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 Administrator of THE ESTATE OF NOELIA OLIVERAS, Jesenia Aybar as Legal Guardian on behalf of KEILA CABRAL, a minor, Anna Aybar and Jessica Aybar as Proposed Administratrix of THE ESTATE OF TIFFANY CABRAL,

Plaintiffs,

- against -

US TIRES AND WHEELS OF QUEENS, LLC,

Defendant.

US TIRES AND WHEELS OF QUEENS, LLC,

Third-Party Plaintiff,

- against –

THE GOODYEAR TIRE & RUBBER COMPANY; GOODYEAR DUNLOP TIRES NORTH AMERICA, LTD; and FORD MOTOR COMPANY,

Third-Party Defendants.

AFFIRMATION IN SUPPORT OF FORD MOTOR COMPANY'S CROSS-MOTION TO DISMISS

Index No. 703632/2017 [E-Filed]

Previously Index No. 9344/2014

Oral Argument Requested

Walsy K. Saez Aguirre, an attorney duly admitted to the practice of law before the Courts of the State of New York, hereby affirms the following to be true, upon information and belief, and under the penalty of perjury:

1. I am an associate of the law firm of Aaronson Rappaport Feinstein & Deutsch, LLP, attorneys for Third-Party Defendant Ford Motor Company ("Ford") in the above-captioned

matter. As such, I am fully familiar with the facts and circumstances of this action by virtue of my review of the file maintained by this office.

2. This Affirmation is submitted in support of Ford's cross-motion seeking an Order dismissing the Third-Party Complaint of US Tires and Wheels of Queens, LLC ("US Tires") against Ford, pursuant to C.P.L.R. § 3211(a)(8), due to lack of personal jurisdiction; and granting such other and further relief as this Court deems just and proper.

3. Ford respectfully submits that this Court is compelled to dismiss US Tires' third-party action against Ford based on the standard for personal jurisdiction established in *Daimler A.G. v. Bauman*, 134 S. Ct. 746, 571 U.S. 117 (2014), which was reaffirmed in *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 198 L. Ed. 36 (2017) and followed by the New York Appellate Division, Second Department, in *Anna Aybar, et al. v. Jose A. Aybar, Jr. et al.*, No. 2016-06194, 2016-07397, 2019 N.Y. App. Div. LEXIS 444, 2019 N.Y. Slip. Op. 00412 (2d Dep't Jan. 23, 2019) (**Exhibit "A"**). In *Aybar*, which involves the same facts, parties and legal issues in this case, the Second Department held that this Court *does not* have personal jurisdiction over Ford.

4. Ford also respectfully requests that this action be stayed pursuant to C.P.L.R. § 3214(b) while this cross-motion remains pending.

5. In the instant action, Ford has not submitted prior applications for the relief sought herein before this Court or any other court.[1]

[1] Ford applied for the same relief in the related action, *Anna Aybar, et al. v. Ford Motor Company, et al.*, Index No. 706909/2015 (**"Action 3"**), in which Defendant/Third-Party Plaintiff US Tires is not a party, and which involves products liability claims against Ford based on the same facts giving rise to the instant action. In August 2015, Ford moved this Court to dismiss Action 3 based on lack of personal jurisdiction. On January 23, 2019, the Second Department ruled that there is no personal jurisdiction over Ford, and granted Ford's motion to dismiss in Action 3 on appeal. *See Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A).

PRELIMINARY STATEMENT

6. This is one of three companion negligence and personal injury actions arising out of a single-vehicle accident involving a 2002 Ford Explorer (the "Subject Vehicle"). Plaintiffs filed the instant lawsuit on or about June 17, 2014 against US Tires and Wheels of Queens, LLC ("US Tires"), which was the auto service shop that installed the rear left-side tire that apparently failed and caused the accident. On or about September 29, 2016, Defendant US Tires commenced this third-party action against Ford Motor Company ("Ford"), seeking indemnification and contribution for any damages for which it might be liable to Plaintiffs.

7. This cross-motion is not about the merits, however, but whether this Court has personal jurisdiction over Ford. Pursuant to U.S. Supreme Court and existing New York appellate precedent, US Tires' Third Party Complaint fails to establish personal jurisdiction over Ford, and must be dismissed. Indeed, the Second Department recently issued a decision on point, ruling in the companion case *Anna Aybar, et al. v. Ford Motor Company, et al.* (Action 3) that New York courts *do not* have personal jurisdiction over Ford under the facts giving rise to this action. *See Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A). As a result, not only is this Court compelled to follow the binding precedent of *Aybar* but also, US Tire's is barred from asserting this third-party action against Ford under the collateral estoppel doctrine.

8. Under the Fourteenth Amendment's Due Process Clause, Ford must be subject to either general or specific jurisdiction in New York on US Tires' claims in order for the Court to exercise personal jurisdiction over Ford. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 918-19, 131 S. Ct. 2846, 2850-2851 (2011). Here, US Tires' claims against Ford should be dismissed under Section 3211(a)(8) of the New York Civil Practice Law and Rules ("C.P.L.R.") because this Court lacks personal jurisdiction over Ford.

9. As to general jurisdiction, Ford is not "at home" in New York. The United States Supreme Court established that a corporation is at home only (i) where it is incorporated and (ii) where it has its principal place of business, unless there are exceptional circumstances, which are not present here. *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. at 1558-59; *Daimler*, 134 S. Ct. at 760-762. *See also Fernandez v. DaimlerChrysler, A.G.*, 143 A.D.3d 765, 766, 40 N.Y.S. 3d 128, 130-131 (2d Dep't 2016); *Carrs v. Avco Corp.*, 124 A.D.3d 710, 2 N.Y.S.3d 533, 533-534 (2d 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). Ford is not "at home" in New York because it is incorporated in Delaware, its principal place of business is in Michigan, and its activities in New York are not sufficiently "continuous and systematic" as to render it essentially "at home" in the State. *Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *11-26 (Ex. A.).

10. As to specific jurisdiction, the U.S. Supreme Court released an opinion reiterating that specific jurisdiction requires a "connection between the forum and the specific claims at issue." *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1781 (2017). The Court referred to its decision in *Walden v. Fiore*, 134 S. Ct. 1115 (2014) as "illustrat[ing] this requirement." *Id.* The Court explained that there was no specific jurisdiction over the defendant in *Walden* even though the plaintiff "suffered foreseeable harm" in the forum because the "relevant conduct occurred entirely" out-of-state. *Id.* at 1781-82 (quoting *Walden*, 134 S. Ct. at 1124, 1126) (emphasis omitted). Here, Ford is not subject to specific jurisdiction in New York because US Tires' third-party claims against Ford do not arise from any contact Ford has with New York. *See* C.P.L.R. § 302(a)(1).

11. Based on the fact that neither general nor specific personal jurisdiction over Ford is proper in this case, US Tires' Third-Party Complaint against Ford must be dismissed in its entirety.

STATEMENT OF FACTS

I. BACKGROUND REGARDING THE UNDERLYING LAWSUIT

12. As previously mentioned, this action is one of three related lawsuits pending before this Court, which arise out of a single-vehicle accident that occurred on July 1, 2012 at Interstate 85 in Brunswick County, Virginia. Plaintiff Jose Aybar was driving a 2002 Ford Explorer (the "Subject Vehicle") with six other passengers when the vehicle's rear left-side tire (the "Subject Tire") allegedly failed, causing the driver to lose control of the vehicle and leading the vehicle to roll over. (*See* Amended Summons and Complaint, Index No. 703632/2017 ("Action 1"), **Exhibit "B,"** at ¶¶ 25, 30; Summons and Complaint, Index No. 706908/2015 ("Action 2"), **Exhibit "C,"** at ¶ 11; Summons and Complaint, Index No. 706909/2015 ("Action 3"), **Exhibit "D,"** at ¶¶ 3-4, 36-41, 43.) As a result of the accident, three passengers died and four passengers, including the driver, suffered bodily injuries. (Am. Compl. Action 1, Ex. B, at ¶¶ 31-38; Compl. Action 2, Ex. C, at ¶¶ 12-13; Compl. Action 3, Ex. D, at ¶¶ 50, 57, 65, 73, 81, 89.)

13. On or about June 17, 2014, Plaintiffs commenced the instant action ("**Action 1**") against US Tires for personal injury and wrongful death, alleging that the accident occurred due to US Tires' negligent installation of the Subject Tire and improper servicing of the Subject Vehicle. (*See* Am. Compl., Action 1, Ex. B.) On or about July 2015, Jose Aybar commenced a separate action ("**Action 2**") against The Goodyear Tire & Rubber Company ("Goodyear Tire") and Goodyear Dunlop Tires North America, Ltd. ("Goodyear Dunlop"), bringing claims

grounded on strict product liability, negligence, breach of warranty and deceptive trade practices. (*See* Compl., Action 2, Ex. C.) Ford is not a party to Action 2. On or about July 20, 2015, the plaintiffs in the instant action, with the exception of Jose Aybar, commenced a separate third action ("**Action 3**") against Jose Aybar, Ford, Goodyear Tire, and "John Does 1 through 30." (*See* Compl., Action 3, Ex. D.)

14. On or about September 29, 2016, Defendant US Tires impleaded Goodyear Tire, Goodyear Dunlop, and Ford into Action 1, by serving the Third-Party Summons and Complaint annexed as **Exhibit "E,"** which seeks indemnification and contribution from Ford, Goodyear Tire and Goodyear Dunlop for damages for which it might be found liable to Plaintiffs. In its Third-Party Complaint, US Tires reiterates Plaintiffs' allegations of negligence in Action 1 against US Tires (based on the installation of the tires), and refers to Plaintiffs' claims against Ford, Goodyear Tire and Goodyear Dunlop in Actions 2 and 3 based on strict products liability, negligence, breach of warranty and deceptive trade practices. (*See* Third-Party Compl., Ex. E, at ¶¶ 1-3.) The crux of US Tires' third-party claim against Ford is that if US Tires is held liable, its liability and damages will have arisen out of the "affirmative active and primary negligence" of Ford, in addition to third-party co-defendants Goodyear Tire and Goodyear Dunlop. (*See id.*)

15. In the instant action, US Tires did not assert any jurisdictional allegations at all against Ford or even specify that Ford engaged in any specific conduct with respect to the Subject Vehicle. Also, Plaintiffs did not assert any claims against Ford in Action 1, and the third-party co-defendants in Action 1 did not assert any cross-claims against Ford. As a result, US Tires is the only party required to establish jurisdiction over Ford. On September 29, 2016, Ford served a Verified Answer to US Tires' Third-Party Complaint, which is annexed as **Exhibit**

"F." In this Verified Answer, Ford pleaded lack of personal jurisdiction as an affirmative defense. (*See* Ford's Answer to Third-Party Complaint in Action 1, Ex. F, at ¶ 5.)

II. THE SUBJECT VEHICLE

16. As stated in the Affidavit of Robert Pascarella annexed as **Exhibit "G,"** Ford did not design or manufacture the Subject Vehicle in New York. (Affidavit of Robert Pascarella, Ex. G, at ¶¶ 5, 7.) In fact, Ford does not have any Ford Explorer manufacturing plants in New York. (*Id.* at ¶ 8.) The Subject Vehicle was assembled at the St. Louis Assembly Plant, which is located in Missouri, and was first sold by Ford to Team Ford Lincoln, an independently-owned Ford dealership located in Ohio. (*Id.* at ¶¶ 5, 6.)

III. FORD'S INCORPORATION, PRINCIPAL PLACE OF BUSINESS, AND BUSINESS REGISTRATION

17. Ford is incorporated in Delaware and its principal place of business is in Michigan. (Pascarella Aff., Ex. G, at ¶ 4.)

18. As mandated under Section 304 of the Business Corporation Law, Ford applied for authorization to do business in the State of New York, registered as a foreign business corporation with the New York State Department of State, and appointed the Secretary of State as its agent for service of process. By simply complying with the requirements of the Business Corporation Law, Ford has not consented to general jurisdiction in New York. *See Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *2, 15-26 (Ex. A).

STANDARD

19. Third-party plaintiffs have the burden of establishing personal jurisdiction over a defendant by a preponderance of the evidence. *Bernardo v. Barrett*, 57 N.Y.2d 1006, 443 N.E.2d 953 (1982); *Wells Fargo Bank, N.A. v. Moza*, 129 A.D.3d 946, 947, 13 N.Y.S.3d 127, 128 (2d Dep't 2015). *See also CRT Invs., Ltd. v. BDO Seidman*, LLP, 85 A.D.3d 470, 471, 925

N.Y.S.2d 439, 440 (1st Dep't 2011); *Pramer S.C.A. v. Abaplus Intl. Corp.*, 76 A.D.3d 89, 95, 907 N.Y.S.2d 154 (1st Dep't 2010). Where a third-party defendant has objected to the court's exercise of personal jurisdiction, the third-party plaintiff bears the ultimate burden of proving jurisdiction based on evidence. *See Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *8; *Mejia-Haffner v Killington, Ltd.*, 119 A.D.3d 912, 914, 990 N.Y.S. 2d 561, 564 (2d Dep't 2014). To establish personal jurisdiction over Ford, US Tires must demonstrate that personal jurisdiction is proper under both the Constitution's Due Process Clause and the New York long-arm statute, C.P.L.R. Section 302. *See LaMarca v. Pak-Mor Mfg. Co.*, 95 N.Y.2d 210, 213, 735 N.E.2d 883, 886 (2000). As further elaborated below, US Tires cannot establish either basis of jurisdiction here, and as a result, their third-party action against Ford must be dismissed under C.P.L.R. Section 3211(a)(8).

ARGUMENT

I. THE DUE PROCESS CLAUSE DOES NOT PERMIT THE EXERCISE OF PERSONAL JURISDICTION OVER FORD.

20. A court's exercise of personal jurisdiction over a defendant is limited by the Due Process Clause, which requires compliance with "traditional notions of fair play and substantial justice." *See Daimler*, 134 S. Ct. at 633; *Goodyear Dunlop*, 564 U.S. at 923; *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 323-324, 66 S. Ct. 154, 161-162 (1945); *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 625, 2016 U.S. App. LEXIS 2763, at *11-12 (2d Cir. 2016); *see also LaMarca*, 95 N.Y.2d at 213 (noting that plaintiffs must prove that personal jurisdiction is proper under the Constitution's Due Process Clause). A court may only exercise personal jurisdiction over a nonresident defendant so long as there exist sufficient "minimum contacts" between the defendant and the forum state as to give rise to general or specific jurisdiction without offending Due Process guarantees. *See BNSF*, 137 S. Ct. at 1558-59; *Bristol-Myers*, 137 S. Ct. at 1785,

1779-80 (citing *Helicopteros Nacionales De Colombia v. Hall*, 466 U.S. 408, 414, 104 S. Ct. 1868, 1872 (1984)); *Brown*, 814 F.3d at 625. *See also Deutsche Bank Securities, Inc. v. Montana Board of Investments*, 7 N.Y.3d 65, 71, 850 N.E.2d 1140, 1142 (Ct. App. 2006).

21. Here, exercising personal jurisdiction over Ford would be improper under the Due Process Clause because Ford does not have the requisite "minimum contacts" with New York so as to give rise to general or specific jurisdiction. First, under binding U.S. Supreme Court and New York Appellate Division precedent set forth in *Daimler*, *BNSF* and *Aybar*, New York courts do not have general personal jurisdiction over Ford because Ford is not essentially "at home" in New York. *Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *23-26 (Ex. A).

22. Second, the Court cannot exercise specific jurisdiction over Ford in this matter because this action *does not* arise out of, or even relate to Ford's contacts with New York. *See* C.P.L.R. § 302(a)(1); *Bristol-Myers*, 137 S. Ct. at 1780; *Walden*, 134 S. Ct. at 1121-1122. Notably, Third-Party Plaintiff US Tires does not even assert any jurisdictional allegations against Ford. (*See* Third-Party Compl., Ex. E.) As there is no basis for this Court to establish general or specific jurisdiction over Ford, this case must be dismissed.

a. New York Does Not Have General Jurisdiction Over Ford Because Ford Is Not "Essentially at Home" in New York.

23. To establish general jurisdiction over a defendant, the plaintiff must demonstrate that the defendant's affiliations with the state are "so 'continuous and systematic' as to render it essentially at home in the forum." *BNSF*, 137 S. Ct. at 1552-1553; *Bristol-Myers*, 137 S. Ct. at 1780 (citing *Goodyear Dunlop*, 564 U.S. at 919); *Daimler*, 134 S. Ct. at 761; *Brown*, 814 F.3d at 627; *Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *9-12 (Ex. A). A corporation is essentially "at home" where it is incorporated or where it has its principal place of business, except in a "truly

'exceptional' case."[2] *BNSF*, 137 S. Ct. at 1552; *Daimler*, 134 S. Ct. at 760. However, a corporation is *not* deemed to be "at home" in "every State in which [it] engages in a substantial, continuous, and systematic course of business." *Daimler*, 134 S. Ct. at 761-62; *see also Bristol-Myers*, 137 S. Ct. at 1780 (citing *Daimler*, 134 S. Ct. at 760); *Sonera Holding B.V. v. Cukurova Holdings A.S.*, 750 F.3d 221, 226, 2014 U.S. App. LEXIS 7809, at *11-12 (2d Cir. 2014), *cert. denied*, 134 S. Ct. 2888, 189 L. Ed. 2d 837 (2014) ("[*Daimler* and *Goodyear*] make clear that even a company's engagement in a substantial, continuous, and systematic course of business is alone insufficient to register it at home in a forum.") (internal quotation marks omitted); *Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *10-11 (Ex. A). The U.S. Court of Appeals for the Second Circuit and the New York Appellate Division have recognized the restrictions the Supreme Court established in *Daimler*. *See Brown*, 814 F.3d at 619; *Stroud v. Tyson Foods, Inc.*, 91 F. Supp. 3d 381, 2015 U.S. Dist. LEXIS 29038 (E.D.N.Y. 2015); *Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A); *Marcio,* 123 A.D.3d 600.

24. In *Daimler*, the Supreme Court held that California lacked general personal jurisdiction over defendants Daimler A.G. and Mercedes-Benz USA, which were incorporated and headquartered outside of California. 134 S. Ct. at 751. The Supreme Court based its decision on the fact neither Daimler nor Mercedes-Benz were incorporated under the laws of, or had their principal place of business in, California. *Id.* at 761. The Court reasoned that allowing

[2] Both *BNSF* and *Daimler* cite to *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 72 S. Ct. 413 (1952), as an "exceptional case." *BNSF*, 137 S. Ct. at 1558. Benguet was a mining company physically located in the Phillipines. Because the Japanese captured the mine lands during wartime, the president of Benguet, who was also general manager and principal stockholder of Benguet, relocated the business temporarily to Ohio, where he maintained the books, maintained company bank accounts, paid employees, conducted business meetings, and managed the wartime business of the corporation. Plaintiff sued Benguet on claims that did not arise in Ohio and did not relate to Benguet's activities in Ohio. *Perkins*, 342 U.S. at 447-8. The Court found that the president of Benguet "carried on in Ohio a continuous and systemic supervision of the necessarily limited wartime activities of the company." 342 U.S. at 448. The Supreme Court held that, under this set of circumstances, it would not be a violation of federal due process for Ohio courts to exercise jurisdiction over Benguet. *Id.*

general personal jurisdiction over the defendants in California would have made general personal jurisdiction available in every state in which the defendants' sales were sizable. *Id.*

25. Following *Daimler*, the Second Circuit also held that "[g]eneral jurisdiction over a defendant satisfies due process only if the defendant is headquartered or incorporated in the forum state or is otherwise 'at home' in that state." *Thackurdeen v. Duke Univ.*, 660 Fed. Appx. 43, 45, 2016 U.S. App. LEXIS 16164, *3-4 (2d Cir. 2016). The Second Circuit has recognized that under *Daimler*, even if a corporation has a "substantial, continuous, and systematic course of business" in the forum, that fact alone is not sufficient to render the corporation "at home" in the forum state. *Sonera Holding*, 750 F.3d at 226 (citing *Daimler*, 134 S. Ct. at 761). *See also Gucci Am. v. Bank of China*, 768 F.3d 122, 135, 2014 U.S. App. LEXIS 17948, at *29-32 (2d Cir. 2014) (concluding that applying *Daimler*, the Bank of China was not subject to general jurisdiction in New York because it was incorporated and headquartered elsewhere and, though it had branch offices and conducted business in New York, its contacts were not sufficiently continuous and systematic for it to be deemed to be essentially "at home" in the state); *Continental Indus. Group, Inc. v. Equate Petro. Co.*, 586 Fed. Appx. 768, 2014 U.S. App. LEXIS 19316 (2d Cir. 2014) (affirming the dismissal of an action because the plaintiff did not allege that the defendant was headquartered or incorporated in New York, and did not allege sufficient facts to demonstrate that the defendant was "at home" in the state).

26. Federal courts around the country have come to the same conclusion in cases involving large corporations. For example, in *Stroud v. Tyson Foods, Incorporated*, the U.S. District Court for the Eastern District of New York dismissed a plaintiff's claims against Tyson Foods and Wendy's based on lack of personal jurisdiction, concluding that neither defendant had sufficient contacts with New York as to make them essentially "at home" in the State. 91 F.

Supp. 3d at 381. The plaintiff in Stroud argued that the defendants were essentially at home in New York because Tyson operated a manufacturing plant in Buffalo, New York, through an alter ego company, and Wendy's had significant contacts with New York through a subsidiary. *Id.* at 387-388. The court rejected these arguments and concluded that even if the contacts of Tyson's alleged alter-ego company and Wendy's New York subsidiary could be attributed to the defendants, those contacts were insufficient to make the defendants "at home" in the State in light of the defendants' operations worldwide. *Id.* In its analysis, the court noted that Tyson's Buffalo manufacturing facility was only one of hundreds of manufacturing plants it operated nationwide, and that Wendy's operated over 6,500 restaurants worldwide. *Id.* at 388-389. Based on *Daimler*, the court noted that the defendants cannot be considered to be "at home" in every forum where they operate restaurants or manufacturing plants. *Id.* at 388.

27. Similarly, in *Ritchie Capital Management, L.L.C. v. Costco Wholesale Corporation*, 2015 U.S. Dist. LEXIS 176994 (S.D.N.Y. 2015), the Southern District found that Costco is not subject to general jurisdiction in New York, although it generates $2.8 billion in annual revenue from New York, has seventeen warehouses in the State, and has 3,400 employees in the State. Relying on *Daimler*, the court found that the plaintiffs were unable to demonstrate that Costco had a disproportionate concentration of business in New York and therefore, it could not be deemed to be essentially "at home" in the State. *Id.* at 16-19.

28. Several courts have rendered similar decisions as it relates to Ford. In fact, last month, the Second Department reversed this Court's decision by Judge Thomas D. Raffaele denying Ford's motion to dismiss Plaintiffs' claims in Action 3 due to lack of personal jurisdiction. *Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A). In its decision, the Second Department held Ford is not at home in New York because Ford is not incorporated in and does

not have its principal place of business in New York. In its analysis, the court emphasized *Daimler*'s mandate that general jurisdiction "'calls for an appraisal of a corporation's activities in their entirety, nationwide and worldwide'" and "'[a] corporation that operates in many places can scarcely be deemed to be at home in all of them'." *Id.* at *11-12. The court found that an appraisal of the magnitude of Ford's activities in New York in the context of Ford's activities worldwide establishes that Ford cannot be deemed to be "at home" in New York. *Id.* at *14.

29. Additionally, last year, the Texas Court of Appeals reversed a lower court's decision denying Ford's motion to dismiss based on lack of personal jurisdiction, after finding that Ford's contacts with Texas were not so "continuous and systematic" as to render it essentially at home in Texas. *Ford Motor Company, et al. v. Natividad Cardenas Cejas, et al.*, No. 09-16-00280-CV, 2018 Tex. App. LEXIS 1389 (Tex. App. –Beaumont [9th Dist.] Feb. 22, 2018). The appellees in *Cardenas* argued that Texas courts had personal jurisdiction over Ford because Ford designed products for the Texas market; had established channels of regular communication with Texas customers; and advertised, owned property, had offices and employees, paid taxes, and maintained a registered agent in Texas. *Id.* at *15. However, the court found that those facts were "insufficient to permit the assertion of all-purpose general jurisdiction over claims like Plaintiffs'." *Id.* at *27. The court also found that the jurisdictional facts the appellees pled did not give rise to "exceptional" circumstances warranting general jurisdiction.

30. In Florida, a district court held that Ford was not subject to general jurisdiction in that state even though Ford "conducts a large volume of business" there. *Erwin v. Ford Motor Co.*, No. 8:16-cv-01322-SCB-AEP, 2016 WL 7655398, at *12 (M.D. Fla. Aug. 31, 2016). In Colorado, a court held that Ford was not subject to general jurisdiction there, even though Ford

sold vehicles in Colorado through a network of independent franchised dealers and "maintain[ed] several offices and businesses in the state." *Magill v. Ford Motor Co.*, 379 P.3d 1033, 1036, 1039 (Colo. 2016). A California district court held that Ford was not subject to general jurisdiction in that state even though the plaintiff alleged that Ford has a regional headquarters and research-and-innovation center in California and sold over 200,000 vehicles a year there. *Sullivan v. Ford Motor Co.*, No. 16-cv-03505-JST, 2016 WL 6520174, at *2 (N.D. Cal. Nov. 3, 2016). Also, in 2015, a Mississippi district court ruled that it did not have personal jurisdiction over Ford because Ford's contacts with Mississippi were not sufficiently "continuous and systematic" as to render Ford at home in the State. *Pitts v. Ford Motor Company*, 127 F. Supp. 3d 676, 2015 U.S. Dist. LEXIS 121673 (S.D. Miss. 2015). The plaintiffs in *Pitts* alleged that Ford was qualified and registered to do business, contracted with a Mississippi-based dealership, and had a registered agent, sold or distributed new vehicles, advertised, and purchased dealerships in Mississippi.

31. Here, the Court is compelled to follow *Daimler* and the Second Department's decision in *Aybar*, and rule that Ford is not subject to general jurisdiction in New York. Accordingly, US Tires' Third-party Complaint must be dismissed as against Ford.

b. This Court Cannot Exercise Specific Jurisdiction Over Ford in this Case Without Violating the Due Process Clause.

32. To determine whether a defendant has sufficient "minimum contacts" with the forum as to give rise to specific jurisdiction, a court must analyze the relationship between the defendant, the forum and the litigation. *Walden*, 134 S. Ct. at 1121 (quoting *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 775, 104 S. Ct. 1473, 1478 (1984)). *See also Bristol-Myers*, 137 S. Ct. at 1780-1781 (discussing that there must be affiliation between the forum and the underlying claims at issue). For a court to exercise specific jurisdiction over a claim, the

defendant's suit-related conduct must create a substantial connection with the forum state. *Walden*, 134 S. Ct. at 1121. *See also Bristol-Myers*, 137 S. Ct. at 1781 (quoting *Goodyear Dunlop*, 564 U.S. at 919) (noting that "for a court to exercise specific jurisdiction over a claim, there must be an 'affiliation between the forum and the underlying controversy, principally [an] activity or occurrence that takes place in the forum State'"). Contacts "between the plaintiff (or third parties) and the forum State" do not suffice, because "the plaintiff cannot be the only link between the defendant and the forum." *BNSF*, 137 S. Ct. at 1121. Also, specific jurisdiction cannot arise solely based on the action of third parties. *See Bristol-Myers*, 137 S. Ct. at 1781; *Walden*, 134 S. Ct. at 1115. *See also Helicopteros*, 466 U.S. at 417 ("[u]nilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction.").

33. In *Bristol-Myers Squibb Company v. Superior Court*, the Supreme Court held that California state courts lacked specific general jurisdiction over the claims of nonresidents, after finding that there was no adequate connection between California and the nonresidents' claims. 137 S. Ct. 1773. In *Bristol-Myers*, a group of consumers, most of whom were not California residents, brought state-law claims against a California pharmaceutical company based on injuries they claimed they suffered from a drug manufactured by that company. The Court found that because the nonresidents were not prescribed the drug in California, did not purchase or consume the drug in California, and were not injured by the drug in California, there was no adequate connection between the forum and the defendant's conduct giving rise to the claims at issue.

34. Further, merely claiming injury within the forum state is insufficient to confer specific jurisdiction. *Walden*, 134 S. Ct. at 1122; *Keeton*, 465 U.S. at 775; *Helicopteros*

Nacionales, 466 U.S. at 414 n.8. In *Walden v. Fiore*, the Supreme Court ruled that a Nevada district court did not have specific jurisdiction over a nonresident defendant because no part of the defendant's course of action occurred in Nevada and the defendant did not form any jurisdictionally relevant contacts with the forum. 134 S. Ct. 1115. The plaintiffs in *Walden* were Nevada residents who claimed that the defendant, a Georgia police officer for the Drug Enforcement Administration, violated their Fourth Amendment rights by unlawfully searching them and seizing their cash in Atlanta, Georgia, while they were preparing to board a plane to Nevada. *Id.* at 1119-1120. The Court found that the defendant did not have the necessary "minimum contacts" with the State to warrant specific jurisdiction, because the relevant conduct took place in Georgia and the defendant did not create any case-related contacts with the State of Nevada. *Id.* at 1124. The Court noted that the mere fact that the defendant's conduct affected Nevada residents and allegedly caused harm in Nevada was not sufficient to make the defendant subject to personal jurisdiction in that state. *Id.* at 1121-1123.

35. Here, there is no specific jurisdiction over US Tires' third-party claims against Ford because the required connection between Ford's alleged suit-related conduct, New York, and US Tires' claims against Ford is lacking. *See id.* at 1781 (citing *Goodyear Dunlop*, 564 U.S. at 919) (noting that when there is no connection between the forum and the underlying controversy, principally through an activity or occurrence that takes place within the forum, "specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State"). Ford's alleged suit-related conduct bears no connection to New York, as Ford did not engage in manufacturing, distributing, selling, or designing the Subject Vehicle within the State. (*See* Pascarella Aff., Ex. G, at ¶¶ 5-10.). US Tires' third-party claims against Ford are not

even premised on any in-state activities by Ford. Additionally, the Subject Vehicle was brought to the New York only through the actions of other parties.

II. THE COURT IS ALSO UNABLE TO ASSERT PERSONAL JURISDICTION OVER FORD UNDER NEW YORK'S LONG-ARM STATUTE.

36. New York's long-arm statute, C.P.L.R. Section 302, outlines the requirements to establish specific jurisdiction over foreign corporations. Under the statute, a foreign corporation is subject to specific jurisdiction in New York if it transacts business within the State, and the claims asserted *arise from* its business activity within the State. *See* C.P.L.R. § 302(a)(1); *Pincione v. D'Alfonso*, 506 Fed. Appx. 22, 24, 2012 U.S. App. LEXIS 25986 (2d Cir. 2012); *Sole Resort. S.A. de C.V. v. Allure Resorts Mgmt. LLC*, 450 F.3d 100, 103, 2006 U.S. App. LEXIS 14538, at *8 (2d Cir. 2006); *In re Dental Supplies Antitrust Litig.*, No. 16 Civ. 696 (BMC) (BRB), 2017 U.S. Dist. LEXIS 153265, at *22 (E.D.N.Y. Sept. 20, 2017). Additionally, Sections 302(a)2 and 3 of the statute permit New York courts to exercise personal jurisdiction over foreign corporations who commit a tortious act within the State of New York, or a tortious act outside of the State that causes injury to a person or property within New York. *See* C.P.L.R. § 302(a)(2)-(3).

37. The Court of Appeals has established that Section 302(a)(2) *does not* apply to foreign manufacturers in products liability actions who improperly manufacture products 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). Also, the Second Department has emphasized that for purposes of C.P.L.R. Section 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).

38. Specific jurisdiction under New York's long-arm statute can only be established where the claims arise from the types of contacts specifically outlined in C.P.L.R. Section 302. C.P.L.R. § 302(c). *See also 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 (1st Dep't 2006). Accordingly, for jurisdiction to exist under New York's long-arm statute, there must be a "substantial relationship" between a defendant's activities and the plaintiff's causes of action. *Fernandez*, 143 A.D.3d at 767.

39. The New York Court of Appeals has established that the scope of New York's long-arm statute is narrower and more restrictive than the jurisdictional limits of Due Process. *See Ehrenfeld v. Bin Mahfouz*, 9 N.Y.3d 501, 512, 881 N.E.2d 830, 837-838 (Ct. App. 2007). In *Ehrenfeld*, the Court explained that the "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.'" *Id.* at 512.

40. Here, US Tires cannot establish personal jurisdiction over Ford under the New York long-arm statute because neither its third-party claims nor Plaintiffs' underlying claims arise out of Ford's activities within the State of New York. For the same reasons, US Tires cannot show that Ford committed any tortious acts that would make it subject to New York's long-arm jurisdiction under C.P.L.R. Section 302(a)(2) or (3). Based on *Longines-Wittnauer Watch*, Section C.P.L.R. Section 302(a)(2) does not apply to Ford, as Ford cannot be deemed to have committed a tortious act within New York because it did not manufacture, primarily design or sell the Subject Vehicle within New York. Finally, the torts Plaintiffs claim Ford committed did not cause any injury within New York within the meaning of C.P.L.R. Section 302(a)(3),

because the accident that caused Plaintiffs' injuries occurred in Virginia, not New York. *See Paterno*, 112 A.D.3d at 44. As a result, US Tires cannot establish specific jurisdiction over Ford under New York's long-arm statute.

III. FORD'S CROSS-MOTION TO DISMISS MUST BE GRANTED IN LIGHT OF THE SECOND DEPARTMENT'S RECENT DECISION IN *AYBAR*.

41. This Court is compelled to grant Ford's cross-motion to dismiss based on *Aybar* on two grounds. First, *Aybar* is binding precedent upon this Court. Second, as the Second Department already decided on the issues raised in this cross-motion, US Tires' third-party claims against Ford are barred under the doctrine of collateral estoppel.

a. The Second Department Already Determined that this Court Lacks Personal Jurisdiction Over Ford Under the Facts of the Companion Cases.

42. Shortly after Action 3 was commenced, Ford and Goodyear Tire moved pursuant to C.P.L.R. Section 3211(a)(8) to dismiss that action as against them based on lack of personal jurisdiction. On or about May 25, 2016, Judge Raffaele of this Court issued separate orders denying Ford's and Goodyear's motions in Action 3. *See Aybar v. Aybar*, No. 706909/2015, 2016 N.Y. Misc. LEXIS 2263, 2016 N.Y. Slip. Op. 31139(U) (Sup. Ct., Queens County 2016); *Aybar v. Aybar*, No. 706909/2015, 2016 N.Y. Misc. LEXIS 2253, 2016 N.Y. Slip. Op. 31138(U) (Sup. Ct., Queens County 2016). The Court found that it had general jurisdiction over both defendants. As to Ford, the Court found that Ford's activities in New York were so continuous and systematic that it was essentially "at home" in the State because Ford has facilities in New York engaged in day-to-day activities and many franchises within the State. *Aybar v. Aybar*, 2016 N.Y. Misc. LEXIS 2263, at *8-10. It also found that Ford consented to general jurisdiction in New York when it registered as a foreign corporation to do business in New York and designated a local agent for service of process within the State. *Id.* at *10-12.

43. Thereafter, Ford and Goodyear Tire perfected an appeal with the Second Department, and oral arguments were heard on March 26, 2018. Plaintiffs and US Tires fully participated in litigating the issue of personal jurisdiction over both Ford and Goodyear Tire before this Court and before the Appellate Division.

44. *On January 23, 2019, the Second Department issued a unanimous decision granting Ford's and Goodyear's motion to dismiss on appeal, finding that personal jurisdiction is lacking in these companion actions.* Specifically, the Second Department decided on the following jurisdictional issues, which are identical to the issues presented in this cross-motion:

(i) whether a foreign corporation becomes subject to general personal jurisdiction in New York through the mere act of registering to do business in or appointing an agent for service of process within New York; and

(ii) whether Ford has sufficiently "continuous and systematic contacts" as to render it to be "at home" in New York and make it subject to personal jurisdiction.

The Second Department decided these questions in the negative. *See Aybar*, 2019 N.Y. App. Div. LEXIS 444 (Ex. A). In its decision, the court squarely rejected Plaintiffs' argument that Ford has sufficient contacts in New York to permit the exercise of general jurisdiction based on its operation of numerous facilities, ownership of property and property expenses, employment of residents, contracts with dealerships, and litigation in the State. *Id.* at *4, 8-15. The court also squarely rejected Plaintiffs' and US Tires' arguments that Ford consented to general jurisdiction in New York by registering to do business with the New York Secretary of State and appointing an agent for service of process in the State. *Id.* at *6-7, 15.

45. In reaching its decision, the Second Department described the evolution of personal jurisdiction jurisprudence, and determined that under the strictures of *Daimler*, Ford's contacts with New York cannot be deemed to be sufficiently continuous and systematic as to warrant the exercise of general jurisdiction over claims that are unrelated to any activity occurring in New York. *Id.* at *13-14. The court found that although Ford had extensive commercial activities in New York, Ford cannot be considered to be "at home" in New York in the context of its worldwide activities since *Daimler* has changed altered the in personam jurisdiction landscape. *Id.* at *14.

46. Additionally, the court analyzed New York and federal jurisprudence construing the act of registering to do business in New York and designating an agent for service in the State as consent to general jurisdiction, and found that those cases are no longer good law in light of *Daimler*. *See id.* at *16-25. The court noted that the pre-*Daimler* cases finding that a foreign corporation's compliance with business registration statutes constitutes consent were premised on the reasoning that registering to do business in and appointing a local agent of service in New York constituted consent to be found "present" in New York. *Id.* at *23-24. The court noted that *Daimler* has established that general jurisdiction cannot be exercised solely based on such presence and therefore, those cases can no longer be followed. *See id.* at *23-25. *Id.* at *24.

b. The Second Department's Decision in* Aybar *Is Dispositive of the Instant Third-Party Action Against Ford.

47. It is settled that trial courts must follow precedent from the Appellate Division in its own department. *See Gutin v. Frank Mascali & Sons, Inc.*, 11 N.Y.2d 97, 99, 181 N.E.2d 449, 450 (Ct. App. 1962); *Stewart v. Volkswagen*, 181 A.D.2d 4 (2d Dep't 1992); *Pataki v. New York State Assembly*, 190 Misc. 2d 716, 735 (Sup. Ct., Albany Co. 2002). Accordingly, this

Court is compelled to follow the Second Department's decision in *Aybar* and dismiss this third-party action against Ford based on lack of personal jurisdiction.

c. Based on* Aybar, *US Tires' Third-Party Claims Are Barred Under the Doctrine of Collateral Estoppel.

48. Under the doctrine of collateral estoppel, parties are precluded from re-litigating in a subsequent action issues that were clearly raised in a prior action and decided against that party, regardless of whether the actions involve the same causes of action. *Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500-501, 467 N.E.2d 487, 490 (Ct. App. 1984). A party is collaterally estopped from litigating an issue in a subsequent lawsuit if the issue was material to the initial action and essential to the decision rendered, and is the same issue to be determined in the second action, such that "'a different judgment in the second would destroy or impair rights or interests established by the first'." *Id.* Collateral estoppel applies if (i) there is an identity of issue that has been "necessarily decided in the prior action and is decisive of the present action," and (ii) the parties had a full and fair opportunity to challenge the decision which is now deemed controlling. *Schwartz v Public Adm'r of County of Bronx*, 24 N.Y.2d 65, 71, 246 N.E.2d 725 (Ct. App. 1969).

49. New York appellate and trial courts have found that under the doctrine of collateral estoppel, the issue of whether a defendant is subject to personal jurisdiction in New York cannot be re-litigated if it was fully briefed and determined. In *Keeler v. West Mountain Corp.*, 105 A.D.2d 953, 482 N.Y.S.2d 92 (3d Dep't 1984), the Third Department found that the doctrine of collateral estoppel barred a fourth-party defendant from asserting the affirmative defense of lack of personal jurisdiction because the court had already previously decided, on appeal in a prior action, that New York courts had personal jurisdiction over the defendant. The court found that collateral estoppel applied because the issue of personal jurisdiction was

material to the prior action and essential to the decision therein, it was the same issue to be determined in the subsequent action, and the fourth-party defendant had a full and fair opportunity to contest the issue because it had moved to dismiss on the basis of lack of personal jurisdiction in the prior action.

50. Similarly, in *DirecTV Latin America, LLC and Latin American Sports, LLC v. Carlos Pratola, et al.*, 94 A.D.3d 628, 942 N.Y.S.2d 528 (1st Dep't 2012), the First Department ruled that the issue of whether New York courts had personal jurisdiction over two defendants could not be re-litigated pursuant to the doctrine of collateral estoppel because the issue had already been determined in a prior federal action. As a federal court had already found that New York courts did not have personal jurisdiction over the defendants, the First Department found that the appellants' claims against the defendants who were deemed not to be subject to the court's personal jurisdiction were barred under the doctrine of collateral estoppel. Consequently, the appellate court affirmed the lower court's decision granting the defendants' motion to dismiss the complaint on the basis of lack of personal jurisdiction.

51. Here, the doctrine of collateral estoppel applies to this case because (i) there is identity of issues, and (ii) all parties had a full and fair opportunity to contest the issue. First, the requirement of identity is met because the issue of whether this Court has personal jurisdiction over Ford was the point determined in Action 1 through the Second Department's recent *Aybar* decision, and it is the same point to be determined in this cross-motion. The Appellate Division already determined that New York courts *do not* have personal jurisdiction over Ford under the facts of the companion actions. Second, the parties had a full and fair opportunity to contest the issue of whether Ford is subject to personal jurisdiction in New York, as they litigated the issue first before this Court in *Aybar v. Aybar*, No. 706909/2015, 2016 N.Y. Misc. LEXIS 2263, 2016

N.Y. Slip. Op. 31139(U) (Sup. Ct, Queens County 2016), and then on appeal before the Second Department. Although Third-Party Plaintiff US Tires was not a party in Action 1, it fully participated as a nonparty-respondent in the appeal and its arguments were fully addressed by this Court as well as the Second Department. *See Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *6-9, 15 (Ex. A). As a result, this Court must rule that US Tires' third-party action against Ford is barred under the doctrine of collateral estoppel, and grant Ford's cross-motion.

IV. FORD HAS NOT CONSENTED TO GENERAL JURISDICTION IN NEW YORK BY REQUESTING AUTHORIZATION TO DO BUSINESS IN NEW YORK, AS MANDATED UNDER BUSINESS CORPORATION LAW SECTION 304.

52. The Business Corporation Law ("B.C.L.") expressly prohibits foreign corporations from doing business within New York unless they designate the New York Secretary of State as their agent for service in their application for authority to conduct business in New York. *See* N.Y. C.L.S. Bus. Corp. § 304(b). Due to B.C.L. Section 304, Ford could not do business in New York unless it applied with the New York Department of State for authority to conduct business in the New York, and agreed to designate the Secretary of State as an agent upon whom process against Ford may be served. Accordingly, Ford's decision to file an application with the Department of State, register with the State as a foreign corporation, and appoint the Secretary of State as its service agent was obligatory and *not* a voluntary decision.

53. As the Second Department noted in *Aybar*, there is no statutory basis for the argument that registering to do business in and appointing an agent for process in New York constitutes consent to the jurisdiction of New York for all purposes. *Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *15 (Ex. A). Additionally, construing Section 304 as requiring foreign corporations to consent to general jurisdiction in New York would be unconstitutional. Accordingly, this Court cannot adopt that interpretation of the statute.

a. There Is No Basis to Interpret Compliance with B.C.L. Section 304 as Consent to General Jurisdiction.

54. Nothing in the B.C.L. indicates that foreign corporations consent to general jurisdiction in New York by applying for authority to do business in the State and appointing the Secretary State as agent for service, in compliance with the requirements of Section 304. In fact, Section 304 does not even mention the words "jurisdiction" or "consent." As a result, this provision cannot be interpreted to mean that a foreign corporation becomes subject to all-purpose jurisdiction, regardless of its connection to New York, simply by appointing the Secretary of State as agent for service of process. *See People v. Tatta*, 196 A.D.2d 328, 283, 610 N.Y.S.2d 280, 282 (2d Dep't 1994) (noting that courts "ought not to add to words having a definite meaning or interpret a statute when there is no need to do so."); *see also Nat'l Fuel Gas Dist. Corp. v. Pub. Serv. Comm'n of N.Y.*, 277 A.D.2d 981, 981, 715 N.Y.S.2d 821, 822 (4th Dep't 2000) (discussing that "[c]ourts are not free to amend a statute by adding words that do not appear therein.").

55. Further, as the Second Department concluded in *Aybar*, any New York case law on consent-by-registration is no longer good law in the post-*Daimler* era. 2019 N.Y. App. Div. LEXIS 444, at *16, 23-26 (Ex. A). Under *Daimler*, it would be "unacceptably grasping" if courts asserted general jurisdiction over a foreign corporation merely based on registration to do business in the state and the appointment of an in-state agent for service, without the corporation's express consent to general jurisdiction. *Id.* at *24. *See also Kyowa Seni, Co., Ltd. v ANA Aircraft Technics, Co., Ltd.*, No. 650589/2017, 60 Misc. 3d 898, 903, 80 N.Y.S.3d 866, 869 (Sup. Ct., NY County 2018).

56. Here, the fact that Ford is registered as a foreign business with New York and appointed the New York Secretary of State as its agent for process of service, as it was legally

required to do under Section 304, does not form basis for establishing general jurisdiction over Ford. *Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *15-26 (Ex. A). As noted, Ford did not consent to general jurisdiction in New York and B.C.L. Section 304 did not explicitly notify Ford that by applying and registering to do business in New York, it would be subject to being sued within the State.

57. None of this means that B.C.L. Section 304 has no effect. Service of process—the act of formally notifying a defendant of a lawsuit—and personal jurisdiction are distinct concepts. Ford's act of appointing the Secretary of State as its agent under Section 304 means that a plaintiff may validly serve process on Ford through the Secretary in a suit that has a sufficient nexus with Ford's activities in New York. But Ford's appointment of the Secretary does not free a plaintiff from proving that such a nexus exists. Accordingly, the Court should follow the Second Department's decision in *Aybar* and hold that, as a statutory matter, Ford's compliance with B.C.L. Section 304 did not mean that Ford can be sued in New York on any and all causes of action here.

b. If the Court Were To Construe B.C.L. Section 304 as Requiring Ford to Consent to General Jurisdiction in New York as a Condition of Doing Business in the State, the Statute Would Be Unconstitutional.

58. Even if it were true that registration constitutes consent to jurisdiction under New York's long-arm statute, it does not follow that registration constitutes consent under the Due Process Clause. As previously discussed, a party seeking to establish personal jurisdiction over a defendant must prove that jurisdiction over the defendant is proper under the long-arm statute *and* the Due Process Clause. *See LaMarca*, 95 N.Y.2d at 214. This distinction is crucial here because New York courts have doubted that a finding of general jurisdiction under C.P.L.R. § 301 satisfies the federal due process analysis following *Daimler*. *See Sonera*, 750 F.3d at 224 n.2 (noting that there is "some tension" between the test under C.P.L.R. Section 301 and

Daimler's tests for general jurisdiction); *Continental Indus. Grp., Inc. v. Equate Protechem. Co.*, 586 Fed. App'x 768, 769-770, 2014 U.S. App. LEXIS 19316, at *3 (2d Cir. 2014) (holding that "[w]hatever the application of CPLR § 301 might be here, it is clear from the facts that general jurisdiction…would be inconsistent with due process" and *Daimler*).

59. If the Court were to find that B.C.L. Section 304 required Ford to consent to general jurisdiction in New York as a condition of doing business here, the statute would be unconstitutional for two reasons. First, the statute would violate *Daimler*'s mandate. *See Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *24 (Ex. A). Numerous New York federal and state courts have explained that after *Daimler*, the mere fact of being registered to do business in and appointing an agent for service in the State does not confer general jurisdiction. *See, e.g.*, *Wilderness USA, Inc. v. DeAngelo Brothers LLC*, 265 F.Supp.3d 301, 312, 2017 U.S. Dist. LEXIS 135555, at *21-22 (W.D.N.Y. 2017); *Famular v. Whirlpool Corp.*, No. 16 CV 944 (VB), 2017 U.S. Dist. LEXIS 8265, 2017 WL 2470844 (S.D.N.Y. 2017); *Sae Han Sheet Co. v. Eastman Chemical Corp.*, 2017 U.S. Dist. LEXIS 173410 (S.D.N.Y. 2017); *Taormina v. Thrifty Car Rental*, 2016 U.S. Dist. LEXIS 176673, 2016 WL 7392214 (S.D.N.Y. 2016); *Aybar*, 2019 N.Y. App. Div. LEXIS 444, at *15-26 (Ex. A); *Kyowa*, 60 Misc. 3d at 902-904; *Matter of Gibson v Air & Liquid Sys. Corp.*, No. 190187/15, 2018 N.Y. Misc. LEXIS 2603, *10-13, 2018 N.Y. Slip. Op. 31324(U), 5-6 (Sup. Ct., New York County 2018); *Matter of Grabowski v A.O. Smith Corp.*, No. 190267/2017, 2018 N.Y. Misc. LEXIS 2643, *5-7, 2018 N.Y. Slip. Op. 31367(U), 2-3 (Sup. Ct., New York County 2018); *Amelious v. Grand Imperial LLC*, 64 N.Y.3d (Sup. Ct., New York County 2017).

60. This is important because New York has never given corporations any notice that by simply registering to do business in New York, they are exposing themselves to suits within

the State for activities they conduct anywhere in the world. As noted by Justice Sherri L. Eisenpress in her May 23, 2017 Order in *Alexandru Barbayanni v. Ford Motor Co., et al.*, Index No. 032616/2017 (Sup. Ct., Rockland County, May 23, 2017), which is annexed as **Exhibit "H,"** several courts have found that:

> registration statutes like New York's do not explicitly notify foreign corporations that registration to do business will open the door to unlimited personal jurisdiction in the State [of New York]; that such an exercise of jurisdiction is coercive and incommensurate with the amount of power a State reasonably needs to have over foreign corporations doing business in order to protect its citizens; registration to do business here [in New York] is a relatively minor ministerial act; and registration does not require the corporation to make any kind of statement that it is consenting to general jurisdiction. (*See* Justice Eisenpress' May 23, 2017 Order, Ex. H, at 8-9.)

61. Second, if compliance with the statute was interpreted as consent to personal jurisdiction, the statute would unconstitutionally restrict a corporation's right to do business in New York. A state may not require a corporation, as a condition to obtaining a permit to do business within the state, to surrender its due process rights. *See Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2596, 570 U.S. 595, 607 (2013) (quoting *S. Pac. Co. v. Denton*, 146 U.S. 202, 207, 13 S. Ct. 44 (1892)) (noting that the "unconstitutional conditions" doctrine prohibits a state from requiring a "corporation, as a condition precedent to obtaining a permit to do business within [a] State, to surrender a right and privilege secured to it by the Constitution"); *Frost v. R.R. Comm'n*, 271 U.S. 583, 595, 46 S. Ct. 605, 608 (1926) (noting that "'[t]hough a state may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so.'"). Interpreting Section 304 as a requirement that foreign companies submit to New York's jurisdiction before they are able to conduct business within the State would be unconstitutional because it would bar companies

from asserting their federal due process rights to resist state-court jurisdiction over matters unconnected to their activities in the State.

62. Fortunately, the B.C.L. does not have to be interpreted in a manner that makes it unconstitutional. Under settled rules of statutory interpretation "where there are two possible interpretations [of a statute] the court will accept that which avoids constitutional doubts." *Courtesy Sandwich Shop, Inc. v. Port of N.Y. Auth.*, 12 N.Y.2d 379, 389, 190 N.E.2d 402, 405 (1963); *see also Long Island Trust Co. v. Porta Aluminum Corp.*, 44 A.D.2d 118, 122, 354 N.Y.S.2d 134, 139 (2d Dep't 1974) ("'We are also obliged to construe statutes as to avoid constitutional doubts.'") (citation omitted). Accordingly, the Court should reject this unconstitutional interpretation of the B.C.L.

V. DISCOVERY IN THIS ACTION MUST BE STAYED PURSUANT TO C.P.L.R. § 3214(b), WHILE THIS CROSS-MOTION IS PENDING.

63. C.P.L.R. Section 3214(b) provides that service of a notice of motion under Sections 3211, 3212 or 3213 stays disclosure until determination of the motion so long as the motion is not solely based on the defense of improper service. C.P.L.R. § 3214(b). Stays under Section 3214(b) are automatic. *See, e.g., Arts4all, Ltd. v. Hancock*, 54 A.D.3d 286, 291, 863 N.Y.S.2d 193, 197 (1st Dep't 2008) (noting that a stay of disclosure went into effect pursuant to C.P.L.R. Section 3214(b) when the defendant moved for summary judgment); *Jeudi v. Columbo*, 278 A.D.2d 370, 371, 718 N.Y.S.2d 623, 624 (2d Dep't 2000) (noting that discovery was automatically stayed pursuant to C.P.L.R. Section 3214(b) due to a pending motion seeking to dismiss the complaint). Here, Ford moved to dismiss US Tire's third-party Complaint by a notice of motion, and its cross-motion does not concern any allegations of improper service. As a result, this action must be stayed pending determination of Ford's Section 3211 cross-motion.

CONCLUSION

64. Ford is not subject to personal jurisdiction in New York. Third-Party Plaintiff US Tires is unable to establish a basis for general or specific jurisdiction over Ford. First, Ford is not "at home" in the State of New York, as it is not incorporated in nor maintains its principal place of business within the State. Second, there is no specific jurisdiction over Ford because Plaintiffs' and US Tires' underlying allegations do not arise out of any contact between Ford and this forum. Indeed, the Second Department has already ruled that based on the facts giving rise to this action, this Court *does not* have personal jurisdiction over Ford. *See Aybar*, 2019 N.Y. App. Div. LEXIS 444. Consequently, this Court must grant Ford's cross-motion in its entirety, and dismiss US Tires' third-party claims against Ford based on lack of personal jurisdiction.

Dated: New York, New York
February 15, 2019

Walsy K. Sáez Aguirre

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

Index No.: 703632/2017
Previously Index No.: 9344/2014

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,

- against -

US TIRES AND WHEELS OF QUEENS, LLC,

Defendant.

US TIRES AND WHEELS OF QUEENS, LLC,

Third-Party Plaintiff,

-against-

THE GOODYEAR TIRE & RUBBER COMPANY, GOODYEAR DUNLOP TIRES NORTH AMERICA, LTD. and FORD MOTOR COMPANY,

Third-Party Defendants.

NOTICE OF CROSS-MOTION TO DISMISS, AFFIRMATION IN SUPPORT OF FORD MOTOR COMPANY'S CROSS-MOTION TO DISMISS, AND EXHIBITS

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