

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

JOSE AYBAR, ORLANDO GONZALES, JOSE AYBAR as Administrator of THE ESTATE OF CRYSTAL CRUZ-AYBAR, JESENIA AYBAR as Administratrix of THE ESTATE OF NOELIA OLIVERAS, JESENIA AYBAR as LEGAL GUARDIAN on behalf of K.C., a minor, ANNA AYBAR and JESENIA AYBAR as Administratrix of THE ESTATE OF TIFFANY CABRAL,	X : Index No. 703632/2017 [E-Filed]
Plaintiffs,	: Previously Index No. 9344/2014
v.	: Motion Seq. No. 17
US TIRE AND WHEELS OF QUEENS, LLC,	: ATTORNEY AFFIRMATION IN FURTHER SUPPORT OF THIRD-PARTY DEFENDANT THE GOODYEAR TIRE & RUBBER COMPANY'S MOTION TO DISMISS
Defendant.	: :
US TIRE AND WHEELS OF QUEENS, LLC,	X :
Third-Party Plaintiff,	: :
v.	: :
THE GOODYEAR TIRE & RUBBER COMPANY and GOODYEAR DUNLOP TIRE NORTH AMERICA, LTD and FORD MOTOR COMPANY	: :
Third-Party Defendants.	: X

I, Justin Edward Kerner, an attorney admitted to practice law before the state courts of New York, affirm the following under penalty of perjury:

1. I am an associate with DLA Piper LLP (US), counsel for Third-Party Defendant The Goodyear Tire & Rubber Company ("Goodyear"). I am familiar with the facts and circumstances described herein.

2. This affirmation is submitted in further support of Goodyear's motion to dismiss the third-party claims asserted by Defendant/Third-Party Plaintiff, U.S. Tire and Wheels of Queens, LLC ("USTW"), for lack of personal jurisdiction and failure to state a claim for indemnification. Specifically, it is submitted to advise the court of recent precedent from a related matter, *Aybar v. Aybar, et al.* (Index Nos. 2016-06194 & 2016-07397) (the "Anna Aybar Decision"). A true and correct copy of the *Anna Aybar* Decision is attached here as **Exhibit A**.

INTRODUCTION

3. Plaintiffs have raised three actions in this Court, all of which relate to a 2012 single-vehicle, motor vehicle accident in southern Virginia (the "Accident"). They are:

- *Anna Aybar, et al. v. US Tire & Wheels of Queens, LLC* ("this Action"). In this Action, Plaintiffs brought claims against USTW, alleging that USTW negligently inspected and/or installed a tire onto a vehicle owned by Jose Aybar, and that such negligent inspection and/or installation caused the Accident and, thus, caused their injuries. USTW asserted third-party claims against Goodyear and co-defendant Ford Motor Company ("Ford") for contribution and indemnification. Goodyear's motion to dismiss—for lack of personal jurisdiction, and also for failure to state a claim for indemnification upon which relief can be granted—is pending.
- *Anna Aybar, et al. v. Jose Aybar, et al.* (Index No. 706909/2015) (the "Anna Aybar Action"). In that case, Plaintiffs (less Jose Aybar) brought suit against Jose Aybar, Ford, and Goodyear. Ford and Goodyear each filed motions to dismiss lack of personal jurisdiction, which were denied. On appeal, the Second Department vacated the trial court's order, granted the motions to dismiss, and dismissed Ford and Goodyear for lack of personal jurisdiction. In so doing, the Court ruled that Plaintiffs' claims of general jurisdiction—based on supposed continuous and systematic contacts with the State of New York, and based on business registration in the State of New York—were meritless. (*See generally* Ex. A, *Anna Aybar* Decision.)
- *Jose Aybar v. Goodyear* (Index No. 706908/2015) (the "Jose Aybar Action"). In the *Jose Aybar* Action, Jose Aybar—the owner and driver of the vehicle involved in the accident—brought suit against Goodyear, which moved to dismiss for lack of personal jurisdiction and, upon the denial of that motion, appealed. The parties to the *Jose Aybar* Action have agreed that "the decision . . . rendered in the *Anna Aybar* [Action] . . . should apply to" the *Jose Aybar* Action. (*See* Ex. B, Ltr. from Atty. Rethore to 2d Dep't, at 1 (Apr. 6, 2018).)

4. For the reasons set forth below, the *Anna Aybar* Decision is controlling precedent.

In light of that decision, this Court should grant Goodyear's motion and dismiss it from this Action for lack of personal jurisdiction.

ARGUMENT

5. On January 23, 2019, the Second Department entered its opinion in the *Anna Aybar* Action, in which it resolved jurisdictional issues that are identical to the issues presented in this Action. Specifically:

- ***The Second Department held that general jurisdiction cannot rest on the mere act of business registration.*** That holding eviscerates Plaintiffs' primary argument in opposition to Goodyear's motion. (*See Ex. A, Anna Aybar* Decision at *5-8.)
- ***The Second Department rejected Plaintiffs' and USTW's argument that general jurisdiction may be based on Goodyear's supposed "continuous and systematic" contacts with the State of New York.*** The appellate court examined Goodyear's contacts with this State and held that Goodyear's contacts with New York are not so pervasive that is should be deemed "at home" and subject to the exercise of general jurisdiction in here. (*See id.* at *5.)^{1,2}
- ***Specific jurisdiction is lacking.*** As the Second Department expressly stated, the tire at issue was designed, manufactured, and tested outside of New York. (*See id.* at *2.) That court also noted that Goodyear "had no way of tracking the sale or ownership of a given tire over its service life . . ." (*Id.*) Those findings are critical. They demonstrate that Goodyear, with respect to the tire at issue, has no proven relationship with the State of New York. Thus, there is no nexus—let alone a constitutionally sufficient nexus—between either Plaintiffs' claims or USTW's third-party claims, on the one hand, and Goodyear's in-state acts, on the other, and specific jurisdiction is lacking. *See, e.g., Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1780 (2017).³

¹ This case is thus distinguishable from *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), in which a foreign company effectively moved its base of operations to Ohio and was thus determined to be subject to the exercise of general jurisdiction in that State. (*See Ex. A, Anna Aybar* Decision at *4-5.)

² Indeed, Goodyear is not "at home" only in Ohio, where it is incorporated and maintains its principal places of business. (*See Ex. A, Anna Aybar* Decision at *1, *4.)

³ In both the *Anna Aybar* Action and *Jose Aybar* Action, Justice Raffaele agreed, holding that specific jurisdiction was lacking. On appeal, the Second Department did not disturb that conclusion.

CONCLUSION

6. As the Second Department held, Goodyear is not subject to personal jurisdiction in this Court, under the facts presented in this lawsuit.

7. Accordingly, for all of the foregoing reasons—and also for the reasons stated in Goodyear's opening affirmation, Reply to USTW's opposition, and Reply to Plaintiffs' opposition—each of the third-party claims asserted against Goodyear should be dismissed with prejudice.⁴

Dated: February 25, 2019

DLA PIPER LLP (US)

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⁴ This attorney affirmation is narrowly focused on the issue of personal jurisdiction, and the effect of the *Anna Aybar* Decision on that issue. However, nothing in or omitted from this affirmation is or should be construed as a waiver of Goodyear's argument that USTW has failed to state an indemnification claim upon which relief can be granted.