15-3294

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 FOR DEFENDANT-APPELLEE

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Pursuant to Fed. R. App. P. 26.1, Defendant-Appellee Costco Wholesale Corporation ("Costco") hereby states that it is a publicly-held company. Costco has no parent corporation and no publicly-held corporation owns 10% or more of its stock.

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PRELIMINARY STATEMENT

There is no personal jurisdiction over Costco in this case. In *Daimler AG v. Bauman*, the U.S. Supreme Court held that, as a matter of due process, a state may subject a corporation to general all-purpose jurisdiction only if the corporation is "at home" in the forum. The Court held that, outside of an "exceptional case," a corporation is only "at home" in the states in which it is incorporated or has its principal place of business. *Daimler*, 134 S. Ct. 746, 760-761 & n.19 (2014); *see also Brown v. Lockheed Martin Corp.*, No. 14-4083, 2016 WL 641392, at *16 (2d Cir. Feb. 18, 2016). Under this precedent, courts in New York may not exercise general personal jurisdiction over Costco, which is incorporated and headquartered in Washington.

Plaintiffs-Appellants ("Ritchie") did not assert below that there was any basis for specific personal jurisdiction over Costco in New York, given that this is a case brought by Illinois and Cayman Islands-based entities against a Washington corporation in connection with a Ponzi scheme operated in Minnesota, and which did not involve any conduct by Costco in or directed at New York. The sole argument for personal jurisdiction Ritchie asserted in the District Court was that there was general jurisdiction over Costco because this was supposedly the "exceptional case" referenced by the Supreme Court in *Daimler*, based on the extent of Costco's business operations in New York.

The District Court rejected that argument and dismissed the case for lack of personal jurisdiction. Ritchie appeals from that judgment, yet fails to identify a single error in the District Court's decision. Instead, Ritchie tries a new tack, belatedly asserting that Costco is subject to general personal jurisdiction in New York because, as a requirement of doing business there (as in all 43 U.S. states in which Costco does business), Costco was required to register with the state and appoint an agent for service of process, which Ritchie argues constituted "consent" to general personal jurisdiction. Ritchie Br. 13-15.[1]

Ritchie has waived that argument by not raising it below. "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Am. Int'l Grp., Inc. v. Bank of America Corp.*, 712 F.3d 775, 784 n.6 (2d Cir. 2013) (alteration in original) (quoting *Allianz Ins. Co. v. Lerner*, 416 F.3d 109, 114 (2d Cir. 2005)). In fact, this Court recently rejected an attempt to raise the consent-through-registration theory of jurisdiction for the first time on appeal. *See Spiegel v. Schulmann*, 604 F.3d 72, 76–77 & n.1 (2d Cir. 2010). There is no reason why this Court should consider Ritchie's newly-asserted theory of jurisdiction, as Ritchie offers no explanation for why it did not assert this

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

purported basis of jurisdiction below despite multiple opportunities to do so. *See In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132-33 (2d Cir. 2008).

In the event the Court considers Ritchie's belated "consent" theory of jurisdiction, that theory should be rejected because the exercise of general jurisdiction over Costco on that basis would be unconstitutional under the Supreme Court's decision in *Daimler*. Ritchie argues that *Daimler* "is about contact-based jurisdiction, not consent." Ritchie Br. 16. *Daimler*, however, did not draw any distinction between jurisdiction based on business contacts with the forum and jurisdiction based on "consent" inferred from registering to do business in the forum. There is no gaping "consent via business registration" loophole in *Daimler*. As this Court recently stated in *Brown v. Lockheed Martin*, as a matter of due process, if a state could require a corporation to register in order to do business in the state and then infer consent to general jurisdiction from the act of registering, "*Daimler's* ruling would be robbed of meaning by a back-door thief." *Lockheed*, 2016 WL 641392, at *17.

In *Daimler*, the Supreme Court rejected the notion that even "a *substantial, continuous, and systematic* course of business" could support the exercise of general personal jurisdiction. *Daimler*, 134 S. Ct. at 761 (emphasis added). Yet Ritchie's theory would allow a state to exercise general jurisdiction so long as a foreign corporation did *any* business in the state, thereby triggering registration

requirements. That result is plainly irreconcilable with *Daimler*, and it cannot be justified by fictional implied consent based on business registration. Accordingly, there is no basis to subject Costco, a Washington corporation, to general all-purpose jurisdiction in New York. This Court should affirm the dismissal of this action.

STATEMENT OF THE ISSUES

1. Whether a plaintiff-appellant has waived a theory of personal jurisdiction over the defendant-appellee where it failed to raise that theory below and offers no explanation for such failure?

2. Whether a court may constitutionally exercise general personal jurisdiction over a corporation that is not "at home" in the forum state merely because the corporation was required to register with the state and appoint an agent for service of process in order to do business there?

STATEMENT OF THE CASE

FACTUAL BACKGROUND[2]

Costco. Costco is a Washington corporation with its headquarters located in Issaquah, Washington. (A-25 ¶ 15). Costco operates membership warehouses in the United States and elsewhere, which sell a wide range of products. (A-21 ¶ 3).

[2] The Factual Background is drawn from the allegations in the First Amended Complaint (Dkt. 19) ("Complaint"), which are presumed to be true for purposes of this appeal on Costco's motion to dismiss only.

National Distributors, an affiliate of Costco, operates as a purchasing arm of Costco. Compl. ¶ 2.

Costco's Registration in New York. In order to do business in New York, Costco was required to register with the state, which required it to appoint an agent for service of process. *See* N.Y. Bus. Corp. Law §§ 1301(a); 1304(a)(6)-(7). If Costco conducted business in New York without meeting the registration requirements, it would be subject to a suit by the New York Attorney General to enjoin it from doing business. *See id.* § 1303. Having made the decision to open stores in New York, in light of these statutory requirements, on February 2, 1990, Costco registered to do business in New York and appointed a registered agent for service of process. *See* Ritchie Br. 11 & n.3. The New York business registration statute does not state that by registering and appointing an agent for service of process a corporation consents to jurisdiction over it in New York.

Ritchie. Plaintiff-Appellant Ritchie Capital Management, L.L.C. is an Illinois investment advisor with its principal place of business in Wheaton, Illinois. (A-137 ¶ 16); *see also infra* note 9. Plaintiffs-Appellants Ritchie Capital Management, Ltd. and Ritchie Special Credit Investments, Ltd. are Cayman Islands-based hedge funds. (A-24 ¶¶ 12-14).

Petters and his Ponzi Scheme. Starting in the 1990s, Costco had a legitimate "business relationship with [Tom] Petters," who operated various

business entities, including Petters Company, Inc. ("PCI"). (A-21 ¶ 3). Among Petters's legitimate businesses was selling "Sony and other brand name consumer electronics goods from manufacturers and/or authorized distributors" that "would not normally sell their products to discount warehouse retailers" to such retailers, including Costco. (A-21 ¶ 3; A-47 ¶ 87). Ritchie alleges that the legitimate business relationship between Costco and Petters "was mutually beneficial and profitable to both parties." (A-21 ¶ 3).

In or around March 1998, General Electric Capital Corporation ("GECC") provided a $50 million credit line to Petters and Petters Capital, Inc. to finance the purported purchase of consumer electronics on a deal by deal basis. (A-25 ¶ 16). Between June and August 2000, GECC allegedly financed a series of purchase-order transactions totaling approximately $50 million for goods that had purportedly been sold to National Distributors. (A-26 ¶¶ 18-19).

Ritchie alleges that in October 2000, GECC contacted Costco to verify 14 purported National Distributors purchase orders, and that Costco determined that the purchase orders did not reflect valid National Distributors orders. (A-27 ¶¶ 20-21). Ritchie attaches to the Complaint a letter purportedly issued by Tom Petters, dated October 24, 2000, and sent to Costco, in which he "deeply apologize[d]" for the issue with the purchase orders. (A-28 ¶ 4; A-59). There is no allegation that

anyone at Costco actually learned that Tom Petters was engaged in a Ponzi scheme.

The Alleged PlayStation Transaction. In March 2008, Petters or someone associated with him purportedly represented (to unidentified individuals) that PCI had an opportunity to buy a large quantity of Sony PlayStation video game consoles from one of its suppliers for approximately $52 million and re-sell them to Costco for approximately $79 million (the "PlayStation Transaction"). (A-40 ¶ 72). The Complaint alleges that, as part of this supposed transaction, Ritchie was "fraudulently induced to lend $31 million to Petters and PCI . . . ." (A-23 ¶ 6). Costco is not alleged to have known of the PlayStation Transaction at that time or to have taken any actions in connection with that transaction. Nor is Costco alleged to have had any contact or communications with Ritchie at any time.

Revelation of the Petters Ponzi Scheme. In September 2008, press reports citing law enforcement affidavits revealed that Tom Petters, who by all appearances had operated for more than a decade as a legitimate business executive, had operated a long-running Ponzi scheme. (A-20-21 ¶¶ 1-2; A-44-45 ¶¶ 82-83; A-216). Petters had apparently offered outsize interest rates to lenders for providing short-term financing to enable Petters to supposedly purchase merchandise that was to be sold "at substantial profits to wholesale warehouse club retailers like Costco" but which turned out to be fabrications. (A-21¶ 2; A-23 ¶ 7).

In April 2010, Petters was sentenced to 50 years in prison following a criminal trial in the District of Minnesota. (A-20 ¶ 1). In addition, numerous associates of Petters pleaded guilty to conspiracy charges and were sentenced to various prison terms. (A-133 n.1).

PROCEEDINGS BELOW

Over five years after the revelation of the Petters Ponzi scheme, Ritchie belatedly brought this lawsuit, alleging for the first time that Costco aided and abetted Petters and conspired with him, supposedly causing Ritchie damage resulting from a $31 million loan to Petters in connection with the PlayStation Transaction. (Dkt. 2).

As set forth more fully in Section I *infra*, Costco moved to dismiss the Complaint on the ground that the District Court lacked personal jurisdiction over Costco, and on statute of limitations grounds. (Dkt. 24, 26). Ritchie's sole theory of personal jurisdiction advocated below was that Costco was subject to general jurisdiction in New York because it was supposedly "at home" there by virtue of the fact that it conducts substantial business in the state. (SPA-12-13). The District Court properly rejected that theory under the Supreme Court's decision in *Daimler*, holding that because Costco was neither incorporated nor headquartered

in New York, there was no general personal jurisdiction over Costco, and thus properly dismissed the case. (SPA 12-13, 17).[3]

SUMMARY OF ARGUMENT

The District Court properly found that there is no personal jurisdiction over Costco in New York for purposes of this action. Rather than challenge any of the District Court's reasoning as to the single basis for jurisdiction that Ritchie raised below – *i.e.,* that this was supposedly the "exceptional case" under *Daimler* in which a corporation could be "at home" outside of its state of incorporation and principal place of business – Ritchie has abandoned that argument and instead belatedly asserts that Costco is subject to general personal jurisdiction in New York because, in order to do business there, it was required to register with the state and appoint an agent for service of process. Ritchie Br. 13-15. Ritchie's newly-asserted basis of jurisdiction is hopelessly flawed for several reasons.

First, Ritchie's new theory of jurisdiction comes far too late. By failing to raise this supposed basis for jurisdiction in the District Court, it is waived, which should end the inquiry. Ritchie ignores the law of this Circuit, under which a plaintiff may not raise a basis for personal jurisdiction over the defendant for the first time on appeal. *See, e.g.*, *Spiegel*, 604 F.3d at 76–77 & n.1. Moreover, this Court has been clear that it will not exercise its discretion to consider an argument

[3] Because the District Court dismissed the case on jurisdictional grounds, it found that it did not need to address Costco's argument that the lawsuit was not timely filed. (SPA-17).

not raised below where the argument was available to the party below and, where, as here, the party proffers no reason for its failure to assert the argument when it had the chance. *See Nortel Networks*, 539 F.3d at 132-33. As discussed further in Section I *infra*, Ritchie had numerous opportunities to raise this supposed basis for jurisdiction in the District Court (as well as in its Pre-Argument Statement on appeal), but failed to do so. Thus, Ritchie's new theory of jurisdiction comes too late and has been waived.

Second, even if it could be considered on appeal, Ritchie's "consent through registration" theory of jurisdiction is unconstitutional. For starters, it is contrary to, and would eviscerate, the Supreme Court's landmark holding in *Daimler*, decided just two years ago. *Daimler* held that under the Due Process Clause, a corporation cannot be subject to general, "all-purpose" jurisdiction outside of its state of incorporation or where it has its principal place of business. That rule ensures fairness to the corporation, provides a discrete set of easily foreseeable and ascertainable forums in which the corporation can be sued on any cause of action, polices appropriate limits on the states' exercise of jurisdiction, and prevents forum shopping. *Daimler* cannot be evaded – and, as a practical matter, nullified – through a fictional theory of implied "consent" based on business registration. For purposes of the constitutional inquiry, there is no difference between a state exercising general jurisdiction by virtue of a company *doing business* in the state

(barred by *Daimler*) and a state exercising general jurisdiction by virtue of a company *registering to do business* in that state. Accordingly, in light of *Daimler*, due process does not permit transforming a run-of-the-mill registration and appointment statute into a corporate consent to the exercise of general jurisdiction. *Lockheed*, 2016 WL 641392, at *15.

Richie cannot evade the clear holding of *Daimler* – and manufacture a giant carve-out to it – by relying on outdated cases, long since invalidated by the Supreme Court. In particular, Ritchie hangs its hat on *Pennsylvania Fire*, decided nearly a century ago in a decidedly different era of due process jurisprudence, when the Nineteenth Century case of *Pennoyer v. Neff*, 95 U.S. 714 (1877), governed personal jurisdiction. *See Lockheed*, 2016 WL 641392, at *10-11; *Pa. Fire Ins. Co. of Phila. v. Gold Issue Min. & Mill. Co.*, 243 U.S. 93, 94-95 (1917). Under *Pennoyer*, courts could not exercise personal jurisdiction over persons outside the geographical bounds of the forum, which led states to invent creative "fictions" for jurisdiction over corporations located outside of the state's territory. *See Lockheed*, 2016 WL 641392, at *10-11. The Supreme Court and this Court have made clear that *Pennsylvania Fire* is no longer good law because it "cannot be divorced from the outdated jurisprudential assumptions of its era." *Id.* at *17.

Ritchie argues that "*Daimler* did not *sub silentio* reverse" cases like *Pennsylvania Fire*. Ritchie Br. 16. In fact, far from being silent on the matter, the

Daimler court expressly held that cases "decided in the era dominated by *Pennoyer*'s territorial thinking . . . *should not attract heavy reliance today*." *Daimler*, 134 S. Ct. at 761 n.18 (emphasis added). This Court has already held that the Supreme Court's "warning" against reliance on outdated cases includes *Pennsylvania Fire*. *Lockheed*, 2016 WL 641392, at *16.

Ritchie's consent theory of jurisdiction also fails because there was no constitutionally sufficient consent here. The notion that Costco "consented" to general jurisdiction – *i.e.*, knowingly and voluntarily waived its due process rights – when it registered to do business in New York is inconsistent with the requirements for a valid waiver of constitutional rights. There is no language at all in New York's business registration statute that puts a corporation on notice that by registering to do business, it will surrender its due process rights. Moreover, to the extent that Costco can be said to have "consented" to general jurisdiction at the time it registered to do business in New York, that consent was coerced and therefore cannot satisfy due process. The only voluntary choice that Costco made was to do business in New York. *Daimler* stands for the proposition that making that choice is not a constitutionally permissible basis on which to subject a company to all-purpose jurisdiction. Indeed, Ritchie's theory of jurisdiction runs afoul of the unconstitutional conditions doctrine, which exists to prevent a company from facing the "Hobson's choice" of choosing between its right to do

business and its right to due process. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013).

Finally, Ritchie's theory of jurisdiction would violate the Commerce Clause. Under the Commerce Clause, "[r]equiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden" on interstate commerce. *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 893 (1988). Ritchie's theory of jurisdiction would allow a state to claim jurisdiction over an out-of-state corporation for any and all claims arising anywhere in the world – including claims without any connection to the state – simply because the corporation does business in the state and therefore was compelled to register to do business there. That result is barred under the Commerce Clause.

Accordingly, the District Court's decision dismissing this case for lack of personal jurisdiction should be affirmed.

ARGUMENT

I. RITCHIE WAIVED ITS SOLE THEORY OF PERSONAL JURISDICTION OVER COSTCO BY FAILING TO RAISE IT IN THE DISTRICT COURT

Ritchie premises its appeal on a new theory of personal jurisdiction by consent. By failing to raise this issue below, Ritchie waived its right to argue for jurisdiction by consent on appeal.

A. Ritchie Identifies No Error By The District Court, Which Found That Costco Was Not Subject To Personal Jurisdiction

The District Court properly dismissed this case under Fed. R. Civ. P (12)(b)(2) because there is no basis for personal jurisdiction over Costco. (SPA-17). Although it now appeals from that decision, Ritchie does not challenge *any* aspect of the District Court's ruling. Ritchie Br. 13-15.

The sole basis for personal jurisdiction that Ritchie advocated below was that Costco, which is incorporated and headquartered in Washington, was somehow "at home" in New York merely because it does business there, and that Costco was therefore subject to general jurisdiction pursuant to N.Y. C.P.L.R. §301. (SPA-7, 12-13). As the District Court correctly recognized, however, and as Ritchie now concedes, that proposition is squarely foreclosed as a matter of due process by the Supreme Court's decision in *Daimler*, in which the Court held that a corporation is only "at home" and subject to general jurisdiction in its state of incorporation and its principal place of business. *Daimler*, 134 S. Ct. at 760-61 &

n.19; *accord Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 224-25 (2d Cir. 2014).

Although the Supreme Court posited in a footnote to *Daimler* that there could be an "exceptional case" that did not fit within that general rule, *Daimler*, 134 S. Ct. at 761 & n.19, the District Court properly rejected Ritchie's argument that, based on the extent of Costco's business in the state, this was that theoretical "exceptional" case. (SPA-11). Ritchie has now conceded that the District Court was correct in rejecting Ritchie's theory of personal jurisdiction in New York based on the argument that Costco was "at home" there. *See* Ritchie Br. 13-15.[4]

B. This Court Should Not Consider Ritchie's Newly-Raised Theory Of Personal Jurisdiction Because It Was Waived

Rather than challenge any of the District Court's conclusions, Ritchie raises a new theory of jurisdiction not presented below. Ritchie's sole argument on appeal is that Costco is subject to general jurisdiction in New York because, in order to do business there, Costco registered with the state pursuant to N.Y. Bus. Corp. Law § 1301, which in turn required Costco to appoint an in-state agent for

[4] The parties agree that Costco is not subject to specific personal jurisdiction. As Judge Broderick correctly held (and Ritchie does not challenge on appeal), Ritchie waived any argument for specific jurisdiction by failing to assert any basis for it in its opposition to Costco's motion to dismiss. (SPA-7, 13-14). In any event, Judge Broderick also held (and Ritchie does not challenge) that even if an argument for specific personal jurisdiction could have been considered, it would fail because Ritchie alleged no basis for specific jurisdiction under N.Y. CPLR § 302. It is likewise undisputed that Ritchie did not allege any "suit-related conduct" by Costco that "create[s] a substantial connection with the forum State" as required to constitutionally exercise specific jurisdiction over the defendant. *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014).

service of process. *See* N.Y. Bus. Corp. Law § 1301, § 1304(a)(6)-(7); Ritchie Br. 10, 13-15.

Beyond the many reasons why Ritchie's new theory of personal jurisdiction fails on the merits, it should not be considered because it comes too late, and, therefore, has been waived. As Ritchie admits, it never raised this theory of jurisdiction in the District Court. Ritchie Br. 24. "[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Am. Int'l Grp.*, 712 F.3d at 784 n.6 (alteration in original) (quoting *Allianz*, 416 F.3d at 114). This rule exists in order to ensure that "litigation remains, to the extent possible, an orderly progression." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 487 & n.6 (2008). As the Supreme Court has held, "litigation is a 'winnowing process,' and the procedures for preserving or waiving issues are part of the machinery by which courts narrow what remains to be decided." *Id.* (quoting *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 531 (1st Cir. 1993)). After all, "[i]f lawyers could pursue on appeal issues not properly raised below, there would be little incentive to get it right the first time and no end of retrials." *Poliquin*, 989 F.2d at 531.

While Ritchie makes several arguments as to why the Court should consider its theory of jurisdiction for the first time on appeal, none is availing. In fact, the Second Circuit has addressed this exact issue in a recent case that Ritchie

conspicuously fails to cite. In *Spiegel v. Schulmann*, as here, the district court granted dismissal as to a defendant for lack of personal jurisdiction. On appeal, the plaintiffs argued for the first time that personal jurisdiction existed based on the fact that "the company had registered to do business in New York State." *Spiegel*, 604 F.3d at 76–77 & n.1. This Court held that "*the Plaintiffs did not raise this argument before the district court and, thus, it is waived*." *Id.* at 77 n.1 (emphasis added). Likewise, in *MacDermid, Inc. v. Canciani*, this Court found that where the appellant "failed to argue before the district court that [the appellee] transacted business in Connecticut by means of an agent[,]" the appellant "ha[d] therefore forfeited" that theory of personal jurisdiction on appeal. *MacDermid*, 525 F. App'x 8, 10 (2d Cir. 2013).

Ritchie cites *Yee v. Escondido*, 503 U.S. 519 (1992), for the proposition that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim" on appeal. Ritchie Br. 24. However, as the Supreme Court has subsequently held, the *Yee* principle "stops well short of legitimizing" untimely arguments. *Exxon*, 554 U.S. at 486–87. Indeed, *Yee* is not even applicable here. As Ritchie acknowledges, *Yee* addresses new arguments raised on appeal in support of a *claim* – *i.e.*, a cause of action such as the Fifth Amendment takings claim at issue in that case. *Yee*, 503 U.S. at 534. Costco is aware of no case – and Ritchie cites to none – in which the *Yee* principle has been applied to allow an

appellant to advance new theories to support personal jurisdiction over the defendant that were not raised below.

Ritchie then argues that "this Court could consider Ritchie's argument even if it had not been properly presented." Ritchie Br. 25. But there is no basis for the Court to exercise its discretion to entertain Ritchie's forfeited theory of jurisdiction here. As an initial matter, considering Ritchie's new theory of jurisdiction is not "necessary to avoid a manifest injustice." *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006) (internal quotation marks and citation omitted). The supposed "manifest injustice" upon which Ritchie relies is that it "cannot prevail on appeal" if the Court does not exercise its discretion to consider the argument. Ritchie Br. 26. That is hardly an "injustice." Ritchie itself has created these circumstances by failing to appeal from the issue decided below (*i.e.*, whether Costco is "at home" in New York) and by failing to raise its "consent" theory below even though it had ample opportunities to do so. Thus, Ritchie's argument that it "cannot prevail on appeal" unless the Court considers its new theory of jurisdiction rings hollow.

In any event, this Court has consistently declined to exercise its "discretion to address . . . new arguments on appeal where those arguments were available to the [parties] below and they proffer no reason for their failure to raise the arguments below." *Nortel Networks*, 539 F.3d at 132 (quoting *Bogle-Assegai*, 470

F.3d at 504) (alteration and omission in original) (internal quotation marks omitted). Ritchie offers no explanation for its failure to advance its registration theory of jurisdiction in the District Court. There is none. Ritchie had numerous chances to argue for registration-based jurisdiction below. Yet, as Ritchie admits (Ritchie Br. 24) it never did so – not in its original complaint; not in the First Amended Complaint; not in its pre-motion letter regarding Costco's forthcoming motion to dismiss; not at the pre-motion conference on Costco's motion to dismiss; and not in its opposition brief to Costco's motion to dismiss. In fact, Ritchie failed to raise this theory of jurisdiction even *after* it filed a notice of appeal in this case. Ritchie's Pre-Argument Statement filed with this Court (Form C), which required Ritchie to provide a "list of the issues proposed to be raised on appeal," did not identify Ritchie's new theory as a basis for appeal. (Document 10-1, Addendum B).[5]

Ritchie's failure to provide any justification – let alone a reasonable one – for not raising the "registration" theory of jurisdiction below, despite ample opportunity to do so, dictates that the Court should decline to consider it now. *See*

[5] Confirming that Ritchie's strategy is a complete afterthought, Ritchie's Affidavit of Service reflects that it did not even serve Costco's designated in-state agent (Dkt. No. 2, Ex. B), unlike the service of process underlying the early Twentieth Century cases it relies on to support its consent theory. *See Bagdon v. Phila. & Reading Coal & Iron Co.*, 217 N.Y. 432, 437 (1916) (Ritchie Br. 14, 20-21) ("service on the agent" of a corporation appointed pursuant to a business registration statute confers jurisdiction over the corporation); *Pa. Fire*, 243 U.S. at 95 (holding that a state could treat in-state service on an appointed agent as a sufficient basis for personal jurisdiction).

Ehrenfeld v. Mahfouz, 518 F.3d 102, 105 (2d Cir. 2008) (quoting *United States v. Braunig*, 553 F.2d 777, 780 (2d. Cir. 1977)) ("The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, and where that party has had ample opportunity to make the point in the [district] court in a timely manner, waiver will bar raising the issue on appeal."); *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand*, 322 F.3d 147, 166 (2d Cir. 2003) (declining to consider argument "being raised for the first time on appeal" because the party raising it had several opportunities to raise it in the district court "but chose not to do so"); *cf. Booking v. General Star Mgmt. Co.*, 254 F.3d 414, 418-19 (2d Cir. 2001) (Ritchie Br. 25) (the Court exercised its discretion to consider a choice of law argument that the appellant "raised, briefed, and argued in the District Court," but which the lower court had not reached in rendering its opinion).

Accordingly, the Court should deem Ritchie's sole theory for personal jurisdiction over Costco to be waived, and should thus affirm the District Court's order dismissing the action for lack of personal jurisdiction.

II. SUBJECTING COSTCO TO GENERAL JURISDICTION IN NEW YORK BECAUSE IT REGISTERED TO DO BUSINESS THERE WOULD VIOLATE DUE PROCESS

Even if the Court could consider Ritchie's new theory of jurisdiction, finding Costco subject to general jurisdiction in New York on that theory would violate due process for numerous reasons.

A. The "Consent Through Registration" Theory Of General Jurisdiction Violates Due Process Under *Daimler*

Ritchie argues that the "dispositive question is whether [New York] has made clear, either in its registration-and-appointment statute or through its court rulings, that registration constitutes consent to general jurisdiction." Ritchie Br. 14. But that statement entirely ignores the real dispositive question: even if a state, by judicial ruling, reads its business registration statute to imply "consent" to general jurisdiction, is the exercise of such jurisdiction constitutional? After the Supreme Court's decision in *Daimler*, and this Court's decision in *Lockheed*, the answer to that question is a decided "no."

Daimler disposes of this case. *Daimler* built upon the Supreme Court's holding in *Goodyear*, which affirmed that "[t]he Due Process Clause of the Fourteenth Amendment sets the outer boundaries of a state tribunal's authority to proceed against a defendant." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2853 (2011) (citing *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977)). *Goodyear* held that, for purposes of due process, "only a limited set of affiliations

with a forum will render a defendant amenable to all-purpose jurisdiction there. 'For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.'" *Daimler*, 134 S. Ct. at 760 (quoting *Goodyear*, 131 S. Ct., at 2853-2854). *Daimler* held that, in nearly all cases, a corporation will be "at home" only in a "forum where it is incorporated or has its principal place of business." *Daimler*, 134 S. Ct. at 760. In this regard, *Daimler* "considerably altered the analytic landscape for general jurisdiction," *Lockheed*, 2016 WL 641392, at *7, by holding that the fact that a corporation does "substantial, continuous, and systematic" business in the forum state is insufficient to confer general jurisdiction over it as a matter of due process. *Daimler*, 134 S. Ct. at 761; *see also Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 135 (2d Cir. 2014).

Requiring foreign corporations to register to do business in a state and then deeming such registration "consent" to jurisdiction would create a giant loophole in *Daimler* and effectively render it a nullity. That loophole simply does not exist in *Daimler*. Moreover, Ritchie's theory of jurisdiction would undermine every fundamental principle embraced by the Supreme Court in *Daimler*, as set forth below.

First, *Daimler* made clear that doing substantial business in a state is not a sufficient basis on which to subject a corporation to general jurisdiction. *Daimler*, 134 S. Ct. at 760-61 & n.19. That is true whether the statutory basis for jurisdiction is the state's long-arm statute (as in *Daimler*) or the state's mandatory business registration statute (as Ritchie advocates). Nevertheless, Ritchie's theory of jurisdiction would permit a state to take a more sweeping view of jurisdiction than was found unconstitutional in *Daimler*. Whereas *Daimler* rejected the notion that even "a substantial, continuous, and systematic course of business" could support the exercise of general personal jurisdiction, *Daimler*, 134 S. Ct. at 761, the consent-via-registration theory of jurisdiction would permit a state to exercise general jurisdiction so long as a foreign corporation did any business in the state whatsoever (which would in turn require the corporation to register).

Second, *Daimler* held that allowing a corporation to be subject to general jurisdiction wherever it did business (even if that business was "substantial") would constitute an "exorbitant exercise[] of all-purpose jurisdiction [that] would scarcely permit out-of-state defendants 'to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Daimler*, 134 S. Ct. at 761-62 (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The Supreme Court emphasized in *Daimler* that the state of incorporation and principal place of business "have the

virtue of being unique—that is, each ordinarily indicates only one place—as well as easily ascertainable." *Daimler*, 134 S. Ct. at 760. Rather than limiting general jurisdiction to a corporation's "unique" and "easily ascertainable" state of incorporation and principal place of business, the consent-through-registration theory would allow multiple states simultaneously to claim general jurisdiction over a corporation, making it impossible for the corporation to know in advance where it could be sued on claims having no nexus to a particular forum. This uncertainty is compounded by the fact that under Ritchie's theory, corporations would be subject to general jurisdiction wherever a state court interprets the state's business registration statute in such a broad fashion, even after the corporation has registered to do business, and even where the statute itself does not address jurisdiction.

Third, Ritchie's theory of jurisdiction is also unconstitutional under *Daimler* because it could subject a national corporation like Costco to jurisdiction on any suit in every state in the country in which it does business. *See Daimler*, 134 S. Ct. at 762 n.20 ("[a] corporation that operates in many places can scarcely be deemed at home in all of them."); *see also World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (due process ensures that states "do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system."). Every state requires foreign corporations to register in order to do business there

and to appoint an in-state agent for service of process. *See Lockheed*, 2016 WL 641392, at *17. Although not every state currently interprets its business registration statute to imply consent to general jurisdiction, several do,[6] and there is nothing in the theory that Ritchie advances that would prevent every state from taking that view. "Finding mere compliance with such statutes sufficient to satisfy jurisdiction would expose companies with a national presence . . . to suit all over the country, a result specifically at odds with *Daimler*." *AstraZeneca AB v. Mylan Pharms., Inc.*, 72 F. Supp. 3d 549, 557 (D. Del. 2014), *aff'd on other grounds sub nom Acorda Therapeutics Inc. v. Mylan Pharms. Inc.*, No. 2015-1456, 2016 WL 1077048 (Fed. Cir. March 18, 2016).

Fourth, *Daimler* reaffirmed that "[s]ince *International Shoe*, 'specific jurisdiction has become the centerpiece of modern jurisdiction theory, while general jurisdiction [has played] a reduced role.'" *Daimler*, 134 S. Ct. at 755 (quoting *Goodyear*, 131 S. Ct. at 2854) (alteration in original); *see also Daimler*, 134 S. Ct. at 762 n.9 ("It is one thing to hold a corporation answerable for operations in the forum State, quite another to expose it to suit on claims having no connection whatever to the forum State.") (internal reference omitted). The

[6] At least nine U.S. states (Delaware, Kansas, Minnesota, Nebraska, New Jersey, New Mexico, New York, Pennsylvania, and Tennessee) either "have made it clear that registration to do business results in 'consent' to general jurisdiction" or have case law that "strongly suggest[s]" that is the case under their laws. *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, 1647 (2015) (citing cases). Costco does business in all nine of these states.

"registration" theory of jurisdiction would swing the pendulum back in the other direction by allowing states to exercise all-purpose general jurisdiction outside of the corporation's "home" forum, by virtue of a corporation's doing business in a state coupled with the state's mandatory registration requirement.

Finally, allowing a corporation that does business nationwide to be subject to general jurisdiction in every state in which it does business (because it was forced to register there) would reinstate the very type of forum shopping that *Daimler* prevents. *See Reynolds & Reynolds Holdings, Inc. v. Data Supplies, Inc.*, 301 F. Supp. 2d 545, 551 (E.D. Va. 2004) ("[A] finding of general personal jurisdiction on the basis of registration and appointment of an agent alone is extremely conducive to forum shopping because many companies have registered to do business and appointed an agent for service of process in numerous states."). Indeed, the only presumable reason why Ritchie brought suit in New York was to attempt to take advantage of New York's statute of limitations, given that Ritchie filed suit in 2014 in connection with a Ponzi scheme that came to light in 2008, when it was far too late to bring suit in Washington (where Costco is subject to general jurisdiction).[7]

[7] *Compare Koch v. Christie's Int'l PLC*, 699 F.3d 141 (2d Cir. 2012) (New York has a six year statute of limitations for aiding and abetting fraud and civil conspiracy to commit fraud) *with* Wash. Rev. Code § 4.16.080 (Washington has a three year statute of limitations for fraud-related claims).

In light of the gross contradiction between *Daimler*'s teachings and the "registration" theory of jurisdiction, it is not surprising that this Court has already indicated that the consent-via-registration theory of jurisdiction is unconstitutional. In the recent *Lockheed* case concerning Connecticut's registration statute, the Court held:

> we can say that the analysis that now governs general jurisdiction over foreign corporations—the Supreme Court's analysis having moved from the "minimum contacts" review described in *International Shoe* to the more demanding "essentially at home" test enunciated in *Goodyear* and *Daimler—suggests that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate "consent"—perhaps unwitting—to the exercise of general jurisdiction by state courts . . . .*

Lockheed, 2016 WL 641392, at *15 (emphasis added).[8]

This Court further held in *Lockheed* that the constitutional problem posed by the registration theory of jurisdiction "particularly" existed in "circumstances where the state's interests seem limited." *Lockheed*, 2016 WL 641392, at *15. Such is the case here. Costco is a Washington corporation. (A-25 ¶ 15). None of Ritchie's allegations relate in any way to New York, which is why Ritchie has conceded there is no specific personal jurisdiction. *See supra* note 4. Likewise,

[8] In *Lockheed*, the Court ultimately avoided definitively deciding the constitutional question because it found that Connecticut's business registration statute had not been interpreted to confer general jurisdiction. *Lockheed*, 2016 WL 641392, at *19.

the Plaintiffs-Appellants are an Illinois-based investment manager and Cayman Islands-based hedge funds.[9]

To be sure, even if the Plaintiffs-Appellants were New York residents, there would still not be general jurisdiction over Costco, since the focus of the inquiry is on the *defendant's* contacts with the forum state. *See Daimler*, 134 S. Ct. at 754. But the fact that they are not underscores why New York has no interest whatsoever in having this case adjudicated in the state, and why it would be an especially egregious violation of due process for a court sitting in New York to exercise jurisdiction over Costco under these circumstances. *See id*. at 751 (holding that were a California court to exercise jurisdiction over Daimler, a German car company, in a lawsuit arising from a car accident injuring a Polish driver in Poland, it would be an "[e]xercise[] of personal jurisdiction so exorbitant" that it would be "barred by due process constraints" on the state's "assertion of adjudicatory authority.").

In a vain attempt to escape *Daimler's* holding, Ritchie tries to manufacture an exception to *Daimler*. Ritchie contends that "*Daimler* is about contact-based

[9] Plaintiff-Appellants Ritchie Capital Management, Ltd. and Ritchie Special Credit Investments, Ltd. are hedge funds based in the Cayman Islands. (A-24 ¶¶ 12-14). Plaintiff-Appellant Ritchie Capital Management, LLC, an investment advisor, is a Delaware LLC and a resident of Illinois, where it has its principal office. *See* A-167 (Illinois Secretary of State File Detail Report reflecting that the "Principal Office" of Ritchie Capital Management, LLC is located in Wheaton, Illinois); A-137 (Sep. 18, 2013 complaint filed in *Ritchie Capital Management, L.L.C. v. Fredrikson & Byron P.A.*, Case No. 2013L010488 (Cir. Ct. Cook County, Illinois)) at ¶ 16 (Ritchie Capital, an "investment advisor," is a "Delaware limited liability company" with "its principal place of business in Wheaton, Illinois"); A-173 at ¶ 12.

jurisdiction, not consent[,]" and that "there is a basis for exercising general jurisdiction over Costco independent of *Daimler*[.]" Ritchie Br. 3, 16. *Daimler* does not make that artificial distinction between contact-based and consent-based general jurisdiction over corporations, and *Daimler*'s holding and implications cannot be cast aside as somehow inapplicable where a plaintiff seeks to subject a company to general jurisdiction based on registering to do business in the forum state. There is no gaping "consent via business registration" loophole in *Daimler*. *See Lockheed*, 2016 WL 641392, at *16 (rejecting the notion that "*Daimler* has no bearing" on the consent through registration theory of jurisdiction); *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015) (McMahon, J.) ("After *Daimler* . . . the mere fact of [the defendant's] being registered to do business is insufficient to confer general jurisdiction in a state that is neither its state of incorporation or its principal place of business."); *AstraZeneca*, 72 F. Supp. 3d at 556 (in light of *Daimler*, "compliance with [state] registration statutes . . . cannot constitute consent to jurisdiction . . . .").

Apparently recognizing the fundamental inconsistency between *Daimler* and its position in this case, Ritchie unfairly abbreviates a quote from *Daimler*, arguing "[t]he *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*[,]'" Ritchie Br. 16 (quoting *Daimler*, 134 S. Ct. at 755-756 (emphasis

added by Ritchie)). In fact, the portion of *Daimler* that Ritchie cites was a quote from *Goodyear*, 131 S. Ct. at 2856, which in turn was quoting *Donahue v. Far Eastern Air Transp. Corp.*, 652 F.2d 1032, 1037 (D.C. Cir. 1981). That D.C. Circuit case did not concern the issue of consent to jurisdiction, but simply described the 1952 *Perkins* case as the "[t]he textbook case of general jurisdiction appropriately exercised over a foreign corporation that has not consented to suit in the forum." *Donahue*, 652 F.2d at 1037; *see also Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952). The Supreme Court's passing reference to that quote in *Daimler* was hardly an indication that the Court sought to create a giant exception to its holding in *Daimler* by allowing states to infer consent to jurisdiction based upon mandatory business registration statutes. In fact, in *Lockheed*, this Court noted that *Daimler* included the quote from *Donahue/Goodyear* that Ritchie cites, and yet went on to indicate that the exercise of general jurisdiction on the basis of the consent-through-registration theory was unconstitutional under *Daimler*. *See Lockheed*, 2016 WL 641392, at *16-17.

Under *Daimler*, doing business in a state is an insufficient basis on which to subject a corporation to all-purpose general jurisdiction there. New York cannot reach that same proscribed result merely by adding the formal step of requiring companies that do business there to register and then calling that registration "consent" to jurisdiction. As this Court has already warned, any other result

"would risk unraveling the jurisdictional structure envisioned in *Daimler* and *Goodyear* based only on a slender inference of consent pulled from routine bureaucratic measures that were largely designed for another purpose entirely." *Id.* at *17.

B. As This Court Recognized In *Lockheed*, *Pennsylvania Fire* And Its Progeny Are No Longer Valid

Although the Supreme Court made clear the limits of general jurisdiction only two years ago in *Daimler,* Ritchie premises its entire argument for jurisdiction over Costco on the supposed continuing validity of *Pennsylvania Fire*, a Supreme Court case decided nearly 100 years ago in a markedly different era of due process jurisprudence. *See Pa. Fire*, 243 U.S. at 94-95 (Ritchie Br. 19-20). That approach is unavailing. As this Court held in *Lockheed*, "*Pennsylvania Fire* is . . . at odds with the approach to general jurisdiction adopted in *Daimler* . . . ." *Lockheed*, 2016 WL 641392, at *16. Thus, "the Supreme Court's analysis in recent decades, and in particular in *Daimler* and *Goodyear*, forecloses such an easy use of *Pennsylvania Fire* to establish general jurisdiction over a corporation based solely on the corporation's registration to do business and appointment of an agent" where, as here, the "state statute lack[s] explicit reference to any jurisdictional implications." *Id.*

When *Pennsylvania Fire* was decided, the Nineteenth Century case of *Pennoyer v. Neff* provided the governing framework for personal jurisdiction

analysis. *See Lockheed*, 2016 WL 641392, at *10-11. In *Pennoyer*, the Supreme Court held that courts could not exercise personal jurisdiction over persons outside the geographical bounds of the forum, and thus could only hear claims against a defendant who was served with process in the forum or who agreed to appear there. *See Pennoyer v. Neff*, 95 U.S. 714, 720, 733 (1877); *Burnham v. Superior Court*, 495 U.S. 604, 616-17 (1990) (plurality opinion). This approach quickly proved unworkable given the "tremendous growth of interstate business activity" in the early Twentieth Century, which led states to invent creative "fictions" for jurisdiction over corporations located outside the state's boundaries. *Burnham*, 495 U.S. at 617-18 (plurality opinion). One such fiction was to infer "consent" to jurisdiction through registration to do business in the forum state and service on an agent appointed in connection with the registration. *See Lockheed*, 2016 WL 641392, at *11 (calling this theory "something of a fiction, born of the necessity of exercising jurisdiction over corporations outside of their state of incorporation"); *see also Burnham*, 495 U.S. at 618 (plurality opinion) (the "consent and presence" on which the consent through registration theory rested "were purely fictional"); *Shaffer*, 433 U.S. at 201-03.

In 1945, the Supreme Court "cast those fictions aside," *Burnham*, 495 U.S. at 618 (plurality opinion), and announced the modern framework of personal jurisdiction in *International Shoe*. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310,

319 (1945). That case and those that followed "abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over [foreign] corporations." *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 222 (1957). Rather than applying strict geographical limits and focusing on service in the forum, the modern approach instead looks to whether the defendant has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe*, 326 U.S. at 316. Since *International Shoe*, the Supreme Court has time and again reaffirmed that "the central concern of the inquiry into personal jurisdiction" is "the relationship among the defendant, the forum, and the litigation," rather than a narrow focus on the appointment of an agent for service in the forum or some other fictional theory of consent. *Daimler*, 134 S. Ct. at 754 (quoting *Shaffer*, 433 U.S. at 204); *see also Walden*, 134 S. Ct. at 1121.

Given the shift announced in *International Shoe*, even before *Daimler*, many courts and commentators found that business registration was insufficient to create general personal jurisdiction that comported with due process. *See, e.g.*, *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (general jurisdiction through business registration is "constitutionally suspect"); *Ratliff v. Cooper Labs.*, 444 F.2d 745, 748 (4th Cir. 1971) ("The principles of due process require [more than] mere compliance with state [registration] statutes."); Lea

Brilmayer et al., *A General Look at General Jurisdiction*, 66 TEX L. REV. 721, 758 (1988) (arguing that neither pre-*International Shoe* cases such as *Pennsylvania Fire* nor "their underlying theories seem[] viable under today's due process standard").

To the extent that there was any remaining possibility that business registration could confer general jurisdiction as a matter of due process, it was foreclosed by *Daimler*, which made clear that a corporation's decision to undertake business in a state outside of its "home" is not a sufficient basis on which to subject it to all-purpose jurisdiction there. Ritchie argues that "*Daimler* did not *sub silentio* reverse the Supreme Court's long-standing case law . . . holding that a defendant may consent to general jurisdiction by registering to do business in a state, if state law so provides." Ritchie Br. 16. However, in *Daimler*, the Supreme Court expressly cautioned that cases "decided in the era dominated by *Pennoyer*'s territorial thinking . . . *should not attract heavy reliance today*." *Daimler*, 134 S. Ct. at 761 n.18 (emphasis added) (internal reference omitted). In *Lockheed*, this Court interpreted the Supreme Court's "warning [in *Daimler*] to embrace *Pennsylvania Fire*." *Lockheed*, 2016 WL 641392, at *16; *see also Shaffer*, 433 U.S. at 212 & n.39 (holding that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny" and that "[t]o the extent that prior decisions are inconsistent" with

"*International Shoe* and its progeny" they have been "overruled.").[10] As this Court noted in *Lockheed*, "*Pennsylvania Fire* cannot be divorced from the outdated jurisprudential assumptions of its era." *Lockheed*, 2016 WL 641392, at *17.[11] Moreover, as this Court observed, "Supreme Court citations to *Pennsylvania Fire* since *International Shoe* are cursory and far between, as are the citations to the Court's pre-*International Shoe* decisions reaffirming *Pennsylvania Fire*." *Id*. at *15 n.21.[12]

Accordingly, as this Court held in *Lockheed*:

> The sweeping interpretation that a state court gave to a routine registration statute and an accompanying power of attorney that *Pennsylvania Fire* credited as a general "consent" has yielded to the doctrinal refinement reflected in *Goodyear* and *Daimler* and the [Supreme]

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[10] In a concurring opinion in a case that found there to be specific jurisdiction over the defendant, Judge O'Malley of the Federal Circuit recently stated in dicta that *Pennsylvania Fire* conferred general jurisdiction over a corporation that registered to do business in Delaware, notwithstanding *Daimler*. *See Acorda Therapeutics Inc. v. Mylan Pharms. Inc.*, No. 2015-1456, 2016 WL 1077048, at *8-13 (Fed. Cir. March 18, 2016) (O'Malley, J., concurring). That conclusion is erroneous for the reasons set forth in this brief.

[11] This analysis also applies to other *Pennoyer*-era cases cited by Ritchie, which are no longer valid for the same reasons. *See Robert Mitchell Furniture v. Seldon Breck Constr. Co.*, 257 U.S. 213, 216 (1921) (Ritchie Br. 19); *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 175 (1939) (Ritchie Br. 18-19, 21, 22).

[12] Indeed, even if the Supreme Court had not expressly overruled *Pennsylvania Fire* in its "warning" in *Daimler* – although it did in fact do so as this Court has already held (*Lockheed*, 2016 WL 641392, at *16) – it clearly overruled it by implication. *See* 18 James Wm. Moore, MOORE'S FEDERAL PRACTICE § 134.05[6] (3d ed. 2008) ("Although a lower court is bound by a prior decision of a higher court until that decision is overruled, there are circumstances in which a prior decision will be overruled implicitly rather than explicitly. A lower court is not bound to follow a decision that has been implicitly overruled.").

> Court's 21st century approach to general and specific jurisdiction in light of expectations created by the continuing expansion of interstate and global business.

Id. at *17.

Thus, while Ritchie points to several Second Circuit cases that cited the New York rule that personal jurisdiction could exist based on business registration, none of these cases analyzed the issue as a matter of due process, and, in any event, none resolves this case in Ritchie's favor because they pre-date *Daimler*.[13] *See Lockheed* 2016 WL 641392, at *16; *AstraZeneca*, 72 F. Supp. 3d at 556 (decisions upholding the consent-via-registration theory of jurisdiction "can no longer be said to comport with federal due process.").

Ritchie also overstates this Court's decision in *Gucci*, 768 F.3d 122, claiming that the Court effectively endorsed Ritchie's theory in that case. Ritchie Br. 17. In reality, this Court simply noted in a footnote that, on remand, the district court "may also consider" whether the registration theory provides a sufficient basis for jurisdiction. *Gucci*, 768 F. 3d at 137 & n. 15; *see also Motorola Credit Corp. v. Uzan*, No. 02 Civ. 666, 2015 WL 5613077, at *2 (S.D.N.Y. Sept. 9, 2015) (Rakoff, J.) ("*Gucci* stands for the proposition that mere operation of a branch office in a forum—and satisfaction of any attendant licensing requirements—is not

[13] *See Phila. & 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 (Ritchie Br. 22); *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 131 (2d Cir. 2009) (Ritchie Br. 22); *Transfield ER Cape Ltd. v. Indus. Carriers, Inc.*, 571 F.3d 221, 224 (2d Cir. 2009) (Ritchie Br. 22).

constitutionally sufficient to establish general jurisdiction."). As *Lockheed* makes clear, this Court's statement in *Gucci* was not an endorsement by the Court of Ritchie's theory.

In light of the shift in personal jurisdiction jurisprudence from the time of *Pennoyer* through *International Shoe* and later *Daimler*, treating registration and appointment of an agent for service under a business registration statute as sufficient to create general jurisdiction through some fiction of consent would only "perpetuat[e] . . .ancient forms" that are inconsistent with fair play and substantial justice. *Shaffer*, 433 U.S. at 212; *see Burnham*, 495 U.S. at 630 (Brennan, J., concurring).

Ritchie's theory of jurisdiction would render *Daimler*, decided by the Supreme Court just two years ago, a dead letter – in favor of a 100-year-old precedent that the Supreme Court has invalidated. As this Court indicated in *Lockheed*, maintaining the *Pennoyer*-era fiction of consent through appointment of an agent would cause *Daimler* to "be robbed of meaning by a back-door thief." *Lockheed*, 2016 WL 641392, at *17.

III. COSTCO DID NOT KNOWINGLY AND VOLUNTARILY CONSENT TO JURISDICTION AND THE CONSENT-THROUGH-REGISTRATION THEORY OF JURISDICTION WOULD VIOLATE THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Ritchie notes that the requirement that a court have personal jurisdiction is an "individual right," and "a defendant can waive the personal jurisdiction requirement by consenting to the exercise of jurisdiction." Ritchie Br. 15-16 (quoting *Ins. Corp. of Ireland v. Compaigne des Bauxites de Guinee*, 456 U.S. 694, 703-04 (1982)). Of course that statement is true at a general level, but it far from addresses the many constitutional problems implicated by Ritchie's "consent" theory here. The real question is whether inferring consent under a mandatory business registration statute constitutes a constitutionally permissible waiver of a due process right. It plainly does not.

A. New York's Registration Statute Does Not Contain Any Express Waiver Of The Right To Be Free From All-Purpose Jurisdiction

As an initial matter, waiver requires the "intentional relinquishment or abandonment of a known right." *United States v. Olano,* 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "[C]ourts indulge every reasonable presumption against waiver of fundamental constitutional rights and . . . do not presume acquiescence in the loss of fundamental rights." *Jones v. Murphy*, 694 F.3d 225, 237 (2d Cir. 2012) (quoting *Zerbst*, 304 U.S. at 458, 464).

To say that Costco "consented" to jurisdiction when it registered to do business in New York would be to "presume acquiescence in the loss" of its due process right to be free from all-purpose jurisdiction where it is not "at home." *Zerbst*, 304 U.S. at 464. There is nothing in New York's business registration statute that in any way relates to jurisdiction. Although this Court stated in *Lockheed* that "[t]he registration statute in the state of New York has been definitively construed to accomplish" general jurisdiction, New York's statute, like the Connecticut statute at issue in *Lockheed*, "nowhere expressly provides that foreign corporations that register to transact business in the state shall be subject to the 'general jurisdiction' of the [New York] courts or directs that [New York] courts may exercise their power over registered corporations on any cause asserted by any person." *Lockheed*, 2016 WL 641392, at *12, *18. Indeed, as this Court noted in *Lockheed*, New York is currently considering legislation that would make such a construction express in the statute (*id.* at *18) – precisely because the statute provides no such indication currently. Thus, it would be unconstitutional to exercise jurisdiction over Costco "based solely on [its] registration to do business and appointment of an agent under a state statute lacking explicit reference to any jurisdictional implications." *Id.* at *16.

Moreover, inferring "consent" to jurisdiction based on the appointment of an agent in the forum is nonsensical under today's jurisprudence. In the *Pennoyer*

era, service upon a corporation in the forum state was sufficient to confer personal jurisdiction. *See Pa. Fire*, 243 U.S. at 95. Thus, at the time, the *Pennsylvania Fire* court had a basis on which to equate appointing an agent for service of process in the forum state to consent to general jurisdiction there. *Id.* at 95-96. That reasoning is not sustainable under today's jurisprudence, under which serving a corporate agent in the forum does *not* create personal jurisdiction. *See, e.g.*, *Martinez v. Aero Caribbean*, 764 F.3d 1062 (9th Cir. 2014) (holding that service of process on a corporation's officer within the forum state does not create general personal jurisdiction over the corporation in a manner consistent with due process), *cert. denied*, 135 S. Ct. 2310 (2015). Rather, appointment of an agent for service of process should be seen for what it is – facilitating *service* in the forum state when the company is doing business there. It is a constitutionally impermissible stretch to interpret a corporation's appointment of an agent for service of process in the forum as its consent to general personal jurisdiction there.

B. Costco Did Not Voluntarily Submit To General Jurisdiction By Registering To Do Business In New York

Ritchie's argument that Costco should be deemed to have *knowledge* of the New York courts' interpretation of the state's business registration statute as conferring general jurisdiction because New York's courts have "long construed" it in that manner (Ritchie Br. 4) is irrelevant. Ritchie conflates knowledge with voluntary action. The fact that New York's statute makes registration *mandatory*

simply because an out-of-state corporation decides to engage in business there demonstrates why it cannot be the basis of *voluntary* consent to jurisdiction, especially when *Daimler* stands for the proposition that a corporation has a right to do business in a state without subjecting itself to general jurisdiction on that basis. *See supra* § II.A; *see also AstraZeneca*, 72 F. Supp. 3d at 557 (business registration statutes "merely outline procedures for doing business in the state; compliance does not amount to consent to jurisdiction or waiver of due process."); *Leonard v. USA Petroleum Corp.*, 829 F. Supp. 882, 891 (S.D. Tex. 1993) ("Consent requires more than legislatively mandated compliance with state laws. Routine paperwork to avoid problems with a state's procedures is not a wholesale submission to its power.").

Indeed, any consent by Costco to general jurisdiction by virtue of complying with New York's mandatory business registration statute was coerced rather than truly voluntary. The State of New York threatened to take away Costco's right to do business in the state unless Costco registered and gave up its constitutional rights. *See* N.Y. Bus. Corp. Law § 1301(a) ("A foreign corporation shall not do business in this state until it has been authorized to do so as provided in this article."). But a waiver of constitutional rights must be "voluntary in the sense that it was the product of a free and deliberate choice rather than . . . coercion . . . ." *Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010); *see also Leonard*, 829 F. Supp.

at 889 ("Due process is central to consent; it is not waived lightly. A waiver through consent must be willful, thoughtful, and fair. *'Extorted actual consent' and 'equally unwilling implied consent' are not the stuff of due process*.") (emphasis added).

In fact, if Costco undertook business in New York without having registered, it would be subject to a suit by the New York Attorney General to enjoin it from doing business. *See* N.Y. Bus. Corp. Law § 1303 ("The attorney-general may bring an action to restrain a foreign corporation from doing in this state without authority any business for the doing of which it is required to be authorized in this state . . . ."); *People v. Nationwide Asset Servs., Inc.*, 26 Misc. 3d 258, 281 (N.Y. Sup. Ct. 2009) ("The Court determines that, pursuant to BCL § 1303, respondents should be permanently enjoined from doing business in New York State unless and until they obtain authorization to do so."); *New York v. Phase II Sys., Inc.*, 109 Misc. 2d 598, 600 (N.Y. Sup. Ct. 1981) ("the Attorney General in his third cause of action, alleges that defendant, a Nevada corporation is not authorized to do business in this state pursuant to B.C.L. §§ 1301 and 1304 … upon this ground the injunction could be issued").

Likewise, if Costco did business in New York without registering, it would lose its ability to bring proceedings in the New York courts, even if New York was the only forum in which it could obtain jurisdiction over a defendant, such as a

landlord or vendor. *See* N.Y. Bus. Corp. Law § 1312(a) ("A foreign corporation doing business in this state without authority shall not maintain any action or special proceeding in this state unless and until such corporation has been authorized to do business in this state . . . ."). Ironically, in this regard, Ritchie argues that Costco got a benefit from registering in that Costco "initiated dozens of actions in New York courts since 1990, none of which it could have commenced without having registered to do business in this state." Ritchie Br. 11-12. But New York's registration statute did not confer a benefit on Costco that it would not have otherwise had in the absence of the statute – rather, the statute *threatened to take away* Costco's right to bring suit in the New York courts unless Costco registered to do business. Thus, far from supporting Ritchie's position, this aspect of New York's registration statute further demonstrates why any "consent" that Costco might be deemed to have rendered was coerced.

C. Registration To Do Business Is Fundamentally Different From The Ways In Which A Party May Validly Consent To Jurisdiction

While there are valid ways in which a corporation may consent to jurisdiction, they fundamentally differ in scope and degree of volition as compared to the theory of "consent" that Ritchie puts forth.

For example, a defendant could freely decide not to contest jurisdiction and to appear in a forum to defend a particular case despite the lack of jurisdiction – which would be the product of a volitional choice the defendant has made rather

than the result of a state coercion. That decision would, of course, be limited to that particular case – by appearing in one case, the defendant does not consent to be subject to any and all suits brought forevermore in the forum. *See WorldCare Ltd. Corp. v. World Ins. Co.*, 767 F. Supp. 2d 341, 355 (D. Conn. 2011) (consent "is meaningless unless its scope is defined.").

Likewise, inferring consent to jurisdiction through business registration is fundamentally different than submission to jurisdiction in a contractual forum selection clause. For one thing, in the case of contractual waivers, consent to jurisdiction is generally limited to claims brought by the parties on matters arising from the contract – that is, it gives rise to *specific* jurisdiction in connection with the particular transaction. Such clauses do not mean that the consenting party has agreed to suit by unrelated plaintiffs on any cause of action. S*ee, e.g.*, *Astra USA, Inc. v. Santa Clara Cnty.*, 131 S. Ct. 1342, 1347 (2011) (nonparty can enforce a contractual provision "only if the contracting parties so intend").

In the case of valid consent to jurisdiction, such as contractual submission, a party has voluntarily chosen to submit to a court's authority. Here, Costco did not make that choice. Rather, the only voluntary choice that Costco made was to engage in business in New York, which in turn triggered the state's mandatory registration requirement. *Daimler* stands for the proposition that making the choice to do business in a jurisdiction is insufficient to confer general jurisdiction

there. If the rule were otherwise, then Daimler AG's choice to do business in California would have been a sufficient basis to find jurisdiction over it. It was not. Likewise, choosing to do business in New York and in turn being forced to register and appoint an agent for service did not amount to Costco's "consent" to jurisdiction.

D. Ritchie's Theory Of Jurisdiction Violates The Doctrine Of Unconstitutional Conditions

The coerced nature of any "consent" that Costco could be deemed to have rendered would run afoul of the doctrine of "unconstitutional conditions," under which "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz*, 133 S. Ct. at 2594 (citation omitted). Under this doctrine, New York may not condition a corporation's ability to do business on its waiver of its constitutional right to be free of suits that violate due process. *See Koontz*, 133 S. Ct. at 2596 (a state may not "require[e] [a] corporation, as a condition precedent to obtaining a permit to do business within [a] State, to surrender a right and privilege secured to it by the Constitution.") (quoting *Southern Pac. Co. v. Denton*, 146 U.S. 202, 206-207 (1892)).

New York has improperly given Costco an unfair choice – give up doing business in the state, or relinquish its constitutional right to be free of all-purpose jurisdiction outside of its "home." The impact on a foreign corporation of being subject to all-purpose jurisdiction in a forum simply because it does business there

is not slight. As the Supreme Court has recognized, requiring a corporation to defend itself against causes of action arising anywhere in the world in jurisdictions in which it does not have requisite contacts for purposes of the action poses a "significant burden." *Bendix*, 486 U.S. at 893; *see also Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 US 102, 113 (1987) (in considering "the reasonableness of the exercise of jurisdiction . . . [a] court must consider the burden on the defendant . . . .").

Thus, it would violate the unconstitutional conditions doctrine to permit New York to condition a corporation's doing business there on the corporation consenting to submit itself to the general jurisdiction of the courts of New York. *See* D. Craig Lewis, *Jurisdiction Over Foreign Corporations Based on Registration and Appointment of an Agent: An Unconstitutional Condition Perpetuated*, 15 DEL. J. CORP. L. 1, 37-38 (1990) ("when the consent or waiver in question is extracted by a state as a precondition of a benefit over which the state has monopolistic control . . . the unconstitutional conditions doctrine properly steps in to prohibit the state from taking unfair advantage of its superior bargaining position.").

IV. THE "CONSENT THROUGH REGISTRATION" THEORY OF GENERAL JURISDICTION VIOLATES THE COMMERCE CLAUSE

Ritchie's theory that a state can exercise unlimited jurisdiction over every corporation that does business in the state (by requiring it to register and appoint an agent for service and then deeming those acts "consent" to general jurisdiction) is also unconstitutional under the Commerce Clause, under which states may not seek to impose burdens on interstate commerce that "exceed[] any local interest that the State might advance." *Bendix Autolite Corp. v. Midwesco Enterprises, Inc.*, 486 U.S. 888, 891 (1988); *see also Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328 (2008) (the Commerce Clause prohibits state laws under which "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.") (alteration in original) (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)).

In *Bendix*, the Supreme Court confronted an Ohio tolling statute that tolled the statute of limitations for any period that a corporation was not "present" in the state. To be "present" in Ohio under the statute at issue, a foreign corporation was required to register and appoint an agent for service of process, from which the state inferred "consent to the general jurisdiction of the Ohio courts." *Bendix*, 466

U.S. at 889.[14] The defendant in *Bendix* was an Illinois corporation with its principal place of business in Illinois, which undertook business in Ohio. When the corporation was sued by a customer for breach of contract in Ohio two years after the applicable statute of limitations would have expired, the plaintiff claimed that the statute had been tolled because the corporation had not registered or appointed an agent for service in Ohio, and therefore had not been "present" in the state. *Id.* at 890.

Holding that the tolling statute placed a "significant" burden on interstate commerce, the Supreme Court struck it down under the Commerce Clause. The Court noted that that the statute "forces a foreign corporation to choose between exposure to the general jurisdiction of Ohio courts or forfeiture of the limitations defense, remaining subject to suit in Ohio in perpetuity." *Id.* at 893. In particular, the Court held that "[r]equiring a foreign corporation to appoint an agent for service in all cases and to defend itself with reference to all transactions, including those in which it did not have the minimum contacts necessary for supporting personal jurisdiction, is a significant burden." *Id* at 893. Nor was there any

[14] In *Lockheed*, this Court held that it did "not believe that the Supreme Court's passing comment in *Bendix* … about the effect in Ohio of appointment of an agent, undermine[d] [its] conclusion[]" that "federal due process rights likely constrain an interpretation" that "transforms" state registration statutes to permit "the exercise of general jurisdiction by state courts." *Lockheed*, 2016 WL 641392, at *14 & n.20. As this Court held, in *Bendix*, the Supreme Court "accepted without discussion the proposition that" registration and appointment of an agent would constitute consent to the general jurisdiction of the Ohio courts, which other courts have referred to as "dicta." *Id.* (citing *Pittock v. Otis Elevator Co.*, 8 F.3d 325, 328–29 (6th Cir.1993)). Thus, this Court properly gave "no special weight to the mention" in *Bendix*. *Id.*

legitimate state interest that could justify the statute under the Commerce Clause, because although it was intended to help Ohio residents to sue out-of-state corporations for in-state conduct (by making service of process easier), it was conceded that the Ohio long-arm statute would have permitted service during the limitations period, *i.e.*, the Ohio courts could exercise specific jurisdiction where their residents' interests were at stake. *Id.* at 894. Thus, forcing a corporation to choose between accepting the burden of general jurisdiction and receiving the benefit of the statute of limitations was an "exaction" that posed an unreasonable burden on commerce. *Id.* at 895.

The principle announced in *Bendix* renders Ritchie's theory of general jurisdiction unconstitutional. If the Commerce Clause forbids a state from forcing a corporation to choose between receiving the benefit of a statute of limitations and being subject to all-purpose jurisdiction in the state, it certainly forbids a state from forcing a corporation to choose between *doing any business in the state* and being subject to general jurisdiction there. Likewise, New York has no legitimate interest in having this case adjudicated there given the lack of a nexus between New York and the out-of-state entities involved in the litigation. *See* Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1398 (2015) (a state "has no conceivable interest in

adjudicating a dispute that does not involve the state in any way or does not involve a defendant who has made the state its home.").

While a state may conceivably claim to have a legitimate interest in requiring an out-of-state corporation doing business in the state to register in order to give the state notice that the corporation is operating in the state and to enable in-state service of process in cases where the state has personal jurisdiction over the corporation in a particular case (*see Bendix*, 466 U.S. at 894), Ritchie's theory would turn business registration into a basis to exercise jurisdiction over the corporation in cases unrelated to the forum state and would thus impose a substantial burden on interstate commerce that outweighs any legitimate state interest. That is unconstitutional under the Commerce Clause. *See Edgar v. MITE Corp.*, 457 U.S. 624, 640 (1982) (striking down Illinois's corporate takeover statute where "the burden the Act imposes on interstate commerce is excessive in light of the local interests the Act purports to further"); Carol Andrews, *Another Look at General Jurisdiction*, 47 WAKE FOREST L. REV. 999, 1073 (2012) ("[e]ven if consent through registration were to survive due process scrutiny, it would face problems under the Dormant Commerce Clause").

The effect of Ritchie's theory of jurisdiction would be to substantially burden an out-of-state corporation's right to do business in New York, by

subjecting it to any and all suits there merely because it does business in the state. The Commerce Clause does not tolerate that result.

CONCLUSION

The District Court properly dismissed Appellants' Complaint. Its decision should be affirmed.

Respectfully submitted,

Dated: March 29, 2016

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)(7)(C)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,417 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 Office Word 2010 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I certify that on March 29, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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