occurred out of state); *Tonns v. Spiegel's,* 90 A.D.2d 548 (2d Dep't 1982) (court found jurisdiction under 302(a)(1) when the defendant was an out of state manufacturer who made a defective product sold to the plaintiff through a New York retailer); *EMI Christian Music Grp. v. MP3tunes, LLC,* 840 F.3d 79 (2d Cir. 2016) (evidence of the intent to market a product nationwide sufficient for minimum contacts in New York).

(b) Where, As Here, the Defendant Specifically Targets The Forum State (New York) with Its Advertising, Marketing and Products, Which Allegedly Cause Injury, an "Articulable Nexis" is Found to Exist

Where, as here, the defendant specifically targeted New York consumers in their advertising or marketing campaign, as the Court below found that Ford and Goodyear did (R.11) and as Ford has admitted (*supra*, at 10-12), New York courts have found that there is a substantial relationship between defendants' advertising and marketing activities and the claim asserted against them sufficient to confer specific jurisdiction.

"The extent of a defendant's advertising and solicitation in a forum state are clearly factors to consider in evaluating whether a court in the forum state has personal jurisdiction over the defendant. A defendant's advertising through direct mail or catalogs, specifically targeted toward the residents of a forum state is sufficient to support an assertion of specific jurisdiction." *Hamilton v. Accu-Tek,*

32 F.Supp.2d 47, 70 (E.D.N.Y. 1998) (citation omitted). *Accord Pilates, Inc. v. Pilates Inst., Inc.*, 891 F.Supp. 175, 179 (S.D.N.Y. 1995) ("I conclude that plaintiff has established a prima facie case that the Institute has deliberately targeted its products and services at New York residents, and that . . . there is a sufficient relationship between defendant corporation's purposeful transactions and this action to confer jurisdiction under CPLR §302(a)(1)."). *Cf. Surdo v. Stamina Products, Inc.*, 2015 WL 5918318, at *3 (S.D.N.Y. Oct. 9, 2015) ("a court can find that a defendant directed its efforts toward the forum state [for purposes of due process] if the defendant designed the product for the forum state market, advertised in the forum state, or marketed the product through a distributor who agreed to serve as the sales agent in the forum state.)

For example, in *State Farm Fire & Cas. Co. v. Swizz Style, Inc.*, 246 F. Supp. 3d 880, 892 (S.D.N.Y. 2017), the court held that it had specific jurisdiction over a Swiss manufacturer of air purifiers with respect to an indemnity claim the distributor asserted against the manufacturer, stemming from a fire allegedly caused by one of its air purifier, where the manufacturer had directly targeted the New York area with its products. The court held:

> Swizz Style has alleged that a significant volume of its sales—as the exclusive distributor in the United States—were directed to New York, that Stadler Form was aware of and "targeted" New York specifically, and that Stadler Form might reasonably have suspected it could be called upon to answer for any fires related to the Viktor air

> purifiers in light of the retrofitting kits it provided to Swizz Style to correct the overheating problem. . . . Therefore, Swizz Style has alleged Stadler Form had the minimum contacts with New York necessary to support the exercise of specific jurisdiction.

Id. at 892 (citation omitted and emphasis added).

Robins v. Procurement Treatment Centers, Inc., 157 A.D.3d 606 (1st Dep't 2018) is also on point. In *Robins,* the court held that the court had specific jurisdiction, pursuant to CPLR §302(a)(1), over a proton radiation treatment facility in New Jersey (PPM) with respect to injurious treatment the plaintiff, a New York resident, allegedly received there, based in substantial part on PPM's targeting of New York residents for its services. The court held:

> With regard to specific jurisdiction (CPLR 302[a][1]), the record shows that PPM's activities in New York were purposeful and that there is a substantial relationship between the transaction and the claim asserted. PPM chose and marketed its Somerset, New Jersey, location to target New York residents, touting its proximity to New York in advertising, entered into an agreement with a consortium of New York City hospitals for the referral of cancer patients for treatment at its facility, and provided the consortium's doctors with privileges at its facility.

Id. at 607 (citation and quotations omitted).

Williams v. Summit Marine, Inc., 2019 WL 4142635 (N.D.N.Y. Aug. 30, 2019) is also instructive on this point, although the court found there was no specific jurisdiction under those highly distinguishable facts. In *Williams,* the plaintiffs were allegedly injured by a faulty boat lift in New York and sued the

manufacturer of the boat lift (Summit) and an alleged component part manufacturer (Automated), a Michigan corporation, which allegedly manufactured the winch brake of the boat lift. The court held that it did not have specific jurisdiction over Automated, pursuant to CPLR §302(a)(1), because there was no evidence that Automated targeted the New York market:

> To be sure, the pleadings contain no allegations that Automated designed, manufactured, or tested winch brakes for the New York market or marketed, distributed, sold, or delivered them to New York consumers. In fact, there are no allegations pertaining to the location of any of Automated defendants' conduct associated with winch brakes, let alone the winch brake at issue. Moreover, there are no allegations from which it can be reasonably inferred that Automated defendants targeted the New York market or knew that boat lifts comprised of their winch brakes were being sold to New York consumers. Further, Summit Marine does not point to a single aspect of its claims that arises from Automated defendants' New York contacts.
>
> Without alleging more than Automated was and is doing business within New York, it cannot be reasonably inferred that there was a substantial relationship between any business transacted by Automated defendants and the claims asserted. Accordingly, plaintiffs and Summit Marine fail to satisfy their burden of making a prima facie showing of personal jurisdiction under N.Y. C.P.L.R. 302(a)(1).

Id., slip op. at *3-*4 (citations and quotations omitted).

In stark contrast to *Williams,* the record in the instant case demonstrates, as the Court below correctly found, that Ford and Goodyear specifically targeted New

York residents, with millions of dollars of advertising and marketing, and sold millions of dollars of their products in New York, including the Ford Explorer and the Goodyear tire at issue, thereby establishing the "articulable nexus" or "substantial relationship" necessary for specific jurisdiction under CPLR §302(a)(1).

(c) Where, As Here, the Defendant Specifically Targets the Forum State (New York) with Its Products, Which Allegedly Cause Injury, an "Articulable Nexis" Exists

Ford also argued that there was an insufficient nexus for specific jurisdiction in a substantially similar case under a similar long arm statute in West Virginia in *State ex rel. Ford Motor Co. v. McGraw*, 788 S.E.2d 319 (W. Va. 2016), which the court rejected. "Ford contend[ed] that because the Ford Explorer [involved in the accident] was manufactured in Kentucky, sold to a dealer in Florida and entered West Virginia via a third party, Ford's asserted activities in West Virginia do not have anything to do with the West Virginia claim." *Id.* at 342. The court disagreed:

> We decline to use the place of sale as a per se rule to defeat specific jurisdiction. Such an approach ignores even the plurality in *J. McIntyre* that indicated that the inquiry considers both the defendant's conduct and the economic realities of the market the defendant seeks to serve. It also utterly ignores the "targeting" of a forum for the purpose of developing a market. The focus in a stream of commerce or stream of commerce plus analysis is not the discrete individual sale, but, rather, the development of a market for products in a forum.

Id. at 343.

In *Hoagland v. Ford Motor Co.*, 2007 WL 2789768 (W.D. Ky. Sept. 21, 2007), which involved interpretation of a Kentucky long-arm statute similar to 302(a)(1), Ford also argued that "'no act or omission by Ford within Kentucky causally relates to' the injuries at issue" sustained in the accident in Indiana and therefore there was no specific jurisdiction. *Id.*, slip op. at *3. As in the instant action, the plaintiff's decedent, a Kentucky resident, purchased the Ford Explorer from an in-state resident and was injured out of state on a "trip that started and was intended to end in Kentucky." *Id.*, slip op. at *3. The court rejected Ford's argument and held that it had specific personal jurisdiction over Ford under both the Kentucky long-arm statute and Federal due process:

> [I]n the matter at hand, there is no dispute that Ford manufactured the Escort at issue, nor is there any dispute that Ford introduced it into the stream of commerce or that such activities constitute Ford's regular course of business in Kentucky, from which it derives substantial revenue. Similarly, the court finds that by manufacturing and introducing this automobile into the stream of commerce, Ford purposefully availed itself of the privileges of acting and causing consequences in Kentucky, that the plaintiff's cause of action arose from the purchase of this car in Kentucky, and that the connection between Ford's actions, the events giving rise to this suit, and Kentucky are such that the court's exercise of jurisdiction over Ford is reasonable. The court concludes that the requirements of the due process clause and Kentucky's long-arm statute have been met;

Id.

In the within case, Ford sold this exact same model Ford Explorer in New York with the same alleged flaws and manufacturing defects as the incident Explorer. Goodyear sold this exact same model tire in New York with the same design flaws and manufacturing defects as the incident tire. That the incident Explorer was not manufactured in New York and that it was initially shipped to a dealer outside New York is irrelevant. So is the fact that the Goodyear tires were manufactured outside New York. As Judge Butler correctly found in the Court below, Ford and Goodyear's sales of these products in general in New York satisfies the nexus requirement of 302(a)(1). In addition, the vehicle was registered in New York and injured New York residents. The tire was on that New York registered vehicle and allegedly serviced by U.S. Tires, a service center in Queens that regularly serviced Goodyear tires and Ford Explorers. It is not only the plaintiffs' claims that satisfy the nexus requirement, but also U.S. Tires' third-party claims for indemnity and contribution, which arise from New York contacts. Specifically, any judgment the plaintiffs may obtain against U.S. Tires would be in New York. U.S. Tires' contribution and indemnity claims would stem from that New York judgment. Moreover, the underlying facts of the case also connect U.S. Tires' claims to New York because the tire and vehicle was serviced in New York in a shop that regularly serviced Goodyear tires and Ford Explorers.

4. The Principal Cases Ford and Goodyear Rely on Are Clearly Distinguishable

Ford and Goodyear principally rely on and repeatedly cite three cases, claiming: "These cases decide this one." (Appellant's Brf., at 14) Contrary to their assertions, the cases are clearly distinguishable.

In *Fernandez v. DaimlerChrysler,* 143 A.D.3d 765 (2d Dep't 2016), Daimler, a German corporation over which the plaintiff sought personal jurisdiction, did not manufacture the subject vehicle involved in the accident or any of its allegedly defective component parts. Nor did the Court address its advertising or marketing activities targeted to New York, if any.

In *Krajewski v. Osterlund, Inc.,* 111 A.D.2d 905 (2d Dep't 1985), the defendant (Osterlund), a Pennsylvania corporation, over whom personal jurisdiction was sought, did not manufacture the truck involved in the accident, unlike Ford and Goodyear. Rather, it was manufactured by a Michigan company that had filed for bankruptcy ten years before the decision. Additionally, the plaintiff failed to lay a foundation establishing that Osterlund did business in New York, in contrast to the instant case, in which Ford and Goodyear freely admit they "purposefully market, promote, advertise and sell products in New York." (Appellant's Brf., at 11)

Pichardo v. Zayas, 122 A.D.3d 699 (2d Dep't 2014) is also readily distinguishable from the case at bar. It did not involve manufacture of an allegedly

defective product, but rather an accident in which the plaintiff was allegedly injured while operating a table saw at the defendants' home in New Jersey. Unlike Ford and Goodyear, the defendants in *Pichardo* submitted evidence that they did not own property in New York, did not solicit business in New York, did not derive substantial business revenue in New York and did not engage in persistent business activities in New York. *Id.* at 700.

In contrast to the defendants in the above cases, Ford and Goodyear admit not only that they manufactured the Ford Explorer and subject tire, but that they had extraordinarily extensive and pervasive contacts with New York, including that: (i) they marketed, promoted, advertised, sold and serviced their products in New York; (ii) they have numerous wholly owned or contractual relationships with independent dealers who sell their products, new and used, to residents of New York; (iii) their goods and products are a large part of the used car and tire markets in New York; (iv) they are registered and authorized to do business in New York; and (v) Plaintiffs and U.S. Tires are New York residents. (Appellant's Brf., at 15-16)

Ford and Goodyear's position that they had no connection with the Plaintiff's and U.S. Tire's claims is entirely unfounded and unsustainable. They cannot dispute that they manufactured the alleged defective products at issue, set up and maintained an enormous business infrastructure in New York to support

and promote those products (both new and used), spent many millions of dollars marketing and advertising (in English and Spanish) those products (both new and used) in New York, constantly interjecting themselves into Mr. Aybar's very home and car with their television, radio and computer advertisements, beckoning to him and undoubtedly influencing him to buy their products, including the very products he purchased that are the subject of this litigation.

Yet, they brazenly deny this very reality by repeatedly arguing: (i) "the claims here have no link to New York" (Appellant's Brf., at 2); (ii) "Neither Ford nor Goodyear had any contacts in New York with Plaintiffs, U.S. Tires, the Explorer, or the tire installed on it" (*id.* at 5); (iii) "the claims did not arise from any contact Ford or Goodyear have with New York" (*id.* at 7); (iv) "Plaintiffs' claims did not arise out of or relate to any of their New York contacts" (*id.*); (v) "*All* of Ford and Goodyear's allegedly relevant conduct took place outside New York" (*id.* at 14); (vi) "Here, the connection between Ford and Goodyear's New York transactions and the asserted tort is, at best, 'merely coincidental.'"

It is a slender reed indeed for them to rest their case on the fact that they did not directly sell Aybar the products, when they indirectly orchestrated and promoted those very sales through their massive, pervasive commercial intrusion into New York, seeking (and benefiting from) the very sales they now attempt to disassociate themselves from.

It is no secret that automobile manufacturers such as Ford benefit enormously from the sale of their replacement parts (and possibly services) for older vehicles such as the Ford Explorer at issue, many of which are purchased second hand from third parties, as here. It is common sense and common knowledge that as an automobile ages, it requires more and more replacement parts, which are frequently purchased directly or indirectly from the manufacturer, to the great benefit of the manufacturer. Through its concerted efforts, Ford instigated the sale of the Ford Explorer to Aybar based on its New York contacts and benefited from that sale in New York. It cannot now walk away based on hyper-technical arguments, claiming no connection to the transaction it facilitated, when Aybar seeks to hold it accountable for defects in that product, which allegedly killed three of his relatives and seriously injured three others, including himself.

Based on the foregoing, the Court should sustain the September 25, 2019 Order holding that the court has specific jurisdiction over Ford and Goodyear, pursuant to CPLR §302(a)(1).

5. Ford and Goodyear Are Subject to Specific Jurisdiction, Pursuant to CPLR §302(a)(3)

The court also has specific jurisdiction in this case under CPLR §302(a)(3). The first requirement of CPLR §302(a)(3) is that the defendant "commits a tortious

act without the state causing injury to person or property within the state." Here, Ford and Goodyear committed tortious acts without the state—they manufactured and designed the products outside of New York.

Those tortious acts caused "injury to person or property within the state." The products injured the plaintiffs, who are New York residents. Ford and Goodyear argue that the injury did not occur "within the state" because the accident happened in Virginia. The court should reject this argument.

Traditionally, in the case of personal injury or property damage, whether the injury occurred "within the state" is determined by the location of the accident. *McGowan v. Smith*, 52 N.Y.2d 268 (1981). The courts have consistently held that pain and suffering or discovery of damages in New York after the injury occurs in another state will not suffice. *Id.*

On this question, however, the Court of Appeals has indicated that it is open for a reconsideration of this "first injury" rule. In *Ingraham v. Carroll*, 90 N.Y.2d 592 (1997), the court addressed the question of jurisdiction under CPLR §302(a)(3) over a Vermont physician who examined the plaintiff in Vermont, but continued to send instructions to her New York physicians. The court decided the question under CPLR §302(a)(3)(ii), by "assuming, without deciding, that the alleged tortious conduct in Vermont caused injury within New York" *Id.* at 597. The dissenting opinion observed that the majority's choice not to affirm the lower

court's ruling that the place of injury was New York signaled the court's willingness to reconsider the place of injury rule in "a more propitious and better assembled case, that may be otherwise determinative of outcome and contributive to the dispositional analysis and developing jurisprudence." *Id* at 604. This is that case.

CPLR §302(a)(3) was enacted precisely to prevent the untenable situation Ford and Goodyear propose: allowing national manufacturers to avoid the jurisdiction of the New York courts where a New York resident is injured by a product marketed in New York and serviced by a New York garage that attempts to assert claims for contribution and indemnity against the manufacturers. When CPLR §302 was amended in 1966 to add CPLR §302(a)(3), the legislature did so in response to the Court of Appeals' determination in *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443 (1965), which held that CPLR §302(a)(2) did not encompass products liability actions where the plaintiff was injured by a product manufactured outside of New York. L. 1966, ch. 590, effective September 1, 1966; Report of the Judicial Conference on the CPLR to the 1966 Legislature, Leg. Doc. (1967) No. 90, pp. 339-344. The amendment was meant to be broad enough to provide legal redress to New York residents who are injured by foreign tortfeasors and yet, not so broad as to unfairly burden nonresidents, whose connection with the state is remote and who could not

reasonably be expected to foresee that their acts outside of New York could have harmful consequences in New York. *See* Report of the Judicial Conference on the CPLR to the 1966 Legislature, Leg. Doc. (1967) No. 90, pp. 340-344. Denying jurisdiction under CPLR §302(a)(3) in our case would subvert the purpose of the statute.

Other cases support this reading of CPLR §302(a)(3), finding that the "original event" (i.e., the injury) happened in New York even if the accident happened elsewhere. In *Distefano v. Carozzi North America*, 286 F.2d 81 (2d Cir. 2001), a wrongful termination action, the court found that the place of injury was New York under CPLR 302(a)(3). The plaintiff worked in New York for a Rhode Island company. The decision to fire him was made outside of New York. He was fired during a meeting that took place in New Jersey. The court found that the "original event" (losing his employment) took place in New York despite the other acts occurring in other states. Here, the same rationale applies. The "original injury" was in New York—the sale, registration, and ownership of the Ford Explorer and Goodyear tire and servicing of them at U.S. Tires in Queens, even if the resulting accident happened in Virginia.

Moreover, even if the plaintiffs' injuries arose in Virginia, the same cannot be said of U.S. Tires' claims against Ford and Goodyear. U.S. Tires' claims against them would stem from a judgment by the plaintiffs against U.S. Tires in

New York. Thus, the "injury" to U.S. Tires would be in New York. Moreover, the underlying event—U.S. Tires' servicing of the tire and vehicle at its garage in Queens—also happened in New York. A garage that regularly sells and services the allegedly defective products should be able to recover against the manufacturers in the state where the work was done.

Therefore, the initial requirement of § CPLR 302(a)(3) is satisfied. Jurisdiction under CPLR 302(a)(3) then requires satisfaction of either subdivision (i) or (ii). Both are satisfied in our case.

a. <u>There is jurisdiction under 302(a)(3(i)</u>

Subsection 302(a)(3)(i) requires that the tortfeasor "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state." There should be no dispute that this subsection is satisfied. Ford and Goodyear engage in regular business in the state and derive substantial revenue from goods sold in the state.

Jurisdiction under this section does not require the same quantity of contacts required for general jurisdiction under CPLR §301. *See Ingraham v. Carroll*, 90 N.Y.2d 592, 597 (1997). Just because the sales in New York might be only a fraction of the defendant's total sales does not mean that it does not "derive substantial revenue" (*i.e.*, many millions of dollars) under this section. *See Allen v.*