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, Plaintiffs, v. US TIRE AND WHEELS OF QUEENS, LLC, Defendant.	Index No. 703632/2017 [E-Filed] Previously Index No. 9344/2014 **ATTORNEY AFFIRMATION IN SUPPORT OF THIRD-PARTY DEFENDANT THE GOODYEAR TIRE & RUBBER COMPANY'S MOTION TO DISMISS**
US TIRE AND WHEELS OF QUEENS, LLC, Third-Party Plaintiff, v. THE GOODYEAR TIRE & RUBBER COMPANY and GOODYEAR DUNLOP TIRE NORTH AMERICA, LTD and FORD MOTOR COMPANY Third-Party Defendants.	

I, Kevin W. Rethore, an attorney admitted to practice law before the state courts of New York, affirms the following, under penalty of perjury:

1. I am a partner with the law firm of DLA Piper LLP (US), attorneys for Third-Party defendant The Goodyear Tire & Rubber Company ("Goodyear") in the above-captioned matter and I am fully familiar with the facts and circumstances herein.

2. This affirmation is being submitted in support of the within motion to dismiss pursuant to CPLR 3211(a)(7) and (8), seeking an order dismissing the Third-Party Complaint by

U.S. Tire and Wheels of Queens, LLC ("USTW") for lack of personal jurisdiction and failure to state a claim for common law indemnification, as follows.

INTRODUCTION

3. USTW's third-party action is derivative of the litigation captioned *Aybar, et al. v. US Tire and Wheels of Queens, LLC*, Index No. 703632/2017 (Sup. Ct., Queens Cnty.) – an action initiated by the Aybar Plaintiffs[1] against USTW for damages they allegedly sustained as a result of a July 1, 2012 motor vehicle accident involving a 2002 Ford Explorer, in Virginia. (Hereafter, the "Aybar/USTW Action.") Specifically, the Aybar Plaintiffs alleged that the accident directly resulted from USTW's negligence in inspecting and installing a ten year old, used tire on the left rear position of the Explorer just two weeks before the accident occurred.

4. USTW brought the instant third-party action against Goodyear (and Ford Motor Company) seeking common law indemnification and contribution, in the event that USTW is found liable to Plaintiffs in the Aybar/USTW Action.

5. USTW's Third-Party Complaint against Goodyear must be dismissed in its entirety, as a matter of law. Simply stated, Goodyear is not subject to personal jurisdiction in this Court here. First, USTW fails to demonstrate, as it must, that the Court has jurisdiction over Goodyear under either New York's long arm statute (CPLR § 302) or the Due Process clause of the U.S. Constitution. Goodyear is not subject to personal jurisdiction in New York under the state's long-arm statute, because it neither committed a tort in New York (as the tire was built and designed by Goodyear outside of New York) nor caused an injury in the State (as the accident occurred in Virginia). Goodyear also submits its own record evidence demonstrating it did not commit a tort in New York, cause any injury in New York, and is certainly not "at home"

[1] 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., Anna Aybar and Jesenia Aybar as Administratrix of The Estate of T.C. (collectively "Aybar Plaintiffs" or "Plaintiffs.")

in New York such that the exercise of general jurisdiction would be appropriate. *See Daimler AG v. Bauman*, 571 U.S. 117, 139 (2014). Accordingly, dismissal is appropriate under CPLR 3211(a)(8) for lack of personal jurisdiction.

6. The United States Supreme Court's decision in *Daimler* makes clear that Goodyear is not subject to general or "all purpose" jurisdiction in New York. In *Daimler,* the Court narrowed the "minimum contacts" test for general jurisdiction, building upon the *Goodyear Dunlop Tires Operations, S.A. v. Brown* decision, by requiring a corporate defendant to have "affiliations with the State [that] are so continuous and systematic as to render [it] essentially at home in the forum State." 571 U.S. at 139 (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

7. Absent exceptional circumstances not present here, a corporation is "at home" *only* in the states: (1) where it is incorporated, and (2) where it has its principal place of business. *Id*. at 137.[2] Goodyear is an *Ohio* corporation with its principal places of business located at 200 Innovation Way in Akron, *Ohio*.

8. Likewise, specific jurisdiction over Goodyear in New York in this lawsuit is lacking because USTW's allegations do not arise from Goodyear's contacts with the state. As explained by the United States Supreme Court in *Walden v. Fiore*, the Constitution does not permit the exercise of jurisdiction based on the "activity of another party or a third person." *Walden v. Fiore,* 134 S. Ct. 1115, 1122 (2014) (quotations omitted). Further, and equally significant, the mere fact that a plaintiff who was allegedly injured in an accident is a resident of

[2] Notably, New York appellate courts, including the Second Department have rendered decisions consistent with *Daimler. See Fernandez v. DaimlerChrysler A.G.*, 143 A.D.3d 765, 767, 40 N.Y.S.3d 128, 131 (2d Dep't 2016); *D & R Global Selections, S.L. v. Bodega Olegario Falcon Pineiro,* 128 A.D.3d 486 (1st Dep't 2015); *Marcio Magdalena v. Eduardo Lins, et al.,* 123 A.D.3d 600, 999 N.Y.S.2d 44 (1st Dep't 2014).

New York does not establish jurisdiction either, as "injury to a forum resident is not . . . sufficient." *Id.* at 1125.

9. Upon information and belief, the tire in question was neither designed nor manufactured in New York, nor is there any evidence that Goodyear sold it there. Absent general or specific personal jurisdiction over Goodyear in this case, the instant motion to dismiss should be granted.

10. Finally, USTW also fails to state a claim for common law indemnification against Goodyear under CPLR 3211(a)(7), as a matter of established law. A party has no right to common law indemnification where it faces liability in its own right, and independent of any potential liability exposure that the potential indemnitor faces. In asserting a right to common law indemnification from Goodyear here, USTW seeks indemnification for potential exposure to underlying negligence claims that are entirely distinct from the product liability claims asserted separately against Goodyear.

STATEMENT OF PERTINENT FACTS

11. On June 17, 2014, Plaintiffs initiated suit against USTW in the Supreme Court of the State of New York, Queens County (*i.e.*, the Aybar/USTW Action). As noted above, that action arises out of a July 1, 2012 motor vehicle collision in Virginia. According to the pleadings filed in that case, USTW allegedly inspected and installed tires on a 2002 Ford Explorer for plaintiff Jose Aybar just two weeks prior to the collision. (*See* USTW's Third-Party Complaint, at Ex. A (*Aybar Plaintiffs' Amended Verified Complaint*), at ¶¶ 19-20, 25, attached hereto as **Exhibit 1**.) Plaintiffs allege that USTW "did not properly and adequately inspect, examine, check and/or test the tires and placed them on plaintiff Jose Aybar's vehicle knowing that the vehicle would be driven with those tires." (*Id.*, at Ex. A, at ¶¶ 20-21.) Plaintiffs also allege that the "collision occurred solely as a result of the negligence and carelessness of the defendant

because the tires were not fit for safe use on the vehicle and defendant placed them on the vehicle anyway without warning Mr. Aybar about their condition." (*Id.*, at Ex. A, ¶ 26; *see also id.* at Ex. A,¶¶ 31-38.) Based on the foregoing, Plaintiffs set forth multiple causes of action against USTW, sounding in negligence, negligent infliction of emotional distress, wrongful death, and a survival action for conscious pain and suffering. (*See generally id.*, at Ex. A, ¶¶ 39-133).

12. On or around July 19, 2016, USTW filed the Third-Party Complaint against Goodyear, Goodyear Dunlop Tires North America, LTD,[3] and Ford Motor Company (the "Third-Party Action"). USTW asserts cause of action in the Third-Party Action solely for common law indemnification and contribution "if [USTW] is held liable to anyone" in the Aybar/USTW Action. (Ex. 1, ¶ 5.)

13. The Third-Party Complaint contains no jurisdictional allegations as to any of the third-party defendants.

14. Goodyear answered the Third-Party Complaint on September 21, 2016, specifically asserting affirmative defenses based on lack of personal jurisdiction and failure to state a claim. (*See* Third-Party Defendant [Goodyear's] Answer to Third-Party Complaint With Affirmative Defenses And Cross Claims, at 2, attached hereto as **Exhibit 2**.)

15. Upon information and belief, the tire allegedly at issue in the Aybar/USTW Action was not designed or manufactured in New York. Nor could it have been, as Goodyear does not have any Wrangler AP manufacturing plants in New York. (*See* Affidavit of Joseph G. Dancy, dated May 14, 2018, ("Dancy Aff."), ¶¶ 7-8, attached hereto as **Exhibit 3**.) Instead, the tire was designed by Goodyear in Akron, Ohio and built in Union City, Tennessee. (*Id.* ¶ 5.) The

[3] Goodyear Dunlop Tires North America, LTD was dismissed from the Third-Party Action on October 11, 2017. *See* NYSCEF Doc. No. 54.

tire was more than ten years old when plaintiff Jose Aybar had it inspected and installed on his 2002 Ford Explorer by USTW. (*See id.* ¶ 5.)

16. Upon leaving Goodyear's possession and control at the manufacturing plant in or about the 4th week of 2002, Goodyear engaged in no known activity at all relating to the subject tire. (*See id.* ¶ 6.)

ARGUMENT

I. THE COURT LACKS PERSONAL JURISDICTION OVER GOODYEAR

17. USTW bears the ultimate burden of proving a basis for personal jurisdiction over Goodyear in this case. *See, e.g.*, *Carrs v. Avco Corp.*, 124 A.D.3d 710, 2 N.Y.S.3d 533 (2d Dep't 2015). To do so, USTW must prove that personal jurisdiction over Goodyear is proper under both the New York long-arm statute (CPLR § 302), as well as under the Due Process clause of the U.S. Constitution. *See LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 213, 735 N.E.2d 883, 886 (2000). USTW cannot establish either.

A. THE COURT DOES NOT HAVE JURISDICTION OVER GOODYEAR UNDER NEW YORK'S LONG-ARM STATUTE.

18. In the Third-Party Complaint, USTW fails to allege any basis for jurisdiction over Goodyear. However, Goodyear anticipates USTW will argue that jurisdiction is predicated on CPLR § 302.

19. Significantly, the long-arm statute does not extend as far as is constitutionally permissible. *See, e.g., Kreutter v. McFadden Oil Corp.*, 71 N.Y. 2d. 460, 471, 522 N.E.2d 40, 46 (1988). Instead, as the New York Court of Appeals has recognized, long-arm or "single act" jurisdiction under CPLR § 302 is intended to be narrower and more restrictive: "the long-arm statute 'does not confer jurisdiction in every case where it is constitutionally permissible'" and '"a situation can occur in which the necessary contacts to satisfy due process are present, but *in*

personam jurisdiction will not be obtained in this State because the statute does not authorize it.'" *Ehrenfeld v. Bin Mahfouz,* 9 N.Y.3d 501, 512, 881 N.E.2d 830, 837-8 (2007) (citations omitted).

20. In light of this, under CPLR § 302, the Court may exercise personal jurisdiction over plaintiff's claims here only if Goodyear "commit[ted] a tortious act within the state," or if Goodyear "commit[ted] a tortious act without the state causing injury to person or property within the state." CPLR § 302(a)(2)-(3). Neither basis of long-arm jurisdiction is satisfied.

21. Further, jurisdiction under CPLR § 302 is limited to the contacts specifically listed in the statute and the claim over which jurisdiction is asserted must arise out of those contacts. *See McGowan v. Smith*, 52 N.Y.2d 268, 272, 419 N.E.2d 321, 323 (1981); *Williams v. Enterprise Rent-A-Car of Boston, Inc.*, 35 A.D.3d 264, 264, 826 N.Y.S.2d 59, 60 (App. Div. 2006). In other words, there must be a "substantial relationship" between a defendant's activities and the plaintiff's claim. *Fernandez*, 143 A.D.3d at 767, 40 N.Y.S.3d at 131.

22. Here, USTW cannot satisfy the requirements under any branch of CPLR § 302. First, "to determine whether personal jurisdiction exists under CPLR 302(a)(1), a court must determine (1) whether the defendant transacted business in New York and, if so, (2) whether the cause of action asserted arose from that transaction." *Id.* The Goodyear tire at issue was designed, manufactured, and first sold outside of New York, and there is no nexus or relationship between USTW's claim and Goodyear's business in New York. (*See* Ex. 3 (Dancy Aff.), at ¶¶ 5-6.) USTW is *not* a Goodyear "authorized service center" or a Goodyear "authorized dealer" and was not at any time material hereto; such relationships/designations can only be established by "a specific contractual agreement with Goodyear actually authorizing such a relationship." (*Id.* ¶¶ 11-14.) USTW does not have and cannot produce any such contract. (*See id.* ¶ 14.)

Accordingly, Goodyear is not subject to jurisdiction under CPLR § 302(a)(1) because USTW's claim does not "arise" from Goodyear's transaction of business in New York.

23. CPLR § 302(a)(2) is also inapplicable because Goodyear did not commit a tortious act within New York. It has long been held that a product-manufacturer does not commit a tort within New York when the product allegedly at issue is manufactured outside of the state. *Longines-Wittnauer Watch Co. v. Barnes & Reinecke, Inc.*, 15 N.Y.2d 443, 459-64, 209 N.E.2d 68, 76-78 (1965). In this case, Goodyear designed the subject tire in Ohio and manufactured it in Tennessee. (Ex. 3, at ¶¶ 5, 8.) As such, Goodyear did not commit a tortious act within the State, under CPLR §302(a)(2).

24. Finally, Goodyear did not commit a tortious act outside of New York that caused injury *inside* New York. As the Second Department has emphasized, for purposes of CPLR § 302(a)(3), "the 'situs of the injury is the location of the original event which caused the injury, *not the location where the resultant damages are subsequently felt by the plaintiff.*'" *Paterno v. Laser Spine Inst.,* 112 A.D.3d 34, 44, 973 N.Y.S.2d 681, 688 (2d Dep't 2013) (citation omitted) (emphasis in original), *aff'd* 24 N.Y.3d 370, 23 N.E.3d 988 (2014). Goodyear's alleged tortious conduct did not cause an injury *inside* New York, because Plaintiffs were injured in Virginia.

25. Personal jurisdiction over Goodyear is therefore not permissible under the New York long-arm statute and USTW's Third-Party Complaint against Goodyear should be dismissed on that basis, alone.

B. EXERCISING PERSONAL JURISDICTION OVER GOODYEAR WOULD VIOLATE DUE PROCESS.

26. Consistent with due process, a court may exercise personal jurisdiction over a non-resident defendant only if there are "minimum contacts" between the defendant and the forum state. *See, e.g., Deutsche Bank Secs., Inc. v. Montana Bd. of Invs.,* 7 N.Y.3d 65, 71, 850 N.E.2d 1140, 1143 (2006). The quantity and nature of the contacts required depends on whether the plaintiff alleges general or specific personal jurisdiction.

27. General jurisdiction is broader than specific jurisdiction, permitting a court to exercise jurisdiction over a defendant even when the litigation arises out of non-forum contacts. A court asserts "general jurisdiction" over a defendant when the court is permitted to hear "any and all claims against" that defendant. *Goodyear,* 564 U.S. at 919. Because general jurisdiction is not related to the events giving rise to the suit, courts impose a more stringent minimum contacts test, requiring the plaintiff to establish that the defendant's "affiliations with the State are so 'continuous and systematic' as to render it essentially at home in the forum State." *Daimler*, 571 U.S. at 139; *see Mejia-Haffner v. Killington, Ltd.,* 119 A.D.3d 912, 990 N.Y.S.2d 561 (2d Dep't 2014).

28. By contrast, specific jurisdiction, "depends on an 'affiliation between the forum and the underlying controversy,' principally, activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Goodyear*, 564 U.S. at 919. Such jurisdiction is "confined to adjudication of 'issues deriving from, or connected with, the very controversy that establishes jurisdiction.'" *Id.* In assessing minimum contacts for specific jurisdiction, "[a] court must look to 'whether there was some act by which the defendant purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.' The defendant's suit-related conduct must

create a substantial connection with the forum State." *SPV Osus Ltd. v. UBS AG*, 882 F.3d 333, 344 (2d Cir. 2018) (citation omitted).

29. Here, Goodyear is not subject to personal jurisdiction under either a general or specific theory of jurisdiction.

i. Goodyear Is Not "At Home" in New York.

30. The *Daimler* decision makes it clear that Goodyear is not amenable to general jurisdiction in New York. Under *Daimler*, the key question in analyzing whether general jurisdiction exists over a given defendant is whether that defendant's "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Daimler*, 571 U.S. at 139 (quoting *Goodyear*, 564 U.S. at 919). The consequences of finding general jurisdiction exists are certainly pronounced: a defendant will be subject to suit in that state for *any and all* claims, including claims that do not implicate the defendant's activities there. *Daimler*, 571 U.S. at 127 (emphasis added). Consequently, "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction." *Id.* at 137. "With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for jurisdiction," because they are "unique," "easily ascertainable," and "afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims." *Id.* (internal quotations omitted); *see also Norex Petroleum, Ltd. v. Blavatnik*, No. 650591/11, 2015 N.Y. Misc. LEXIS 3136, at *48-49, (Sup. Ct. N.Y. Cnty. Aug. 25, 2015).

31. *Daimler* involved a California action brought against two defendants: Daimler A.G., a company based outside the country, and Mercedes-Benz USA (MBUSA), a domestic

company located in a different state.[4] *Daimler*, 571 U.S. at 121. The Supreme Court held that the California court lacked general personal jurisdiction over both defendants, because neither were incorporated in California, nor did either entity have its principal place of business there. *Id.* at 138. Permitting general personal jurisdiction to exist over MBUSA in California would have meant that such jurisdiction "would presumably be available in every other State in which MBUSA's sales are sizable" – a proposition the Supreme Court rejected. *Id.* at 139. A contrary holding would "broadly and unfairly expose multi-state or multi-national corporations to [general personal] jurisdiction in many states." *George v. Uponor Corp.,* 988 F. Supp. 2d 1056, 1079 (D. Minn. 2013); *see also Lexion Med., LLC v. SurgiQuest, Inc.,* 8 F. Supp. 3d 1122, 1127-28 (D. Minn. 2014) (holding based on *Daimler* that sale of a product and regular service work on that product did not establish general personal jurisdiction).

32. The Second Circuit has held that "when a corporation is neither incorporated nor maintains its principal place of business in a state, mere contacts, no matter how 'systematic and continuous,' are extraordinarily unlikely to" allow general jurisdiction. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 629 (2d Cir. 2016); *see also Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 226 (2d Cir. 2014) (*Daimler* and *Goodyear* "make clear that even a company's 'engage[ment] in a substantial, continuous, and systematic course of business' is alone insufficient to render it at home in a forum") (citation omitted; brackets in original).

33. Similarly, New York state and federal courts applying New York law have repeatedly rejected general jurisdiction over non-New York corporations, even where the corporations owned manufacturing plants, ran restaurants, or operated bank branches in the

[4] Defendant MBUSA – a subsidiary of defendant Daimler – was a Delaware corporation, having its principal place of business in New Jersey, and conducting business nationwide. MBUSA's primary contacts with the forum state (California) were its distribution of vehicles in the state and its establishment of regional facilities. *Daimler,* 571 U.S. at 121.

State. *Stroud v. Tyson Foods, Inc.*, 91 F. Supp. 3d 381, 387-88 (E.D.N.Y. 2015) (finding the operation of manufacturing plants and restaurants insufficient to find general jurisdiction); *Karoon v. Credit Suisse Grp. AG*, No. 15 Civ. 4643 (JPO), 2016 WL 815278, at *3 (S.D.N.Y. Feb. 29, 2016) (finding the operation of a bank branch insufficient to find general jurisdiction); *Fernandez,* 143 A.D. 3d at 767, 40 N.Y.S.3d at 131; *see also SPV Osus Ltd.*, 882 F.3d at 343-44 (finding no general or specific jurisdiction over Luxemburg company); *Gucci Am., Inc. v. Bank of China*, 768 F.3d 122, 135 (2d Cir. 2014) (Second Circuit analyzed the impact of the *Daimler* opinion in connection with New York's long-arm statute, held that no personal jurisdiction existed, despite defendant's continuous and systematic conduct of business in New York and presence of branches there). In short, even engaging in "continuous business" in New York is "insufficient to establish general jurisdiction after *Daimler.*" *Karoon,* 2016 WL 815278, at *3.

34. Applied here, *Daimler*'s holding dictates that this Court lacks general personal jurisdiction over Goodyear because it is an Ohio corporation, with its principal place of business in Ohio – that is the jurisdiction in which they are "essentially at home." *Daimler,* 571 U.S. at 138. There is no other basis for asserting general jurisdiction over Goodyear. *Daimler* made it clear that general jurisdiction may only be exercised over a corporation outside of those "paradigm bases of jurisdiction"– *i.e.*, a corporation's place of incorporation and its principal place of business – only in an "*exceptional* case."[5] *Id.* at 139 n.19 (emphasis added).

35. There are no "exceptional" facts about this case that render Goodyear "essentially at home" in New York, particularly because the Court further clarified that a corporation is not at

[5] The *Daimler* Court provided an example of such an "exceptional" case, where a Philippine company had temporarily made Ohio its principal place of business. *Daimler*, 571 U.S. at 129.

home in "every State in which [it] engages in a substantial, continuous, and systematic course of business." *Daimler*, 571 U.S. at 138.[6]

36. Significantly, USTW makes no effort to establish personal jurisdiction. That fact notwithstanding, generic allegations that a defendant conducts business in New York does not satisfy a plaintiff's burden and is insufficient to confer general jurisdiction in light of *Daimler's* mandate. *See Morrow v. Calico Res Corp.,* No. 14 Civ. 03348, 2015 WL 535342, at *5 (D. Colo. Feb. 9, 2015) (citing *Daimler,* 571 U.S. at 138 n.18); and *Sonera Holding B.V.,* 750 F.3d at 226, *cert denied*, 134 S. Ct. 2888 (2014).

37. Goodyear did not design, manufacture, test or inspect the subject tire – or P245/70R16 Wrangler AP tires, for that matter – in New York. (Ex. 3 (Dancy Aff.), at ¶¶ 5, 8.) Nor did Goodyear direct any marketing or sales activities regarding the Wrangler AP tire in New York. (*See id.* ¶ 9.) Unlike Vehicle Identification Numbers ("VINs") for motor vehicles, DOT serial numbers are not used to record ownership of a given tire over its service life. (*Id.* ¶ 6.) Goodyear does not have any way of tracking the sale of vehicles or products equipped with its tires as original equipment, nor is there a way to identify sales transactions involving replacement tires. (*See id.*) Goodyear therefore has no records indicating where or to whom an individual tire was sold – or its location, history or condition – after it left the manufacturing plant. (*Id.*) Moreover, Goodyear has no knowledge as to how or when the subject tire first entered the State of New York, nor does it possess any information that Goodyear was involved in any sale of the subject tire in the New York, if any sale occurred there at all. (*Id.*)

38. At all relevant times, Goodyear was and is "at home" in Ohio under *Daimler* and its progeny; as such, it is not subject to general jurisdiction in New York.

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[6] "Otherwise, 'at home' would be synonymous with 'doing business' tests implicating the exercise of specific jurisdiction." *Daimler*, at 139 n.20.

ii. Goodyear Is Not Subject To Specific Jurisdiction in New York for the Conduct Alleged in this Case.

39. USTW also cannot meet its burden to establish specific or "case-related" jurisdiction over Goodyear, because it has not pled – nor does Goodyear have – any case-related contacts with the State of New York.

40. "The inquiry whether a forum State may assert specific jurisdiction over a nonresident defendant 'focuses on the relationship among the defendant, the forum, and the litigation.'" *Walden v. Fiore*, 134 S. Ct. 1115, 1121 (2014) (quoting *Keeton v. Hustler Magazine, Inc.,* 465 U.S. 770, 775 (1984)).

41. Constitutionally, specific jurisdiction turns on whether "the defendant has 'purposefully directed' his activities at . . . the forum and the litigation 'arises out of or relates to' those activities." *Gucci Am., Inc.*, 768 F.3d at 136 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)). The U.S. Supreme Court reemphasized that the relationship between the defendant's conduct and the forum "must arise out of contacts that the 'defendant *himself*' creates with the forum . . . [and the] 'minimum contacts' analysis looks to the defendant's contacts with the forum . . . itself, not the defendant's contacts with persons who reside there." *Walden* at 1122. In short, "the plaintiff cannot be the only link between the defendant and the forum." *Id.*

42. There is simply nothing in USTW's or the Aybar Plaintiffs' complaints or otherwise that the subject tire – a used tire installed on the subject vehicle by an independent third party in New York more than ten years after the tire was made – found its way into the state through the actions of anyone other than third parties, independent of Goodyear. As indicated above, "contacts between . . . third parties[] and the forum State" do not provide a basis for specific jurisdiction. *Id.*

43. Moreover, USTW has not pled that Goodyear specifically "targeted" New York or its residents with respect to the marketing or sale of any products, including Wrangler AP P245/70R16 tires and/or the subject tire, nor could it support such a position, if it had. *See Faber v. Townsend Farms, Inc.,* 54 F. Supp. 3d 1182, 1189 (D. Colo. 2014) (granting motion to dismiss because, *inter alia*, "the Court can find no facts in the complaint . . . suggesting that [the defendant] engaged in a 'regular flow' or 'regular course' of dealing with Colorado or did anything else suggesting it targeted Colorado.") Goodyear's advertising, marketing and sales activities relating to the Wrangler AP tire, and any other tire, are not and never have been specifically directed at the State of New York or New York residents. (*See* Ex. 3 (Dancy Aff.), at ¶ 9).

44. Here, a used tire was inspected and installed on the subject vehicle by a third party, independent of Goodyear (*i.e.*, USTW) more than ten years after the tire was made. The Aybar Plaintiffs now allege numerous causes of action against USTW, alleging the "collision occurred *solely as a result of the negligence and carelessness of [USTW]* because the tires were not fit for safe use on the vehicle and defendant placed them on the vehicle anyway without warning Mr. Aybar about their condition." (Ex. 1, at Ex. A (Aybar/ USTW Complaint), at ¶ 26 (emphasis added).) There is simply no allegation in the Third-Party Complaint connecting Goodyear to the installation of the subject tire. *See Walden,* 134 S. Ct. at 1122 ("contacts between . . . third parties[] and the forum State" do not provide a basis for specific jurisdiction).

45. The fact that the injured plaintiff is a resident of New York does not establish specific jurisdiction because "injury to a forum resident is not a sufficient connection to the forum." *Walden*, 134 S. Ct. at 1125. Therefore, the fact that a New York resident was injured in Virginia is also insufficient to confer specific jurisdiction in New York. As the Appellate

Division has held, "[t]he situs of the injury is the location of the original event which caused the injury, not the location where the resultant damages are subsequently felt by the plaintiff." *Vaichunas v. Tonyes,* 61 A.D.3d 850, 851, 877 N.Y.S.2d 204, 205 (2d Dep't 2009). Plaintiff simply cannot show that the suit "arise[s] or relate[s] to the defendant's contacts with the forum." *Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 U.S. 408, 414 n.8 (1984).

46. The mere fact that plaintiff Jose Aybar sought out a third party tire shop in Queens, New York to inspect his ten year old used tire and install it on his 2002 Ford Explorer has nothing to do with any conduct Goodyear may have had in New York or purposely directed toward the state.

47. Accordingly, specific jurisdiction over Goodyear is completely lacking.

II. USTW FAILS TO STATE A CLAIM AGAINST GOODYEAR FOR COMMON LAW INDEMNIFICATION

48. In this Third-Party action, USTW brings suit against Goodyear for common law indemnification and contribution. (Ex. 1 (USTW Third-Party Compl.), at ¶ 5.) Here, USTW allegedly harmed the Aybar Plaintiffs by independently and negligently inspecting and installing Jose Aybar's tire in June of 2012 – *ten years* after the tire was made. Accordingly, the causes of action directed to USTW are separate and apart from any duty allegedly owed by Goodyear to the Aybar Plaintiffs in the product liability context. In these circumstances, a claim for common law indemnity by USTW against Goodyear must be dismissed.

49. On a motion to dismiss under CPLR 3211(a)(7), "the facts pleaded are presumed to be true and accorded every favorable inference," however, "allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration." *Wilson v. Hochberg,* 245 A.D.2d

116, 116, 665 N.Y.S.2d 653, 653-54 (1st Dep't 1997); *see also M&B Joint Venture, Inc. v. Laurus Master Fund, Ltd.*, 49 A.D.3d 258, 260, 853 N.Y.S.2d 300, 303 (1st Dep't 2008) (same).

50. Common law indemnification "permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party." *Bivona v. Danna & Assocs., P.C.*, 123 A.D.3d 956, 957–58, 999 N.Y.S.2d 490, 493 (2d Dep't 2014) (citations omitted). The legal principle applies only where the "plaintiff's injury is solely passive, and thus its liability is purely vicarious." *Id.* Accordingly, if a party has "actually participated in the wrongdoing" then common law indemnification is inapplicable. *See id.* (citing *Bedessee Imports, Inc. v. Cook, Hall & Hyde, Inc.*, 45 A.D.3d 792, 796, 847 N.Y.S.2d 151, 155; *see also 17 Vista Fee Assocs. v. Teachers Ins. & Annuity Ass'n of Am.*, 259 A.D.2d 75, 80, 693 N.Y.S.2d 554, 557-58).

51. In turn, "[t]he party seeking indemnification 'must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought,' and must not have committed actual wrongdoing itself." *Tiffany at Westbury Condo. By Its Bd. of Managers v. Marelli Dev. Corp.*, 40 A.D.3d 1073, 1077, 840 N.Y.S.2d 74, 78 (2d Dep't 2007) (citing *17 Vista Fee Assocs.*, 259 A.D.2d at 80, 693 N.Y.S.2d 554). "[T]he key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is 'a separate duty owed the indemnitee by the indemnitor.'" *Greenberg v. Blake*, 117 A.D.3d 683, 684, 985 N.Y.S.2d 279, 281 (2d Dep't 2014) (quoting *Raquet v. Braun*, 90 N.Y.2d 177, 183, 659 N.Y.S.2d 237, 240 (1997).).

52. Accordingly, common law indemnification claims fail as a matter of law where "the third-party plaintiffs would not be compelled to pay damages for the alleged negligent acts of the third-party defendants." *Balkheimer v. Spanton*, 103 A.D.3d 603, 604, 959 N.Y.S.2d 697,

698 (2d Dep't 2013) (dismissing common law indemnification claim on motion to dismiss) (citing *Lovino, Inc. v. Lavallee Law Offices*, 96 A.D.3d 909, 946 N.Y.S.2d 875; *Jakobleff v. Cerrato, Sweeney & Cohn*, 97 A.D.2d 786, 786–787, 468 N.Y.S.2d 894, 895).

53. In *Lovino, Inc. v. Lavallee Law Offices*, the Second Department reversed a trial court's denial of a third-party defendant's CPLR 3211(a)(7) motion to dismiss a common law indemnification claim. 96 A.D.3d 909, 910, 946 N.Y.S.2d 875, 876 (2d Dep't 2012). The Second Department explained that although "the defendants third-party plaintiffs and the third-party defendant both allegedly violated duties to the plaintiffs in the main action, *they did not violate the same duty or share responsibility for the same injury, and the defendants third-party plaintiffs are not being compelled to pay damages for the wrongful act of the third-party defendant*." *Id.* 96 A.D.3d at 910, 946 N.Y.S.2d at 876 (emphasis added); *see also Schottland v. Brown Harris Stevens Brooklyn, LLC*, 137 A.D.3d 997, 999, 27 N.Y.S.3d 634, 636–37 (2d Dep't 2016) (common law indemnification claim dismissed because "any potential liability" of third party plaintiff was result of its own actions); *Jakobleff v. Cerrato, Sweeney & Cohn,* 97 A.D.2d 786, 786–787, 468 N.Y.S.2d 894, 895 (2d Dep't 1983) (affirming dismissal of common law indemnification claim where third party plaintiffs are charged with own negligence); *Old Republic Nat'l Title Ins.v. Kaufman*, No. 96 Civ. 4533 (JSM), 1997 WL 309212, at *2 (S.D.N.Y. June 9, 1997) (defendants have "no right to indemnity" where complaint seeks to hold defendants "responsible for their own wrongs").

54. Here, USTW's common law indemnity claim fails as a matter of law for at least two reasons. First, USTW fails to set forth any duty that Goodyear owes to USTW, as indemnitee. *See Greenberg v. Blake*, 117 A.D.3d 683, 684, 985 N.Y.S.2d 279, 281 (2d Dep't 2014).

55. Second, the claim fails because any liability that USTW faces will be due to USTW's *own* duties to the Aybar Plaintiffs, and not any duty owed by Goodyear to the Aybar Plaintiffs. Specifically, USTW alone is alleged to have inspected and installed the subject tire for plaintiff Jose Aybar in June 2012, and "did not properly and adequately inspect, examine, check and/or test the tires and placed them on plaintiff Jose Aybar's vehicle knowing the vehicle would be driven with those tires." (Ex. 1, at Ex. A (Aybar/USTW Compl.), at ¶¶ 20-21.) Further, the "collision occurred *solely as a result of the negligence and carelessness of [USTW]* because the tires were not fit for safe use on the vehicle and defendant placed them on the vehicle anyway without warning Mr. Aybar about their condition." (*Id.*, at Ex. A, at ¶ 26 (emphasis added); *see also id.*, at Ex. A, at ¶¶ 31 – 38 (stating collision occurred solely as a result of the negligence and carelessness of the defendant [USTW]").) Based on the foregoing, the Aybar complaint sets forth fourteen causes of action against USTW alleging theories of negligence, negligent infliction of emotional distress, wrongful death, and a survival action for conscious pain and suffering. (*See generally id.*, at Ex. A, at ¶¶ 39 – 133.) Those claims contrast any product liability claims by the Aybar Plaintiffs of defective design or manufacturing against Goodyear. Therefore, to the extent USTW faces any liability to Aybar, the duties allegedly violated by USTW are distinct from those duties allegedly owed to the Plaintiffs by Goodyear. *See Lovino, Inc.*, 96 A.D.3d at 910, 946 N.Y.S.2d at 876.

56. Under these circumstances, USTW cannot claim that it is owed any common law indemnity because the conduct at issue involves different duties allegedly owed to the Aybar Plaintiffs. Accordingly, and as a matter of law, the common law indemnification claim against Goodyear must be dismissed.

CONCLUSION

57. For the foregoing reasons, Third-Party Defendant The Goodyear Tire & Rubber Company respectfully requests that this Court grant its motion to dismiss Third-Party Plaintiff USTW's complaint in its entirety for lack of personal jurisdiction and failure to state a claim and grant such other and further relief as the Court deems just and proper in the circumstances.

Dated: May 15, 2018

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