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 Motion Seq. No. 17 **ATTORNEY AFFIRMATION IN FURTHER 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, Justin Edward Kerner, an attorney admitted to practice law before the state courts of New York, affirm the following under penalty of perjury:

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

2. This affirmation is submitted in further support of Goodyear's motion to dismiss the third-party claims asserted by Defendant/Third-Party Plaintiff, U.S. Tire and Wheels of Queens, LLC ("USTW"), for lack of personal jurisdiction and failure to state a cause of action for common-law indemnification. Specifically, it is submitted in response to Plaintiffs' "Opposition" to Goodyear's motion.[1]

INTRODUCTION

3. This Court cannot exercise personal jurisdiction over Goodyear without violating its rights under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

4. Goodyear is not subject to personal jurisdiction in this action, and the third-party claims asserted against it should be dismissed.

5. Plaintiffs raise four contrary arguments in their "Opposition" to Goodyear's motion. First, they argue in favor of a finding of issue preclusion, urging adoption of the decision in *Aybar v. Aybar* (Index No. 706909/2015) (the "*Anna Aybar*" action), in which the court concluded that Goodyear consented to the exercise of general jurisdiction by registering to do business in the State of New York. However, issue preclusion does not apply here. As set forth in Goodyear's Attorney Affirmation in Further Support of its Motion to Dismiss (filed on June 11, 2018) ("Goodyear's Reply to USTW"):

- Goodyear has not yet had a ***full*** and fair opportunity to litigate the issue at hand. The *Anna Aybar* decision was appealed, and, during the pendency of that appeal, the doctrine of collateral estoppel is inapplicable as a matter of law.

- Moreover, the doctrine of collateral estoppel does not apply to purely legal issues, *e.g.*, statutory interpretation. Thus, it does not apply here, where the issue to be

[1] Plaintiffs sought and were granted leave to be heard on Goodyear's motion to dismiss the third-party claims asserted by US Tire and Wheels of Queens, LLC ("USTW"). They have not, however, demonstrated how their interests could possibly be affected by Goodyear's dismissal. They cannot. By their own admission, Plaintiffs maintain two other New York actions against Goodyear, in which they have asserted claims directly against the Ohio-based tire company.

considered is the proper interpretation of New York's business registration statutory scheme.

- Collateral estoppel should not be applied here because the claims at issue in both *Anna Aybar* and *Jose Aybar* (Index No. 706908/15) are materially different from those at issue in this action. In *Anna* and *Jose Aybar*, plaintiffs asserted product liability claims against Goodyear (and others). Here, by contrast, they assert pure negligence claims against USTW based on its installation of a tire that was in such bad condition that it should have been removed from service.

6. Second, Plaintiffs argue for the exercise of general jurisdiction over Goodyear based upon its "continuous and systematic" sales and business operations in New York. However, that argument flies in the face of binding precedent from the Supreme Court of the United States, which demonstrates that any such exercise of activity-based general jurisdiction would constitute reversible error. *See BNSF Ry. Co. v. Tyrell*, 137 S. Ct. 1549, 1558-59 (2017). Goodyear is not "at home" in New York, and it should not be subjected to the exercise of general jurisdiction here. *See Daimler AG v. Bauman*, 571 U.S. 117, 137 (2014) (noting that the paradigm fora for the exercise of general jurisdiction are those in which a corporation is "at home"—*i.e.*, "the place of incorporation and principal place of business"). After all, a "corporation that operates in many places can scarcely be deemed at home in all of them." *Id.* at 139 n.20.

7. Third, Plaintiffs argue that general jurisdiction may be exercised over Goodyear because Goodyear complied with New York's business registration statute. But the principal decision upon which they rely, the *Anna Aybar* decision, was wrongly decided. As detailed below, that decision does not align with more recent, post-*Daimler* case law issued by state and federal courts across this State.[2]

[2] Indeed, it is likely that the *Anna Aybar* decision will be reversed. Goodyear's appeal is still pending before the Second Department.

8. Fourth, and finally, Plaintiffs urge the exercise of specific jurisdiction based on their allegation that the tire at issue was "mounted onto a vehicle that was registered to a New York resident and duly licensed in New York State." (Pls.' Opp'n, ¶ 7.) But it is black-letter law that "mere injury to a forum resident is ***not*** a sufficient connection to the forum," *Walden v. Fiore*, 571 U.S. 277, 290 (2014) (emphasis added), and "the plaintiff cannot be the only link between the defendant and the forum. Rather, it is the ***defendant's*** conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him," *id.* at 285 (emphasis added). No such conduct was alleged here. Plaintiffs do not dispute that Goodyear designed the tire in Ohio and manufactured it in Tennessee (*see* Dancy Aff., ¶ 5 (attached to the Att'y Affirmation in Supp. of Goodyear's Mot. to Dismiss, which was filed on May 15, 2018 (the "Rethore Aff."), as Ex. 3)), and they do not allege where, when, or to whom Goodyear sold that tire, which Plaintiffs purchased from a non-party.[3]

9. For all of these reasons, Plaintiffs' arguments are meritless.[4] Goodyear is not subject to jurisdiction in this third-party action, and each of the claims asserted against it should be dismissed.

ARGUMENT

I. COLLATERAL ESTOPPEL IS INAPPLICABLE.

10. Plaintiffs first argue that "the doctrine of 'issue preclusion' applies" based upon the *Anna Aybar* decision, in which general jurisdiction was exercised over Goodyear. However, like USTW, Plaintiffs fail to recognize that issue preclusion does not and cannot apply here as a

[3] *See, e.g., Aybar v. Cohen, Placitella & Roth, PC*, 58 Misc.3d 1226(A), 2018 N.Y. Slip Op. 50278(u), at *1 (N.Y. Sup. Ct. Feb. 28, 2018) (finding that Jose Aybar purchased the tire from his cousin, who had kept it in storage in an unspecified location for some unspecified period of time).

[4] Further, Plaintiffs do not dispute that USTW's common law indemnification claim fails as a matter of law.

matter of law. That is so for each of the reasons stated in Goodyear's Reply to USTW, which is incorporated by reference here. (*See* Goodyear's Reply to USTW, ¶¶ 9-23.)

II. BECAUSE GOODYEAR IS NOT "AT HOME" IN THE STATE OF NEW YORK, THIS COURT SHOULD NOT EXERCISE GENERAL JURISDICTION.

11. Plaintiffs next argue that Goodyear's "corporate presence in New York is pervasive" and so "continuous and systematic" that it should be deemed at home and subjected to the exercise of general jurisdiction here. (Pls.' Opp'n, ¶¶ 10, 20; *see also id.* at ¶¶ 19-21.)

12. In so doing, Plaintiffs ignore that Goodyear is not at home in the State of New York because it is not incorporated here and does not maintain its principal place of business here. *See Bauman*, 571 U.S. at 137 (internal quotation marks and alterations omitted) ("With respect to a corporation, the place of incorporation and principal place of business are paradigm bases for general jurisdiction.").

13. Moreover, they disregard that a "corporation that operates in many places can scarcely be deemed at home in all of them. . . . Nothing in *International Shoe* [*v. Washington*, 326 U.S. 310 (1945)] and its progeny suggests that a particular quantum of local activity should give a State authority over a far larger quantum of . . . activity having no connection to any in-state activity." *Id.* at 139 n.20 (citations and some internal quotation marks omitted).

14. The Supreme Court of the United States reaffirmed the limited bases for exercising general jurisdiction in *BNSF Railway Co. v. Tyrell*, in which the plaintiffs—like Plaintiffs here, with respect to Goodyear—urged the exercise of general jurisdiction based on BNSF's business activities in the forum State, which were significant; the defendant railway company had "over 2,000 miles of railroad track and more than 2,000 employees in" the forum. 137 S. Ct. at 1559. Nevertheless, the Court concluded that BNSF was not "so heavily engaged in activity" in the forum so "as to render it essentially at home" there. *Id.*

15. In so doing, the Court also clarified the sort of "'exceptional case'" in which a corporation might be deemed "at home" in a forum other than that in which it is incorporated or maintains its principal place of business. *Id.* It cited *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), demonstrating that the "exceptional case" is, as the term suggests, the exception rather than the rule. In *Perkins*, a Filipino company was deemed to be at home (and subject to the exercise of general jurisdiction) in Ohio because its owner relocated to Ohio during the Japanese occupation of the Philippines. In effect, the owner transported the company's principal place of business from the Philippines to Ohio, where he conducted the company's day-to-day business by, *inter alia*, employing administrative staff, maintaining office files, distributing checks, using local banks, holding directors' meetings, and supervising policies related to the company's Filipino operations. 342 U.S. at 448.

16. Plaintiffs argue otherwise, but no such exceptional circumstances are present here. Plaintiffs may not invoke general jurisdiction simply by arguing that Goodyear sells products here. "[E]ven regularly occurring sales of a product in a State do not justify the exercise of jurisdiction over a claim unrelated to those sales." *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 930 n.6 (2011).

III. GOODYEAR DID NOT CONSENT TO THE EXERCISE OF GENERAL JURISDICTION BY REGISTERING WITH THE DEPARTMENT OF STATE TO DO BUSINESS HERE.

17. Plaintiffs also argue that Goodyear "voluntarily availed itself of the laws of New York . . . by voluntarily registering its corporate presence in New York State with the Department of State, and thus has voluntarily consented to accept service of process within New York State . . . ." (Pls.' Opp'n, ¶ 28.) They conflate Goodyear's agreement to accept service of process with consent to the exercise of general jurisdiction. (*See id.* at ¶¶ 28-29.)

18. The decisions Plaintiffs cite—including three that precede *Bauman*, and the *Anna Aybar* decision, which has been appealed and is under review by the Second Department—lend them no aid. They represent the minority view. The majority of courts to consider post-*Daimler* whether business registration constitutes consent to the exercise of personal jurisdiction have answered with a resounding "no." *See Spratley v. FCA US LLC*, No. 17-cv-62, 2017 WL 4023348, at *4 (N.D.N.Y. Sept. 12, 2017) ("The Court agrees with the majority of district courts that have considered this issue: after *Daimler*, registration to do business in New York does not amount to consent to general jurisdiction."); *Amelius v. Grand Imperial LLC*, 57 Misc.3d 835, 852, 64 N.Y.S.3d 855, 868 (N.Y. Sup. Ct. 2017) ("For the dual reasons that the statutes do not adequately apprise foreign corporations that they will be subject to general jurisdiction in the courts of this State and that foreign corporations are required to register for conducting a lesser degree of business in this State than the Supreme Court of the United States has ruled should entail general jurisdiction, this Court finds that Yelp is not subject to general jurisdiction merely because it has registered to do business here.").[5]

[5] *See also, e.g.*, *Wilderness USA, Inc. v. DeAngelo Bros. LLC*, 265 F. Supp. 3d 301, 313-14 (W.D.N.Y. 2017) (criticizing the minority view for its "brief and incomplete analytical treatment of this issue," and concluding that "it is clear that New York's registration statute does not provide an express requirement of consent to general jurisdiction as a condition for a foreign corporation to become authorized to transact business within the state"); *Famular v. Whirlpool Corp.*, No. 16-cv-944, 2017 WL 2470844, at *4 (S.D.N.Y. June 7, 2017) ("[T]he Court agrees with defendants that . . . a foreign defendant is not subject to the general personal jurisdiction of the forum state merely by registering to do business with the state, whether that be through a theory of consent by registration or otherwise."); *Bonkowski v. HP Hood LLC*, No. 15-cv-4956, 2016 WL 4536868, at *3 (E.D.N.Y. Aug. 30, 2016) (declining "to give New York's statutory scheme such an expansive reading"); *Taormina v. Thrifty Car Rental*, No. 16-cv-3255, 2016 WL 7392214, at *6 (S.D.N.Y. Dec. 21, 2016); *Chatwal Hotels & Resorts LLC v. Dollywood Co.*, 90 F. Supp. 3d 97, 105 (S.D.N.Y. 2015); *Kyowa Seni, Co. v. ANA Aircraft Technics, Co.*, --- N.Y.S.3d ----, 2018 WL 3321410 (N.Y. Sup. Ct. July 5, 2018) (holding that the defendants' mere "registration in New York is an insufficient grounds for this Court to exercise general jurisdiction over them").

19. Plaintiffs' argument has been widely rejected with good reason. "If mere registration . . . sufficed to confer general jurisdiction by implicit consent, every corporation would be subject to general jurisdiction in every state in which it registered, and *Daimler's* ruling would be robbed of meaning by a back-door thief." *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 640 (2d Cir. 2016).

IV. PLAINTIFFS' HALF-HEARTED ATTEMPT TO INVOKE SPECIFIC JURISDICTION SHOULD BE SUMMARILY REJECTED.

20. In passing, Plaintiffs state that "specific jurisdiction is . . . asserted." (Pls.' Opp'n, ¶ 7.) However, they offer no citations or argument to support that assertion. Thus, they waive the right to present argument in favor of the exercise of specific jurisdiction.

21. In any event, specific jurisdiction cannot be exercised here without violating Goodyear's Due Process rights. Specific jurisdiction is appropriate only where the defendant has "minimum contacts" with the forum and the plaintiffs' claims "arise out of or relate to" those contacts. *Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty.*, 137 S. Ct. 1773, 1780 (2017) (alterations omitted). Here, Plaintiffs' claims neither arise out of nor relate to any New York actions attributable to Goodyear. As noted above, Goodyear designed the tire at issue in Ohio and manufactured it in Tennessee. (*See* Dancy Aff., ¶ 5.)

22. Plaintiffs disregard those facts and repeatedly urge the Court to examine their own contacts with the State. (*See* Pls.' Opp'n, ¶¶ 7, 13.) But Plaintiff's relationship with the forum should not be part of the Court's jurisdictional calculus. It is not relevant that Plaintiffs live here, stored their vehicle here, or asked USTW to inspect and install the tire at issue here. "Rather, it is the ***defendant's*** conduct that must form the necessary connection with the forum State that is the basis for its jurisdiction over him." *Walden*, 571 U.S. at 285 (emphasis added).

V. JURISDICTIONAL DISCOVERY WOULD SERVE NO PURPOSE.

23. Plaintiffs contend that jurisdictional discovery would prove that Goodyear is "authorized to do business in this State and derives substantial income from that business . . . ." (Pls.' Opp'n, ¶ 33.) However, they fail to show that such discovery would aid the Court's resolution of Goodyear's jurisdictional challenge. As detailed above, neither a finding that Goodyear is registered to do business in the State of New York nor findings pertaining to the extent of Goodyear's sales or revenue in this State could possibly justify the exercise of personal jurisdiction. Goodyear is not at home here, and there is no evidence of record suggesting (let alone showing) that Goodyear has taken any actions in New York that relate to Plaintiffs' product liability claims.

CONCLUSION

24. Despite Plaintiffs' urging, Goodyear is not subject to personal jurisdiction in this Court, in this lawsuit.

25. Accordingly, for the foregoing reasons and also for the reasons stated in Goodyear's opening affirmation and Goodyear's Reply to USTW, the third-party claims asserted against Goodyear should be dismissed with prejudice.

Dated: August 20, 2018

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