15-3294-cv

United States Court of Appeals

for the

Second Circuit

RITCHIE CAPITAL MANAGEMENT, L.L.C., RITCHIE CAPITAL MANAGEMENT, LTD., RITCHIE SPECIAL CREDIT INVESTMENTS, LTD.,

Plaintiffs-Appellants,

– v. –

COSTCO WHOLESALE CORPORATION,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, the undersigned counsel for Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., and Ritchie Special Credit Investments, Ltd., certifies as follows:

(A) Ritchie Capital Management, L.L.C. does not have any parent corporations, and no publicly held corporation owns 10% or more of its stock.

(B) Ritchie Capital Management, Ltd. does not have any parent corporations, and no publicly held corporation owns 10% or more of its stock.

(C) Ritchie Special Credit Investments, Ltd.'s parent corporation is Ritchie Structured Investments, Ltd., and no publicly held corporation owns 10% or more of its stock.

Dated: January 29, 2016

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

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PRELIMINARY STATEMENT

This appeal turns on a single issue of law: did Costco Wholesale Corporation consent to general personal jurisdiction in New York when it registered to do business in this state and designated an agent for service of process under a state process that provides for such consent? The answer is yes, according to the U.S. Supreme Court, the New York Court of Appeals, this Court, and other federal Courts of Appeals. Because Costco consented to the exercise of general jurisdiction in New York by registering to do business in the state, this Court should reverse the district court's order dismissing this case for lack of personal jurisdiction over Costco.

This case arises from Costco's knowing facilitation of Thomas J. Petters' notorious scheme to deceive lenders into loaning billions of dollars to a business that did not exist. Costco's actions perpetuated the fraud and enabled Peters to swindle appellants, Ritchie Capital Management, L.L.C. and related entities. Petters began his fraud by acting as a "diverter" for Costco. As a "diverter," Petters bought name-brand goods from manufacturers who were unwilling to sell directly to Costco, and he resold those goods to Costco for a profit. Petters did not have sufficient working capital to purchase these goods, and he convinced lenders to finance his transactions by providing them with purchase orders and guaranty

letters from Costco, which he used to demonstrate that he was engaged in genuine transactions.

Petters eventually turned his "diverting" business into a massive Ponzi scheme, obtaining financing for phantom transactions and using the proceeds of those loans to pay off prior lenders. Costco discovered Petters' fraud in 2000, when a Petters lender asked Costco to verify purchase orders that Costco discovered were fraudulent. Rather than sever ties with Petters, Costco actively assisted and cooperated in the fraud in order to protect its own business interests and so it could continue to receive "diverted" goods. It provided Petters with fake purchase order numbers and guaranty letters regarding fictitious diverting transactions for Petters to present to his lenders. Ritchie specifically reviewed and relied on purchase order numbers and guaranty letters that Costco gave to Petters to make a direct loan to Petters of $31 million.

As a result of Costco's active participation in the fraud, Ritchie lost this entire sum. Ritchie asserts claims of aiding and abetting fraud and civil conspiracy against Costco to recover these losses.

The district court dismissed Ritchie's claims, finding that it lacked personal jurisdiction over Costco because Costco did not have sufficient contacts with New York to justify the exercise of general jurisdiction under *Daimler AG v. Bauman*,

134 S. Ct. 746 (2014), which requires that a corporate defendant be "at home" in the forum state.

Even if Costco does not have sufficient *contacts* with New York under *Daimler*, it is still subject to general jurisdiction here. That is because there is a basis for exercising general jurisdiction over Costco independent of *Daimler*—namely, that Costco has *consented* to suit in New York by registering to do business in this state and designating an agent for service of process. The Supreme Court has long held that states may validly condition a foreign corporation's registration to do business on its consent to be sued in that state and that the federal courts are to honor a state's choice regarding the scope of that consent. The law in New York has been clear for 100 years—a foreign corporation that registers to do business in New York and appoints an agent for service of process consents to the exercise of general jurisdiction in this state. Accordingly, both the Supreme Court and this Court have held that a company like Costco that registers to do business in New York and appoints an agent for service of process validly consents to general personal jurisdiction. As a result, this Court should reinstate the action and permit Ritchie to pursue its fraud claims against Costco.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1332(a) and 1441(a) because there is complete diversity between the parties and

the amount in controversy exceeds $75,000. This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final order entered September 21, 2015, granting Costco's motion to dismiss and disposing of all claims asserted by Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., and Ritchie Special Credit Investments, Ltd. (collectively, "Ritchie"). Ritchie timely filed a Notice of Appeal on October 16, 2015.

ISSUE PRESENTED

Does a foreign corporation consent to general personal jurisdiction in New York by registering to do business in the state and designating an agent for service of process, where New York has long construed these acts as consenting to general personal jurisdiction?

STATEMENT OF THE CASE

A. Procedural History

Ritchie commenced this action on February 4, 2014, by filing a Summons with Notice in the Supreme Court of New York, County of New York. (Dkt. 2 at 1-2 ¶ 1, Ex. A).[1] Ritchie filed a complaint on April 9, 2014. (Dkt. 2 Ex. D). On June 27, 2014, Costco removed the action to the United States District Court for the Southern District of New York (Broderick, J.). (Dkt. 2). Ritchie filed a First Amended Complaint on October 17, 2014. (Dkt. 19). This Complaint asserted

[1] "Dkt." refers to the district court docket (S.D.N.Y. No. 14-cv-4819); "A" refers to the Appendix filed jointly by all parties; and "SPA" refers to the Special Appendix.

claims against Costco for aiding and abetting fraud and civil conspiracy to commit fraud. (A-48-54).

On November 13, 2014, Costco moved to dismiss the Complaint for lack of personal jurisdiction and, alternatively, to dismiss the claims of Ritchie Capital Management, L.L.C. as time-barred. (Dkt. 24). By an unreported Memorandum & Order dated September 21, 2015, the district court granted Costco's motion on personal jurisdiction grounds and dismissed the Complaint. (Dkt. 40; SPA-1).[2] The same day, the court entered judgment and closed the case. (Dkt. 41).

This appeal followed.

B. Factual Background

1. The Purchase-Order Financing Fraud

From approximately 1998 through 2008, Petters spearheaded a massive fraud in which he induced private lenders to loan him billions of dollars based on false representations concerning the supposed business purpose of the loans. (A-20 ¶ 1; A-44 ¶ 82). Specifically, Petters and his companies formed special purpose entities that, he represented, purchased consumer merchandise at wholesale prices and re-sold it to "big-box" retailers such as Costco. (A-21 ¶ 2). Petters further represented that he needed financing to purchase merchandise in fulfillment of purchase orders from the retailers, and he provided copies of these purported

[2] The court did not reach the statute of limitations issue. (SPA-17).

purchase orders and guaranty letters from his buyers to prospective lenders as proof of the legitimacy of his operations. (A-22 ¶¶ 4-5; A-45 ¶ 83(b)-(c)). Petters represented that the loans would be repaid directly from—and were secured by—the expected proceeds from his sales to the retailers. (A-26 ¶ 18).

In reality, there was no merchandise, and the purchase orders that Petters held out as proof of his legitimate operations were fictitious. Unbeknownst to the victims of his fraud, including Ritchie, Petters was actually operating a Ponzi scheme whereby he repaid lenders with the proceeds he received from other defrauded lenders. (A-44-47 ¶¶ 82-85). This was one of the largest Ponzi schemes in U.S. history. When it finally collapsed in 2008, Petters had unpaid obligations in excess of $3 billion. (A-20 ¶ 1).

2. *Costco And The Diverting Business*

Costco is a "warehouse club" retailer. Consumers who wish to purchase items in Costco's stores must join the Costco "club" and pay an annual membership fee. In the 1990s and continuing during Petters' fraud, it was difficult for Costco to purchase brand-name consumer goods to sell in Costco's stores. The manufacturers of these products did not want their products sold in warehouse club stores, because that lowered the goods' value and brand esteem. Accordingly, the manufacturers often refused to sell directly to warehouse club retailers like Costco, and they prohibited their authorized distributors from selling to such retailers as

well. Costco, however, wanted to carry these goods because they were highly desired by Costco's consumers and helped Costco attract new club members. For this reason, Costco relied on intermediaries to purchase these goods by acquiring them from authorized distributors and reselling them to Costco, in a process known as "diverting." (A-21 ¶¶ 2-3).

3. *Costco Was Instrumental In Defrauding Ritchie*

Beginning in 1992, Petters' Minnesota-based companies functioned as diverting agents for Costco, helping it to acquire thousands of units of consumer electronics. (A-21 ¶¶ 2-3).

Petters, however, soon began to use his diverting business as bait for a Ponzi scheme. Petters represented to lenders that his companies needed short-term loans to buy consumer electronics that had supposedly been pre-sold to a Costco affiliate, National Distributors. In return for this "purchase order" financing, Petters promised high interest rates and profit-sharing arrangements. But the vast majority of these purported transactions were fictitious, and Petters typically refinanced his existing loans with funds obtained from new lenders. (A-21-23 ¶¶ 2, 4-7; A-44-47 ¶¶ 83-85).

Costco learned of Petters' fraud no later than October 2000, when a Petters lender, General Electric Capital Corporation ("GECC"), asked Costco to verify certain purchase orders that Petters had presented to GECC to secure a loan and

that GECC understood Costco had guaranteed. Costco determined that the purchase orders were illegitimate. Although the documents looked like National Distributors purchase orders and contained identification numbers from actual purchase orders that National Distributors had placed, National Distributors had never issued these purchase orders to Petters. Rather, Petters had forged these documents from purchase orders (or the identification numbers associated with those orders) that National Distributors had issued to other vendors.

Costco could, and should, have severed its ties with Petters as soon as it uncovered Petters' fraud. It did not. Instead, it continued to do business with him, despite his fraud, to serve its own business interests. Costco needed assurances from Petters that GECC would not make any claims against Costco regarding the fraudulent orders. Moreover, as explained further below, Costco realized it could use Petters to finance Costco's transactions with other diverters so that Costco could continue to obtain highly desired brand-name goods for its stores. As a result, Costco agreed to assist Petters in his continued wrongdoing. (A-22 ¶¶ 4-5; A-27-28 ¶¶ 20-25; A-49 ¶ 95; A-52-53 ¶¶ 109-10).

In the following months, Costco assisted Petters in numerous ways. Costco provided Petters with information about checks that it had issued to other payees for Petters to use to assure his lenders that Costco had paid him for his sales. (A-28-30 ¶¶ 26-31).

Costco also used Petters to obtain diverted goods from other diverters, allowing it to expand its warehouse club business. Costco relied on several diverting agents other than Petters, but these agents did not have the capital or access to conventional financing necessary to purchase brand-name goods in the quantities Costco desired. As a result, Costco asked Petters to finance these other agents. Costco knew that Petters would need to mislead lenders in order to obtain the funds he would pass on to the other agents. Few lenders would deal with Petters if they knew he was using their money to finance third parties, as it would be difficult for the lenders to obtain a security interest in their favor. Consequently, Costco gave Petters phony purchase orders indicating that he—rather than the actual diverting agent—was the party purchasing the goods and selling them to Costco. (A-30-35 ¶¶ 33-53).

In addition, Costco provided Petters with illegitimate guaranty letters for Petters to provide to his lenders to obtain over $100 million of new loans. In these letters, Costco pledged to pay Petters for goods he supposedly was selling to National Distributors. The letters covered sales in 2001 and from 2006 to 2008. The supposed transactions guaranteed by the letters, however, did not exist. Like the purchase orders, the guaranty letters reflected fictitious transactions between Costco and Petters. (A-20 ¶ 5; A-30 ¶¶ 32, 34; A-35-40 ¶¶ 55-71; A-49 ¶¶ 94, 96; A-52-53 ¶¶ 108, 110).

In March 2008, Ritchie loaned Petters $31 million for a diverting transaction. Petters claimed that he would use the money to buy Sony Playstation video game consoles and resell them to Costco, generating a $27 million profit. In making this loan, Ritchie relied on Petters' longstanding and successful diverting business with Costco, which Costco had helped Petters to present as genuine, even though Costco knew that it was a sham. Ritchie also relied on the illegitimate guaranty letters that Costco had provided to Petters, representing fictitious transactions. (A-40-44 ¶¶ 78-80).

As a result of Ritchie's loan to Petters, Ritchie has suffered damages of $31 million. Had Costco severed its ties with Petters, rather than affirmatively assisting his Ponzi scheme, Ritchie would never have made its ill-fated loan and would not have been damaged at all. (A-44 ¶ 81; A-50-51 ¶¶ 97, 101-02; A-54 ¶ 115).

4. *New York's Registration-And-Appointment Statutes*

Before doing business in New York, a foreign corporation must seek authorization. *See* N.Y. Bus. Corp. Law § 1301(a). The corporation's application for authority to do business in New York must include "[a] designation of the secretary of state as its agent upon whom process against it may be served." *Id.* § 1304(a)(6); *see also id.* § 304(a)-(b). The corporation may designate its own registered agent as well. *See id.* § 1304(a)(7). A foreign corporation that registers

to do business in New York is given, among other things, the privilege of being able to commence litigation in the New York courts. *See id.* §§ 1312-1313.

5. *Costco Registered To Do Business And Designated An Agent For Service Of Process In New York In 1990*

The online public records of the New York Department of State reflect that Costco registered to do business in New York on February 2, 1990, and that it remains an active foreign business corporation in this state to this day.[3] These records also reflect that Costco has designated CT Corporation System, in New York, New York, as its registered agent for service of process.

Pursuant to its registration, Costco operates seventeen warehouse stores in New York and thus engages in significant local business in the state. (A-221-25). The online public records of the federal and state courts of New York reflect that Costco has initiated dozens of actions in New York courts since 1990, none of

[3] *See* N.Y. Dep't of State, Div. of Corps., *Entity Information* for Costco Wholesale Corporation, http://www.dos.ny.gov/corps/bus_entity_search.html (search "Costco Wholesale Corporation," then click on "Costco Wholesale Corporation") (last updated January 28, 2016). Alternatively, the webpage may be accessed directly: https://appext20.dos.ny.gov/corp_public/CORPSEARCH.ENTITY_INFORMATION?p_nameid=1525934&p_corpid=1419510&p_entity_name=costco%20wholesale%20corporation&p_name_type=A&p_search_type=BEGINS&p_srch_results_page=0. Costco's registration is beyond genuine dispute; it is a matter of public record; and this Court can take judicial notice of it for the first time on appeal. *See, e.g.*, *United States v. Davis*, 726 F.3d 357, 367 (2d Cir. 2013) (taking judicial notice for the first time on appeal of the fact of federal jurisdiction over particular land); *Giraldo v. Kessler*, 694 F.3d 161, 164 & n.2 (2d Cir. 2012) (taking judicial notice of public records for the first time on appeal); *Sprague & Rhodes Commodity Corp. v. Instituto Mexicano Del Cafe*, 566 F.2d 861, 862 (2d Cir. 1977) (same).

which it could have commenced without having registered to do business in this state.[4]

C. The District Court's Opinion and Order

The district court dismissed Ritchie's lawsuit against Costco for lack of personal jurisdiction. Relying on the Supreme Court's recent decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), the court held that the exercise of general jurisdiction over Costco would not comport with due process, as Washington was Costco's state of incorporation and principal place of business and Costco's contacts with New York were not sufficiently pervasive to render it "essentially at home" in the state. (SPA-8, 11-13). The district court also determined that there was no specific jurisdiction over Costco. (SPA-13-16).

[4] *See, e.g.*, *Costco Wholesale Corp. v. Anthony J. Costello & Son Dev., LLC*, No. 6:15-cv-06657 (W.D.N.Y. Oct 28, 2015); *Costco Wholesale Corp. v. Nassau Cnty.*, No. 400858/2011 (N.Y. Sup. Ct. May 29, 2014); *Costco Wholesale v. N.Y. State Liquor Auth.*, No. 6754/2013 (N.Y. Sup. Ct. June 4, 2013); *Costco Wholesale v. Borinquen Candy*, No. 304858/2010 (N.Y. Sup. Ct. June 15, 2010); *Costco Wholesale Corp. v. Akos Beverages, Inc.*, No. 9232/2010 (N.Y. Sup. Ct. Apr. 13, 2010); *Costco Wholesale Corp. v. Atl. Candy & Beverages*, No. 9231/2010 (N.Y. Sup. Ct. Apr. 13, 2010); *Costco Wholesale Corp. v. Town Bd. of Oyster Bay*, No. 15656/2009 (N.Y. Sup. Ct. Aug. 21, 2009); *Costco Wholesale Corp. v. Morris Indus. Builders LP*, No. 21460/2006 (N.Y. Sup. Ct. Aug. 28, 2007); *Costco Wholesale v. Parker*, No. 471/2003 (N.Y. Sup. Ct. July 15, 2003); *Costco Wholesale Corp. v. Oyster Bay*, No. 9890/2003 (N.Y. Sup. Ct. July 9, 2003); *Costco Wholesale Corp. v. McLymont*, No. 6986/2002 (N.Y. Sup. Ct. Feb. 4, 2003); *Costco Wholesale Corp. v. Bridgestone/Firestone Inc.*, No. 15008/2002 (N.Y. Sup. Ct. Oct. 30, 2002).

STANDARD OF REVIEW

"[T]he showing a plaintiff must make to defeat a defendant's claim that the court lacks personal jurisdiction over it varies depending on the procedural posture of the litigation." *Dorchester Fin. Sec., Inc. v. Banco BRJ, S.A.*, 722 F.3d 81, 84 (2d Cir. 2013) (internal quotation marks omitted). The plaintiff is required to make only a prima facie showing of jurisdiction where (1) the defendant challenges the legal sufficiency of the plaintiff's factual allegations on a motion to dismiss or (2) the jurisdictional facts are disputed, but the court does not hold an evidentiary hearing to resolve the dispute. *See id.* at 84-86.

"Where, as here, the district court relies on the pleadings and affidavits, and does not conduct a full-blown evidentiary hearing," this Court "review[s] the district court's resulting legal conclusions *de novo*." *Id.* at 85 (internal quotation marks omitted). In doing so, this Court is to "construe the pleadings and affidavits in the light most favorable to plaintiffs, resolving all doubts in their favor." *Id.* (internal quotation marks omitted); *see also Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59 (2d Cir. 2012); *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 208 (2d Cir. 2001).

SUMMARY OF THE ARGUMENT

Costco knowingly and voluntarily consented to general personal jurisdiction in New York when it registered to do business in the state and appointed an agent

for service of process pursuant to a statutory procedure that the New York Court of Appeals has long construed as consenting to general personal jurisdiction. For close to 100 years, the Supreme Court has held that states may validly condition a foreign corporation's registration to do business on its consent to be sued in that state. The dispositive question is whether the state has made clear, either in its registration-and-appointment statute or through its court rulings, that registration constitutes consent to general jurisdiction. In 1916, with then-Judge Cardozo writing for the court, the New York Court of Appeals held in *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432, 433-39 (1916), that registering to do business in New York constitutes consent to general jurisdiction in this state.

Both the Supreme Court and this Court have, accordingly, held that registration to do business in New York subjects foreign companies to personal general jurisdiction in New York. *See Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939); *Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 224 (2d Cir. 2009); *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 131-33 (2d Cir. 2009). Because consent is an independent basis for general jurisdiction, Costco's registration provides a basis for this Court's exercise of jurisdiction over Costco, irrespective of whether Costco could also satisfy *Daimler's* "at-home" test for contacts-based jurisdiction. As a

result, the district court can exercise jurisdiction over Costco, and its dismissal of the action should be reversed.

ARGUMENT

I. COSTCO KNOWINGLY AND VOLUNTARILY CONSENTED TO GENERAL PERSONAL JURISDICTION BY REGISTERING TO DO BUSINESS IN NEW YORK

A. Costco's Consent Satisfies The Due Process Clause And Provides An Independent Basis For Jurisdiction Irrespective Of *Daimler*

This appeal concerns the district court's exercise of consent-based personal jurisdiction. The requirement of personal jurisdiction is a federal due-process right that protects a defendant from having to defend itself in a distant forum unless it could reasonably anticipate litigation in that forum. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985). A defendant's due process rights may be satisfied in two distinct ways, through a defendant's contacts with the state *or* through a defendant's consent. As the U.S. Supreme Court has explained, a plaintiff may "make clear to the court that it has personal jurisdiction over the defendant" by pointing to "certain historical facts" regarding the defendants' contacts with the state, such as the defendant's domicile, corporate home, or case-specific contacts with the forum. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982). However, "this is not the only way in which the personal jurisdiction of the court may arise." *Id.* Rather, because the personal jurisdiction requirement is an "individual right," which can, "like other such rights,

be waived," a defendant can waive the personal jurisdiction requirement by consenting to the exercise of jurisdiction. *Id*. at 703.

Daimler is about contact-based jurisdiction, not consent. The plaintiffs were Argentinian citizens who sued Daimler, a German company, in California federal court regarding events that had occurred in Argentina. In finding that Daimler was not subject to general jurisdiction in California, the Court rejected the plaintiffs' proposed standard for finding contacts-based general jurisdiction—namely, that a defendant is subject to general jurisdiction in every state with which it has continuous and systemic contacts. The Court declared instead that, for contact-based general jurisdiction to exist, a defendant's contacts must be "so continuous and systematic as to render it essentially at home in the forum State." *Daimler*, 134 S. Ct. at 761 (internal quotation marks and alterations omitted).

The *Daimler* opinion makes clear that the Court was considering the bounds of "general jurisdiction . . . over a foreign corporation that *has not consented to suit in the forum*." *Id.* at 755-756 (emphasis added) (quoting *Goodyear Dunlop Tires Ops., S.A. v. Brown*, 131 S. Ct. 2846, 2856 (2011)). Accordingly, both this Court and other federal appellate courts have recognized that *Daimler* did not *sub silentio* reverse the Supreme Court's long-standing case law (explained below) holding that a defendant may consent to general jurisdiction by registering to do business in a state, if state law so provides.

Indeed, there was no reason for the Supreme Court to consider the consent issue in *Daimler*, as the issue was not present. Daimler was not registered to do business in California, *see Bauman v. DaimlerChrysler AG*, No. C-04-00194 RMW, 2005 WL 3157472, at *1 (N.D. Cal. Nov. 22, 2005), and registration does not constitute consent under California state law in any event, *see Thomson v. Anderson*, 113 Cal. App. 4th 258, 268 (2003). For this reason, this Court held in *Gucci America, Inc. v. Weixing Li*, 768 F.3d 122 (2d Cir. 2014), that *Daimler* "defines the scope of a court's jurisdiction when an entity has *not consented* to suit in the forum." *Id.* at 136 n.15 (internal quotation marks omitted) (emphasis added). *Gucci* held that a foreign bank was not "at home" in New York under *Daimler*, but it nevertheless remanded for the district court to determine whether the bank had "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." *Id.*[5]

Other courts are in accord. *See, e.g., Perrigo Co. v. Merial Ltd.*, No. 8:14-CV-403, 2015 WL 1538088, at *7 (D. Neb. Apr. 7, 2015) (concluding that *Daimler* "does nothing to affect the long-standing principle that a defendant may consent to personal jurisdiction" by registering to do business in Nebraska);

[5] The district court did not reach this question on remand, because it found that the bank was subject to specific jurisdiction. *See Gucci Am., Inc. v. Weixing Li*, No. 10 Civ. 4974 (RJS), 2015 WL 5707135, at *15 (S.D.N.Y. Sept. 29, 2015).

Otsuka Pharm. Co. v. Mylan Inc., 106 F. Supp. 3d 456, 468 (D.N.J. 2015); *Novartis Pharm. Corp. v. Mylan Inc.*, Civil Action No. 14-777-RGA, 2015 WL 1246285, at *3 (D. Del. Mar. 16, 2015); *Forest Labs, Inc. v. Amneal Pharm. LLC*, Civil Action No. 14-508-LPS, 2015 WL 880599, at *12-13 (D. Del. Feb. 26, 2015); *Acorda Therapeutics, Inc. v. Mylan Pharm. Inc.*, 78 F. Supp. 3d 572, 588-91 (D. Del. 2015).[6]

Simply put, consent is a separate inquiry.

B. The Supreme Court Has Consistently Held That Registering To Do Business In A State Constitutes Consent To General Jurisdiction Where State Law Provides For Such Consent

One of the most well-established means of consenting to personal jurisdiction is by voluntarily registering to do business in a state and appointing an agent for service of process. The Supreme Court has long held that states may make consent to general jurisdiction "part of the bargain by which [an out-of-state corporation] enjoys the business freedom of the State." *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939).

The Supreme Court has repeatedly and expressly held that:

1. States have historically required out-of-state corporations to "designate agents for service of process in return for the privilege of doing local business,"

[6] *But see, e.g., Motorola Credit Corp. v. Uzan*, __ F. Supp. 3d __, No. 02 Civ. 666 (JSR), 2015 WL 5613077, at *2 (S.D.N.Y. Sept. 9, 2015); *AstraZeneca AB v. Mylan Pharm., Inc.*, 72 F. Supp. 3d 549, 556-57 (D. Del. 2014).

and that service on such an agent "constituted consent to be sued" in the forum state. *Neirbo*, 308 U.S. at 170;

2. State law determines whether registering to do business in a state constitutes consent to general jurisdiction because "state legislation and consent of parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case. *Id.* at 175 (internal quotation marks omitted). Accordingly, when determining whether complying with a state's registration-and-appointment process constitutes consent to jurisdiction, the dispositive question is the scope of the registration statute given by "state law either expressly or by local construction." *Robert Mitchell Furniture v. Seldon Breck Constr. Co.*, 257 U.S. 213, 216 (1921); and

3. The exercise of general jurisdiction based on a registration-and-appointment process does "not deprive the defendant of due process of law." *Pa. Fire Ins. Co. of Phila. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 94-95 (1917). Rather, a statute "calling for [designation of an agent for service of process] is constitutional, and the designation of the agent a voluntary act," *Neirbo*, 308 U.S. at 175 (internal quotation marks omitted), because when a foreign corporation registers under a state process, "it takes the risk of the construction that will be put upon the statute . . . by the State." *Robert Mitchell*, 257 U.S. at 215-16.

Simply put, in those states where registration provides consent to general jurisdiction, the "execution [of the registration document] [i]s the defendant's voluntary act" that supplies the consent. *Pa. Fire.* 243 U.S. at 96.[7] As demonstrated below, New York is such a state, as the New York Court of Appeals and this Court have repeatedly held.

C. The New York Court of Appeals And This Court Have Long Held That Registering To Do Business In New York Constitutes Consent To General Jurisdiction

In *Bagdon v. Philadelphia & Reading Coal & Iron Co.*, 217 N.Y. 432 (1916), the New York Court of Appeals held that registering to do business in New York under New York's statutory regime constitutes consent to general jurisdiction. *See id.* at 436-39. The Court further held that it did not violate due

[7] *See, e.g., Bane v. Netlink, Inc.*, 925 F.2d 637, 640-41 (3d Cir. 1991) (holding that "registration by a foreign corporation carries with it consent to be sued in Pennsylvania courts"); *Knowlton v. Allied Van Lines, Inc.*, 900 F.2d 1196, 1200 (8th Cir. 1990) ("[A]ppointment of an agent for service of process . . . gives consent to the jurisdiction of Minnesota courts for any cause of action, ... and resort to minimum-contacts or due-process analysis to justify the jurisdiction is unnecessary."); *Cowan v. Ford Motor Company*, 694 F.2d 104, 105-07 (5th Cir. 1982) (upholding general personal jurisdiction under a Mississippi statute). *Compare, e.g., King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 577-78 (9th Cir. 2011) (finding no general jurisdiction over a defendant merely registered in Montana because "Montana's statutory scheme" did not extend "to companies that have not transacted any business in Montana."); *Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) ("[n]o Texas state court decision has held that" the state's business registration statute gives rise to general jurisdiction over foreign corporations); *Wilson v. Humphries (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (making no finding that Indiana has construed its registration statute to require consent to general jurisdiction and declining to so construe it).

process for New York courts to exercise general jurisdiction over a foreign corporation that, as required by statute, had registered to do business in New York and appointed an agent for service of process in the state. *See id.* The Court reasoned that the designation of an agent, in exchange for the authority to do business in New York, is "a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. . . . The actions in which he is to represent the corporation are not limited." *Id.* at 436-37.[8]

Both the Supreme Court and this Court have relied on *Bagdon* to hold that defendants who register to do business in New York have consented to general personal jurisdiction in the state. In *Neirbo*, the Supreme Court upheld New York's registration-and-appointment procedures because the New York Court of Appeals had "authoritatively determined" in *Bagdon* that foreign corporations were required by statute to appoint an agent for service in New York and that

[8] *Bagdon* construed a predecessor to New York's current statutory regime. *See Neirbo*, 308 U.S. at 174-75 & n.18; *Bagdon*, 217 N.Y. at 433. The material provisions of this regime have remained unchanged since *Bagdon*, and *Bagdon*'s holding thus applies equally to New York's current registration-and-appointment statute, codified in Sections 1301 through 1304 of the Business Corporation Law. *Cf. Bane*, 925 F.2d at 641 (finding that a "predecessor statute" gave the out-of-state corporation notice that it was subject to personal jurisdiction in Pennsylvania).

compliance with the statute qualifies as "actual consent . . . to be sued" in both state and federal court. 308 U.S. at 175.[9]

This Court has likewise consistently held that registration under New York's registration-and-appointment regime subjects foreign companies to general jurisdiction in New York. This Court first so held in *Philadelphia & Reading Coal & Iron Co. v. Kever*, 260 F. 534, 537-38 (2d Cir. 1919), *corrected on reh'g on other grounds*, 260 F. at 542, where it relied on *Bagdon* to hold that service on a designated agent for a foreign corporation allows the federal courts in New York to exercise general jurisdiction over the corporation.

This Court has repeatedly reaffirmed that holding. *See STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 131 (2d Cir. 2009) ("registration under § 1304 subjects foreign companies to [general] personal jurisdiction in New York"); *Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 224 (2d Cir. 2009) (same). The reason is simple: "authorization to do business in New York and designation of a registered agent for service of process

[9] The defendant in *Neirbo* challenged venue, rather than personal jurisdiction. But, as explained above, the Supreme Court held in that case that the defendant had consented to suit, and this consent waived any objection to venue *as well as* personal jurisdiction. 308 U.S. at 175. Indeed, *Neirbo* is repeatedly cited for the proposition that a defendant can consent to personal jurisdiction. *See Leroy v. Great W. United Corp.*, 443 U.S. 173, 180 (1979); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506 (1947), *superseded in other respects by statute, as recognized in Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994); *Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 441-44 (1946).

'amount to consent to [general] personal jurisdiction in New York.'" *STX Panocean*, 560 F.3d at 131 (quoting *Rockefeller Univ. v. Ligand Pharms.*, 581 F. Supp. 2d 461, 467 (S.D.N.Y. 2008)); *see also id.* at 132 (noting that the "defendant has already voluntarily subjected itself to the district's [general] jurisdiction by reason of its registration with the State"), 133 ("companies that have both appointed an agent for service of process and registered in New York" have "consent[ed] to [general] jurisdiction"). Since *Bagdon*, then, it has been eminently clear to foreign corporations that by registering to do business in New York and designating an agent for service of process, they are agreeing that courts in New York may hear any and all claims against them.

As explained above, Costco registered to do business in New York and designated both the New York Secretary of State and CT Corporation as its agents for service of process in 1990. *See supra* at 11 & n.3. Costco submitted its registration-and-appointment application voluntarily, decades after the New York Court of Appeals put it on notice that its registration would constitute consent to general jurisdiction in this state. Costco, moreover, has availed itself of the numerous privileges afforded to it under this New York regime. The record establishes that it operates seventeen stores in the state, and this Court can take judicial notice of the fact that Costco has initiated dozens of litigations in this state. *See supra* at 11-12 & n.4. Nothing more is required for personal jurisdiction in

New York. *See, e.g.*, *STX Panocean*, 560 F.3d at 131-33 ("companies that have both appointed an agent for service of process and registered in New York" have "consent[ed] to jurisdiction").

II. THE ISSUE OF COSTCO'S CONSENT TO PERSONAL JURISDICTION IS PROPERLY BEFORE THE COURT

Given that Costco consented to personal jurisdiction by registering to do business in New York, Costco will likely seek an affirmance on grounds unrelated to the merits of Ritchie's argument. Costco may contend, for example, that Ritchie did not advance its consent argument to the district court and has therefore forfeited it. That is incorrect. Ritchie has not forfeited the argument, and this Court should consider Ritchie's argument even if Ritchie has forfeited it.

First, Ritchie has preserved its argument for appellate review. Ritchie's trial counsel argued to the district court that Costco was subject to general jurisdiction in New York and therefore amenable to suit for conduct unrelated to New York. Although counsel did not rely on Costco's consent to jurisdiction based on its registration, this Court may entertain that argument because "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. Escondido*, 503 U.S. 519, 534 (1992); *see also Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 330-31 (2010) (new challenge to precedent was preserved by general claim that First Amendment rights were violated); *In re Air Cargo*

Shipping Servs. Antitrust Litig., 697 F.3d 154, 161 n.3 (2d Cir. 2012) (party may cite new support for its position on appeal); *Eastman Kodak Co. v. STWB, Inc.*, 452 F.3d 215, 221 (2d Cir. 2006) ("[A]ppeals courts may entertain additional support that a party provides for a proposition presented below.").

Second, this Court could consider Ritchie's argument even if it had not been properly presented. "Entertaining issues raised for the first time on appeal is discretionary with the panel hearing the appeal," *Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994), and this Court routinely exercises that discretion to consider forfeited arguments that present pure "question[s] of law." *Commack Self-Serv. Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 208 n.11 (2d Cir. 2012) (new constitutional challenge to regulation); *see also United States v. Sellers*, 784 F.3d 876, 883 n.4 (2d Cir. 2015) (new argument regarding effect of New York law); *United States v. Brunner*, 726 F.3d 299, 304 (2d Cir. 2013) (statute raised for the first time on appeal); *Dean v. Blumenthal*, 577 F.3d 60, 67 n.6 (2d Cir. 2009) (qualified immunity raised for the first time on appeal); *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004) (new antitrust theory); *Booking v. Gen. Star Mgmt. Co.*, 254 F.3d 414, 419 (2d Cir. 2001) (choice of law); *Baker v. Dorfman*, 239 F.3d 415, 420-21 (2d Cir. 2000) (new argument against malpractice theory). Here, the sole issue is whether a defendant's registration to do business in New

York constitutes consent to general jurisdiction. That is a pure question of law that the Second Circuit has already resolved—in Ritchie's favor.

The Court also exercises its discretion to consider forfeited arguments in order to "avoid manifest injustice." *Commack*, 680 F.3d at 208 n.11. For example, in *Booking v. General Star Management Co.*, this Court exercised its discretion to consider the appellant's belated argument that Texas law, rather than New York law, applied to her claims. *See* 254 F.3d at 419 & n.5. It held that "not considering the choice of law issue w[ould] likely lead to a substantial injustice," since "under New York law it [wa]s apparent that it w[ould] be all but impossible" for the appellant to prevail. *Id.* at 419. Similarly, Ritchie cannot prevail on appeal if the Court limits it to the *Daimler* argument it made below, rather than following its well-reasoned precedents and holding that Costco has consented to personal jurisdiction in New York. Ritchie should not be foreclosed from seeking a remedy for its $31 million in losses against Costco, which facilitated a fraudulent scheme against Ritchie and others.

CONCLUSION

The Memorandum and Order dismissing the Complaint should be reversed, and the case should be remanded to the district court for further proceedings.

Dated: New York, New York
January 29, 2016

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. The undersigned counsel of record for Plaintiff-Appellants certifies pursuant to Federal Rules of Appellate Procedure 32(a)(7)(C) that the foregoing brief contains 6,466 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the Word Count feature of Microsoft Word 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font of Times New Roman.

Dated: January 29, 2016

/s/ Alexandra A.E. Shapiro
Alexandra A.E. Shapiro

SPECIAL APPENDIX

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SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RITCHIE CAPITAL MANAGEMENT, L.L.C., et al.,

Plaintiffs,

- v -

COSTCO WHOLESALE CORPORATION,

Defendant.

14-CV-4819 (VSB)

MEMORANDUM & ORDER

Appearances:

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VERNON S. BRODERICK, United States District Judge:

Plaintiffs Ritchie Capital Management, L.L.C., Ritchie Capital Management, Ltd., and Ritchie Special Credit Investments, Ltd. (collectively, "Plaintiffs") bring this action against Defendant Costco Wholesale Corporation ("Defendant" or "Costco") for aiding and abetting fraud and for civil conspiracy. Because there is no basis to assert jurisdiction over Defendant, Defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(2), (Doc. 24), is GRANTED, and this case is DISMISSED.

I. Background[1]

Costco, an international warehouse club retailer selling a wide variety of products, is a Washington State corporation with headquarters in Issaquah, Washington. (Am. Compl. ¶¶ 2-3, 15.)[2] Plaintiffs, a Delaware limited liability company and two Cayman Islands exempt companies, bring claims related to Costco's purported role in a fraudulent scheme run by a Minnesota-based now-convicted felon named Thomas Petters ("Petters"). (*See id.* ¶¶ 1, 12-14, 16.) The fraud, which Petters and his co-conspirators ran using a number of Minnesota-based companies and their affiliates, lasted for more than a decade and resulted in over $3 billion in unpaid debts. (*Id.* ¶¶ 1, 16, 84a-e.) Petters' scheme was based on his representations to lenders that he was able to buy brand-name consumer electronics at below-wholesale prices and sell those goods at substantial profit to warehouse retailers such as Costco. (*Id.* ¶ 2.) Based on those representations, Petters and entities controlled by Petters obtained loans from various lenders, including Plaintiffs. (*Id.* ¶¶ 2, 5, 6, 73.)

Beginning in 1992, Petters and Costco entered into a "business relationship" whereby Petters would sell brand-name consumer electronic goods to Costco, which, due to contractual prohibitions, could not obtain the goods directly from manufacturers or authorized distributors. (*Id.* ¶ 3.) Plaintiffs claim that in as early as 2000 Costco was aware that Petters had used counterfeit purchase orders to induce lenders into making loans to Petters' affiliates. (*See id.* ¶¶ 4, 18-21.) Specifically, in October 2000, General Electric Capital Corporation ("GECC"), a commercial lender that had issued a $50 million line of credit to Petters and a Petters affiliate to

[1] The following factual summary is drawn from the allegations of the Amended Complaint, which I assume to be true for purposes of this motion. My references to these allegations should not be construed as a finding as to their veracity, and I make no such findings.

[2] "Am. Compl." refers to the Amended Complaint. (Doc. 19.)

finance the purported purchase of consumer electronics, (*id.* ¶¶ 16-18), wrote to Costco requesting verification of 14 purchase orders purportedly issued by a Costco affiliate called National Distributors f/k/a National Clothing ("National Distributors"), (*id.* ¶¶ 2, 20). Despite Costco employees being aware that "the only legitimate information regarding the 14 purchase orders . . . were the purchase order numbers," (*id.* ¶ 21), Costco entered into an agreement with Petters whereby Costco would assist Petters in refinancing his debts to GECC and "covering up the truth concerning the National Distributors diverting scheme" in exchange for being relieved of liability for the 14 GECC purchase orders. (*Id.* ¶¶ 22-23.) Beginning in early 2001, Costco issued "guaranty letters" to GECC and other prospective lenders that enabled Petters "to obtain billions of dollars of purchase-order financing loans from investment funds." (*Id.* ¶ 5; *see also id.* ¶¶ 74, 85-90.)

In March of 2008, following Petters' representation that loan proceeds would be used to purchase Sony PlayStation consoles that had been pre-sold to Costco for $79 million (the "PlayStation Transaction"), Plaintiffs loaned $31 million to Petters and a Minnesota-based Petters affiliate called Petters Company, Inc. ("PCI"). (*Id.* ¶¶ 6, 16, 72, 73.) Petters and PCI stated that Costco would pay the $79 million within 115 days of March 21, 2008. (*Id.* ¶¶ 6, 73.) At least some of the PlayStation Transaction negotiations between Petters and Plaintiffs occurred in New York. (*Id.* ¶¶ 10-11.)

In September of 2008, federal and local law enforcement uncovered Petters' scheme. (*See id.* ¶¶ 1, 2, 82-88.) Petters' criminal trial, which took place in November 2009, revealed that the PlayStation Transaction was a fabrication—there were no PlayStations that had been purchased by PCI for resale to Costco. (*Id.* ¶¶ 7, 19.) Petters was convicted in December 2009 on twenty counts of fraud, money laundering, and related offenses. (*Id.* ¶ 1.) Petters was

sentenced to 50 years' imprisonment in April 2010, and substantially all of his assets were forfeited to the United States pursuant to a forfeiture judgment in excess of $3.5 billion. (*Id.*)

II. Procedural History

Plaintiffs initiated this lawsuit in the Supreme Court of the State of New York, County of New York on February 4, 2014 by filing a Summons with Notice.[3] (Doc. 2-1.) Following Defendant's demand for a complaint, (Doc. 2-3), Plaintiffs filed their complaint on April 9, 2014, (Doc. 2-4).[4] On April 22, 2014, Defendant requested information regarding Plaintiffs' citizenship for purposes of determining whether a federal court could exercise diversity jurisdiction. (*See* Doc. 2 ¶ 8.) On May 30, 2014, Plaintiffs' counsel confirmed that their clients do not have any members who are citizens of Washington State. (*See id.* ¶ 9; *see also* Doc. 2-5.) Defendant filed a Notice of Removal on June 27, 2014, and the action was removed to this Court. (*See* Doc. 2.)

On July 2, 2014, Defendant filed a letter stating its intention to move to dismiss and seeking an extension on its time to respond to the complaint. (Doc. 9.) On July 3, I granted Defendant's request, (Doc. 10), and on July 21, Defendant filed a pre-motion letter seeking leave to file a motion to dismiss Plaintiffs' complaint for lack of personal jurisdiction, failure to file suit within the applicable statute of limitations, and failure to state a claim, (Doc. 13). On July 24, Plaintiffs filed their response opposing Defendant's anticipated motion. (Doc. 14.) I granted Defendant's request for a pre-motion conference, and, after resolving various scheduling issues, set the pre-motion conference for October 10, 2014. (*See* Docs. 17, 18.)

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[3] Under New York law a litigation can be initiated by filing and serving a summons with notice. N.Y.C.P.L.R. § 304.

[4] The Summons with Notice, which was filed under Index No. 650382/2014, was filed by three entities in addition to Plaintiffs. Those entities are not named as plaintiffs in the complaint and are not party to this suit. (*See* Doc. 2-4.)

At the pre-motion conference on October 10, Plaintiffs requested and I granted leave to file an amended complaint. (*See* Doc. 20 at 7-8.) I also granted Defendant leave to move to dismiss the forthcoming amended complaint should they wish to do so without the need to file a pre-motion letter. (*See id.*) On October 17, 2014, Plaintiffs filed their Amended Complaint. (Doc. 19.) The parties filed a joint letter on October 22 proposing a briefing schedule for Defendant's motion to dismiss and I approved that schedule the following day. (Docs. 22, 23.) Defendant filed its motion to dismiss the Amended Complaint, (Doc. 24), and accompanying declaration with exhibits, (Doc. 25), and memorandum of law, (Doc. 26), on November 13, 2014. Plaintiffs filed their opposition memorandum, (Doc. 30), and declaration with exhibits, (Doc. 31), on December 19, 2014, and Defendant filed its reply memorandum, (Doc. 34), and reply declaration with an exhibit, (Doc. 35), on January 16, 2015.[5] Costco filed a supplemental letter on July 30, 2015, (Doc. 37), alerting me to a recent decision from the Northern District of Illinois relating to the Petters scheme, Plaintiffs filed a response to Costco's letter on August 7, (Doc. 38), and Costco filed a letter in reply on August 13, (Doc. 39).

III. Legal Standards

The "plaintiff bears the burden of demonstrating personal jurisdiction over a person or entity against whom it seeks to bring suit." *Penguin Gr. (USA) Inc. v. Am. Buddha*, 609 F.3d 30, 34 (2d Cir. 2010); *accord MacDermid, Inc. v. Deiter*, 702 F.3d 725, 727 (2d Cir. 2012). "[T]o survive a motion to dismiss for lack of personal jurisdiction, a plaintiff must make a prima facie showing that jurisdiction exists." *Thomas v. Ashcroft*, 470 F.3d 491, 495 (2d Cir. 2006). A

[5] On November 24, 2014, I requested that the parties submit supplemental letters explaining why, in light of the November 10, 2014 ruling in *Ritchie Capital Management, L.L.C. v. JPMorgan Chase & Co.*, No. 14-CV-2557, this case should not be transferred to the District of Minnesota. (Doc. 28.) I reviewed the parties' letters, (Docs. 32, 33), both of which opposed transfer and, on June 4, 2015, confirmed that I would not transfer this case to the District of Minnesota, (*see* Doc. 36).

prima facie case requires (1) procedurally proper service upon the defendant; (2) a statutory basis for personal jurisdiction; and (3) that "the exercise of personal jurisdiction . . . comport[s] with constitutional due process principles." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 673 F.3d 50, 59-60 (2d Cir. 2012). When a court is sitting in diversity, the "breadth of a federal court's personal jurisdiction is determined by the law of the state in which the district court is located." *Reich v. Lopez*, 38 F. Supp. 3d 436, 454 (S.D.N.Y. 2014) (quoting *Thomas*, 470 F.3d at 495).

"A plaintiff can make [a prima facie] showing [of personal jurisdiction] through his own affidavits and supporting materials, containing an averment of facts that, if credited, would suffice to establish jurisdiction over the defendant." *Whitaker v. Am. Telecasting, Inc.*, 261 F.3d 196, 208 (2d Cir. 2001) (internal quotation marks, citation, and alterations omitted); *accord Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 171 F.3d 779, 785 (2d Cir. 1999); *see also Hsin Ten Enter. USA, Inc. v. Clark Enters.*, 138 F. Supp. 2d 449, 452 (S.D.N.Y. 2000) (on motions to dismiss for lack of personal jurisdiction, "a court may consider matters outside the pleadings without converting the motion to dismiss into a motion for summary judgment"). In considering the pleadings and supporting materials, "all allegations are construed in the light most favorable to the plaintiff and doubts are resolved in the plaintiff's favor, notwithstanding a controverting presentation by the moving party." *A.I. Trade Finance, Inc. v. Petra Bank*, 989 F.2d 76, 79-80 (2d Cir. 1993); *accord Whitaker*, 261 F.3d at 208. A court is "'not bound to accept as true a legal conclusion couched as a factual allegation,' and a plaintiff may not rely on 'conclusory non-fact-specific jurisdictional allegations' to overcome a motion to dismiss." *Doe v. Del. State Police*, No. 10-CV-3003, 2013 WL 1431526, at *3 (S.D.N.Y. Apr. 4, 2013) (quoting *Jazini v. Nissan Motor Co.*, 148 F.3d 181, 185 (2d Cir. 1998)).

IV. Discussion

Courts may exercise either general or specific personal jurisdiction. *Daimler AG v. Bauman*, 134 S. Ct. 746, 751 (2014). General jurisdiction allows a court to adjudicate "any and all" claims against a defendant, regardless of whether the claims are connected to the forum state. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2851 (2011). Specific jurisdiction renders a defendant amenable to suit only with respect to claims "arising out of or relating to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984); *Goodyear*, 131 S. Ct. at 2851.

Resolution of a motion to dismiss for lack of personal jurisdiction is a two-step analysis. *Bank Brussels Lambert v. Fiddler Gonzalez & Rodriguez*, 305 F.3d 120, 124 (2d Cir. 2002). A district court sitting in diversity in New York "must determine if New York law would confer upon its courts the jurisdiction to reach the defendant," and "[i]f there is a statutory basis for jurisdiction, the court must then determine whether New York's extension of jurisdiction in such a case would be permissible under the Due Process Clause of the Fourteenth Amendment." *Id.* Plaintiffs argue only for jurisdiction under New York Civil Practice Law and Rules ("CPLR") § 301, New York's general jurisdiction statute. Although Plaintiffs do not argue for jurisdiction under CPLR § 302, New York's long-arm specific jurisdiction statute, and have abandoned an argument for jurisdiction on that basis, I nevertheless have considered whether there is a basis for jurisdiction under § 302.[6] For the reasons explained below, construing Plaintiffs' allegations in the light most favorable to Plaintiffs, I find there is no basis to exercise personal jurisdiction over Costco in this case.

[6] With regard to the requirement that Plaintiff establish a prima facie case, Defendant does not challenge whether service was proper.

A. *General Jurisdiction*

Under CPLR § 301, a New York court "may exercise jurisdiction over persons, property, or status as might have been exercised heretofore." New York courts interpret Section 301 to provide a statutory basis to exercise general jurisdiction over an out-of-state corporation that "has engaged in such a continuous and systematic course of 'doing business' in New York that a finding of its presence in New York is warranted." *Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 224 (2d Cir. 2014) (alterations and internal quotation marks omitted) (quoting *Landoil Res. Corp. v. Alexander & Alexander Servs.*, 77 N.Y.2d 28, 33 (1990)). A corporation is "doing business" in New York if it "does business in New York not occasionally or casually, but with a fair measure of permanence and continuity." *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 95 (2d Cir. 2000) (internal quotation marks omitted).

In arguing that this Court lacks personal jurisdiction under a general jurisdiction theory, Costco correctly focuses on the second prong of the jurisdictional analysis—whether the exercise of jurisdiction over Costco comports with due process. (*See generally* D's Mem. 8-10; D's Reply Mem. 1-5.)[7] Recent Supreme Court precedent supplies guidance on this question. In *Daimler AG v. Bauman*, 134. S. Ct. at 751, the Supreme Court confirmed that consistent with due process a corporation may be subject to general jurisdiction "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" *Id.* (alteration in original) (quoting *Goodyear*, 131 S. Ct. at 2851) (holding general jurisdiction did not exist over German company even assuming company's United States subsidiary was subject to general jurisdiction in California and

[7] "D's Mem." refers to Defendant's Memorandum of Law in Support of Defendant Costco Wholesale Corporation's Motion to Dismiss the First Amended Complaint. (Doc. 26.) "D's Reply Mem." refers to Defendant's Reply Memorandum of Law in Support of Defendant Costco Wholesale Corporation's Motion to Dismiss the First Amended Complaint. (Doc. 34.)

imputing those contacts to company, because due process did not permit exercise of general jurisdiction over company due to its slim contacts with California). Aside from "exceptional case[s]," a corporation is only "at home" and subject to general jurisdiction in its state of incorporation and its principal place of business. *Id.* at 761 & n.19; *accord Sonera*, 750 F.3d at 225.

The Court in *Daimler* explained that "general jurisdiction has come to occupy a less dominant place in the contemporary scheme." 134 S. Ct. at 758. As far back as *International Shoe Co. v. Washington*, 326 U.S. 310, 317-18 (1954), the Supreme Court recognized that *general* jurisdiction arises from activities that are "so substantial and of such a nature as to justify suit . . . on causes of action arising from dealings entirely distinct from those activities," whereas *specific* jurisdiction arises from "continuous and systematic" activities only if those activities give rise to the claims in the suit. *Id.*; *see Daimler*, 134 S. Ct. at 761. In other words, the law has developed to make clear that "ties serving to bolster the exercise of specific jurisdiction do not warrant a determination that, based on those ties, the forum has *general* jurisdiction over a defendant." *Goodyear*, 131 S. Ct. at 2855.

Drawing on these principles, the *Daimler* Court explicitly rejected as "unacceptably grasping" the view that it is appropriate for courts to exercise general jurisdiction "in every State in which a corporation engages in a substantial, continuous, and systematic course of business." *Daimler*, 134 S. Ct. at 761 (internal quotation marks omitted); *accord Goodyear*, 131 S. Ct. at 2856 (rejecting the view that "any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, wherever its products are distributed"); *see also id.* at 2857 n.6 ("[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales."). That is because "[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. If it were otherwise, the Court explained, "'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States." *Id.* Accordingly, the relevant inquiry is whether the non-domiciliary corporation's contacts with the forum state are substantial enough relative to its national and international activities so as to constitute an "exceptional case" in which the corporation is "at home" in the forum. *See Daimler*, 134 S. Ct. at 761 n.19, 762 n.20 (general jurisdiction "calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide").

Daimler therefore "expressly cast[s] doubt on previous Supreme Court and New York Court of Appeals cases that permitted general jurisdiction on the basis that a foreign corporation was doing business through a local branch office in the forum." *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014) (citing *Daimler*, 134 S. Ct. at 761 n.18); *accord Sonera*, 750 F. 3d at 224 n.2 ("not[ing] some tension between *Daimler*'s 'at home' requirement and New York's 'doing business' test for corporate 'presence'" and observing that "*Daimler*'s gloss on due process may lead New York courts to revisit" the "doing business" analysis); *Reich*, 38 F. Supp. 3d at 454-55 ("The Supreme Court's recent decision in *Daimler AG v. Bauman* has brought uncertainty to application of New York's 'doing business' rule. As a result, it is unclear whether existing New York general jurisdiction jurisprudence remains viable."); *Cortlandt St. Recovery Corp. v. Deutsche Bank AG, London Branch*, No. 14-CV-1568, 2015 WL 5091170, at *3 (S.D.N.Y. Aug. 28, 2015). The factors relevant to whether a corporation's activities were sufficiently "continuous and systematic" to establish general jurisdiction delineated by New York courts prior to *Daimler* and *Gucci* are, after *Daimler*, "relevant only if they exist to such a degree in comparison to the corporation's overall national and international presence that would

render the corporation an 'exceptional case' where it is at home in [an] additional forum." *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, No. 14-CV-8679, 2015 WL 539460, at *4 (S.D.N.Y. Feb. 6, 2015.)

Applying this framework, I find that while Plaintiffs allege a series of contacts with New York, these activities, relative to Costco's out-of-state domestic and international activities, are not sufficiently substantial so as to render Costco "at home" in New York. Costco is a Washington State corporation that is headquartered in Issaquah, Washington. (Am. Compl. ¶ 15.) Accordingly, in order to find general jurisdiction over Costco the facts would have to establish that, as Plaintiffs urge, (Ps' Opp. 6-9)[8], this is an "exceptional case." *Daimler*, 134 S. Ct. at 761 n.19. A review of Plaintiffs' own allegations and the documents they have submitted to support their arguments in favor of jurisdiction demonstrate that this case is far from exceptional. Moreover, despite the holdings and guidance contained in the relevant case law, Plaintiffs do not even attempt to analyze Costco's amount of business in New York compared with its overall national and international presence.

As an initial matter, the scope of Costco's operations is extensive. Costco operates an international chain of 671 membership warehouses in 474 locations in the United States (in 43 states and Puerto Rico), 88 locations in Canada, 34 in Mexico, 26 in the United Kingdom, 20 in Japan, 11 in Korea, ten in Taiwan, seven in Australia, and one in Spain, employs 189,000 full and part-time employees, and has annual revenues of $112.6 billion. (Leyva Decl. Ex. B, at 2-3.)[9] These facts alone suggest that to establish that the exercise of jurisdiction over Costco

[8] "Ps' Opp." refers to Plaintiffs' Memorandum of Law in Opposition to Costco Wholesale Corporation's Motion to Dismiss the First Amended Complaint. (Doc. 30.)

[9] "Leyva Decl." refers to the Declaration of Leo V. Leyva, Esq. in Opposition to Costco Wholesale Corporation's Motion to Dismiss. (Doc. 31.)

comports with due process Plaintiff would need to demonstrate that a disproportionate concentration of Costco's global business occurs in New York. Plaintiffs do not come close; the contact Costco has with New York that Plaintiffs identify simply does not support their statement that "this is precisely the type of 'exceptional case' that the Supreme Court contemplated in *Daimler*." (P's Opp. 8.) Plaintiffs aver that Costco's annual revenue from New York is $2.8 billion, (*id.*); assuming the truth of Plaintiffs' assertion, this figure amounts to only a small fraction—2.49%—of Costco's aggregate annual revenue. (*See* Ps' Opp. 8; *see also* Leyva Decl. Ex. B, at 3.) Plaintiffs also rely on the fact that Costco has seventeen warehouses in New York, (Ps' Opp. 8; *see also* Leyva Decl. Ex. A), but New York warehouses only comprise 2.53% of Costco's total number of warehouses, (*see* Leyva Decl. Ex. B, at 2).[10] Likewise, Plaintiffs' assertion that Costco has 3,400 New York employees, (Ps' Opp. 8), means that Costco's in-state employees account for only 2.64% of Costco's nationwide workforce and 1.80% of Costco's worldwide workforce, (*see* Leyva Decl. Ex. B, at 3).

Based on these figures, the proportion of business Costco does in New York is similar to the proportion of business the defendant in *Daimler* did in California. Although Daimler was the largest supplier of luxury vehicles in California with $4.6 billion in annual sales in the state, *Daimler*, 134 S. Ct. at 752, 767; Daimler's business in California accounted for only 10% of Daimler's new vehicle sales in the United States and only 2.4% of Daimler's worldwide sales, *id.* at 752, and thus Daimler was not "at home" in California for purposes of general jurisdiction, *id.* at 760. Here, Plaintiffs' jurisdictional assertions are likewise insufficient to make a prima facie

[10] Costco submitted additional documentation highlighting that six states have more Costco warehouse stores than New York. (*See* D's Reply Mem. 4; Reply Declaration of Adam M. Harris in Further Support of Costco Wholesale Corporation's Motion to Dismiss the First Amended Complaint, Ex. A.) This documentation is entirely consistent with the documentation provided by Plaintiffs and provides additional support for the determination that this is not an exceptional case. It is proper for me to consider Defendant's submission of these documents on a 12(b)(2) motion. *See, e.g.*, *Pilates, Inc. v. Pilates Inst., Inc.*, 891 F. Supp. 175, 178 n.2 (S.D.N.Y. 1995).

case of general jurisdiction as nothing in the Supreme Court's jurisprudence "suggests that [Costco's] particular quantum of local activity should give [New York] authority over a far larger quantum of activity having no connection to any in-state activity." *See id.* at 762 n.20. Therefore, Plaintiffs have failed to sustain their burden of demonstrating personal jurisdiction under a theory of general jurisdiction and the Amended Complaint must be dismissed.

B. *Specific Jurisdiction*

In New York, CPLR § 302(a) provides the statutory basis for "specific jurisdiction over a non-domiciliary defendant arising out of particular acts." *Reich*, 38 F. Supp. 3d at 457 (internal quotation marks omitted). Jurisdiction is authorized if the claims arise from when the non-domiciliary:

> (1) transacts any business within the state or contracts anywhere to supply goods or services in the state; or (2) commits a tortious act within the state . . . ; or (3) commits a tortious act without the state causing injury to person or property within the state . . . , if he (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce; or (4) owns, uses or possesses any real property situated within the state.

CPLR § 302(a). Defendant argues that there is no basis for specific jurisdiction under any of the subsections of CPLR § 302(a). (*See* D's Mem. 10-17.) Plaintiffs do not respond to these arguments—they do not mention Section 302(a) in their briefing or even raise the possibility of specific jurisdiction—and therefore they have abandoned the argument that specific jurisdiction applies here.[11] *Cf. Gundlach v. Int'l Bus. Machines Corp.*, No. 11-CV-846, 2012 WL 1520919,

[11] Plaintiffs' response to Defendant's pre-motion letter cursorily addresses CPLR § 302(a), saying that because of Costco's presence in New York (warehouses, employees, etc.), "each and every one of [subsections (1), (3) and (4)] applies to Costco." (*See* Doc. 14 at 2.) However, despite Costco raising arguments against specific jurisdiction in its opening brief, (*see* D's Mem. 10-17), Plaintiffs do not press those arguments in their opposition. Under these facts, Plaintiffs' pre-motion letter is insufficient to preserve this argument.

at *8 n.10 (S.D.N.Y. May 1, 2012) (plaintiff made explicit that he would not argue a Section 302 theory and accordingly had "abandoned any claim that the Court has jurisdiction over [the defendant] under CPLR section 302."); *Arquest, Inc. v. Kimberly-Clark Worldwide, Inc.*, No. 07-CV-11202, 2008 WL 2971775, at *11 (S.D.N.Y. July 31, 2008) ("Plaintiffs make no mention of specific jurisdiction in their supplemental brief, and appear to have abandoned this argument."). To demonstrate that jurisdiction would not be appropriate regardless of which theory—specific or general—Plaintiff might assert, I have considered whether specific jurisdiction is applicable and conclude that there is no basis for specific jurisdiction here.

CPLR § 302(a)(1) confers specific jurisdiction when a defendant transacts business in New York and that transaction has an "articulable nexus, or a substantial relationship," with the claims asserted. *Licci*, 673 F.3d at 66. It is not sufficient that the claims are merely related to the defendant's in-state business. *Id.* at 66-67. While Plaintiffs make assertions regarding Defendant's business transactions in New York, most notably that Costco has a retail presence in New York, (*see* Ps' Opp. 8; Leyva Decl. Exs. A, B), Plaintiffs provide no evidence to support a finding that there is any relationship between Plaintiffs' claims for fraud and civil conspiracy and Costco's New York retail operations.[12] Accordingly, CPLR § 302(a)(1) does not provide a basis for jurisdiction.

To establish jurisdiction under CPLR § 302(a)(3) a plaintiff must show that the defendant committed a tortious act outside of New York, the cause of action arose from that act, the act caused injury to a person or property in New York, and either the defendant engaged in "one of four alternative forms of ongoing New York activity" or the defendant derived substantial

[12] In a letter unrelated to the instant motion, Plaintiffs explained that "Costco is believed to have acted largely from its headquarters in Washington," citing to communications from Costco headquarters in Washington attached to the Amended Complaint. (Doc. 32 at 3 & n.7.)

revenue from interstate or international commence and expected or should have expected that the act would have consequences in New York. *Doe v. Del. State Police*, 939 F. Supp. 2d 313, 326 (S.D.N.Y. 2013) (internal quotation marks omitted). Under the well-established "situs-of-injury" test, a tortious act "caused injury . . . in New York" if the "original event which caused the injury" occurred in New York. *Bank Brussels Lambert*, 171 F.3d at 791. When a fraud is committed outside of New York, the key question is "where the first effect of the tort was located that ultimately produced the final economic injury." *Id.* at 792. Plaintiffs' allegations regarding the effects of the fraud in New York amount to, in essence, that the negotiations between Plaintiffs' agents and Petters regarding the PlayStation Transaction took place at least in part in New York and that at least one of the Plaintiffs maintained an office in New York during the relevant time. (Am. Compl. ¶¶ 9-12.) These allegations, which do not address where Plaintiffs acted in reliance on the purported misrepresentations, are not sufficient to show that Costco's acts caused injury in New York. *See, e.g.*, *Bank Brussels Lambert*, 171 F.3d at 792 (plaintiff's disbursement of funds following misrepresentations was "original event that caused the injury" to a bank with a New York office); *Miller Inv. Trust v. Xiangchi Chen*, 967 F. Supp. 2d 686, 696 (S.D.N.Y. 2013) (location of first action in reliance on misrepresentation is location of the "original event" giving rise to the injury); *de Ganay v. de Ganay*, No. 11-CV-6490, 2012 WL 6097693, at *6 (S.D.N.Y. Dec. 6, 2012) ("original event" was French court liquidating the plaintiff's marital estate in reliance on misrepresentation). CPLR § 302(a)(3) thus does not provide a basis for jurisdiction over Defendant.

The remaining statutory bases for specific jurisdiction over Defendant are similarly inapplicable. Plaintiffs make no allegations that Costco committed any tortious acts in New York, nor do any of the materials submitted in connection with personal jurisdiction suggest that

any of Plaintiffs' allegations regarding Costco involve torts within in New York. CPLR § 302(a)(2) thus does not apply. Finally, CPLR § 302(a)(4) is wholly inapplicable because although Plaintiffs allege that Costco maintains a physical footprint in New York, Plaintiffs' allegations do not arise from Costco's ownership or use of that real property.

C. *Jurisdictional Discovery*

Plaintiffs have not sought jurisdictional discovery, instead relying on the factual allegations in the Amended Complaint and their sworn submissions in connection with this motion.[13] In any event, jurisdictional discovery is not warranted here.

District courts have broad discretion in deciding whether to order jurisdictional discovery. *Best Van Lines, Inc. v. Walker*, 490 F.3d 239, 255 (2d Cir. 2007); *Marine Midland Bank, N.A. v. Miller*, 664 F.2d 899, 904 (2d Cir. 1981). To avoid what could amount to a fishing expedition, jurisdictional discovery is appropriate when "Plaintiffs' preliminary showings . . . reveal more than mere speculations or hopes that jurisdiction exists." *Reich*, 38 F. Supp. 3d at 459 (internal quotation marks omitted). Plaintiffs who fail to state a prima facie case for personal jurisdiction are not automatically entitled to jurisdictional discovery. *Jazini*, 148 F.3d at 186. As a result, "[d]istrict courts in this [C]ircuit routinely reject requests for jurisdictional discovery where a plaintiff's allegations are insufficient to make out a *prima facie* case of jurisdiction." *Stutts v. De Dietrich Grp.*, 465 F. Supp. 2d 156, 169 (E.D.N.Y. 2006) (collecting cases).

Plaintiffs have failed to make a prima facie case for personal jurisdiction and have identified no facts amounting to a "sufficient start toward establishing" jurisdiction, *Biro v.*

[13] Plaintiffs simply note that "[w]here, as here, discovery has not yet occurred, a plaintiff need only make a prima facie showing that the court possesses personal jurisdiction over the defendant." (Ps' Opp. 6.) Plaintiffs do not address whether there is a basis to proceed with discovery should I find that they have not made a prima facie showing of personal jurisdiction.

Condé Nast, No. 11-CV-4442, 2012 WL 3262770, at *8 (S.D.N.Y. Aug. 10, 2012) (internal quotation marks omitted); *see also Reich*, 38 F. Supp. 3d at 459. Moreover, Plaintiffs have not put forth any arguments, and I do not glean any on the record before me, suggesting that they could prove jurisdiction through additional discovery. *See Havlish v. Royal Dutch Shell PLC*, No. 13-CV-7074, 2014 WL 4828654, at *5 (S.D.N.Y. Sept. 24, 2014). In particular, because "it is hard to see why much in the way of discovery would be needed to determine where a corporation is at home," *Daimler*, 134 S. Ct. at 762 n.20, even if Plaintiffs had requested jurisdictional discovery it is not appropriate here.

D. *Statute of Limitations*

Because I find that this Court lacks jurisdiction over Defendant, I decline to consider the arguments raised by Defendant's 12(b)(6) motion. *See DH Servs., LLC v. Positive Impact, Inc.*, No. 12-CV-6153, 2014 WL 496875, at *2 (S.D.N.Y. Feb. 5, 2014); *Rosario v. Cirigliano*, No. 10-CV-6664, 2011 WL 4063257, at *6 (S.D.N.Y. Sept. 12, 2011) (having found improper service, "[t]he Court declines to reach Defendants' contention that the Complaint should be dismissed for failure to state a claim, or address whether the statute of limitations ceased to be tolled . . . as the Court is yet without jurisdiction to do so."); *Mende v. Milestone Tech., Inc.*, 269 F. Supp. 2d 246, 251 (S.D.N.Y. 2003) ("Before addressing Defendants' Rule 12(b)(6) motion to dismiss, the Court must first address the preliminary questions of service and personal jurisdiction."). I therefore do not address Defendant's argument that this lawsuit was not timely filed.

V. Conclusion

For the foregoing reasons, Defendant's motion to dismiss, (Doc. 24), for lack of personal jurisdiction is GRANTED, and the Amended Complaint is DISMISSED.

The Clerk's Office is respectfully directed to terminate all pending motions and close the case.

SO ORDERED.

Dated: September 21, 2015
New York, New York

Vernon S. Broderick
United States District Judge