of them." BSNF Ry. Co. v. Tyrrell, 137 S. Ct. at 1559. Yet the proposed legislation's very result renders an out-of-state corporation that operates and hence registers in New York, as well as in any other states, "at home" here and in any of those other states: an untenable result under Daimler as interpreted and applied by BSNF Ry.. In sum, using registration to conduct business to establish general jurisdiction equates "at home" with "doing business, "the result that Daimler expressly proscribed. Daimler AG v. Bauman, 134 S. Ct. at 762 n. 20.

At best, the constitutional questions that the proposed legislation raises currently are unsettled. Absent any demonstrated need to enact this legislation now, it only would invite additional expense and uncertainty until the courts settle these questions. In the meantime the policy rationales for the proposed legislation must be subject to further debate.

CONCLUSION

The current policy rationales do not justify the proposed legislation's potential conflicts with the Due Process and Commerce Clauses of the United States Constitution. These constitutional issues already are being litigated in New York and other courts, so that it is only prudent to await further judicial clarification before enacting this legislation. For these reasons, the City Bar does not support the legislation.[1]

Reissued June 2019

[1] We also refer you to the correspondence from the Association's Banking Law Committee to the bill's sponsors dated June 9, 2014, commenting on A.9576/S.7078 (2014 Sess.). The Banking Law Committee also cautioned that the bill's proposed amendment to the Business Corporation Law raised jurisdictional issues with regard to foreign banking corporations conducting business in New York, because Article 5 of the Banking Law includes specific provisions addressing jurisdiction over those corporations as well as related issues (citing N.Y. Banking Law §§ 200 et seq.). See https://www2.nycbar.org/pdf/report/uploads/20072741-GeneralJurisdictionForeignBusiness.pdf.