UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 2015-1456

ACORDA THERAPEUTICS INC., AND
ALKERMES PHARMA IRELAND LIMITED,
Plaintiffs-Appellees,

v.

MYLAN PHARMACEUTICALS INC., AND MYLAN INC.,
Defendants-Appellants.

Appeal from the United States District Court for the District of Delaware, The Honorable Leonard P. Stark, Chief Judge, No. 14-cv-00935

CORRECTED BRIEF OF LAW PROFESSORS THOMAS C. ARTHUR AND RICHARD D. FREER, EMORY UNIVERSITY SCHOOL OF LAW; LISA A. DOLAK, SYRACUSE UNIVERSITY COLLEGE OF LAW; AND MEGAN M. LA BELLE, CATHOLIC UNIVERSITY OF AMERICA, COLUMBUS SCHOOL OF LAW AS *AMICI CURIAE* IN SUPPORT OF ACORDA THERAPEUTICS INC. AND ALKERMES PHARMA IRELAND LIMITED

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CERTIFICATE OF INTEREST

Counsel for Amici Curiae Thomas C. Arthur and Richard D. Freer, Emory University School of Law; Lisa A. Dolak, Syracuse University College of Law; Megan M. La Belle, Catholic University of America, Columbus School of Law, certifies the following:

1. The full name(s) of every party or amicus represented by us are:

Thomas C. Arthur and Richard D. Freer of Emory University School of Law

Lisa A. Dolak of Syracuse University College of Law

Megan M. La Belle of Catholic University of America, Columbus School of Law

2. The name of the real party in interest (if the party named in the caption is not the real party of interest) represented by us is:

Not applicable.

3. All parent corporations are all publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by us are:

Not applicable.

4. The names of the all law firms and the partners and associates that appeared for amici curiae in the trial court or are expected to appear in this Court are:

Sidley Austin LLP – Carter G. Phillips, Ryan C. Morris and Anna M. Weinberg

Dated: July 24, 2015

Respectfully submitted,

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INTEREST OF THE *AMICI CURIAE*

This *amici curiae* brief is submitted on behalf of four professors and distinguished academics—Thomas C. Arthur, Richard D. Freer, Lisa A. Dolak, and Megan M. La Belle (collectively, "Amici")—all of whom teach in law schools throughout the United States. Amici's teaching and scholarship focus on civil procedure and/or patent law issues. Amici have an interest in advancing the correct interpretation of the Supreme Court's cases addressing personal jurisdiction, including those addressing consent to jurisdiction through registration and designation of agents for service of process under states business statutes.

The parties have consented to the filing of this *amici curiae* brief in accordance with Federal Rule of Appellate Procedure 29(a). Pursuant to Federal Rule of Appellate Procedure 29(c), Amici state that no party's counsel authored this brief, in whole or in part, and no party or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

Consent is and has long been a basis for establishing personal jurisdiction over a foreign corporation. According to the Supreme Court, "voluntary use of certain state procedures" constitutes consent to jurisdiction. *Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 704 (1982). Registration to do business and designation of an agent in a State under that State's business stat-

utes is one example of such a "state procedure[]"—that is, a foreign corporation may be required to consent to personal jurisdiction within the State in exchange for the privilege of conducting business within the State. Although this Court has not addressed this issue, the Supreme Court has, and its longstanding jurisprudence establishes that registration under state business statutes is a *voluntary* act that leaves "no doubt of the jurisdiction of the state court" over a foreign corporation when state law so provides. *Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917).

The Supreme Court has neither overturned the *Pennsylvania Fire* line of cases, nor expressed any doubts about the continuing viability of consent to jurisdiction via registration pursuant to state business statutes. Contrary to Appellants' contentions, the Supreme Court's decisions in *International Shoe* and *Daimler* did not implicitly overrule *Pennsylvania Fire* or otherwise disturb this well-established principle. Indeed, the Court was clear in those cases that it was evaluating personal jurisdiction where there was an *absence of consent*. *Daimler AG v. Bauman*, 134 S. Ct. 746, 755–56 (2014); *Int'l Shoe Co. v. State of Wash.*, 326 U.S. 310, 317 (1945). In fact, the rationale in *Daimler* for narrowing the scope of general jurisdiction is wholly consistent with the rule that a foreign corporation can consent to personal jurisdiction by registering to do business in a State—consent under a state statutory scheme is a simple jurisdictional rule that makes personal jurisdiction

over a foreign corporation predictable and discernible. And it is perfectly reasonable for a corporation to expect to be haled into court in a State where the corporation voluntarily agreed to be sued in that State.

Even if the issue were subject to more doubt than it is, this Court cannot disturb deep-rooted precedent that the Supreme Court itself has not overruled. Delaware's business statutes require corporations that seek to benefit from doing business in Delaware to consent to general personal jurisdiction in the State. Delaware's requirement is entirely consistent with well-established Supreme Court precedent governing personal jurisdiction. Accordingly, this Court should affirm.

ARGUMENT

Personal jurisdiction first and foremost is a legal right protecting a personal liberty. *Ins. Corp. of Ir.*, 456 U.S. at 705. Like other such privileges, a party may voluntarily cede it, whether through waiver or consent. *Id.* at 703; *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939) ("Being a privilege it may be lost . . . . Whether such surrender of a personal immunity be conceived negatively as waiver or positively as a consent to be sued, is merely an expression of literary preference.").

Despite grappling with other bases for establishing personal jurisdiction, the Court has always acknowledged consent as one of the fundamental bases for finding personal jurisdiction over a party. *See, e.g., Ins. Corp. of Ir.*, 456 U.S. at 705;

J. McIntyre Mach., Ltd. v. Nicastro, 131 S. Ct. 2780, 2787 (2011) (recognizing "explicit consent" as one example of how a person or entity can submit to a State's authority and thereby support the exercise of general jurisdiction). The Supreme Court has explained that "[a] variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court," such as contractual agreements to submit to personal jurisdiction in a particular venue, and, significant for present purposes, "voluntary use of certain state procedures." *Ins. Corp. of Ir.*, 456 U.S. at 703–704; *see also Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (noting the variety of legal arrangements by which a litigant can give express consent to personal jurisdiction of a State). Indeed, every party in this appeal agrees that jurisdiction exists over a defendant who has consented to suit in the State. Appellants Br. at 17–18; Appellees Br. at 15–17.

The sole question is simply whether a corporation can adequately consent to personal jurisdiction by voluntarily registering to do business in a State and designating an agent pursuant to state business laws, where such actions are deemed to constitute consent in the State through explicit law or judicial determination. And on that question, binding Supreme Court precedent answers "yes." Well-established, longstanding Supreme Court decisions, including *Pennsylvania Fire* and *Neirbo*, subject Appellants to jurisdiction in Delaware. And no subsequent Supreme Court decisions have overruled these clear, on-point holdings. Appel-

lants do not even argue that the Supreme Court has explicitly overruled *Pennsylvania Fire* and its progeny. It argues instead that the Court has implicitly upset this precedent in subsequent cases—namely, *Daimler* and *International Shoe*. *See* Appellants Br. at 27–28. That is wrong. In both *Daimler* and *International Shoe*, there was no consent to jurisdiction, and neither case addressed consent jurisdiction. Both cases set forth an analysis that is only applicable to evaluating general jurisdiction over a foreign corporation in the *absence* of consent and *without* physical presence.

In fact, well after *International Shoe*, Supreme Court dicta confirmed that a corporation's registration and designation of an agent in a State pursuant to state business statutes can constitutionally constitute consent to personal jurisdiction in that State. *See, e.g.*, *Bendix Autolite Corp. v. Midwesco Enter., Inc.*, 486 U.S. 888, 889 (1988). And, the logic of the Supreme Court's *Daimler* decision does not undermine or detract from the viability of consent jurisdiction based on state business statutes.

In *Daimler*, the Court was concerned with a corporation's ability to anticipate being haled into court in any State. But, a corporation is fully aware of the jurisdictional implications of registering to do business in any particular State when State law makes the consequences clear (as here), has a choice of whether to register (without coercive consequences), and is thus readily able to anticipate where it

will be permissibly subject to personal jurisdiction. Thus, there is a degree of predictability to the legal system that "permit[s] 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*, 471 U.S. at 472).

In such circumstances, where the Supreme Court has spoken directly on point, this Court is to follow this precedent until and unless the Supreme Court explicitly indicates otherwise. *Eberhart v. United States*, 546 U.S. 12, 14–15, 19–20 (2005).

A. Longstanding Supreme Court Precedent Establishes That a Corporation's Compliance with State Business Statutes Can Constitute Consent to Personal Jurisdiction.

Since the late 1880s, the Supreme Court has repeatedly acknowledged that registration to do business in a State and designation of an agent in that State may constitute consent by a foreign corporation to the exercise of personal jurisdiction over that corporation in the courts of that State. In *St. Clair v. Cox*, the Supreme Court first examined the motivation for States requiring registration of a foreign corporation and designation of an agent in a State. 106 U.S. 350, 354–55 (1882). The Court explained that, as the number of corporations and volume of business increased, it became both inconvenient and manifestly unjust that a corporation could only be sued in its home State. *Id.* at 355. "To meet and obviate this incon-

venience and injustice," States placed conditions on the privilege of foreign corporations doing business in the State, and designation of an agent in the State by a corporation pursuant to state laws constituted assent to jurisdiction. *Id.* The Court reasoned that "[t]here would seem . . . to be no sound reason why, to the extent of their agency, [designated agents] should not be equally deemed to represent it in the states for which they are respectively appointed when it is called to legal responsibility for their transactions." *Id*. at 356; *see also Ex parte Schollenberger*, 96 U.S. 369, 377 (1877).

In 1917, in the seminal *Pennsylvania Fire* decision, the Supreme Court expressed "little doubt" that a foreign corporation's appointment of an agent for service of process could subject the corporation to personal jurisdiction in the State. 243 U.S. at 95. There, a foreign corporation obtained a license to do business in Missouri and, in compliance with the state statute, filed a power of attorney consenting that service of process upon the agent would be deemed personal service upon the company. *Id.* at 94. The corporation argued that service on the designated agent was insufficient except for cases involving Missouri insurance contracts and otherwise denied it due process under the Fourteenth Amendment. *Id.* at 95. The Court was unmoved by the corporation's arguments, explaining that "[t]he construction of the Missouri statute thus adopted hardly leaves a constitutional question open." *Id.* A unanimous Court held that the corporation, by executing a

power of attorney thereby appointed an agent authorized for service, and engaged in a *voluntary* act that left "no doubt of the jurisdiction of the state court over a transitory action" and that "the construction did not deprive the defendant of due process of law even if it took the defendant by surprise." *Id.*

The Court further distinguished *Pennsylvania Fire* from other cases that would require fictional consent—a separate issue that has been hotly contested over the years—explaining those decisions "left untouched" "[t]he case of service upon an agent *voluntarily* appointed." *Id.* at 95–96. The Court also had little patience for any unfairness arguments, explaining that "execution was the defendant's *voluntary* act" and that "when a power actually is conferred in a document, the party executing it *takes the risk* of the interpretation that may be put upon it by the courts." *Id.* at 96 (emphases added).

In the decades following *Pennsylvania Fire*, the Court repeatedly reaffirmed that registration statutes could confer jurisdiction through consent, indicating that the scope of such consent would depend on the particular state statute. In *Robert Mitchell Furniture Co. v. Selden Breck Construction Co.*, for instance, the Court held that compliance with the particular statute there did not confer a broad scope of jurisdiction over the defendant corporation because it was limited to "liability incurred within this State." 257 U.S. 213, 216 (1921). But, the Court noted that "the state law [could] either expressly or by local construction give[] to the ap-

pointment a larger scope." *Id.*; *see also Louisville & N.R. Co. v. Chatters*, 279 U.S. 320, 329 (1929) (finding appointment of agent "operates as a consent" although the scope of consent depends on the statute).

In *Neirbo*, the Supreme Court explicitly reaffirmed its holding in *Pennsylvania Fire.* 308 U.S. 165 (1939). The Court upheld a lower court's determination that a corporation that had complied with a New York statute requiring it to designate an agent for service of process had waived the right to contest venue. *Id.* at 175.[1] The *Neirbo* Court explained that "[t]he scope and meaning of such a designation [was] part of the bargain by which [defendant] enjoys the business freedom of the State of New York," and, quoting Judge Cardozo, concluded that "'[t]he stipulation is therefore a *true contract*. The person designated is a *true agent*. The consent that he shall represent the corporation is *real consent* . . . The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of subject-matter. It means that, whenever jurisdiction of the subject-matter is present, service on the agent shall give jurisdiction of the person.'" *Id.* at 175 (quoting *Bagdon v. Phil & Reading C & I, Co.*, 217 N.Y. 432, 436, 437 (1916) (Cardozo, J.)) (emphases added). Citing *Pennsylvania Fire*, the Court unequivo-

[1] The analysis of venue and personal jurisdiction is analogous because venue and personal jurisdiction are "both personal privileges of the defendant, rather than absolute strictures on the court, . . . [and] both may be waived by the parties." *Leroy v. Great Western United Corp.*, 443 U.S. 173, 180 (1979).

cally held "[a] statute calling for such a designation is *constitutional*, and the *designation of the agent 'a voluntary act.'*" *Id.* at 175 (citing *Pennsylvania Fire*, 243 U.S. 93) (emphases added). Significantly, the Court distinguished *Southern Pacific Co. v. Denton*—a case on which Amicus in support of Appellants rely here—as "an entirely different situation" where the state statute denied foreign corporations access to the federal courts. 308 U.S. at 173–74 (discussing *Denton*, 146 U.S. 202 (1892)). The *Neirbo* Court chastised lower courts that improperly applied *Denton* to "govern situations where valid consent did exist." *Id.*

The Supreme Court has made clear that a foreign corporation can be subject to personal jurisdiction through service on its designated agent pursuant to state statutes, and the scope of such jurisdiction is dictated by statute.

B. Under Supreme Court Precedent, Compliance With Delaware's Business Statute Constitutes Broad Consent to Personal Jurisdiction in Delaware.

Consistent with that precedent, Delaware's Supreme Court has made equally clear that Sections 371[2] and 376[3] of the State code "do[ ] not in [their] terms limit

[2] Section 371 states: "No foreign corporation shall do any business in this State . . . until it shall have paid the Secretary of State of this State for the use of this State, $80, and shall have filed in the office of the Secretary of State: . . . A statement . . . setting forth (i) the name and address of its registered agent in this State . . ." 8 Del. C. § 371(b).

[3] Section 376 states: "All process issued out of any court of this State, all orders made by any court of this State, all rules and notices of any kind required to be served on any foreign corporation which has qualified to do business in this State

the amenability of service of a qualified foreign corporation to one which does business in Delaware or with respect to a cause of action arising in Delaware. By the generality of [their] terms, a foreign corporation qualified in Delaware is *subject to service of process in Delaware on any transitory cause of action*." *Sternberg v. O'Neil*, 550 A.2d 1105, 1115 (Del. 1988) (internal quotations and citations omitted) (emphasis added). Indeed, in *Sternberg*, the Delaware Supreme Court distinguished consent jurisdiction pursuant to Section 376 from the jurisdiction analysis of its long-arm statute. The court explained that Section 376 amounts to "[e]xpress consent to jurisdiction" to "any action that is within the scope of the agent's authority" (and "[t]here are no limitations"), whereas Section 382—Delaware's long-arm statute—relies on "implied consent" and requires analysis of a corporation's "transacting business in Delaware." *Id.* at 1115–16 (citing *Pennsylvania Fire*, *Neirbo*, and Restatement (Second) of Conflicts of Law § 44); *id.* at 1113 ("If a foreign corporation has expressly consented to jurisdiction of a state by registration, due process is satisfied and an examination of 'minimum contacts' to find implicit consent is unnecessary.").

After *Sternberg*, "[i]t is undisputed [that] a foreign corporation's appointment of a statutory agent to receive service of process pursuant to a statute is an

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may be served on the registered agent of the corporation designated in accordance with § 371 of this title, or, if there be no such agent, then on any officer, director or other agent of the corporation then in this state." 8 Del. C. § 376(a).

express consent to general jurisdiction" in Delaware. *Macklowe v. Planet Hollywood, Inc.*, 1994 WL 586838, at *4 (Del. Ch. 1994) (citing *Sternberg*); *Cont'l Cas. Co. v. Am. Home Assurance Co.*, 61 F. Supp. 2d 128, 129–30 (D. Del. 1999) (citing *Pennsylvania Fire* and *Sternberg*). Under those principles the holding of the District Court should be affirmed.

C. *International Shoe* and Its Progeny Did Not Alter the Supreme Court's Holdings that Consent Pursuant to a State Business Statute Provides a Constitutional Basis for Personal Jurisdiction.

The Supreme Court's decision in *International Shoe Co. v. State of Washington* unquestionably effected a sea change in the analysis of whether personal jurisdiction exists under a State's long-arm statutes, 326 U.S. 310 (1945). But *International Shoe* did not affect the jurisdictional analysis when there is explicit consent—that is, it did not touch the continued viability of the Court's earlier decisions in *Pennsylvania Fire* and *Neirbo*. *See, e.g.*, *King v. Am. Family Mut. Ins. Co.*, 632 F.3d 570, 576 n.6 (9th Cir. 2011) (agreeing *Pennsylvania Fire* survived *International Shoe*). In *International Shoe*, the Court explicitly limited its jurisdictional determination to cases where "*no consent* to be sued or *authorization to an agent* to accept service of process has been given." *Id.* at 317 (emphases added). Later, in *Burger King*, the Supreme Court again made clear that the "minimum contacts" analysis applied "[w]here a forum seeks to assert specific jurisdiction

over an out-of-state defendant *who has not consented to suit there*." 471 U.S. at 472 (emphasis added).

Nor has any decision since *International Shoe* overruled *Pennsylvania Fire* and *Neirbo.* Indeed, several decisions indicate that those holdings provide continued bases for general personal jurisdiction. For instance, in *Perkins v. Benguet Consolidated Mining Co.*—decided seven years after *International Shoe*—the Court noted that due process does not require or prevent States from opening their courts to actions that did not arise from actions within the State. 342 U.S. 437, 445–446 (1952). The Court conducted a "minimum contacts" analysis because the foreign corporation at issue was not registered in Ohio and had not appointed an agent for service of process. The Court noted that had the corporation engaged in such conduct, there would have been no need for the courts to engage in a "minimum contacts" analysis because valid, explicit consent through registration and the presence of a designated agent would be a fully adequate basis for the court to exercise jurisdiction over the corporation. *Id.* at 444. The Court explained that "there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state through such service of process upon that representative," *id.*, and affirmatively cited *Pennsylvania Fire*'s statutory appointment of an agent as an example of where jurisdiction exists over acts occurring outside of a State, *id.* at 446 & n.6.

In *Olberding v. Illinois Central Railroad Co.*—issued eight years after *International Shoe*—the Court borrowed the logic of *Neirbo* in analyzing venue, explaining that *Neirbo* articulates a doctrine that designation of an agent pursuant to the New York state statute "constituted an 'actual consent' to be sued in New York," both in state and federal courts, "not the less so because it was 'part of the bargain by which [the defendant] enjoys the business freedom of the State of New York." 346 U.S. 338, 341–42 (1953). The Court further confirmed that "[o]f course this doctrine would equally apply to an individual defendant in situations where a state may validly require the designation of an agent for service of process as a condition of carrying on activities within its borders." *Id.* at 342.

In *Bendix Autolite Corp.*—decided 43 years after *International Shoe*—the Court found that personal jurisdiction was lacking in that case but noted that "[*t*]*o be present* in Ohio, a foreign corporation *must appoint an agent* for service of process, which *operates as consent* to the general jurisdiction of the Ohio courts." 486 U.S. at 889 (emphases added); *id.* at 891–92 ("To gain protection of the limitations period, Midwesco would have had to *appoint a resident agent* for service of process in Ohio and subject itself to *the general jurisdiction* of the Ohio courts." (emphasis added)).

Indeed, several courts of appeals have recognized that compliance with registration statutes can provide the basis for valid consent to personal jurisdiction

without offending due process.[4] *See also* Restatement (Second) of Conflicts § 44 cmt a (1971) ("By authorizing an agent or public official to accept service of process in actions brought against it, the corporation consents to the exercise by the state of judicial jurisdiction over it as to all causes of action to which authority of the agent extends.").

D. *Daimler* Does Not Address Consent Jurisdiction Under State Business Statutes.

As in *International Shoe*, nothing in the Supreme Court's *Daimler* decision suggests that the Court intended to alter consent as a basis for personal jurisdiction. There is no mention of *Pennsylvania Fire*, *Neirbo*, or any of the consent-based cases discussed above, *see supra*, § A, much less any indication that in *Daimler* the Court sought to overrule those cases.

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[4] *See, e.g.*, *Bane v. Netlink, Inc.*, 925 F.2d 637, 640 (3d Cir. 1991) ("We need not decide whether authorization to do business in Pennsylvania is a 'continuous and systematic' contact with the Commonwealth ... because such 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 (8th Cir. 1990) ("The whole purpose of requiring designation of an agent for service is to make a nonresident suable in the local courts. The effect of such a designation can be limited to claims arising out of in-state activities, and some statutes are so limited, but the Minnesota law contains no such limitation."); *Holloway v. Wright & Morrissey, Inc.*, 739 F.2d 695, 697 (1st Cir. 1984) (Justice Stewart). Some circuits have incorrectly reached a different conclusion without any analysis or acknowledgement of binding Supreme Court precedent, including *Pennsylvania Fire* and *Neirbo*. *See Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1245 (7th Cir. 1990) (failing to consider *Pennsylvania Fire*, *Neirbo*, or any on-point Supreme Court precedent and wrongly applying *International Shoe* analysis despite consent); *Ratliff v. Cooper Labs., Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) (same).

In fact, the Court's only reference to consent jurisdiction distinguishes it from the issue presented in *Daimler*. The *Daimler* Court discusses *Perkins* as "the textbook case of general jurisdiction appropriately exercised over a foreign corporation that *has not consented to suit in the forum*." *Daimler*, 134 S. Ct. at 755–56 (internal quotations and citations omitted; emphasis added).[5] As already discussed, *see supra*, § C, *Perkins* only conducted the "minimum contacts" analysis because the defendant had *not consented* to jurisdiction, through compliance with Ohio's business statutes or otherwise, and the Court affirmatively cited *Pennsylvania Fire* as one of many examples where valid, explicit consent existed. 342 U.S. at 444, 446 & n.6.

Furthermore, the concerns justifying the narrowing scope of general jurisdiction in *Daimler* are simply not present when a corporation voluntarily registers to do business and designates an agent in the State. For example, the *Daimler* Court was concerned that foreign corporations should be able "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *Id.* at 761–62 (quotations omitted). But, when a for-

[5] Post-*Daimler*, at least one circuit has remanded for the district court to consider, in view of the changed landscape of general personal jurisdiction, whether a party that registered to do business and designated an agent for service in the State had thus consented to personal jurisdiction. *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 136 n.15 (2d Cir. 2014); *Tiffany (NJ) LLC v. China Merch. Bank*, 589 Fed. Appx. 550, 553 (2d Cir. 2014).

eign corporation voluntarily agrees to comply with state business statutes requiring registration and designation of an in-state agent and the state courts have provided an authoritative construction of the statute, there is no uncertainty as to whether or not it can be subject to general jurisdiction in that State. This is exactly the type of "simple jurisdictional rule[]" that provides predictability to corporate defendants. *Daimler*, 134 S. Ct. 760. All States have long had registration statutes, and the law on these statutes is well-developed for the vast majority of states. For example, in several States, compliance with the State's registration statute has been construed to constitute consent to general jurisdiction over the foreign corporation in the State's courts.[6] Other States' registration statutes have been construed to limit personal jurisdiction over the registered foreign corporation only to those actions that occurred within the State.[7] Further, some States have unequivocally held that their state registration statutes do not constitute consent to personal jurisdiction over a

[6] *E.g.*, *Bohreer v. Erie Ins. Exch.*, 165 P.3d 186, 91 (Ariz. Ct. App. 2007) (Arizona); *Sternberg v. O'Neil*, 550 A.2d 1105, 1116 (Del. 1988) (Delaware); *Merriman v. Crompton Corp.*, 146 P.3d 162, 170 (Kan. 2006) (Kansas); *Rykoff-Sexton, Inc. v. Am. Appraisal Assocs., Inc.*, 469 N.W.2d 88, 90 (Minn. 1991) (Minnesota); *Werner v. Wal-Mart Stores, Inc.*, 861 P.2d 270, 272 (N.M. Ct. App. 1993) (New Mexico); *Augsbury Corp. v. Petrokey Corp.*, 97 A.D.2d 173, 175 (N.Y. App. Div. 1983) (New York); *Sadler v. Hallsmith SYSCO Food. Servs.*, 2009 WL 1096309 (D.N.J. 2009) (New Jersey); *Bane*, 925 F.2d 637(Pennsylvania).

[7] *E.g.*, *Wenche Siemer v. Learjet Acquisition Corp.*, 966 F.2d 179, 183 (5th Cir. 1992) (Texas); *Smith v. Lloyd's of London*, 568 F.2d 1115, 1118 & n.7 (5th Cir. 1978) (Georgia): *Samuelson v. Honeywell*, 863 F. Supp. 1503, 1507 (E.D. Okl 1994) (Oklahoma).

registered foreign corporation.[8] Thus, a foreign corporation can surmise the extent to which it will be subject to personal jurisdiction within the State if it chooses to register and designate an agent in that State. *See Daimler*, 134 S. Ct. 760 (focusing on forums where personal jurisdiction is "easily ascertainable"). Thus, with respect to the vast majority of States, there are simply no jurisdictional surprises or unknowns for corporations that voluntarily elect to do business in the State and affirmatively act to designate an agent for service of process.

Contrary to Appellants' and the U.S. Chamber's contentions, a foreign corporation does have a real choice regarding whether to register in a particular State and potentially subject itself to jurisdiction. While registration itself is mandatory, the choice of whether to do business in a State in the first place is not. Moreover,

[8] *E.g.*, *Gray Line Tours v. Reynolds Elec. & Eng'g Co.*, 238 Cal. Rptr. 419, 421 (Cal. Ct. App. 1987) (California); *Wilson*, 916 F.2d at 1245 (Indiana); *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 89 n.6 (1st Cir. 1990) (Maine); *Freeman v. Second Jud. Dist. Ct.*, 1 P.3d 963, 968 (Nev. 2000) (Nevada); *Ratliff v. Cooper Labs, Inc.*, 444 F.2d 745, 748 (4th Cir. 1971) (South Carolina): *Wash. Equip. Mfg. Co. v. Concrete Placing Co.*, 85 Wash. App. 240, 245, 931 P.2d 170, 172 (1997) (Washington); *In re Mid-Atl. Toyota Antitrust Litig.*, 525 F. Supp. 1265, 1278 (D. Md. 1981), *aff'd Penn. v. Mid-Atl. Toyota Distribs., Inc.*, 704 F.2d 125 (4th Cir. 1983) (West Virginia). Nevada, Utah, Idaho, Wyoming, Montana, South Dakota, North Dakota, Arkansas, Mississippi, Maine, and the District of Columbia have adopted the Model Registered Agent Act, which explicitly states "[t]he designation or maintenance in this state of a registered agent does not by itself create the basis for personal jurisdiction over the represented entity in this state." MODEL REGISTERED AGENTS ACT § 15 (2006).

in Delaware, a company that chooses not to register and designate an agent pursuant to Section 376 would not incur coercive penalties or be subject to prejudicial regulation. *Cf. Bendix*, 486 U.S. 888. It merely would be unable to avail itself of the Delaware courts, and incur a fine of $200-$500, which is *de minimis* relative to the benefit of doing business in a State. *See* 8 Del. Ch. §§ 383(a), 378. And, as with any other state law, States are free to change these statutes if consent jurisdiction is too high a price to attract foreign corporations.

CONCLUSION

For the foregoing reasons, and those in Appellees' brief, the Court should affirm the district court's determination that Mylan Pharmaceuticals Inc. consented to personal jurisdiction in Delaware by virtue of its registration to do business in the State and designation of an agent for service of process pursuant to Delaware state statute.

Date: July 24, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rules 29(d) and 32(a)(7)(B) because it contains 4,839 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Dated: July 24, 2015

/s/ Carter G. Phillips
Carter G. Phillips

CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2015, a true and correct copy of the foregoing was timely filed with the Clerk of the Court using the appellate CM/ECF system, which will send notifications to all counsel registered to receive electronic notices.

/s/ Carter G. Phillips
Carter G. Phillips